UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

In re:

Case No. 00-16176
Chapter 7

JOHN WESLEY WHITE
KARLA SMITH WHITE

Debtors

LEO SPURGIN, d/b/a Sand Mountain Cabinets

Plaintiff

v.

Adversary Proceeding
No. 01-1089

JOHN WESLEY WHITE

Defendant

MEMORANDUM

Appearances: Thomas L. N. Knight, Grisham, Knight & Hooper, Chattanooga, Tennessee, Attorney for Plaintiff

Thomas E. Ray, Wooden, Ray, Fulton & Scarborough, P.C., Chattanooga, Tennessee, Attorney for Defendant

HONORABLE R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding was commenced by Leo Spurgin, d/b/a Sand Mountain Cabinets, to determine the dischargeability of a debt. The defendant is one of the co-debtors, John Wesley White ("debtor"). The debtor has filed a motion to dismiss the complaint. The question now before the court is whether the complaint states a claim upon which relief can be granted.

Mr. Spurgin's complaint makes the following allegations. The debtor was in the construction business. The debtor repaired homes, remodeled homes, built homes for others, and built homes for himself to sell. In the course of this business, the debtor entered into subcontracts with other builders and suppliers. He hired Mr. Spurgin as a subcontractor to install kitchen cabinets in three homes the debtor was building or remodeling.

Mr. Spurgin asserts that he did the work, and that the debtor was supposed to pay him when the work was completed. He alleges the debtor obtained full payment from the homeowners by certifying to them that all subcontractors and suppliers had been paid, even though debtor had not paid Mr. Spurgin. Mr. Spurgin further alleges debtor did not use the money debtor obtained from the homeowners to pay Mr. Spurgin. According to Mr. Spurgin the debt should be excepted from discharge under Bankruptcy Code § 523(a)(2)(A) on the ground that the debtor obtained property or services from Mr. Spurgin by fraud or false representations. 11 U.S.C. § 523(a)(2)(A). He also asserts the debt should be excepted from discharge under § 523(a)(4) as a debt arising from the debtor's fraud or defalcation while acting in a fiduciary capacity. 11 U.S.C. § 523(a)(4). Finally, the

complaint requests that the debt be excepted from discharge under § 523(a)(6) as a debt for willful and malicious injury. 11 U.S.C. § 523(a)(6).

The debtor's motion to dismiss relies on Rule 12(b)(6). *Fed. R. Bankr. P.* 7012(b); *Fed. R. Civ. P.* 12(b)(6). Rule 12(b)(6) allows the court to dismiss a complaint if it fails to state a claim upon which relief can be granted. A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the complaint. The court treats the allegations of the complaint as true and views them in the light most favorable to the plaintiff. *Amini v. Oberlin College*, 259 F.3d 496 (6th Cir. 2001). With these rules in mind, the court must decide whether the facts alleged and reasonable inferences from those facts can establish that the debt to Mr. Spurgin is excepted from discharge under the statutes upon which he relies.

The court begins with the question of whether the complaint states a claim under § 523(a)(4), which excepts a debt from discharge if the debt arises from the debtor's fraud or defalcation while acting in a fiduciary capacity. 11 U.S.C. § 523(a)(4). "Fiduciary capacity" requires an express or technical trust. *R. E. America, Inc. v. Garver (In re Garver)*, 116 F.3d 176 (6th Cir. 1997). The debtor's failure to pay Mr. Spurgin with the money received from the homeowners may be a felony under a Tennessee statute, depending partly on whether the debtor had the intent to defraud Mr. Spurgin. *Tenn. Code Ann.* § 66-11-138. However, this statute does not create an express or technical trust of the kind required to except a debt from discharge under Bankruptcy Code § 523(a)(4). *See, e.g., Burleson Constr. Co. v. White (In re White)*, 106 B.R. 501 (Bankr. E. D. Tenn.

1989); *Kannon v. Blalock (In re Blalock)*, 15 B.R. 33 (Bankr. E. D. Tenn. 1981). In recognition of this, Mr. Spurgin's response to the motion admits that the complaint fails to state a claim upon which relief can be granted under § 523(a)(4).

The next question is whether the complaint states a claim upon which relief can be granted under Bankruptcy Code § 523(a)(2)(A). Section 523(a)(2)(A) excepts from discharge a debt for obtaining money, credit, property, or services by fraud, false pretense, or false representation. 11 U.S.C. § 523(a)(2)(A).

Mr. Spurgin is attempting to except from the discharge the debt to him for the property and services he provided to the debtor. The debt is obviously a debt for obtaining property and services from Mr. Spurgin, but is it a debt for obtaining the property and services from Mr. Spurgin by fraud or false representation?

The only false representations alleged in the complaint were directed to the homeowners. The complaint alleges that the debtor obtained full payment from the homeowners by falsely stating that all subcontractors and suppliers, including Mr. Spurgin, had been paid. This false representation by the debtor was not used to obtain the property and services from Mr. Spurgin. The debt to Mr. Spurgin is not a debt for obtaining the property and services from him by means of this false representation. *Crestar Bank v. Green (In re Green)*, 175 B.R. 609 (Bankr. E. D. Va. 1994); *Paine Webber, Inc. v. Magisano (In re Magisano)*, 228 B.R. 187 (Bankr. S. D. Ohio 1998); *Bernard Lumber Co. v. Patrick (In re Patrick)*, 265 B.R. 782 (Bankr. N. D. Ohio 2001). The complaint does not

allege any other false representation that was used to obtain the property and services from Mr. Spurgin.

The complaint has the same problem with regard to fraud. Do the alleged facts and the reasonable inferences from them show that the debtor obtained the property and services from Mr. Spurgin by fraud? Mr. Spurgin is relying on fraud as a broader concept than false representation. For example, if a person obtains credit when he does not intend to pay the debt, but he does not make any representation, then it may be fraud. *McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000); *J. C. Penney Co. v. Shanahan (In re Shanahan)*, 151 B.R. 44 (Bankr. W. D. N. Y. 1993). As evidence of fraud, Mr. Spurgin relies on the debtor's having obtained full payment from the homeowners by fraud – the false representation that all the suppliers and subcontractors had been paid. The theory seems to be that this implies the debtor never intended to pay Mr. Spurgin for the work he did. The court disagrees. The debtor's fraud on the homeowners does not even weakly suggest that he never intended to pay Mr. Spurgin. The court concludes that the complaint fails to state a claim under § 523(a)(2)(A) based on fraud. *Rembert v. Citibank South Dakota*, 219 B.R. 763 (E. D. Mich. 1996).

With regard to § 523(a)(2)(A), the court reiterates that Mr. Spurgin is not attempting to stand in the shoes of the homeowners. *Kansas Bankers Surety Co. v. Eggleston (In re Eggleston)*, 243 B.R. 365 (Bankr. W. D. Mo. 2000); *Griffith, Strickler, Lerman, Solymos & Calkins v. Taylor (In re Taylor)*, 195 B.R. 624 (Bankr. M. D. Pa. 1996). He also is not asserting that he had a property interest in the money obtained from them.

Mr. Spurgin is asserting that the debt to him for the property and services provided by him should be excepted from discharge.

The third count of the complaint relies upon Bankruptcy Code § 523(a)(6), which excepts from discharge a debt for willful and malicious injury by the debtor to another entity or another entity's property. 11 U.S.C. § 523(a)(6). The debtor's motion to dismiss does not address whether this count of the complaint should be dismissed under Rule 12(b)(6). Because the parties have not addressed the question, the court also declines to address it.

The court will enter an order dismissing the counts of the complaint under § 523(a)(2)(A) and § 523(a)(4).

This Memorandum constitutes findings of fact and conclusions of law as required by *Fed. R. Bankr. P.* 7052.

ENTER:

BY THE COURT

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R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

[entered 10-24-01]