

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
GEORGE LLOYD WENDT,)	CASE NO. 10-30759 HCD
)	CHAPTER 7
)	
DEBTOR.)	
)	
)	
JEFF POLANSKEY and)	
CHARLOTTE POLANSKEY,)	
PLAINTIFFS.)	
vs.)	PROC. NO. 10-3039
)	
GEORGE LLOYD WENDT,)	
)	
DEFENDANT.)	

Appearances:

Phillip R. Skodinski, Esq., counsel for plaintiff, 502 West Washington Street, South Bend, Indiana 46601;
and

Mark P. Telloyan, Esq., counsel for defendant, Post Office Box 449, South Bend, Indiana 46624-0449.

MEMORANDUM OF DECISION

At South Bend, Indiana, on August 30, 2011.

Before the court in this adversary proceeding are the Complaint to Determine Dischargeability of Debts, filed by the plaintiffs Jeff and Charlotte Polanskey (“plaintiffs”) pursuant to 11 U.S.C. § 523(a)(2), and the Answer, filed by the defendant George Lloyd Wendt, chapter 7 debtor (“defendant” or “debtor”). Following a trial on the Complaint, the court took the matter under advisement. For the reasons that follow, the court determines that the debt owed by the defendant to the plaintiffs is dischargeable in the defendant’s bankruptcy proceeding.¹

¹ The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

BACKGROUND

The debtor filed his chapter 7 bankruptcy petition on March 1, 2010. After the Trustee declared that there was no property available for distribution from the estate, the court entered the Order discharging the debtor on June 14, 2010, and the case was closed a month later.

The plaintiffs timely commenced this adversary proceeding, charging that the defendant made false representations and concealed material information when selling his residential property to them.² The underlying facts are not in dispute. On April 28, 2007, the plaintiffs entered into an agreement with the defendant to purchase the defendant's residence on Jackson Road in South Bend, Indiana. After moving into the home on June 16, 2007, they discovered water leaks in the garage and basement. The plaintiffs alleged that the defendant knew of the existence of those leaks before entering into the sale and concealed and failed to disclose those defects. They also alleged that the defendant made a material representation that there were no known leaks at the time of the sale. The representation was false, claimed the plaintiffs, and they relied on it to their detriment. As a result, they sought damages of \$7,000.00, the cost of repairing the water damage.

The debtor, in his Answer, insisted that there were no leaks when he lived there. In addition, he pointed out, the plaintiffs had complete access to the garage and basement in May 2007 and were present when the home inspection was made. No water problems were found. Finally, the defendant noted that he had purchased a home warranty for the plaintiffs to cover any problems not known at the time of the sale.

At trial, the plaintiff Jeff Polanskey testified that he took possession of the defendant's home on June 16, 2007, and saw water leaks on August 1, 5, 9, 15, and 20, 2007, and on January 9, 2008, primarily in the garage. He described water coming under the garage door and draining out a hole cut into the back of the garage. He offered photographs, taken of the finished basement in January 2008, of mold, rotten wood, rusted iron legs, and buckled concrete. Because he is a carpenter, he said, he recognized that the mold

² The plaintiffs filed a two-count Complaint, but withdrew the first count.

and water damage had been there for many more months than he had lived there. In February 2008, the plaintiff hired a water proofing company to install a concrete drive and a drainage system around the foundation of the home. The company charged \$7,000.00 for the job.

Mr. Polanskey pointed out that the Seller's Residential Real Estate Sales Disclosure form, dated April 11, 2007, and signed by the defendant, stated there was no moisture problem.³ See Pl. Ex. 2. In the plaintiff's view, the real estate inspection firm Michiana Home Inspections, which had inspected the house before the sale, made an inaccurate inspection report on the home. In addition, he insisted that the photograph of the hole in the back of the garage, where the water ran out of the garage, was evidence that the debtor knew of the water problems before he sold the house and failed to disclose them.

On cross examination, Mr. Polanskey acknowledged that he had read the Sales Disclosure form when he viewed the house in April 2007 and knew it reported that there were no water problems. His claim that the debtor perpetrated a fraud on him arose from this disclosure form and its "no moisture" checked box. The plaintiff admitted, however, that the debtor had provided both homeowner's insurance and a home warranty program, but claimed that the warranty did not cover a leaky basement. Mr. Polanskey also admitted that he himself chose and hired Michiana Home Inspections, that both he and Mr. Wendt were present when the inspection was made, and that the inspector's 21-page report did not list any problem with water in the garage or the basement.

The plaintiff testified that he went through the house in April, before signing the purchase agreement on April 28, 2007, and that his chosen inspection company went through it in May. There was no standing water or wet carpet found. He admitted that there was no problem in the basement or garage in April, May, or June, when he took possession of the house, and that he discovered the water problem only in August 2007. In the plaintiff's view, the water certainly leaked during the time between the inspection

³ The court noted that the Seller's Residential Real Estate Sales Disclosure Form asked the question "Are there moisture and/or water problems in the basement, crawl space area, or any other area?" The defendant, as seller, checked the "NO" box. Pl. Ex. 2 at 2.

and his realization of the problem. Mr. Polanskey also admitted that he was an experienced home buyer and that he owned at least ten rental houses at one time. He agreed that his own background and training as a carpenter, home purchaser, and landlord gave him an expertise in inspecting a house before buying it.

On redirect, the plaintiff pointed out that the hole in the garage was hidden from view. He stated that he was unable to see the hole when he visited the home; he found it only after the first substantial rain in August 2007. Mr. Polanskey concluded his testimony, and the plaintiff rested.

Testifying for the defendant was Charles Michael Wendt, the son of the defendant George Lloyd Wendt. He stated that his father, now 80 and dying of cancer, could not testify.⁴ He assured the court that he was completely familiar with the house in which he grew up, the state court lawsuit, and the bankruptcy adversary proceeding.⁵ There was no objection to his testifying on behalf of his father.

Mr. Wendt and his father moved into the Jackson Road house in 1972, and he lived there until 1982. In addition, he stated, he went back home a couple of times a week to visit. He testified that he never saw water in the garage. When his father owned the house, the driveway was made of gravel, and the rain soaked into it. However, when the new owners put in a concrete driveway, it sloped toward the garage; he thought it might cause problems, he said. When asked about the hole in the garage wall, he explained that it was put in so that he could plug in the weed-eater cord.

Mr. Wendt confirmed that the garage and basement were inspected before the sale and that no water damage was found. He stated, as well, that Mr. Polanskey had stored his belongings in the garage and had access to it before he moved into the house. He also said that, in the ten years he lived in the house, and in the almost 30 years since, he never saw standing water in the basement. He and his father had remodeled

⁴ The court was notified that the defendant George Lloyd Wendt passed away on July 1, 2011. The death of a chapter 7 debtor, however, does not abate his bankruptcy case; the court maintains jurisdiction to conclude the case “in the same manner, so far as possible, as though the death” had no occurred. Fed. R. Bankr. P. 1016.

⁵ The plaintiffs filed a lawsuit against the defendant in state court on January 21, 2009, almost two years after they had purchased the house. Nothing further concerning that suit was reported to this court.

the basement in the summer of 1974 or 1975. They never had a problem with water in the house, and the inspection company found no evidence of water or of moisture.

The last witness to testify was Margaret Bird, an office manager at Martin's Grocery Store who lived in the house with the defendant for the year before it was sold. She was present when the house was sold and when the inspection was done. She testified that there were no water leaks or running water in the garage when she lived there and that the basement was also dry. She added that Mr. Polanskey had stored his lawn mower and appliances in the garage and never reported seeing water. The inspector, as well, reported no water or signs of moisture anywhere. His house inspection report was accurate, she insisted; she added that Mr. Polanskey had selected Michiana Home Inspections himself. In her view, the Seller's Residential Real Estate Sales Form also was accurate. She stated that the real estate agent filled out the form with the defendant and that Mr. Wendt signed it. She added that Mr. Wendt had provided a one-year warranty for the protection of the buyer. Finally, Ms. Bird explained that the hole in the garage back wall was used to give access to electrical connections and garden hoses. When her testimony was completed, the defendant rested.

Mr. Polanskey was recalled in rebuttal to testify that he did not use or go into the basement before they moved into the house and that he did not change the nature of the driveway when the concrete driveway was poured. At the conclusion of his rebuttal testimony, counsel for the parties presented closing arguments and the court took the matter under advisement.

DISCUSSION

The plaintiffs alleged that the defendant misrepresented or knowingly concealed material facts concerning the condition of his home when he sold his residential property to the plaintiffs. Consequently, they contended, the repair costs for the damage they sustained as a result of those misrepresentations should be excepted from the debtor's discharge pursuant to 11 U.S.C. § 523(a)(2). The plaintiffs did not state

whether the debt should be excepted pursuant to § 523(a)(2)(A) or (B). Because the plaintiffs did not allege that the debtor made a false written statement about his financial condition, however, the court finds that they did not rely upon § 523(a)(2)(B), and intended instead to base their claim upon § 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 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, a creditor must establish that: (1) the debtor “made a false representation or omission, which he either knew was false or made with reckless disregard for the truth;” (2) the debtor “possessed an intent to deceive or defraud;” and (3) the creditor “justifiably relied on the false representation.” *Reeves v. Davis (In re Davis)*, 638 F.3d 549, 553 (7th Cir. 2011) (citing cases); *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 each 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)).

⁶ To prevail on a claim under § 523(a)(2)(B), a creditor must prove, by a preponderance of the evidence, that the debtor made a materially false written statement about his financial condition with the intent to deceive, and that the creditor reasonably relied on the statement. *See In re Sheridan*, 57 F.3d 627, 633 (7th Cir. 1995).

The plaintiffs alleged that the defendant made a material misrepresentation that there were no known leaks in the garage or basement at the time of the sale of his house to the plaintiffs. Mr. Polanskey testified that the defendant falsely represented the condition of the house by signing the Seller's Residential Real Estate Sales Disclosure form and checking the box stating that there were no moisture or water problems in the basement or any other area. He had the burden of proving that the statement was false and that the defendant made it with knowledge of its falsity.

Mr. Polanskey gave no evidence to show that Mr. Wendt knew, at the time of the sale of his home, of any mold, water, or drainage problems. The plaintiff argued instead that the evidence made clear that the defendant must have known. The evidence at trial demonstrated that Mr. Polanskey himself did not discover signs of leakage or mold during his own inspections of the home prior to the sale or when he moved into the home on June 16, 2007. Nor did he notice indicia of moisture on his own possessions stored in the garage before he moved into the house. He first reported seeing water leaks in August and again five months later. His photographic evidence of damage was taken in January 2008, nine months after the purchase. However, the evidence concerning conditions at the time of the sale reflected no water problems: (a) Mr. Polanskey's own inspection of the home found no damage; (b) the evidence of his inspector's 21-page report affirmatively stated that there were no water problems; and (c) the Seller's Disclosure form, completed by the defendant and his realtor, stated that there was no history of water leakages. All the evidence concerning the condition of the house at the time of the sale was consistent; there was not a scintilla of evidence of water damage. The court finds that the plaintiffs failed to prove, by a preponderance of the evidence, that there were water or moisture problems at the time of the sale, that the defendant knew of such difficulties, and that he gave a false declaration in the Seller's Disclosure form by checking the "no" box to the question whether there were moisture problems.

The court further finds that the plaintiffs were unsuccessful in demonstrating that the defendant intended to deceive the plaintiffs about the water problems in the basement and garage. *See In re Davis*, 638

F.3d at 553 (“Whether [the defendant] possessed the requisite intent is a question of fact.”). It notes first that the plaintiffs’ Complaint contained no allegation of the defendant’s intent to deceive. At trial, however, the testifying plaintiff focused on the hole in the garage wall to prove Mr. Wendt’s fraudulent intent. Mr. Polanskey testified that he did not find the hole in the garage wall until after the sale. He insisted that the defendant placed the hole in the wall to allow drainage of water that seeped into the garage, and that he hid the hole intentionally from the purchasers. The defendant’s son and friend testified that the hole was used for access to the garden hose and electric cord, to attach the weed-eater, and not for drainage. The only evidence on this issue was the testimony of the witnesses. The court found that the explanations given by the defendant’s two witnesses were completely plausible and more credible than the plaintiff’s theory, which was devoid of any evidence to support his theory. In fact, the court found the defendant’s witnesses candid, straightforward, and very credible, and the plaintiff less trustworthy in his assessment of the facts and circumstances. *See In re Davis*, 638 F.3d at 554 (finding no clear error in bankruptcy court’s weighing of the credibility of the parties’ testimony). The plaintiffs had the burden of proving, by a preponderance of the evidence, that the defendant engaged in fraud: that he knew that the hole was made and used to drain water out of the garage and that he deliberately omitted telling the plaintiffs about it, in order to deceive them. The court finds they were unsuccessful in proffering sufficient evidence of the defendant’s material omission or of his fraudulent intent concerning water in the garage.⁷

Concerning his allegations of water and moisture in the basement, Mr. Polanskey gave evidence of the defendant’s deceit by presenting testimony and photographs of mold and water damage readily visible in the photographs taken in January 2008. He testified that he, a professional carpenter, knew that the damage had been there for much longer than the months they owned the house. However, because the evidence of the water damage was visible, not latent, the court believed that a professional carpenter would have detected long-term damage before the sale of the home. Mr. Polanskey relied on his own expertise,

⁷ In the court’s view, a person intending to hide water problems in the garage would not have allowed the purchasers to store their belongings in the garage if he knew they might get wet.

not on the independent research of an expert witness, when charging that the damage in the basement had been long-term, but failed to explain why he (and the inspector he hired) did not recognize the signs of water damage before he bought the house. *Compare, e.g., In re Dart*, 371 B.R. 75, 83 (Bankr. M.D. Pa. 2006) (contrasting obvious and hidden defects in homes, finding that debtor made misrepresentations concerning known latent defects). In light of the inspections done by the plaintiff and his inspection company prior to the purchase, the court finds the plaintiff's testimony concerning the defendant's intent to deceive lacking in evidentiary proof and credibility. It concludes that the plaintiff failed in the burden of proving by a preponderance of the evidence that the defendant intended to defraud the plaintiffs.

The final test, when seeking an exception from the discharge of a debt, was whether the plaintiffs justifiably relied on the facts the defendant represented to them. The Supreme Court made clear that whether a plaintiff justifiably relies "depends on whether, by the use of their senses and experience, Plaintiffs had the capacity to appreciate the falsity of [the plaintiff's] representations at the time they were made." *In re Russell*, 203 B.R. 303, 314 (Bankr. S.D. Cal. 1996) (citing *Field v. Mans*, 516 U.S. at 71, 116 S. Ct. at 444)). In this case, the plaintiffs could have observed the mold and water problems in the basement as they inspected the home, if the problems had been there when they inspected it. In addition, the court notes that Mr. Polanskey was not an ordinary residential home buyer; he was a contractor who bought real estate for rental units, and therefore his experience and expertise gave him additional skills upon which to rely when assessing a house purchase. In addition, as reasonable buyers the plaintiffs took the added precaution of hiring a building inspector, and that firm apprised them that there were no problems with the home before they closed the sale. The court thus finds that the plaintiffs relied on Mr. Polanskey's own qualifications and on the assessment of their independent inspector. *See Hurrell v. Barker (In re Barker)*, 2000 WL 35888262 at *11-12 (9th Cir. B.A.P. June 2, 2009) (affirming bankruptcy court's conclusion that sophisticated businessman plaintiff relied on own examination of the property and on independent inspector's report, and not on defendant's representation). It determines that any reliance the plaintiffs

placed on the defendant's representation concerning water problems was not justifiable under the circumstances.

The court concludes, after considering all the evidence in the record, the testimony of the witnesses, and the arguments of counsel, that the plaintiffs did not make the required proof, by a preponderance of the evidence, on any of the elements under § 523(a)(2)(A).

CONCLUSION

In light of the foregoing discussion, the court concludes that the plaintiffs' claim against the debtor is dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). The relief requested by the plaintiffs Jeff and Charlotte Polanskey, in their Complaint, asking that their damage claim against the defendant George Lloyd Wendt be excepted from discharge, is denied.

SO ORDERED.

/s/ HARRY C. DEES, JR.

HARRY C. DEES, JR., JUDGE
UNITED STATES BANKRUPTCY COURT