

NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN RE: CASE NO. 13-12883)
)
SHANE ALLEN MONTGOMERY)
ANDRENETTE DESHAY LEE)
MONTGOMERY)
)
Debtors)
)
)
SERGIO S. HERNANDEZ-GUTIERREZ)
)
Plaintiff)
)
vs.) PROC. NO. 13-1148
)
)
ANDRENETTE DESHAY LEE)
MONTGOMERY)
)
Defendant)

DECISION

On June 10,
2015

This case does not ask whether the debtor breached her obligations to the plaintiff – she clearly did – or whether the plaintiff was damaged by the debtor’s conduct – he clearly was. Instead, it asks whether the plaintiff was defrauded in some way. Plaintiff seeks a declaration that the debtor/defendant’s obligation to him is non-dischargeable, under § 523(a)(2)(A) of the United States Bankruptcy Code, as a “debt for money, property, [or] services . . . obtained by – false pretenses, a false representation, or actual fraud . . .” 11 U.S.C. § 523(a)(2)(A). The matter is before the court following trial of that issue.

It is often said that only “honest but unfortunate” debtors may discharge their debts. Marrama v. Citizens Bank, 549 U.S. 365, 367, 127 S.Ct. 1105, 1107 (2007); Grogan v. Garner, 498

U.S. 279, 286-87, 111 S.Ct. 654, 659 (1991); Local Loan Co. v. Hunt, 292 U.S. 234, 244, 54 S.Ct. 695, 699 (1934). Section 523(a)(2)(A) is part of what gave rise to that common maxim. It excepts from discharge debts that, whether by word or deed, have their roots in somehow cheating someone else. McClellan v. Cantrell, 217 F.3d 890, 893 (7th Cir. 2000). This requires some type of “moral turpitude” or “intent to deceive” on the part of the debtor. Matter of Sheridan, 57 F.3d 627, 635 (7th Cir. 1995); Gabellini v Rega, 724 F.2d 579, 581 (7th Cir.1984); In re Hunter, 780 F.2d 1577, 1579 (11th Cir. 1986); In re Black, 787 F.2d 503, 505 (10th Cir. 1986). See also, McClellan, 217 F.3d at 894. The plaintiff bears the burden of proving that the debt has such an origin, but it need only do so by a preponderance of the evidence. See, Grogan, 498 U.S. at 286, 111 S. Ct. at 659.

In March of 2012, the debtor agreed to sell the property at 2729 Radcliffe Drive to the plaintiff, pursuant to a land contract, for the sum of \$20,000, \$5,000 of which was paid upon signing and the balance at the rate of \$400 a month for thirty-seven and one-half months. The problem was that the debtor did not actually own the property. She was, herself, buying it on a land contract she had entered into with the property’s owner, Thomas Blacketor, in January of 2010, which required monthly payments of \$490 for sixty months. All might have been well, but for the debtor’s financial problems. She was in default to her contract seller when she entered into the land contract with the plaintiff. Indeed, that default appears to have been a significant reason she sought to sell the property. Although she used part of the plaintiff’s down payment to, as she believed, cure her default to Mr. Blacketor, her financial problems continued. Her post-sale payments to Mr. Blacketor were erratic and she did not even consistently remit the monthly payment she received from the plaintiff as a partial payment to her contract seller. Ultimately, things collapsed when the debtor filed bankruptcy. In order to preserve his interest in the property, the plaintiff was required to enter into

his own land contract with Mr. Blacketor, but for an amount that exceeded the balance otherwise due the debtor. Plaintiff claims that additional amount, together with the attorney fees incurred in connection with salvaging things, is non-dischargeable.

The core of the plaintiff's claim to non-dischargeability is the debtor's failure to disclose that she did not own the property when she agreed to sell it to him. Had she done so – had she revealed that she was buying it from someone else on a land contract – the plaintiff would not have agreed to the purchase. Yet, the debtor never said she was the owner and the plaintiff never asked. Nonetheless, through her actions in offering the property up for sale, unfettered access to it, and showing it to him, she led him to believe she was the owner and would be able to convey title when he paid off the contract. Plaintiff's reliance upon the impression the debtor created was justifiable: he was not required to search the real estate records to determine where title lay. Field v. Mans, 516 U.S. 59, 70, 116 S. Ct 437, 444 (1995). Even though the impression the debtor created was not true, it was not wholly false either. She had an interest in the property – equitable title – and her seller's interest was the same as a lien: Indiana views the relationship as mortgagor-mortgagee. Skendzel v. Marshall, 261 Ind 234, 301 N.E.2d 641, 646 (1973). Moreover, she had discussed her financial problems with Mr. Blacketor and believed she had his permission to find someone who could somehow take over the payments on the land contract.¹ Finally, even though the plaintiff did not know the debtor was buying the property on a land contract, he did know that her interest in it was encumbered in some way. During the course of the conversations leading up to the execution of the

¹The debtor's agreement with Mr. Blacketor prohibited her from transferring her interest under the contract without his written consent, which was never obtained. Nonetheless, such provisions are for the benefit of the contract seller – not third parties, such as the plaintiff – and may be waived. McClellan v. Beatty, 53 N.E.2d 1013, 1015 (Ind. App. 1944).

agreement and the discussion of the monthly payment, the debtor made it known that she had to make a \$490 a month payment to someone.²

The court does not need to consider any subtle distinctions between fraud, false pretenses, and false representations in § 523(a)(2)(A), the differences between actual misrepresentations, implied misrepresentations and false impressions, whether the debtor had a duty to disclose, or the degree to which the impression she created in the debtor's mind was false. This case does not turn upon the truth or falsity of what the debtor led the plaintiff to believe. Instead, it turns on the debtor's intent: her intent to deceive or, more precisely, the lack thereof.

The debtor did not intend to deceive the plaintiff. She had an interest in the property and genuinely believed she could somehow transfer that interest to someone else. None of the parties consulted an attorney with regard to the transaction until it was too late and it was apparent from the testimony that the defendant never had a good handle on the true nature of her interest in the property, her obligations under the agreement with Mr. Blacketor, or the actual extent of her default in their performance. Neither can the court conclude that the debtor had no intent to perform her obligations to either Mr. Blacketor or the plaintiff when she agreed to sell the property. Although her subsequent payments to her own seller were admittedly sporadic, that was consistent with her behavior prior to the agreement with the plaintiff. While she did not remit the full amount of the down payment she received from the plaintiff to her seller, she did pay enough to satisfy him at the time.

The debtor was struggling financially and robbing Peter to pay Paul to make ends meet. Her

²The plaintiff speaks little English. All the conversations between him and the debtor were carried on through a family friend who served as a translator, read the proposed contract and explained it to him.

agreement with the plaintiff was a do-it-yourself effort to cobble together something that would somehow help to keep her financial house together. It did not succeed. Debtor's financial difficulties ultimately overcame her and the entire structure collapsed.

While the defendant's conduct was not admirable, and may even be unfair, it was not deceitful. The court is sympathetic to the plaintiff's situation, but the evidence at trial only supports the conclusion that the debtor and the plaintiff entered into a contract which the debtor failed to perform. That is not sufficient to prove the debt is non-dischargeable. See, In re Kountry Korner Store, 221 B.R. 265, 272 (Bankr. N.D. Okla. 1998) ("fraud must be clearly distinguished from the mere failure to perform a promise, which is not fraud but breach of contract") (citations omitted). See also, 4 Collier on Bankruptcy, ¶ 523.08[1][d](16th ed.) ("failure to perform a mere promise is not sufficient to make a debt nondischargeable, even if there is no excuse for the subsequent breach.").

Debtor's obligation to the plaintiff is dischargeable. Judgment will be entered accordingly.

/s/ Robert E. Grant
Chief Judge, United States Bankruptcy Court