UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	CASE NO. 04-66906
Marcellus Valden Whirl,	CHAPTER 7
Debtor.	JUDGE MASSEY
Celia Brewer,	
Plaintiff,	
v.	ADVERSARY NO. 04-6497
Marcellus Valden Whirl,	
Defendant.	

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

Plaintiff seeks a judgment declaring a debt owed by Defendant to be nondischargeable because it allegedly arose from fraud. The debt is evidenced by a promissory note based on three advances of funds from Defendant to Plaintiff. Plaintiff alleges that Defendant represented himself to be a financial planner and that he induced Plaintiff to turn money over to him on three different occasions based on false representations. First, she gave Defendant $12,000 for an investment in a project of NASCAR licensee but alleges that there was never any such person and that Defendant spent the money. Second, she contends that she gave Defendant $22,000 for a house dwonpayment and that Defendant spent a portion of those funds on his own mortgage

payments. Third, she contends that she gave $6,000 to Defendant to purchase an interest in an apartment complex but that Defendant used the funds personally.

Defendant does not deny receiving the funds in question from Plaintiff or that he owes a debt to her. He disputes that he committed fraud, however, and moves for summary judgment.

First, he contends that the note he signed is a contract and that under Georgia law, Plaintiff is prevented by the parol evidence rule from introducing any evidence of what they talked about in connection with the advances of money. This defense is totally without merit. The issue presented is not what the terms of the contract to repay the debt were. Rather, it is what the nature of the debt to be repaid was: whether Defendant knowing made a false representation to Plaintiff to induce her to pay him money on which she justifiably relief causing her damages.

Second, Defendant contends that the acceptance of the note by Plaintiff was a novation of any prior agreements that the parties may have had, thereby precluding her from suing for fraud, or was an accord and satisfaction of the prior claims. Defendant has not shown an absence of a factual dispute concerning the issue of novation or accord and satisfaction. He has not even shown that he provided any new consideration for Defendant's giving up a fraud claim.

> A novation or accord and satisfaction is in itself a contract and must have all the elements of a de novo contract . . . Therefore, there must be a meeting of the minds if the novation or accord and satisfaction is to be valid and binding . . . The existence vel non of mutual intention is ordinarily a question of fact which is reserved for determination by the jury." *Mayer v. Turner*, 142 Ga.App. 63, 64(1), 234 S.E.2d 853, 855.

Ward v. Venture Industries, Inc., 147 Ga. App. 17, 18, 248 S.E.2d 7, 8 (Ga. App. 1978). Nor has Defendant shown that the note was an accord and satisfaction of the fraud claim.

Even if the note signed by Defendant constituted a novation or an accord and satisfaction, that circumstance would not prevent Plaintiff "from showing that the settlement debt arose out of

'false pretenses, a false representation, or actual fraud,' and consequently is nondischargeable, 11 U.S.C. § 523(a)(2)(A)." *Archer v. Warner,* 538 U.S. 314, 323, 123 S.Ct. 1462, 1468 (2003).

Finally, Defendant contends that Count Three of the Complaint does not state a claim for relief because it alleges only false oral statements. As Defendant reads that section, a false statement in writing is required. That section of the motion for summary judgment is titled: "Writing required pursuant to 11 U.S.C. § 523(a)(2)(B)." A fraud claim under subparagraph (B) is one based on a false representation concerning the debtor's financial condition and that representation must have been in writing. But Count Three does not refer to subparagraph (B) but is instead based on section 523(a)(2)(A), which does not require a writing.

For these reasons, it is

ORDERED that Defendant's motion for summary judgment is DENIED.

Dated: May 3, 2005.

James E. Massey
JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE