

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: )  
)  
DONALD J. DEMPKEY, )  
)  
Debtor. )  
\_\_\_\_\_)  
KIYVON & JON AUGUSTIN and ) CASE NO. BK01-41559  
THAINE & MARGARET SAUNDERS, ) A01-4066  
)  
Plaintiffs, )  
)  
vs. ) CH. 7  
)  
DONALD J. DEMPKEY, )  
)  
Defendant. )

**MEMORANDUM**

Trial on the adversary complaint was held in Lincoln, Nebraska, on October 25, 2002. Daniel Fullner appeared for the debtor/defendant, and Clark Grant appeared for the plaintiffs. This memorandum contains findings of fact and conclusions of law required by Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(I).

I. BACKGROUND

The plaintiffs in this case, Kiyvon Augustin and Thaine Saunders, are the children of Karen Dempkey. Defendant-Debtor Donald Dempkey married Karen Dempkey in 1986. At the time of the marriage, Karen Dempkey owned the home which is the subject of this litigation and after their marriage Donald and Karen Dempkey occupied the home as their marital residence.

Karen Dempkey was diagnosed with cancer in 1997. At that time, she conveyed her home to her children, Thaine Saunders and Kiyvon Augustin, and reserved a life estate in herself and husband Donald Dempkey. Karen Dempkey then died in March of 1998.

Thereafter, Donald Dempkey, pursuant to the life estate granted to him by Karen Dempkey, continued to reside in the

home.

In October of 1999, Mr. Dempkey asked Kiyvon Augustin and Thaine Saunders if they would sign a deed of trust conveying their remainder interest in the real property, for security purposes, to enable him to borrow money against his interest in the house. They agreed, and Mr. Dempkey arranged for a \$50,000 loan to be secured by a deed of trust executed by him, Thaine Saunders and Kiyvon Augustin. On the day of closing, Mr. Dempkey and Thaine Saunders signed the deed of trust, but Ms. Augustin did not. Instead, on that day or the following day, she contacted Mr. Dempkey and requested that, in consideration for her agreeing to allow him to borrow money against the house, he borrow enough money to purchase the remainder interest in the real estate held by herself and her brother Thaine Saunders. Mr. Dempkey agreed.

Ms. Augustin then had a purchase agreement drafted and she signed the deed of trust and directed her attorney not to release the deed of trust until Mr. Dempkey had signed the purchase agreement. He did so within a day or two and the deed of trust was released, the original \$50,000 loan was funded, and Mr. Dempkey made efforts to obtain an additional \$50,000 to buy out the remainder interests of the plaintiffs.

Mr. Dempkey found out shortly after the execution of the purchase agreement that the additional \$50,000 was available from the same lender as had made the earlier loan, but his monthly payments would increase from approximately \$500 per month to \$850 per month. He determined that he could not afford to make the payments and, therefore, did not close on the loan. He then listed the property for sale in an attempt to come up with enough money to pay off his original loan and to pay the \$50,000 obligation to the plaintiffs. For one reason or another, the house did not sell and the listing with the real estate agent expired.

On the date of Karen Dempkey's death and as of the date of trial, the value of the home exceeded \$100,000.

Mr. Dempkey, at the time of trial, was 49 years old. Although no evidence was presented as to his life expectancy, it is assumed for the purposes of this order that unless he purchases the remainder interest of the plaintiffs, they will receive no funds and no benefit from the remainder interest until his death which may be several years from now.

Prior to the transaction involving the deed of trust and purchase agreement, plaintiffs had a remainder interest in a parcel of real estate with a value of more than \$100,000 and no debt against it. Now, because of the transaction, they have a remainder interest in real estate having a value of more than \$100,000, but encumbered to the extent of \$50,000 less whatever payments Mr. Dempkey has made. If Mr. Dempkey actually pays off the note which is secured by the deed of trust against the real estate, the plaintiffs will be in the same position that they were in prior to the execution of the deed of trust. That is, they will still retain a remainder interest, as contemplated by their mother, and it will be unencumbered. They will receive the benefit of the conveyance from their mother upon the death of Mr. Dempkey, which may be years from now. On the other hand, if Mr. Dempkey dies without paying the note which is secured by the deed of trust, the plaintiffs will receive the value of the remainder interest, less the balance of the note.

Prior to bankruptcy the plaintiffs sued Mr. Dempkey in state court for specific performance of the real estate purchase agreement. Prior to the time that case went to judgment, Mr. Dempkey filed his bankruptcy proceeding. Plaintiffs then filed this adversary proceeding, requesting that the court order specific performance of the real estate transaction and enter an order finding that the obligation of Mr. Dempkey to pay \$50,000 for the remainder interests held by the plaintiffs is nondischargeable. It is the position of the plaintiffs that Mr. Dempkey fraudulently induced them to execute the deed of trust by misrepresenting his intent to purchase their remainder interest for \$50,000. The action is brought under 11 U.S.C. § 523(a)(2)(A) which provides that a discharge shall not be granted to an individual debtor from any debt for money, property, services, or an extension, renewal, or refinancing of credit to the extent obtained by false pretenses, a false representation, or actual fraud.

## II. LAW

For a debt to be declared nondischargeable under § 523(a)(2)(A) for fraud, the creditor must show, by a preponderance of the evidence, that: (1) the debtor made a representation; (2) the representation was made at a time when the debtor knew the representation was false; (3) the debtor made the representation deliberately and intentionally with the intention and purpose of deceiving the creditor; (4) the creditor justifiably relied on such representation; and (5) the

creditor sustained a loss as the proximate result of the representation having been made. Universal Bank, N.A. v. Grause (In re Grause), 245 B.R. 95, 99 (B.A.P. 8th Cir. 2000) (citing Thul v. Ophaug (In re Ophaug), 827 F.2d 340, 342 n.1 (8th Cir. 1987), as supplemented by Field v. Mans, 516 U.S. 59 (1995)). In Field v. Mans, the Supreme Court held that § 523(a)(2)(A) requires justifiable reliance, in which "[j]ustification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than the application of a community standard of conduct to all cases." Id. at 71 (citing the Restatement (Second) of Torts § 545A cmt. b (1976)).

The focus of a § 523(a)(2)(A) determination is whether the debtor ever intended to pay the obligation.

To qualify as a false representation or false pretense under § 523(a)(2)(A), the statement must relate to a present or past fact. Shea v. Shea (In re Shea), 221 B.R. 491, 496 (Bankr. D. Minn. 1998). "[A debtor's] promise . . . related to [a] future action [which does] not purport to depict current or past fact . . . therefore cannot be defined as a false representation or a false pretense." Id. (quoting Bank of Louisiana v. Bercier (In re Bercier), 934 F.2d 689, 692 (5th Cir. 1991)). A debtor's promise related to a future act can constitute actionable fraud, however, where the debtor possesses no intent to perform the act at the time the debtor's promise is made. Universal Pontiac-Buick-GMC Truck, Inc. v. Routson (In re Routson), 160 B.R. 595, 609 (Bankr. D. Minn. 1993).

Gadtke v. Bren (In re Bren), 284 B.R. 681, 690 (Bankr. D. Minn. 2002).

"The intent element of § 523(a)(2)(A) does not require a finding of malevolence or personal ill-will; all it requires is a showing of an intent to induce the creditor to rely and act on the misrepresentations in question." Merchants Nat'l Bank v. Moen (In re Moen), 238 B.R. 785, 791 (B.A.P. 8th Cir. 1999) (quoting Moodie-Yannotti v. Swan (In re Swan), 156 B.R. 618, 623 n.6 (Bankr. D. Minn. 1993)). "Because direct proof of intent (i.e., the debtor's state of mind) is nearly impossible to obtain, the creditor may present evidence of the surrounding circumstances from which intent may be inferred." Id. (quoting Caspers v. Van Horne (In re Van Horne), 823 F.2d 1285, 1287 (8th

Cir. 1987)). The intent to deceive will be inferred when the debtor makes a false representation and knows or should know that the statement will induce another to act. Id. (quoting Federal Trade Comm'n v. Duggan (In re Duggan), 169 B.R. 318, 324 (Bankr. E.D.N.Y. 1994)).

### III. FACTS & DISCUSSION

From the evidence presented, I find no false representation having been made by Mr. Dempkey. After Ms. Augustin and Mr. Saunders agreed to execute the deed of trust which would allow Mr. Dempkey to borrow the original money, and after Mr. Saunders executed the deed of trust, Ms. Augustin requested that Mr. Dempkey agree to purchase the plaintiffs' interest in the property or she would not sign the deed of trust. He agreed to purchase the interest in the property. He attempted to finance that purchase. He made a determination that the cost of the financing of the purchase was something he could not handle and declined to complete the financing transaction. He then listed the property for sale, with the intention of receiving sufficient funds to pay his debt and to pay the \$50,000 to the plaintiffs. The sale did not occur and he breached his contract to purchase.

The fact that he breached his contract to purchase is not evidence of his original intentions with regard to the purchase agreement. In contrast, his willingness to go forward with the lending institution to obtain information about his ability to finance the purchase, and his later willingness to list the property for sale, are indicative of his original intent, which was to satisfy the concerns of Ms. Augustin and purchase her remainder interest.

Because I have found that the debtor did not make a false representation, it follows that his contract obligation to purchase the property cannot be excepted from discharge under 11 U.S.C. § 523(a)(2). There is, therefore, no legal or factual reason for the court to reach the issue of "specific performance" of the contract, because the contract obligation is discharged.

Before agreeing to execute the deed of trust for the benefit of Mr. Dempkey, as mentioned above, the plaintiffs held remainder interests in unencumbered real property, subject to the life estate of Mr. Dempkey, who was then approximately 47 years old. Had they gone forward with the original agreement,

as Thaine Saunders did, they would now be the holders of remainder interests subject to an encumbrance, but an encumbrance which they voluntarily allowed to be imposed upon their remainder interest. Whether the amount of the encumbrance was \$30,000, the amount originally discussed by the parties, or \$50,000, the amount ultimately borrowed, the legal significance of the transaction is that they had originally agreed to allow the imposition of a lien upon their future interest. There is no claim in this adversary proceeding that Mr. Dempkey engaged in any fraud with regard to the original request that they execute a deed of trust.

This adversary proceeding does not assert that their contingent liability for Mr. Dempkey's loan, by virtue of the existence of the encumbrance upon their remainder interest, should be held nondischargeable. They simply suggest that they would not have finally agreed to execute the deed of trust but for the fact that he agreed to purchase their remainder interest for \$50,000. There is no question that he has breached that contract to purchase. However, the fact of a contract and a breach does not give rise to a claim of nondischargeability without evidence of a fraudulent misrepresentation. Plaintiffs are now without the benefit of their bargain, the sale of their remainder interest, but they are left with the benefit of their original bargain, an encumbrance on their remainder interest, which may be released by full payment prior to the death of Mr. Dempkey. The harm to them, if any, is that they will have to await the death of Mr. Dempkey to enjoy the gift from their mother. That apparently was her original intent, and they have not presented sufficient evidence from which I can find a fraudulent representation.

Judgment shall be entered in favor of the defendant and the obligation which is the subject matter of this adversary proceeding shall be discharged.

DATED: February 10, 2003

BY THE COURT:

/s/Timothy J. Mahoney  
Chief Judge

Notice given by the Court to:

\*Clark J. Grant, P.O. Box 455, Columbus, NE 68602-0455  
Daniel J. Fullner

United States Trustee

Movant (\*) is responsible for giving notice of this journal entry to all other parties not listed above if required by rule or statute.

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Defendant. )

**JUDGMENT**

Trial on the adversary complaint was held in Lincoln, Nebraska, on October 25, 2002. Daniel Fullner appeared for the debtor/defendant, and Clark Grant appeared for the plaintiffs.

IT IS ORDERED: For the reasons set forth in the Memorandum of today's date, judgment is hereby entered in favor of the defendant. The obligation which is the subject matter of this adversary proceeding is discharged.

DATED: February 10, 2003

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