

IT IS SO ORDERED.

Dated: 19 July, 2012 04:50 PM



JESSICA E. PRICE SMITH
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
Eastern Division

In Re:

In Proceedings Under Chapter 7

FELIX S. NACHT,
Debtor.

Case No.: 11-14865

AUDREY HELLER NACHT
Plaintiff,

Adv. Proc. No. 11-1208

v.

JUDGE JESSICA E. PRICE SMITH

FELIX S. NACHT,
Defendant.

MEMORANDUM OF OPINION AND ORDER

Before the Court is the Debtor's Motion for Summary Judgment on the Plaintiff's complaint to have a certain debt declared nondischargeable pursuant to 11 U.S.C. §§ 523(a)(2)(A), (a)(2)(B) and (a)(4). Plaintiff opposes the Motion. This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334 and General Order No. 84 of this District. This adversary proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I) and (O).

The following facts are undisputed: In 2010, Debtor had a purchaser for Springcrest Apartments, an apartment building he owned. (Plaintiff's deposition, pg. 12) He asked Plaintiff to loan him money for the building's water bill in order to ensure continued water

service. (*Id.* at pg. 11). On December 31, 2010, Plaintiff and Debtor entered into a loan agreement and Plaintiff loaned Debtor money to pay the water bill. *Id.* Pursuant to the Loan Agreement, Debtor was to pay the loan “fully and in full upon the closing of the sale and receipt by borrower of the proceeds of the sale of his building.” (Exhibit 1, Plaintiff’s deposition). The sale did not close because the buyer was unable to obtain financing and Debtor has not repaid the loan. (Plaintiff’s deposition, pg. 15, 18).

In reviewing summary judgment motions, evidence is viewed in a light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. *White v. Turfway Park Racing Ass’n, Inc.*, 909 F.2d 941, 943-44 (6th Cir. 1990). A fact is “material” only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In addition, exceptions to discharge are to be strictly construed against the creditor. *See Manufacturer’s Hanover Trust v. Ward (In re Ward)*, 857 F.2d 1082, 1083 (6th Cir. 1988). Viewing the evidence in the light most favorable to the Plaintiff, and strictly construing the exception to discharge raised, the Plaintiff’s claims cannot survive the summary judgment motion.

Debtor moves for summary judgment on Plaintiff’s complaint seeking to have the debt owed declared nondischargeable pursuant to §§ 523(a)(2)(A), (a)(2)(B) and (a)(4). Plaintiff’s complaint with respect to §§ 523(a)(2)(A) and (a)(2)(B) is not well founded because she must show that a misrepresentation caused her loss. *See Longo v. McLaren (In re McLaren)*, 3 F.3d 958, 961 (6th Cir. 1993)(stating that reliance on false representation must be the proximate cause of the loss). It is undisputed that the sale of the property did not close because the buyer could not obtain financing. (Plaintiff’s deposition). Other obligations against the property were not

relevant to Plaintiff's loan being repaid. Furthermore, Plaintiff has produced no writing regarding the Debtor's financial condition as required by § 523(a)(2)(B) to support her allegations of nondischargeability. Summary judgment is therefore granted on these counts.

The Debtor also moves for summary judgment on Plaintiff's request to have the debt declared nondischargeable pursuant to 11 U.S.C. § 523(a)(4). Plaintiff alleges that the Debtor committed fraud or defalcation while acting in the fiduciary capacity as her husband. (Plaintiff's Amended Complaint, ¶ 6). To prevail under the fraud or defalcation provision, the Plaintiff must prove: 1) the existence of an express trust status to the property at issue; 2) the defendant was acting in a fiduciary capacity; and 3) the alleged debt arose from the defendant's fraud or defalcation while acting in a fiduciary capacity. *Capitol Indem. Corp. v. Interstate Agency, Inc. (In re Interstate Agency)*, 760 F.2d 121, 124 (6th Cir.1985). In order to establish the existence of an express or technical trust under Ohio law, Plaintiff must show: "1) an intent to create a trust; 2) a trustee; 3) a trust res; and 4) a definite beneficiary." *In re Blaszkak*, 397 F.3d 386, 391 (6th Cir. 2005). Plaintiff has failed to allege facts that would support the finding of a trust and therefore cannot prevail under the fraud or defalcation provision of § 523(a)(4). Accordingly, summary judgment in Debtor's favor is granted with respect to this claim as well.

Based on the foregoing, Debtor's Motion for Summary Judgment is granted. Plaintiff's opposition is overruled and the debt owed to her is found to be dischargeable. Although the claims of the Plaintiff are resolved by the summary judgment motion, the Court does not find that the claims were not substantially justified. Therefore, each party will bear its respective costs and fees associated with this matter. The adversary proceeding is dismissed.

IT IS SO ORDERED.