



IT IS ORDERED as set forth below:

Date: March 17, 2011

Mary Grace Diehl

**Mary Grace Diehl
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION**

| | | |
|------------------------------|---|-----------------------------------|
| IN RE: | : | Chapter 7 |
| | : | |
| DONNA R. RICHARDS, | : | Case Number: 10-41171-MGD |
| | : | |
| Debtor, | : | Judge Diehl |
| | : | |
| ARC REAL ESTATE. LLC, | : | |
| | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | Adversary Proceeding No: 10-04100 |
| | : | |
| DONNA R. RICHARDS, | : | |
| | : | |
| Defendant. | : | |

ORDER GRANTING PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT

This case is before the Court on ARC Real Estate, LLC's Motion for Entry of Default Judgment ("Motion") filed on December 21, 2011 (Docket No. 6). ARC Real Estate, LLC ("Plaintiff" or "ARC") commenced the above-styled adversary proceeding against Donna R.

Richards (“Defendant”) on November 10, 2010, seeking a determination that Defendant’s debt to Plaintiff was nondischargeable pursuant to 11 U.S.C. §§ 523(a)(2)(A) and (a)(6). A summons was issued commanding Defendant to file and serve an answer to the complaint. According to the certificate of service, it appears service was proper under Rule 7004(b) of the Federal Rules of Bankruptcy Procedure. (Docket No. 4). Rule 7012 of the Federal Rules of Bankruptcy Procedure requires a defendant to “serve an answer within 30 days after the issuance of the summons.” Defendant did not file a response or otherwise make an appearance within the 30-day period, and, upon Plaintiff’s request, entry of default was made December 21, 2010. Defendant, *pro se*, filed a document on January 7, 2011 titled, “In response to complaint non-discharge ability of Debt.” (Docket No. 8). Plaintiff construed Defendant’s document as a response to the Motion and subsequently filed a reply on January 25, 2011. (Docket No. 9).

This is a core proceeding under 28 U.S.C. § 157(b)(2) and jurisdiction and venue are proper.

Plaintiff alleges sufficient facts to award judgment in favor of the Plaintiff and deem the debt nondischargeable under §§ 523(a)(2)(A) and 523(a)(6). Defendant’s response asserts two defenses to Plaintiff’s Motion and requests a hearing. Defendant’s defenses are discussed below and no hearing is necessary. For the reasons set forth below, Plaintiff’s Motion is **GRANTED**.

I. **FACTS**

Defendant filed a Chapter 7 case in the Northern District of Georgia, Rome Division on March 24, 2010. (Complaint, ¶ 1). Plaintiff is a Delaware Limited Liability Company registered to do business in the state of Georgia. (Complaint, ¶ 6). Defendant was the managing member of Richards’ Advantage Housing, LLC (“Advantage”). (Complaint, ¶ 9). Advantage is a Georgia Limited Liability Company. (Complaint, ¶ 9). Advantage sold mobile homes in Georgia.

(Complaint, ¶ 10). Defendant managed Advantage's day-to-day affairs and was the sole person authorized to enter into contracts and other financing arrangements on Advantage's behalf. (Complaint, ¶ 11). On November 28, 2007, Plaintiff entered into a certain purchase contract with Advantage ("Purchase Contract"), which was executed by Plaintiff in her capacity as President of Advantage. (Complaint, ¶ 13; Exhibit A).

Under the terms of the Purchase Contract, Plaintiff agreed to purchase certain mobile homes, and these homes were a combination of two types of homes. (Complaint, ¶¶ 14-15). Plaintiff agreed to pay \$17,648.00 for each home where the sale of the home was being financed under a contract for title ("Contract Home"). (Complaint, ¶¶ 15-16). Advantage agreed to transfer to Plaintiff the title to thirty-three Contract Homes upon execution of the Purchase Contract. (Complaint, ¶ 19; Exhibit A, ¶ 2). The Purchase Contract, included Advantage's express representation and warranty that it had legal and marketable title to each Contract Home subject to the Purchase Contract. (Complaint, ¶ 19; Exhibit A, ¶¶ 2-3). Defendant made or caused Advantage to make a false representation to Plaintiff. (Complaint, ¶ 49). When the representation was made, Defendant knew that Advantage did not have legal and marketable title of the Contract Homes. (Complaint, ¶ 51). The misrepresentation was material and induced Plaintiff to enter into the Purchase Contract. (Complaint, ¶ 54). Plaintiff relied on this representation and warranty when it, in accordance with the terms of the Purchase Contract, transferred a \$100,000.00 deposit and \$369,407.20 in purchase money to Advantage around the date the Purchase Contract was executed. (Complaint, ¶ 18). Plaintiff's reliance was justified. (Complaint, ¶ 55). Defendant knew the misrepresentation – that Advantage was the legal owner of each manufactured home for which Plaintiff was advancing money under the Purchase Contract – was substantially certain to cause Plaintiff economic injury.

(Complaint, ¶¶ 62-63). Defendant made this misrepresentation deliberately and intentionally to induce Plaintiff to enter into the Purchase Contract. (Complaint, ¶ 62).

Advantage failed to perform its obligations under the Purchase Contract, including the transfer of Contract Homes, under the terms provided by the Purchase Contract. (Complaint, ¶ 23). As of the closing date under the Purchase Contract, February 28, 2008, Advantage had only delivered nine of the Contract Homes to Plaintiff. (Complaint, ¶¶ 22, 24). The delivery of the nine Contract Homes was incomplete under the terms of the Purchase Contract because the necessary documentation was not delivered. (Complaint, ¶ 25). Advantage never returned the purchase money upon its failure to perform under the Purchase Contract. (Complaint, ¶ 27).

On or about December 18, 2008, a Repayment Agreement and Personal Guarantee (“Repayment Agreement” and Exhibit B) were executed. (Complaint, ¶ 29). The parties to the Repayment Agreement were Plaintiff, Advantage, and Defendant. (Complaint, ¶ 29; Exhibit B). Under the Repayment Agreement, Defendant guaranteed all of Advantage’s obligations to ARC, and Advantage was required to deliver to ARC certain payments based on the amount owed, as provided in the Repayment Agreement. (Complaint, ¶¶ 32-34; Exhibit B, ¶ 12). Advantage failed to comply with the defined payment terms, failed to deliver other certain Contract Homes, and failed to produce the promised documentation with respect to the nine Contract Homes. (Complaint, ¶¶ 35-39).

On July 2, 2009, Plaintiff brought suit in the United States District Court for the Northern District of Georgia, the Honorable Harold L. Murphy presiding, against Advantage and Defendant. (Complaint, ¶ 40; Case No. 4:09-cv-00106-HLM). Advantage and Defendant failed to answer, and Plaintiff was awarded default judgment for the sum of \$331,271.61 with interest and statutory attorneys’ fees. (Complaint, ¶¶ 41-42). On February 4, 2010, the District Court issued a Writ of

Execution.

Defendant filed a voluntary Chapter 7 case on March 24, 2010. (Docket No. 6). On May 20, 2010, at Defendant's § 341 meeting of creditors, Defendant testified under oath that Advantage did not have the titles of the Contract Homes when the Purchase Contract was executed. (Complaint, ¶¶ 44-46).

II. DISCUSSION

Plaintiff has moved for a default judgment. The Court has discretion as to the entry of a default judgment. Federal Rule of Civil Procedure 55(b), made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7055, provides that the court *may* enter judgment by default. FED. R. CIV. P. 55(b) (emphasis added). “[A] defendant’s default does not in itself warrant the court in entering default judgment. There must be a sufficient basis in the pleadings for the judgment entered.” *Nishimatsu Constr. Co., Ltd. v. Houston Nat’l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975); *see also Alan Neuman Prods., Inc. v. Albright*, 862 F.2d 1388, 1392 (9th Cir. 1988), *cert. denied*, 493 U.S. 858 (1989); *Wahl v. McIver*, 773 F.2d 1169, 1174 (11th Cir. 1985). The Supreme Court has explained that the pleading requirements under Rule 8 of the Federal Rules of Civil Procedure¹, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7008, require the complaint to contain “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Here, Plaintiff has alleged sufficient facts to be awarded judgment.

Defendant’s response asserts two defenses to Plaintiff’s Motion. First, Defendant asserts that

¹ Federal Rule of Civil Procedure 8(d)(1) provides that “each allegation must be simple, concise, and direct.”

Plaintiff did not suffer any loss associated with the Purchase Contract. Second, Defendant asserts that she is shielded from personal liability by Advantage's corporate form. "A defendant, even though in default, is still entitled to contest the sufficiency of the complaint and its allegations to support the judgment being sought." *Tyco Fire & Sec., LLC v. Hernandez Alcocer*, 218 Fed. Appx. 860, 863 (11th Cir. 2007) (citations omitted). However, Defendant's failure to file and serve an answer as commanded in the complaint results in an admission of all of the complaint's allegations. FED. R. CIV. P. 8(b)(6).

A. 11 U.S.C. § 523(a)(2)(A)

Plaintiff asserts that the debt Defendant owes Plaintiff is nondischargeable under § 523(a)(2)(A). Section 523(a)(2)(A) provides an exception from a chapter 7 discharge for an individual debtor from any debt for "money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud. . . ." 11 U.S.C. § 523(a)(2)(A). Plaintiff asserts an actual fraud claim. The requisite elements of a 523(a)(2)(A) claim are the traditional elements of common law fraud:

1. The debtor made a false representation with the purpose and intent of deceiving the creditor;
2. The defendant/debtor knew the representations were false at the time they were made;
3. The creditor relied upon such representations;
4. The creditor's reliance was justified; and
5. The creditor sustained a loss as a result of such representation.

SEC v. Bilzerian (In re Bilzerian), 153 F.3d 1278, 1281 (11th Cir. 1998); *In re Johannessen*, 76 F.3d 347, 350 (11th Cir. 1996); *Grogan v. Garner*, 498 U.S. 279, 287, 111 S. Ct. 654, 112 L. Ed. 2d 755(1991).

The complaint's well-plead allegations are taken as true due to the default. *Tyco Fire & Sec., LLC v. Hernandez Alcocer*, 218 Fed. Appx. 860, 863 (11th Cir. 2007); FED. R. CIV. P. 8(b)(6). Here, Plaintiff has plead factual allegation to make out each required element of a § 523(a)(2)(A) claim. The admitted facts are as follows: Defendant made a false representation regarding having legal and marketable title to the Contract Homes, and Defendant's representation and warrantee in the Purchase Contract was made with an intent to deceive Plaintiff. Defendant knew the misrepresentation was false at the time it was made, and Plaintiff justifiably relied on the misrepresentation when it entered into the Purchase Contract and the subsequent Repayment Agreement and Personal Guarantee. As a result of such reliance, Plaintiff suffered a loss by transferring money and not receiving its bargained-for Contract Homes and the legal titles for such homes.

Defendant first defense is that Advantage's corporate form protects her from this action: "This was a debt incurred by Richards Advantage Housing LLC a Georgia Corporation that us no longer open." Plaintiff is correct that generally corporate law protects its officers and shareholders from corporate liability through its separate legal existence. *Fuda v. Kroen*, 420 S.E.2d 767 (Ga. App. Ct. 1992). The mere operation of corporate business does not render one personally liable for corporate acts. *Id.* However, the corporate entity can be invaded in some instances.

"The concept of piercing the corporate veil is applied in Georgia to remedy injustices which arise where a party has over extended his privilege in the use of a corporate entity in order to defeat justice, perpetrate fraud or to evade contractual or tort responsibility." *Id.* Here, the admitted factual allegations make out a fraud claim, and can create personal liability for Defendant as part of the Purchase Contract, in addition to her admitted personal liability created from the Repayment

Agreement and Personal Guarantee. “[A] corporate officer cannot use the corporate form to shield himself from personal liability for fraud in which he himself is involved is a tenet of corporate law too well settled for debate.” *Sellers v. Mallard*, 1987 U.S. Dist. LEXIS 8494, 19-20 (S.D. Ga. Sept. 8, 1987) (citing *Hamilton Bank and Trust Co. v. Holliday*, 469 F. Supp. 1229 (N.D. Ga. 1979) (applying Georgia Law); *Coke v. City of Atlanta*, 184 F. Supp. 579 (N.D. Ga. 1960) (applying Georgia law); see also *Lobato v. Pay Less Drug Stores, Inc.*, 261 F.2d 406 (10th Cir. 1958) (stating general rule); see generally W. Fletcher, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 990 (Perm. Ed. 1986)).

Defendant’s second defense relates to whether Plaintiff sustained a loss as a cause of the misrepresentation. However, the admitted facts regarding the purchase money Plaintiff transferred to Advantage based on the misrepresentation of having legal and marketable title satisfy this element. Additionally, Plaintiff obtained a final judgment as to damages resulting from the Purchase Contract and Repayment Agreement. Defendant’s asserted defense does not defeat Plaintiff’s fraud claim under § 523(a)(2)(A).

B. 11 U.S.C. § 523(a)(6)

Section 523(a)(6) provides that “[a] discharge under section 727...of this title does not discharge an individual debtor from any debt... (6) for willful and malicious injury by the debtor to another entity or to the property of another entity.” To be nondischargeable under § 523(a)(6), the debt must result from a deliberate and intentional injury and not merely a deliberate or intentional act that leads to injury. *Kawaauhau v. Geiger*, 523 U.S. 57, 118 S.Ct. 974 (1998). Willful is defined in the Eleventh Circuit as “intentional or deliberate and can not be established merely by applying

a recklessness standard.” *In re Ellerbee*, 177 B.R. 731, 739 (Bankr. N.D. Ga. 1995) (quoting *In re Ikner*, 883 F.2d 986, 989 (11th Cir. 1986)). Further, the term “willful” modifies the term “injury,” so the intent to be proven is the intent to cause the harmful consequences of an act, not merely the intent to commit the act. *Kawaauhau v. Geiger*, 523 U.S. at 64. A willful injury, therefore, is “an injury that the debtor intended to cause or that the debtor knew was substantially certain to be the consequence of his acts.” *In re Ellerbee*, 177 B.R. at 740. Plaintiff must also show that the injury was malicious. Malicious is defined in the Eleventh Circuit as “wrongful and without just cause or excessive even in the absence of personal hatred, spite or ill-will.” *Id.* at 739 (quoting *In re Latch*, 820 F.2d 1163, 1166 n.4 (11th Cir. 1987)). The required malice may be implied or constructive, if the nature of the act committed sufficiently implies malice. *In re Ikner*, 883 F.2d 986, 991 (11th Cir. 1986).

Here, the admitted factual allegations establish that Defendant’s misrepresentation – that Advantage had legal and marketable title for the Contract Homes under the Purchase Agreement—amounts to an intentional act to cause injury or an act that Defendant knew was substantially certain to cause injury. Defendant’s misrepresentation was not mere recklessness; the misrepresentation was not an oversight or made with a lack of due diligence. Instead, the admitted factual allegations include that Defendant had knowledge that Advantage did not hold title for the certain Contract Homes at the time of the Purchase Contract, and that Defendant, by making a false warranty, intended an injury to Plaintiff. This false warranty was made without just cause, and was, therefore, made with malice. *In re Ellerbee*, 177 B.R. at 139. Plaintiff is entitled to an award of judgment for this § 523(a)(6) claim.

Defendant's response to the Motion also includes a request for a hearing so she can be represented by counsel. No hearing is needed to dispose of the Motion and the response thereto. The procedural posture of this case indicates that Defendant has had ample time to retain counsel to represent her in this action, and that such counsel could have filed any written motion on her behalf. Accordingly, it is

ORDERED that Plaintiff's Motion for Default Judgment is hereby **GRANTED**.

The Clerk is directed to serve a copy of this Order upon Plaintiff, Plaintiff's counsel, Defendant, and Chapter 7 Trustee.

A separate judgment in favor of Trustee will be entered contemporaneously with this Order.

END OF DOCUMENT