IT IS ORDERED as set forth below:

Date: April 01, 2010

Mary Grace Diehl

Mary Grace Diehl
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In Re:	:	Case No. 08-70254-MGD
STEVEN MARK HORNYAK,	:	Chapter 7
Debtor.	:	Judge Mary Grace Diehl
LARRY THOMPSON and BEVERLY THOMPSON,	:	
Plaintiffs,	:	Adversary Proceeding
v.	:	No. 08-09048
STEVEN MARK HORNYAK,	:	
Defendant.	:	
LARRY THOMPSON and BEVERLY THOMPSON,	:	
Plaintiffs,	:	Adversary Proceeding
v.	:	No. 10-09002
GEORGE F. CHANDLER, III,	:	
Defendant.	:	

ORDER GRANTING DEFENDANTS' MOTION FOR INVOLUNTARY DISMISSAL

A trial for the above-styled consolidated adversary proceedings was held on March 29, 2010. Plaintiffs Larry Thompson and Beverly Thompson ("Plaintiffs") sought a nondischargeability determination under 11 U.S.C. §§ 523(a)(6) or 523(a)(19)[1] based on a loan transaction between Plaintiffs and Riverbrooke Capital Partners, LLC ("RCP"), a corporation owned by Defendants Steven Hornyak and George F. ("Jeff") Chandler (collectively, "Defendants"). The Court has jurisdiction pursuant to 28 U.S.C. § 1334, and this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

The Court heard testimony from Plaintiffs, Jean Taylor Miller, and Robert Eugene Miller. Mrs. Miller is Plaintiff Beverly Thompson's sister and Mr. Miller is the brother-in-law of both Plaintiffs. Plaintiffs' Exhibits 1 through 6 were admitted into evidence without objection. When Plaintiffs rested their case, Defendants moved for an involuntary dismissal under Rule 7041 of the Federal Rules of Bankruptcy Procedure, and the Court heard argument on the motion. The Court announced its findings of fact and conclusions of law pursuant to Rule 52(a)(1) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Rule 7052 of the Federal Rules of Bankruptcy Procedure, from the bench. This Order memorializes the Court's oral ruling granting Defendants' motion to dismiss. Defendants' motion for involuntary dismissal is granted because the facts in evidence presented by Plaintiffs could not sustain a verdict for Plaintiffs.

In March of 2006, Plaintiffs loaned RCP the principal amount of two million dollars with a two-year maturity date and a thirty percent per year interest rate ("Note"). (Plaintiffs' Exhibit 3).

[1] Plaintiffs' abandoned their 11 U.S.C. § 523(a)(2) claim during argument heard by the Court on Defendants' Motion for Involuntary Dismissal.

Under the terms of the Loan Agreements, RCP pledged its interest in three affiliated development companies; RCP agreed to acquire a 24.5 acre property ("Paradise Drive") that Plaintiffs would lease for one dollar per year during the two-year loan term; and upon the Note's maturity date, the $950,000.00 purchase price of Paradise Drive would be deducted from the principal and interest owing Plaintiffs. (Plaintiffs' Exhibit 4). Additionally, Defendants' personally guaranteed the note. (Plaintiffs' Exhibit 5). RCP failed to repay the Note, and RCP and Defendants have filed for Chapter 7 bankruptcy protection.

A central purpose of the Bankruptcy Code is to provide an opportunity for certain debtors to discharge their debts and enjoy a fresh start. *See Grogan v. Garner*, 498 U.S. 279, 284-85, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991); *Quaif v. Johnson*, 4 F.3d 950, 952 (11th Cir. 1993). Congress created some exclusions to the general policy of discharging debts. Section 523(a)(6) of the Bankruptcy Code provides one such exception. It states that a discharge under § 727 does not discharge an individual debtor from 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). In nondischargeability actions under § 523, the burden of proof is on the party objecting to discharge and must be carried by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. at 291.

For the purposes of § 523(a)(6), an injury is willful if the injury was intended or substantially certain to result. *Hope v. Walker (In re Walker)*, 48 F.3d 1161, 1165 (11th Cir. 1995). Willful and malicious injury under § 523(a)(6) "is confined to debts based on what the law has for generations called an intentional tort," done with an actual intent to cause injury as opposed to acts done intentionally that result in injury. *Kawaauhau v. Geiger*, 523 U.S. 57, 62, 118 S.Ct. 974, 140

L.Ed.2d 90 (1998); *see also In re Walker*, 48 F.3d at 1165. A debtor must intend the injury caused by his conduct. *Id.*

Although not presented in the Complaint or the Pre-trial Order, Plaintiffs' theory of recovery under § 523(a)(6) is based on Defendants' violation of Georgia's Disabled Adults and Elder Persons Protection Act. O.C.G.A. § 30-5-1 *et seq*. Plaintiffs assert that Defendants violated Georgia law by abusing or exploiting Plaintiffs, who purportedly qualified as disabled adults or elder persons. The facts and testimony do not support that Defendants committed any unlawful act in creating the debt at issue. There is no evidence of any abuse or exploitation of Defendant Beverly Thompson, and Plaintiff Larry Thompson does not qualify for protection under the Disabled Adults and Elder Persons Protection Act. Although there was credible testimony and evidence that Plaintiff Larry Thompson suffers from disabilities following a stroke, under this Act, a disabled adult is limited to a resident of a long-term care facility. O.C.G.A. § 30-5-8(a)(2)(A). The evidence established that Mr. Thompson was living and had lived with his wife in their residence for more than forty years. Additionally, Mr. Thompson does not qualify as an elder person. He testified that he was sixty-eight years old at the time of trial. Therefore, at the time the loan was procured, in March of 2006, Mr. Thompson was sixty-four years of age. Under the definition section of the Act, an elder person is defined as a person sixty-five years of age or older. O.C.G.A. § 30-5-3(7.1). The Court is also unconvinced that the Disabled Adults and Elder Persons Protection Act was designed to apply to a two-party financial transaction, which serves as the basis of Plaintiffs' claim.

Absent the underlying intentional tort under the Disabled Adults and Elder Persons Protection Act, there is no basis to support a nondischargeability verdict against Defendants under § 523(a)(6). Plaintiffs presented no evidence of Defendants' intent to injure or harm Plaintiffs.

There was no evidence that at the time the loan was procured that Defendants intended to not repay or not comply with the terms of the Note and related documents. There was similarly no evidence that Defendants were in a position that repayment was substantially uncertain or unattainable. The evidence only demonstrates that Defendants were unable ultimately to perform under the Note, not that they intended not to at the time the debt was incurred. In fact, the evidence shows that, Defendants did make efforts to comply with the terms of the Note. Defendants did purchase Paradise Drive as provided under the Note and Plaintiffs occupied the home at the Paradise Drive property for a period of time.

Plaintiffs also assert that § 523(a)(19) provides a basis for this debt to be deemed nondischargeable. Section § 523(a)(19) excepts from discharge any debt arising from the violation of federal or state securities laws, or for common law fraud, deceit, or manipulation in connection with the purchase or sale of any security. 11 U.S.C. § 523(a)(19); *Prime Equity Fund, LP. v. Lichtman (In re Lichtman)*, 388 B.R. 396, 409 (Bankr. M.D. Fla. 2008). Section 523(a)(19) expressly contemplates a postpetition determination of liability by a nonbankruptcy forum for debts resulting from securities law violations as well as common law fraud, deceit, or manipulation in connection with the purchase or sale of a security. *Holland v. Zimmerman (In re Zimmerman)*, 341 B.R. 77, 80 (Bankr. N.D. Ga. 2006). Again, Plaintiffs must prove each and every element of their case by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. at 291.

Plaintiffs assert that the Note qualifies as a security and that § 523(a)(19) is applicable to their claim. Plaintiffs rely on *Reves v. Ernst & Young*, 494 U.S. 56, 67, 110 S. Ct. 945, 108 L. Ed. 2d 47 (1990), and argue that this Note should be classified as a security. In *Reves*, the Supreme Court explained that to determine whether an instrument denominated a "note" is a "security," courts are

to apply the version of the "family resemblance" test, which includes that a note is presumed to be a "security," and that this presumption may be rebutted only by a showing that the note bears a strong resemblance, according to four identified factors, to one of the enumerated categories of instrument. *Id.* Plaintiffs assert that the short-term nature of the note coupled with the high rate of return support a finding that the Note is a security, and, therefore, § 523(a)(19) is applicable.

The Court disagrees that § 523(a)(19) is applicable to this action. First, there is no evidence of any misrepresentations by Defendants. There was no evidence that Defendants made statements that were untrue, misleading, or false at the time they were made. Any federal or state securities cause of action would require a misrepresentation, and no evidence of this sort was presented by Plaintiffs.

Further, this Note does not qualify as a security under the *Reves* framework. This Note arose out of a private, two-party transaction. Security laws are generally aimed at regulating broad market-based transactions. *Reves v. Ernst & Young*, 494 U.S. at 57. In the *Reves* case, notes were being offered to 23,000 co-operative members and non-members to finance the general business operations of the co-operative. *Id.* at 56. The public offering in *Reves* stands in stark contrast to this two-party, private transaction. Additionally, *Reves* indicates that one of the specific factors against a security determination would be when a note is procured for the purpose of securing funding to correct the sellers cash flow. *Id.* at 66. The evidence presented by Plaintiffs demonstrates that this transaction was designed exactly for such a purpose.

For all of these reasons and those stated orally on the record, the lack of evidence in support of Plaintiffs' claims warrants dismissal of the action. Accordingly, it is

ORDERED that Defendants' Motion to Involuntarily Dismiss is hereby **GRANTED,** and the above-styled adversary proceeding is **DISMISSED** with prejudice.

The clerk is directed to serve the Plaintiffs, counsel for the Plaintiffs, the Defendants, and counsel for the Defendants.

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