IT IS ORDERED as set forth below:

Date: July 14, 2014

James R. Sacca
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	]	
	]	Case No. 13-68500-JRS
GERALDINE DELONG,	]	
	]	Chapter 7
Debtor.	]	
	]	
KENNETH GURTA, Plaintiff,	]	
	]	
vs.	]	Adv. Pro. 14-5004
	]	
GERALDINE DELONG,	]	
	]	
Defendant.	]	

ORDER

This matter came on for trial on May 29, 2014 on the Complaint filed by Plaintiff wherein he alleges that the Defendant should not be granted a discharge (a) for any of her debts under 11 U.S.C. § 727(a)(4)(A) for making a false oath and (b) for the debts specifically owed to him under 11 U.S.C. § 523(a)(2)(A) for fraud or false pretenses and 11 U.S.C. § 523(a)(6) for

willful and malicious injury.

On November 2, 2011, Geraldine DeLong entered into a two year, residential real property lease with Kenneth Gurta for a house located at 2732 Wilding Green Lane, Dacula, Georgia 3001. Ms. DeLong was more than 70 years old when she entered into the lease. She lived with her daughter in the house. The monthly rent was $1,200. Payments were due on the 5th of the month. She generally paid within ten days of the due date, but Mr. Gurta would go by the house personally to collect the rent. The parties seemed cordial at first, but the relationship deteriorated. Mr. Gurta said he would bring over a beer or two when he went to collect the rent and stay for at least an hour because Ms. DeLong liked to talk and tell stories and he did not want to seem rude. Ms. DeLong testified that Mr. Gurta would bring over a six pack, that he would be noticeably drunk upon arrival and that he would linger because he was nosy, including going through her refrigerator and mail without her permission.

During the summer of 2012, Ms. DeLong was injured at her job at Steak 'n Shake and was unable to work. She only collects social security now. She paid her July 2012 rent about two weeks after the due date and she did not pay her August rent until the end of the month. Because she failed to pay her September rent, Mr. Gurta and his girlfriend[1] delivered a notice to Ms. DeLong on October 2, 2012 advising her that if she failed to pay the rent, he would commence dispossessory proceedings.

In response to the notice, Ms. DeLong told Mr. Gurta that she had a workers' compensation claim from which she would pay him the past due rent out of the settlement proceeds. Her workers' compensation lawyer communicated with Mr. Gurta and they worked out an arrangement in early November pursuant to which the lawyer sent Mr. Gurta a check for

[1] To say there is animosity between Ms. DeLong and her daughter and Mr. Gurta's girlfriend would be an understatement.

$2,000[2] and they agreed that the $995 balance would be paid from the settlement proceeds. In return, Mr. Gurta agreed not to commence dispossessory proceedings.

Ms. DeLong did not make the regular November rent payment, but she did pay the rent in December, January, February and March. Although Ms. DeLong denies promising to pay the past due rent from the workers' compensation settlement, and her daughter testified that she never heard her mother make such a promise, it appears to the Court that from October 2012 through perhaps as late as May 2013, Ms. DeLong periodically told Mr. Gurta that she would pay him the past due amounts from her settlement when she received it, although it appears the parties did not agree on what the amount of the past due rent was at any given time. If Ms. DeLong did not make that representation to Mr. Gurta, it would not have made sense for Mr. Gurta to continue to forbear from commencing dispossessory proceedings during that entire time.

Ms. DeLong received the first $29,336 from her settlement on February 26, 2013. Mr. Gurta did not receive any of that money toward the past due rent. Although she did pay the March rent, Ms. DeLong did not pay rent in April and May. Ms. DeLong received another $10,961 of her settlement on May 6, 2013, but did not use any of that money to pay the past due rent; instead, that money was used to pay for further surgery from her injury at Steak 'n Shake. On June 4, 2013, Mr. Gurta had his girlfriend deliver another letter to Ms. DeLong notifying her that if the rent was not paid, he would commence a dispossessory proceeding and two days later he did commence such a proceeding. In the dispossessory proceeding, Ms. DeLong disputed the amount due and raised other defenses, but the magistrate court found that she owed $6,309.67 plus court costs and granted Mr. Gurta a writ of possession. Ms. DeLong and her daughter

[2] The check from Ms. DeLong's lawyer to Mr. Gurta was a loan from the lawyer to Ms. DeLong which was also to be paid from the settlement proceeds.

moved out of the property in early to mid July 2013.

Mr. Gurta claims that before Ms. DeLong moved out, she intentionally damaged or stole his property: she allegedly took the microwave that was stored in the attic, put sugar in the gas tank of the lawn mower and ruined it and poured something down the garbage disposal to ruin it, as well. The parties did agree that Ms. DeLong installed her own microwave in the property. Ms. DeLong and her daughter denied taking the microwave or doing anything to the garbage disposal or lawn mower. Rather, they contended that the lawn mower was used and stopped working and that the garbage disposal stopped working as well.

Disaster struck Ms. DeLong's family after the initial promise was made in October to pay the past due rent from the workers' compensation settlement. Ms. DeLong's mother and aunt died in November 2012, her brother died in December 2012, her sister was murdered in April 2013 and she has a sister who was terminally ill who she has had to help support financially. Ms. DeLong used the money she received from the settlement to pay for funeral expenses for her mother, brother, sister and aunt, to help support her terminally ill sister and repay the $2,000 loan from her lawyer. She also testified that the lawyer received 25% of the settlement for his fees. There was no evidence that she purchased any luxury items with the settlement proceeds.

Ms. DeLong filed her Chapter 7 bankruptcy petition on August 26, 2013. When she filed her initial Statement of Financial Affairs and Schedule of Assets in her bankruptcy case, she disclosed that she received $27,000 in November 2012 on account of a personal injury settlement and that she may be entitled to another $10,000. In response to questions at the Section 341 Meeting of Creditors, she amended her Statement of Financial Affairs and Schedule of Assets to disclose that she received settlement proceeds of $29,336 on February 26, 2013 and $10,961 on

May 6, 2013 and to remove the reference that she may be entitled to more on account of the settlement.

I. 11 U.S.C. § 727(a)(4)(A)—Denial of discharge for a false oath

Section 727(a)(4)(A) provides that the court shall grant the debtor a discharge unless she knowingly and fraudulently made a false oath or account in connection with the case. This subsection is generally designed "to ensure that a debtor provides complete and accurate information to the bankruptcy court and those with an interest in the administration of the debtor's estate" *In re Kontos*, 12-50156C-7W, 2014 WL 176571 (Bankr. M.D. N.C. Jan. 13, 2014). The plaintiff bears the burden of proving that the debtor is not entitled to a discharge and must prove its case by a preponderance of the evidence. *In re Beaubouef*, 966 F.2d 174, 178 (5th Cir. 1992); *see* Fed. Bankr. P. 4005.

To justify the denial of a discharge under subsection (A), the false oath must be (1) fraudulent and (2) material. *See Swicegood v. Ginn*, 924 F.2d 230, 232 (11th Cir. 1991). Cases under this subsection almost always involve omissions from the debtor's schedules. *See e.g. Swicegood*, 924 F.2d at 232.

1. Fraud Requirement

A fraudulent statement under this section must be made with a knowing intent to defraud creditors. *In re Chalik*, 748 F.2d 616, 618 (11th Cir. 1984). Deliberate omissions from the schedules may constitute false oaths and result in the denial of discharge. *Id.* at 618 n. 3. The plaintiff must demonstrate actual, not constructive fraud; *In re Wines*, 997 F.2d 852, 856 (11th Cir. 1993), but since defendants will rarely admit their fraudulent intent, actual intent may be inferred from circumstantial evidence. *In re Ingersoll*, 124 B.R. 116, 123 (M.D. Fla. 1991). An inference of an intent to deceive may be formed from a series or pattern of errors or omissions.

In re Buck, 166 B.R. 106, 109 (Bankr. M.D. Tenn. 1993) (George C. Paine, II, B.J.). However, the discharge may not be denied when the false oath was caused by a mistake or inadvertence. *Beaubouef*, 966 F.2d at 178.

2. Materiality Requirement

The false oath must also be material. *Swicegood*, 924 F.2d at 232. A misrepresentation is material if it is related to the debtor's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence or disposition of property. *Chalik*, 748 F.2d at 618. A showing of harm to the creditor is not required. *Id.* at 618. Creditors are entitled to judge for themselves what will benefit or prejudice them. *Beaubouef*, 966 F.2d at 178. However, a demonstration that a misstatement is material is insufficient in and of itself to deny a discharge. The misstatement or omission must be made with the requisite fraudulent intent, and the size of the error may bear on whether intent exists. *In re Bailey*, 147 B.R. 157, 164 (Bankr. N.D. Ill. 1992).

In a § 727(a)(4)(A) case, the court may consider a correction in schedules, and an explanation of such correction by the debtor, when deciding whether the debtor made a bona fide effort to value her assets when preparing the original schedules. *Wines*, 997 F.2d at 857. However, an amendment including omitted assets in response to a creditor's objections will support a finding that the assets were deliberately omitted. *Swicegood*, 924 F.2d at 232.

Because a general discharge facilitates a debtor's "fresh start"—one of the primary purposes of bankruptcy law—the discharge provisions must be construed liberally in favor of the debtor and strictly against the objecting creditor. *In re Burgess*, 955 F.2d 134, 137 (1st Cir. 1992). The grounds for denial of discharge must be proven specifically, and the proof must address the transfer or concealment alleged. A debtor should not be denied a discharge on "general equitable

considerations." *Rice v. Matthews*, 342 F.2d 301, 304 (5th Cir. 1965).

In this case, the Ms. DeLong initially disclosed on her Statement of Financial Affairs and Schedules of Assets that she received $27,000 from the settlement of a personal injury claim in November 2012 and that she might be entitled to another $10,000 from that claim after the filing of the case. After her first meeting of creditors, at which questions were asked about the claim by Plaintiff and the trustee, she amended her Statement of Financial Affairs to disclose that she received the proper amounts on the proper dates in February and May 2103. Although the initial disclosure of the claim and its settlement were not accurate, the disclosure was sufficient to put the trustee and creditors on adequate notice about its size, existence and settlement to permit a meaningful investigation of it. The claim was neither omitted nor unreasonably valued as might be the case if a debtor were trying to dissuade a trustee from investigating the claim. The Court finds there was no fraudulent intent with respect to the misstatement and the incorrect dates of the receipt of the settlement proceeds were not material under the facts of this case. Accordingly, Plaintiff's objection to Ms. DeLong's general discharge must be denied.

II. § 523(a)(2)(A)—Exception from discharge for a false representation

Section 523(a)(2)(A) provides that a discharge under § 727[3] does not discharge an individual debtor from "any debt for money property, services, or an extension, renewal, or refinancing of credit," if obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." 11 U.S.C. § 523(a)(2)(A). A party seeking to classify a debt as nondischargeable under § 523(a)(2)(A) must prove all the statutory elements by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 290 (1991). Exceptions to discharge are strictly construed, and the burden is on the creditor to prove the exception. *In re St. Laurent*, 991 F.2d 672, 680 (11th Cir. 1993).

[3] This provision also applies to §§ 1141, 1228(a), 1228(b), and 1328(b). 11 U.S.C. § 523(a)(2)(A).

In order to succeed under this provision, a creditor must prove the following requirements: (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. *In re Bilzerian*, 153 F.3d 1278, 1281 (11th Cir. 1998); *see Field v. Mans*, 516 U.S. 59, 74 (1995) (clarifying that § 523(a)(2)(A) requires justifiable, but not reasonable reliance). The misrepresentation can be oral, unless it concerns the debtor's financial condition, in which case it must be in writing. *In re Appling*, 500 B.R. 246, 250 (Bankr. M.D. Ga. 2013) ("A debt based upon an oral misrepresentation of financial condition is not actionable and will be dischargeable."); *see* 11 U.S.C. § 523(a)(2)(B).

Intent must exist at the time of the misrepresentation, and cannot be implied, although gross recklessness may be sufficient. *In re Martin*, 761 F.2d 1163 (6th Cir. 1985). Courts should look to the totality of the circumstances to determine intent. *In re Ford*, 186 B.R. 312, 320 (Bankr. N.D. Ga. 1995). "The burden is heavier where . . . no intermediary exists like in transactions between a credit card holder and a credit card company." *In re King*, 258 B.R. 786, 794 (Bankr. D. Mont. 2001) (citing *In re Slyman*, 234 F.3d 1081, 1086 (9th Cir. 2000)). In such cases the creditor must prove the elements of fraud and reliance by direct evidence. *Id.*

The creditor's reliance upon the false information must be justifiable. *In re Vann*, 67 F.3d 277, 281 (11th Cir. 1995). The justifiable reliance standard is an individual standard that requires examination of the surrounding circumstances and qualities of the particular plaintiff. *Field v. Mans*, 516 U.S. at 59-60. In general, the standard does not require a duty to investigate, unless a creditor has reason to suspect that he is being deceived. *Id.* Reliance is not justifiable if a cursory investigation can reveal the representation's falsity. *Id.*

The Court finds that Mr. Gurta did not carry his burden in proving that his claim against Ms. DeLong should be non-dischargeable under § 523(a)(2)(A). The Court cannot find that Ms. DeLong did not intend to pay Mr. Gurta at the time the representations were made. Ms. DeLong paid $2,000 shortly after the initial representation was made and then made regular rent payments in December, January, February and March. That does not appear to this Court to be the conduct of a person who is committing a fraud. It appears to the Court that when the Debtor did get her money from the settlement she simply decided to pay other things which she considered more important, such as funeral expenses for her family members, caring for her dying sister, the loan to her lawyer and further medical work.[4]

The conduct alleged by Mr. Gurta does not seem materially different than what many creditors hear from their delinquent debtors: "I promise to pay you when I get my paycheck." When the paycheck comes and the money is paid elsewhere, it is not fraud, but merely a broken promise. For a creditor to carry his burden that his debt is non-dischargeable under § 523(a)(2)(A), the creditor must provide evidence that there was more than a future promise to pay. *See In re Martin*, 70 B.R. 146, 149 (Bankr. M.D. Ala. 1987). "Fraud is not usually found in promises to act in the future." ***Id.*** [cite] In this case, Ms. DeLong did not misrepresent the fact that she had a worker's compensation claim. She merely chose not to pay Mr. Gurta from the proceeds of it like she said she would when the time came to pay those other expenses which she

[4] The Court does not have before it sufficient evidence of when Ms. DeLong made the last representation to Mr. Gurta to find that she continued to make the representation after she knew she was not going to be getting any further money from the settlement with which to pay Mr. Gurta. Because Ms. DeLong did get additional money in May from the settlement, the Court cannot find that any representation made prior to that payment was made falsely with the intention of deceiving Mr. Gurta. Furthermore, there is no evidence that Ms. DeLong understood at that time that she was not going to be receiving more money after May 6, which could explain why she initially disclosed a potential claim for additional sums on her Schedule of Assets. Even assuming that a false representation was made after May 6 with the intention to deceive Mr. Gurta and on which Mr. Gurta was justified in relying, Mr. Gurta's damages would not be the entire amount owed, but rather only about one month's rent because he could not have evicted her until June anyway instead of July, so the damages would only be one month's rent.

consider more important or urgent. Every lessor or lender has a promise to pay from a debtor. The mere breach of that promise alone is not fraud.

III. § 523(a)(6)—Exception from discharge for willful and malicious injury

Section 523(a)(6) provides, in pertinent part, that an individual debtor is not entitled to discharge 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). A party seeking to except a debt from discharge under this section must prove willfulness and malice by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279 (1991). Again, exceptions to discharge are strictly construed, and the burden is on the creditor to prove the exception. *In re Hunter*, 780 F.2d 1577 (11th Cir. 1986) (citations omitted).

The term "willful" means intentional and deliberate. *In re Ikner*, 883 F.2d 989, 991 (11th Cir. 1989). "Malicious" means wrongful and without just cause or with excessive spite or ill-will, even in the absence of personal hatred. *Id.* A showing of mere recklessness does not prove willfulness, but it can prove malice.[5] A deliberate or intentional act that results in injury does not constitute "willful and malicious injury," for purposes of a § 523(a)(6) exception to discharge. *In re Walker*, 48 F.3d 1161, 1164 (11th Cir. 1995). The debtor must intend actual injury, rather than the underlying act, before the resulting debt may be nondischargeable. *Id. See Kawaauhau v. Geiger*, 523 U.S. 57, 63 (1998) (explaining that § 523(a)(6) covers intentional torts as opposed to negligent or reckless torts).

Mr. Gurta did not carry his burden of proving the elements necessary to have a non-dischargeable claim for the value of the microwave, lawn mower or garbage disposal. He said

[5] *Compare In re Ikner*, 883 F.2d 986 (11th Cir. 1989) ("wanton" conduct causing car wreck not "intentional" under § 523(a)(6)) *with In re Rebhan*, 842 F.2d 1257 (11th Cir. 1988) (a finding of reckless disregard will not satisfy the "willful" requirement, but is sufficient to establish malice). *See also Tinker v. Colwell*, 193 U.S. 473 (1904) (establishing that special malice need not be proved; implied or constructive malice is sufficient).

Ms. DeLong damaged or took these items. Ms. DeLong and her daughter testified that they did not. Neither party presented any third party evidence to support their respective positions nor was the testimony of one more credible than the other on these matters: therefore, because Mr. Gurta had the burden of proof, he loses on this claim because he failed to carry that burden. *See In re Kibbee*, 287 B.R. 239 (Bankr. E.D. Mo. 2002) (finding "that any damage caused to the property [did] not meet the standards of willful and malicious injury"). In *Kibbee*, the court questioned the landlord's credibility and found that he failed to establish that the premises contained all the appliances and other property he claimed had been removed by the debtors when they left. *Id.*

IV. § 523(d)—Grant of reasonable attorney's fees if creditor not substantially justified

Ms. DeLong has requested an award of $400 of attorneys' fees pursuant to 11 U.S.C. § 523(d). Section 523(d) originally sought to deter groundless nondischargeability actions brought primarily to coerce settlements from honest debtors who could not effectively fight back. *In re Machuca*, 483 B.R. 726, 733 (9th Cir. BAP 2012); *see* S. Rep. No. 95-989 at 80 (1978). Since 1984, however, the standard has shifted to become more "creditor-friendly" so that creditors are not discouraged from pursuing legitimate nondischargeability actions. *Id.* [6] Section 523(d) now provides that the court shall award attorney's fees to a prevailing debtor where it finds that the creditor was not substantially justified in challenging the debt's dischargeability, unless special circumstances make such an award unjust. *Id.* at 734.

To support a request for attorney's fees under § 523(d), a debtor initially needs to prove: (1) that the creditor sought to except a debt from discharge under § 523(a); (2) that the debt was a

[6] When Congress enacted new legislation in 1984 it replaced the "clearly inequitable" standard (an explicit fee shifting that favored the consumer debtor) with the "substantially justified" requirement. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, § 307(b), 98 Stat. 333 ("BAFJA"). Congress adopted this approach from the Equal Access to Justice Act ("EAJA"). *See In re Hunt*, 238 F.3d 1098, 1103 (9th Cir. 2001).

consumer debt; and (3) that the debt ultimately was discharged. *In re Stine*, 254 B.R. 244, 249 (9th Cir. BAP 2000). "Once the debtor establishes these elements, the burden shifts to the creditor to prove that its actions were substantially justified." ***Id.*** To satisfy the substantial justification requirement, the creditor must demonstrate that it had a reasonable factual and legal basis for its claim. *In re Machuca* at 734. The relevant legislative history supports this approach. S.Rep. No. 98-65, at 59 (1983) ("To avoid a fee award, the creditor must show that its challenge had a reasonable basis both in law and in fact."). In order for its actions to be substantially justified, a creditor cannot "simply ignore red flags that directly call into question the truth of the statements on which the creditor claims to have relied." ***Id.*** at 737 (citing *In re McGee*, 359 B.R. 764, 775 (9th Cir. BAP 2006)).[7]

A fee award issue often arises when a creditor loses an action otherwise filed in good faith by summary judgment, directed verdict, or a judgment on the pleadings. ***Id.*** at 735. These types of outcomes often suggest a lack of substantial justification. ***Id.*** Here, the Plaintiff lost at trial. "The standard, however, should not be read to raise a presumption that the creditor was not substantially justified, simply because it lost the challenge." S. Rep. No. 98-65 at 59.

After having reviewed the relevant law and the facts of this case, this Court concludes that Ms. DeLong is not entitled to an award of attorneys' fees pursuant to § 523(d).

CONCLUSION

Based on the forgoing, Mr. Gurta's Complaint against Ms. DeLong is dismissed and her debt to him is discharged.

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[7] ***Id.*** at 737. (The creditor's 'version of events [was] so utterly discredited by the record that no reasonable jury could have believed' it.)