

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
STEVE SOTIRIOS GERTZAS,)	CASE NO. 07-31421 HCD
)	CHAPTER 7
DEBTOR.)	
)	
)	
BARBARA CLAYTON, et al.,)	
)	
PLAINTIFFS,)	
vs.)	PROC. NO. 07-3075
)	
STEVE SOTIRIOS GERTZAS,)	
)	
DEFENDANT.)	

Appearances:

Douglas D. Small, Esq., counsel for plaintiffs, Foley & Small, 1002 East Jefferson Boulevard, South Bend, Indiana 46617; and

Philip R. Skodinski, Esq., counsel for defendant, 502 West Washington Street, South Bend, Indiana 46601.

MEMORANDUM OF DECISION

At South Bend, Indiana, on September 30, 2009.

Before the court is the Amended Complaint to Determine Dischargeability of Debt and Objection to Debtor's Discharge ("Complaint") pursuant to 11 U.S.C. § 523(a).¹ The plaintiffs are Barbara Clayton, Holly Decker, Richard Benko, Thomas Sykes, Jack Ford, Candida Francis, and Aaron Haste, individually and on behalf of other similarly situated persons.² See R. 10. The defendant Steve Sotirios Gertz, appearing *pro se*, filed an Amended Answer. See R. 14. This adversary proceeding was delayed by numerous continuances, discovery and other filing extensions, and even the defendant's *pro se* filing of an

¹ Because the Complaint was brought under § 523 and not § 727, the court construes it to be a Complaint to determine the dischargeability of the debts owed to the plaintiffs rather than an objection to discharge.

² Candida Francis is the only plaintiff in this case that failed to appear at trial.

Answer to a Motion for Summary Judgment before the summary judgment motion itself had been filed. *See* R. 48. Based on the defendant's Answer, the plaintiffs moved to withdraw their proposed summary judgment motion and to resolve the genuine issues of material fact at trial. *See* R. 50. On April 20, 2009, attorney Philip R. Skodinski filed an appearance on behalf of the *pro se* defendant. A trial on the Complaint was held June 2, 2009. Following the trial, the court took the matter under advisement. For the reasons that follow, the court denies the plaintiffs' Complaint.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(I) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

The plaintiffs in this adversary proceeding are former buyers and sellers of real estate in St. Joseph County, Indiana. Trinity Century 21 Real Estate Company, Inc. ("Trinity") provided brokerage services to them in their real estate transactions. In the Complaint, the plaintiffs described debtor-defendant Steve Sotirios Gertz as ("Gertz") as "an owner, shareholder, officer and director" of Trinity. R. 10 at 3. In his Answer to the Complaint, Gertz described himself as a "realtor/salesperson" and 33% shareholder in Trinity from the end of 2004 to March 2007. R. 14.

Before Gertz filed his petition in bankruptcy, plaintiff Barbara Clayton ("Clayton") filed a

Class Action Complaint against multiple defendants – Trinity; Gertz; Radomir Ivanovich, IV; Debra A. Young; Mill Lake Mortgage Co., Inc.; Title Express, Inc.; and Kayci M. Mueller – in the St. Joseph Superior Court on November 13, 2006. Claiming to represent all “victims of Trinity Century 21 and Title Express, Inc.,” Clayton alleged breach of contract, negligence, fraud, and conversion with respect to real estate transactions undertaken by the defendants. In that 16-page state court action, Clayton’s only allegation against Gertz was that “Steve Gertz was also identified as an owner of Trinity and as participating in its activities in these real estate/title-closing transactions.” R. 1, Ex. 1 at ¶ 23.

While the state action was pending, Gertz filed a voluntary chapter 7 petition in this court on June 7, 2007, and obtained a discharge on September 4, 2007. The case was closed on February 25, 2008. The plaintiffs’ Complaint (filed July 5, 2007, and amended September 6, 2007) sought a determination of the dischargeability of the defendant’s debts to the plaintiffs pursuant to § 523(a) of the Bankruptcy Code. *See* R. 10. The Complaint alleged that Gertz, as owner, shareholder, officer, and director of Trinity, was involved in the daily operations of Trinity and took an active part in Trinity’s fraudulent real estate transactions. *See id.*, ¶ 14. According to the Complaint, the defendant “engaged in a variety of fraudulent activities, as set forth in the State Action.” *Id.*, ¶ 16.

Those activities specifically included identifying residential properties that were in a “distressed” condition or otherwise valued in a low amount. Defendant and those working and acting with him would secure the services of appraisers who would prepare false and fraudulent appraisals placing the value of the real estate at an amount far in excess of its true market value or, would simply not obtain an appraisal at all, but simply affix a value to the property far in excess of its true market value. A buyer for the property would be obtained who otherwise could not have purchased real estate in a conventional manner. The buyer would be sold the property at its grossly inflated price with the property typically being financed by a mortgage. Defendant and those acting and working in concert with him would pull money out of the transaction by various fraudulent means, including charging for so called repair or renovation cost to the property, for repairs and renovations which were never completed; by charging for fees for work and services that were not completed or never undertaken; and by including other costs and expenses which were not valid or legitimate. The buyer would be left with the property purchased at a value far in excess of its true market value and with an excessive mortgage debt. The seller often was not told the true sale price or was given false information regarding the fees and expenses and so-called repair or restoration costs incurred in the transaction. The seller would also be left with a potential tax liability for a purported capital gain on a transaction which was fraudulently inflated and which gain the seller never received. The defendant and those acting and working

in concert with him then took for their own use or benefit the misappropriated funds from the real estate transactions.

Id. In Paragraph 17 of the Complaint, the plaintiffs duplicated a paragraph in the state court action, describing the real estate transaction involving Clayton, as an “example of the fraudulent and deceptive practices undertaken by the defendant and those acting together and in concert with him.” *Id.*, ¶ 17. The defendant was not named or mentioned in the paragraph. The Complaint then listed each plaintiff as a seller or purchaser of property and stated that he or she “was the victim of fraudulent activities of the defendant and those acting in concert with him in the same means and manner” as was described in the earlier paragraphs and in the state court action.

The Complaint set forth “class action allegations” and described “fraudulent and unlawful conduct” by the defendant, reiterating the claims of fraud, criminal conversion, and criminal deception alleged in the state court action. However, the Complaint in this bankruptcy adversary proceeding contained only one Count: It requested that the debts owed by the defendant to the plaintiffs be found nondischargeable pursuant to 11 U.S.C. § 523(a). It specifically alleged that Gertz as “engaged in activities individually and together in concert with others [involving] fraud and related criminal conduct.” R. 10, ¶ 43. In particular, Gertz as “[m]isappropriated money and funds from the plaintiffs by engaging in acts of false pretense, false representation, and actual fraud.” *Id.* In light of this allegation, the court construes the Complaint to seek nondischargeability pursuant to 11 U.S.C. § 523(a)(2)(A).³

Gertz as filed an Answer on his own behalf. He stated that he was a realtor/salesperson and 33% shareholder in Trinity. However, he never obtained a broker’s license, he said. He left Trinity and gave up his shareholder interest in March 2007. He then worked as a sales person for Premier Properties International, in Mishawaka, Indiana. The defendant then denied the Complaint’s allegations generally:

³ The Complaint also alleged that the defendant engaged in conduct involving willful and malicious injury to the plaintiffs. R. 10, ¶ 43. Section 523(a)(6) of the Bankruptcy Code provides that an individual debtor is not discharged from any debt “for willful and malicious injury by the debtor to another entity or to the property of another entity.” However, at trial, no evidence was presented and no argument was raised on that ground. Therefore, this court treats the Complaint as one brought only under § 523(a)(2)(A).

. . . I, Steve Gertz, never met any of the persons listed as plaintiffs in this case, nor had I ever negotiated nor profited from any deals with them. Furthermore, I had no knowledge of their existence as customers to Century 21 Trinity, Mill Lake Mortgage, or any named defendant(s) in this case.

. . .

Again, I, Steve Gertz, would like to state that I was not involved in any ownership of Mill Lake Mortgage, Title Express, or A & A Restorations. As an independent real estate agent I received no commissions or performed any services that require compensation regarding the plaintiffs or the companies, namely: Century 21 Trinity, Title Express, Mill Lake Mortgage, and or A&A Restorations in the context of this case.

R. 14.

A trial on the Complaint and Answer was held on June 2, 2009. The defendant failed to appear at trial. The defendant's counsel, however, was present. Although he stated that his client had returned to Greece and could not be reached, the court denied his request for a continuance.⁴ At trial, neither witnesses nor exhibits were tendered to the court on behalf of the defendant.

Three of the plaintiffs who appeared as witnesses testified that they worked with agents of Trinity to sell their real estate: Barbara Clayton, Thomas Sykes, and Sherry Benko. Three other plaintiffs also testified that they used agents of Trinity to purchase, rather than sell, properties: Holly Decker (who bought three properties), Jack Ford (who bought five properties), and Aaron Haste (who bought eight properties). Their testimonies contained common facts found in the experiences of all or most of the witnesses. First, the properties involved were located in declining neighborhoods. Second, the witnesses, it appeared, were inexperienced in real estate transactions. In addition, several of the sellers had attempted without success to sell their real estate at an earlier time. All the plaintiffs had worked with Trinity agent Debra Young ("Young") or broker Radomir Ivanovich ("Ivanovich"), not with Gertz. The plaintiffs who sold their properties through Trinity discovered, by examining the closing documents they received long after the closing, that the commission fee had been 10%, rather than 7%; that without their knowledge they had been charged market analysis fees, administrative fees, consultation fees, and large "repair costs" for repairs that never were made; and/or that the house had sold for much more than they were told. Those who purchased

⁴ The court had denied a similar motion to continue by the defendant on May 21, 2009. *See* R. 66.

properties through Trinity testified that they were encouraged to buy rental properties to improve their credit ratings or to make easy money with Trinity's help. They were told they did not have to provide a down payment and that Trinity would help repair or renovate the houses, find renters, and manage the rentals. In the end, they testified, they received no help from Trinity. The purchasing plaintiffs stated that they paid too much for the properties they bought in a depressed real estate market and that their credit rating and financial condition were ruined.

Because the plaintiffs' Complaint, in this court, alleged that the debts Gertz as owed to the plaintiffs should be excepted from his discharge based on his "acts of false pretense, false representation, and actual fraud," the court focused on the testimony of the witnesses for evidence of such acts by Gertz as. The witnesses described questionable, deceptive, perhaps fraudulent real estate transactions. However, their testimony concerning Gertz as's actual involvement in any of the alleged fraudulent conduct presented no "smoking gun." The court summarizes the witnesses's accounts of their real estate transactions.

A. Plaintiff Barbara Clayton

Barbara Clayton testified that she sold her house through Trinity agent Young in 2006. Clayton's two earlier attempts to sell her house, using a different brokerage service and listing it at \$48,000, were unsuccessful. Young told Clayton that she would have no trouble selling it for about \$40,000; in addition, the second mortgage would be paid off and the buyer would pay the taxes. Trinity would find a buyer and get a 7% commission fee, she said. Young brought an appraiser to assess the value of the home, but he conducted his appraisal from the street only. Nevertheless, Young secured a buyer – Darvis Jones.

The closing was held late on a Friday afternoon. Clayton, Young, and a settlement agent from Title Express met at the Trinity office for the signing. Jones, the buyer, was not present. When the paperwork was ready, around 4 p.m., Young told Clayton she would receive \$25,000. Clayton questioned the low figure, but Young told her that, if she wanted to get her check deposited, she needed to sign the

settlement statement papers by 5 p.m., when the bank closed. Clayton testified that she had total confidence in Young, and therefore she signed the statement without reading it.

When Clayton received a copy of the settlement statement in the mail, however, she learned that her house was sold for \$81,000. *See* Pl. Ex. 5 at 1. In addition, the statement listed various charges and fees about which she had no prior notice: a broker commission of 10% of the sale price, not 7%; an “administration fee” of \$500 payable to Trinity; a “market analysis fee” of \$250; a charge for “consultation pro service” in the amount of \$400; and, perhaps most significantly, a charge of \$28,683.22 identified as “pay repair invoice” payable to A & A Restoration, which was delivered in the form of a check to A & A Restoration that was endorsed by Young. *See id.* at 1-2, 5. However, Clayton testified, no repairs were done to Clayton’s house, before or after closing. Clayton stated that Young told her that A & A Restoration was a company set up by Young because Ivanovich, one of the bosses at Trinity, had told her to set it up. In the end, for the sale of her house Clayton received a check in the amount of \$27,579.04; \$5,000 to pay off the loan on her mobile home; \$5,000 to pay off the second mortgage; and no fees imposed for taxes.

Clayton testified that she was introduced to Gertz as by Young at the Trinity office at some point. However, she only met him once and never talked to him.

B. Plaintiff Thomas Sykes

Thomas Sykes was Clayton’s neighbor. Clayton introduced him to Young when he wanted to sell his house. He told Young that he was willing to sell his house for \$37,000. About one week later, an appraiser came to his house to assess its value. The house was sold to Jones, the purchaser of Clayton’s home. On the day of closing, Sykes signed the closing documents at Title Express; he said he had a general idea of their contents. About one month after the closing, Sykes received a copy of the settlement statement and discovered that the house was sold for \$79,500. *See* Pl. Ex. 6 at 1. The settlement statement contained an invoice charge for repairs in the amount of \$28,330.69. Sykes testified that no extensive repair work worth that amount was done prior to or after closing. Also listed on the statement were a 10% commission,

a “market analysis fee” of \$250, and a “consultation pro service” charge in the amount of \$400. Sykes testified that he had no prior notice of these charges. From the sale of his house, Sykes received approximately \$32,000 to pay off his mortgage and an additional \$5,000.

C. Plaintiff Richard Benko

Richard Benko was too ill to testify. His wife Sherry Benko testified on his behalf. She and her husband sold a rental property in a declining neighborhood through Trinity in 2006. Their previous attempt to sell it for a price between \$57,000 and \$59,000, through another realtor, had failed. She testified that a female broker from Trinity first contacted her without solicitation and stated that she would have no problem selling the property. It was sold in two to three months. At the closing, held on a late Friday afternoon at the insistence of the broker from Trinity, there were many people and much disturbance. When the paperwork was ready for signing around 7 p.m., Mrs. Benko saw that the contract was incorrect: The sale price was listed as \$60,000, but her agreement with Trinity was that they were to receive \$35,000. She and her husband refused to sign the contract. Because no one there could change the terms of the contract on a Friday night, the Benkos came back the following Monday. However, the contract that the Benkos were presented on Monday looked like the one from the previous Friday. The Benkos stated that they did not wish to pay income taxes on capital gains that they did not realize. However, Mr. Benko became agitated and signed the paperwork. The settlement statement contained a \$14,790 charge for “repairs and replacements.” *See* Pl. Ex. 1 at 1. However, Mrs. Benko testified that no repair work worth that amount was done before or after closing. The Benkos received \$35,000 from the sale but were required to pay taxes from the sale and income taxes on the capital gain calculated from the sale proceeds of \$60,000.

D. Plaintiff Holly Decker

Holly Decker testified that she was introduced to Ivanovich through a friend. He convinced her to buy rental properties to improve her credit rating. He suggested that she should buy several properties;

Trinity would renovate the properties, help her manage them, and find renters. Decker relied on Ivanovich's representations because she believed Ivanovich was a reputable mortgage broker or real estate salesman at Trinity.

Decker bought three properties through Trinity. However, Trinity did not make any repairs on her properties or help her locate renters. She testified that Ivanovich kept none of the promises he had made, despite her complaints to him. Eventually, two of the three properties were sold at short sales and one was foreclosed. Consequently, her credit rating deteriorated from decent to very poor.

Decker testified that, when she purchased those properties, she did not provide a down payment because, she was told, the down payments would be taken from the mortgage company. However, the settlement statements reported that the buyer (Decker) had provided cash for these transactions. She also said she believed that the two properties sold at short sales were sold at prices lower than the original purchase prices because the actual value of the properties was lower than the purchase prices.

Decker also testified that she met Gertz as several times at the Trinity office but that he was not personally involved with her real estate transactions; she dealt with Ivanovich. But she believed that Gertz as was "in charge" at Trinity.

E. Plaintiff Jack Ford

Jack Ford testified that he first met Ivanovich and Gertz as at bars, and he discussed refinancing his home mortgage through Trinity with Ivanovich. Ivanovich suggested that Trinity could help him purchase rental properties and renovate them to make money. The discussions moved from the bars to the Trinity office. Ford spoke primarily with Ivanovich, but Gertz as might have been present for some of the discussions. However, Ford never suggested that Gertz as was actively or personally involved in his transactions.

Ford himself had no prior experience in real estate transactions or rental properties. He purchased five rental properties through Trinity. Each settlement statement indicated that the buyer had provided cash

as down payment; however, Ford testified that he never provided cash. Instead, Ivanovich would provide Ford with a check to deposit into Ford's bank account to show that Ford had sufficient money in the bank for a down payment. Then Ford would withdraw the money and return it to Ivanovich. In addition, each settlement statement contained an invoice charge for repairs in an amount over \$10,000; however, no repairs were made. Ford said he believed that part of the money charged for repairs served as down payment and that Ivanovich and Gertz as split the rest. Eventually, three of the five properties were sold at short sales and the other two were sold at sheriff's or tax sales. As a result, Ford's credit rating and financial condition were ruined.

Ford testified that he had heard Ivanovich and Gertz as arguing at the Trinity office about splitting money, but Ford did not suggest that the argument concerned his own transactions at Trinity.

F. Plaintiff Aaron Haste

Aaron Haste testified that he became an administrative assistant at Trinity in March 2005 and worked there six or seven months while he earned his real estate license. While there, Ivanovich approached him and suggested that he could buy homes to make extra money. Ivanovich said that he would give Haste money for the down payments and would repair and manage the properties for him. Haste said that he believed Ivanovich because Ivanovich was his boss at Trinity and because Ivanovich and others at Trinity were engaging in the same practice. He testified that he had no prior experience in rental properties.

In studying to earn his real estate license, Haste had learned to conduct market analyses. He therefore became aware, he said, that there was something wrong with some of the real estate transactions Trinity handled. For instance, the properties he himself had acquired were in a depressed real estate market, and he believed he purchased them at prices significantly higher than their actual values. Haste acquired eight rental properties; some were sold at short sales, but most were foreclosed. As a result, his credit rating deteriorated dramatically. According to Haste, in five of his eight transactions the closing contract contained a repairs charges; however, he, not Trinity, made the repairs. He also stated that, if he could not obtain

100% financing, Ivanovich would provide him with the money. Haste would deposit that money in his bank account, to show that he had enough money in his account for the down payment. He then would withdraw the same amount and return the money to Trinity. Haste said that he was told that Gertz as was Ivanovich's partner and would fill in for Ivanovich if needed. He thought Gertz as had a real estate license, but he never saw Gertz as engage in typical realtor tasks at Trinity. Gertz as also owned a restaurant nearby.

G. Nonparty Witness Darvis Jones

Darvis Jones, the purchaser of Clayton's and Sykes's houses, also testified. Jones is not a plaintiff in this adversary proceeding. He came from Chicago to buy a house in South Bend. He met with Young, Ivanovich, and Gertz as at Trinity. Young showed him Clayton's property, and he bought it. Jones testified that, to make the purchase, Gertz as told Young to give Jones a certified check and take him to the bank to deposit it, to show that he had money in his account. Young then told Jones to withdraw the same amount in the form of a certified check on the same day. *See* Pl. Ex. 8 at 1, 3-4. Jones stated that he was told by Gertz as, Ivanovich, and Young that he did not need to make a down payment. The settlement statement, however, indicated that the buyer had provided cash in the amount of \$11,742.76. *See* Pl. Ex. 5 at 1. The settlement statement also contained a repair charge of \$28,683.22. Nevertheless, Jones said that no repair work was done before or after the sale. The purchase price for Clayton's property was \$81,000.00. Jones was told, at a meeting where Gertz as was present, that \$81,000.00 was the appraised value; at the time, he thought that it seemed to be the right price because he was from Chicago, where prices are higher.

Jones then purchased Sykes's house for \$79,500. *See* Pl. Ex. 6 at 1. He again was told that it was the appraised value. The settlement statement contained a repair charge for \$28,330.69, even though no repair work was done before or after the sale. Jones also bought a third property, after Gertz as told him about a special program that would provide help to Jones if he could not find tenants or make the mortgage payments. However, when he later asked Gertz as about entering into the special program, he was told that Gertz as had too many properties at that time and could not obtain any help.

Jones testified that, for all three transactions, he signed the closing documents without reading them. After receiving the closing papers, however, he discussed the transactions at a meeting where Gertz was present; Gertz told him that what was involved in the transactions was in a “grey area” but was not illegal. Jones said he believed the properties were over-priced. He testified that all the properties eventually went to foreclosure and that his credit rating had deteriorated. He further testified that he was inexperienced in real estate transactions and had relied upon Trinity in making these purchases.

H. Nonparty Witness Philip Krause

Philip Krause, also not a party to this action, is a certified general appraiser from The Appraisal Group, Inc. *See* Pl. Ex. 9 at 1. Krause testified that he became a certified general appraiser in 1988 and has been conducting real estate appraisals ever since. Plaintiffs’ counsel asked him to assess the values of ten properties, some of which were the plaintiffs’ real estate. *See* Pl. Ex. 10-a. Krause testified that he observed these properties from drive-by conditions and then applied sale prices of comparable properties sold at approximately the same time in the immediate areas to reach opinions on the values of these properties. His opinion was that the values were actually much lower than Trinity’s sale prices. The Clayton property, for example, was sold for two times its value, he said. Krause described those properties as “starter homes”; in his opinion, the values of those properties should generally follow the cost of living. Such huge swings in property values would be unusual, he said, in this home market in South Bend.

I. Nonparty Witness Nicholas Avgerinos

Nicholas Avgerinos, the last witness, was not a plaintiff in this adversary proceeding. He testified that he and Gertz were members of the same church and knew each other. He owned his own home and one commercial property in Elkhart, Indiana; he had no other experience in real estate. Gertz told him that there were 12 properties for sale and that Avgerinos could purchase them, if he was interested. Gertz said that the properties were in good condition, that five or six of them were already rented, that Gertz would

advertise to help him rent the remaining properties, and that he could use the rental income to pay the mortgages. Avgerinos decided to pursue the opportunity, knowing that Gertz was real estate and would protect his interest because they were friends.

He purchased 12 properties through Trinity, in the total amount of \$872,000, between April and October of 2005. *See* Pl. Ex. 7 at 1. Avgerinos testified that Gertz was a real estate salesman, that Ivanovich was a broker, and that Ivanovich handled the closing statements and mortgages. He stated that he never signed any real estate broker agreement with Gertz. He said Trinity did secure renters for him for the first month. They first used the rental income to pay the mortgage, but then used it for repairs, he explained. Avgerinos also admitted that he did not read the closing statements for the transactions. Soon after the transactions were completed, however, he questioned Gertz about the appraisals, which he believed to be too high. Gertz told him that the figures were set by an appraiser and were accurate. Avgerinos added that he did not provide any cash for the transactions; nevertheless, the settlement statements indicated that the buyer had provided cash for all 12 transactions. *See* Pl. Ex. 7. In addition, all 12 statements included repair charges, but Avgerinos testified that no repair work was ever done on any of the properties. Because the properties could not generate enough income for him to make the mortgage payments, in the end eight of them were repossessed by the banks and four had judgments against them.

In closing arguments, plaintiffs' counsel described a conspiracy to commit fraud.⁵ There were two corporate entities, Trinity and Mill Lake Mortgage, that solicited individuals like Mr. Avgerinos, unsophisticated in real estate transactions, to take part in investment opportunities. They were told they could acquire properties with no money down. The appraisals were bogus, the costs were inflated, and large repair charges were made for repairs never done. Those charged amounts ended up in Gertz's personal bank account, he asserted. He asked that the debt not be discharged.

⁵ At the end of the trial, the plaintiffs offered a deposition of Gertz taken on April 15, 2008. *See* Pl. Ex. 14. It was admitted over the objection of counsel for defendant. The court found, upon examination after trial, that the deposition was not verified or signed by the defendant or the notary public.

Counsel for the defendant pointed out that witnesses Jones and Avgerinos were not parties to the action. Gertz was involved with Avgerinos, but his acts were not fraudulent. Gertz merely failed to follow through with his promises to Avgerinos; that is not fraud, he asserted. Moreover, the plaintiffs in their testimony seldom referred to Gertz. They did not show a clear relationship between Gertz and Trinity, Gertz's counsel argued. He insisted that the sellers were not the victims in the transactions, since they got the amounts they expected in the sales. He questioned whether there was harm to the buyers, as well. Finally, he argued that there was no link between the real estate transactions and any benefit the debtor received. He asked that the defendant receive his discharge. The court took the matter under advisement.

Discussion

The plaintiffs alleged that the defendant, acting individually and together in concert with others, misappropriated funds from the plaintiffs by engaging in acts of false pretense, false representation, and actual fraud with respect to their real estate transactions. They asked the court to declare that the defendant's debts owed to them are nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).⁶

Section 523(a)(2)(A) provides that an individual debtor is not discharged from any debt "for money, property, [or] services" to the extent obtained by "false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2)(A). The party seeking to establish that a debt is nondischargeable pursuant to any subsection of § 523(a) bears the burden of proof by a preponderance of the evidence. *See Grogan v. Garner*, 498 U.S. 279, 291, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991); *In re Crosswhite*, 148 F.3d 879, 881 (7th Cir. 1998); *In re Bero*, 110 F.3d 462, 465 (7th Cir. 1997). Furthermore, it is well established that exceptions to discharge in bankruptcy should be construed "strictly against a creditor and liberally in favor

⁶ As the court noted above, the plaintiffs brought this action under 11 U.S.C. § 523(a) without further specificity. Their allegation of fraud falls squarely into § 523(a)(2)(A). Their other allegation, of conduct involving willful and malicious injury to the plaintiffs, falls into § 523(a)(6). However, the plaintiffs neither argued nor presented evidence that the defendant engaged in any conduct involving willful and malicious injury to the plaintiffs. Therefore, the court construed the plaintiffs' Complaint as one brought only under § 523(a)(2)(A).

of the debtor.” *In re Morris*, 223 F.3d 548, 552 (7th Cir. 2000) (quoting *Goldberg Secs., Inc. v. Scarlata (In re Scarlata)*, 979 F.2d 521, 524 (7th Cir. 1992)).

To prevail on a § 523(a)(2)(A) claim with respect to debts obtained by false pretenses or a false representation, a creditor must establish that: (1) the debtor obtained the money or property through a representation that was false or was made with such reckless regard for the truth as to constitute willful misrepresentation; (2) the debtor acted with an intent to defraud; and (3) the creditor actually and justifiably relied on the false representation. *Heptacore, Inc. v. Luster (In re Luster)*, 50 Fed.Appx. 781, 784 (7th Cir. 2002); see *In re Sheridan*, 57 F.3d 627, 635 (7th Cir. 1995); see also *Field v. Mans*, 516 U.S. 59, 74-75, 116 S. Ct. 437, 133 L. Ed. 2d 351 (1995) (holding that a creditor’s reliance need only be justifiable, not reasonable). The creditor must prove every one of these elements to support a finding of a false pretense or misrepresentation, and failure to establish any one element is determinative of the outcome. *Rae v. Scarpello (In re Scarpello)*, 272 B.R. 691, 700 (Bankr. N.D. Ill. 2002) (citing *Bletnitsky v. Jairath (In re Jairath)*, 259 B.R. 308, 314 (Bankr. N.D. Ill. 2001)).

In addition, “actual fraud” has been interpreted broadly in this circuit. It is not limited to misrepresentations and misleading omissions, even though most frauds do involve misrepresentation. See *McClellan v. Cantrell*, 217 F.3d 890, 893 (7th Cir. 2000). Actual fraud may encompass “any deceit, artifice, trick or design involving direct and active operation of the mind, used to circumvent and cheat another.” *Id.* (quoting 4 *Collier on Bankruptcy* ¶ 523.08[1][e], at 523-45 (Lawrence P. King ed., 15th ed. rev. 2000)). The plaintiffs, without specification, alleged that the defendant’s conduct involved acts of false pretense, false representation, and actual fraud. The court thus turns to the evidence before it to determine whether the plaintiffs have shown, by a preponderance of the evidence, that the defendant obtained money, property, or services from the plaintiffs through his fraudulent conduct.

In order to declare that a debt is nondischargeable under § 523(a)(2)(A), there first must be a representation made by the defendant to the plaintiffs; second, the representation must have been made with

knowledge of its falsity. The court considered the testimony of each plaintiff to determine whether there was culpable conduct by the defendant with respect to the real estate transactions at issue.

The court found that none of the plaintiffs in this case had any direct dealings with the defendant.⁷ Clayton testified that she was introduced to Gertz as once, at the Trinity office, but that she never had a conversation with him. The other two plaintiffs who sold houses through Trinity, Sykes and Benko, never mentioned Gertz as. Decker testified that Gertz as was not involved in her real estate transactions; she purchased rental property through Ivanovich. Ford spoke primarily with Ivanovich, with Gertz as only occasionally present. Haste said he was told that Gertz as was Ivanovich's partner at Trinity and that he filled in for Ivanovich when necessary. However, Haste testified that he never saw Gertz as engage in typical realtor tasks. The court concluded that the plaintiffs had no direct dealings with Gertz as. Not one plaintiff established that the defendant made a representation of any type to him or her, and therefore clearly there was no showing that the defendant made a *false* representation or misleading omission to a plaintiff. *See Weule v. Nordstrom (In re Nordstrom)*, 8 Fed. Appx. 823, 829 (9th Cir.), *cert. denied*, 534 U.S. 822 (2001) (stating that there must be an allegation that the debtor made a representation to the plaintiff before the plaintiff is entitled to challenge the dischargeability of a debt on the ground of fraud). The plaintiffs therefore have failed in their burden of proving, by a preponderance of the evidence, the first element of a § 523(a)(2)(A) claim.

Two witnesses who were not plaintiffs testified that they worked directly with Gertz as. Jones, who purchased several properties through Trinity, testified that he had three contacts with Gertz as. First, Gertz as told Young to take Jones to the bank to deposit a certified check in his bank account. Second, Gertz as told Jones about a special program, but later did not help Jones to get into the program. Finally, Gertz as told Jones that some real estate transaction involved a "gray area" but was not illegal. Without more

⁷ The plaintiff Candida Francis did not appear at trial, and there was no evidence of any contact between Gertz as and Francis. Indeed, there is no allegation by Francis that Gertz as owed a debt to her that could be declared nondischargeable. The Francis claim is dismissed for failure to state a claim.

context to these statements, the court cannot find that the witness demonstrated by a preponderance of the evidence that those representations were fraudulent. The second nonparty witness, Nicholas Avgerinos, followed Gertz as's suggestion to get into the real estate business because it was lucrative. He purchased twelve properties from a gentleman who wanted to sell the properties. Ivanovich handled the paperwork. Gertz as had said he would find renters for the properties, and initially, Avgerinos testified, he did so. Avgerinos later felt he had to take over management of the properties and later decided that the prices he had paid were overblown. Nothing in Avgerinos' testimony, however, demonstrated that the defendant made false statements or used any other fraudulent conduct to cheat Avgerinos. Moreover, none of the evidence by the two nonparties could be considered corroborating evidence to support an argument that the Defendant's conduct toward the plaintiffs themselves was fraudulent.

The plaintiffs' principal argument, however, was that Gertz as was part of a scheme to defraud the plaintiffs in their real estate transactions. Courts have held that, if a debtor was an active and knowing participant in a scheme or conspiracy, the acts of others can be attributed to the debtor. *See Blackmon v. Evans (In re Evans)*, _B.R._, 2009 WL 2486332 at *4 (Bankr. M.D. Fla. May 28, 2009) (concluding that there was sufficient proof that the defendant was an active and knowing participant in a fraudulent scheme). The actors in this scheme, as the witnesses presented it to the court, were Young and Ivanovich, both non-defendants. The plaintiffs did not describe any culpable conduct by the defendant, did not point to one overt act of deception or one false representation by Gertz as, that tied him to this alleged scheme to defraud them. Counsel for the plaintiff used the terms "conspiracy" and "collaboration," and implied that Gertz as's ownership role at Trinity might result in his liability, but none of those relationships was developed by the plaintiffs. In fact, the witnesses had different hypotheses concerning Gertz as's role at Trinity. The court finds that there was no evidence that the defendant was an active and knowing participant in a real estate fraud scheme, and therefore the acts of the non-defendants cannot be attributed to Gertz as. The only way that a debt can be declared nondischargeable in this adversary proceeding against the defendant is if the

defendant's own actions, individually or in concert with others, under agency or conspiracy principles, satisfy the elements of § 523(a)(2)(A). See *Pisano v. Verdon (In re Verdon)*, 95 B.R. 877, 882 (Bankr. N.D.N.Y. 1989) (noting plaintiff's confusion between debtor's and nondebtors' actions, finding that debtor's actions did not warrant finding of nondischargeability). The court finds that the plaintiffs, through their testimony and evidence at trial, failed to prove by a preponderance of the evidence that Gertz was part of a real estate scheme and obtained money, property or services from the plaintiffs by representations or acts that were false or fraudulent.

The court also finds that the plaintiffs failed to prove that the defendant had an intent to deceive the plaintiffs. The determination of whether the debtor had the intent to deceive the creditor is a factual question that is resolved by a review of "all of the relevant circumstances of a particular case." *Scarpello*, 272 B.R. at 700 (citing *Park Nat'l Bank & Trust v. Paul (In re Paul)*, 266 B.R. 686, 694 (Bankr. N.D. Ill. 2001)). Proof of intent to deceive is measured by a debtor's subjective intention at the time the representation was made. *Id.* (citing *Mercantile Bank v. Canovas*, 237 B.R. 423, 428 (Bankr. N.D. Ill. 1998)). Because direct proof of fraudulent intent is often unavailable, the intent may be inferred from the surrounding circumstances. *Colemichael Invs., L.L.C. v. Burke (In re Burke)*, 405 B.R. 625, 646-47 (Bankr. N.D. Ill. 2009) (citing cases). In this case, the plaintiffs alleged that the defendant (and those working and acting with him) would use appraisers who would provide false appraisals with excessive values for the properties. However, the plaintiffs failed to connect the defendant to those inflated appraisals. Without testimony or evidence concerning the involvement of the defendant with those appraisers, the court cannot determine whether the defendant influenced the appraisers or used their appraisals to induce the plaintiffs to buy or sell the properties. See *Liberty Sav. Bank, FSB, v. McClintic (In re McClintic)*, 383 B.R. 689, 694-95 (Bankr. S.D. Ohio 2008) (concluding that, because plaintiff failed to provide critical information concerning appraiser, court could not find intent to deceive). The court agrees with the *McClintic* court's decision that, when it "is only left with transactions that on the surface appear suspect," and when "the Code

