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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBERS**
JEFFERY FULLER EMMA J. FULLER, Debtors.	:	BANKRUPTCY CASE NO. 02-17147-WHD
F & M BANK AND TRUST COMPANY, Plaintiff, v.	:	ADVERSARY PROCEEDING NO. 02-1720
JEFFERY FULLER EMMA J. FULLER, Defendants.	:	IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE

ORDER

Before the Court is the complaint objecting to dischargeability of a particular debt filed by the Plaintiff, F & M Bank & Trust (hereinafter the "Plaintiff") against the Defendants, Jeffrey and Emma Fuller (hereinafter the "Debtors"). Following a trial on the complaint, the Court took the matter under advisement. This matter constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(I).

FINDINGS OF FACT

1. The Defendants obtained a loan (the "Loan") from the Plaintiff on or about September 8, 2000. The Loan was provided in the form of a $48,000 line of credit.

2. The purpose of the Loan was to fund improvements to the Defendants' home, which was a four-room house located at 301 Elm Street, Hogansville, Georgia (hereinafter "the House").

3. The Defendants pledged the House and the land upon which it sat as collateral to secure the Loan.

4. Upon obtaining the Loan, the Defendants took an advance on the line of credit in the amount of $17,345.40, leaving an available balance of $30,654.60.

5. As of August 2000, without the planned improvements, the House was worth approximately $17,000-20,000.

6. The lot upon which the House is situated is worth approximately $3,000-4,000.

7. The Loan matured on March 7, 2001. On April 3, 2001, the Defendants and the Plaintiff renewed the Loan.

8. On April 19, 2001, the Defendants applied for a permit to destroy the House. By April 27, 2001, the Defendants had caused the House to be completely destroyed.

9. The Defendants had intended to obtain and had made application for a permanent mortgage from Prestige Mortgage. The Defendants had also intended to purchase the adjoining lot and to replace the House with a modular home.

10. The Defendants never obtained written permission from the Plaintiff to destroy the House.

11. On November 8, 2001, the Defendants renewed the Loan by pledging the House and lot as collateral for the Loan. At that time, the Defendants signed a new promissory note and deed to secure debt in which they granted the Plaintiff a security interest in the House.

12. As of November 8, 2001, the Defendants knew that the House no longer existed.

Conclusions of Law

A. Section 523

The concept of discharging pre-existing debt forms one of the primary tenets of bankruptcy policy. Indeed, "a central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.'" *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (citations omitted). At the same time, a separate equitable policy mandates that any such mechanism for an unencumbered fresh start should only redound to the benefit of those debtors who are indeed unfortunate, yet honest. *Id.* at 286-87. Through the discharge exceptions set forth in section 523(a), the Bankruptcy Code offers a means of denying those individuals who do not qualify as "honest but unfortunate debtors" the benefits of a fresh start. *Id.* at 287. It is a long-standing principle of law, however, that discharge exceptions must be narrowly construed against the creditor and in favor of the debtor. *Gleason v. Thaw*, 236 U.S. 558, 562 (1915); *Schweig v. Hunter (In re Hunter)*, 780 F.2d 1577, 1579 (11th Cir. 1986).

In this action, the burden of proof lies with the Plaintiff, and it must prove by the preponderance of the evidence that the debt in question is not dischargeable. *Grogan v. Garner*, 498 U.S. 279, 287 (1991); Fed. R. Bankr. P. 4005. Therefore, the Court must determine whether the Plaintiff has met its evidentiary burden as to the two subsections of

§ 523 that form the gravamen of its Complaint. The Plaintiff alleges that the debt owed to it is nondischargeable pursuant to § 523(a)(2)(A) and (a)(6).

B. Section 523(a)(2)

The Plaintiff contends that its debt is nondischargeable under § 523(a)(2)(A), which provides that a discharge under section 722 does not discharge an individual debtor of any debt to the extent the debt was obtained by "false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2)(A). To succeed under § 523(a)(2)(A), a creditor must establish by a preponderance of the evidence that:

> (1) the debtor made a false representation with the purpose and intention of deceiving the creditor;
>
> (2) the creditor relied upon the debtor's representation;
>
> (3) such reliance by the creditor was justifiable; and
>
> (4) the creditor suffered a loss as a result of that reliance.

See City Bank & Trust Co. v. Vann (In re Vann), 67 F.3d 277, 279-84 (11th Cir. 1995); *see also Grogan*, 498 U.S. at 285-90; *Signet Bank v. Keyes*, 959 F.2d 245 (10th Cir. 1992); *Mfr. Hanover Trust Co. v. Ward (In re Ward)*, 857 F.2d 1082, 1082 (6th Cir. 1988); *Hunter*, 780 F.2d at 1579.

In the case *sub judice*, it is undisputed that the Debtors made a false representation to the Plaintiff when they renewed the Loan by granting the Plaintiff a security interest in collateral that no longer existed. However, the Debtors assert that they did not make this representation with the intent to deceive the Plaintiff, but instead had informed a representative of the Plaintiff, prior to executing the loan renewal paperwork, that they had torn down the House with the intent to replace it with a new modular home. If this allegation is true, this fact would also preclude the Court from finding that the Plaintiff was justified in relying upon the Debtors' misrepresentation.

The Debtors each testified that they had informed Mr. Weigenka, an officer of the Plaintiff, that they had torn down the House and that they intended to proceed with the purchase of a modular home that would replace the House on the vacant lot. They also testified that Mr. Weigenka and the owner of Prestige Mortgage, the mortgage company with whom they were seeking permanent financing, had spoken about the Debtors' plans to purchase a modular home. Neither party produced this individual to testify as to whether or not she had any discussions with Mr. Weigenka about the modular home. The Debtors essentially contend that they orally informed the Plaintiff's representative that the House no longer existed and merely signed the paperwork to renew the Loan without intending their execution of the papers to be a representation that the House was still standing.

Mr. Weigenka testified that the Debtors never informed him that they had torn down the House. He alleges that, when the Note came due in November 2001, the Debtors informed him that they were not planning on drawing down any additional funds for remodeling the House because Defendant Mr. Fuller had lost his job. He asserts that this development is the reason why the Plaintiff insisted that the Loan be converted from interest only to a 12-month fixed payment loan with a balloon payment due upon maturity. In support of his testimony, Mr. Weigenka noted that the Debtors never informed the Plaintiff of any change of address and that the Plaintiff continued to send the Debtors' monthly interest statements to the Property even after the House had been torn down. Mr. Weigenka testified that the first knowledge that he or any other representative of the Plaintiff had that the House had been torn down came in January 2002, after the Defendants had filed their bankruptcy petition, at which time he personally inspected the Property.

This case essentially comes down to the relative credibility of the three witnesses. As it stands, the only three individuals who were privy to the conversation at issue have presented their testimony to the Court. All three witnesses have an interest in presenting the Court with some-what self-serving testimony. The Defendants' interest is clearly to obtain the discharge of the debt owed to the Plaintiff. Mr Wiegenka also appears to have a personal interest in this case, as he was the representative of the Plaintiff responsible for renewing the Loan. Assuming Mr. Wiegenka had been told that the House was no longer standing, and renewed the Loan anyway in anticipation that the House would be replaced with a more valuable modular home, one can imagine that he would not want to admit prior knowledge of the fact that the House had been torn down after it was discovered that the Debtors no longer had the ability to finance the modular home. In short, the Court finds that all three witnesses have equally compelling reasons to fabricate testimony.

Additionally, the Court finds the testimony of each witness to be equally credible and finds both versions of what transpired in this case to be believable, considering the facts surrounding the transaction between these parties. It is possible that the Debtors told Mr. Weigenka of their future plans, that the papers for the renewal were mistakenly drawn with the old collateral description, and that, in November 2001, when the Debtors disclosed to Mr. Weigenka that they could not afford permanent financing for a modular home, Mr. Weigenka wanted to hide his mistake in judgment by sending the Debtors to a new mortgage company and getting the Loan off of the Plaintiff's books. However, the Court finds it equally possible that the Debtors acted without the knowledge of any representative of the Plaintiff and later realized that the Plaintiff would accelerate the Loan if they told the Plaintiff that they had torn down the House and could not afford to replace it with a modular home.

That being said, the Court must conclude that the Plaintiff has not met its burden of proof on the issue of whether the Debtors intended to deceive the Plaintiff by executing the Loan renewal papers. Inasmuch as the Plaintiff has failed to meet the threshold requirement of showing the Debtors' "intent to deceive," the Court rejects the Plaintiff's argument that the Debtors obtained money by false pretenses or actual fraud.

C. Section 523(a)(6)

Section 523(a)(6) of the Bankruptcy Code provides that any debt for willful and malicious injury by the debtor shall be nondischargeable. 11 U.S.C. § 523(a)(6). Such an injury can include a willful and malicious injury to a person's property. *In re Pharr Luke,* 259 B.R. 426 (Bankr. S.D. Ga. 2000); *In re LaGrone,* 230 B.R. 900 (Bankr. S.D. Ga.1999) (the act of conversion of property is an intentional injury contemplated by the exception to discharge).

In the instant case, the Plaintiff has alleged that the Debtors willfully and maliciously caused an economic injury to the Plaintiff by destroying a portion of the Plaintiff's collateral and thereby harming the Plaintiff's ability to collect its debt. It is undisputed that the destruction of the House diminished the value of the Plaintiff's collateral by approximately $14,000 - $17,000, and that the Plaintiff has suffered an economic injury because it has lost the ability to recover that portion of the debt. However, in order to find that the debt owed to the Plaintiff should be declared nondischargeable, the Court must also conclude that the Debtors destroyed the House with the intent to cause this injury to the Plaintiff.

The United States Supreme Court has held that a finding that the debtor's actions were voluntary is insufficient to support a finding of nondischargeability. "The word 'willful' . . . modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional *injury,* not merely a deliberate or intentional *act* that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57 (1998). Therefore, the plaintiff must establish that the debtor acted with the intent to cause the plaintiff's injury. *Id.*

Subsequent to the Supreme Court's decision in *Geiger*, courts have disagreed over the correct standard for determining whether an injury is intentional. *See In re Su*, 290 F.3d

1140 (9th Cir. 2002) ("... [L]ower courts have differed over whether to adopt a strict subjective test when applying§ 523(a)(6)."). Courts have generally adopted either an objective approach or a subjective approach. Under the objective approach, "[a]n injury is 'willful and malicious' where there is either objective substantial certainty of harm or subjective motive to cause harm." *Miller v. J.D. Abrams, Inc. (In re Miller),* 156 F.3d 598, 606 (5th Cir.1998). Under the subjective approach, "a debt is nondischargeable under § 523(a)(6) only if the debtor intended to cause harm or knew that harm was a substantially certain consequence of his or her behavior." *In re Su*, 290 F.3d at 1143 (citing *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455 (6th Cir. 1999)).

The Court need not adopt either approach for purposes of this Complaint, as the outcome would be the same under either test. Having considered the Defendants' testimony, the Court concludes that, at the time the Defendants demolished the House, the Defendants subjectively believed that they would replace the House with a more valuable modular home and did not intend to leave the lot vacant. Accordingly, under either the subjective or objective approach, they did not have an actual desire to cause harm to the Plaintiff's ability to collect its debt. Further, the Court finds that the Defendants did not know, at the time the House was torn down, that their financial condition would preclude them from obtaining permanent financing for a modular home. Under those circumstances, it cannot be said that the Defendants knew that their destruction of the House was substantially certain to cause an economic injury to the Plaintiff. Accordingly, the Plaintiff has failed to meet either requirement under the subjective approach.

Additionally, if the Court were to adopt the objective approach, the Court would conclude that the Plaintiff has failed to establish the existence of an objective substantial certainty of harm. A reasonable person, with knowledge of the same facts known by the Defendants at the time, would not have considered that their actions were *substantially* certain to diminish the value of the Plaintiff's collateral. The Defendants acted with the intent to obtain a permanent mortgage that would have allowed them to purchase an adjacent lot and place a new modular home on the lot. No evidence has been presented that the Defendants had any knowledge or reason to believe that their financial condition would change or that they would not be able to obtain permanent financing. Tearing down the House without first having the permanent financing in place may have been reckless, but the discharge exception of § 523(a)(6) is not meant to apply to actions that are taken with a reckless disregard for another's property interest. *See In re Miller*, 156 F.3d at 603 ("The Supreme Court's disposition in *Kawaauhau* certainly eliminates the possibility that "willful" encompasses negligence or recklessness."). Accordingly, the Court cannot conclude that the debt owed to the Plaintiff resulted from a willful and malicious injury.

CONCLUSION

Having carefully considered the testimony introduced at trial, the Court concludes that the Plaintiff failed to carry its burden of proof that the obligation owed to it by the

Defendants is nondischargeable under 11 U.S.C. § 523(a)(2) or (6). Accordingly, judgment on the Complaint shall be entered for the Defendants.

IT IS SO ORDERED.

At Newnan, Georgia, this 20 day of February, 2004.

W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE