

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN RE:)
)
 PAUL AND MARY THOMASON,)
)
 Debtors.)
)
 JEFFREY AND PATRICIA LUCE,)
)
 Plaintiffs,)
)
 vs.)
)
 PAUL AND MARY THOMASON,)
)
 Defendants.)

BK 82-283

CV 83-

FILED
 DISTRICT OF NEBRASKA
 AT _____ M.
 OCT 12 1983
 ORDER
 William L. Olson, Clerk
 By _____ Deputy

This matter is before the Court on appeal from a judgment of the Bankruptcy Court for the District of Nebraska denying a discharge with respect to a debt owed by Paul Thomason [defendant] to Jeffrey and Patricia Luce [plaintiffs], pursuant to 11 U.S.C. § 523(a)(2)(A). The false representation or fraud for which discharge was denied appeared in a warranty deed and affidavit signed by defendant and presented to plaintiffs at a real estate closing in which defendant and his wife sold plaintiffs real property in Lincoln, Nebraska.

The deed and affidavit represented that all bills for labor and materials furnished with respect to the property had been paid and that the property was free and clear of such obligations. In fact, after plaintiffs took possession of the property, four liens were filed. Defendant signed and delivered the deed and affidavit in his capacity as seller of the property, which he had purchased from one Ronald Cronn, a contractor. However, defendant also acted throughout his dealings with plaintiffs as

their real estate broker. The Bankruptcy Court entered judgment in favor of the plaintiffs, finding a nondischargeable debt in the amount of \$6,601.25 plus interest. The judgment is affirmed.

11 U.S.C. § 523(a)(2)(A) requires proof of the following elements:

- (1) That the debtor made a false representation;
- (2) That he knew the representation was false when it was made;
- (3) That he made the representation with intent to deceive;
- (4) That plaintiffs relied on the representation; and
- (5) That plaintiffs sustained losses as a proximate result thereof.

In the Matter of Cicero, 28 B.R. 480, 482 (Bankr. E.D. Wis. 1983).

See generally, In re Cheek, 17 B.R. 875 (Bankr. M.D. Ga. 1982).

Under Local Rule 51(IV)(3), the District Court, reviewing a judgment of the Bankruptcy Court, may accord as much or as little deference to the findings of the Bankruptcy Court as the District Court determines. While this Court agrees with the Bankruptcy Court's decision in the present case, this Court has made the following findings and conclusions de novo and independently on the basis of the record.

To establish nondischargeability under section 523(a)(2)(A), a plaintiff must establish that the debtor's false representation of material fact was knowingly, intentionally and fraudulently made. Actual fraud is required, not fraud implied in law. However, since direct proof of state of mind is rarely available, fraud may be inferred from other proven facts and from the totality of the circumstances. In the Matter of Cicero, 28 B.R. at 484; In re Huckins, 17 B.R. 620, 624 (Bankr. D. Me. 1982).

The Court finds in the record a clear and convincing inference of fraudulent intent by a seller, experienced in real estate transactions, who was determined to consummate a sale, and of reliance by inexperienced buyers who were entering into their first home purchase. The Court finds plaintiffs' version of events credible as well as consistent with their actions and the other evidence in this case. On the other hand, the Court finds much of the defendant's testimony unlikely and unconvincing.

Within hours of meeting plaintiffs, defendant, acting as their real estate broker, directed them to a house which defendant was in the process of purchasing on his own behalf. Never in the course of his dealings with plaintiffs did defendant affirmatively reveal to them that he had a pecuniary interest in the house which he had showed them in his capacity as their realtor. Long after they had decided to buy the property, plaintiffs discovered from another source that defendant was in fact their seller, not just their realtor.

Plaintiffs had notified defendant that they wanted an occupancy date of December 1, 1978, as they were vacating their apartment at that time. Defendant admitted that at least a week prior to the closing date, Ronald Cronn informed him that the sewer for the property had not yet been installed and that the sewer bill remained unpaid. Defendant did not inform plaintiffs of this fact when he learned of it. As a result, plaintiffs were deprived of whatever opportunity they might have had to negotiate an extended occupancy of their apartment and were effectively denied the opportunity to rescind the agreement to purchase or at least to delay closing until all outstanding obligations had been paid.

At closing and in the presence of one loan officer, plaintiffs paid for the property, and defendant delivered to plaintiffs a warranty deed and an affidavit which represented that no amounts were then due or to become due for work or materials furnished with respect to the property. It was not until after the transaction had been completed and the loan officer had left that defendant disclosed the facts of the uninstalled sewer and the unpaid sewer bill.

After closing, plaintiffs left the loan officer's office with defendant. At this time, defendant directed them to sit down in some nearby chairs. He then disclosed to plaintiffs that their house was uninhabitable because the sewer had not been connected. He indicated that an amount would be held in escrow to pay for the sewer and offered them a daily amount for food and lodging during the period before the house became habitable. The Court finds in the timing of this disclosure an inescapable inference of intent to deceive for the purpose of pushing through what would otherwise have been an unlikely closing, if not sale.

The Court also finds it impossible to credit defendant's alleged complete reliance upon the affidavit and representations of Ronald Cronn. Despite his own status as the seller of the property to plaintiffs, his experience in real estate transactions, and his knowledge of the outstanding sewer bill, defendant made no independent investigation concerning whether other bills remained unpaid. Apparently defendant did not even require that Cronn show him statements or other proofs of payment to the contractors and suppliers who had furnished services and materials for the property. In addition, defendant had previously been

warned by other members of his real estate firm that Cronn might not be trustworthy, and on at least two occasions, Cronn had neglected to pay taxes prior to closing in transactions of which defendant was aware. Defendant's initial involvement with the property occurred because of Cronn's difficulties in obtaining financing. The Court finds defendant's protestations of good faith reliance unconvincing.

The Court concludes, therefore, that the warranty deed and the affidavit signed by defendant and delivered to plaintiffs at closing were materially false, were known by defendant to be false when made, and were made with the intent to deceive so as to consummate the sale and avoid the delay or possible rescission which would have been the likely consequence of truthful disclosure. The Court further finds that plaintiffs relied on defendant's representations and suffered losses proximately caused thereby.

The judgment of the Bankruptcy Court is hereby affirmed.

DATED this 12th day of October, 1983.

BY THE COURT:



C. ARLEN BEAM
UNITED STATES DISTRICT JUDGE