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APR 07 2009

United States Bankruptcy Court  
Columbia, South Carolina (19)

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

In re,

Brian Denver Payne,

Debtor(s).

Ronald Lewis, Hazel Lewis,

Plaintiff(s),

v.

Brian Denver Payne,

Defendant(s).

C/A No. 08-03647-JW

Adv. Pro. No. 08-80175-JW

Chapter 7

JUDGMENT

Based on the Findings of Fact and Conclusions of Law set forth in the attached Order of the Court, judgment is hereby entered in favor of the Brian Denver Payne ("Defendant") and the claim of Ronald Lewis and Hazel Lewis is not excepted from discharge pursuant to 11 U.S.C. §§ 523(a)(2), 523(a)(4), or 523(a)(6).

  
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina  
April 7, 2009

ENTERED

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L.O.

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Chapter 7

ORDER

This matter comes before the Court upon a complaint seeking to have the debt of Debtor to Ronald Lewis and Hazel Lewis ("Plaintiffs") determined to be nondischargeable in this chapter 7 bankruptcy case pursuant to 11 U.S.C. §§ 523 (a)(2), 523(a)(4), and 523(a)(6) and based on *res judicata*.<sup>1</sup> The Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1334. This is a core matter under 28 U.S.C. § 157(b)(2). After considering the stipulations of the parties, the credible testimony of the witnesses, and other evidence presented, the Court grants judgment in favor of Brian Denver Payne ("Debtor") on the Plaintiffs' complaint. In so holding, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ. P. 52, which is made applicable to this adversary proceeding by Fed. R. Bankr. P. 7052.<sup>2</sup>

ENTERED

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L.O.

<sup>1</sup> The allegation of *res judicata* was based on Plaintiffs obtaining a default judgment in State Court. Plaintiffs abandoned their *res judicata* claim at the call of the case.

<sup>2</sup> To the extent that any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

## FINDINGS OF FACT

1. Plaintiffs entered into a construction contract with 4D Homes, LLC ("4D"), dated April 21, 2006. The contract was for the construction of a home at 1560 Worthington Crossing, Rock Hill, South Carolina ("Home").

2. Debtor was the 100% shareholder of 4D. 4D built multiple homes simultaneously and used one general corporate checking account ("4D Homes Account") to disburse funds.

3. The contract provided that the price for the Home was \$268,700.00 and that time was of the essence. The contract also required Plaintiffs to pay a nonrefundable deposit of \$39,780.00 to 4D.

4. Plaintiffs submitted the \$39,780.00 deposit to Debtor, who deposited the funds into the 4D Homes Account. 4D subsequently closed on a construction loan on the Home with First Citizens Bank in the amount of \$215,000.00.<sup>3</sup>

5. While 4D began construction of the Home, the Home was never completed. Debtor testified that \$243,000.00 was spent towards the construction of the Home and when construction ceased, the home was eighty-five (85%) percent complete. He further testified that the construction budget for the home was \$241,070.00. The Home was ultimately foreclosed on by First Citizens Bank.

6. Debtor filed a voluntary petition for relief under chapter 7 of the Bankruptcy Code on June 20, 2008. Debtor listed Plaintiffs on Schedule F as creditors holding an unsecured nonpriority claim. Debtor also listed a pending state court suit that was filed by Plaintiffs against Debtor, 2008-CP-46-075, Court of Common Pleas, York County, South Carolina.

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<sup>3</sup> The real property lot was purchased by 4D using a portion of these funds.

## CONCLUSIONS OF LAW

Plaintiffs assert that their unsecured claim of \$39,780.00 is nondischargeable on the grounds that Debtor obtained money from them by false pretenses, a false representation, or actual fraud; by acts of fraud or defalcation while acting in a fiduciary capacity; or by acting willfully and maliciously to injure Plaintiffs and their property. 11 U.S.C. §§ 523(a)(2)(A), (4), and (6). Plaintiffs bear the burden of establishing that the debt is nondischargeable under 11 U.S.C. § 523 by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 286-87, 111 S.Ct. 654, 659-60, 112 L.Ed. 2d 755 (1991). Exceptions to discharge under § 523 are traditionally interpreted narrowly to protect the purpose of providing debtors a fresh start. In re Rountree, 478 F.3d 215, 219 (4th Cir. 2007)(citing Foley & Lardner v. Biondo (In re Biondo), 180 F.3d 126, 130 (4th Cir. 1999).

### **I. Section 523(a)(2)(A): False Pretenses, False Representations, Actual Fraud**

Section 523(a)(2)(A) excepts from discharge any debt “for money... to the extent obtained by (A) false pretenses, a false representation, or actual fraud....” To establish a claim under § 523(a)(2)(A), a creditor must prove the following elements: (1) that the debtor made a representation, (2) that at the time the representation was made, the debtor knew it was false, (3) that the debtor made the false representation with the intention of defrauding the creditor, (4) that the creditor justifiably relied upon the representation, and (5) that the creditor was damaged as a proximate result of the false representation. See Biondo, 180 F.3d at 134; Arrow Concrete Co. v. Bleam (In re Bleam), 356 B.R. 642 (Bankr. D.S.C. 2006).

Plaintiffs allege that Debtor made specific representations and guarantees to them concerning the construction of the Home and made these representations with knowledge of

Debtor's inability to perform pursuant to the terms of the contract. The court is not persuaded by the evidence presented that Debtor made a misrepresentation. It appears that Debtor made representations about his ability to construct and complete the Home;<sup>4</sup> however, it does not appear that Debtor knew at the time he made those representations that they were false. Plaintiffs have failed to show any fraudulent conduct. While Plaintiffs may have demonstrated that a breach of contract occurred—that is, that Debtor, through 4D, failed to build the house he promised to build and that the actual cost of construction exceeded the amount that had been agreed upon, they have not proven the necessary intent required on the part of Debtor. “For a breach of contract to result in a nondischargeable debt, the debtor must have misrepresented his or her intention to perform contractual duties, which may be inferred if the debtor failed to begin performance.” In re Heilman, 241 B.R. 137, 150 (Bankr. D.Md. 1999). Debtor's credible testimony indicated that at the time he accepted the Plaintiffs' down payment, Debtor, through 4D, intended to complete the Home in accordance with the contract and made efforts towards its completion until there were no more funds available,<sup>5</sup> which occurred when the Home was approximately 85% complete. Based on these efforts to perform, the Court concludes that he did not misrepresent his intention to perform at the time he entered into the contract. Accordingly, the Court finds that Plaintiffs have not established a claim under § 523(a)(2)(A).

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<sup>4</sup> Plaintiffs testified that Debtor told them that the home would be inhabitable by August of 2006 and they could go ahead and sell their home in Indiana, which they did. Debtor testified that he could not remember when he said the Home would be completed but that he always told his clients that it would take approximately six months to complete construction. He testified that he was aware that Plaintiffs needed the Home to be inhabitable by fall of 2006 so their grandchildren could be enrolled in school. He further testified that unforeseen events, including the purchase of a different lot, a dispute with a subcontractor, and the Plaintiffs going beyond their allowances for several items in the home contributed to the delay and ultimate failure to complete on budget or on time.

<sup>5</sup> Debtor presented evidence demonstrating that the construction budget for the Home was \$241,070.00 and approximately \$243,000.00 was actually spent towards the Home's construction. Debtor further testified that all of the draws from the construction loan were approved, each of which required a site visit from the bank's representative to determine that sufficient progress had been made on the Home to allow another draw.

## II. Section 523(a)(4): Defalcation

Section 523(a)(4) excepts from discharge debts that arise out of fraud or defalcation while acting in a fiduciary capacity. To establish a claim under § 523(a)(4), Plaintiffs must demonstrate (1) that the debt in issue arose while Debtor was acting in a fiduciary capacity and (2) that the debt arose from Debtor's fraud or defalcation. In re Strack, 524 F.3d 493, 497 (4th Cir. 2008).

The term "fiduciary" is not defined within the Bankruptcy Code, thus its interpretation for purposes of § 523(a)(4) is governed by federal common law. Harrold v. Raeder (In re Raeder), 399 B.R. 432, 439 (Bankr. N.D. W.Va. 2009). The term has been narrowly construed in dischargeability actions. Bleam, 356 B.R. at 649. Courts have generally held that a fiduciary relationship for § 523(a)(4) purposes must arise from a pre-existing express or technical trust. Id. The trust relationship must have arisen before the wrong occurred and without reference to the wrong. Id. (citing Davis v. Aetna Acceptance Co., 293 U.S. 328, 333 (1934)). To determine whether a trust was established, the Court must look to state law. Strack, 524 F.3d at 498. For a trust to exist under South Carolina law, there must be a declaration creating the trust, a trust *res*, and designated beneficiaries. Whetstone v. Whetstone, 309 S.C. 227, 231-32, 420 S.E.2d 877, 879 (Ct. App. 1992). "A trust is an 'arrangement whereby property is transferred with the intention that it be administered by trustee for another's benefit.'" State v. Jackson, 527 S.E.2d 367, 370 (S.C. Ct. App. 2000)(citing Black's Law Dictionary 1047 (6th ed. 1991)). However, as stated in the Restatement 2nd of Trusts § 12, "[i]f the intention is that the person receiving the money shall have the unrestricted use thereof, being liable to pay a similar amount whether with or without interest to the payor or to a third person, a debt is created."

Plaintiffs allege that Debtor had a fiduciary duty to Plaintiffs “as a result of trust and confidence that existed between them.”<sup>6</sup> No evidence was presented that a declaration, either written or oral, was made creating a trust. No language in the contract demonstrates an intention to create a trust. Cf. Strack, 524 F.3d at 499 (holding that an agreement created an express trust where it unequivocally showed an intention that the transferee take possession of the funds, segregate them from his own funds and hold them on behalf of the transferor). In fact, the contract between the parties provided that the \$39,780.00 deposit due at signing was “non-refundable” and placed no limitations on Debtors’ use of the funds. The terms of the contract did not obligate Debtor to dedicate the deposit to the construction of the Home, nor did it require the funds to be segregated. This would appear to indicate that the parties intended for Debtor to have the unrestricted use of these funds.<sup>7</sup> In a typical home construction relationship, it is expected that some portion of the contract price would represent a profit for the builder to realize from his work. No testimony was presented that indicated that the parties intended to create an express trust. Further, no argument was presented that a trust arose by virtue of a state statute. Since the Plaintiffs have failed to demonstrate the existence of an express trust, the Court concludes that Plaintiffs have failed to establish the existence of a fiduciary relationship between the parties. Accordingly, Plaintiffs’ claim under § 523(a)(4) must fail. See Harrold v. Raeder (In re Raeder), 399 B.R. 432, 439 (Bankr. N.D. W.Va. 2009).

### **III. Section 523(a)(6): Willful and Malicious Injury**

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<sup>6</sup> Plaintiffs have not alleged that the debt should be nondischargeable because it is based on embezzlement or larceny, which are other grounds for nondischargeability under § 523(a)(4).

<sup>7</sup> No evidence has been presented that demonstrates that the funds or a like amount were not used in the construction of the Home.

Section 523(a)(6) provides that debts arising from willful and malicious injury by the debtor to another entity or to the property of another entity are nondischargeable. It applies only to acts done with actual intent to cause injury and not to negligent, grossly negligent or reckless conduct. Duncan v. Duncan (In re Duncan), 448 F.3d 725, 728 (4th Cir. 2006). To establish a claim under § 523(a)(6), Plaintiffs must prove that (1) Debtor's actions caused an injury to Plaintiffs' person or property, (2) Debtor's actions were willful, and (3) Debtor's actions were malicious. "For an injury to be 'willful,' the debtor must have intended the consequences of the debtor's act.... For an act to be 'malicious' the act must be targeted at the plaintiff, at 'least in the sense that the conduct is certain or almost certain to cause financial harm.'" Raeder, 399 B.R. at 440-41 (quoting Barclays American/Business Credit, Inc. v. Long (In re Long), 774 F.2d 875, 881 (8th Cir. 1985)). The requirements of willfulness and maliciousness may be inferred based on the surrounding circumstances. Raeder, 399 B.R. at 441.

Plaintiffs assert that Debtor's actions in failing to properly quote the job, failing to properly oversee the job, failing to pay subcontractors, failing to utilize all available funds for the Plaintiffs' home towards their project, misrepresenting the status of the construction of the Plaintiffs' home and using Operating Account funds for his own benefit were "willful" in that they were done deliberately and intentionally. This Court has previously stated that " 'willful,' as used in § 523(a)(6), connotes intent to bring about an injury, and not merely intent to commit an act that causes an injury... [and] requires more than a 'reckless disregard.'" Internet Automotive Group v. Shaffer (In re Shaffer), 305 B.R. 771, 776 (Bankr. D.S.C. 2004)(citing Kawaauhau v. Geiger, 523 U.S. 57, 61, 118 S. Ct. 974, 977 (1998)). The evidence in this case fails to persuade the Court that Debtor intended to cause

financial injury to Plaintiffs.<sup>8</sup> Even assuming that Plaintiffs could demonstrate that Debtor's actions were willful under this standard, no evidence was presented indicating that Debtor's conduct was malicious. Debtor's Schedules indicate that Debtor owed multiple subcontractors and vendors for debts relating to several construction projects, which shows that Debtor's business failed as a whole. It appears that the harm to Plaintiffs was the unintended result of Debtor's failed business enterprise. The Court further notes that evidence was presented that Plaintiffs overspent their allowances for several items for the Home, resulting in the cost of construction going over budget, and that construction of their Home was delayed as a result of a subcontractor walking off the job. These factors appear to have contributed to the failure of the construction project. Because Plaintiffs have failed to establish that Debtor's actions were both willful and malicious, Plaintiffs' claim under § 523(a)(6) must also fail.

#### CONCLUSION

Based on the foregoing, the Court grants judgment in favor of Debtor.<sup>9</sup> Plaintiffs' claim shall not be excepted from discharge pursuant to § 523(a)(2), (4), or (6).

**AND IT IS SO ORDERED.**

  
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina  
April 7, 2009

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<sup>8</sup> The Court notes that during this same time, Debtor, through 4D, successfully completed the home of Plaintiffs' daughter.

<sup>9</sup> In light of its findings in this Order, the Court declines to determine whether the corporate veil of 4D should be pierced to impose liability on Debtor individually at this time.