SO ORDERED.
SIGNED this 26th day of July, 2019

Suzanne H. Bauknight
UNITED STATES BANKRUPTCY JUDGE

THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.

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

In re

JOHN FREDERICK CONLEY

Debtor

Case No. 3:17-bk-32877-SHB
Chapter 7

JOHN T. CURBOW

Plaintiff

v.

JOHN FREDERICK CONLEY

Defendant

Adv. No. 3:17-ap-03043-SHB

MEMORANDUM AND ORDER
DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

On December 22, 2017, Plaintiff filed the Complaint for Determination of Dischargeability Pursuant to Section 523 of the Bankruptcy Code ("Complaint") commencing this adversary proceeding, which seeks a judgment against Defendant in the amount of $100,000.00 and a determination that the judgment is nondischargeable under 11 U.S.C. §

523(a)(2)(A). Before the Court is the Defendant's Motion for Summary Judgment ("Motion") filed on May 16, 2019 [Doc. 39], which is supported by a brief, a statement of undisputed facts as required by E.D. Tenn. LBR 7056-1(a), deposition testimony of both Plaintiff and Defendant together with referenced exhibits, and the Affidavit of Defendant [Docs. 40, 41]. On June 21, 2019, Plaintiff responded to the Motion and the statement of undisputed facts and added to the record the purchase agreements executed by the parties and additional deposition testimony. [Docs. 46, 47, 48.] Finally, Defendant filed a reply to Plaintiff's response on June 28, 2019, making this matter ripe for determination. [Doc. 49.] The trial of this matter is scheduled for August 13, 2019.

I. UNDISPUTED FACTS

For the purposes of summary judgment, the following material facts are of record or are not disputed by the parties.

The debt in question is owed by Defendant to Plaintiff under an Agreement for Stock Purchase and Sale of Central Communications and Electronics, Inc. executed by the parties on January 20, 2012, and a second Agreement for Stock Purchase and Sale of Central Communications and Electronics, Inc. executed on January 31, 2012 (collectively, "Agreements"). [Docs. 40 and 48 at ¶ 1; 40-2 at pp. 26, 31; 48-1; 48-2.] Defendant, who was a licensed attorney, prepared the first agreement in August or September 2011, and Plaintiff reviewed it briefly (i.e., for five minutes) before he approved it. [Docs. 40 and 48 at ¶¶ 7, 10.] Plaintiff did not hire Defendant as an attorney, nor did Plaintiff consider Defendant to be Plaintiff's attorney for preparation of the Agreements, and Defendant did not represent Plaintiff in the transaction. [Docs. 40 and 48 at ¶¶ 14-15.] Plaintiff chose not to have a lawyer review the

Agreements "because he was anxious to conclude the deal and get out." [Docs. 40 and 48 at ¶ 15.]

Under the Agreements, Defendant purchased stock from Plaintiff for $250,000.00. [Docs. 40 and 48 at ¶ 3; 40-2 at p. 26 and 31; 48-1; 48-2.] In order to learn about the business before purchasing the stock, Defendant, who informed Plaintiff that he wanted to change careers, worked for Plaintiff at Central Communications and Electronics, Inc. in 2011. [Docs. 40 and 48 at ¶¶ 6-7.]

Defendant filed a Voluntary Petition commencing his Chapter 7 bankruptcy case on September 18, 2017, approximately six months after Plaintiff had filed suit in state court for the unpaid balance of $100,000.00 owed under the Agreements. [Docs. 5 at ¶ 12; 13 at ¶ 12.] At the time the case was filed, Defendant owed $100,000.00 to Plaintiff under the Agreements. [Docs. 40 and 48 at ¶ 5.]

II. ANALYSIS

A. Rule 56 – Standard for Summary Judgment

Federal Rule of Civil Procedure 56, which is applicable to adversary proceedings by virtue of Rule 7056 of the Federal Rules of Bankruptcy Procedure, provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law[,]" utilizing the procedures defined in subsections (c)(1) through (c)(4). When deciding a summary judgment motion, the Court does not weigh the evidence to determine the truth of the matter asserted but simply determines whether a genuine issue for trial exists, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

As movant, Defendant bears the burden of proving that, based on the record presented to the Court, there is no genuine dispute concerning any material fact and that he is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *Owens Corning v. Nat'l Union Fire Ins. Co.*, 257 F.3d 484, 491 (6th Cir. 2001). "A genuine issue of material fact exists when 'there is sufficient evidence favoring the nonmoving party for a [fact-finder] to return a verdict for that party.'" *Laster v. City of Kalamazoo*, 746 F.3d 714, 726 (6th Cir. 2014) (quoting *Anderson*, 477 U.S. at 249). "[The] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion[,]" *Celotex Corp.*, 477 U.S. at 323, and "[a]s the party moving for summary judgment, Defendant[] bear[s] the burden of showing the absence of a genuine issue of material fact as to at least one essential element of Plaintiff's claim[s]." *Laster*, 746 F.3d at 726.

Once the initial burden of proof is met, the burden shifts to the nonmoving party to prove that there are genuine disputes of material fact for trial, but reliance solely on allegations or denials contained in the pleadings is insufficient because a "mere scintilla of evidence in support of the nonmoving party will not be sufficient." *Nye v. CSX Transp., Inc.*, 437 F.3d 556, 563 (6th Cir. 2006); *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials[.]" Fed. R. Civ. P. 56(c)(1)(A). The Court must view the facts and all resulting inferences in a light most favorable to Plaintiff (as the respondent) and decide whether "the evidence presents a sufficient disagreement to require submission to a [fact-finder] or whether it is

so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 243. Summary judgment is appropriate only if the fact-finder could not find for the non-moving party based on the "the record taken as a whole." *Matsushita*, 475 U.S. at 587.

B. 11 U.S.C. § 523(a)(2)(A)

Plaintiff's Complaint asks for a determination that the $100,000.00 owed by Defendant is nondischargeable under § 523(a)(2)(A), under which Plaintiff must prove that Defendant obtained money or property from him through false pretenses, false representations, or actual fraud. To demonstrate false pretenses or false representations under § 523(a)(2)(A), Plaintiff must prove that Defendant obtained money from or belonging to Plaintiff through a material misrepresentation that Defendant knew was false or was made with gross recklessness, that Defendant intended to deceive Plaintiff, that Plaintiff justifiably relied on Defendant's false representations, and that Plaintiff's reliance was the proximate cause of his losses. *See McDonald v. Morgan (In re Morgan)*, 415 B.R. 644, 649 (Bankr. E.D. Tenn. 2009). Debts may also be nondischargeable under § 523(a)(2)(A) for "actual fraud," which "encompasses forms of fraud, like fraudulent conveyance schemes, that can be effected without a false representation." *Husky Int'l Elecs., Inc. v. Ritz*, ___ U.S. ___, 136 S. Ct. 1581, 1586 (2016).

"At the heart of the exception to discharge under . . . § 523(a)(2)(A) is the element of intent . . . , [which] is generally determined by the debtor's subjective intention at the inception of the debt." *6050 Grant, LLC v. Hanson (In re Hanson)*, 437 B.R. 322, 327 (Bankr. N.D. Ill. 2010). "Determining whether a debtor had the requisite intent under § 523(a)(2)(A) is, therefore, a factual, subjective inquire decided by examining all of the relevant circumstances, including those that took place after the debt was incurred." *Id*. at 328. To determine intent to deceive, the court considers "whether the totality of the circumstances 'presents a picture of deceptive

conduct by the debtor which indicates an intent to deceive the creditor.'" *Graham v. Graham (In re Graham)*, 600 B.R. 90, 95 (Bankr. D. Kan. 2019) (quoting *Groetken v. Davis (In re Davis)*, 246 B.R. 646, 652 (B.A.P. 10th Cir. 2000 (citation omitted))). Summary judgment on claims that involve the issue of fraudulent intent is very rare because intent is almost always an issue of fact. *See Mendelsohn v. Jacobowitz* (*In re Jacobs)*, 394 B.R. 646, 658 (Bankr. E.D.N.Y. 2008) (citing *Golden Budha Corp. v. Canadian Land Co. of Am.*, 931 F.2d 196, 201-02 (2d Cir. 1991); *New York v. North Storonske Cooperage Co.*, 174 B.R. 366, 390 (N.D.N.Y. 1994)).

C. The Parties' Arguments

Defendant argues that he is entitled to summary judgment because Plaintiff acknowledges that Defendant intended to pay under the Agreements. [Docs. 41 at p. 6; 49 at pp. 2, 6.] Plaintiff responds that Defendant's argument misses the point – Plaintiff's claim is that Defendant misrepresented his intent to prepare and execute a promissory note and security agreement as allegedly provided for in the Agreements prepared by Defendant. [Doc. 47 at pp. 3-5.] Plaintiff, thus, argues that there is a genuine dispute of material facts concerning whether Defendant intended to prepare and execute a promissory note and security agreement:

> Given the importance of the promissory note and security agreement in protecting Plaintiff's pecuniary interests in this transaction, Plaintiff submits that Defendant's failure to prepare the documents; Defendant's failure to notify Plaintiff that the necessary documents were not prepared and Defendant's advantageous positioning without the existence of the promissory note and security agreement, when coupled with Defendant's knowledge and experience as a licensed attorney and Defendant's failure to inform Plaintiff that he was not an attorney licensed in the State of Tennessee, could lead a fact-finder to conclude that the Defendant entered into the Agreement[s] with an intent to deceive Plaintiff.
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> . . . . Plaintiff believes that summary disposition of this matter to be [*sic*] inappropriate as a determination of the dischargeability of the debt in question should be based upon the fact-finder's assessment of each party's credibility in relation to the traditional indicia of fraud, the totality of the circumstances as they existed around the time the parties entered the Agreement[s], Defendant's superior knowledge as an attorney at law, and the Defendant's conduct both before and after

the Agreement[s] were entered.

[*Id*.at pp. 6-7.]

D. Analysis

Here, given the reluctance of the Court to enter summary judgment based on a finding concerning a debtor's subjective intent, *see Smith v. Morse (In re Morse)*, 535 B.R. 268, 279 (Bankr. E.D. Tenn. 2015), the Court will deny Defendant's Motion as stated. Moreover, taking the pleadings and all inferences created therein in a light most favorable to Plaintiff, the Court finds that Defendant's argument that he intended to pay, in fact, is misguided and does not negate the disputed facts that Plaintiff has alleged in the Complaint.

In reply to Plaintiff's response to the Motion, although Defendant acknowledges that Plaintiff alleges that Defendant intended "to deceive because no Promissory Note or Security Agreement w[ere] prepared," Defendant points to his unrefuted testimony that (1) the Agreements simply call for the buyer to "'execute a promissory note setting forth the above terms (attached as Exhibit 'A'), which shall be secured by a security interest in the assets of Central'" and (2) the Agreements did not require Defendant to prepare a promissory note. [Doc. 49 at pp. 4-5.] Defendant then concludes: "The subjects raised by [Plaintiff] in reliance on this exchange may relate to many other aspects of the Section 523 claim, but nothing in this argument raises disputed issues of fact that relate to [Defendant]'s intent to pay [Plaintiff] and do not establish that [Defendant] had the intent to deceive at the time [the] Agreements were signed." [*Id.* at p. 6.]

Thus, notwithstanding Plaintiff's argument that Defendant's misrepresentation under § 523(a)(2)(A) concerned his intent to prepare and execute a promissory note and security agreement (which, also, is the focus of the Complaint [*see* Doc. 5 at ¶¶ 17, 21]), Defendant

focuses on his intent to pay. As a result, Defendant fails to develop an argument on Plaintiff's central allegation – that Defendant intended to deceive Plaintiff concerning preparation and execution of a promissory note and security agreement. Defendant's single-minded focus on his intent to repay ignores that fraudulent intent under § 523(a)(2)(A) is not limited to whether a party intended to repay a debt obligation.

E. Rule 56(f)

The Court could simply deny Defendant's Motion and proceed to trial on August 13. Because the undisputed material facts appear to provide other possible grounds for summary judgment, however, the interests of judicial economy justify the application of Federal Rule of Civil Procedure 56(f)(2) and (3), which provide that "[a]fter giving notice and a reasonable time to respond, the court may . . . grant the motion on grounds not raised by a party[] or . . . consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute." Although not raised directly by Defendant, the Court has determined that, based on the record, whether the debt owed by Defendant to Plaintiff falls within the scope of § 523(a)(2)(A) depends on whether Defendant represented to Plaintiff that he would prepare and execute a promissory note but never intended to do so and, if so, whether Plaintiff reasonably relied on such misrepresentation. The undisputed facts establish that the Agreements did not include any requirement that Defendant *prepare* a promissory note or security agreement [Docs. 40-1 at pp. 26-27 (¶¶ 2.02(c), 3.02(b), 3.03(b)), p. 31 (¶¶ 2.02(c), 3.02(b), 3.03(b))]; Plaintiff chose not to obtain representation concerning the Agreements because "he was anxious to conclude the deal and get out" [Docs. 40 and 47 at ¶¶ 14-15]; and Plaintiff spent only five minutes reviewing the first agreement before indicating his approval to Defendant [Docs. 40 and 47 at ¶ 10]. Although the undisputed facts also seem to establish that Defendant never intended

to prepare a promissory note or security agreement, the facts cited above would seem to prevent Plaintiff from meeting his burden under § 523(a)(2)(A) to prove that Defendant materially misrepresented that he would prepare a promissory note or security agreement and that Plaintiff reasonably relied on any such misrepresentation. Because these issues were not the focus of the parties' papers, however, the Court directs the following:

1. The trial scheduled for August 13, 2019, is CONTINUED indefinitely, as are all deadlines imposed by the Amended Pretrial Order entered on November 16, 2018 [Doc. 37].

2. No later than August 16, 2019, Plaintiff shall file a brief to set forth his argument (including any statement of undisputed material facts with record citations), if any, against a finding that (A) Defendant did not make a material misrepresentation concerning his intent to prepare a promissory note and security agreement and (B) to the extent that any such misrepresentation was made, Plaintiff's reliance on the representation was not justified, such that summary judgment against Plaintiff should not be entered.

3. No later than August 30, 2019, Defendant shall respond to Plaintiff's arguments, including responding to any statement of undisputed material facts submitted by Plaintiff.

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