

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
THEODORE ROBERT SCHMICKER,)	CASE NO. 04-34725 HCD
)	CHAPTER 7
)	
DEBTOR.)	
)	
)	
OLSON AUCTIONS, INC.,)	
)	
PLAINTIFF,)	
vs.)	PROC. NO. 04-3148
)	
THEODORE ROBERT SCHMICKER,)	
)	
DEFENDANT.)	

Appearances:

Kevin C. Tankersley, Esq., attorney for plaintiff, P.O. Box 363, Winamac, Indiana 46996-0363; and Theodore Robert Schmicker, pro se, 1704 Smead Street, Logansport, Indiana 46947.

MEMORANDUM OF DECISION

At South Bend, Indiana, on September 30, 2005.

This is an adversary proceeding commenced by the Complaint to Determine Dischargeability filed by the plaintiff Olson Auctions, Inc. (“Olson” or “plaintiff”) on November 29, 2004. The defendant, debtor Theodore Robert Schmicker (“Schmicker” or “defendant”), appearing pro se, filed an answer on January 27, 2005. A trial on the complaint was held on July 26, 2005. The court then took the matter under advisement. For the reasons presented below, the court denies the plaintiff’s Complaint and finds the debt owed by the defendant to the plaintiff to be dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

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 debtor filed his chapter 7 petition on September 2, 2004. On Schedule F, he listed the plaintiff Olson Auctions as an unsecured creditor, in the amount of \$41,900.84.¹ The plaintiff filed his Complaint against the defendant on November 29, 2004. According to the Complaint, the plaintiff holds a default judgment debt issued by the Pulaski Superior Court against the defendant in the amount of \$41,900.84. The state court claim against the defendant was based on fraud.² Attached as Exhibit A to the Complaint was an Order of the Pulaski Superior Court stating that the debtor had failed to appear for the hearing on damages. It granted the plaintiff \$13,597.28 in damages; it also awarded triple damages, costs and fees, for a total judgment of \$41,900.84. No

¹ The court notes that other unsecured creditors are listed on Schedule F holding what appears to be the same debt arising from the same claim:

Olsen Auction, Inc. holds a claim on account for \$13,597.28 (the original state court damage award); Kevin Tankersley, plaintiff's counsel, holds a judgment debt of \$41,900.84 (the treble damage award); and Kevin Tankersley, plaintiff's counsel, also holds a claim for attorney fees of \$1,000 (as compensation for services in the state court action).

² No documentary evidence of the state court fraud determination was submitted in evidence.

appeal was taken from that judgment. The plaintiff asks that this court find that the debt is nondischargeable pursuant to 11 U.S.C. § 523.

In response, the debtor wrote a note in letter form to the Judge of this bankruptcy court at the bottom of the Payment Notice from Case Credit – a notice of payment due on May 1, 2002.³ The court construed it to be the pro se debtor's Answer. He stated:

I sold a farm and told my wife to pay off my combine. After, I sold this combine to Olson Auction. I received a bill for \$4,107.71. I called. They said I owed \$8,000, so I paid them. I was never notified till after a judgment was put against me. If I was going to defraud Olson I would not have paid \$8,000 to Case Credit, see copies of bill and check enclosed. I pray this matter will be over so I can go on. Thank you. Ted Schmicker

R. 4.

The plaintiff submitted a pretrial order on its own, without additions from the defendant. In it, the plaintiff stipulated to the following facts:

- (a) The plaintiff obtained a judgment against the defendant in the Pulaski Superior Court in the amount of \$41,900.84.
- (b) The plaintiff was listed by the defendant as an unsecured creditor in the sum of \$41,900.84.
- (c) No appeal was taken from the state court judgment, and the time for appeal has passed.
- (d) The judgment obtained in the Pulaski Superior Court was based on a complaint alleging the tort of fraud by the defendant upon the plaintiff. The defendant sold the plaintiff a combine with knowledge that there was a lien on the combine held by Case Credit Company. The defendant failed to tell the plaintiff of the lien and then failed to pay the balance owed to the lienholder, thereby subjecting the plaintiff to a lawsuit for replevin by the lienholder which the plaintiff had to pay the balance owed to the lienholder to prevent the combine from being taken from him.

R. 9 at 2-3. According to the plaintiff, the only legal issue before the court is whether the defendant can discharge a debt that was incurred by his committing fraud on the plaintiff.

On July 26 2005, the court held a trial on the Complaint. The court advised the debtor, appearing pro se, of his rights and responsibilities during the proceeding and of the procedure followed in this court. The

³ The Payment Notice, dated April 4, 2002, had printed "PAY THIS AMOUNT \$4,107.71." The debtor had crossed out that figure and had written in "\$8,000." The debtor attached to the "Payment Notice Answer" a copy of his check to Case Credit Corporation, dated April 12, 2002, in the amount of \$8,000.

only witnesses testifying at the hearing were Gary Olson, of Olson Auctions, and the debtor. From the testimony and documentary evidence presented at the trial, the court finds the following facts relevant to the resolution of this controversy.

Gary Olson has known Ted Schmicker since childhood; they grew up in the same neighborhood, and he knows him as a businessman in town. On April 2 or 3, 2002, Olson purchased a combine and grain head from Schmicker for \$17,000. After the purchase, Schmicker let him store the equipment in Schmicker's rented building until the fall, when Olson would use it in the field. When he went to pick up the equipment in August, however, the building was locked. Schmicker's wife (from whom he was separated at the time) told Olson that he wouldn't get the equipment until the lien was paid. Olson accused Schmicker of selling him the equipment without advising him that there was a lien on it.

Olson eventually did retrieve the combine and used it that fall. When he later found the grain head sitting outside of the building, he just picked it up. He contacted Schmicker, after he became aware of the lien, but "got no satisfaction that he [Schmicker] was going to do anything to satisfy the lien." Tr. at 8. Schmicker told Olson that he had given his wife the money to pay off the lien; he did not know what she had done with the money. Olson talked to Schmicker on the phone twice again, and once he indicated that he would take legal action. Schmicker told him that there wasn't anything he could do. He said that his wife had taken money out of his business that he had put into it, and that Olson should do whatever he "needed to do." Tr. at 10.

The following July, the Case International Harvester dealer telephoned Olson. He wanted to pick up the combine because the lien had not been paid. Olson demanded proof of the lien. In September 2003, he received a Complaint from Case Credit concerning the outstanding lien. *See* Pl. Ex. 2, "Complaint on Contract and Request for Replevin," filed by New Holland Credit Company against Schmicker and Olsen (spelled in that manner).⁴ After consulting with his attorney, Olson refinanced the combine and paid \$13,597.28 for the release

⁴ No explanation of the relationship between New Holland Credit Company ("NHCC") and Case Credit was given at trial. The complaint, filed in Cass County Superior Court on September 16, 2003, alleges that NHCC (continued...)

of the lien so that he could keep the equipment. Although Schmicker was named as a co-defendant, Olson believed that he never responded to the complaint or paid anything. In all, Olson paid \$17,000 to Schmicker for the equipment, \$13,597.28 to New Holland Credit Company for release of the lien, and \$1,000 to his attorney to defend him and to negotiate on his behalf.

Olson then sued Schmicker in Pulaski Superior Court, seeking costs plus treble damages. On May 7, 2004, the court Order granted Olson damages of \$13,597.28, then tripled the amount and added court costs and attorney fees, for a total judgment of \$41,900.84. *See* R. 1, Ex. A.

Olson insisted that Schmicker never advised him that there was a lien on the combine or that he would not pay it off. Olson relied on the fact that there was no lien when he purchased the combine. He testified:

I made an assumption, we agreed on the price of the combine. You know, I've know Ted for quite a few years, and he had a business in town, and I just – I just in no way thought that that would happen, that the lien would – if there was a lien and I bought the combine, it wouldn't be satisfied.

Tr. at 16.

When Schmicker presented his testimony at trial, he filled in parts of the story, and Olson did not challenge his facts. Schmicker had asked Olson to include the combine and head in his summer auction sale. Olson replied that his son wanted a rotary combine and asked Schmicker what price he wanted for it. The defendant told him he didn't know what the price should be, but that he didn't owe anything on it. They arrived at a sale price of \$17,000 for the equipment. As far as Schmicker was concerned, although they might have been worth more, \$17,000 was a fair price for the combine and the head. Also, he insisted that, as far as he knew, there was no lien on them.

Six or eight months after the sale, when Olson contacted Schmicker about the lien, Schmicker said to him, "If there is a lien, she [his wife] didn't pay." Tr. at 16. He explained that he and his wife were going

⁴(...continued)

holds the perfected lien in the equipment under the retail installment sale contract and security agreement Schmicker and Kenney Farm Implements, Inc. signed. It further alleges that Schmicker failed to make payments and that "Olsen" had possession of the equipment. The complaint demands payment, possession and replevin from Schmicker and/or Olsen, by virtue of any ownership interest each may claim in the equipment.

through an ugly divorce, that there was a restraining order against him, and that he could not go to his house or business. But he said he'd check into it.

Schmicker had purchased the used combine and head on October 30, 1998, from Kenney Farm Implements, Inc., for \$50,431.80. He had financed the purchase with Case Credit, with payments scheduled over a five-year period. He did not recall the name of the financing company involved, but agreed, when he saw Plaintiff's Exhibit 3, that he had entered into a security agreement with Case Credit to purchase the combine. When asked why he didn't know there was a lien on it, he testified: "Because I asked my wife to pay it off when I sold my farm, and then we had an insurance agency and bail bonds; we had plenty of money." Tr. at 20. Schmicker explained that his business was insurance and bail bonds, but that he also was involved in farming. His wife was responsible for paying all their bills, including paying off that equipment. Because he had told her to pay off that debt, he assumed that the loan had been paid off. He did not check to see if it had been paid off.

After Olson called him, however, Schmicker asked his wife why the combine had not been paid off. She told him she had too many bills to pay. She also told him that \$8,000 would pay off the lien, and so he sent Case Credit a check for \$8,000 on April 12, 2002. He stated: "At the time I paid him \$8,000, I had \$19,000 in my farm checking. I would have sent him the whole thing if I knew there was \$18,000 owed against it." Tr. at 28.

Sometime later, Schmicker called Case Credit and was told that he still owed \$11,000 or more. At that point, however, he could not pay, because he had lost everything in the divorce. He testified that he had an insurance business and a farm. "The next thing I knew, I was restrained out of the office, out of my home. Wound up losing my home; she got my home in court, the business, everything. I had nothing." Tr. at 29.

Speaking on his own behalf, the defendant testified that he lost 30 years of personal belongings, carpenter tools, farm machinery, and even the farm. He vehemently denied that Olson was misled into buying the equipment – because he had no inkling that there was a lien on the property at the time. He also insisted that he was not notified about the lawsuit filed by Olson Auctions against him in the Pulaski Superior Court or of the

hearing and judgment in Cass County. When he talked to his attorney about the judgment, however, his lawyer told him just to file bankruptcy. That's what he did.

In his closing argument, counsel for the plaintiff argued that the debt to Olson was incurred through actual fraud and that Schmicker's defense that he didn't know of the lien wasn't supportable by the evidence. Schmicker had signed a security agreement, with payments through 2003. He admitted that he knew he had taken out a loan on the combine, but he then told Olson that he didn't owe anything. That was a material misrepresentation, but Olson took him at his word. Schmicker had no documentation that the equipment had been paid off, but he assumed it had. He should have known that his material misrepresentation would have led Olson to purchase the combine. He urged the court to find that the debt should not be discharged.

Discussion

Olson claims that Ted Schmicker made a material misrepresentation to Gary Olson when he said that he didn't owe anything on the equipment that Olson purchased from him. The plaintiff asks the court to find that the state court default judgment, in the amount of \$41,900.84, is nondischargeable under § 523 of the Bankruptcy Code.⁵ The plaintiff does not specify which subsection of § 523 is applicable. Fraudulent misrepresentations fall under 11 U.S.C. § 523(a)(2)(A), and so that subsection will be the court's designated legal test in this case. The issue before the court, therefore, is whether Olson has demonstrated that the defendant's obligation to the plaintiff is excepted from its discharge under § 523(a)(2)(A). That section provides that an individual debtor is not discharged from any debt —

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by —

(A) false pretenses, a false representation, or actual fraud

⁵ The plaintiff was successful in his state court action. However, his recovery was by default, and there are no factual findings and legal conclusions from the state court decision that would allow this court to determine whether the state court judgment was based upon the same proof of fraud required in this court's dischargeability determinations. The plaintiff wisely has not asked this court to apply collateral estoppel or res judicata herein. Instead, the court will make its own findings based upon the testimony and documentary evidence brought at trial.

11 U.S.C. § 523(a)(2)(A).

It is the goal of the Bankruptcy Code to provide a debtor with a fresh start. To preserve and further that policy, “exceptions to discharge are to be construed strictly against a creditor and liberally in favor of a debtor.” *In re Scarlata*, 979 F.2d 521, 524 (7th Cir. 1992) (quoting *In re Zarzynski*, 771 F.2d 304, 306) (7th Cir. 1985)). To succeed under § 523(a)(2)(A), a creditor has the burden of proving by a preponderance of the evidence that the debt owed to it by the debtor was obtained by actual fraud, false pretenses, or misrepresentation. *See McClellan v. Cantrell*, 217 F.3d 890, 893-94 (7th Cir. 2000) (stating that fraud is not limited to misrepresentations and misleading omissions); *In re Bero*, 110 F.3d 462, 465 (7th Cir. 1997) (setting forth burden of proof). The creditor in this case must establish that (1) the debtor sold him the equipment through representations that the debtor either knew to be false or made with such reckless disregard for the truth as to constitute willful misrepresentation; (2) the debtor acted with an intent to deceive the creditor; and (3) the creditor justifiably relied on the debtor’s false representations to its detriment. *See In re Sheridan*, 57 F.3d 627, 635 (7th Cir. 1995); *Mayer v. Spanel Int’l, Ltd.*, 51 F.3d 670, 673 (7th Cir.), *cert. denied*, 516 U.S. 1008 (1995); *In re Maurice*, 21 F.3d 767, 774 (7th Cir. 1994); *see also Field v. Mans*, 516 U.S. 59, 74-75, 116 S. Ct. 437, 446, 133 L.Ed.2d 351 (1995) (holding that a creditor’s reliance need only be justifiable, not reasonable). The intent to defraud or deceive is a factual question usually determined by circumstantial evidence and may be inferred if the totality of the circumstances “present[s] a picture of deceptive conduct by the debtor which indicates he intended to deceive or cheat the creditor.” *Leeb v. Guy (In re Guy)*, 101 B.R. 961, 978 (Bankr. N.D. Ind. 1988); *see also WebMD Practice Services, Inc. v. Sedlacek (In re Sedlacek)*, 327 B.R. 872, 887 (Bankr. E.D. Tenn. 2005). “Proof of intent for purposes of Section 523(a)(2)(A) must be measured by a debtor’s subjective intention at the time of the transaction in which the debtor obtained the money, property or services.” *Nite Lite Signs and Balloons, Inc. v. Philopulos (In re Philopulos)*, 313 B.R. 271, 282 (Bankr. N.D. Ill. 2004).

The case set forth by Olson at trial was focused on Schmicker’s misrepresentation that he did not owe anything on the combine and head and his failure to disclose to Olson the fact that Case Credit had a lien on that

equipment purchased by Olson. The court finds that Olson has demonstrated, by a preponderance of the evidence, that Schmicker obtained the \$17,000 payment from Olson by means of a material misrepresentation. *See Regency Motors, Inc. v. Barnes (In re Barnes)*, 287 B.R. 195, 199 (Bankr. E.D. Mo. 2001) (“The lack of a lien on the vehicle was a material issue in Regency’s decision to purchase the car.”). The central issues in this case, therefore, are the remaining two prongs of the § 523(a)(2)(A) test, the defendant’s intent to deceive or defraud and the plaintiff’s justifiable reliance. The plaintiff must prove both elements of the test.

The court turns first to the intent issue. According to the testimony of Gary Olson, Schmicker never told him that there was a lien; in fact, he said that he didn’t owe any money on the equipment. Schmicker had signed a security agreement and had no documentation that the debt contract had been paid in full and that the lien had been lifted. Olson claimed that Schmicker materially misrepresented the fact that there was a lien and should have known there was a lien.

The defendant conceded that he had signed the security agreement and that he told Olson that he didn’t owe anything on the combine. He testified that he had no idea there still was a lien; his nondisclosure of a lien was not intentional. According to the defendant, his wife always paid the bills and he had told her to pay off this lien. When she later told him that there were too many bills to pay off the lien, he asked her how much still was owed. She told him \$8,000 was owed. Even though the bill received from Case Credit said that the payment due on May 1, 2002 was \$4,107.71, he crossed out that amount and wrote in \$8,000. Schmicker then wrote a check on April 12, 2002, to Case Credit for \$8,000. He believed that the \$8,000 payment was the final payment on the equipment. He denied that he ever intended to deceive Olson.

The crucial time period, when considering the defendant’s intent, is the time of the transaction in which the defendant obtained money from the plaintiff. In this case, therefore, the court looked at the circumstances surrounding the sale of the equipment to Olson. Although each witness told a different part of that

episode, neither challenged the testimony of the other witness and both appeared to be credible and forthright. The two men had known each other a long time and had done business together. Schmicker asked Olson to sell the farm equipment at his auction, and Olson asked if, instead, he could purchase it for his son's use. Schmicker told Olson that he didn't owe any money on it, and they simply agreed on a price of \$17,000. Neither party checked to see if there was a lien on the combine and head. In the view of the court, an auctioneer usually would conduct such an investigation. However, each trusted the other; each took the word of the other. Olson left the equipment in Schmicker's possession until the fall, and Schmicker never mentioned a charge for the storage. As Olson testified at the hearing, they had known each other quite a few years, and he assumed Schmicker was telling the truth. Furthermore, he never thought that, once they realized there was a lien, that Schmicker would not satisfy it.

It is clear to the court that, at the time Olson bought Schmicker's equipment, Schmicker did not act with an intent to deceive Olson. The court found Schmicker's testimony to be credible and plausible. In the view of the court, after considering the totality of the circumstances, Schmicker's statement to Olson that he owed nothing on the equipment, even though he was mistaken in that understanding, was not dishonest or intended to trick Olson into purchasing the equipment. *See General Elec. Capital Corp. v. Acosta (In re Acosta)*, 406 F.3d 367, 374 (5th Cir. 2005) (concluding that it is plausible that the debtor, although mistaken in his understanding of matters, acted without dishonest intent). Moreover, the defendant's later actions – paying the \$8,000 to Case Credit as soon as his wife told him of the existing lien, and testifying that he would have paid off the entire lien, if he had known that more was owed, because at that time he had the funds to pay it – bolstered Schmicker's assertion that he did not intend to defraud Olson when he sold him the equipment. *See In re Barnes*, 287 B.R. at 199 (focusing issue of intent “on whether the debtor's actions appear so inconsistent with his self-serving assertion of honest intent that the evidence leads the court to disbelieve the debtor”) (citation omitted). The court determines that the defendant did not intentionally fail to disclose the lien or deliberately misrepresent that nothing was owed on the combine and head. Without evidence that the defendant intended to deceive the

plaintiff, the court now finds that the plaintiff has failed to carry its burden of proving the defendant's intent to deceive it by a preponderance of the evidence. *See id.* at 201 (finding that debtors had a good faith belief that they had clear title to the car, and that the creditor failed to establish that they acted with intent to commit fraud); *Raimi v. Kalinowski (In re Kalinowski)*, 27 B.R. 114, 116 (Bankr. M.D. Fla. 1983) (finding that the debtors' failure to mention an assignment of their mortgage, because they believed it to be invalid, was not intentional misrepresentation; also finding that there was no showing of actual intent to mislead or defraud).

Accordingly, the court determines that the debt the defendant owes to the plaintiff is dischargeable in the defendant's bankruptcy.

Conclusion

For the reasons set forth above, the Complaint to Determine Dischargeability filed by plaintiff Olson Auctions, Inc. against the defendant debtor Theodore Robert Schmicker is denied.

SO ORDERED.

/s/ HARRY C. DEES, JR.
Harry C. Dees, Jr., Chief Judge
United States Bankruptcy Court

Copy by United States mail to: Theodore Robert Schmicker