

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

DALE PERRITT and
AMY PERRITT,

Case No. 03-25896whb

ANNA HAMILTON d/b/a
ANNA'S STEAKHOUSE,
Plaintiff,

v.

Adv. Proc. No. 03-0611

DALE PERRITT and
AMY PERRITT,
Defendants.

**MEMORANDUM OPINION ON COMPLAINT
FOR EXCEPTION FROM DISCHARGE**

A trial on this complaint was held on March 23 and 24, 2004, after which the parties were given time to submit post-trial memoranda, and the Court took the proceeding under advisement. The Court having considered the evidence at trial, the exhibits and memoranda, this memorandum opinion contains the Court's findings of fact and conclusions of law. Fed. R. Bankr. P. 7052.

SUMMARY OF COMPLAINT

The complaint filed by Anna Hamilton, d/b/a Anna's Steakhouse (hereinafter "Hamilton"), seeks a monetary judgment and a determination that the judgment is excepted from the Debtors' discharge pursuant to 11 U.S.C. §§ 523(a)(2)(A) and (a)(4). The complaint alleges that the Defendant Dale Perritt ("Perritt"), who was formerly engaged in the construction business, undertook the duties of construction manager for Hamilton to over-see the construction of a building for her restaurant, Anna's Steakhouse, in Bartlett, Tennessee.¹ Perritt was to be paid \$5,000 for this work, but the complaint alleges that he misrepresented himself to have the necessary contractor's license, that he presented false invoices from his prior corporate business, SCI Corporation ("SCI"), that he inflated draws to SCI, and that he converted the Plaintiff's money. The first count of the complaint is one of fraud, and the complaint also alleges a breach of fiduciary duty, misapplication of contract funds, unlawful distribution to a corporate officer by SCI, and license fraud under Tennessee law. The monetary damages sought are approximately \$175,000.

ISSUES

The issues presented to the Court are whether the Plaintiff Hamilton has proven her claim to monetary damages, if so, in what amount, and whether those damages are excepted from discharge either under the false representation or actual fraud exception of § 523(a)(2)(A), or the fiduciary defalcation exception of § 523(a)(4).

¹ The complaint seeks an exception from discharge as to Amy Perritt, Dale Perritt's spouse; however, the Court finds no evidence under any applicable Code section to support an exception from discharge as to Amy Perritt, and a directed verdict in favor of Amy Perritt was granted at the conclusion of the trial. Therefore, any reference in this opinion to "Perritt," unless specified otherwise, is to Dale Perritt.

FINDINGS OF FACT

From the evidence presented, including the testimony of witnesses and the exhibits, the Court makes the following findings of facts critical to this adversary proceeding determination:

1. Prior to any involvement with Dale Perritt, Anna Hamilton had decided to construct a new building for her existing restaurant, and she had spoken with a general contractor about that, but Hamilton had then decided to act as her own contractor, subcontracting to various persons or companies the necessary construction tasks. However, she could not “pull” or obtain her own building permit since the City of Bartlett authorities required a licensed contractor to do that for commercial construction.

2. Hamilton also had engaged an architect, who had prepared drawings for the construction of a metal building.

3. At some point in about March, 2001, Hamilton had a conversation with Perritt about her project, and he offered to act as construction supervisor for a fee of \$5,000. The parties agreed orally to this arrangement. Hamilton expected that Perritt would “pull” the necessary permit. Perritt denies that the \$5,000 agreement applied to any work that might be performed by SCI.

4. Hamilton needed a proposal of construction costs in order to finalize her financing, and she sought Perritt’s help. Together, they prepared an estimate, produced on SCI’s letterhead for \$350,715, including \$68,095 for the metal building components and erection. This estimate, plus the \$100,000 land costs already incurred by Hamilton, was submitted to BancorpSouth, which extended a construction loan of \$450,000 to Hamilton.

5. Hamilton expressed on more than one occasion to Perritt that she did not want a general contractor, who would add profit and overhead costs to her construction expense. Perritt admits this

but denies that this agreement applied to any work supplied by SCI, which he contends was a sub-contractor and entitled to earn a profit.

6. Estimates for the metal building components and erection were obtained by Perritt through SCI: one from Big Bee Steel Buildings, Inc. for \$57,200; one from Crown Metal Buildings for \$33,849; and one from Globe Construction (“Globe”) to furnish the metal building components and erection for \$48,498. Moreover, Globe’s proposal provided for \$50 per man-hour for its survey services and for weekly construction progress inspections. Hamilton testified that she was never given a copy of Globe’s proposal and that she was unaware of Globe’s inspection charges until she received Globe’s billing that had been unpaid by SCI.

7. Perritt, though SCI, was unable to pull the necessary permit, since SCI was not licensed in a sufficient amount with the state of Tennessee. Perritt, therefore, entered into an agreement with Globe, a corporation independent from Perritt and SCI, for Globe to pull the required permit. Perritt admits that this permit service by Globe was not to cost Hamilton anything.

8. Perritt accepted Globe’s proposal for the metal building, which included \$34,398 for the metal building components and \$14,100 for erection. Payment terms required 25% of the building’s component costs upon order, 75% of the component’s costs upon delivery, 45% of the erection upon steel structure completion, 45% of the erection upon roofing completion, and the final 10% erection upon trim completion. The Globe proposal/contract was executed by Perritt on February 26, 2002. Plaintiff Ex. 8.

9. On September 5, 2001, prior to the Globe contract’s execution, Perritt told Hamilton that an initial payment of \$37,500 was needed to order the metal building, and Hamilton authorized a draw in that amount on her construction loan. Perritt made the draw, and he deposited the funds into

SCI's bank account. The \$37,500 was not in fact needed at that time to purchase the metal building, and Globe's contract with SCI would not require that amount at the time of the order: Only \$8,500 was required under the Globe contract to order the building. As Perritt admitted, SCI spent the \$37,500 draw on its normal business expenses but not on the Hamilton job.

10. On March 31, 2002, SCI presented an invoice to Hamilton for \$9,960 for metal building drawings and the permit, and on August 15, SCI invoiced Hamilton for \$29,600, allegedly for delivery of the metal building, metal studs and other building materials. Hamilton authorized a draw on her construction loan for these invoices. Globe did not invoice SCI for any drawings, and its contract with SCI did not provide for such a charge. Perritt admitted that most of the \$9,960 was actually used by SCI to make the \$8,500 initial building payment to Globe.

11. Between July and November, 2002, Hamilton did not see Perritt at the job site much, and she learned that he was no longer working for SCI. When confronted by her, Perritt stated that he would finish his duties as construction supervisor on Hamilton's project. From November, 2002 until completion of the building, Hamilton did not see Perritt back on the job site, and Hamilton was required from that point on to supervise the construction, including supervision of sheetrock work, a task that Perritt had subcontracted to TriState Drywall, Inc. ("TriState").

12. Hamilton was invoiced by SCI and paid \$800 for a dumpster at the construction site, but SCI did not pay the supplier; thus, Hamilton was required to pay the \$800 twice. Perritt testified that he told Hamilton to offset the extra \$800 against his \$5,000 fee, of which only \$1,000 has been paid.

13. Hamilton received an invoice from Globe for \$4,849.80 for unpaid metal framing labor, and she testified that she paid this to prevent Globe's filing of a lien. In discovery for this proceeding she saw for the first time other invoices from Globe to SCI for Globe's other charges,

which had been paid by SCI.

14. Hamilton testified that she had insufficient funds in her construction loan to pay all construction and equipment costs, and she drew on other loan funds, including personal credit cards, to pay the costs in excess of her construction loan, approximately \$117,000. Although Hamilton offered as an exhibit a summary of these “incidental losses” on this construction, most of these losses were for interest charges, other bank charges, and kitchen equipment.

15. SCI, through Perritt, prepared an itemization of its estimated charges for the construction, totaling \$186,001; however, this itemization (Plaintiff Ex. 13) was never shown to Hamilton, nor was it signed by anyone.²

16. Globe invoiced SCI or Anna’s Steakhouse for the following:

4/30/02	building permit	\$1,062.50
5/03/02	building order deposit	8,599.50
7/24/02	building progress payment	25,798.50
9/18/02	building progress payment	9,250.20
9/18/02	one month rental on VSR and MR Seamers	746.93
12/12/02	final erection charge	4,849.80
8/30 - 9/24/02	inspection services	<u>2,625.00</u>
	Total	\$52,932.43

Of these invoices, which exceeded Globe’s contract with SCI, \$49,052.81 was paid by SCI to Globe (Defendant Ex. 10). Hamilton paid Globe’s \$4,849.80 final erection charge and \$2,355 of its inspection fees (Plaintiff Ex. 21). Apparently, Globe cut off its inspection charges to Hamilton at some point, but there is no explanation in the proof as to why a combination of SCI’s and Hamilton’s payments overpaid Globe’s invoices by \$3,325.18.

² The Court accepts Hamilton’s testimony that she was not shown SCI’s unsigned itemization over Perritt’s testimony that he showed it to her.

17. Based upon the testimony and exhibits, Hamilton paid the following amounts to SCI:

9/05/01	Invoice for building deposit	\$37,500.00
4/01/02	Drawings (\$8,600) and permit (\$1,360)	9,960.00
8/16/02	Dumpster (\$800); building delivery (\$12,500), Studs and other material (\$17,100)	30,400.00
10/04/02	Erection draw (\$9,250.20), framing and exterior Sheeting labor and material (\$10,168), 3 metal door Frames (\$393.30)	19,811.50
11/13/02	Base plate labor and material (\$2,433.18), rental of VSR and MR seamers (\$746.92), installing windows (\$610), framing, sheating insulation and sheetrock finishing (\$9,857.30), and installing bathroom backing (\$200)	<u>13,847.41</u>
	Total	\$111,518.91

In addition to the \$49,052.81 paid by SCI to Globe, SCI's records show that it paid \$24,478.60 to TriState for the Hamilton job; thus, SCI's records support that it paid out \$73,531.41 on the Hamilton construction job, leaving \$37,987.50 unaccounted for. Hamilton admitted in her deposition that SCI had paid out approximately \$70,000 on her job. The difference in SCI's actual payout and the \$111,518.91 paid by Hamilton to SCI is approximately the amount of the initial \$37,500 draw that was misrepresented to be for the building order.

DISCUSSION

A. Claim for Compensatory Damages

The difficulty with Hamilton's damage request begins with the fact that she had no written contract with either Perritt or SCI. Her oral agreement was with Perritt, one that capped his construction supervisor fee at \$5,000, of which \$1,000 has been paid to him. Although she had no agreement with SCI, Hamilton was obviously aware of SCI's involvement since she was presented with and then paid its invoices. What was left unclear was whether SCI would receive any "profit" or "overhead" for whatever it did, and the parties to this litigation obviously never discussed that.

Perritt attempts to shield himself from any damage liability by saying that he personally agreed to limit his income to \$5,000 but that SCI made no agreement to restrict its overhead or profit. The problem with this attempt is that Perritt did not disclose to Hamilton what SCI's financial understanding was, if in fact it had one, and Perritt was a 50% shareholder and salaried employee of SCI. Notwithstanding Perritt's efforts to characterize SCI as a subcontractor, the Court finds that Perritt treated SCI as a general contractor for the job, permitting SCI to invoice for services, pay out to Globe and suppliers, while retaining a profit. This is the very thing that Hamilton had told Perritt she did not want. Perritt admits that Hamilton clearly expressed that she did not want a general contractor which would add profit and overhead to her construction costs. It was, therefore, an inappropriate concealment by Perritt of his intentions as to SCI, a corporation that he could have profited from personally.

The Court finds that in addition to Perritt's concealment of his profit motive for SCI, he misrepresented other matters to Hamilton and that his misrepresentations were personal ones that can't be protected by SCI's corporate shield. Perritt permitted SCI to be paid \$37,987.50 that did not go into the Hamilton construction job. The proof clearly established that Perritt personally misrepresented that \$37,500 was needed as an initial payment for the ordering of the building components, and Hamilton justifiably relied on that representation in payment. At that point, Hamilton had not seen Globe's contract and had no awareness that Globe was not billing for anything yet, nor that Globe would expect only \$8,599.50 when the building was ordered. Perritt was aware of Hamilton's ignorance of these facts, since he had kept the Globe contract negotiations secret from her. Since Hamilton had made it clear to Perritt that she was acting as the general contractor, she was entitled to know the details of Perritt's dealings with, and SCI's contract with,

Globe. Moreover, Perritt admitted, and the proof from SCI's bank records confirmed, that SCI consumed the \$37,500 payment within a few days for SCI's business expenses that were unrelated to the Hamilton job: None of the \$37,500 went for Hamilton's benefit. Again, while the money flowed through SCI, it was Perritt's personal misrepresentation to Hamilton that caused her to pay SCI, and the Court finds Perritt to be responsible for his misrepresentation.

As noted in the findings of fact, the evidence established that Hamilton paid SCI \$111,518.91 and that SCI paid out on the Hamilton job \$73,531.41. Of the \$37,987.50 difference, the \$37,500 initial draw is the substantial amount. SCI had billed Hamilton \$800 for a dumpster and did not pay the supplier; thus, Hamilton paid the supplier, meaning she paid it twice, but Perritt had offered that she should offset this \$800 extra payment against his \$5,000 fee. Although Perritt did not finish his job, he had done some work; thus, the Court finds it unnecessary to assess the \$800 extra payment against Perritt.

The proof also established that Perritt advised Hamilton that she would not incur any costs due to Globe pulling the permit, yet Globe billed SCI \$1,062.50 for the permit; SCI in turn billed Hamilton \$1,360 for the permit. Globe billed SCI \$225.00 for its meetings with the City Engineer, again a cost that was not revealed to Hamilton. However, these undisclosed Globe charges to SCI are already included in the \$37,987.50 paid by Hamilton to SCI. It is clear from the proof that Hamilton paid Globe \$2,355 for Globe's site inspection services, and this was a charge that she never expected. Hamilton's understanding with Perritt was that she would not have any general contractor fees. Globe's inspection fees were of that nature, and Perritt did not disclose them to Hamilton. Moreover, Hamilton paid Globe its final construction invoice of \$4,849.80 in order to prevent the filing of a supplier's lien. Had Perritt not concealed the Globe contract terms nor

misrepresented the \$37,500 draw, Hamilton would not have incurred these payments to Globe. As noted in the findings of fact, it appears that between SCI's and Hamilton's payments, Globe was overpaid \$3,325.18, based upon the Globe invoices introduced into evidence. The Court can make no finding as to why this occurred, but must take it into account in assessing damages. Therefore, the Court will assess damages against Perritt for the \$7,204.80 paid to Globe by Hamilton, less the \$3,325.18 overpayment, for net damages of \$3,879.62. Again, these damages are appropriately assessed against Perritt personally, since it was his concealment and misrepresentation that directly led to the loss.

Hamilton seeks other damages, including all costs that ran over her original estimate for construction. She also seeks as incidental damages the amounts that she had to borrow from sources other than BancorpSouth to finish the construction and furnish the kitchen with equipment. However, these damages are too speculative to permit the Court to assess them against Perritt. In the absence of a written contract between these parties, the Court can't say that Perritt is responsible for all cost overruns. Certainly, there is nothing in the proof to indicate that Perritt should be liable for Hamilton's equipment or her borrowing costs. Moreover, in the absence of a contract providing for attorney fees, there is no specific authority for the Court to award Hamilton fees for this litigation. There are instances where the Court's equity jurisdiction may permit awarding of fees in the absence of a contract, but the Court does not find a fee award to be justified in this case. Although the Court has found fraud on Perritt's part, there are degrees of fraud, and Hamilton must bear some responsibility for the situation. She acted as a general contractor, an area obviously outside her expertise, and she acted without the protection of a written contract. Notwithstanding Perritt's liability for some of her loss, Hamilton must bear some responsibility as well; therefore,

the Court will not assess her attorney fees or litigation expense against Perritt.

It is too speculative for the Court to attribute any damage liability due to the possibility that Hamilton could have negotiated a cheaper building cost with a supplier other than Globe. Based upon the proof, it would be mere guesswork that Hamilton would have chosen another supplier. She might have opted for Globe notwithstanding its higher cost based upon Globe's superior reputation, for example. Hamilton testified that she was pleased with the metal building as supplied by Globe. Also, the proof did not establish that other cost overruns were the fault of Perritt. Hamilton acted as her own general contractor and she subcontracted with some suppliers and workers without the involvement of Perritt; thus, it would again be guesswork for the Court to assess to Perritt any cost that exceeded the construction estimate. Hamilton testified that some of her subcontractors exceeded their estimates, and she did not know whether Perritt had saved her money on any of the subcontractors that he arranged.

A victim of fraud can recover compensatory damages sufficient to place the victim in the same position she would have been in had the fraud not occurred. *Jones v. Kimberly-Clark Corp.*, No. 99-6280, 2000 WL 1800475 (6th Cir. Nov. 28, 2000)(citing *Harrogate Corp. v. Systems Sales Corp.*, 915 S.W.2d 812 (Tenn. Ct. App. 1995)). The proof only supports a compensatory damage award against Dale Perritt for \$41,379.62, the damages that can be directly attributed to Perritt's fraud, misrepresentation or concealment: \$37,500 paid to SCI based upon Perritt's misrepresentation that it was necessary to order the building and \$3,879.62 net that was paid directly to Globe by Hamilton.

B. Dischargeability of the Debt

Section 523(a)(2)(A) of the Bankruptcy Code governs the dischargeability of the debt to

Hamilton based on misrepresentation and actual fraud, and provides:

(a) A discharge under section 727 . . . does not discharge an individual debtor from any debt –

(2) for money, property, services, or an extension . . . of credit, to the extent obtained by –

(A) 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). In dischargeability actions under § 523(a)(2)(A), the burden of proof is on the plaintiff-creditor to establish nondischargeability by a preponderance of the evidence.

Rembert v. AT&T Universal Card Serv., Inc. (In re Rembert), 141 F.3d 277, 281 (6th Cir.), *cert.*

denied sub nom AT&T Universal Card Serv., Inc. v. Rembert, 525 U.S. 978, 119 S.Ct. 438

(1998)(citing *Grogan v. Garner*, 498 U.S. 279, 291 (1991)). Courts addressing dischargeability

issues have set forth the creditor’s burden of proof as to false representations as follows:

In order to except a debt from discharge under § 523(a)(2)(A), a creditor must prove the following elements: (1) the debtor obtained money through a material misrepresentation that, at that time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of the loss.

Providian Bancorp v. Shartz (In re Shartz), 221 B.R. 397, 399 (B.A.P. 6th Cir. 1998)(citing *Rembert*,

141 F.3d at 280-81). An action based on the debtor’s false representation is distinguished from an

action based on actual fraud, and in this case Hamilton has alleged both.

When faced with allegations of nondischargeability based on actual fraud, courts have applied a broad definition: “Actual fraud . . . consists of any deceit, artifice, trick, or design involving direct and active operation of the mind, used to circumvent and cheat another – something said, done or omitted with the design of perpetrating what is known to be a cheat or deception.” Steven H.

Resnicoff, *Dischargeability in Bankruptcy of Debts Incurred by “Purported Purchasers”*, 64 ST. JOHN’S L. REV. 253, 262 (1990)(citing COLLIER ON BANKRUPTCY, § 523.08[5] (L. King 15th ed. 1990)). The Bankruptcy Appellate Panel for the Sixth Circuit has determined that “actual fraud as used in 11 U.S.C. § 523(a)(2)(A) is not limited to misrepresentations and misleading omissions.” *Mellon Bank, N.A. v. Vitanovich (In re Vitanovich)*, 259 B.R. 873, 877 (B.A.P. 6th Cir. 2001). “When a debtor intentionally engages in a scheme to deprive or cheat another of property or a legal right, that debtor has engaged in actual fraud and is not entitled to the fresh start provided by the Bankruptcy Code.” *Id.*

As indicated in the prior discussion of facts and damages, the Court finds that Dale Perritt personally misrepresented the need for the initial \$37,500 draw and he concealed from Hamilton the role of SCI, just as he concealed the terms of SCI’s contract with Globe. As stated previously, Hamilton justifiably relied upon Perritt’s representation in paying the \$37,500. Based upon the totality of the proof and the inferences drawn from it, the Court finds that Dale Perritt intended to deceive Hamilton, and that Hamilton’s justifiable reliance on his misrepresentation caused her a loss. Perritt also committed actual fraud, designed to conceal the truth from Hamilton. As a result, the Court concludes that \$41,379.62 actual damages are excepted from his discharge under § 523(a)(2)(A).

Having reached that conclusion, it is unnecessary to explore Hamilton’s additional alleged reasons to except the debt from discharge, including her allegation that the damages arose from “fraud or defalcation while acting in a fiduciary capacity” under § 523(a)(4). Under that section, Hamilton must establish (1) the existence of a fiduciary relationship between Dale Perritt and herself, and (2) a defalcation committed by Perritt in the course of that relationship. The Court notes, without

extensive discussion, that the proof does not support a finding of a fiduciary relationship between Perritt and Hamilton. Even if such a relationship were proven, the monetary damages could be no greater than found under the misrepresentation/fraud exception, and they would likely be less. A defalcation under § 523(a)(4) could only lead to damages for the amount unaccounted for, in this case \$37,500.

C. Amy Perritt

As mentioned in the initial footnote to this opinion, the Court orally granted a directed verdict in Amy Perritt's favor at the end of the trial and an order of dismissal has been entered on April 19, 2004.

CONCLUSION

Based upon the findings and conclusions as discussed, the Court finds that Dale Perritt is personally liable for a debt of \$41,379.62 due to the damages his concealment, fraud and misrepresentation caused Anna Hamilton, and concludes that the debt is excepted from Dale Perritt's discharge under § 523(a)(2)(A).

A separate order, consistent with this opinion, will be entered, along with a final judgment.

The clerk will service copies of this opinion and its related order on:

Debtors
George D. McGrary, attorney for Anna Hamilton
Tommy L. Fullen, attorney for Dale and Amy Perritt
U.S. Trustee