UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	CHAPTER 7
MARK H. BORELL, DEBRA A. BORELL,	CASE NO. 02-64029
Debtors.	ADVERSARY NO. 05-6059
CAROL PAQUAY,	JUDGE RUSS KENDIG
Plaintiff,	**MEMORANDUM OPINION**
vs.	
MARK H. BORELL,	
Defendant.	

In this adversary proceeding, Carol Paquay (hereinafter "Plaintiff") seeks to have a debt owing her by Mark H. Borell (hereinafter "Defendant") deemed nondischargeable for alleged fraud. Plaintiff filed her complaint on April 26, 2005. On the eve of trial, Plaintiff filed a motion for leave to file an amended complaint. This matter came before the court for trial on February 27, 2006. The court granted Plaintiff's motion to file an amended complaint in part, allowing Plaintiff to add a paragraph stating that Defendant orally misrepresented his qualifications to Plaintiff.

The court has jurisdiction of this matter pursuant to 28 U.S.C. § 1334(b) and the General Order of Reference entered in this district on July 16, 1984. This is a core proceeding under 28 U.S.C. § 157(b)(2). The following are the court's findings of facts and conclusions of law pursuant to Fed. R. Bankr. P. 7052.

FACTS

Defendant and his wife filed a petition under Chapter 7 of the Bankruptcy Code on August 28, 2002.[1] Plaintiff became acquainted with Defendant in the summer of 2001 while Defendant was doing masonry work on a house across the street from Plaintiff's son. Defendant did business under the name Father & Son Masonry. After several meetings with Defendant,[2] Plaintiff entered into a contract with Defendant for the construction of a home at 7460 State Road, Wadsworth, Ohio. Defendant was to act as the general contractor for the project. The contract,[3] dated August 30, 2001, states that work would commence on or before September 28 and should be "substantially completed" by January 30, 2002. Plaintiff and Defendant agreed to a contract price of $156,360. Article 6 of the contract states that the contract does not include the following items: digging a water well, installing a propane tank, sewer permit, sewer boring, sewer line casing, counters, cabinets, and carpet, linoleum, or floor tile. The contract further states that payments would be made "per contractor request as material and labor progresses accordingly."

Though there is some dispute as to whether construction had started at the job site at this point in time, Plaintiff paid Defendant $42,700 in early October of 2001. Plaintiff made additional payments to Defendant in the following intervals: $29,846.36 on October 31, 2001, $1,175.00 on November 6, 2001, $22,731.27 on December 2, 2001, $21,000.00 on December 27, 2001, $975.00 on December 27, 2001, and $9,387.31 on February 28, 2002.[4] On March 22, 2002, Defendant informed Plaintiff that he needed $1,516 to pay for materials to continue construction of the house. Plaintiff refused to pay the additional funds and Defendant did not return to the construction job.

Defendant had served as a general contractor for several commercial construction jobs prior to 2001, but he had never acted as a general contractor for a residential construction job prior to the summer of 2001. The construction of Plaintiff's home was Defendant's primary job throughout this process.

The court heard testimony from several witnesses at trial. Deborah Borell, Defendant's wife and bookkeeper, testified to various drafts and expenses that were part of the Paquay construction project. She described three change orders that Plaintiff requested and paid for during the construction project. Deborah Borell stated that Defendant's business was making a

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[1] Unless otherwise stated, references to "the Code" or "the Bankruptcy Code" are to Title 11 of the United States Code. Unless otherwise stated, a reference to a "section" is a reference to a section within the Bankruptcy Code.

[2] Plaintiff also contacted another contractor during this process to inquire about constructing her home.

[3] Defendant copied the contract out of a legal book without any assistance from Plaintiff or an attorney. Plaintiff did not have the contract reviewed by an attorney.

[4] See Plaintiff's Exhibits E and G.

profit on Plaintiff's construction project, but that Defendant was not "ahead" on the project in March of 2002, because the money not directly used for materials was used for general business overhead and because Defendant had not yet figured in his own labor time for projects that he completed by himself. When asked why Plaintiff's construction project was not completed by January 30, 2002, as per the contract, Mrs. Borell stated that the delay was caused by Plaintiff's changes, such as moving a set of stairs.

Defendant testified that he has been in the construction business for twenty-five (25) years, with experience in masonry, carpeting, and excavating. He never served as a general contractor on a residential construction job prior to Plaintiff's project, but did serve as a general contractor on several commercial construction projects. Defendant stated that he never offered the information that he had never acted as a general contractor on a residential construction project to Plaintiff's son because the subject was not discussed. Plaintiff's son was the initial point of contact prior to entering into the contract. Similarly, Defendant did not volunteer this information to Plaintiff. Defendant further testified that Plaintiff did not ask to see other houses that he had worked on, but that such a request would have been reasonable. Instead, Defendant thought that, when deciding to enter into a construction contract with him, Plaintiff and her son relied upon his work at a house located across the street from Plaintiff's son. Defendant testified that his conversations with Plaintiff prior to the signing of the contract centered primarily on the materials and construction plans to complete the project Plaintiff presented, and that conversation about Defendant's previous construction experience was limited.

Defendant figured in a five percent management fee for himself when he computed the original contract numbers. Defendant attempted to accommodate Plaintiff when she requested changes in the project by submitting change orders. When Plaintiff was concerned about paint quality, Defendant submitted a paint sample to Sherwin-Williams to determine if the paint was of proper quality. Defendant asserted that he was "ahead" on the construction project in March of 2002 because he had not yet paid himself for his own manual labor time. Defendant believed that he could have finished the project at the original contract price. Defendant testified that he did not divert money from Plaintiff's construction project to other projects.

Plaintiff, a 70 year old artist, met Defendant after her son suggested that Defendant might be able to assist her with home construction. Plaintiff testified that Defendant told her about different jobs he had done and that he said he would build her a "beautiful house" that would be a "dream come true." Plaintiff stated that, prior to signing the contract, she and Defendant spoke more about plans for her house than his previous experience. However, Plaintiff stated that when she inquired about viewing other houses Defendant built, Defendant informed her that homeowners would not allow her to view their homes. Plaintiff testified that Defendant "seemed knowledgeable" and that she relied upon the information he provided her about his background when entering into the contract with him.

Plaintiff testified that she paid Defendant more than needed. When questioned about unfinished items, Plaintiff stated that the following items were not completed: sewer, sidewalk,

and garage apron. Plaintiff stated that Defendant refused to return to the house in March of 2002 until she paid him $1,500 for paint, but acknowledged the contract provision allowing Defendant to stop work on the project if he was not paid. She asserted that the first draw of $42,700 was paid to Defendant before work began and that he had enough money to purchase the materials when he stopped work.

Ron Lewis (hereinafter "Lewis"), the framing sub-contractor on this project, testified that he spoke with Plaintiff every day and that Defendant continually sought to accommodate Plaintiff's changes. Defendant paid Lewis in full for framing of Plaintiff's house.

Stephen Moore (hereinafter "Moore"), a sub-contractor on this project, testified that he completed the siding, cornices, and fixed a set of steps. When asked about a set of steps that appeared to be problematic, Moore agreed that the work was not acceptable. He stated that the steps were not in poor condition when he left the job site, and further stated that the problems could be corrected very easily. Defendant paid Moore in full for his work on Plaintiff's house.

Luke Thoma (hereinafter "Thoma") testified that he located sub-contractors to finish and repair problems in Plaintiff's home after March of 2002. Thoma stated that some of the siding was not applied correctly and that a set of stairs had to be removed and re-built. He testified that the project was approximately sixty percent completed when he first assessed the situation and that this sixty percent would include some profit in addition to materials cost. Thoma stated that the sewer boring under the road, exterior concrete for the sidewalk and garage pad, gutters, downspouts, and front door trim were not completed when he first arrived at Plaintiff's home.

PARTIES' ARGUMENTS

Plaintiff alleges that Defendant obtained money from her through false premises, false representations, or actual fraud. Though Plaintiff's complaint does not specifically delineate under which section of the Bankruptcy Code she asserts the amount is nondischargeable, it appears that Plaintiff is claiming nondischargeability through 11 U.S.C. § 523(a)(2)(A). Plaintiff asserts that she paid Defendant $127,814.94.[5] Defendant contends that Plaintiff paid him a total of $126,639.[6] Plaintiff asserts that Defendant falsely represented to Plaintiff his background, experience, and expertise, that he intended to deceive Plaintiff with these representations, that

[5] The original complaint states that Plaintiff paid Defendant $151,418.35. The court is unsure from where the number in the original complaint derives. However, in Plaintiff's Amended Complaint and "Proposed Findings of Fact," this number is not mentioned and instead Plaintiff states that, as of February 28, 2002, she spent a total of $134,531.91 on her home. This matches Plaintiff's Exhibit I, which details payments from Plaintiff to Defendant and "others" from October 2001 through March 2002. The Amended Complaint, Plaintiff's Exhibit G and Plaintiff's "Proposed Findings of Fact" state that Defendant received a total of $127,814.94 from Plaintiff.

[6] The court is unsure as to how this number was calculated. Plaintiff's Exhibit G indicates that Plaintiff directly paid Defendant a total of $127,814.94 and Plaintiff's Exhibit E, containing Mrs. Borell's handwritten records of payment from Plaintiff on the project, also reflects the same total.

Plaintiff relied on these representations, and that this reliance was the proximate cause of her loss. Though not specifically mentioned in the original or amended complaint, the testimony and arguments at trial indicate that Plaintiff alleges that Defendant engaged in a scheme to defraud Plaintiff by continually requesting money for the project, even though Defendant had sufficient funds to continue with the project at that particular time.

Defendant states that he did not make any misrepresentation to Plaintiff about any material fact. Further, Defendant asserts that he was not "ahead" on the project and he did not divert any materials from this project to another project. Defendant states that Plaintiff cannot prove the intent to deceive requirement as listed in 11 U.S.C. § 523(a)(2)(A), nor can she prove reasonable reliance or causation.

LAW AND ANALYSIS

I. Statutory Framework

Pursuant to Section 727(b), a discharge under Chapter 7 generally relieves debtors from all debts incurred prior to the order for relief. 11 U.S.C. § 727(b). However, the provision contains an exception to the general discharge for debts listed in 11 U.S.C. § 523. Section 523(a)(2) is the "fraud" dischargeability provision and excludes debts incurred by fraud from application of the general discharge. 11 U.S.C. § 523(a)(2). The provision provides, in pertinent part:

> (a) A discharge under section 727...of this title does not discharge an individual debtor from any debt-
>
> ....
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by –
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition....

11 U.S.C. § 523(a)(2)(A).

In order to prove nondischargeability under this provision, a creditor must demonstrate that:

> (1) the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor

> intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss.

Rembert v. AT&T Universal Card Serv., Inc. (In re Rembert), 141 F.3d 277, 280-81 (6th Cir. 1998) (citing Longo v. McLaren (In re McLaren), 3 F.3d 958, 961 (6th Cir. 1993)). Plaintiff must prove these elements by a preponderance of the evidence. See Grogan v. Garner, 498 U.S. 279, 291 (1991). All exceptions to discharge are strictly construed against the creditor. See Rembert, 141 F.3d at 281 (citing Manufacturer's Hanover Trust v. Ward (In re Ward), 857 F.2d 1082, 1083 (6th Cir. 1988).

II. Material Misrepresentation

The court must first determine whether Plaintiff proved that Defendant made a material misrepresentation that Defendant knew to be false or which was made with gross disregard for its truth. A false representation is defined as "an expressed misrepresentation." Wings & Rings, Inc. v. Hoover (In re Hoover), 232 B.R. 695, 700 (Bankr. S.D. Ohio 1999). Silence can constitute a material misrepresentation if a defendant fails to disclose a material fact. Id. However, for a failure to disclose a material fact to be actionable, a duty to disclose must exist. See Rowe v. Steinberg (In re Steinberg), 270 B.R. 831, 835 (Bankr. E.D. Mich. 2001) (citing In re Embrace Sys. Corp., 178 B.R. 112 (Bankr. W.D. Mich. 1995)). In contrast, a false pretense is defined as an "implied misrepresentation or conduct intended to create or foster a false impression...[I]n effect a false pretense is designed to convey an impression without oral representation." Wings & Rings, Inc., 232 B.R. at 700. The key component of false pretenses "appears to be a series of events or communications which collectively create a false or misleading set of circumstances." Kadlecek v. Ferguson (In re Ferguson), 222 B.R. 576, 586 (Bankr. N.D. Ill. 1998).

A. Affirmative Misrepresentation

Plaintiff asserts that Defendant made a material misrepresentation when he told her, after she inquired about viewing homes he had built, that individuals living in homes that he built would not allow her to view the homes. She further asserts that he materially misrepresented his background, experience, and expertise regarding being a general contractor. The testimony is not sufficient to carry the burden of proof that Defendant made any representations to Plaintiff about his experience in being a general contractor for previous residential construction projects. Defendant denies that Plaintiff specifically inquired as to his experience as a general contractor on a residential project and denies that he informed Plaintiff that she could not view his other projects.

After listening to both the Plaintiff and Defendant testify that they spent most of their pre-contract meetings discussing plans for Plaintiff's house, rather than discussing Defendant's previous experience, the court draws the conclusion that Plaintiff had developed a general

impression of what Defendant did and the experience he had and used this, along with the fact that her son had seen Defendant's masonry work, as a basis for entering into the contract. Additionally, it is likely that the conflicting testimony from Plaintiff and Defendant concerning whether Defendant stated that he had actually "built" a house before this project stemmed from a simple misunderstanding as to whether re-modeling and additions qualify as house "building."[7] Given Plaintiff's lack of experience in the construction industry, such a misunderstanding is understandable.[8] The court cannot find that Defendant affirmatively misrepresented any facts to Plaintiff prior to entering into the contract, nor during the course of the project.

B. Silence as Material Misrepresentation

Though neither the original complaint or the amended complaint allege that Defendant's silence constituted a material misrepresentation, testimony at trial discussing whether Defendant, without prompting, informed Plaintiff that he never served as a general contractor on a residential project seems to indicate that Plaintiff may be proffering the silence as a material misrepresentation theory. However, no duty to disclose has been alleged in this case. Without a duty, Defendant's silence on the issue of whether he previously served as a general contractor on a residential construction project cannot rise to a misrepresentation.

C. False Pretenses

In this case, a specific allegation of conduct that collectively created a false or misleading set of circumstances was not contained in the original or amended complaint. However, the questioning at trial leads the court to believe that Plaintiff was attempting to prove that Defendant engaged in a scheme to defraud Plaintiff by continually requesting advances for materials when Defendant had sufficient funds to purchase the materials.[9] The court is not convinced that such a scheme existed. Though it is not clear as to the exact day Defendant began

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[7] Defendant testified that he had acted as a general contractor for home remodeling contracts and that such work is more difficult than new construction. This testimony was similar to that of Lewis.

[8] An example of how easily such a misunderstanding can occur was exhibited while a witness (Lewis) was testifying at trial. When asked by defense counsel if he ever built an entire house, Lewis replied in the affirmative. Counsel for plaintiff inquired as to how many houses Lewis "built as a general contractor," and Lewis stated that he built 35-40 homes. Counsel for Plaintiff stated that, when Lewis stated that he "built a whole house," counsel for Plaintiff thought that meant Lewis had acted as a general contractor on these projects. Lewis, however, stated that he only acted as a framing contractor on these jobs, not as a general contractor and that his interpretation of the term "building a whole house" was different from that of Plaintiff's counsel, and included the framing of an entire house.

[9] The complaint states that Plaintiff paid Defendant $151,418.35. Defendant contends that Plaintiff paid him a total of $126,639, which includes $123,500 towards the contract price, plus some "extras." The exact amount is difficult to determine, as Plaintiff occasionally purchased her own materials. Because the cost of the materials was to be deducted at the end of a contracted job that was never completed, it is unclear as to what the final contract payment would have been.

working on Plaintiff's property, the check registers from Plaintiff's Exhibit O indicate that Defendant began purchasing materials for Plaintiff's house contemporaneously with receiving the first draft from Plaintiff.[10] Subsequent payments were made, per the contract, as Defendant required material and incurred labor costs. Some confusion arises from the fact that Plaintiff purchased materials for the project for herself, contrary to the provisions in the contract. Plaintiff, Defendant, and Deborah Borell testified that the cost of these materials purchased by Plaintiff would be deducted by Defendant when the contract was completed. Plaintiff offered no evidence to show that Defendant would not have deducted these amounts when the contract was completed.

Defendant testified that, in March of 2002, he could have finished the project for $30,000,[11] making a profit, defined as the "excess of revenues over expenditures in a business transaction" on the house of approximately $35,000. Black's Law Dictionary (8th ed. 2004). Defendant contends that this is within the contract price because Plaintiff would have been credited for the materials she purchased out-of-pocket and due to the fact that Plaintiff made several changes that she was required to pay for over and above the contract price. The court finds this line of reasoning logical.

Plaintiff focuses upon the fact that she paid more to Defendant than he can account for in bills for materials and sub-contractors. However, as a general contractor, Defendant is entitled to a management fee, in addition to payment for work on the project that he completed himself. The cost to complete the project is not indicative of "getting ahead." Plaintiff cannot rely solely on the costs she paid to complete the project because many problems that she had fixed (i.e. staircase) would have been the responsibility of Defendant's sub-contractors to repair under the contract. Further, Plaintiff's cost to finish the project is much higher than the cost would have been to complete the bid work, as she paid contractors on an hourly basis. Defendant had subcontractors obligated to complete work, correct work and finish punch list type items pursuant to bids. Plaintiff lost all the benefit of these arrangements by hiring other contractors and agreeing to pay hourly rates to complete. Finally, though Plaintiff asserts that Defendant left the sewer and sidewalk unfinished, there are alternate explanations for these results.[12] Thus, the court cannot find that Defendant collectively created a false set of circumstances that misled Plaintiff.

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[10] According to Plaintiff's Exhibit I, Plaintiff paid $42,700 on October 8, 2001. Similarly, according to Plaintiff's Exhibit O, Defendant purchased materials from Lowe's and Medina Supply, after obtaining permits form the Medina County Building Department and Medina County Engineer in September.

[11] Defendant testified that he had to complete the following items to finish the project: paint, complete final plumbing, grading outside the house, concrete pad and walk, hearthstone, and gutters.

[12] The contract specifically excludes sewer permit, sewer boring, and sewer line casing. Further, the money for the sidewalk was deducted from Plaintiff's bill.

II. Intent to Deceive

To meet her burden of proof under the second prong of § 523(a)(2)(A), Plaintiff must demonstrate that Defendant's representations were made with an intent to deceive. Germain Lincoln Mercury of Columbus, Inc. v. Begun (In re Begun), 136 B.R. 490, 494 (Bankr. S.D. Ohio 1992). Intent may be "inferred from an evaluation of the evidence as a whole. This includes consideration of circumstantial evidence." Blascak v. Sprague (In re Sprague), 205 B.R. 851, 861 (Bankr. N.D. Ohio 1997).

No evidence, direct or circumstantial, was presented that Defendant attempted to deceive Plaintiff. Defendant testified that he did not affirmatively inform Plaintiff that he served as a general contractor before because he thought that his work on a house located across the street from her son's residence was appropriate evidence of his work. The court finds this testimony credible. Further, both Plaintiff and Defendant agree that the primary focus of their discussions prior to signing the contract was the materials, plans, and requirements for the building of Plaintiff's house, rather than on Defendant's qualifications and previous construction experience.

Likewise, the circumstantial evidence does not indicate intent to deceive. Defendant did not exhibit a lackadaisical attitude toward Plaintiff or the project. Lewis and Moore testified that Defendant made every effort to accommodate Plaintiff's requests. The fact that Defendant executed several change orders also indicates his willingness to accommodate Plaintiff. In addition, even when there were problems with the sub-contractors and the project overall, Defendant continually attempted to pull the project together. For example, when Plaintiff thought that the paint used by Defendant was defective, Defendant asked the paint supplier to run tests on the paint.[13] Defendant fully paid the sub-contractors he hired to assist him with this project. These are not actions taken by contractors engaging in fraudulent conduct, as indicia of fraud include hiring sub-contractors and not paying them, or not appearing at a job site once a sum of money was advanced. There is not one lien nor is there any subcontractor or supplier that is unpaid. Though Plaintiff did offer evidence to show that Defendant and the sub-contractors he hired made mistakes in the construction project, (i.e. installing insulation with backing still on and upside-down floor pole supports) this evidence of lack of judgment does not equal intent to deceive. Plaintiff has failed to prove that Defendant intended to deceive Plaintiff.

III. Justifiable Reliance

Plaintiff must establish that her reliance was justifiable, "which takes into account the circumstances of each case and the nature of the interactions between the parties and their experiences." Williams v. Logan (In re Logan), 313 B.R. 745, 749 (Bankr. S.D. Ohio 2004). Further, a person is "required to use his senses and cannot recover if he blindly relies upon a misrepresentation, the falsity of which would be patent to him if he had utilized his opportunity

[13] Defendant's Exhibit 5 demonstrates that Defendant did, in fact, return the paint to the supplier for testing. The supplier determined that the batch of paint performs within manufacturer specifications.

to make a cursory examination or investigation." Kadlecek, 222 B.R. at 584 (quoting Field v. Mans, 516 U.S. 59 (1995)). Plaintiff contends that she would not have signed the contract with Defendant if she had known about his limited experience in residential construction.

While the court recognizes that Plaintiff is not highly experienced in dealing with construction contractors, there is a question as to what extent Plaintiff inquired into Defendant's construction background. As both Plaintiff and Defendant testified, the majority of their pre-contract conversations consisted of discussing the blueprint she sought to use for her home and what materials and labor would be required for such a job. Though there is a dispute as to whether Defendant informed Plaintiff that she could not view homes in which he completed construction, Plaintiff had every right and opportunity to further inquire of Defendant's qualifications or decline to sign the contract without viewing such homes. She did not take these steps. If Defendant had informed Plaintiff that she could not view the interiors of homes he worked on, it would seem natural for Plaintiff to ask for addresses of such homes, so that she could at least drive by to view Defendant's work. Plaintiff did not adequately utilize her opportunity to make a cursory examination of Defendant's qualifications enough for the court to find justifiable reliance.

IV. Causation

A plaintiff can establish proximate cause by showing that a defendant's conduct was a substantial factor in his loss or that his loss reasonably follows therefrom. Wings & Rings, Inc., 232 B.R. at 700. As Plaintiff has failed to prove that she justifiably relied on Defendant's statements and the record is devoid of a set of misleading communications, she cannot prove that her reliance proximately caused her damages. Therefore, Plaintiff has failed to meet the fourth prong of § 523(a)(2)(A).

V. Conclusion

Plaintiff has failed to demonstrate that Defendant made any material misrepresentations with the intent to deceive and upon which Plaintiff relied. Further, Plaintiff has failed to demonstrate that Defendant executed a scheme or series of misleading communications with intent to deceive and upon which Plaintiff relied. Thus, Plaintiff has not carried the burden in proving fraud under § 523(a)(2)(A) by a preponderance of the evidence. Accordingly, the debt owing Plaintiff is dischargeable.

A separate order is issued herewith.

/s/ Russ Kendig

JUN 23 2006

Judge Russ Kendig
U.S. Bankruptcy Judge

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