

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
ANGELA CHRISTI WHITE,
Debtor.

Case No. 02-28694-L
Chapter 7

Builder Resource Corp.,
Plaintiff,

v.

Adv. Proc. No. 02-0590

Angela Christi White,
Defendant.

**ORDER GRANTING IN PART AND DENYING IN PART
DEFENDANT'S RENEWED MOTION TO DISMISS FOR FAILURE TO STATE
A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

BEFORE THE COURT is the Renewed Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted filed by the defendant on October 2, 2002. The defendant asserts that the Amended Complaint to Deny Dischargeability of Debt, filed by the plaintiff, Builder Resource Corp. ("Builder Resource") on September 26, 2002, should be dismissed pursuant to FED. R. BANKR. P. 7012, which incorporates FED. R. CIV. P. 12(b)(6), for failure to state a claim upon which relief can be granted. For the reasons stated below, the motion will be granted in part and denied in part. This is a core proceeding. 28 U.S.C. § 157(b)(2)(I).

The complaint essentially alleges that the defendant/debtor is a general contractor who caused Builder Resource to supply building materials to six properties during 2001-02. The building materials were incorporated into homes constructed at these properties. The debtor/defendant sold the completed homes to third parties but did not pay Builder Resource for the building materials.

The defendant filed a voluntary petition for relief under Chapter 7 on May 24, 2002, and Builder Resource timely filed its complaint to determine dischargeability on July 10, 2002. The court granted the defendant's initial motion to dismiss for failure to state a claim, but gave Builder Resource an opportunity to amend its complaint. The amended complaint was filed September 26, 2002, and the renewed motion to dismiss was filed October 2, 2002. The amended complaint alleges that the debt to Builder Resource is nondischargeable pursuant to 11 U.S.C. §§ 523(a)(2)(A); (a)(2)(B); (a)(4); and/or (a)(6).

With respect to the claim under section 523(a)(2)(B), the amended complaint fails to allege that the debtor gave any statement in writing concerning its financial condition upon which Builders Resource relied in extending credit to the defendant. Typically, a complaint would allege that the defendant gave a financial statement or completed a credit application in order to induce the plaintiff to extend credit. Builder Resource has been given a second opportunity to plead facts sufficient to state a cause of action under this section but has failed to do so. The motion to dismiss will be granted as to the claim pursuant to section 523(a)(2)(B).

Section 523(a)(2)(A) does not require that the defendant make a false representation to the plaintiff, but only that the defendant obtain money, property, services, etc. by false pretenses, a false representation or actual fraud. "Fraud is a generic term, which embraces all the multifarious means which human ingenuity can devise and which are resorted to by one individual to gain an advantage over another by false suggestions or by the suppression of truth. No definite and invariable rule can

be laid down as a general proposition defining fraud, and it includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated.” *McClellan v. Cantrell*, 217 F.3d 890, 893 (7th Cir. 2000) quoting *Stapleton v. Holt*, 207 Okla. 443, 250 P.2d 451, 453-54 (Okla.1952). In this case, the plaintiff has alleged that the defendant sold the completed homes and received payment for them by making false representations to third parties to the effect that all the properties were being sold “free, clear, and unencumbered except for subdivision restrictions, building lines and easements of record and possibly taxes not yet due and payable” and that “there were no outstanding repairs for which repairmen had not been paid.” The complaint alleges that these statements were false because Builder Resource had not been paid for the materials it supplied for construction of the homes. The allegations of the amended complaint state a claim under section 523(a)(2)(A).

With respect to Builder Resource’s claim under section 523(a)(4), the court notes that Tennessee Code Annotated § 66-34-304 creates a statutory trust for the benefit of subcontractors, material suppliers and furnishers. That section provides:

66-34-304. Payments held in trust by contractor. –Any sums received by the contractor for work, services, equipment and materials supplied by the subcontractor, material supplier or furnisher for the improvements to real property shall be held by the contractor in trust for the benefit and use of such subcontractor, material supplier or furnisher and shall be subject to all equitable remedies.

Any payments received by the defendant/debtor from the sale of completed homes were impressed by a statutory trust in favor of unpaid subcontractors and suppliers. It is not necessary for the court to fashion a constructive trust to accomplish this result. The statutory trust gives rise to fiduciary

obligations, violation of which may give rise to a cause of action under section 523(a)(4). *See Carlisle Cashway v. Johnson (In re Johnson)*, 691 F.2d 249 (6th Cir. 1982) (statutory trust created by Michigan's Building Contract Fund Act gives rise to fiduciary capacity for purposes of section 523(a)(4)); *Capitol Indemnity Corp. v. Interstate Agency, Inc. (In re Interstate Agency, Inc.)*, 760 F.2d 121, 124 (6th Cir. 1985) (statutory trust created under Michigan Insurance Code gives rise to fiduciary capacity for purposes of section 523(a)(4)); *but see, R.E. America v. Garver (In re Garver)*, 116 F.3d 176, 178 (6th Cir. 1997) (attorney-client relationship does not satisfy fiduciary capacity requirement of section 523(a)(4)). Where the complaint alleges that funds were received from the sale of improved real estate as payment for materials supplied by a material supplier, and that the contractor used these funds for some purpose other than payments of suppliers, a cause of action is stated under section 523(a)(4).

Finally, with respect to plaintiff's claim for willful and malicious injury under section 523(a)(6), Builder Resource has alleged that the defendant, at the time of closing of sales of properties, knowingly made false statements to third parties that prevented Builder Resource from receiving payment for materials it supplied. Plaintiff certainly could have said more, and must say more in order ultimately to prevail on this claim, but when these allegations are construed in the light most favorable to the plaintiff, it is not clear that the plaintiff can prove no set of facts in support of this claim that would entitle it to relief. *See Mixon v. Ohio*, 193 F.3d 389, 400 (6th Cir. 1999).

In re Angela Christi White
Chapter 7 Case No. 02-28694-L
Builder Resource Corp. v. Angela Christi White
Adv. Proc. No. 02-0590
Order on Defendant's Renewed Motion to Dismiss

Accordingly, it is ORDERED that the motion to dismiss is GRANTED as to the claim under 11 U.S.C. § 523(a)(2)(B), but is DENIED as to all remaining claims.

BY THE COURT,

JENNIE D. LATTA
United States Bankruptcy Judge

Date: _____

cc: Plaintiff
Plaintiff's Attorney
Defendant
Defendant's Attorney

C:\Documents and Settings\tamami\Desktop\Pre-cm.op\jdl20021031nn1.htm