IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 02-32131

JERRY LYNN CASSELL
BRENDA FAYE CASSELL

Debtors

CITIZENS BANK AND TRUST COMPANY
OF GRAINGER COUNTY

Plaintiff

v. Adv. Proc. No. 02-3168

JERRY LYNN CASSELL and
BRENDA FAYE CASSELL

Defendants

M E M O R A N D U M

APPEARANCES: HODGES, DOUGHTY & CARSON, PLLC
Thomas H. Dickenson, Esq.
Post Office Box 869
Knoxville, Tennessee 37901-0869
Attorneys for Plaintiff

JENKINS & JENKINS, PLLC
Edward J. Shultz, Esq.
2121 First Tennessee Plaza
800 S. Gay Street
Knoxville, Tennessee 37929-2121
Attorneys for Defendants/Debtors

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding came on for trial on December 15, 2003, on the Complaint to Determine Dischargeability of Debt or Alternatively to Deny Debtors' Discharge filed by the Plaintiff, Citizens Bank and Trust Company, on September 30, 2002, requesting a judgment against the Debtors based upon their default on two loans and seeking a determination that this judgment is nondischargeable under 11 U.S.C.A. § 523(a)(2)(A) (West 1993).[1] The record before the court consists of seventeen exhibits introduced into evidence, together with the testimony of four witnesses, Edward Davis, Kevin Ritter, Lee Brickey, and the Debtor, Jerry Cassell.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(I) (West 1993).

I

For several years, Mr. Cassell has owned and operated a construction business, building and selling single-family residential houses. From the early 1990's until July 2001, he obtained twenty-five to thirty loans from the Plaintiff for both business and personal use. His contact with the Plaintiff throughout this relationship was Edward Davis, who served as loan officer and branch manager of the Washburn Branch where the Debtors banked.[2]

Pursuant to this long-term relationship, on February 21, 2000, the Debtors submitted a Home Loan Application, requesting a loan from the Plaintiff in the amount of $64,000.00. *See* TRIAL EX. 1. Mr.

---

[1] An objection to the Debtors' discharge under 11 U.S.C.A. § 727(a)(3) (West 1993) asserted by the Plaintiff in the Complaint, together with a counterclaim asserted by the Debtors against the Plaintiff, were dismissed by the parties pursuant to the Pretrial Order entered on January 31, 2003. An alternative nondischargeability claim asserted by the Plaintiff under 11 U.S.C.A. § 523(a)(2)(B) was withdrawn in open court on the day of the trial.

[2] Mr. Davis retired from the Plaintiff in July 2001.

Cassell told Mr. Davis that the purpose of the loan was to construct a "spec" house on Lot 100 in Indian Ridge which would then be sold. The Plaintiff, through Mr. Davis, approved the application, and on April 8, 2000, the Debtors executed a Universal Note and Security Agreement with a maturity date of January 10, 2001, a Simple Interest Note, Disclosure, and Security Agreement, and a Line of Credit Agreement. *See* COLL. TRIAL EX. 2. The purpose for the loan, as represented by Mr. Cassell to Mr. Davis, was stated on the Universal Note and Security Agreement as to "buy lot 100 construction of house for resale." COLL. TRIAL EX. 2. Additionally, on April 8, 2000, the Debtors executed a Deed of Trust in the amount of $64,360.00, securing this loan with real property known as Lot 100, Riverpoint Subdivision Indian Ridge, Blaine, Grainger County, Tennessee 37709 (Lot 100). TRIAL EX. 3. Under the terms of this loan, the Plaintiff disbursed $11,718.76, representing 75% of the appraised value of Lot 100, on April 10, 2000. The remainder of the loan proceeds were held as a line of credit, subject to draws upon the request of Mr. Cassell either by telephone or in person. The following draws, totaling $46,241.24, were made against the loan proceeds: (1) on May 9, 2000, in the amount of $15,000.00; (2) on May 12, 2000, in the amount of $5,000.00; (3) on May 16, 2000, in the amount of $10,000.00; (4) on May 22, 2000, in the amount of $8,500.00; (5) on May 23, 2000, in the amount of $4,500.00; and (6) on June 9, 2000, in the amount of $3,241.24. *See* TRIAL EX. 9.

On June 9, 2000, the Debtors completed another Home Loan Application, requesting a loan from the Plaintiff in the amount of $66,000.00. *See* TRIAL EX. 4. The Plaintiff, through Mr. Davis, again approved the Debtors' application, and on July 10, 2000, the Debtors executed a Universal Note and Security Agreement with a maturity date of April 10, 2001, a Simple Interest Note, Disclosure, and

Security Agreement, and a Line of Credit Agreement. *See* COLL. TRIAL EX. 5. As stated on the Universal Note and Security Agreement, the purpose of this loan was for "construction of new house for resale." COLL. TRIAL EX. 5. The Debtors also executed a Deed of Trust in the amount of $66,778.52, securing this loan with real property known as Lot 23R, Greenbriar Place Subdivision, Unit 3, having a street address of 6200 Vandemere Drive, Knoxville, Tennessee 37921 (Lot 23R). TRIAL EX. 6. As with the previous loan, on July 10, 2000, the Plaintiff disbursed 75% of the appraised value of Lot 23R, or $11,250.00. Again, the remaining loan proceeds were held as a line of credit, and Mr. Cassell could request draws thereon by either telephone or in person. Mr. Cassell made the following draws against this loan, totaling $54,850.00: (1) on July 17, 2000, in the amount of $15,000.00; (2) on July 31, 2000, in the amount of $6,400.00; (3) on August 3, 2000, in the amount of $9,550.00; (4) on August 21, 2000, in the amount of $20,000.00; (5) on September 5, 2000, in the amount of $2,500.00; and (6) on September 7, 2000, in the amount of $1,400.00. *See* TRIAL EX. 10.

Under the terms of the two loans, Mr. Cassell was not required to make payments until after the expiration of the respective maturity dates. However, the Debtors failed to pay the Lot 100 loan after its January 10, 2001 maturity date, and they failed to pay the Lot 23R loan after its April 10, 2001 maturity date. Sometime in May or June 2001, Mr. Cassell telephoned Mr. Davis at his home and stated "I'm in trouble," and "there's not any houses on those lots that I borrowed the money for." Mr. Cassell told Mr. Davis that he was sorry and that "I got in trouble and I just used the money for something else." Mr. Cassell agreed to pay on the loans, but he was unable to commence payments. As a result of the Debtors' default under the terms of the loans, the Plaintiff foreclosed on Lot 100 in August 2001 and on Lot 23R

in September 2001. Thereafter, it attempted to collect the balance on the loans until April 22, 2002, when the Debtors filed the voluntary petition initiating their bankruptcy case under Chapter 7 of the Bankruptcy Code.

II

11 U.S.C.A. § 523 governs the nondischargeability of debts and provides, in material part:

> (a) A discharge under section 727,[3] . . . of this title does not discharge an individual debtor from any debt—
>
> . . . .
>
> > (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
> >
> > > (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition[.]
>
> . . . .
>
> (c)(1) Except as provided . . ., the debtor shall be discharged from a debt of a kind specified in paragraph (2) . . . of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2) . . ., as the case may be, of subsection (a) of this section.

11 U.S.C.A. § 523 (West 1993 & Supp. 2003). The Plaintiff, as the party seeking a determination of nondischargeability, bears the burden of proving all elements by a preponderance of the evidence. *Grogan v. Garner*, 111 S. Ct. 654, 661 (1991). Moreover, the court construes § 523(a) strictly against the

---

[3] Debts of Chapter 7 debtors arising pre-petition are discharged, "[e]xcept as provided in section 523 of this title . . . ." 11 U.S.C.A. § 727(b) (West 1993). Generally, the primary purpose for filing a Chapter 7 bankruptcy case is to obtain a discharge in order to facilitate a "fresh start." *See In re Krohn*, 886 F.2d 123, 125 (6th Cir. 1989); *In re Williams*, 291 B.R. 445, 446 (Bankr. E.D. Tenn. 2003).

Plaintiff and liberally in the Debtors' favor. *Rembert v. AT&T Universal Card Servs., Inc. (In re Rembert)*, 141 F.3d 277, 281 (6th Cir. 1998); *Haney v. Copeland (In re Copeland)*, 291 B.R. 740, 759 (Bankr. E.D. Tenn. 2003).

A determination that a debt is nondischargeable under § 523(a)(2)(A) requires the Plaintiff to prove that the Debtors engaged in conduct that was somewhat "blameworthy." *Copeland*, 291 B.R. at 759 (citing *Commercial Bank & Trust Co. v. McCoy (In re McCoy)*, 269 B.R. 193, 198 (Bankr. W.D. Tenn. 2001)). Based upon a totality of the circumstances, fraudulent conduct "may be inferred as a matter of fact." *Copeland*, 291 B.R. at 759. Misrepresentations, misleading omissions, and actual fraud are included within the scope of nondischargeable § 523(a)(2)(A) debts. *Copeland*, 291 B.R. at 759. Under § 523(a)(2)(A),

> "false pretense" involves implied misrepresentation or conduct intended to create and foster a false impression, as distinguished from a "false representation" which is an express misrepresentation[, while a]ctual fraud "consists of any deceit, artifice, trick, or design involving direct and active operation of the mind, used to circumvent and cheat another - something said, done or omitted with the design of perpetrating what is known to be a cheat or deception."

Copeland, 291 B.R. at 760 (quoting *Ozburn v. Moore (In re Moore)*, 277 B.R. 141, 148 (Bankr. M.D. Ga. 2002) and *First Centennial Title Co. v. Bailey (In re Bailey)*, 216 B.R. 619, 621 (Bankr. S.D. Ohio 1997)). "A debtor's silence and failure to disclose a material fact may constitute a misrepresentation actionable under [§] 523(a)(2)(A)." *Drake Capital Sec., Inc. v. Larkin (In re Larkin)*, 189 B.R. 234, 239 (Bankr. D. Mass. 1995); *see also Redmond v. Finch (In re Finch)*, 289 B.R. 638, 643 (Bankr. S.D. Ohio 2003) ("Mere silence regarding a material fact may constitute a false representation.").

For a determination of nondischargeability under § 523(a)(2)(A), the Plaintiff must prove that the Debtors obtained the loans through material misrepresentations that they knew were false or that they made with gross recklessness, that the Debtors intended to deceive the Plaintiff, that the Plaintiff justifiably relied on the Debtors' false representations, and that the Plaintiff's reliance was the proximate cause of its losses. *See Copeland*, 291 B.R. at 760 (citing *Rembert*, 141 F.3d at 280). Additionally, all elements must be proved against each of the Debtors individually. *See, e.g., Myers v. Ostling (In re Ostling)*, 266 B.R. 661, 665 (Bankr. E.D. Mich. 2001). Finally, the bankruptcy court has the jurisdiction and authority to both adjudicate the Plaintiff's claims and award damages, if necessary. *See Copeland*, 291 B.R. at 792 (citing *Longo v. McLaren (In re McLaren)*, 3 F.3d 958, 965 (6th Cir. 1993)).

A

The Plaintiff seeks a determination of nondischargeability against both of the Debtors, on the basis that Mrs. Cassell, along with her husband, executed the loan documents, and she had an opportunity to advise the Plaintiff that the loan proceeds were not being used for the stated purpose. In opposition, the Debtors argued that the Plaintiff has offered no evidence to prove that Mrs. Cassell had any relationship with the Plaintiff other than executing the loan documents and that the Complaint against her should be dismissed.[4]

"It is generally held that the marriage relationship itself is an inappropriate basis for imputing fraud." *Tsurakawa v. Nikon Precision, Inc. (In re Tsurakawa)*, 287 B.R. 515, 526 (B.A.P. 9th Cir. 2002); *see*

[4] Mrs. Cassell did not appear at trial.

also Ostling, 266 B.R. at 665 (holding that because the husband and wife relationship, in and of itself, is insufficient to impute liability between spouses, as a legal relationship in addition to the marriage must exist). "Fraudulent intent may not be imputed from one spouse to another simply based on the marital relationship of the parties. In order for liability to attach, the person to whom intent is sought to be imputed must be aware of the spouse's misconduct and must participate in the use or enjoyment of the ill-gotten gains." *Auto. Fin. Corp. v. Vasile (In re Vasile)*, 297 B.R. 893, 902 (Bankr. M.D. Fla. 2003). Similarly, under Tennessee law, the court will not assume a partnership or agency relationship between the Debtors simply because they are married. *See Martin v. Coleman*, 19 S.W.3d 757, 761 (Tenn. 2000). While "there is no doubt that a married person may be authorized to act for the other spouse, . . . authority in this connection will not be implied from the marital relation." *Goode v. Daugherty*, 694 S.W.2d 314, 317 (Tenn. Ct. App. 1985) (quoting 41 AM. JUR. 2D *Husband and Wife* § 241 (1968)).

The court finds no evidence that would support a finding of nondischargeability against Mrs. Cassell. Clearly, she executed the loan documents; however, based upon the proof presented, that was the extent of her connection to these loans and/or the proceeds therefrom. The bank account into which all loan proceeds were transferred was in Mr. Cassell's name alone and was entitled "Jerry Cassell, Building Account." *See* TRIAL EX. 16. The Plaintiff offered no evidence indicating, much less supporting, a contention that Mrs. Cassell was even involved in her husband's construction business, nor was there any evidence that Mrs. Cassell herself personally met with or talked to Mr. Davis regarding the two loans that are the subject of this adversary proceeding. Section 523(a) actions are construed strictly in favor of

debtors, and having found that other than her signature appearing on the loan documents, Mrs. Cassell was not involved in these loan transactions, the court shall dismiss the Complaint against her.

B

Once again, to establish its case against Mr. Cassell, the Plaintiff must prove (1) that Mr. Cassell received money from the Plaintiff that he procured by making material misrepresentations and that he either knew the representations were false, or he was reckless in failing to determine their veracity; (2) that Mr. Cassell possessed an intent to deceive the Plaintiff; (3) that the Plaintiff justifiably relied on Mr. Cassell's representations; and (4) that this reliance was the proximate cause of the Plaintiff's loss. *See Copeland*, 291 B.R. at 760 (citing *Rembert*, 141 F.3d at 280).

The Plaintiff contends that Mr. Cassell failed to use the loan proceeds for the purposes designated in the loan documentation; i.e., for the purchase of Lot 100 and Lot 23R and the construction of homes thereon. The Plaintiff asserts that Mr. Cassell knew that he was not using the proceeds for these purposes, and he never informed the Plaintiff of that fact because he knew that the Plaintiff would not advance any additional funds on the loans. Additionally, with regards to Lot 100, the Plaintiff argued that although Mr. Cassell may not have had fraudulent intent when he first obtained the loan, his conduct of continuing to make draws on the line of credit and not using the proceeds to build the house on Lot 100 constituted fraudulent intent, or at the very least, reckless disregard. Finally, the Plaintiff contends that Mr. Cassell actually possessed fraudulent intent when he obtained the Lot 23R loan because he had already received the Lot 100 loan and was aware that the proceeds therefrom were not being used to build the house.

As to the first requirement, there is no dispute that Mr. Cassell received proceeds of the two loans from the Plaintiff, totaling $124,060.00 in principal. Therefore, the issue before the court is whether he either knowingly or recklessly made material misrepresentations to the Plaintiff in order to obtain the loans and continue receiving disbursements thereunder. Material misrepresentations are "'substantial inaccuracies of the type which would generally affect a lender's or guarantor's decision.'" *Copeland*, 291 B.R. at 761 (quoting *Candland v. Ins. Co. of N. Am. (In re Candland)*, 90 F.3d 1466, 1470 (9th Cir. 1996)). "Knowing" under § 523(a)(2)(A) requires proof that Mr. Cassell deliberately made representations that he understood were false, while his representations were "reckless" if he made them with a "conscious indifference to the consequences" thereof. *Copeland*, 291 B.R. at 763.

The second requirement, intent to deceive, requires proof that Mr. Cassell made false representations that he knew or should have known would convince the Plaintiff to make the loans in question. *Copeland*, 291 B.R. at 765-66. "'Fraudulent intent requires an actual intent to mislead, which is more than mere negligence. . . . A 'dumb but honest' [debtor] does not satisfy the test.'" *Copeland*, 291 B.R. at 766 (quoting *Palmacci v. Umpierrez*, 121 F.3d 781, 788 (1st Cir. 1997)). The court may infer fraudulent intent by examining the totality of the circumstances, including Mr. Cassell's conduct at the time the loans were made and all subsequent conduct, to determine if he presented the Plaintiff with "'a picture of deceptive conduct . . . indicat[ing] an intent to deceive.'" *Copeland*, 291 B.R. at 766 (quoting *Wolf v. McGuire (In re McGuire)*, 284 B.R. 481, 492 (Bankr. D. Colo. 2002)).

The final two requirements concern the Plaintiff and its actions, rather than those of Mr. Cassell. First, the Plaintiff must prove that it actually relied on Mr. Cassell's representations and that, based on the facts and circumstances known to the Plaintiff at that time, such reliance was justifiable. *Copeland*, 291 B.R. at 767. Justifiable reliance can be found even if the Plaintiff "'might have ascertained the falsity of the representation had [it] made an investigation.'" *Copeland*, 291 B.R. at 767 (quoting *McCoy*, 269 B.R. at 198). Additionally, the Plaintiff must prove that its reliance on the representations made by Mr. Cassell was the proximate cause of the loss sustained by his failure to repay the loans' proceeds. In order to prove proximate cause, the Plaintiff must show "'a direct link between the alleged fraud and the creation of the debt.'" *Copeland*, 291 B.R. at 767 (quoting *McCrory v. Spigel (In re Spigel)*, 260 F.3d 27, 32 n.7 (1st Cir. 2001)).

Several facts and a portion of the evidence introduced at trial concern both loans obtained by Mr. Cassell, and the court can easily make its determination as to whether certain elements of nondischargeability are met as to both loans. First, based upon the evidence presented at trial, the court can readily find that Mr. Cassell made material representations to the Plaintiff upon which the Plaintiff justifiably relied. Mr. Cassell applied for the Lot 100 loan and the Lot 23R loan, both for the express and stated purpose of constructing houses on those lots. This purpose is evidenced by oral representations made by Mr. Cassell directly to Mr. Davis and on the loan documents executed by the Debtors, *see* COLL. TRIAL EX. 2; COLL. TRIAL EX. 4, and was admitted by Mr. Cassell himself at trial. By requesting these loans for the purpose of building houses, Mr. Cassell made material representations to the Plaintiff to obtain the loans. Accordingly, that element is satisfied as to both the Lot 100 loan and the Lot 23R loan.

Moreover, based upon the proof at trial, there is no question that the Plaintiff relied upon Mr. Cassell's representations and that its reliance was justified. The Plaintiff and Mr. Cassell had an existing lending relationship at the time he applied for these loans, dating back to the early 1990's. During that period, Mr. Cassell dealt almost exclusively with Mr. Davis as loan officer and branch manager. Mr. Davis testified that the Debtors, primarily Mr. Cassell, had obtained between twenty-five and thirty loans throughout the duration of their lending relationship and that there had never been a default on any of the previous loans. Both Mr. Davis and the Debtor testified that the relationship had been successful up until 2000. Additionally, Mr. Davis testified that because of this past successful relationship, he never doubted that Mr. Cassell was building the houses while taking draws on the loans, nor was there ever any reason for the Plaintiff to actually go to the construction sites to check on progress. Mr. Davis stated that he was shocked when he received the telephone call from Mr. Cassell in June 2001, advising that the houses had not been built, and when he accused Mr. Cassell of lying, Mr. Cassell agreed that he had lied.

Mr. Cassell contends that the Plaintiff's reliance was not justified because the credit report that it obtained in connection with the Debtors' February 2000 loan application showed three judgments against Mr. Cassell.[5] *See* TRIAL EX. 15. In response to questioning regarding this credit report, Mr. Davis testified that he recalled asking Mr. Cassell about the judgments and that Mr. Cassell's explanation that the judgments were obtained in error or had otherwise been resolved were credible and satisfactory. Considering that the parties had a ten-year history, taking all of the evidence together, it is reasonable that

[5] The credit report evidenced two judgments out of the Knox County General Sessions Court in the respective amounts of $2,561.00 and $1,888.00, and one judgment out of the Blount County General Sessions Court in the amount of $3,895.00.

the Plaintiff approved the Debtors' loan applications, even in light of the judgments evidenced on Mr. Cassell's credit report.

Mr. Cassell also argued that the Plaintiff's reliance was not reasonable because Mr. Cassell's bank account with the Plaintiff evidenced many instances in which checks were presented with insufficient funds present in the account. The bank statements introduced into evidence begin with the January 10, 2000 statement and end with the September 11, 2000 statement. *See* COLL. TRIAL EX. 16. With respect to the reliance issue, however, the only statements that would be of any concern are those immediately preceding the Lot 100 loan application: (1) the January 10, 2000 statement evidencing five checks presented with insufficient funds present; and (2) the February 14, 2000 statement evidencing two checks presented with insufficient funds present. *See* COLL. TRIAL EX. 16.

While the court recognizes that the knowledge that Mr. Cassell was presenting checks with insufficient funds present could cause some concern, Mr. Cassell did not present sufficient evidence that Mr. Davis ever, in fact, knew that Mr. Cassell had presented such checks. Mr. Davis testified that all insufficient funds charges were processed through the Plaintiff's main office in Rutledge, but that he would be contacted about whether to pay the checks or return them unpaid. However, it was not clear whether he was actually alerted to the customers whose accounts were affected. Additionally, this fact, in and of itself, does not negate the ten-year lending relationship of these parties, and the long history of payment by Mr. Cassell on more than twenty-five loans. The court is satisfied that the Plaintiff actually relied upon Mr. Cassell's representations and that its reliance was both reasonable and justified.

Also, the proof evidences that Mr. Cassell's representations are the proximate cause of the Plaintiff's loss. Mr. Davis testified that the Plaintiff loaned the funds in question in response to Mr. Cassell's loan applications and his execution of the loan documents. He also testified that if he had been aware that the loan proceeds were not being used to build the houses on Lot 100 and Lot 23R, he would have stopped allowing Mr. Cassell to take his draws on the two loans. As to the amount of the Plaintiff's loss, at trial, the Plaintiff introduced the testimony of Lee Brickey, Collections Manager for Citizens Bank. Mr. Brickey testified that the Plaintiff foreclosed upon Lot 100 and Lot 23R in either September or October 2001. After applying all credits therefrom, Mr. Brickey testified that the remaining balance on Lot 100 is $61,232.69, and the remaining balance on Lot 23R is $79,560.10. He also testified that this $140,792.79 does not include attorneys' fees, although the loan documents and deeds of trust allow the Plaintiff to recoup its attorneys' fees.

Thus, the remaining issue is whether Mr. Cassell possessed the requisite intent for a finding of nondischargeability under § 523(a)(2)(A). This issue must be determined by examining each individual loan and Mr. Cassell's actions concerning each.

1

Mr. Cassell applied for the Lot 100 loan on February 21, 2000, and the loan documents were executed on April 8, 2000. *See* TRIAL EX. 1; COLL. TRIAL EX. 2. On April 10, 2000, Mr. Cassell

received the initial disbursement of $11,718.76.[6] *See* TRIAL EX. 9. Between the time that he received the initial disbursement on April 10, 2000, and the time that he applied for the Lot 23R loan on June 9, 2000, Mr. Cassell received six draws from the Plaintiff on the Lot 100 loan, totaling $46,241.41. *See* TRIAL EX. 9. Mr. Cassell made his first draw from the Lot 100 loan on May 9, 2000,[7] in the amount of $15,000.00, via telephone transfer into his business checking account. *See* TRIAL EX. 9; COLL. TRIAL EX. 16. Between the time that Mr. Cassell received the initial disbursement on April 10, 2000, and the first draw on May 9, 2000, his bank statements evidence no activity referencing Lot 100. *See* COLL. TRIAL EX. 16.

Mr. Cassell's remaining draws on the Lot 100 loan, totaling $31,241.24, were made between May 12, 2000, and June 9, 2000. As reflected on Mr. Cassell's bank statement for May 2000, he wrote only two checks referencing materials or work for Lot 100: (1) check number 1747, dated May 3, 2000, payable to American Limestone in the amount of $234.31; and (2) check number 1757, dated May 19, 2000, payable to Dale Cockum in the amount of $428.00. *See* COLL. TRIAL EX. 16. These two checks total $662.31. Other checks reference payments made on account of other lots, various loans, and payroll, along with many checks with no references.

Mr. Cassell also produced invoices evidencing materials purchased for Lot 100 from Schaad's Do-it Center during May 2000, totaling $5,294.59, which are broken down as follows: (1) May 4, 2000, in the amount of $647.77; (2) May 9, 2000, in the amount of $205.70; (3) May 15, 2000, in the amount of

---

[6] Mr. Cassell's bank statements reflect that this disbursement was not deposited into his business account; however, at trial, Mr. Cassell testified that he used this disbursement to actually purchase Lot 100.

[7] Trial Exhibit 9 shows a transaction date of May 9, 2000, while Mr. Cassell's bank statement shows that the funds were actually transferred into his account on May 8, 2000.

$1,643.64; (4) May 17, 2000, in the amount of $183.21; (5) May 18, 2000, in the amount of $2,580.84; and (6) May 31, 2000, in the amount of $33.43. *See* COLL. TRIAL EX. 13. While these invoices establish that Mr. Cassell at least purchased materials for construction on Lot 100, the invoices all clearly state "Amount Charged to Store Account," indicating that Mr. Cassell did not actually pay these invoices on the dates that he purchased the materials referenced. COLL. TRIAL EX. 13. And, although his bank records do reflect that he wrote check number 1755 to Schaad's Lumber on May 16, 2000, in the amount of $3,835.13, the check does not reflect a reference to any specific lot, nor does this amount match with any of the above invoice amounts. *See* COLL. TRIAL EX. 16. Thus, in light of the fact that Mr. Cassell was paying for construction on other lots with the funds in his account during May 2000, the court cannot presume that check number 1755 was written in connection with Lot 100.

Nevertheless, according to Mr. Cassell's business records, he spent a total of $5,956.90 on materials and/or labor for Lot 100. At trial, Mr. Cassell testified that he began construction on Lot 100, but he did not finish the house. He stated that he had laid the concrete slab, erected walls, and installed plumbing and a septic tank. Relatedly, the Plaintiff introduced the testimony of Kevin Ritter, loan officer with Citizens Bank, who personally inspected Lot 100 in September 2001, after the loan went into default. He testified that the construction on Lot 100 at that time evidenced about 15% completion on the house, because a concrete slab had been laid, and some of the walls were standing; however, Mr. Ritter did not recall the installation of plumbing or a septic system. In addition, Mr. Ritter took three photographs of the lot, which also evidence that very little work had been completed. *See* COLL. TRIAL EX. 8. The

photographs support Mr. Ritter's testimony that plumbing and a septic system do not appear to have been installed.

Clearly, Mr. Cassell did not use the proceeds from the Lot 100 loan to build a house. At trial, he admitted that he obtained the loan for the express purpose of purchasing the lot and building a home thereon. At trial, he testified that he purchased Lot 100 with the $11,718.76 disbursed on April 10, 2000. Additionally, there is proof that he did begin construction of a house on Lot 100 and that at least a small portion of the proceeds from the Lot 100 loan were actually used for that purpose. *See* COLL. TRIAL EX. 8; COLL. TRIAL EX. 13; COLL. TRIAL EX. 16. Based upon these facts, and taking the evidence in a light most favorable to Mr. Cassell, the court does not believe that Mr. Cassell possessed the requisite intent to deceive when he first obtained the Lot 100 loan and when he received the first disbursement thereon. Therefore, the court finds that the initial disbursement amount of $11,718.76 is dischargeable. Additionally, strictly construing the statute in Mr. Cassell's favor, the court finds that the $5,956.90 actually spent on materials and/or labor in connection with Lot 100 is also dischargeable.

On the other hand, the court believes that Mr. Cassell did possess the requisite intent to deceive, or at the very least, a reckless indifference to the consequences, necessitating a determination that the remaining $43,557.03 owed on the Lot 100 loan is nondischargeable. The first draw occurred on May 9, 2000, and was deposited directly into Mr. Cassell's building account. The remaining five draws occurred between May 12, 2000, and June 9, 2000; however, according to his bank records, Mr. Cassell used the proceeds from these draws for work on other lots, truck payments, payroll, and payments on

other loans, including loans for his children.[8] Mr. Cassell's actions in obtaining $31,241.24 for the one-month period between May 9 and June 9, 2000, and then using less than $6,000.00 therefrom for construction on Lot 100 evidences that he was, at the very least, recklessly indifferent to the consequences of those actions. The court does not believe that Mr. Cassell, who has built houses for many years, could reasonably believe that his failure to build a house on Lot 100 would not affect his ability to repay the Lot 100 loan. Taking all of the evidence together, based on a totality of the circumstances, the court finds that when Mr. Cassell took the six draws on the Lot 100 loan, he was representing to the Plaintiff that the house was, in fact, being built on Lot 100, and that it would be completed. Furthermore, while he was taking these draws on the Lot 100 loan, Mr. Cassell never informed the Plaintiff that he was not building the house. Mr. Cassell's failure to use the funds for that purpose, coupled with his failure to advise the Plaintiff thereof, convince the court that he possessed the requisite intent to deceive the Plaintiff, justifying a determination that the remaining $43,557.03 owed on the Lot 100 loan is nondischargeable.

2

With respect to the Lot 23R loan, the evidence clearly preponderates in favor of the Plaintiff that the entire $79,560.10 owed is nondischargeable. Mr. Cassell applied for the Lot 23R loan on June 9, 2000, the date upon which he took the final draw on the Lot 100 loan. *See* TRIAL EX. 4. The loan documents for the Lot 23R loan were executed on July 10, 2000, and he received the initial $11,250.00 disbursement for the purchase of the lot on that date. *See* COLL. TRIAL EX. 5; TRIAL EX. 10. Beginning

[8] While Mr. Cassell testified that Mr. Davis required him to use proceeds from the Lot 100 loan to pay on other loans owed to the Plaintiff, Mr. Davis testified that he never directed such activity, which would have been a direct violation of bank policy. The court does not find the Debtor's testimony on this issue to be credible.

on July 17, 2000, and continuing through September 7, 2000, Mr. Cassell took six draws totaling $54,850.00. *See* TRIAL EX. 10. By his own admission, however, he never spent any of the Lot 23R loan proceeds towards construction of a house on Lot 23R.

At the time that Mr. Cassell applied for the Lot 23R loan, he had already received almost the entire proceeds from the Lot 100 loan, but he had failed to use the Lot 100 proceeds to build a house on Lot 100. At the time that he applied for the Lot 23R loan, he was clearly aware of his financial condition, and yet, he represented to the Plaintiff that everything was status quo, based upon their ten-year lending relationship. Nevertheless, he continued to take draws on the Lot 23R loan until September 7, 2000, all the while again spending the proceeds for other lots, payments on other loans, including his children's loans, and payroll. *See* COLL. TRIAL EX. 16. Additionally, Mr. Cassell also paid for football camp, gas, a sander, and a saw during this time period. *See* COLL. TRIAL EX. 16. Taking all of the facts and circumstances together, even in a light most favorable to Mr. Cassell, the court finds that Mr. Cassell's actions in applying for the Lot 23R loan and then failing to spend any portion of the loan proceeds towards the construction of a house evidences to the court that he intended to deceive the Plaintiff.

In summary, the court finds that the Debtor may not discharge $43,557.03 of the Lot 100 loan and the entire $79,560.10 owed on the Lot 23R loan. The remaining $17,675.66 owed on the Lot 100 loan shall be discharged.

C

The Plaintiff has also requested that the court award it attorneys' fees, based upon the loan documents for each loan authorizing such an award. *See* COLL. TRIAL EX. 2; COLL. TRIAL EX. 5. In support of this request, and as proof of its attorneys' fees, the Plaintiff offered into evidence the Affidavit of its attorney, Thomas H. Dickenson, attesting that the Plaintiff has incurred attorneys' fees in the amount of $10,149.02 in its prosecution of this adversary proceeding and attaching copies of his law firm's bills to the Plaintiff therefor. *See* TRIAL EX. 21. According to the Affidavit, this amount does not, however, include the days immediately preceding the trial, or the trial itself. *See* TRIAL EX. 21. Additionally, the Plaintiff referred the court to the Universal Note and Security Agreement, which states, in material part:

> COLLECTION COSTS AND ATTORNEY'S FEES - I agree to pay all costs of collection, replevin or any other or similar type of cost if I am in default. In addition, if you hire an attorney to collect this note, I also agree to pay any fee you incur with such attorney plus court costs (except where prohibited by law). To the extent permitted by the United States Bankruptcy Code, I also agree to pay the reasonable attorney's fees and costs you incur to collect this debt as awarded by any court exercising jurisdiction under the Bankruptcy Code.

COLL. TRIAL EX. 2; COLL. TRIAL EX. 5.[9]

Based upon the loan documents, the Plaintiff is entitled to receive attorneys' fees; however, there is the question of the proper amount to be awarded. The court may not award damages, including attorneys' fees, based upon speculation; instead, the Plaintiff must prove the amount of all damages with a reasonable degree of certainty. *See BVT Lebanon Shopping Ctr. v. Wal-Mart Stores, Inc.*, 48 S.W.3d 132, 138 (Tenn. 2001); *Boling v. Tenn. State Bank*, 890 S.W.2d 32, 35-36 (Tenn. 1994). Since the

[9] The language is the same on each document.

Plaintiff did not present any evidence setting forth the amount of attorneys' fees other than Mr. Dickenson's Affidavit, the court may award only those attorneys' fees set forth therein; i.e., $10,149.02.[10]

Accordingly, the Plaintiff shall be awarded a judgment against Mr. Cassell in the principal amount of $133,266.15, and this judgment shall be nondischargeable by Mr. Cassell.

A judgment consistent with this Memorandum will be entered.

FILED: January 12, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

[10] At the conclusion of the trial, the court informed the Debtors' counsel that the Debtors would be provided the opportunity to review Mr. Dickenson's Affidavit and that any objection to the requested attorneys' fees should be filed by December 22, 2003, with the court to thereafter rule on any objection without a further hearing. No objection was filed.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 02-32131

JERRY LYNN CASSELL
BRENDA FAYE CASSELL

Debtors

CITIZENS BANK AND TRUST COMPANY
OF GRAINGER COUNTY

Plaintiff

v. Adv. Proc. No. 02-3168

JERRY LYNN CASSELL and
BRENDA FAYE CASSELL

Defendants

J U D G M E N T

For the reasons stated in the Memorandum filed this date, containing findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure, it is ORDERED, ADJUDGED, and DECREED as follows:

1. As to the Defendant Brenda Faye Cassell, the Plaintiff's Complaint to Determine Dischargeability of Debt or Alternatively to Deny Debtors' Discharge filed September 30, 2002, is DISMISSED.

2. The Plaintiff shall have and recover from the Defendant Jerry Lynn Cassell the sum of $123,117.13, together with attorneys' fees of $10,149.02, for a total judgment of $133,266.15.

3. The judgment awarded the Plaintiff herein against the Defendant Jerry Lynn Cassell is nondischargeable under 11 U.S.C.A. § 523(a)(2)(A) (West 1993).

ENTER: January 12, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE