

Dated: April 27, 2007
The following is ORDERED:



Jennie D. Latta

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UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
DOUGLAS A. HUNSUCKER d/b/a
HUNSUCKER CONSTRUCTION,
Debtor.

Case No. 05-40969-L
Chapter 7

Builders Resource Corporation d/b/a
Memphis Sash & Door Company,
Plaintiff,

v.
Douglas A. Hunsucker d/b/a
Hunsucker Construction,
Defendant.

Adv. Proc. No. 06-00120

MEMORANDUM OPINION

BEFORE THE COURT is a complaint filed by the Plaintiff, Builders Resource Corporation d/b/a Memphis Sash & Door Company, against Douglas A. Hunsucker d/b/a Hunsucker Construction. The complaint seeks a money judgment and declaration that the claim of Builders Resource is not dischargeable pursuant to sections 523(a)(2), (4), and/or (6) of the Bankruptcy Code.

11 U.S.C. §§ 523(a)(2), (4), (6). The Plaintiff alleges that it supplied construction materials that were used by the Defendant but that it did not receive payment. The Court conducted a trial on February 21, 2007. The parties were asked to prepare proposed findings of fact and conclusions of law, which the Plaintiff, but not the Defendant, has done. Having carefully considered the pleadings, exhibits, and testimony of the witnesses, the court makes the following findings of fact and conclusions of law. This is a core proceeding. 28 U.S.C. § 157(b)(2)(I).

I. FACTS

Two distinct transactions are at issue in this case. In the first, Builders Resource delivered windows, window trim, doors, door trim, and crown molding to property located at Lot 25, 80 Austin Drive, Bell Meade Subdivision, Oakland, Tennessee, on August 6, 2004, and March 23, 2005. Hunsucker and his wife were the owners of that property at the time the materials were delivered. Hunsucker constructed a single family home upon the property and sold it to a third party on April 1, 2005. An invoice for the initial delivery of materials in the amount of \$3,672.15 was paid by Hunsucker by check dated August 20, 2004. An invoice for the second delivery of materials, in the amount of \$976.29, remains unpaid. Hunsucker and his wife gave an affidavit at closing to the effect that there were no outstanding claims for materials used at the property. Builders Resource alleges that this affidavit was false and that Hunsucker knew it was false. Builders Resource introduced the title commitment related to the property, which makes “[p]roof of payment of all bills for labor and material furnished or to be furnished in connection with improvements erected or to be erected,” a condition of closing. Builders Resource also introduced

the closing statement, which shows that Hunsucker received proceeds of \$21,566.99 at closing. No representative of Builders Resource was made aware of the closing.

Hunsucker testified that he purchased the Austin property and constructed a “spec” home on that property that remained unsold for thirteen months. When he was able to find a buyer, the buyer asked that he finish a second-floor area, which he had left unfinished. The second delivery of materials by Builders Resource was for this purpose. Hunsucker testified that although the materials were delivered in the week before closing, the work was not done at the property until after closing. At that time, the trim materials delivered to the property were installed. Hunsucker testified that his affidavit was accurate when he gave it. He said that the second invoice from Builders Resource was simply overlooked.

The second transaction at issue in this case involves property located at 1980 Highway 195, Somerville, Tennessee. This property is owned by Paula Rodriguez, who testified by deposition. She testified that she engaged Hunsucker to construct a home for her on her property according to plans and specifications that she supplied. A contract was made between Rodriguez and Hunsucker on February 4, 2004, setting out a sales price of \$207,000. Oakland Bank provided her construction loan, which provided for a schedule of draws depending on the percentage of completion. The contract called for a standard interior trim package, but Rodriguez later determined that she preferred stain-grade trim. The difference between the standard trim package and the stain-grade trim package was \$7,000, not including extra charges by the painter for staining the trim. Rodriguez agreed to pay this difference outside the loan.

Builders Resource introduced three invoices for materials it alleges were delivered to and installed at 1980 Highway 195: the first dated March 23, 2005, in the amount of \$7,326.26; the

second, dated March 30, 2005, in the amount of \$6,146.62; and the third, dated April 25, 2005, in the amount of \$63.86. The total amount of these invoices is \$13,536.74, which Builders Resource maintains remains unpaid.

Rodriguez testified that there were significant delays in the construction of her home and concerns about the payment of subcontractors. She said that the original completion date was supposed to be October of 2004, but that she was not able to take occupancy until September of 2005. Even then, there were a number of punch list items unfinished. Rodriguez eventually broke off communication with Hunsucker. Rodriguez testified that she paid a total of \$27,830 to Hunsucker for upgrades. She testified that although Builders Resource did not file a lien against the property, they later claimed that they were not paid. In connection with Rodriguez's deposition, Builders Resource introduced two checks that it alleges were given in payment for the materials supplied by it. The first is a carbon copy of a check drawn on the account of Rodriguez. The copy provided to the court is virtually illegible, but Rodriguez testified that it is a copy of check number 5091 dated February 9, 2005, made payable to Hunsucker, in the amount of \$7,000 for "trim." Rodriguez testified that this was for material costs over and above the construction contract. The amount of this check is consistent with the \$7,000 upgrade amount established by Hunsucker for stain-grade trim. The second is a draw check from Oakland Deposit Bank dated April 8, 2005, in the amount of \$12,500, made payable to Hunsucker Construction. Behind it is a handwritten document dated April 6, 2005, on the letterhead of Hunsucker Construction, which references "Paula Rodriguez Construction Loan," and lists "Trim \$8,000," "Trim Labor \$4,500," and gives a total of \$12,500. Rodriguez testified that she received these documents from the bank and had no discussions with any representative of the bank about them, but that she believed this check was

given in payment of the trim amounts included in the original contract. The dates of what the court assumes was a draw request from Hunsucker and the corresponding draw check are shortly after the dates of the first two invoices from Builders Resource.

Hunsucker agreed that he received the first two invoices relied upon by Builders Resource, dated March 23 and 30, 2005, and that they were for trim materials supplied by Builders Resource for the Rodriguez home. He said he did not recall the third invoice dated April 25, 2005. He acknowledged that he did not pay the invoices of Builders Resource. He did not recall receiving the \$7,000 check from Rodriguez. He testified that he was forced off the job in May of 2005. He said that he thought that \$11,000 was left to be drawn on the construction loan at that time. Nevertheless, he acknowledged that Oakland Bank stopped giving draw checks directly to him in May, but instead paid subcontractors directly.

II. ANALYSIS

Builders Resource claims that the debts owed to it by Hunsucker are nondischargeable pursuant to three separate provisions of the Bankruptcy Code. First, it argues that the debts are excepted from discharge pursuant to § 523(a)(2)(A) because they are debts for property obtained by false pretenses, a false representation, or actual fraud. Second, it argues that the debts are nondischargeable pursuant to § 523(a)(4) because they are debts for fraud or defalcation while acting in a fiduciary capacity. Third, it argues that the debts are excepted from discharge pursuant to § 523(a)(6) because they resulted from willful and malicious injury to the property of Builders Resource. As a general rule, exceptions to discharge are to be strictly construed in favor of the debtor. *See, e.g., Jones v. Warren Constr. (In re Jones)*, 296 B.R. 447, 450 (Bankr. M.D. Tenn.

2003). Builders Resource must establish the applicability of an exception to discharge by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291, 111 S. Ct. 654, 661 (1991).

The court will consider each of Builders Resource's arguments in turn.

A. Debts Incurred by Fraud

Section 523(a)(2)(A) excepts from discharge "any debt for money, property, services, or an extension or refinancing of credit, to the extent obtained by false pretenses, a false representation or actual fraud, other than a statement based upon the debtor's or an insider's financial condition." Builders Resource contends that Hunsucker represented to Rodriguez that subcontractors and material suppliers were being paid and that he executed a false affidavit stating that there were no materialman's liens on Lot 25, when in fact Builders Resource had not been paid for materials delivered the week before closing. Neither of these arguments tends to show that Hunsucker incurred a debt for property or an extension of credit obtained by fraud. The debt at issue in this proceeding is the debt to Builders Resource. Hunsucker obtained property from Builders Resource and Builders Resource extended credit to Hunsucker when materials were delivered to the two job sites on open credit. There is no allegation or proof that Hunsucker engaged in any type of fraudulent activity in order to obtain property and credit from Builders Resource. The allegations and arguments of Builders Resource concern events that occurred *after* the property and credit were obtained. Nor is there an allegation that Hunsucker obtained a refinancing of credit as the result of fraudulent activity. The allegation is that Hunsucker received payment from Rodriguez and from the buyers of the Austin property as the result of false statements about the payment of materialmen. These statements, even if false, did not result in a refinancing of credit. Rather, the debt owed to Builders Resource simply remained unpaid.

Nothing was *obtained from* Builders Resource by fraud. Rather, its argument is that Hunsucker obtained money from Rodriguez and the buyers of the Austin property that should have been paid to Builders Resource. The obtaining of these funds did not result in the debt owed to Builders Resource, however, nor did it result in a debt owed to Rodriguez and the buyers of the Austin property. No debt arose as the result of Hunsucker's alleged fraud. While it is true, as Builders Resource argues, that "[f]raud is a generic term, which embraces all the multifarious means which human ingenuity can devise," nevertheless, under section 523(a)(2)(A) the fraud must result in a debt for property or credit *obtained by* that fraud. Builders Resource's arguments really are better aimed at section 523(a)(4), because it wants to say that the funds received from Rodriguez and the buyers of the Austin property were impressed by a trust of some sort for its benefit.

B. Debts for Fraud or Defalcation in a Fiduciary Capacity

Section 523(a)(4) excepts from discharge debts for fraud or defalcation while acting in a fiduciary capacity. Builders Resource argues that Hunsucker acted as a fiduciary for it in receiving funds from the buyers of the Austin property and from Rodriguez as the result of Tennessee Code Annotated § 66-34-304. That section provides:

Payments to be held in trust by contractor. – Any sums received by the contractor as payment for work, services, equipment and materials supplied by the subcontractor, materialman or furnisher for improvements to real property shall be held by the contractor in trust for the benefit and use of such subcontractor, materialman or furnisher and shall be subject to all legal and equitable remedies.

Tenn. Code Ann. § 66-34-304. That section is part of the Tennessee Prompt Pay Act of 1991. By its terms, the provisions of that act do not apply "to contracts for the construction of , or home improvement to, any land or building, or that portion thereof which is used or designed to be used as a residence or dwelling place for one (1), two (2), three (3), or four (4) single family units." Tenn.

Code Ann. § 66-34-702. Both of the properties at issue in this case are single family homes. Therefore, section 66-34-304 does not apply. This is significant because it is settled in this judicial circuit that section 523(a)(4) applies only to express trusts. *See R.E. America, Inc. v. Garver*, 116 F.3d 176, 179 (6th Cir. 1997). Builders Resource makes no argument concerning the establishment of an express trust for its benefit other than its statutory trust argument, which fails.

C. Willful and Malicious Injury to Property

Builders Resource's final allegation is that the debts owed to it are nondischargeable pursuant to section 523(a)(6), for willful and malicious injury by the debtor to another entity or to the property of another entity.¹ Section 523(a)(6) is directed to debts arising from intentional torts. *See Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S. Ct. 974, 977 (1998). It requires proof of "a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." *Id.* at 61, 118 S. Ct. at 977. The debt owed to Builders Resource arises from breaches of contract. Section 523(a)(6) is not directed to claims arising from contract. To hold otherwise would unduly expand the scope of that section. Further, even if the court were to find that Hunsucker's failure to pay Builders Resource was intentional (i.e., he had the funds to pay but deliberately withheld them intending to injure Builders Resource), Builders Resource has offered no proof that Hunsucker's failure to pay was malicious. Malice is "proven when a creditor shows that a debtor acted in conscious disregard of the rights of others, without just cause or excuse." *River View Land Co. V. Bucak (In re Bucak)*, 278 B.R. 488, 493-94 (W.D. Tenn. 2002) (citing *Tinker v. Colwell*, 193 U.S.

¹ Although Builders Resource included a claim under section 523(a)(6) in its original complaint, it included no discussion of that section in its proposed findings of fact and conclusions of law. The court could fairly conclude that Builders Resource has abandoned its argument under that section, but will address it nevertheless.

473, 486 (1904). If one were to apply a requirement of malice to a claim for breach of contract, it would seem to require proof of an intent to injure beyond the mere economic “injury” that results whenever a debt is not paid. It would seem to require intent, for example, to cause harm to the target’s business or reputation by rendering it unable to meet its own obligations. *See Crye-Leike Realtors, Inc. v. WDM, Inc.*, 1998 WL 651623*6 (“malice is the willful violation of a known right,” (Tenn Ct. App. Sept. 24, 1998)). But this is mere speculation. Builders Resource has offered no proof that Hunsucker’s failure to pay resulted from malice.

III. CONCLUSION

While Builders Resource has shown that Hunsucker came into possession of funds that *could have* been used for the payment of his debts to it, and perhaps *should have* been used for that purpose, it has failed to prove the applicability of any of the specific exceptions to discharge. The essence of its argument is really one for breach of trust, but the statute relied upon by Builders Resource to establish the existence of a statutory trust does not apply in this case. The court will enter judgment for Hunsucker.

cc: Debtor/Defendant
Attorney for Debtor/Defendant
Plaintiff
Attorney for Plaintiff