

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

_____| |
IN RE: CASE NO. 05-83912
William Ralph LaFevor,
CHAPTER 7
Debtor. JUDGE MASSEY
_____| |

Ann Woolner,
Plaintiff,
v. ADVERSARY NO. 06-6167
William Ralph LaFevor,
Defendant.
_____| |

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND GRANTING IN PART AND DENYING IN PART
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Ann Woolner seeks a determination that a debt owed to her by Debtor and Defendant William LaFevor is not dischargeable pursuant to sections 523(a)(2)(A), 523(a)(2)(B), and 523(a)(6) of the Bankruptcy Code. Both parties have filed motions for summary judgment. The Court has jurisdiction over this core proceeding pursuant to 28 U.S.C. §§ 1334(b) and 157(b)(2)(I).

Plaintiff entered into a contract dated February 11, 2003 with "RS, Inc." for renovation work on Ms. Woolner's home; Defendant signed the contract on behalf of RS, Inc. as president. Woolner Aff. Ex. A. The contract contains no representations concerning the good standing of RS, Inc., its ownership or its financial condition. It is undisputed that RS, Inc. is not the name of a

corporation with which Defendant has any connection. In his brief, Defendant asserts that he used “RS, Inc.” as shorthand for another corporation he operated known as Residential Maintenance Services, Inc.

During the course of the work, Defendant removed portions of the roof of Plaintiff’s home and covered the exposed portions with a tarp. In March 2003, the tarp proved inadequate during a rainstorm, leading to interior and structural damage to the home. Ms. Woolner fired Mr. LaFevor in April of 2003.

On July 9, 2005, Ms. Woolner sued Mr. LaFevor and Bascom Murrah, the architect for the project, in state court, asserting claims of breach of contract, negligent construction, fraud and professional negligence. Mr. Lefevor filed bankruptcy on October 10, 2005.

Plaintiff bases her claims in this adversary proceeding on three sets of allegedly false representations made by Defendant: (1) that RS, Inc. was a validly formed corporation with capacity to enter into contracts, (2) that Defendant and/or RS, Inc. carried liability insurance sufficient to protect her from losses with respect to the work to be performed, and (3) that “the work described on the draw requests [submitted by Defendant to Plaintiff] had been properly performed on the project, that the labor and material referenced on the draw requests had been furnished to the project, and that all labor and materials procured by Lefevor (sic) to perform the Renovation Contract had been fully paid.” Complaint, p. 4.

Under Fed. R. Civ. P. 56, made applicable in adversary proceedings by Fed. R. Bankr. P. 7056, a motion for summary judgment should be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The movant bears the burden of showing that there is no genuine

issue as to any material fact. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). In deciding a motion for summary judgment, “the court must view all evidence and make all reasonable inferences in favor of the party opposing summary judgment.” *Chapman v. AI Transp.*, 229 F.3d 1012, 1023 (11th Cir. 2000). “The Rule 56 standard is not affected by the filing of cross motions for summary judgment[.]” *Lenoir v. BellSouth Telcoms.*, No. 1:05-CV-02559-MHS, 2006 U.S. Dist. LEXIS 76611, at *8-9 (N.D. Ga. Oct. 17, 2006).

Section 523(a)(2)(A) excepts from discharge any debt “for money, property, services, ... to the extent obtained, by— (A) false pretenses, a false representation, or actual fraud.” 11 U.S.C. § 523(a)(2)(A).

Courts have generally interpreted § 523(a)(2)(A) to require the traditional elements of common law fraud. A creditor must prove that: (1) the debtor made a false representation to deceive the creditor, (2) the creditor relied on the misrepresentation, (3) the reliance was justified, and (4) the creditor sustained a loss as a result of the misrepresentation.

SEC v. Bilzerian (In re Bilzerian), 153 F.3d 1278, 1281 (11th Cir. 1998). The creditor bears the burden of proving nondischargeability under section 523(a)(2), *In re Hunter*, 780 F.2d 1577, 1579 (11th Cir. 1986), and as well as under section 523(a)(6), *In re Thirtyacre*, 36 F.3d 697, 700 (7th Cir. 1994).

Defendant acknowledges that there was no corporation known as RS, Inc. Hence, Plaintiff has shown that Defendant made a false representation in describing the contracting party as RS, Inc. Plaintiff has failed to show, however, that there is no dispute of material fact as to any of the other factual elements that she must prove under section 523(a)(2)(A). She made no showing that Defendant intended to mislead her by using RS, Inc. His position is that he was referring to a corporation he owned with a different name. Nor did Plaintiff make any showing that she relied on the misrepresentation, let alone that her reliance was justifiable.

Plaintiff contends that Defendant falsely represented that he or RS, Inc. carried liability insurance to cover any loss she might incur with respect to the work to be performed. But Plaintiff has not shown that Defendant knew that he had no coverage, and Defendant has proffered evidence that he was insured. Article 5 of the contract attached to Plaintiff's affidavit is entitled "Insurance." It raises more questions than it answers about the precise extent to which Defendant was obligated to obtain insurance coverage. Thus, Plaintiff has failed to show that there is no genuine issue of material fact regarding all of the elements of this portion of her claim.

Plaintiff further contends that Defendant made fraudulent representations in draw requests. Here again, she has not provided sufficient evidence to show the absence of a factual dispute. For example, she provided no evidence concerning the extent to which draw requests overstated the work performed from which the Court could infer the requisite intent to deceive her. The draw requests themselves do not show a representation that the subcontractors, laborers, and suppliers were paid in full, as Plaintiff asserts. Woolner Aff. Ex. I, J. The contract, or at least the portion attached to Plaintiff's affidavit, does not provide that the Contractor had to pay subcontractors prior to submitting draw requests. Accordingly, she is not entitled to summary judgment with respect to allegedly fraudulent misrepresentations involving draw requests.

In the alternative to her claim under section 523(a)(2)(A), Plaintiff contends that each of the allegedly false representations made by Defendant renders the debt nondischargeable pursuant to section 523(a)(6). Section 523(a)(6) excepts from discharge any debt "for willful and malicious injury by the debtor *to another entity or to the property of another entity.*" 11 U.S.C. § 523(a)(6). (Emphasis added.)

Section 523(a)(6) does not apply to a debt arising from fraud. *IndyMac Bank, F.S.B. v. Mitchell (In re Mitchell)*, 2005 Bankr. LEXIS 1924, at *9 (Bankr. N.D. Ga 2005). To fall within

the scope of section 523(a)(6), a debtor must have intended to cause the injury, not just the act which caused the injury. See *Kawaauhau v. Geiger*, 523 U.S. 57, 61-63 (1998). *In re Walker*, 48 F.3d 1161, 1164 (11th Cir. 1995) (“[I]n order to be ‘willful’ under section 523(a)(6), the debtor must have intended more than merely the act that results in injury.”) Plaintiff nowhere alleges, much less shows, that Defendant intended to cause injury to her or to her property.

Plaintiff cites *Hester v. Saturday*, (*In re Saturday*), 138 B.R. 132 (Bankr. S.D. Ga 1991), for the proposition that failure to carry insurance can give rise to a debt for a willful and malicious injury under section 523(a)(6). Her reliance on this case is misplaced. Although a failure to carry insurance might constitute a willful act, the injury suffered must have been substantially certain to occur as the result of a debtor’s failure to obtain insurance. *In re Walker*, 48 F.3d at 1164; *cf. Walters v. Betts* (*In re Betts*), 174 B.R. 636 (Bankr. N.D. Ga 1994). The immediate cause of a large portion, if not all, of the injury to Plaintiff’s residence was water damage following a rainstorm. Plaintiff cannot prove that Defendant’s use of the name “RS, Inc.” or failure to obtain insurance or misrepresentation of the extent of work performed caused the rainstorm or otherwise resulted in damage to Plaintiff’s residence. Hence, Plaintiff is not entitled to summary judgment with respect to the claim under section 523(a)(6).

The Court now turns to Defendant’s motion for summary judgment. Because Defendant does not bear the burden of proof on the issue of nondischargeability, he may prevail by demonstrating Plaintiff cannot prove her case at trial or that she cannot prevail as a matter of law. *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437-38 (11th Cir. 1991).

Defendant has not made a sufficient showing to defeat Plaintiff’s claims under section 523(a)(2)(A). He argues that the misrepresentation concerning RS, Inc. did not constitute fraud because Defendant cannot show that whatever loss she suffered resulted from this

misrepresentation. Defendant misunderstands the nature of the fraud claim. If Plaintiff can prove that Defendant used RS, Inc. to dupe Plaintiff, that she relied on the representation in that she would not have entered into the contract had she known that RS, Inc. was not a valid corporation and that her reliance was justified, any loss arising out of the performance of the contract would constitute a nondischargeable debt. Defendant has not shown that Plaintiff could not prove facts to make such a showing.

As to the insurance representation, Defendant points to documents that purportedly show that he had insurance at the time the parties entered the contract. Def. Mot. Sum. J. Ex. 2, 4. Plaintiff counters this evidence with evidence that Defendant's insurance policy was cancelled prior to the contract date. Woolner Aff. Ex. H. At best, this conflicting evidence shows that a genuine issue of fact exists as to whether Defendant had liability insurance as of the commencement of the work. Accordingly, he is not entitled to summary judgment on this issue.

Defendant did not address whether the draw requests constituted false representations or whether he falsely represented he had paid or would pay subcontractors with the funds received. Nor did he address any other elements of this portion of Plaintiff's claim under section 523(a)(2)(A). Consequently, he is not entitled to summary judgment with respect to this portion of the claim.

Defendant points out that Plaintiff has not shown or even alleged facts supporting a finding of nondischargeability under section 523(a)(2)(B), which deals with false written statements concerning a debtor's financial condition. He further argues that the contract cannot be construed as a representation of his financial condition. Plaintiff did not respond to Defendant's contentions on this point. The Court concludes that the mention of section 523(a)(2)(B) in the complaint was

an error. The mere mention of a code section does not suffice to state a claim for relief.

Accordingly, Defendant is entitled to summary judgment with respect to section 523(a)(2)(B).

Defendant also moves for summary judgment with respect to section 523(a)(6). He is entitled to summary judgment because Plaintiff cannot prevail as a matter of law based on the facts alleged in the complaint. Section 523(a)(6) deals only with intentional torts resulting in injury “to another entity or to the property of another entity.” Plaintiff has not alleged, or put forth any evidence demonstrating, that Defendant intended to injure Plaintiff’s home or her personally; nor can she show that injury to her home was caused by or was substantially certain to occur as the result of any misrepresentation Defendant is alleged to have made. Defendant is therefore entitled to summary judgment on the issue of nondischargeability pursuant to section 523(a)(6).

For these reasons, it is

ORDERED that Plaintiff’s motion for summary judgment is DENIED and that Defendant’s motion for summary judgment is GRANTED as to Plaintiff’s claims brought under sections 523(a)(2)(B) and 523(a)(6) of the Bankruptcy Code and DENIED as to Plaintiff’s claims under section 523(a)(2)(A).

Dated: January 11, 2007.



JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE