Dated: August 03 2006

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 05-34829
	)	
Chad Michael Lawson,	)	Chapter 7
	)	
Debtor.	)	Adv. Pro. No. 05-3246
	)	
Juli Jones,	)	Hon. Mary Ann Whipple
	)	
Plaintiff,	)	
v.	)	
	)	
Chad Michael Lawson	)	
	)	
Defendant.	)	

MEMORANDUM OF DECISION AND ORDER DENYING MOTION FOR SUMMARY JUDGMENT

This adversary proceeding is before the court on Plaintiff's Motion for Summary Judgment [Doc. #28], Defendant's response [Doc. # 34], and Plaintiff's reply [Doc. # 35]. Plaintiff alleges in her complaint that certain debts owed to her by Defendant should be excepted from discharge under 11 U.S.C. § 523(a)(2)(A), (a)(2)(B) and (a)(6).

The court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §1334(b) and the

general order of reference entered in this district. Proceedings to determine dischargeability are core proceedings that the court may hear and decide. 28 U.S.C. § 157(b)(1) and (b)(2)(I). Having considered the motion and supporting brief, the response and the reply, as well as the affidavits of the parties, for the reasons that follow, Plaintiff's motion will be denied.

FACTUAL BACKGROUND

Before November 2002, Plaintiff and Defendant were acquaintances. Plaintiff worked at Home Depot doing inventory control and became the delivery/will call coordinator. [Pl. Aff. ¶ 3]. Defendant worked with his brother's business, Lawson Brothers, doing primarily roofing. [*Id.* at ¶ 4]. In November 2002, Plaintiff and Defendant developed a friendship and began spending time together and sharing conversation and ideas, including ideas regarding self-employment – Plaintiff expressing a desire to start a cleaning company and Defendant to own his own construction company. [Def. Aff. ¶ 6]. While working at Home Depot, Plaintiff was learning about such things as bidding on construction jobs and thought Defendant had good ideas for his business. [Pl. Aff. ¶ 9].

Although the parties dispute who initially broached the subject of loaning Defendant money to start his new construction business, Lawson General Contracting ("LGC"), Plaintiff was interested in doing so. [*Id.* at ¶ 9]. On February 25, 2003, she loaned him $4,000 at 8% interest, which she believed to be a sound investment since the money was going to earn a higher rate of return than it would sitting in the bank. [*Id.* at ¶¶ 11 -12]. She also loaned Defendant $11,000 on March 21, 2003, for tools and other business items. By March and April, 2003, Defendant had started in business, hired three employees, one of which was a bookkeeper, and took on some construction jobs. [*Id.* at ¶ 15; Def. Aff. ¶ 10]. LGC was not incorporated, however, until May 23, 2003, after he had obtained legal advice on how best to operate his business. [Def. Aff. ¶ 10].

In July 2003, Plaintiff loaned Defendant $6,000 in order that LGC could meet its payroll and other expenses while it completed its construction jobs. [*Id.* at ¶¶ 12, 16]. Although LGC had several jobs in progress, after expenses were paid, very little profit was realized on those jobs. [Def. Aff. ¶ 12]. Nevertheless, by July 2003, Plaintiff had received payments from Defendant totaling $6,250. [Pl. Aff. ¶ 17 and attached Ex. A].

In July 2003, Defendant discussed with Plaintiff an opportunity that had been presented to him by a private investor, Tom Dicke, to build a spec home in Parklane Estates, Shawnee Township, Ohio. Plaintiff was excited about the opportunity and encouraged Defendant to undertake the project. [*Id.* at ¶18; Def. Aff.

¶ 14]. Although Defendant had never completed a project of that magnitude, he believed he was competent in his ability to complete a quality spec home. [Def. Aff. ¶ 14]. On the recommendation of Tom Dicke, a separate company, Parklane Builders, LLC, was established that was responsible only for the building of the spec home and future spec homes in Parklane Estates. [*Id*. at ¶ 25]. Parklane Builders was established on May 5, 2003, by Defendant and Travis Lawson, with Travis Lawson being named as its statutory agent. [Pl. Aff., Ex. H, unnumbered pp. 2-3]. Subsequently, on June 13, 2003, Defendant was appointed the statutory agent. [*Id.*, pp. 6-7]. Defendant does not dispute that Parklane Builders, rather than LGC, entered into an agreement with Tom and Mary Alice Dicke, as trustees of a living trust, ("the Dickes") to build the spec home. However, contrary to Plaintiff's assertions, Defendant avers that Plaintiff always knew about the separate company and its purpose. [Def. Aff. ¶ 25].

Defendant did not obtain separate legal representation to negotiate and advise him with respect to his agreement with the Dickes. [*Id.* at ¶ 41]. Under that agreement, the Dickes conveyed certain real estate located in Parklane Estates to Parklane Builders for the purpose of constructing a residence. [Plf. Aff., attached Ex. 1]. In return, Defendant executed a promissory note, in his capacity as a member of Parklane Builders, and a guaranty, in his individual capacity, in favor of the Dickes in the amount of $250,000, which included the $70,000 purchase price of the land plus a $180,000 line of credit to finance the cost of constructing the home. [*Id.*, ¶ 43 and attached Ex. I]. As a member of Parklane Builders, he also granted the Dickes a mortgage on the purchased property in order to secure the promissory note. [*Id.*]. Defendant executed additional promissory notes in favor of the Dickes that were secured by mortgages on the property and that provided Parklane Builders additional lines of credit to finance the cost of construction on January 20 and March 8, 2004, in the amounts of $60,000 and $6,337.05, respectively. [*Id.*, attached Ex. J].

In August 2003, Plaintiff's business was having cash flow problems. Plaintiff assisted Defendant in developing a list of debts to be paid and, based on that list, loaned Defendant another $31,000. [Pl. Aff. ¶ 19]. The parties drafted[1] and executed, without the advice or assistance of counsel, an agreement ("Agreement") that acknowledged the debt owed to Plaintiff by Defendant at that time. The Agreement provided in its entirety as follows:

> THIS IS A LEGAL AGREEMENT BETWEEN Chad Lawson AND Julie Jones TO REPAY THE FOLLOWING DOLLAR AMOUNT BORROWED OF 47,529.41. THIS CONTRACT

[1]I There is a dispute as to who drafted the Agreement. Plaintiff contends that Defendant drafted the Agreement, [Pl. Aff. ¶ 20], and Defendant contends that it was drafted by the joint effort of both Plaintiff and Defendant, [Def. Aff. ¶ 18].

> MAKES Julie Jones A SILENT PARTNER OF Lawson General Contracting UNTIL THE BALANCE OF THE LOAN IS PAID IN FULL. BALANCE OF LOAN TO BE PAID IN FULL AFTER OF (sic) BEFORE THE SALE OF Spec home on 3147 Springblossom Ct. ANY NEGLECT TO PAY THIS LOAN BACK IN FULL WILL RESULT IN A COMPLETE SURENDER (sic) OF ALL BUISNESS (sic) ASSETS TO Julie Jones.

[*Id*. at ¶ 20 and attached Ex. D]. Notwithstanding the language in the Agreement, Defendant states in his affidavit that he "never offered or intended to give an interest [to Plaintiff] in the business that [he] was starting up." [Def. Aff. ¶ 7].

Defendant's business continued to experience cash flow problems. During the building of the spec home, he discovered a problem with his contract to build the home when he attempted to make a draw for labor related expenses, a problem of which he had been previously unaware. Tom Dicke informed him that the contract did not provide for any draws or payment for Defendant's labor and that Defendant's labor would not be paid until completion of the contract. [Def. Aff. ¶ 16]. Defendant determined that his only option was to complete the spec home and obtain a purchaser, while continuing to obtain other jobs in order to meet payroll and other expenses. [*Id.*]. Plaintiff, in order to protect the loans she had already made, continued to loan Defendant money in order to allow him to finish the spec house so it could be sold and she could be repaid. [Pl. Aff. ¶27].

On March 8, 2004, Defendant executed a promissory note (the "Note") in Plaintiff's favor for the principal sum not to exceed $100,000, both in his capacity as president of LGC and individually as a guarantor. [*Id.*, Ex. F]. The Note was prepared by the same attorney who had prepared the notes executed by Defendant in favor of the Dickes ("the Dicke notes") that were associated with his contract to build the spec house. [*Id.* at ¶28; Def. Aff. ¶ 22]. The Note contains a reference to a mortgage securing the Note in a separate paragraph, stating that "[i]n case of default in payment of interest or installment. . . or, in case of default in performance of any or either of the terms and conditions of the mortgage securing this Note, the whole principal sum and accrued interest shall, at the option of the owner and holder hereof, become due and payable. . . ." [Pl. Aff. Ex. F]. Identical language is contained in paragraphs of the January 20 and March 8, 2004, Dicke notes. [*See* Pl. Aff. Ex. I, unnumbered p. 11]. A separate mortgage, however, was never executed in favor of Plaintiff. According to Defendant, although the parties had planned on using the proceeds from the sale of the spec house to satisfy Defendant's obligation to Plaintiff, there was never any discussion regarding granting Plaintiff a mortgage. [Def. Aff. ¶ 22]. Ultimately, between December 1, 2003, and October 20, 2004, Plaintiff loaned Defendant additional sums totaling $137,898.78. [Pl. Aff. ¶ 39 and

attached Ex. G].

At the start of the 2004 construction season, at Plaintiff's suggestion and because payroll expenses were exceeding income, Defendant laid off all of his employees, including his bookkeeper. Plaintiff assumed the responsibilities of maintaining the books. [Def. Aff. ¶ 26]. Defendant disputes Plaintiff's assertion that she was only given the records for LGC. He contends that she was given all business records, including those for Parklane Builders. [*Id.*]. Also during 2004, the parties each sold their own houses and moved into a house together that Plaintiff purchased from her mother. However, by February 2005, their relationship had deteriorated, constantly arguing about finances, and Defendant moved out. [*Id.* at ¶ 35; Pl. Aff. ¶ 40].

Although the spec house was not yet completed, the house was placed on the market in order to generate a source for repayment of Plaintiff's loans. But in June 2004, the Dickes exercised their right under their contract with Defendant to purchase the house in the event that Defendant did not complete the house within a specified time period. Under the contract, the purchase price was calculated by taking the actual cost expended by Parklane Builders in constructing the house, excluding any and all "in kind contributions of material or labor" by Defendant, and adding 10% of the amount actually drawn on the line of credit from the Dickes. [Pl. Ex. K, unnumbered pp. 3-4]. At closing of the sale to the Dickes, Plaintiff received $20,689.70, which he, in turn, paid to 21st Century Cabinets, a supplier for the spec house. [*Id.*; Def. Aff. ¶ 31]. Defendant disputes Plaintiff's statement that she knew nothing of this transaction, stating that she was aware of the sale and that the proceeds were paid to the supplier. [Def. Aff. ¶ 31; Pl. Aff. ¶ 44].

It is undisputed that, during 2003 and 2004, LGC's gross sales were approximately $149,000. [Def. Aff. ¶ 41]. It is also undisputed that Defendant withdrew LGC funds, beyond his annual salary of $18,754, for other than business use, including expenses jointly incurred on a ten-day vacation to Vail, Colorado, with Plaintiff's family. [*Id.* at ¶¶ 38, 40]. According to Defendant, personal payments from the business account were also made for Plaintiff. [*Id.* at ¶ 38]. Although additional facts are alleged in both Defendant's and Plaintiff's affidavits, those facts are disputed and are not specifically set forth in this opinion.

On May 12, 2005, Defendant filed the underlying Chapter 7 petition. And on August 9, 2005, Plaintiff timely filed the instant complaint to determine the dischargeability of the debt owed to her by Defendant.

LAW AND ANALYSIS

I. Summary Judgment Standard

Under Rule 56 of the Federal Rules of Civil Procedure, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056, summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In reviewing a motion for summary judgment, however, all inferences "must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-88 (1986). The party moving for summary judgment always bears the initial responsibility of informing the court of the basis for its motion, "and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party has met its initial burden, the adverse party "may not rest upon the mere allegations or denials of his pleading but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue for trial exists if the evidence is such that a reasonable factfinder could find in favor of the nonmoving party. *Id.*

II. 11 U.S.C. § 523(a)(2)(A)

Under § 523(a)(2)(A), a debt is excepted from discharge to the extent it was obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." In order to except a debt from discharge under this section due to false pretense or false representation, a plaintiff must prove the following elements by a preponderance of the evidence: (1) the debtor obtained money or services through a material misrepresentation, either express or implied, 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 Services, Inc. (In re Rembert)*, 141 F.3d 277, 280-81 (6th Cir. 1998). A debtor's intent to defraud a creditor is measured by a subjective standard and must be ascertained by the totality of the circumstances of the case at hand. *Id.* at 281-82. "If there is room for an inference of honest intent, the question of nondischargeability must be resolved in favor of the debtor." *ITT Fin'l Servs. v. Szczepanski (In re Szczepanski)*, 139 B.R. 842, 844 (Bankr. N.D.Ohio 1991).

For purposes of § 523(a)(2)(A), "false representations and false pretenses encompass statements that falsely purport to depict current or past facts." *Peoples Sec. Fin. Co., Inc. v. Todd (In re Todd)*, 34 B.R. 633,

635 (Bankr. W.D. Ky. 1983). "'False pretense' involves implied misrepresentation or conduct intended to create and foster a false impression, as distinguished from a 'false representation' which is an express misrepresentation." *Ozburn v. Moore (In re Moore)*, 277 B.R. 141, 148 (Bankr. M.D. Ga. 2002)(quoting *Sears Roebuck & Co. v. Faulk (In re Faulk)*, 69 B.R. 743, 750 (Bankr. N.D. Ind. 1986)).

In addition, § 523(a)(2)(A) also addresses "actual fraud" as a concept broader than misrepresentation. *See McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000); *Mellon Bank, N.A. v. Vitanovich (In re Vitanovich)*, 259 B.R. 873 (B.A.P. 6th Cir. 2001). "Actual fraud has been defined as intentional fraud, consisting in deception intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed. It requires intent to deceive or defraud." *Vitanovich*, 259 B.R. at 877 (quoting *Gerad v.Cole (In re Cole)*, 164 B.R. 951, 953 (Bankr. N.D. Ohio 1993)). A debtor's intent to defraud a creditor under § 523(a)(2)(A) is measured by a subjective standard and must be ascertained by the totality of the circumstances of the case at hand. *Id*.; *Rembert*, 141 F.3d at 281-82.

A finding of fraudulent intent may be made on the basis of circumstantial evidence or from the debtors "course of conduct," as direct proof of intent will rarely be available. *Hamo v. Wilson (In re Hamo)*, 233 B.R. 718, 724 (B.A.P. 6th Cir. 1999). However, where a debtor's subjective intent is at issue, summary judgment is generally inappropriate unless all reasonable inferences defeat the claims of the opposing party. *Sicherman v. Rivera (In re Rivera)*, 338 B.R. 318, 327 (Bankr. N.D. Ohio 2006) (citing *Hoover v. Radabaugh*, 307 F.3d 460, 467 (6th Cir.2002) ("When the defendants' intent is at issue, summary judgment is particularly inappropriate") and *Gertsch v. Johnson & Johnson Finance Corp. (In re Gertsch)*, 237 B.R. 160, 165 (B.A.P. 9th Cir. 1999) ("Where intent is at issue, summary judgment is seldom granted, however, summary judgment is appropriate if all reasonable inferences defeat the claims of one side")).

In this case, there is a factual dispute with respect to every element of Plaintiff's claim. First, Plaintiff argues that Defendant obtained loans from her under the false pretense that he would only use the funds for his business operating as LGC. She then relies on the fact that, without her knowledge, Defendant used a portion of the loaned funds for his business operating as Parklane Builders and used some funds from the LGC account for his own personal expense. However, Defendant offers his affidavit stating that Plaintiff always knew about Parklane Builders and its purpose of undertaking the building of the spec home and anticipated future spec homes in Parklane Estates. And there is no dispute that Plaintiff knew substantial sums loaned by her were used by Defendant in building the spec home. Also, Defendant's affidavit states that funds were withdrawn from the LGC business for both Plaintiff's and Defendant's personal use. Viewing this evidence in a light most favorable to Defendant, the court may infer that Plaintiff

knew of such use of the LGC account and acquiesced in such use. To the extent Plaintiff was aware of Parklane Builders and the use of the LGC account, her false pretense argument will fail.

Next, Plaintiff argues that Defendant obtained the loaned funds by false representations and actual fraud. Plaintiff argues that Defendant represented to her that she had an interest in the spec house without disclosing the fact that Parklane Builders owned the house or that it had granted a mortgage to the Dickes. However, viewing the evidence in a light most favorable to Defendant, a reasonable factfinder could conclude no such representation was ever made. Although Plaintiff relies, at least in part, on the Agreement memorializing the amount of $47,529.41 owed to her by Defendant as of approximately August 2003, the Agreement merely states that the loan will be paid in full at or before the sale of the spec home; it does not promise Plaintiff an interest in the home. Defendant does not dispute that it was always the parties' plan to repay Plaintiff with proceeds from the sale of the home. However, he states that they simply never discussed granting Plaintiff a mortgage. Although a mortgage is referenced in the Note executed by Defendant in Plaintiff's favor, it would not be an unreasonable inference that such language was an inadvertent error by the attorney who prepared the Note, as he had also prepared the promissory notes executed in favor of the Dickes that contained identical language. Such an inference is supported by the fact that no mortgage in the spec house was, in fact, ever granted Plaintiff. Furthermore, as already discussed, Defendant's affidavit, if believed, contradicts Plaintiff's contention that she did not know about Parklane Builders and its purpose.

While Defendant's repeated assurances that he would repay the loans received from Plaintiff with proceeds from the sale of the spec house would support a finding of a false representation if he did not, in fact, believe there would be sufficient proceeds to meet the repayment obligation at the time he made those representations, *see Stifter v. Orsine (In re Orsine)*, 254 B.R. 184, 188 (Bankr. N.D. Ohio 2000) (explaining that "any debtor who does not intend to perform a contract from its inception has knowingly made a false representation"), Defendant states that he did plan on repaying Plaintiff when he sold the spec house. He further states that he put the house on the market in 2004 in an attempt to obtain funds to repay her. His efforts were thwarted by the Dickes' exercise of their option to purchase at a predetermined price. While it is not clear what price Defendant might have otherwise obtained or what he reasonably believed he could have obtained if the Dickes had not exercised their option, viewing the evidence in a light most favorable to Defendant, a factfinder could reasonably conclude that, at the time Defendant obtained the loans, he did intend to repay Plaintiff from the proceeds of the sale of the house.

Defendant's affidavit also contradicts Plaintiff's contention that she relied on alleged representations

that Defendant or LGC owned the spec house and the fact that such reliance caused her loss. As indicated above, Defendant states that Plaintiff always knew about Parklane Builders and knew that it was established in order to create a separate entity responsible for building the spec home and future spec homes in Parklane Estates.

Plaintiff argues, however, that the court should disregard several assertions in Defendant's affidavit since they are self-serving and contradictory to the record. A party cannot create a factual issue to avoid summary judgment through the introduction of self-serving affidavits that contradict prior sworn testimony. *United States ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296, 303 (6th Cir.1998). In addition, the Sixth Circuit has found that a party cannot create a factual issue through a self-serving affidavit in circumstances where the evidence is overwhelmingly to the contrary. *Whitley v. Spencer County Police Dept.*, No. 97-5904, 1999 WL 196499, *3 (6th Cir. Mar. 26, 1999) (rejecting the plaintiff's self-serving affidavit and conclusory allegations in light of objective medical evidence to the contrary); *Reist v. Orr*, No. 95-1128, 1995 WL 592041, *3 (6th Cir. Oct.5, 1995) (rejecting the plaintiff's self-serving allegations in light of overwhelming evidence to the contrary).

The specific assertions by Defendant that Plaintiff challenges are : (1) Plaintiff always knew about the existence of Parklane Builders, (2) Defendant never offered or intended to give Plaintiff an ownership interest in LGC, and (3) Plaintiff was aware that the money she loaned was used for other than business purposes. Plaintiff does not argue that Defendant's affidavit contradicts prior sworn testimony, and the court finds that the first and third assertions do not contradict evidence that is overwhelmingly to the contrary. More problematic, however, is the second assertion in light of the Agreement's provision that "this contract makes Julie Jones a silent partner of [LGC] until the balance of the loan is paid in full. . . . Any neglect to pay this loan back in full will result in a complete surender (sic) of all buisness (sic) assets to Julie Jones." [Pl. Aff, attached Ex. D]. While that Agreement is not sufficient to create an interest of Plaintiff in LGC,[2] except perhaps as its creditor with a lien on the business assets, the language in the Agreement suggests that Defendant did offer Plaintiff an interest in the business. However, the court recognizes that the parties are obviously unsophisticated in drafting legal documents and did not have legal counsel in doing so. It is not clear what the parties believed the language in the Agreement actually meant. And the court does not find the Agreement to be such overwhelming evidence that Defendant's averment must be disregarded. Nevertheless, even if disregarded, for the reasons discussed above, including Plaintiff's alleged knowledge of the existence and purpose of Parklane Builders, the evidence is not such

[2] LGC is a corporation, not a partnership.

that would require judgment in Plaintiff's favor as a matter of law.

III. 11 U.S.C. § 523(a)(2)(B)

Section 523(a)(2)(B) provides as follows:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt –
> . . . .
> (2) for money . . . to the extent obtained by –
> . . . .
> (B) use of a statement in writing–
> (i) that is materially false;
> (ii) respecting the debtor's or an insider's financial condition;
> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
> (iv) that the debtor caused to be made or published with intent to deceive.

In support of this claim Plaintiff relies on the August 2003 Agreement and the March 8, 2004, Note executed in Plaintiff's favor by Defendant, both individually and as president of LGC. While these documents are in writing, they are not "statement[s]...respecting the debtor's or an insider's financial condition." They are both promises for and the terms of repayment of certain debts and do not mention Debtor's financial condition. As transactional documents they say nothing about Debtor's financial responsibility, creditworthiness and ability to repay the debts memorialized by them. *Bednarsz v. Brzakala (In re Brzakala)*, 305 B.R. 705, 709-10 (Bankr. N.D. Ill. 2004)(bad check and settlement agreement not statements respecting debtor's financial condition); *Caruso v. Segal (In re Segal)*, 195 B.R. 325, 331-32 ((Bankr. E.D. Pa. 1996)(lease and promissory note are not statements respecting debtor's financial condition). Any inferences that might be drawn about Debtor's financial condition and his ownership of property from these documents are not enough to bring them under § 523(a)(2)(B). Plaintiff has thus failed to establish for purposes of summary judgment at least one critical element of her § 523(a)(2)(B) claim.[3]

Even if these documents are within the ambit of § 523(a)(2)(B), genuine issues of material fact preclude summary judgment in Plaintiff's favor. According to Plaintiff, both documents "suggest" that LGC owned the spec home. However, neither document actually addresses ownership of the spec home. For the reasons discussed above, there are factual disputes that preclude the granting of summary judgment, including (1) whether Plaintiff was aware of the existence of Parklane Builders and of its ownership of the

[3]As § 523(a)(2)(A) expressly excludes statements respecting a debtor's financial condition as a basis for exception to discharge thereunder, Plaintiff ultimately cannot have it both ways as to these documents. But she is certainly entitled to plead in the alternative.

spec house, (2) to the extent the documents "suggest" that LGC owned the spec home, whether such "suggestion" was made by Defendant with intent to deceive, and (3) whether Plaintiff reasonably relied on such "suggestion."

IV. 11 U.S.C. § 523(a)(6)

Section 523(a)(6) provides that a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity" is not dischargeable. 11 U.S.C. § 523(a)(6). In order to be entitled to a judgment that the debt is excepted from discharge, Plaintiff must prove by a preponderance of the evidence that the injury from which the debt arises was both willful and malicious. *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 463 (6th Cir. 1999); *J & A Brelage, Inc. v. Jones (In re Jones)*, 276 B.R. 797, 801-2 (Bankr. N.D. Ohio 2001). A willful injury occurs when "(i) the actor desired to cause the consequences of the act or (ii) the actor believed that the given consequences of his act were substantially certain to result from the act." *Monsanto Co. v. Trantham (In re Trantham)*, 304 B.R. 298, 307 (B.A.P. 6th Cir. 2004) (citing *Markowitz*, 190 F.3d at 464). Under § 523(a)(6), "'malicious' means in conscious disregard of one's duties or without just cause or excuse; it does not require ill-will or specific intent." *Id.* (citing *Wheeler v. Laudani*, 783 F.2d 610, 615 (6th Cir. 1986).

In this case, and for all of the reasons previously discussed, there are material facts in dispute as to whether Defendant intended to cause Plaintiff's loss or, alternatively, whether he believed that her loss was substantially certain to result from his acts. As such, Plaintiff is not entitled to summary judgment on this claim.

THEREFORE, having found that genuine issues for trial exist with respect to each of Plaintiff's claims, good cause appearing,

IT IS ORDERED that Plaintiff's Motion for Summary Judgment be, and hereby is, **DENIED.**