

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

In re:

Case No. 02-8501-8G7

KIMBERLY DAVID STEVENS,

Debtor.

Chapter 7

GRACE FUGATE,

Plaintiff,

vs.

Adv. No. 8:02-ap-589-PMG

KIMBERLY DAVID STEVENS,

Defendant.

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND MEMORANDUM OPINION**

THIS CASE came before the Court for a final evidentiary hearing in the above adversary proceeding.

The Plaintiff, Grace Fugate, commenced this adversary proceeding by filing a Complaint against the Debtor, Kimberly David Stevens.

In the Complaint, the Plaintiff asserts that the Debtor made certain false representations in connection with his proposed sale to her of certain real property located in Pasco County, Florida. The Plaintiff further asserts that the Debtor subsequently refused to return the deposit that the Plaintiff had paid to him at the time that the Contract for Sale was signed. Consequently, the Plaintiff contends that the debt owed to her by the Debtor is nondischargeable pursuant to §523(a)(2)(A) and §523(a)(2)(B) of the Bankruptcy Code.

In response, the Debtor denies that he made false representations to the Plaintiff, denies that he intended to deceive the Plaintiff, and asserts that the Plaintiff defaulted under the terms of the Contract for Sale.

Background

On December 23, 1999, the Debtor and his wife, as buyers, entered into a Contract for Deed and Purchase Money Balloon Mortgage with Alto Pharmaceuticals, Inc. Pension Fund, as the seller. (Debtor's Exhibit 2). Pursuant to the Contract, the Debtor agreed to purchase "Lot 2 of Ehrens Cutoff Subdivision," located in Pasco County, for the total purchase price of \$42,500, payable in monthly installments commencing on February 1, 2000, and continuing until February 1, 2005.

On February 4, 2002, the Debtor and the Plaintiff executed a Contract for Sale of Real Estate. (Debtor's Exhibit 1). The Contract provides:

Deloras R. Johnson Realtor, acknowledge[s] receipt from Grace A. Fugate, hereinafter called Buyer, of the sum of Twenty four thousand dollars and no cent, (\$ 24,000.00) DOLLARS Cash or Check as deposit on account of offer to purchase the property of Alto Pharmaceuticals, Inc. Pension Fund hereinafter called Seller, said property being known as

Lot 2 Sec 30 Twp 25 R 19
Pasco County FL being 2 acres mol
Legal to be provided by survey.
Address: 8217 Eren Cutoff
Land O' Lakes, FL 34639

The buyer and seller agree that the deposit is to be given to the seller at the time of the contract.

Upon the terms and conditions as follows:

1. Full Purchase Price \$ 63,000.00, payable \$ Cash in cash, of which the above deposit shall apply as part and shall be held by said Realtor in escrow pending closing of transaction, balance payable in the following manner:

Shed and mobile home to stay. Check the depth of well. Survey and title to be clear furnished by the seller. Realtor to attach small portion of the lot to lot #3 and to see to prorated taxes.

Additionally, the Contract provided for the following remedies in the event of default by either party:

If the Buyer fails to perform this contract within the time herein specified, time being of the essence of this agreement, the deposit made by the Buyer shall be disposed of in the following manner: To the Realtor an amount equal to his earned commission. But in no event to exceed one-half (1/2) of the deposit, which shall discharge the Seller's obligation to him for that service. Remainder to the seller to be credited by him against his damages accrued by reason of the breach of contract. If the transaction shall not be closed because of the Seller's refusal to perform, then the Seller shall pay said commission to the Realtor on demand.

The closing date was scheduled for March 15, 2002. As set forth above, the Contract was signed by both the Plaintiff and the Debtor.

On February 6, 2002, two days after the Contract was signed, the Debtor contacted David L. Smith Professional Surveyors & Mappers, Inc. for the purpose of obtaining a survey of the property. (Debtor's Exhibit 3).

Also on February 6, 2002, the Debtor's wife endorsed and cashed the deposit check tendered by the Plaintiff. (Plaintiff's Exhibit 1).

On March 13, 2002, the Plaintiff wrote a letter to the Debtor in which she stated as follows:

Please accept this written notice as your notification that I am withdrawing from my agreement to purchase the property at 8217 Ehren Cutoff. The stipulations and situation considered when I purchased the property have changed. These changes are due to delays in following through with our agreement of Feb 4th per the contract. Some of the facts given at the time of the sale have also changed. Our closing date was to be March 15th or sooner this will be an impossibility since I have not yet even applied for my loan. I was not able to apply for a loan without the survey that I was told would be given to me within the first week of the sale. My bank is no longer offering the program offered to me on the forth [sic] of February in the conversation that I had with them in the presence of yourselves and Mrs. Delores Johnson.

It is my intention to purchase property as it always was. The more I wait in applying for a loan the higher the interest rates are going and I [sic] as you know the price of property is also on the rise.

(Plaintiff's Exhibit 2). The Plaintiff therefore requested a refund of her deposit in the amount of \$24,000.00.

On March 27, 2002, Smith Surveyors prepared a Boundary Survey and Survey Sketch, based on a "field date" of March 15, 2002. (Debtor's Exhibit 4).

On April 8, 2002, the Debtor's attorney, Jess Yado, wrote a letter to the Plaintiff in which he stated:

The contract between you and our clients was for a straight cash deal with no provisions or contingencies on you getting any financing. You were to purchase 2 acres to be cut off from the parcel described. There were also no other contingencies regarding your future use of the property, etc. Our client's did agree to assist you in any way they could in your future use of the property. The closing was scheduled for [March] 15th but you did not specify which two acres of the parcel you wanted until [March] 13th, making the availability of a survey and preparation of the closing by [March] 15th impossible. Our clients were prepared to close on the original contract as soon as the closing & survey could be ready after your [March] 13th election. You have defaulted in refusing to go through with the contract and your deposit is being retained by our clients, as damages, as stated in the contract.

(Debtor's Exhibit 5). The letter further indicated that the Debtor was willing to conclude the sale under the terms of the original contract.

The Debtor filed a petition under chapter 7 of the Bankruptcy Code on May 1, 2002.

The deposit has not been returned to the Plaintiff.

Discussion

In her Complaint, the Plaintiff asserts that she is entitled to recover the amount of her deposit from the Debtor, and that the debt owed to her by the Debtor is nondischargeable pursuant to §523(a)(2)(A) and §523(a)(2)(B) of the Bankruptcy Code. Those sections provide as follows:

11 U.S.C. § 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) 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;

(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.

11 U.S.C. §523(a).

The causes of action set forth in §523(a)(2)(A) and §523(a)(2)(B) are mutually exclusive and distinct in their purposes and elements. In re Vann, 67 F.3d 277, 282n.6 (11th Cir. 1995); In re Ferrell, 213 B.R. 680, 686 (Bankr. N.D. Ohio 1996).

A. Count II - §523(a)(2)(B)

Count II of the Plaintiff's Complaint is based on §523(a)(2)(B) of the Bankruptcy Code. In Count II, the Plaintiff alleges that (1) the Debtor represented in writing that he held an ownership interest in the Ehren Cutoff property by signing the Contract for Sale of Real Estate; (2) that the Debtor did not possess any ownership interest in the property at the relevant time; and that (3) the Debtor's written

representation that he owned the property, in the form of his signature on the Contract, was therefore materially false and made with the intent to induce the Plaintiff to sign the Contract.

To prevail under §523(a)(2)(B), a plaintiff "must prove that its debt was obtained by the use of a statement: (1) in writing; (2) that is materially false; (3) respecting the debtor's or an insider's financial condition; (4) on which the creditor to whom the debtor is liable for money, property, services or credit reasonably relied; (5) that the debtor caused to be made or published with intent to deceive." In re Monus, 2003 WL 21403687, at 3,4 (Bankr. N.D. Ohio)(Emphasis supplied). See also In re Hunter, 229 B.R. 851, 859 (Bankr. M.D. Fla. 1999).

To establish a claim under §523(a)(2)(B), therefore, a plaintiff must show, among other elements, that the debtor's allegedly false statement was in writing, and that the statement related to the debtor's financial condition. It is generally well-accepted that §523(a)(2)(B) was intended to address a particular type of written statement.

Congress intended application of §523(a)(2)(B) to be limited to 'the so-called false financial statement.' While a financial statement under § 523(a)(2)(B) may not require the formalities of an audited balance sheet or income statement, nothing in the legislative history indicates that § 523(a)(2)(B) should be expanded beyond statements about a debtor's net worth or overall earnings.

In re Medley, 214 B.R. 607, 612 (9th Cir. BAP 1997)(quoting In re Mercado, 144 B.R. 879, 882-82 (Bankr. C.D. Cal. 1992))(citing 124 Cong.Rec. H11095-96 (daily ed. Sept. 28, 1978) and Cong.Rec. S17412 (daily ed. Oct. 6, 1978)). "Section 523(a)(2)(B) is meant to pertain to a specific type of financial statement, one that specifically states a debtor's or insider's net worth." In re Mercado, 144 B.R. at 885(quoting In re Seaborne, 106 B.R. 711, 714 (Bankr. M.D. Fla. 1989)).

In this case, the Plaintiff primarily contends that the Debtor falsely represented to her that he owned the real property that was subject to the proposed sale. The only "writing" involved in the case is the

Contract for Sale of Real Estate. The Contract for Sale of Real Estate is not a financial statement that reflects the Debtor's overall net worth or ability to generate income. In re Mercado, 144 B.R. at 885. The Contract does not provide any information regarding the Debtor's assets and liabilities. See In re Hale, 139 B.R. 41, 43 (Bankr. M.D. Fla. 1992). The Contract deals only with the terms of the proposed sale, and discloses no information whatsoever regarding the Debtor's net worth or earning capacity.

Subsection (B) of §523(a)(2) is "limited to financial-type statements that are sufficient to determine the entity's overall financial responsibility." In re Alicea, 230 B.R. 492, 502 (Bankr. S.D.N.Y. 1999)(citing In re Price, 123 B.R. 42, 45 (Bankr. N.D. Ill. 1991)). See also In re Barr, 194 B.R. 1009, 1024 (Bankr. N.D. Ill. 1996)(A Sale Contract did not qualify as written statement regarding the debtor's financial condition.)

The Contract for Sale of Real Estate is not a "statement in writing . . . respecting the debtor's . . . financial condition" within the meaning of §523(a)(2)(B) of the Bankruptcy Code. Consequently, the Plaintiff has not established all of the required elements of a cause of action under §523(a)(2)(B), and Count II of the Plaintiff's Complaint, based on §523(a)(2)(B), should be dismissed.

B. Count I - §523(a)(2)(A)

Count I of the Plaintiff's Complaint is based on §523(a)(2)(A) of the Bankruptcy Code. In Count I, the Plaintiff alleges that (1) the Debtor did not possess any ownership interest in the Ehren Cutoff property at the relevant time; and that (2) the "Debtor's representations that he had any ownership interest in the property located at 8217 Ehren Cutoff were made to induce Plaintiff to enter into the Contract for the Sale of Real Estate."

To prevail under §523(a)(2)(A), a plaintiff must prove that "(1) Defendant made a false representation with the purpose and intent of deceiving Plaintiffs; (2) Plaintiffs relied upon the

representation; (3) Plaintiff's reliance on the representation was justifiably founded; and (4) Plaintiffs sustained a loss as a result of the representation." In re Wiggins, 250 B.R. 131, 134 (Bankr. M.D. Fla. 2000). See also In re Hunter, 229 B.R. 851, 858-59 (Bankr. M.D. Fla. 1999).

The plaintiff must prove each of the four elements by a preponderance of the evidence. In re Wiggins, 250 B.R. at 134; In re Hunter, 229 B.R. at 859.

The Court determines that the Plaintiff has failed to establish the elements of a cause of action under §523(a)(2)(A) of the Bankruptcy Code with the requisite degree of proof.

1. A representation

First, the testimony is in conflict as to the content of any oral representations made by the Debtor. The Plaintiff testified that the Debtor told her during the course of negotiating the sale that he was the owner of the Ehrens Cutoff property.

The Debtor, however, testified that he told the Plaintiff from the outset that he was in the process of purchasing the property from his former employer, but that he was authorized to enter the Contract for Sale. The Debtor testified that the Plaintiff was fully aware of his arrangement or relationship with Alto Pharmaceuticals.

The parties presented conflicting testimony as to the Debtor's oral representations regarding ownership of the property. No corroborating evidence was admitted into the record, however, to support the Plaintiff's account of the events. Consequently, the Court finds that the Plaintiff failed to establish by a preponderance of the evidence that the Debtor made a false representation regarding his ownership of the property.

2. Intent to deceive

Second, the Plaintiff did not establish that the Debtor intended to deceive the Plaintiff in order to induce her to enter into the Contract.

"A debtor intends to deceive a creditor 'when the debtor makes a false representation which the debtor knows or should have known would induce another to advance goods or services to the debtor.'" In re Copeland, 291 B.R. 740, 765 (Bankr. E.D.Tenn. 2003)(quoting In re Patrick, 265 B.R. 913, 916 (Bankr. N.D. Ohio 2001)). "Fraudulent intent requires an actual intent to mislead, which is more than mere negligence." Palmacci v. Umpierrez, 121 F.3d 781, 788 (1st Cir. 1997)(quoted in In re Copeland, 291 B.R. at 766).

The court may consider not only the debtor's conduct at the time of the representations, but may consider subsequent conduct, to the extent that it provides an indication of the debtor's state of mind at the time of the actionable representations.

In re McGuire, 284 B.R. 481, 492 (Bankr. D. Colo. 2002)(quoted in In re Copeland, 291 B.R. at 766).

"Because intent is a purely subjective question, the court must examine the totality of the Debtor's actions to determine if she possessed the requisite intent to deceive the Plaintiffs. Any benefit of the doubt must be resolved in favor of the Debtor, as §523(a)(2) is strictly construed in her favor." In re Copeland, 291 B.R. at 766.

In this case, the Court finds that the Plaintiff did not establish the Debtor's "intent to deceive" by a preponderance of the evidence. The totality of the evidence indicates that the Debtor believed that the property could be sold to the Plaintiff, and intended to conclude the sale.

The Debtor, as buyer, had entered into an agreement to purchase the property from Alto Pharmaceuticals in 1999. (Debtor's Exhibit 2). Two days after he signed the Contract to sell the property to the Plaintiff, the Debtor contacted David L. Smith Professional Surveyors & Mappers, Inc.

for the purpose of obtaining a survey of the property, in compliance with the Contract. (Debtor's Exhibit 3). The survey was completed on March 27, 2002, following a "field date" of March 15, 2002. (Debtor's Exhibit 4). Within three weeks after the Plaintiff "withdrew" from the Contract, the Debtor engaged an attorney, who wrote the Plaintiff a letter stating that the Debtor had been "prepared to close on the original contract," and that the Debtor continued to be willing to complete the sale even after the Plaintiff notified him of her withdrawal. (Debtor's Exhibit 5).

The actions do not suggest that the Debtor was engaged in any sort of artifice or trick designed to cheat the Plaintiff out of her deposit. See In re Howard, 261 B.R. 513, 517 (Bankr. M.D. Fla. 2001). Instead, the actions are consistent with an intention to sell the property to the Plaintiff in accordance with the terms and purchase price set forth in the Contract.

The evidence does not establish that the Debtor made false representations regarding his ownership of the property with the "intent to deceive" the Plaintiff by inducing her to sign the Contract.

3. Justifiable reliance

Third, the Plaintiff did not prove that she justifiably relied on the representation by the Debtor concerning his ownership of the property.

The Contract for Sale of Real Estate does not identify the Debtor as the owner of the property. Instead, Alto Pharmaceuticals, Inc. Pension Fund is identified on the Contract as the "seller." Specifically, the document signed by the Plaintiff states that her deposit was "on account of offer to purchase the property of Alto Pharmaceuticals, Inc. Pension Fund hereinafter called Seller." (Debtor's Exhibit 1).

For purposes of §523(a)(2)(A), it is well-established that the Plaintiff is not required to show that her reliance on the Debtor's representation was reasonable. On the contrary, under §523(a)(2)(A), the

Plaintiff is only required to show that her reliance was "justifiable." Field v. Mans, 516 U.S. 59 (1995).

Although it is generally acknowledged that the test for "justifiable" reliance may be less stringent than the objective test for "reasonable" reliance, the Supreme Court of the United States has expressly stated that "justifiability is not without some limits." For a person's reliance to be justifiable, he 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 to make a cursory examination or investigation.

Field v. Mans, 516 U.S. at 71 (quoting Restatement (Second) of Torts, §541, *comment a*, (1976)). In other words, if the facts should be apparent to a person of the plaintiff's knowledge and intelligence from a cursory glance, "or he has discovered something which should serve as a warning that he is being deceived, . . . he is required to make an investigation of his own." Field v. Mans, 516 U.S. at 71 (quoting W. Prosser, *Law of Torts*, §108, p.718 (4th ed. 1971)).

Based on the circumstances surrounding the execution of the Contract for Sale of Real Estate in this case, the Court finds that the Plaintiff's reliance on the Debtor's representation was not justifiable. The Plaintiff signed the Contract for Sale of Real Estate. At best, the identification of Alto Pharmaceuticals as the seller in the Contract should have placed the Plaintiff on notice that further inquiry was warranted as to the Debtor's ownership of the property. Further, nothing in the record indicates that the Debtor was more sophisticated than the Plaintiff, or that he had acquired any special advantage in the business relationship.

The Plaintiff did not show by a preponderance of the evidence that she justifiably relied on any oral representation by the Debtor that he owned the property.

4. Causation

Finally, the Plaintiff did not establish that any damages that she sustained from the loss of her deposit were proximately caused by the Debtor's representations regarding ownership of the Ehrens Cutoff property.

To prevail under §523(a)(2)(A), the Plaintiff was required to prove that she sustained a loss "as a result of" the Debtor's false representation, or in other words, that she was damaged "as a result of" the false statement. In re Wiggins, 250 B.R. at 134; In re Hunter, 229 B.R. at 859. Essentially, the Plaintiff is required to establish a causal link between the Debtor's false statement and the Plaintiff's loss. "Proximate causation - loss or damage to the creditor 'as a proximate result of' the debtor's misrepresentation - is an element that must be proved in order to establish nondischargeability under §523(a)(2)(A)." United States v. Spicer, 57 F.3d 1152, 1157 (D.C. Cir. 1995).

This standard will be satisfied, even in the presence of other contributing factors, as long as the misrepresentation was material to the lender's decision to grant the loan and the lender's losses were a foreseeable consequence of the debtor's conduct.

In re Priestly, 201 B.R. 875, 886 (Bankr. D. Del. 1996).

In this case, even if she had proven that the Debtor made a false representation regarding his ownership of the property, the Plaintiff did not show that the representation was the proximate cause of her loss.

Specifically, the Plaintiff contends that she has been damaged in the amount of the \$24,000 deposit that she paid at the time that she signed the Contract. The deposit was to be applied to the total amount of the purchase price at closing, in accordance with the terms of the Contract. (Debtor's Exhibit 1). The deposit has not been returned to the Plaintiff.

It is undisputed that the closing of the sale was never concluded. On March 13, 2002, the Plaintiff wrote a letter notifying the Debtor that she was "withdrawing" from her agreement to purchase the property. (Plaintiff's Exhibit 2). In her letter, however, the Plaintiff nowhere suggests that her "withdrawal" was due to her discovery that the Debtor did not own the property. In fact, the Plaintiff's letter does not mention the ownership of the property in any context.

On the contrary, the Plaintiff's letter suggests that the proposed sale fell through for reasons other than the Debtor's representation regarding ownership. In the letter, for example, the Plaintiff makes several vague and non-specific references to changes in the "situation," to "delays" in following through on the contract, and to various "complications." Most importantly, however, the Plaintiff appears to indicate that the primary reason for her withdrawal from the Contract was that her bank was "no longer offering the program offered to" her when the contract was signed, and that she had not yet applied for the loan.

Finally, the Debtor's attorney wrote a letter to the Plaintiff approximately three weeks after the Plaintiff's revocation, on April 8, 2002, and asserted that the Debtor was prepared to close on the contract, and that the sale could be concluded if the Plaintiff was still willing to purchase the property. (Debtor's Exhibit 5).

The Court has considered both the Plaintiff's letter dated March 13, 2002, and the Debtor's response dated April 8, 2002. Based on these documents, as well as other related evidence, the Court finds that the Plaintiff did not prove that her damages were proximately caused by the Debtor's representation regarding his ownership of the property. It appears that the sale of the real property fell through for a variety of independent reasons. The Plaintiff has not shown that the failure to close was the result of the Debtor's representation that he owned the property.

Count I of the Plaintiff's Complaint, based on §523(a)(2)(A) of the Bankruptcy Code, should be dismissed.

Conclusion

In conclusion, the Court finds that the Plaintiff has failed to establish the required elements of either §523(a)(2)(A) or §523(a)(2)(B) of the Bankruptcy Code.

As to §523(a)(2)(A), the Plaintiff did not show that the Debtor falsely represented to the Plaintiff that he owned the real property at issue, that the Debtor intended to deceive the Plaintiff, that the Plaintiff justifiably relied on the representation, or that the Plaintiff's damages were proximately caused by the Debtor's representation.

As to §523(a)(2)(B), the Plaintiff did not establish that the Contract for Sale was a "statement in writing . . . respecting the debtor's . . . financial condition."

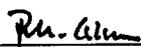
Accordingly:

IT IS ORDERED that:

1. A Final Judgment should be entered in favor of the Debtor, Kimberly David Stevens, and against the Plaintiff, Grace Fugate, as to both Count I and Count II of the Complaint.
2. A separate Final Judgment will be entered consistent with this Opinion.

DATED this 12th day of September, 2003.

BY THE COURT



PAUL M. GLENN
Chief Bankruptcy Judge