UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re:

Alfred J. Armstrong, Jr.
and Maureen J. Armstrong,
Debtors

Bk. No. 98-10392-JMD
Chapter 7

Daniel Fischbein,
Plaintiff

v.

Alfred J. Armstrong, Jr.,
Defendant

Adv. No. 98-1063-JMD

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SCHROEDER, MCLETCHIE & CLOUGH
Attorney for Plaintiff

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Attorney for Debtors/Defendant

MEMORANDUM OPINION

I. INTRODUCTION

Daniel Fischbein brought a complaint pursuant to 11 U.S.C. § 523(a)(2)(A), in which he objected to the dischargeability of an alleged obligation of Alfred J. Armstrong, Jr. (the "Debtor") to him, relating to a plumbing and heating job that the Debtor agreed to perform at the Ridgewood Country Club in Moultonboro, New Hampshire (the "Ridgewood job"). The Court conducted a consolidated trial of this case with another adversary proceeding brought by Mr. Fischbein in which he sought to deny the Debtor's discharge pursuant to 11 U.S.C. §§ 727(a)(2) and 727(a)(4)(A) for the Debtor's failure to disclose certain assets on his bankruptcy petition.

II. FACTS

The facts are relatively straightforward. In August 1997, Mr. Fischbein entered into a contract with the owner of the Ridgewood Country Club to construct several buildings at the golf course. Mr. Fischbein solicited a bid from the Debtor to perform the heating and cooling work. At the time Mr. Fischbein solicited the bid, he and the Debtor were working together on another project in Ossipee, New Hampshire. On November 29, 1997, the Debtor bid $16,671 on the Ridgewood job. The written proposal detailed the materials that the Debtor would use and provided that the Debtor would be paid 20% as a deposit, 60% upon materials delivery, and 20% upon completion. The bid contained no language regarding the Debtor's time to complete the job. On December 2, 1997, Mr. Fischbein accepted the bid and delivered to the Debtor a check in the amount of $3,200, or 19% of the total price. On December 8, 1997, after the Debtor delivered the boiler and other materials to the site, Mr. Fischbein delivered a second check to the Debtor in the amount of $10,271, or 62% of the total price.

Sometime after December 8, 1997 a dispute arose between the parties as to the time for the Debtor's performance under the contract. The Debtor testified that he had until April 1, 1998 to complete the Ridgewood job. Mr. Fischbein testified that the completion date for the entire construction project was April 1, 1998 and that the Debtor's portion of the work was to be completed sometime in December 1997 or by early January 1998 at the latest. In the middle of December, Mr. Fischbein began calling the Debtor in an attempt to get him to come to the site and begin the installation as the Debtor had failed to perform any significant work at the site to date. By January 6, 1998 Mr. Fischbein was extremely disturbed by the Debtor's lack of performance. On that date, he telephoned the Debtor, spoke to the Debtor's wife, and informed her that he was firing the Debtor. Mr. Fischbein told the Debtor's wife that the Debtor should appear at the site the next day to pick up his materials. Mr. Fischbein had decided to hire a new subcontractor to install the heating and cooling system.

The Debtor arrived at the site on the afternoon of January 7, 1998. He and Mr. Fischbein engaged in a heated exchange. According to Mr. Fischbein, he demanded, before the Debtor removed the boiler and other materials from the site, that the Debtor give him a check in the amount of $13,471, the amount that he

had already paid to the Debtor under the contract. The Debtor did not give a check to Mr. Fischbein but rather stated that he would take the boiler and other materials back to his supplier and, upon receiving credit, he would pay Mr. Fischbein the money.[1] However, when Mr. Fischbein telephoned the Debtor later that day to inquire about the check, he was informed by the Debtor that he should hire a lawyer and file suit to collect the money.

Mr. Fischbein took the Debtor's advice and on January 21, 1998 he filed suit in Carroll County Superior Court asserting counts for assumpsit and negligent and intentional misrepresentation. On January 26, 1998, Mr. Fischbein obtained an order permitting him to attach the boiler and other assets of the Debtor. On February 10, 1998, the Debtor filed Chapter 7 bankruptcy staying the state court litigation.

III. DISCUSSION

Section 523(a)(2)(A) of the Bankruptcy Code provides:

> A discharge under section 727 . . . 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 . . . .

11 U.S.C. § 523(a)(2)(A). Exceptions to discharge under section 523(a) are to be narrowly construed and construed in favor of the debtor. See Palmacci v. Umpierrez, 121 F.3d 781, 786 (1st Cir. 1997). A creditor must show that his claim comes squarely within the exception. See id. To make out a claim under section 523(a)(2)(A), a creditor must prove the following elements by a preponderance of the evidence[2]:

A. The debtor made a false representation;

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[1] Although the Debtor testified that he did not remember agreeing to provide Mr. Fischbein with a check, he did testify that he wanted to get away from Mr. Fischbein and would have said whatever was necessary to get off the site.

[2] The party contesting the dischargeability of a debt has the burden of proving each element by a preponderance of the evidence. See Grogan v. Garner, 498 U.S. 279, 283 (1991); Palmacci, 121 F.3d at 787.

B. The debtor did so with fraudulent intent (i.e., scienter);

C. The debtor intended to induce the plaintiff to rely on the misrepresentation;

D. The misrepresentation actually induced reliance;

E. The reliance was justifiable; and

F. The misrepresentation caused damage.

See Palmacci, 121 F.3d at 786; Menna v. Menna, 16 F.3d 7, 10 (1st Cir. 1994); Commerce Bank & Trust Co. v. Burgess (In re Burgess), 955 F.2d 134, 140 (1st Cir. 1992); In re Beeman, 225 B.R. 522, 528 (Bankr. D.N.H. 1998).[3]

In his complaint, Mr. Fischbein alleged that the Debtor obtained the $13,471 from him by making a false statement as to his intent and ability to perform the Ridgewood job. At trial, Mr. Fischbein admitted, however, that at the time that the Debtor accepted the money from Mr. Fischbein the Debtor did intend to perform the work. Mr. Fischbein testified that he thought that the Debtor accepted the money from him, started spending it, and then found himself unable to complete the job. In light of this testimony, the Court must find that there was no false representation at the time the Debtor obtained money from Mr. Fischbein. See Palmacci, 121 F.3d at 787 (stating that there is no false representation if at the time of making the statement the debtor did actually intend to perform the future action but later changed his mind or intervening events caused him to act otherwise). Accordingly, Mr. Fischbein's claim that the Debtor obtained money from him by false representations or fraud is denied.

Mr. Fischbein has also argued that the Debtor made a false representation when he stated that he would return the materials to his supplier, obtain a credit, and then write a check to Mr. Fischbein for the $13,471 he was paid by Mr. Fischbein to complete the Ridgewood job. Mr. Fischbein testified at trial that he would not have allowed the Debtor to remove the boiler and other materials if the Debtor had not represented that he would repay Mr. Fischbein the money he paid on the contract. The Debtor admitted at trial that he may have told Mr. Fischbein that he would repay the money. He also stated that he later

[3] The terms in section 523(a)(2)(A) are to be interpreted with reference to the general common law of torts. See Field v. Mans, 516 U.S. 59, 70 (1995).

decided that he would not repay Mr. Fischbein as he had performed the contract according to its terms and that Mr. Fischbein was the one who breached the contract.

An essential element of a claim under section 523(a)(2)(A) is the requirement that a debtor obtain something (i.e., property, money, or services) from a creditor. See Hilliard v. Peel (In re Peel), 166 B.R. 735, 738 (Bankr. D. Okla. 1994); Johnson v. Kriger (In re Kriger), 2 B.R. 19, 21 (Bankr. D. Or. 1979). Here, Mr. Fischbein alleges that the Debtor obtained the boiler and other materials from him based upon his representation that he would repay Mr. Fischbein. For the reasons discussed below, this is insufficient to support Mr. Fischbein's action under section 523(a)(2)(A).

The New Hampshire Supreme Court has ruled, in a factually similar case, that heating and plumbing materials supplied by a subcontractor remain the subcontractor's property until affixed to the real estate. See In re Trailer and Plumbing Supplies, 133 N.H. 432, 438 (1990).[4] In the instant case, the contract between Mr. Fischbein and the Debtor was a single indivisible contract predominantly for services, not the sale of goods. Both parties testified that the Debtor did not affix the boiler or other materials to the golf club building. As Mr. Fischbein testified, that was the crux of the problem: the Debtor was not performing the installation work. In accordance with the Trailer and Plumbing Supplies decision, the Court finds that the boiler and other materials remained the Debtor's property even after their delivery to the

[4] In Trailer and Plumbing Supply, the subcontractor contracted with a condominium developer to install plumbing at a condominium construction project. Pursuant to their contract, the developer was to pay for materials upon delivery and to make periodic payments as installation progressed. The subcontractor purchased some plumbing and heating materials for the project from third-party suppliers and had them delivered to the site. The subcontractor then billed the developer. The developer did not pay the bill and the subcontractor did not install the plumbing material in the condominiums. Sometime later, the developer had the materials moved off site. The subcontractor reported to the police that his materials were missing. The materials were located at the property of an employee of the developer and were seized by the police. The State of New Hampshire filed a petition in Superior Court requesting that the plumbing and heating materials be returned to the subcontractor. The Superior Court found that the subcontractor owned the materials and ordered their return. Upon appeal, the Supreme Court held that the contract between the subcontractor and the developer was a single indivisible contract predominantly for services not for the sale of goods. The Supreme Court applied the "predominant factor" test to determine whether the contract should be governed by the Uniform Commercial Code or by common law. Because the contract was one for services, common law, and not the Uniform Commercial Code, governed the issue of ownership of the materials. The Supreme Court concluded that the plumbing and heating materials belonged to the subcontractor because they were never affixed to the realty. See Trailer and Plumbing Supplies, 133 N.H. at 343-48.

Ridgewood site. At the time the Debtor removed of the boiler and other materials from the Ridgewood site, such property was not subject to any lien or attachment in favor of Mr. Fischbein. Thus, even if the Debtor made a false statement to Mr. Fischbein regarding repayment of the money, the misrepresentation did not allow the Debtor to obtain property of Mr. Fischbein. Rather, the Debtor was simply removing his own property from the site. Accordingly, Mr. Fischbein did not suffer any harm as a result of any misrepresentation by the Debtor.

IV. CONCLUSION

As Mr. Fischbein failed to satisfy his burden under section 523(a)(2)(A) of the Bankruptcy Code, his complaint is denied. Any obligation that the Debtor may have to Mr. Fischbein is discharged. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate judgment consistent with this opinion.

DATED this 23rd day of September, 1999, at Manchester, New Hampshire.

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J. Michael Deasy
Bankruptcy Judge