



Dated: June 09, 2016
The following is SO ORDERED:


David S. Kennedy
UNITED STATES CHIEF BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re Case No. 15-23544
Robert Clark Wheeler, Chapter 7
Debtor.
SSN: xxx – xx – 4586

Myrtle Sanders and
Gary Sanders,
Plaintiffs.

vs. Adv. Proc. No. 15-00237

Robert Clark Wheeler,
Defendant.

MEMORANDUM AND ORDER DENYING PRO SE PLAINTIFFS' COMPLAINT UNDER 11
U.S.C. § 523(a)(2) AND (a)(6) COMBINED WITH RELATED ORDERS AND NOTICE OF THE
ENTRY THEREOF

INTRODUCTION

This adversary proceeding was commenced by the pro se plaintiffs, Ms. Myrtle Sanders and Mr. Gary Sanders (collectively, “the Sanders”)¹, under 11 U.S.C. § 523(a)(2)(A) and (a)(6) seeking to except from the general discharge a particular pre-petition debt which was reduced to a State Court judgment entered in the Shelby County General Sessions Court owed by the above-named Chapter 7 debtor, Robert Clark Wheeler (“Mr. Wheeler”), to the Sanders. The Sanders styled this adversary proceeding as a “Complaint/Response in Opposition to Debtor’s Robert Wheeler’s Petition for Bankruptcy.” Mr. Wheeler subsequently filed both a “Motion to Dismiss or in Alternative a More Definite Statement”, as well as an answer to the Sanders’ instant adversary proceeding. Mr. Wheeler’s “Motion to Dismiss or in Alternative a More Definite Statement” was denied awaiting the outcome of a trial based on the merits.

The ultimate question for judicial adjudication here is whether Mr. Wheeler committed either a fraudulent act, false representation, or a “willful and malicious injury” as contemplated by 11 U.S.C. § 523(a)(2) and/or (a)(6), such that the underlying debt and resulting State Court judgment owed to the Sanders should be declared a statutory exception to Mr. Wheeler’s general Chapter 7 discharge. On May 26, 2016, the court held a trial on the merits to consider this adversary proceeding. Mr. Sanders and Mr. Wheeler testified at the trial. Ms. Sanders also made sworn statements but did not offer a complete testimony.

This is a core proceeding under 28 U.S.C. § 157(b)(2)(I). The following shall constitute this court’s findings of fact and conclusions of law in accordance with Rule 7052 of the Federal Rules of Bankruptcy Procedure.

BACKGROUND FACTS AND PROCEDURAL HISTORY

The pre- and postpetition background facts and judicial/procedural history may be summarized, in relevant part, as follows. In 2014, the Sanders filed a civil action lawsuit for a “breach of contract” against Mr. Wheeler in the General Sessions Court of Shelby County, Tennessee. The Sanders’ General Sessions lawsuit did not allege specific violations that would give rise to a subsequent non-dischargeable

¹ Ms. Sanders is Mr. Sanders’ Mother.

judgment under 11 U.S.C. § 523(a)(2)(A) and/or § 523(a)(6) based on the doctrine of collateral estoppel (issue preclusion). The General Sessions Court action arose out of a contract entered into between the Sanders and Mr. Wheeler for construction and renovation work to be performed on real property owned by Ms. Sanders, located at 1978 Chelsea Avenue, Memphis, Tennessee, after the property suffered damage from a fire. After Mr. Wheeler failed to fully perform under the contract, the reasons of which are disputed, the Sanders later received a judgment for breach of contract in the General Sessions Court of Shelby County against Mr. Wheeler in the approximate amount of \$15,848 plus costs. The State Court judgment was never appealed and is, thus, a final judgment. The General Sessions Court “Civil Warrant” introduced by the Sanders at trial simply listed the State Court cause of action as “Breach of Contract \$15,000.” Trial Ex. 3. However, the complaint filed in the instant adversary proceeding alleges that Mr. Wheeler “defrauded [the Sanders] out of \$16,000 on the pretext of [being] a licensed contractor” and by failing to complete the project for which he was contracted. The Sanders went on to make several other allegations in the complaint that the court will not address in this § 523(a)(2)(A) and (6) opinion.²

On April 20, 2015, Mr. Wheeler filed the instant Chapter 7 bankruptcy case. In his Schedule F, Mr. Wheeler listed the Sanders as unsecured judgment creditors holding a claim in the approximate amount of \$16,163.³ The deadline to file exceptions to Mr. Wheeler’s general discharge was July 20, 2015. The Sanders timely commenced this adversary proceeding under 11 U.S.C. § 523(a)(2) and (6) and Fed. R. Bankr. P. 7001(6) seeking to except from Mr. Wheeler’s general Chapter 7 discharge the judgment received in the General Sessions Court of Shelby County.

In response to the Sanders’ complaint, Mr. Wheeler essentially denied any fraudulent behavior, concealment of assets, or other wrongdoing. In fact, Mr. Wheeler claimed during his sworn trial

² The Sanders, *e.g.*, make allegations suggesting that Mr. Wheeler has concealed assets from the bankruptcy court. No proof existed at trial that Mr. Wheeler is concealing assets. This court also notes that neither the Chapter 7 case trustee nor the United States Trustee for Region 8 filed 11 U.S.C. § 727 objections to discharge nor did they file 11 U.S.C. § 707(b) motions to dismiss this Chapter 7 case for fraud or abuse. Neither, to this court’s knowledge, have there been any allegations of bankruptcy fraud, which is a criminal act punishable under Title 18.

³ It also is noted that Mr. Wheeler did not schedule this unsecured debt as being “contingent, unliquidated, or disputed.” *See* Sch. F.

testimony that he was forced to forgo completion of his work for the Sanders because the proper permits were not secured prior to construction and that the Sanders decided to make the home a “rooming house” which would require more work and expenses. Moreover, Mr. Wheeler seeks to recover attorney’s fees from the Sanders under 11 U.S.C. § 523(d), which provides that “[i]f a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of section 523, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney’s fee for, the proceeding if the court finds that the position of the creditor was not substantially justified.” See discussion of 11 U.S.C. § 523(d), *infra*. Section 101(8) of the Bankruptcy Code expressly defines the term “consumer debt” to mean a debt incurred by an individual primarily “for a personal, family, or household purpose.” 11 U.S.C. § 101(8).

DISCUSSION

Bankruptcy laws exist to provide the honest but unfortunate debtor “a ‘new opportunity in life and a clear field for future effort, unhampered by the pressure of discouragement of preexisting debt.’” *Lines v. Frederick*, 400 U.S. 18, 19 (1970). The benefits of filing bankruptcy include the immediate “breathing spell” provided by the statutory automatic stay and ultimately obtaining a general discharge of certain debts. See 11 U.S.C. § 362(a); 11 U.S.C. § 524. The statutory exceptions to a Chapter 7 discharge are not to be taken lightly and are, thus, strictly construed against the objecting or excepting creditor and liberally in favor of the debtor. *Gleason v. Thaw*, 236 U.S. 558 (1915); *In re Ward*, 857 F.2d 1082, 1082 (6th Cir. 1988); *In re Rembert*, 141 F.3d 277, 281 (6th Cir. 1998).

Although the issue of whether or not the doctrine of collateral estoppel (issue preclusion) applies to the General Sessions Court judgment⁴ awarded to the Sanders prior to Mr. Wheeler’s petition for bankruptcy was never raised by the parties, this court concludes in any event, under the circumstances, that it is not applicable in the instant proceeding. The Supreme Court in *Brown v. Felson* held that the bankruptcy court is not limited or confined to a review of the judgment in a prior state court litigation

⁴ See *In re O’Rourke*, 169 B.R. 383, 385 (Bankr. M.D. Tenn. 1994)(“res judicata principles apply to final judgments in General Sessions Court”).

when subsequently determining the dischargeability of the debtor/defendant's debt in the bankruptcy context. *Brown v. Felson*, 442 U.S. 127 (1979). As such, when the debtor invokes the new defense of bankruptcy, the court may consider additional evidence in connection with the prepetition judgment when ascertaining whether a prior judgment debt is dischargeable under the laws of Congress relating to bankruptcy.

The doctrine of collateral estoppel treats as final only those issues actually and necessarily litigated and decided in prior pre-bankruptcy litigation. *Grogan v. Garner*, 498 U.S. 279 (1991). Here, the General Sessions Court judgment provided by the Sanders to this bankruptcy court only lists the State law cause of action as being based on a "breach of contract." Trial Ex. 3. As such, questions of actual fraud, false representations, false pretenses, or willful and malicious injury were not actually and necessarily litigated in the prepetition action between Mr. Wheeler and the Sanders. These specific issues and allegations between the parties are, in this court's opinion, being raised now for the first time. As such, in the present proceeding and in accordance with *Brown v. Felson*, the doctrine of res judicata does not prevent this court from hearing and ruling on the merits of the Sanders' non-dischargeability claims against Mr. Wheeler, as they were not actually and necessarily litigated in the Shelby County General Sessions Court.

This court will now address each of the 11 U.S.C. § 523(a)(2)(A) and (a)(6) allegations made by the Sanders against Mr. Wheeler seeking to except from discharge the particular debt owed to them by Mr. Wheeler.

11 U.S.C. § 523(a)(2)(A)

Section 523(a)(2)(A) of the Bankruptcy Code was intended to codify case law as expressed in *Neal v. Clark*, 95 U.S. 704 (1887), which interpreted "fraud" to mean actual or positive fraud rather than fraud implied by law. 124 Cong. Rec. H. 11,095.6 (daily ed. Sept. 28, 1978); S 17,412-13 (daily ed. Oct. 6, 1978). In other words, positive fraud must be shown rather than implied fraud. Section 523(a)(2)(A) provides that a general discharge "does not discharge an individual debtor from any debt [. . .] for money, property, services, or an extension, renewal, or refinancing or credit, to the extent obtained by [. . .] false

pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." 11 U.S.C. § 523(a)(2)(A).

To except a certain pre-petition debt from a debtor's general Chapter 7 discharge under 11 U.S.C. § 523(a)(2)(A), a creditor must prove each of the elements set forth in the Sixth Circuit *In re McLaren* case. *In re McLaren*, 3 F.3d 958, 961 (6th Cir. 1993). The creditor must prove by a preponderance of the evidence that:

1. the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth;
2. the debtor's intent to deceive;
3. the creditor reasonably relied on the false representation; and
4. reliance was the proximate cause of the loss.

Id. at 961.

When considering the first *McLaren* factor, the court must determine whether fraud existed in the inception of the contract or transaction. While a debtor's misrepresentation of his or her intent to actually perform the duties under a contract could give rise to a finding of a false representation, "[t]he failure to perform a mere promise is not sufficient to make a debt nondischargeable, even if there is no excuse for the subsequent breach." See ALAN N. RESNICK & HENRY J. SOMMER, *COLLIER ON BANKRUPTCY* § 523.08 (2013). Moreover, intent, or lack thereof, to perform under the contract may be inferred by any steps taken by the debtor in carrying out his or her duties under the contract. *Id.* In the case at hand, Mr. Wheeler did in fact take measurable steps to begin performance under the contract. Mr. Wheeler testified that he worked on several rooms in the house (a point that the Sanders concede) before he was forced to terminate his construction by a local governmental authority due to a lack of a permit.⁵ As such, this court finds that Mr. Wheeler did not misrepresent his intentions to perform under the contract with the Sanders that would render the judgment against him nondischargeable under § 523(a)(2)(A).

⁵ Mr. Wheeler did not provide any physical evidence of a local governmental regulatory body's intervention and termination of his work other than his sworn testimony.

The Sanders also argue that Mr. Wheeler falsely represented that he was a licensed contractor under the laws of the State of Tennessee. Mr. Wheeler strongly denies this allegation and openly admitted during his sworn testimony that he surrendered his contracting license in 2003. [Trial record at 10:45 a.m.]. The Sanders, as the plaintiffs here, bear the ultimate burden of proving that Mr. Wheeler did in fact claim to be a licensed contractor. However, the Sanders have provided no evidence to support their allegation outside of Mr. Sanders' own testimony. A disputed fact exists. This lack of evidence coupled with Mr. Wheeler's frank testimony that he surrendered his contracting license in 2003 negates to an extent the Sanders' proposition that they were fraudulently induced into the contract because of Mr. Wheeler's misrepresentation that he was a licensed contractor. Furthermore, according to the provisions of TENN. CODE ANN. § 62-6-102(4)(A)(i), Mr. Wheeler was not statutorily required to even have a contracting license, as the project contracted for was under the \$25,000 threshold requirement.⁶ The particular project here was under \$25,000.⁷ It is emphasized that Mr. Wheeler did not need a contracting license to be able to enter into the contract with the Sanders. Thus, there is insufficient evidence to support the allegation that Mr. Wheeler claimed to be a licensed contractor, but even so, a license was not mandated by Tennessee state law so the misrepresentation would not have been "material" to the contract. *In re McLaren*, 3 F.3d at 961.

Turning now to the second factor, the Sixth Circuit in *In re Rembert* held that "[w]hether a debtor possessed an intent to defraud a creditor within the scope of § 523(a)(2)(A) is measured by a subjective standard." *In re Rembert*, 141 F.3d 277, 281 (6th Cir. 1998)(citing *Field v. Mans*, 516 U.S. 59, 111 S.Ct. 654, 661, 112 L.Ed.2d 351 (1995)). The focus is, thus, on the debtor's subjective intent—whether the debtor (Mr. Wheeler) actually intended to deceive the creditor (the Sanders) so as to induce them into a contract. Although the court is mindful that the Sanders are representing themselves, they nonetheless

⁶ "Contractor means any person or entity that undertakes to, attempts to or submits a price or bids or offers to construct, supervise, [. . .] housing development, improvement or any other construction undertaking for which the total cost is twenty-five thousand dollars (\$25,000) or *more*." TENN. CODE ANN. § 62-6-102(4)(A)(i)(*emphasis added*).

⁷ The renovation and construction contracted for here was \$16,000. *See* Trial Ex. 1.

have provided, unfortunately for them, no evidence of a subjective intent on behalf of Mr. Wheeler to fraudulently entice the Sanders to enter into the transaction at hand. In fact, based on testimony provided by Mr. Wheeler at trial, Mr. Wheeler claimed to have previously known Ms. Sanders, having completed work for her in the past. [Trial record at 10:44 a.m.]. It is noted that Mr. Wheeler actually took measurable steps toward completion of the subject project for which he was contracted.

The prior connection between Mr. Wheeler and the Sanders, coupled with partial performance by Mr. Wheeler under the contract, sufficiently negates the proposition that Mr. Wheeler actually intended to defraud the Sanders and is insufficient evidence to support a subjective intent to deceive. The court finds that, based on the evidence in this instant case, the Sanders have failed to carry the heightened, and somewhat difficult, burden of proving that Mr. Wheeler possessed a subjective intent to defraud the Sanders in such a manner as to render the debt non-dischargeable under 11 U.S.C. § 523(a)(2)(A).

Considering the third factor, in *Field v. Mans*, 516 U.S. 59, 116 S.Ct. 437 (1995), the Supreme Court held that the standard for determining a creditor's reliance should be an "intermediate" justifiable standard. *Id.* at 73, 445. As such, while a creditor's reliance might be unreasonable or the fraud easily discoverable with further investigation or probing, a creditor may still be able to meet the burden of proof for justifiable reliance as long as the reliance is not completely unfounded or illegitimate. As discussed above, a contracting license is not required under applicable Tennessee law to bid on a project that is under the \$25,000 threshold. *See* discussion, *supra*. While this court believes it would have, indeed, been reasonable to rely on a statement that a contracting party has the necessary qualifications, experience, and licensures required to dutifully perform under the contract, and actually intends to perform under that contract, the Sanders provided no hard evidence that Mr. Wheeler did, in fact, claim to be a licensed contractor and that they justifiably relied on this statement prior to entering into the contract. Furthermore, the Sanders did not provide any evidence that, had they known Mr. Wheeler was not a licensed contractor, they would *not* have entered into the contract. Accordingly, the Sanders cannot prove justifiable reliance on asserted fraudulent statements that have not been sufficiently proven to have been made.

Finally, the court will briefly address the issue of proximate cause. As previously discussed, the Sanders have failed to carry their required burden of proof to show that Mr. Wheeler committed actual or positive fraud or a fraudulent misrepresentation that caused the injury for which they seek redress. Mr. Wheeler, seemingly, possessed an intent to perform under the contract because he took affirmative steps toward completion of his renovation work and construction. Additionally, though the Sanders have not provided proof that Mr. Wheeler did, in fact, hold himself out to be a licensed contractor, the lack of a contracting license, in this particular instance, is seemingly irrelevant because a license is not required for projects that do not meet the \$25,000 threshold limit, as set forth above. As such, the absence of a license could not have proximately caused the injury because a license was not mandated by Tennessee law for the contracted amount of work here.

11 U.S.C. § 523(a)(6)

In order to prevail in an action filed under 11 U.S.C. § 523(a)(6), a plaintiff/creditor has the burden of proving, by a preponderance of the evidence, that the injury or damage to the creditor's property was a result of the defendant/debtor's "willful and malicious" acts or conduct. The United States Supreme Court has previously held that a "willful and malicious injury" requires more than an intentional act that subsequently results in an injury. *In re Geiger*, 523 U.S. 57, 61, 118 S.Ct. 974 (1998). Rather, the Supreme Court held that in order to qualify as "willful and malicious," the act must be "done with the actual intent to cause injury." *Id.*; see also *In re Markowitz*, 190 F.3d 455, 464-66 (6th Cir. 1999)(adopting the Supreme Court's subjective definition of "willful and malicious"). In other words, the debtor (Mr. Wheeler) must have intended the harm that actually occurred in order to have the debt owed excepted from his general discharge under 11 U.S.C. § 523(a)(6).

Here, the Sanders allege that Mr. Wheeler committed a "willful and malicious injury" to their property by falsely representing that he was licensed to complete the contracted work and by failing to actually complete the project for which he was contracted, thereby causing the Sanders to expend more funds in order to bring the home back into a state of repair to prevent condemnation by the City of Memphis. While the court is painfully mindful of the inconvenience, expense, and, perhaps, added

burden, both physically and financially, that was placed on the Sanders by Mr. Wheeler's failure to completely perform his end of the bargain, Mr. Wheeler's failed performance does not, in and of itself, rise to the level of a "willful and malicious injury" that would deem the debt nondischargeable. In fact, Mr. Wheeler provided testimony that, after he began renovation work on Ms. Sanders' home, he was forced to discontinue his work because a proper permit for the construction had not been obtained.⁸ The fact that a local governmental regulatory body forced Mr. Wheeler to forgo completion of the project due to a lack of necessary permits severely lessens or even negates the Sanders' claim that Mr. Wheeler intended to cause the injury to their property that eventually resulted due to his failed performance and/or lack of professional contracting license. As such, the Sanders have not provided the court with sufficient evidence to meet this heightened standard of "willful and malicious" conduct contemplated in 11 U.S.C. § 523(a)(6).

11 U.S.C. § 523(d)

Bankruptcy Code § 523(d) provides that when a "creditor requests a determination of dischargeability of a 'consumer debt' under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified." *See* 11 U.S.C. § 523(d). Said another way, if a creditor files a 11 U.S.C. § 523(a)(2) complaint to have a "consumer debt" excepted from a debtor's general discharge and is unsuccessful, the court must award the debtor attorney's fees and costs for defending the suit if the § 523(a)(2) complaint was, in fact, unwarranted, unjustified, or frivolous. As previously discussed, "consumer debt" is a statutorily defined term meaning "debt incurred by an individual primarily for a personal, family or household purpose." 11 U.S.C. § 101(8).

In order to prevail under 11 U.S.C. § 523(d), a *debtor* must establish:

1. the creditor requested a determination of the dischargeability of the debt under section 523(a)(2);

⁸ The court notes that the contract between the Sanders and Mr. Wheeler does, in fact, require the Sanders to "furnish all fixtures and pay for permits." Trial Ex. 1.

2. the debt is a consumer debt; and
3. the debt was discharged.

See ALAN N. RESNICK & HENRY J. SOMMER, *COLLIER ON BANKRUPTCY* § 523.08 (2013). “If the debtor establishes these three elements, the burden then shifts to the creditor to prove either that its position was substantially justified or that special circumstances exist that would make an award of costs and attorney fees unjust.” *Id.* (other citations omitted). In *In re Carman*, 723 F.2d 16 (6th Cir. 1983), the Sixth Circuit held that the only exception whereby a debtor would not be awarded attorney’s fees for defending a dischargeability complaint for a “consumer debt” filed by a creditor would be if the court determined the award of fees “clearly inequitable.” *Id.* at 17.

While Mr. Wheeler has proven that the Sanders timely requested a judicial determination of dischargeability of this particular 11 U.S.C. §523(a)(2) debt and that the debt is dischargeable, the court is not satisfied that the debt is, in fact, a “consumer debt” as contemplated by the Bankruptcy Code to warrant the award of attorney fees and costs in favor of Mr. Wheeler. *See* 11 U.S.C. § 101(8). The debt at issue here, a General Sessions Court judgment, stems from a breach of contract for failure to perform construction and renovation services to real property arising out of a business transaction. Though the judgment was against Mr. Wheeler personally, rather than a business entity, the debt is not one typically incurred for “a personal, family or household purpose.” 11 U.S.C. § 101(8). Furthermore, Mr. Wheeler has provided no additional evidence to support the claim that this was, in fact, a “consumer debt” rather than a business debt other than simply citing the relevant section in the pleadings.

Assuming, *arguendo* that this debt was indeed a “consumer debt,” this court nevertheless finds under the existing circumstances that the result would be the same. The Sanders indeed have met their burden of proof here that this 11 U.S.C. § 523(a)(2) complaint seeking an exception to the general discharge of Mr. Wheeler was “substantially justified” and an award of attorney’s fees and costs in favor of Mr. Wheeler would be “clearly inequitable” here. *In re Carman*, 723 F.2d at 17. Mr. Wheeler is not entitled to attorney fees and costs against the Sanders under 11 U.S.C. § 523(d).

CONCLUSION

Based on all the foregoing and strictly construing the Sanders' 11 U.S.C. § 523(a) exceptions to discharge against the Sanders and liberally in favor of Mr. Wheeler, the Sanders' dischargeability complaint is denied. The Sanders, under the particular facts and circumstances as presented here, have not met the required burden of proof by a preponderance of the evidence that their underlying claim against Mr. Wheeler and the resulting judgment from the General Sessions Court of Shelby County, Tennessee, should be excepted from Mr. Wheeler's general Chapter 7 discharge. The debt owed by Mr. Wheeler to the Sanders in this particular case will be subject to the general discharge provisions of 11 U.S.C. § 524; however, Mr. Wheeler's 11 U.S.C. § 523(d) claim against the Sanders is clearly denied for the reasons mentioned above.

The Bankruptcy Court Clerk shall cause a copy of this Order and Notice to be sent to:

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