

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 00-10251-JMD  
Chapter 7

Rickie J. Voisine and  
Sharon L. Voisine,  
Debtors

Sperry Concrete, Inc.,  
Plaintiff

v.

Adv. No. 01-1057-JMD

Rickie J. Voisine and  
Sharon L. Voisine,  
Defendants

*Cynthia L. Fallon, Esq.*  
*THE LAW OFFICE OF RODNEY L. STARK, P.A.*  
*Attorney for Plaintiff*

*Grenville Clark III, Esq.*  
*GRAY, WENDELL & CLARK, P.C.*  
*Attorney for Debtors/Defendants*

**MEMORANDUM OPINION**

**I. INTRODUCTION**

Sperry Concrete, Inc. (“Sperry Concrete”) brought a complaint pursuant to 11 U.S.C. § 523(a)(2)(A), in which it objects to the dischargeability of the Debtors’ obligation to it in the amount of \$6,120.56, relating to Sperry Concrete’s installation of a foundation on the Debtors’ property in Northfield, New Hampshire. The Debtors assert a counterclaim under 11 U.S.C. § 523(d) on the grounds that Sperry Concrete’s complaint is not substantially justified and therefore the Debtors should be entitled to their attorney’s fees and costs in defending the action. Both parties filed motions for summary judgment, which were denied except that the Debtors’ motion was granted as to Mrs. Voisine as the summary judgment

record clearly reflected that Mrs. Voisine took no part in the actions that form the basis of Sperry Concrete's complaint. Accordingly, Sperry Concrete's claim against Mr. Voisine, the Debtor, proceeded to trial on October 30, 2001. After hearing the evidence of the parties and the arguments of counsel, the Court took the matter under advisement.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

## **II. FACTS**

On March 27, 1999, the Debtor signed a purchase and sale agreement for a parcel of unimproved land in Northfield, New Hampshire. The purchase and sale agreement provided for a sales price of \$16,000.00. The Debtor was to pay a total of \$1,000.00 for a deposit and a down payment. According to the agreement, the balance of \$15,000.00 was to be financed by the seller. The agreement further provided that title would transfer after twenty-five percent of the principal purchase price, or \$4,000.00, was paid by the Debtor to the seller. The Debtor testified that he paid the \$1,000.00 deposit and down payment. He also testified that he made monthly payments to the seller during 1999 but these monthly payments did not total \$3,000.00, which with the \$1,000.00 deposit and down payment was the amount required for the transfer of title. The Debtor further testified that after he signed the purchase and sale agreement he obtained possession of the property and was able to remove trees from the property without getting authorization from the seller. The Debtor also stated that upon signing the purchase and sale agreement he was required to pay real estate taxes on the property.

The Debtor's intent in purchasing the property was to place a modular home on it and make the property his residence. In late September 1999, the Debtor applied for a mortgage loan with East Union Mortgage in the amount of \$85,000.00 in order to finance his purchase of the land and the house and his

payments to contractors for the work that needed to be completed prior to occupancy. On October 18, 1999, the Debtor sent the modular home builder a certified check in the amount of \$4,100.00 as a deposit so that construction of his home could begin in Canada. The Debtor testified that the money for the deposit came from a loan from his parents as well as the Debtor's savings. On October 22, 1999, East Union Mortgage sent a commitment letter to the modular home builder at the Debtor's request. The commitment letter indicated that East Union Mortgage would fund a loan in the amount of \$82,000.00 plus closing costs of approximately \$2,800.00, or a total amount of approximately \$84,800.00. The Debtor testified that he provided East Union Mortgage with estimates for the work that needed to be completed on the house.

The Debtor had contracted with a concrete contractor to install the foundation for his house for \$4,400.00. However, the boom on the contractor's truck broke shortly before he was to install the foundation. The Debtor needed to hire another concrete contractor quickly as his house was scheduled to be delivered to the site in late November 1999. The Debtor testified that he contacted a number of foundation contractors but no one could do the job as quickly as he wanted except Sperry Concrete.

On November 11, 1999, Mr. Sperry, the principal of Sperry Concrete, and the Debtor met to review the dimensions of the foundation and the job specifications that they had previously discussed in a telephone conversation. Sperry Concrete takes the position that the Debtor informed Mr. Sperry that the Debtor owned the Northfield property. The Debtor testified that he never explicitly discussed the issue of ownership of the property with Mr. Sperry; rather, the Debtor states that he told Mr. Sperry that "he had some land in Northfield" on which he needed a foundation poured. Sperry Concrete also takes the position that the Debtor informed Mr. Sperry at the meeting that the Debtor had a mortgage in place and that within a few days of the house being delivered and placed on the foundation the Debtor would receive funds from his mortgage lender with which he would pay Sperry Concrete. The parties agreed to a due date of November 26, 1999, which took into account the Debtor's financing arrangement with his mortgage lender. According to Mr. Sperry, Sperry Concrete agreed to provide services based on the Debtor's representations.

Both Mr. Sperry and the Debtor signed an estimate prepared by Sperry Concrete which estimated the price for the job at \$6,270.00 and stated that the total invoice was due by November 26, 1999.

It is undisputed that Sperry Concrete poured a foundation on the Debtor's property sometime between November 11, 1999 and November 18, 1999. After the work was completed, Sperry Concrete sent the Debtor an invoice dated November 18, 1999, in the amount of \$5,922.00, an amount that was less than the estimate due to some changes in the job specifications.

The Debtor testified that on November 22 or 23, 1999, East Union Mortgage informed him that it was rejecting his loan application because the Debtor had recently changed jobs and therefore his length of employment was insufficient to meet its lending guidelines. The Debtor stated that he was unaware that the lender would continue to monitor his financial condition up until the time the loan closed. The Debtor testified that he did not inform Mr. Sperry that his financing had fallen through.

On November 26, 1999, the Debtor's modular home was delivered and placed on the foundation installed by Sperry Concrete. The Debtor failed to pay Sperry Concrete's invoice by the due date. Mr. Sperry testified that he went to the Debtor's property in either late November or early December in order to discuss payment of his bill with the Debtor. At that time, the Debtor represented to him that he was having problems with his lender regarding disbursement of the funds. According to Mr. Sperry, the Debtor did not represent that he had in fact lost his financing.

Upon learning that his loan had been rejected, the Debtor began contacting other lenders in order to obtain financing. At some point, the Debtor submitted a loan application to GNA Mortgage Group, Inc. ("GNA"). In that application the Debtor sought a loan in the amount of \$87,500.00, which amount was to cover \$86,000.00 in outstanding debts and liens and \$1,500.00 of the estimated \$5,939.06 in closing costs. The remainder of the closing costs, or \$4,440.06, was to be paid by the Debtor at the closing. The Debtor testified that he sent GNA copies of estimates and invoices for work completed on his property which would need to be paid with the loan proceeds, including the invoice of Sperry Concrete.

On December 14, 1999, the seller signed a warranty deed transferring title to the property in Northfield to the Debtor. On December 16, 1999, the Debtor attended the closing for his loan and mortgage with GNA. Two settlement statements were prepared for the closing, neither of which contains a reference to the Sperry Concrete debt.<sup>1</sup> One settlement sheet shows cash in the amount of \$8,141.99 going to the Debtor at the closing. The other settlement sheet shows the Debtor owing cash in the amount of \$1,318.01. The difference between the two settlement sheets results from changes in the amounts to be paid to the three contractors. The Debtor testified that when it appeared that there would be insufficient funds to pay all of his contractors, including Sperry Concrete, he telephoned his contractors, but not Sperry Concrete, from the closing to see if they would reduce the amount of their claims. After several of the contractors agreed to reduce their claims, the amounts listed on the settlement sheet were changed. Specifically, the amount to be paid to Contoocook Artesian was reduced from \$4,160.00 to \$3,800.00, the amount to be paid to Dig-Rite was reduced from \$17,400.00 to \$8,500.00,<sup>2</sup> and the amount to be paid to Mass. Electric was reduced from \$1,400.00 to \$1,200.00. As a result of these changes, the final settlement statement showed a credit to the Debtor in the amount of \$8,141.99, which the Debtor testified he was paid.<sup>3</sup> Despite the final settlement statement showing a credit to the Debtor, the Debtor did not request that Sperry Concrete's claim in the amount of \$5,922.00 be paid from the closing. As a result, Sperry Concrete did not receive any funds from the Debtor's mortgage loan.<sup>4</sup>

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<sup>1</sup> The Debtor testified that he telephoned GNA from the closing to inquire why Sperry Concrete had been omitted from the settlement sheets and why its bill was not being paid. The Debtor testified that GNA told him that there were insufficient funds to pay all of the Debtor's bills.

<sup>2</sup> The Debtor testified that at the time of the closing Dig-Rite had not yet completed all of its work. For that reason, the amount to Dig-Rite was reduced.

<sup>3</sup> The Debtor also testified, however, that he paid \$1,318.01 by personal check as stated on the first settlement sheet. He also testified that he paid \$4,400.00 by certified check for closing costs. However, neither settlement sheet reflects this second payment of \$4,400.00. The settlement sheets only reflect a "borrower credit" of \$2,557.13, which credit was not explained at trial.

<sup>4</sup> The Debtor also admitted at trial that he made two false statements at the closing when he signed an affidavit for the title company stating that (1) no person had furnished any labor, services or material

On December 22, 1999, the Debtor's deed was recorded at the Merrimack County Registry of Deeds. On that same day, the Debtors met with Attorney Grenville Clark to discuss bankruptcy. On December 23, 1999, the Debtor transferred \$1,500.00 to his father on account of the loan his father made to him to fund the deposit for the modular home back in October 1999. On December 24, 1999, the Debtor transferred \$1,000.00 to his mother for the same reason.

Sometime after the Debtor's closing, in late December 1999 or early January 2000, the Debtor offered Sperry Concrete \$4,000.00 in full settlement of its claim against the Debtor. After Sperry Concrete declined the Debtor's offer, the Debtor used \$4,000.00 from the closing proceeds to pay Dig-Rite, his site work contractor, so that it could finish covering the Debtor's septic system and install a culvert to permit completion of the Debtor's driveway.

The Debtor used the remaining funds from the closing, or \$1,660.00, to file for bankruptcy on February 4, 2000. The bulk of that amount, \$1,475.00, was paid to Attorney Clark. The remainder, \$185.00, was used to pay the Chapter 13 bankruptcy filing fee. At the time the Debtors filed their bankruptcy petition, the Debtor had not made any payments to Sperry Concrete. As previously determined by the Court in a separate order, the amount owing to Sperry Concrete is \$6,120.56.

### **III. DISCUSSION**

Sperry Concrete seeks to have its debt in the amount of \$6,120.56 excepted from discharge pursuant to section 523(a)(2)(A) of the Bankruptcy Code. Section 523(a)(2)(A) provides that a debt for "services" or "an extension, renewal, or refinancing of credit" is nondischargeable to the extent it is obtained by "false pretenses, a false representation, or actual fraud." 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 McCrory v. Spigel (In re Spigel), 260 F.3d 27, 32 (1<sup>st</sup> Cir. 2001); Palmacci v. Umpierrez, 121 F.3d 781,

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within the last 120 days for which a lien could be filed; and (2) all vendors entitled to payment would be paid at the closing from disbursements of the mortgage loan.

786 (1<sup>st</sup> Cir. 1997). A creditor must prove by a preponderance of the evidence that its claim comes squarely within the exception. See Grogan v. Garner, 498 U.S. 279, 283 (1991); Spigel, 260 F.2d at 32; Palmacci, 121 F.3d at 787. To satisfy its burden under section 523(a)(2)(A), Sperry Concrete must prove the following:

1. The Debtor made a knowingly false representation or made a representation in reckless disregard of the truth;
2. He did so with fraudulent intent (i.e., with scienter);
3. He intended to induce Sperry Concrete to rely on the false statement;
4. Sperry Concrete actually relied upon the misrepresentation;
5. Sperry Concrete's reliance was justifiable; and
6. Sperry Concrete's reliance upon the false statement caused damage.

See Spigel, 260 F.3d at 32; Palmacci, 121 F.3d at 786; Century 21 Balfour Real Estate v. Menna (In re Menna), 16 F.3d 7, 10 (1<sup>st</sup> Cir. 1994); Gem Ravioli, Inc. v. Creta (In re Creta), 271 B.R. 214 (B.A.P. 1<sup>st</sup> Cir. 2002); Reilly v. Beeman (In re Beeman), 225 B.R. 522, 528 (Bankr. D.N.H. 1998). The first two elements of the test describe the conduct and scienter required to show the Debtor's fraudulent conduct generally. See Spigel, 260 F.3d at 32. The last four elements embody the requirement that Sperry Concrete's claim must arise as a direct result of the Debtor's fraud. See id.

### **A. False Representations**

In its complaint, Sperry Concrete set forth two representations by the Debtor that it alleges are false and which form the basis for its claim. First, Sperry Concrete alleges that the Debtor represented to Mr. Sperry that he owned the property located in Northfield on which the foundation was installed, when in fact the Debtor was not the record title holder of the property at the time the representation was made nor at the time the work was completed. Rather, the Debtor did not obtain title to the property any earlier than December 14, 1999. Second, Sperry Concrete alleges that the Debtor represented that payment for Sperry Concrete's services would be made from proceeds from a mortgage loan that the Debtor already had obtained and therefore the Debtor would be able to pay Sperry Concrete for its foundation services as soon as the loan proceeds were disbursed, when in fact the Debtor had not then closed on any mortgage loan. The closing on the Debtor's mortgage loan did not occur until December 16, 1999, and Sperry Concrete was not paid from the proceeds.

At trial, Sperry Concrete alleged that the Debtor continued to make misrepresentations to Mr. Sperry, after the November 26, 1999 due date for payment, regarding the status of his mortgage and his ability and intention to pay Sperry Concrete's invoice from the loan proceeds. While Sperry Concrete has not formally requested that its complaint be amended to assert that its debt be excepted from discharge based on the Debtor's alleged continuing misrepresentations, such formal request is unnecessary. Federal Rule of Civil Procedure 15(b), incorporated by Federal Rule of Bankruptcy Procedure 7015, provides:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial on these issues. . . .

Fed. R. Civ. P. 15(b). Rule 15(b) is intended to promote the objective of deciding cases on their merits rather than in terms of the relative pleadings skills of counsel or on the basis of claims made at a preliminary point in the action. 6A Charles Alan Wright et al., Federal Practice and Procedure § 1491 (2d ed. 1990).

As a result, courts have been advised to interpret this rule liberally. Id. See also



Noonan v. Rauh (In re Rauh), 119 F.3d 46, 52 (1<sup>st</sup> Cir. 1997); Jones v. Pineda, 22 F.3d 391, 400 (1<sup>st</sup> Cir. 1994).

The record demonstrates that the Debtor did not object at trial to the presentation of evidence regarding the Debtor's further statements and/or misrepresentations to Mr. Sperry after their meeting on November 11, 1999, and in fact, the Debtor's attorney asked Mr. Sperry questions regarding his failure to take action, e.g., obtain a mechanic's lien, after the Debtor failed to pay Sperry Concrete's bill on November 26, 1999. In addition, during the Debtor's closing argument, the Court engaged Debtor's counsel in a dialogue regarding what would be the result if the Court were to find that the Debtor made a false statement after November 11, 1999, from sometime around the closing on December 16, 1999, through January 2000. Debtor's counsel did not object to the Court's hypothetical or argue that such statements could not form the basis of Sperry Concrete's claim; but, rather, counsel stated that any later misrepresentations would be inconsequential as the damage to Sperry Concrete was complete as of November 26, 1999, when the invoice was not paid. Given this record, the Court finds that the Debtor implicitly consented to trying this case on the basis that the debt should be discharged even if the Debtor made fraudulent misrepresentations after November 11, 1999, especially after the November 26, 1999 due date for payment. See Sullivan v. Young Brothers & Co., Inc., 91 F.3d 242, 248 (1<sup>st</sup> Cir. 1996); Jones, 22 F.3d at 400-01; Law v. Ernst & Young, 956 F.2d 364, 375 (1<sup>st</sup> Cir. 1992). Further, the Court does not find that any unfair prejudice results from amending the complaint to conform to the evidence that Sperry Concrete presented at trial as the Debtor attempted to rebut the evidence by suggesting that he believed at all times that Sperry Concrete would be paid from any mortgage loan he obtained. See Rauh, 119 F.3d at 52-53.

Accordingly, the Court's consideration of Sperry Concrete's complaint objecting to discharge under section 523(a)(2)(A) shall consider three alleged misrepresentations. Those alleged misrepresentations involve: (1) the Debtor's ownership of the Northfield property on November 11, 1999; (2) the status of the

Debtor's mortgage financing on November 11, 1999; and (3) the status of the Debtor's mortgage financing after November 26, 1999, the date his obligation to Sperry Concrete was due.

### **1. Ownership of Property**

There is a factual dispute as to whether the Debtor actually stated to Mr. Sperry that he "owned" the property in Northfield or whether he simply stated that he "had some property" in Northfield on which he was building a house. Assuming for purposes of this discussion that the Debtor stated that he owned the property, the Debtor's statement was false. While the Debtor had previously entered into a contract for the purchase of the property, the terms had not yet been satisfied and he was not the record title holder at the time the parties discussed the job on November 11, 1999, nor at the time the foundation was installed during the ensuing week. Accordingly, if the Debtor stated that he "owned" the property, the Debtor made a false statement within the meaning of section 523(a)(2)(A). However, if the Debtor merely stated that he "had some property," the Debtor did not make a false statement.

### **2. Status of Mortgage on November 11, 1999**

At their meeting on November 11, 1999, the Debtor represented that he had a mortgage in place and that Sperry Concrete would be paid from proceeds from the mortgage loan, as soon as the loan proceeds were disbursed. In fact, while the Debtor had been pre-approved for a mortgage loan, the loan had not been finally approved nor had the transaction closed. When the Debtor finally obtained a loan, he did not use any of the proceeds to pay Sperry Concrete. The Court finds that the Debtor made a false statement within the meaning of section 523(a)(2)(A) regarding the status of his mortgage on November 11, 1999.

### **3. Status of Mortgage after November 26, 1999**

On November 22 or 23, 1999, the Debtor learned that his loan application with East Union Mortgage had been rejected. The Debtor testified that he did not inform Mr. Sperry that his financing had fallen through. Rather, it appears that after the time passed for paying Sperry Concrete's bill, November 26, 1999, Mr. Sperry visited the Debtor at his new house in Northfield. According to Mr. Sperry, the

Debtor indicated that his mortgage lender had not yet disbursed the loan proceeds because the Debtor's house was not finished. The Debtor indicated that he was having a problem with the lender regarding disbursement. The Debtor did not indicate that he had no financing at all or that a new mortgage application was pending. The Court finds that the Debtor made misrepresentations to Sperry Concrete regarding the status of his mortgage after November 26, 1999.

## **B. Fraudulent Intent**

The scienter requirement of section 523(a)(2)(A) "may be met in one of several ways: if the maker of the misrepresentation '(a) knows or believes that the matter is not as he represents it to be; (b) does not have the confidence in the accuracy of the representation that he states or implies; or (c) knows that he does not have the basis for his representation that he states or implies.'" Palmacci, 121 F.3d at 787. "Fraudulent intent requires an actual intent to mislead, which is more than mere negligence." Id. at 788. A debtor's intent to deceive may be inferred from the totality of the circumstances, including inferences from circumstantial facts. Id. at 790. However, scienter cannot be presumed. Id. "It is the province of the trial court to determine this issue: the court may choose to infer intent or not to draw that inference, based on all the evidence." Id.

### **1. Ownership of Property**

Sperry Concrete has not met its burden of establishing that the Debtor acted with fraudulent intent if and when the Debtor stated that he owned the property in Northfield upon which the foundation was placed. The Debtor testified that he considered himself the owner of the property after he made the deposit and down payment. The Debtor further testified that, upon signing the purchase and sales contract, he was required to pay the real estate taxes on the property. It is also undisputed that the Debtor was able to cut down trees and start construction on the property without seeking further authorization from the actual owner and seller of the property. For these reasons, the Court cannot find that the Debtor intended to mislead Sperry Concrete if he, in fact, stated that he "owned" the property. Accordingly, Sperry Concrete's claim under section 523(a)(2)(A) with respect to the Debtor's representations as to his ownership of the

Northfield property on November 11, 1999, is denied. Sperry Concrete has not proven that the Debtor's misstatement was made with fraudulent intent.

## **2. Status of Mortgage on November 11, 1999**

While the Debtor did not have a mortgage in place as he represented to Sperry Concrete on November 11, 1999, the Court is unable to conclude that the Debtor intended to mislead Mr. Sperry as to the status of his mortgage on that date. Rather, the Debtor testified that he thought his financing was in place. He had, in fact, obtained a commitment from East Union Mortgage and a letter to that effect was forwarded to the modular home manufacturer in late October 1999. It was not until November 22 or 23, 1999, that the Debtor learned that his mortgage would not be approved due to his change of employment. It is plausible that on November 11, 1999, the Debtor believed that his loan would close and that the loan proceeds would be sufficient to pay Sperry Concrete's invoice. Accordingly, Sperry Concrete's claim under section 523(a)(2)(A) with respect to the Debtor's representations as to the status of his mortgage on November 11, 1999, is denied. Sperry Concrete has not proven that the Debtor's misstatement was made with fraudulent intent.

## **3. Status of Mortgage after November 26, 1999**

The Court cannot conclude that the Debtor made an innocent or negligent mistake after November 26, 1999, when he told Mr. Sperry on more than one occasion that he was only having a problem with finishing the work and obtaining disbursement from his mortgage lender, when in fact the Debtor had lost his financing altogether and was desperately searching for a new lender. As noted above, a debtor's intent to deceive may be inferred from the totality of the circumstances, including post-transaction conduct. Id.; Williamson v. Busconi, 87 F.3d 602, 603 (1<sup>st</sup> Cir. 1996). Here, it is clear that the Debtor was willing to do and say anything in order to close the loan and finish construction of his house. The Debtor wanted to put Sperry Concrete off as long as possible in the hopes that he could obtain financing that would result in payment to Sperry Concrete and the Debtor's other contractors.

The Debtor contends that he intended and expected to pay Sperry Concrete after his mortgage closing. However, no later than the middle of December, he knew that Sperry Concrete could not be paid from the proceeds of the closing. The Debtor acknowledged during trial that he signed false statements at the closing on December 16, 1999. He testified that he wanted his loan to close, even though Sperry Concrete was not listed as a contractor to be paid, so that as many people as possible could be paid as the holidays were approaching. The Debtor testified that he anticipated he could work something out with Sperry Concrete after the closing. Despite knowledge of the insufficiency of the closing proceeds, the Debtor proceeded to close the loan without any notice to Sperry Concrete.

The Debtor testified that he brought to the attention of the closing attorney or the mortgagee at the closing that Sperry Concrete had been omitted from the settlement statement, but that their response was it did not make any difference because there were insufficient proceeds to pay all contractors. The Court does not find it credible, that a mortgage lender would close a loan knowing that a contractor was not being paid, while the Debtor left the closing with excess proceeds. The Court finds it more likely that the Debtor never disclosed Sperry Concrete's bill to the mortgage lender prior to or at the closing.

The Debtor's admitted conduct during and immediately after the closing display an intent on his part to close the loan no matter what problems developed and to deal with the problems later. Such intent reflects at best a reckless or callous disregard for the truth of the representations and promises made by the Debtor to Sperry Concrete after November 26, 1999 and intentional misrepresentation of the truth after the mortgage closing. Accordingly, the Court finds that after November 26, 1999 the Debtor made his false statements with respect to the status of his mortgage with the fraudulent intent.

### **C. Intent to Induce Reliance**

By the end of November, the Debtor was in a jam. He had contracted to purchase property in Northfield and for the construction and delivery of a manufactured home. He had hired several contractors, including Sperry Concrete, to perform work so that his manufactured home could be delivered and installed on the site. The mortgage commitment that the Debtor thought was final had been rejected. The Debtor

needed to obtain new financing, and he needed to hold off his creditors, particularly Sperry Concrete, which was insisting that it be paid. The Court can infer from the evidence that the Debtor intended for Sperry Concrete to rely on his statement that he was just waiting for the loan proceeds to be disbursed to pay it. The Debtor wanted Sperry Concrete to rely on the misstatement so that it would defer any collection efforts pending his obtaining new financing. Sperry Concrete has established the third element of its non-dischargeability claim.

**D. Actual Reliance**

The evidence demonstrates that Mr. Sperry actually relied on the Debtor's false statement regarding the status of the mortgage loan. Sperry Concrete took no legal action to collect its debt after the original due date of November 26, 1999, and before the closing on December 16, 1999. Mr. Sperry sent a letter to the Debtor on January 10, 2000, in which it is clear that Sperry Concrete had been waiting for the Debtor "to resolve the funding issue with [his] mortgage holder" before seeking to place a lien on the property. The Court finds that Sperry Concrete has established that it actually relied on the Debtor's misrepresentations.

### **E. Justifiable Reliance**

The Court finds that Sperry Concrete's actual reliance on the Debtor's misrepresentations was justifiable within the meaning of section 523(a)(2)(A) and Field v. Mans, 516 U.S. 59 (1995). There were no warning signs that should have alerted Sperry Concrete that the Debtor was misrepresenting the actual status of his mortgage loan. There were no further steps that Sperry Concrete was required to take to ascertain the truth of the Debtor's statements. Even Debtor's counsel agreed during his final argument that Sperry Concrete would have been justified in relying on the Debtor's statements.

### **F. Damage**

It is undisputed that Sperry Concrete suffered damage. Sperry Concrete provided services to the Debtor for which it was not paid. The Court has previously ruled that the amount of Sperry Concrete's claim is \$6,120.56. At issue, however, is whether Sperry Concrete suffered damage as a result of the Debtor's misrepresentations after the work was performed and after the original due date on November 26, 1999. In other words, is there a debt that was proximately caused by the Debtor's fraudulent conduct? See Creta, 271 B.R. 214.

Proximate cause consists of two elements, causation in fact and legal causation. Id. The Debtor did not have the cash necessary to pay for the construction of his house. As evidenced by his need to borrow money from his parents to complete the down payment to the modular home manufacturer, the Debtor had insufficient personal cash resources to even begin the construction project. His ability to finish the project and pay the various contractors and vendors was absolutely dependent upon his ability to secure and close on sufficient mortgage financing. Based upon his discussions with Mr. Sperry on November 11, 1999, the Debtor must have understood that Sperry Concrete was waiving its usual down payment requirement because of the fact that payment was due within two weeks on November 26, 1999. The Court has already found that the Debtor had a reasonable basis on that date to believe that he had sufficient financing in place. However, after the termination of his mortgage commitment on November 22 or 23, 1999, he knew that he had a potentially fatal problem in paying his contractors and vendors. By inducing

Sperry Concrete to forebear collection activity after his mortgage financing had become problematic, he was misleading Sperry Concrete on a material term of the contract, prompt payment. The Debtor's fraudulent misrepresentations on the status of his mortgage after November 26, 1999 induced Sperry Concrete not to consider or take collection action which would likely have resulted in it being paid for its work.

Sperry Concrete has established that the Debtor's fraudulent misrepresentation after November 26, 1999 did in fact cause a loss by inducing Sperry Concrete to wait for payment rather than pursue collection action. In addition, Sperry has established legal causation because it was foreseeable that reliance on the Debtor's misrepresentations of his mortgage status could lead to Sperry Concrete failing to be paid even if a mortgage closing occurred. The Court finds that Sperry Concrete has established that the Debtor's misrepresentations were a direct and proximate cause of its loss.

#### **G. Summary**

The Court finds the facts of this case analogous to those in Field v. Mans, 157 F.3d 35 (1<sup>st</sup> Cir. 1998). In Field v. Mans, the debtor argued that notwithstanding his fraudulent misrepresentation as to whether the property had been transferred, the creditors were required to prove that they would actually have accelerated the debt if they had been aware of the debtor's misrepresentation. Id. at 45. The debtor contended that regardless of the fraud no actual "extension of credit" could have occurred unless the creditor would have accelerated the debt. Id. The First Circuit rejected this argument and stated:

It does not lie in [the debtor's] mouth, having cheated the [creditors] of their opportunity to have decided . . . whether or not to exercise their acceleration right, to argue that they must now bear the difficult burden of demonstrating beyond question that they would, in fact, have accelerated the loan. We think it enough that the bankruptcy court found that, when the fraud occurred, the economic circumstances would have allowed the [creditors] to have successfully recovered their loan had they wished to do so. . . .

To force them to prove not only that they might realistically have exercised their acceleration remedy at the time, but that they necessarily would have done so, would place the shoe on the wrong foot, allowing a defrauder to escape the consequences of his fraud in all but the most unusual and clear-cut circumstances. [The debtor's] misstatements are the reason why the [creditors'] course of action must always, in some sense, remain speculative; it is fair that the weight of uncertainty should fall on [the debtor].

Id.



In this case, by deceiving Sperry Concrete into continuing its payment terms, when Sperry Concrete could have perfected its mechanic's lien, contacted the mortgagee or taken other action to ensure payment of its invoice at the closing, the Debtor induced Sperry Concrete to forebear from pursuing its legal options. Thus, the Debtor's fraudulent misrepresentations after November 26, 1999 resulted in "an extension of credit" within the meaning of section 523(a)(2)(A). The Debtor's fraud caused Sperry Concrete to forebear from pursuing its legal rights, and thus caused Sperry Concrete to "extend" credit that otherwise Sperry Concrete could or would have stopped. See id. at 43. As in Field v. Mans, the Debtor's fraud was designed to affirmatively mislead Sperry Concrete into thinking that the Debtor was simply having difficulty getting the loan proceeds disbursed, not that he had lost his financing altogether or that the prospective mortgage loan proceeds would be insufficient to pay the Debtor's obligation to Sperry Concrete. As a result of the Debtor's deceit, the Debtor hoped to put off Sperry Concrete as long as he could and prevent Sperry Concrete from taking steps to collect its debt. See id. at 44.

Sperry Concrete need not show that it would have taken affirmative steps to collect its debts, e.g., record its mechanic's lien or contact the mortgagee regarding payment. See id. at 45-46. It is enough to show that the Debtor deprived Sperry Concrete of that opportunity and that Sperry Concrete suffered as a result. See id. at 45. Sperry Concrete could have taken formal legal action to obtain a mechanic's lien or contacted the prospective mortgagee after November 26, 1999 and before the closing on December 16, 1999. The Court has no doubt that if Sperry Concrete had taken such action it would have been paid at the Debtor's mortgage closing or would have ultimately been paid by the landowner.

#### **IV. CONCLUSION**

Accordingly, Sperry Concrete has met its burden of proving all six elements under section 523(a)(2)(A) with respect to the Debtor's misrepresentations as to the status of his mortgage loan after November 26, 1999. Accordingly, the Debtor's obligation to Sperry Concrete in the amount of \$6,120.56 is excepted from discharge and the Debtors' counterclaim under 11 U.S.C. § 523(d) is denied. 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 25<sup>th</sup> day of January, 2002, at Manchester, New Hampshire.

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J. Michael Deasy  
Bankruptcy Judge