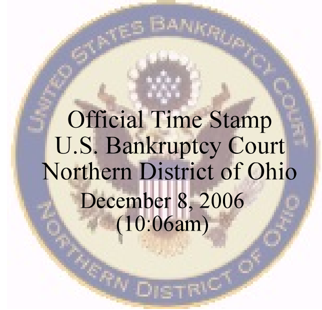
THIS OPINION NOT INTENDED FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 05-94616
	)	
LESLEY DAWN NELSON,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	
RICHARD A. NELSON,	)	Adversary Proceeding No. 06-1219
	)	
Plaintiff,	)	
	)	
v.	)	**MEMORANDUM OF OPINION**
	)	
LESLEY DAWN NELSON,	)	
	)	
Defendant.	)	

The plaintiff Richard Nelson filed this adversary proceeding asking that a debt owed to him by his former wife, the debtor-defendant Lesley Nelson, be found nondischargeable under 11 U.S.C. §§ 523(a)(2)(A) and (a)(6).[1] For the reasons stated below, the plaintiff did not meet his burden of proof and judgment will be entered in favor of the defendant finding that the debt is discharged.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

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[1] Although the complaint cited additional sections, the plaintiff stated at trial that he was relying only on these.

TRIAL

These findings of fact reflect the court's weighing of the evidence presented at the trial, including determining the credibility of the witnesses. "In doing so, the court considered each witness's demeanor, the substance of the testimony, and the context in which the statements were made, recognizing that a transcript does not convey tone, attitude, body language or nuance of expression." *In re The V Companies*, 274 B.R. 721, 726 (Bankr. N.D. Ohio 2002). *See* FED. R. BANKR. P. 7052 (incorporating FED. R. CIV. P. 52). When the court finds that a witness's explanation was satisfactory or unsatisfactory, it is using this definition:

> The word satisfactory 'may mean reasonable, or it may mean that the Court, after having heard the excuse, the explanation, has that mental attitude which finds contentment in saying that he believes the explanation–he believes what the [witness] says with reference to the [issue at hand]. He is satisfied. He no longer wonders. He is contented.'

United States v. Trogdon (*In re Trogdon)*, 111 B.R. 655, 659 (Bankr. N.D. Ohio 1990) (discussing the issue in context of bankruptcy code § 727) (quoting *First Texas Savings Assoc., Inc. v. Reed*, 700 F.2d 986, 993 (5th Cir. 1983)).

FACTS[2]

While married, the debtor Lesley Nelson and Richard Nelson lived on Maplewood Court in Painesville, Ohio (the property). They both signed a note to Leader Mortgage secured by a first mortgage on the property, a note to Charter One Bank secured by a second mortgage, and a

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[2] The parties stipulated to some facts (docket 18) and presented the remaining evidence at trial. The plaintiff presented his case through his own testimony, the testimony of Fran Nelson (his mother), Kimberly Nelson (his sister-in-law), and cross-examination of the debtor. The debtor presented her case through her own testimony, the testimony of Melanie Houghkerk (her former neighbor), and cross-examination.

home equity line of credit agreement with Charter One secured by a third mortgage on the property.

Their divorce decree dated February 4, 2002, gave Richard[3] all right, title, and interest in and to the property and required him to assume all responsibility for paying the first and second mortgage. The divorce decree was silent as to the line of credit. The parties did not owe any money on it at the time. Richard's mother, Fran Nelson, advised both of them "to deal with this account" as part of the divorce, but neither Richard nor Lesley was willing to pay the fee required by Charter One to remove a name from the credit line. They chose, therefore, to leave the line of credit open, without changing the authority to draw on the line or the responsibility for paying any debt incurred. The divorce decree did not call for either party to pay child support or alimony; it did provide that they had shared responsibility for their two children's expenses.

Both parties found it hard to make ends meet following the divorce. At his mother's suggestion, Richard moved out of the property and into his grandmother's mobile home so that he could rent the property to help pay the notes. Leslie dealt with her situation by incurring credit card debt to pay some of her expenses.

In April 2002, Lesley purchased a condominium and moved there with the children. At some point in early fall 2002,[4] the couple attempted to reconcile and Richard moved into Lesley's condominium. Unfortunately, the reconciliation was unsuccessful and Richard moved back out in mid-2003. This dispute grows out of the fact that during the time that Richard and Lesley

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[3] Because the parties have the same last name, the court will refer to them by first names.

[4] The testimony was inconclusive as to the exact date, but the fact is not legally relevant in any event.

were reconciled, Lesley wrote several checks on the line of credit. Although the testimony did not address exactly what happened with the line of credit, it seems that Richard later paid the account balance in connection with refinancing the property. In any event, what is clear is that Lesley is no longer responsible for the debt and Richard is.

Lesley testified to these facts: after the divorce, she incurred credit card debt to support her children. When Richard moved into her condominium, she discussed her financial difficulties with him. Lesley suggested paying the credit card debt by drawing on the line of credit. Her reasoning was that she would then have one consolidated debt with an interest rate lower than the rates she was paying on the credit cards and she would have an easier time paying her expenses. Richard suggested as an alternative that she refinance her condominium, but she could not do this because she did not have any equity in the real estate. According to Lesley, Richard agreed that she would use the line of credit as outlined above and Lesley agreed that she would make the payments on it.

Lesley then drew on the line by writing these checks:

February 7, 2003	$4,855.50
February 7, 2003	$1,380.91
March 5, 2003	$450.31
March 31, 2003	$3,600.00
April 14, 2003	$628.99
May 6, 2003	$179.37
June 12, 2003	$589.64

Lesley also made these payments on the account:

March 25, 2003	$100.00
May 2, 2003	$100.00
June 5, 2003	$79.19
June 16, 2003	$100.00

Lesley's uncontradicted testimony was that Charter One sent them the checks for the account when they opened the line of credit, Richard brought the checks with him when he moved into her condominium, and she asked Charter One to send the monthly statements to her at the condominium so that she could pay the bills after she drew on the line. Lesley's testimony that she discussed the line of credit with Richard was corroborated by Melissa Houghkerk, a friend of Lesley's who also lived at the condominium from the end of 2002 through January 2003 and heard a conversation or two on this topic.

This is Richard's testimony: He drew one check on the account in the amount of $3,000.00 on November 21, 2002 to pay attorneys fees and he repaid the amount in full a few days later. He never discussed the line of credit with Lesley during their reconciliation. He did not know anything about Lesley using the line until April 2003 when his mother was assisting him with refinancing the property. At that time, Fran Nelson told him that Charter One advised her that there was a $10,000.00 balance on the account. He was very angry and upset and confronted Lesley, who said that she would make the payments. Richard's testimony about the conversation with his mother was corroborated by Fran Nelson. At about the same time, Fran confronted her daughter-in-law Kimberly Nelson, who she suspected of helping Lesley to access the credit. At trial, Kimberly denied playing that role.

BANKRUPTCY CODE §§ 523(a)(2)(A) and (a)(6)

A debtor who files a chapter 7 bankruptcy case is entitled to a discharge of all debts with the exception of those identified by Congress in bankruptcy code § 523. *See* 11 U.S.C. §§ 727(b) and 523. In this case, Richard relies on these two subsections:

> (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 –
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition; [or]
>
> * * *
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity [.]

11 U.S.C. §§ 523(a)(2)(A) and (a)(6).

Exceptions to discharge are strictly construed against creditors. *See Rembert v. AT&T Universal Card Servs., Inc. (In re Rembert*)*,* 141 F.3d 277, 281 (6th Cir. 1998). The creditor has the burden of proving each element of the cause of action by a preponderance of the evidence. *See Grogan v. Garner*, 498 U.S. 279 (1991).

THE POSITIONS OF THE PARTIES

Richard argues that the debt is not dischargeable under § 523(a)(2)(A) because Lesley did not have authority to use the line of credit and she made a fraudulent misrepresentation by concealing her use of it from him. He also contends that the debt is not dischargeable under § 523(a)(6) on the ground that Lesley used the line knowing she should not do so, thus willfully and maliciously causing injury to him. Lesley's position is that she did not conceal anything.

Instead, she argues, she discussed using the credit line with Richard, he agreed to it, and she repaid part of it, showing that she intended to repay it.

DISCUSSION

A. 11 U.S.C. § 523(a)(2)(A)

To have a debt declared nondischargeable under § 523(a)(2)(A) based on fraudulent misrepresentation, a creditor must prove each of these four elements:

(1) the debtor obtained property through a material misrepresentation known to the debtor to be false when made or made with gross recklessness as to its truth:

(2) the debtor intended to deceive the creditor;

(3) the creditor justifiably relied on the misrepresentation; and

(4) the reliance was the proximate result of the loss.

See In re Rembert, 141 F.3d at 280-81. A statement is a misrepresentation if it is not in accord with the facts. *Merchants Nat'l Bank of Winona v. Moen (In re Moen)*, 238 B.R. 785, 791 (B.A.P. 8th Cir. 1999). A misrepresentation is material if it "touch[es] upon the essence of the transaction." 4 Lawrence P. King, Collier on Bankruptcy ¶ 523.08[1][d] (15th ed. rev. 2006). A debtor's silence about a material fact can constitute a false representation. *Caspers v. Van Horne (In re Van Horne)*, 823 F.2d 1285 (8th Cir. 1987); *Abdel-Hak v. Saad (In re Saad),* 319 B.R. 147, 154 (Bankr. E.D. Mich. 2004).

A debtor's intent in making a representation is determined subjectively, rather than objectively. *Rembert,* 141 F.3d at 281. The determination is made by examining all of the facts and circumstances, as a debtor will rarely acknowledge having acted with fraudulent intent. *Id.* at 282.

Richard's case hinges on his proving by a preponderance of the evidence that Lesley used the line of credit without his knowledge. He did not do so. In reaching this conclusion, the court considers it significant that when Lesley first drew on the line, the parties were living together and trying to provide for their children. Her explanation for why she wanted to use the line is cogent and the court finds it satisfactory. Under these circumstances, it is more likely than not that Richard agreed to her use of the line of credit to benefit their children. Additionally, Richard did not show that Lesley had any motivation to hide the use of the account from him. While Richard argues that Lesley concealed her actions by having the account statements sent to her condominium, the court finds that the opposite is true: knowing that Richard was living in the condominium and had full access to the mail, Lesley nevertheless had the statements sent there. This is consistent with the acts of someone who has nothing to hide. Richard did not, therefore, prove that Lesley made a material misrepresentation of fact by concealing her use of the line of credit. As a creditor must prove each element under § 523(a)(2)(A), Richard has not met his burden of proof.

B. 11 U.S.C. § 523(a)(6)

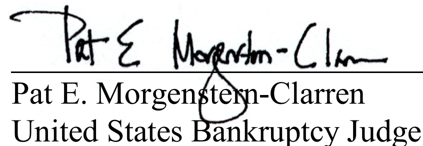
A chapter 7 debtor does not receive a discharge from any debt for "willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). A creditor must prove that the injury was both willful and malicious to come within this exception. *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 463 (6th Cir. 1999). In *Kawaauhau v. Geiger*, the United States Supreme Court held that the willful and malicious standard is a stringent one, must go beyond an act that is reckless or negligent, and is limited to acts done with the intent to cause harm. *Kawaauhau v. Geiger*, 523 U.S. 57 (1998). In applying

the *Geiger* ruling, the Sixth Circuit clarified that "unless 'the actor desires to cause [the] consequences of his act, or . . . believes that the consequences are substantially certain to result from it,' he has not committed a willful and malicious injury as defined under § 523(a)(6)." *Markowitz*, 190 F.3d at 464 (quoting Restatement (Second) Torts § 8A, at 15 (1964)). In other words, the debtor "must have intended not only his conduct, but also the consequences of his conduct." *Gonzalez v. Moffitt (In re Moffitt)*, 252 B.R. 916, 922 (BAP 6th Cir. 2000). A person acts maliciously when he acts in conscious disregard of his duties or without just cause or excuse. *Id.* at 923.

Richard bases his "willful and malicious argument" on his contention that Lesley used the credit line without his knowledge and concealed it from him. Having failed to prove that fact for the reasons stated above in the § 523(a)(2)(A) discussion, he also failed to prove that fact for purposes of § 523(a)(6).

CONCLUSION

For the reasons stated, the plaintiff Richard Nelson did not prove that the debt owed to him by the debtor Lesley Nelson is nondischargeable. The court will enter a separate order reflecting this decision.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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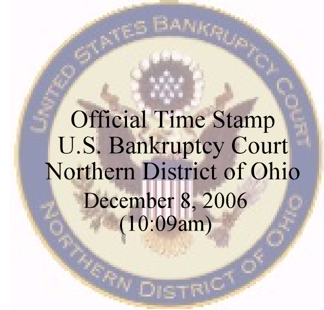

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Debtor.	)	Judge Pat E. Morgenstern-Clarren
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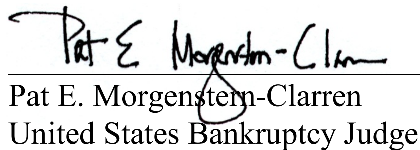
	)	
RICHARD A. NELSON,	)	Adversary Proceeding No. 06-1219
	)	
Plaintiff,	)	
	)	
v.	)	**JUDGMENT**
	)	
LESLEY DAWN NELSON,	)	
	)	
Defendant.	)	

For the reasons stated in the memorandum of opinion entered this same date, judgment on the complaint is entered in favor of the defendant-debtor under 11 U.S.C. §523.

IT IS SO ORDERED.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge