

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

IN RE

**Gerald Wilkerson
DBA Wilkerson Home Improvement,

Debtor.**

**Case No. 98-11490

Chapter 7**

**Roy Dunning and Ruth Dunning,

Plaintiff,**

v.

Adv. Pro. No. 98-5243

**Gerald Wilkerson,

Defendant.**

**MEMORANDUM OPINION AND ORDER RE
COMPLAINT TO DETERMINE DISCHARGEABILITY OF
DEBT PURSUANT TO 11 U.S.C. § 523**

At issue in this case is a pre-petition home improvement contract the plaintiffs entered into with the debtor/defendant. In filing this complaint, the plaintiffs allege that the debtor/defendant entered into the contract with the fraudulent intent to obtain as much money as possible from the plaintiffs without ever intending to complete the work. The debtor/defendant, on the other hand, asserts that he entered into the contract with every intention of completing the project, but later realized he had significantly underbid the project and was unable to finish the remodeling as a result of financial constraints.

The Court conducted a trial in this matter on December 9, 1998. FED. R. BANKR. P. 7001. Pursuant to 28 U.S.C. § 157(b)(2), this is a core proceeding. After reviewing the testimony from the trial and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACTS

In June of 1997, the Plaintiffs, Roy and Ruth Dunning, (hereinafter “Dunnings”), entered into a contract with the debtor/defendant, Gerald Wilkerson, (hereinafter “Wilkerson”), wherein Wilkerson agreed to do certain work on a home owned by the Dunnings in Gleason, Tennessee. The overall contract price was \$25,500. According to the contract, the Dunnings paid Wilkerson \$12,000 of the

contract price at the time of signing, with the remaining “balance to be paid as needed.” The contract does not set forth how the \$25,500 was to be divided among supplies and labor. The contract lists nine (9) tasks Wilkerson agreed to complete for the Dunnings, but does not describe these tasks with any specificity. The contract merely lists the work as follows: “siding, bed room, living room, kitchen, 3 rooms upstairs, wiring, 2 baths, ins[ulate], garage.”

In accordance with the terms of the contract, the Dunnings paid Wilkerson \$6,995.00 on August 26, 1997, and \$5,000.00 on September 29, 1997. Throughout the summer of 1997, several people observed Wilkerson working on the Dunnings’ house. According to receipts introduced at trial by the debtor/defendant, Wilkerson spent approximately \$10,000 on supplies for the Dunning project.

In the fall of 1997, two things occurred which made it impossible for Wilkerson to finish work on the Dunnings’ home. First, Wilkerson began to suffer from health problems and was forced to slow down his work pace as a result. Secondly, the further Wilkerson got into the remodeling project, the clearer it became to him that the \$25,500 contract price was not going to be sufficient to complete all of the work. Once Wilkerson ran out of money, he stopped work on the home. According to photographs introduced into evidence at the trial, Wilkerson had completed a portion of the work he had agreed to do under the contract.

II. CONCLUSIONS OF LAW

Section 523(a)(2)(A) excepts from discharge any debt obtained by “false pretenses, a false representation, or actual fraud.” 11 U.S.C. § 523(a)(2)(A). This Court has previously held that in order to have a debt declared nondischargeable pursuant to this section, the creditor must prove (1) the debtor made a material representation, (2) the debtor knew the representation was false at the time of making it, or made the representation with gross recklessness as to the truth, (3) the debtor made the representation with the intention of deceiving the creditor, (4) the creditor justifiably relied on such representation, and (5) the creditor sustained loss and damage as the proximate result of the representations.” *A T & T Universal Card Serv. v. Crutcher (In re Crutcher)*, 215 B.R. 696,699 (Bankr. W.D. Tenn. 1997).

The party asking for the exception to discharge bears the burden of proof in a § 523(a)(2)(A) action. *In re Martin*, 698 F.2d 883, 887 (7th Cir. 1983). Exceptions to discharge are to be strictly construed against the creditor and liberally in favor of the debtor. *In re Zarzynski*, 771 F.2d 304, 306 (7th

Cir. 1985). The burden of proof on the objecting creditor is a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291, 111 S.Ct. 654, 661, 112 L.Ed.2d 755 (1991).

In the case at bar, the Court does sympathize with the plaintiffs with regard to the current state of the Dresden house. From the photographs, it is apparent that there is still a great deal of work to be done on the house. Despite this sympathy, however, the Court does not feel it can grant a judgment of nondischargeability to the plaintiffs. As is set forth in the preceding paragraph, the standard for a § 523(a)(2)(A) action is whether or not the debtor made a representation which, *at the time of making such representation*, he knew was false. In the current case, there was no proof introduced by the plaintiffs which even hinted at a fraudulent intent on Wilkerson's part either at the time of entering into the contract or at the time of receiving the disbursements under the contract. Wilkerson signed the contract and began work on the house. It is evident from the photographs, that Wilkerson had done a great deal of work on remodeling the Dunnings's home before being forced to quit in the fall of 1997. Wilkerson did admit to the Court that he eventually realized he had significantly underbid the project; however, the Court simply cannot conclude, logically or legally, that this error in judgment is tantamount to fraud—a mistake, yes, but not fraud. An order will be entered in accordance herewith.

III. ORDER

It is therefore **ORDERED** that the Plaintiff's Complaint to Determine Dischargeability of a Debt Pursuant to 11 U.S.C. § 523 is **DENIED**. The debt arising out of the \$23,995.00 the plaintiffs paid to the debtor/defendant under the pre-petition contract is hereby discharged.

IT IS SO ORDERED.

By the Court,

**G. Harvey Boswell
United States Bankruptcy Judge**

Date: January 25, 1999