SO ORDERED.
SIGNED this 10th day of August, 2022

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

Suzanne H. Bauknight
UNITED STATES BANKRUPTCY JUDGE

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

In re

SAMUEL ALLAN PINNER

Debtor

Case No. 3:21-bk-30565-SHB
Chapter 7

DR. BRANDON COFFEY
LAUREN COFFEY

Plaintiffs

v.

Adv. Proc. No. 3:21-ap-3033-SHB

SAMUEL A. PINNER

Defendant

MEMORANDUM AND ORDER
ON MOTION FOR SUMMARY JUDGMENT

Plaintiffs initiated this adversary proceeding on June 30, 2021, through the filing of the Complaint of Dr. Brandon Coffey, Lauren Coffey to Determine Dischargeability of Debt [Doc. 1], seeking (1) a judgment against Defendant for damages incurred by the collapse of a chimney, loss of value to their home, and pre- and post-judgment interest and (2) a determination that the

judgment is nondischargeable under 11 U.S.C. § 523(a)(2)(A). Defendant answered on December 14, 2021 [Doc. 16], and on April 19, 2022, he filed a Motion for Summary Judgment, as amended on April 22, 2022[1] (collectively "Summary Judgment Motion"), with a brief and Statement of Undisputed Facts with supporting materials.[2] [Docs. 28, 29, 30, 33.] Plaintiffs filed their Response to Defendant's Statement of Undisputed Facts and brief (collectively, "Response") opposing the Summary Judgment Motion on June 22, 2022,[3] citing in support of disputed facts solely to the Building Permit and Affidavit of Exemption supplied by Defendant. [Doc. 39 at p. 3; Doc. 40 at ¶¶ 3, 7, 9-16.] The matter is now ripe for adjudication.

Under Rule 56 of the Federal Rules of Civil Procedure, "[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." Fed. R. Civ. P. 56(c). When deciding a motion for summary judgment, 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. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary

[1] The April 22, 2022 amendment was filed solely to correct a typographical error in the notice legend referencing the Local Rule.

[2] The Summary Judgment Motion is supported by the Affidavit of Samuel A. Pinner; the Declaration of Rhett C. Holderfield; corporate documentation concerning Southeastern Development Group Inc. from the Tennessee Secretary of State; an Application for Building Permit to the Town of Farragut dated August 10, 2009 ("Building Permit"); a substitute trustee's deed and three warranty deeds filed with the Knox County Register of Deeds; and an excerpt from Defendant's answers to interrogatories. [Docs. 30-1 to 30-9.]

[3] Notwithstanding that the notice legend on the Summary Judgment Motion reflected the standard 21-day response time set forth in E.D. Tenn. LBR 7007-1, the Pretrial Order entered on February 8, 2022, specified a deadline of June 10, 2022, for responses to dispositive motions. [*See* Doc. 26.] On June 9, 2022, Plaintiffs filed a Motion for Additional Time to Obtain Discovery Before Consideration of Defendant's Summary Judgment Motion [Doc. 34], which was denied for reasons stated in the Court's Order entered June 15, 2022 [Doc. 37]. The June 15, 2022 Order also directed Plaintiffs to respond to the Summary Judgment Motion no later than June 22, 2022. [*Id*.] Thus, Plaintiffs' June 22, 2022 Response and brief were timely filed.

judgment." *Id.* at 248.

Defendant, as the moving party, bears the burden of proving, based on the record before the Court, that he is entitled to judgment as a matter of law because there is no genuine dispute concerning any material fact, such that the defenses alleged are factually unsupported. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Once Defendant meets his burden, the burden then shifts to Plaintiffs to prove that there are genuine disputes of material fact for trial. *Id*. at 324. Plaintiffs may not rely solely on allegations or denials contained in the pleadings because reliance on 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).

The Court must review the facts and all resulting inferences in a light most favorable to Plaintiffs, as non-movants, to 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. Nevertheless, Rule 56(e) provides that when a party does not address a properly asserted fact that is supported by the record (with citations thereto), the court may "consider the fact undisputed for purposes of the motion" and/or "grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it[.]" Fed. R. Civ. P. 56(e)(2), (3).

Under 11 U.S.C. § 523(a)(2)(A), an individual is not discharged 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, other than a statement respecting the debtor's or an insider's financial condition." "'[A]ctual fraud' . . . encompasses

forms of fraud, like fraudulent conveyance schemes, that can be affected without a false representation." *Husky Int'l. Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1586 (2016).

To meet their burden of proof required under § 523(a)(2)(A), Plaintiffs must establish that Defendant obtained money or property from or belonging to Plaintiffs through false pretenses and/or material misrepresentations that Defendant knew were false or he made with gross recklessness or through actual fraud; Defendant intended to deceive Plaintiffs when he made any such statements or acted fraudulently; Plaintiffs justifiably relied on such statements; and their reliance was the proximate cause of the losses Plaintiffs incurred. *See, e.g., Lansden v. Jones (In re Jones)*, 585 B.R. 465, 502 (Bankr. E.D. Tenn. 2018). Here, Plaintiffs rely on the doctrine of fraudulent concealment, which tolls the running of a statute of limitations and requires Plaintiffs to prove:

> (1) an affirmative act by the defendant to conceal the cause of action or the failure to disclose material facts despite a duty to speak; (2) that the plaintiff could not have discovered the cause of action despite exercising reasonable care and diligence; (3) the defendant must be aware of the wrong; [and] (4) the concealment of material information from the plaintiff by withholding information or making use of some device to mislead the plaintiff in order to exclude suspicion or prevent inquiry.

Coffey v. Coffey, 578 S.W.3d 10, 22 (Tenn. Ct. App. 2018) (citing *Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W.3d 436, 462-63 (Tenn. 2012)).

Factually, Plaintiffs allege that Defendant fraudulently concealed a defectively built chimney at a residence located at 703 Barnsley Road, Knoxville, Tennessee ("Barnsley Property"), which had been purchased, renovated, and resold by Southeast Development Group, Inc. ("SDG"), a for-profit Tennessee corporation evenly owned by two shareholders, Defendant and Fred Leonard ("Leonard"). [Doc. 1 at ¶¶ 6-7, 10; Doc. 30 at ¶¶ 1-2, 5, 17-19; Doc. 40 at ¶¶ 1-2, 5, 17-19.] Defendant acted as a real estate broker for SDG, dealing with marketing aspects, while Leonard primarily developed land to sell lots in a subdivision. [Doc. 30 at ¶¶ 3-4; Doc. 40

at ¶¶ 3-4.] SDG purchased the real property and partially constructed house on the Barnsley Property at a foreclosure sale on November 15, 2007, to renovate and resell (or "flip") it. [Doc. 30 at ¶¶ 4-5; Doc. 40 at ¶¶ 4-5.]

Defendant asserts (with record support) that, at Leonard's request, Defendant filled out the building permit for the Barnsley Property and erroneously listed himself, instead of SDG, as the property owner. [Doc. 30 at ¶¶ 8-10.] Defendant indicates that he neither participated in construction of the house on the Barnsley Property nor did he hire, communicate with, or consult anyone regarding the construction. [*Id*. at ¶¶ 11, 13.] Defendant states that he had no knowledge of additions, improvements, alterations, or changes to the dwelling at the Barnsley Property. [*Id*. at ¶¶ 13-14.] Defendant also denies knowledge of any method or device, or construction materials used to build, support, or reinforce the chimney at the Barnsley Property. [*Id*. at ¶¶ 11, 14.] Defendant states that he entered the Barnsley Property only three times: once in 2008, soon after SDG purchased it, and twice in 2010, when it was completed and ready to be marketed and after SDG sold it. [*Id*. at ¶15; Doc. 30-1 at ¶¶ 14, 16.]

SDG sold the Barnsley Property to the Elizabeth Ann Turner Revocable Trust in 2010, which in turn sold it to the Champlin Living Trust in 2017, from whom Plaintiffs purchased it in 2019. [Doc. 30 at ¶¶ 17-19; Doc. 40 at ¶¶ 17-19.] On January 24, 2020, the chimney at the Barnsley Property collapsed. [Doc. 30 at ¶ 20; Doc. 40 at ¶ 20.] Defendant has never communicated with Plaintiffs, who have not communicated with anyone employed by SDG regarding the Barnsley Property or the chimney. [Doc. 30 at ¶ 21; Doc. 40 at ¶ 21.]

In response to some of Defendant's statements of fact, Plaintiffs "disputed" Defendant's assertions that Leonard asked Defendant to fill out the building permit and that Defendant listed himself as owner of the Barnsley Property in error. [Doc. 30 at ¶¶ 9-10; Doc. 40 at ¶¶ 9-10.]

Plaintiffs, however, cite only to the Building Permit and Affidavit of Exemption, initially provided by Defendant and also attached to Plaintiffs' Response, with no additional explanation for disputing the facts. [Doc. 40 at ¶¶ 3, 7, 9-16.] Plaintiffs also dispute Defendant's factual assertions that he did not participate in construction of the house; that he had no knowledge of how the chimney was constructed; that he did not hire, communicate with, or consult with anyone about the construction of the house; that he lacks knowledge about the construction of the dwelling and that Leonard made construction decisions; that he entered the house only a few times when it was first purchased and when it was completed in 2010; and that he did not know about construction materials or anything possibly used to conceal problems with the chimney. [Doc. 30 at ¶¶ 9-16; Doc. 40 at ¶¶ 9-16.]

Plaintiffs' Response, however, is not actually supported by the Building Permit or Affidavit of Exemption.[4] Simply, their denials do not comply with Rule 56(c)(1) and E.D. Tenn. LBR 7056-1(b)(3) because they fail to provide citations to record evidence that supports the denials. [*See id*.] Thus, the Court is within its authority to deem Defendant's facts as undisputed. *See, e.g., Taylor v. Methodist Le Bonheur Healthcare*, No. 2:19-cv-02796-MSN-atc, 2021 WL 2934596, at *2 (W.D. Tenn. June 22, 2021), R. & R. adopted in No. 2:19-cv-02796-MSN-atc, 2021 WL 2932747 (W.D. Tenn. July 12, 2021) ("To the extent [the plaintiff] has failed to demonstrate a dispute with [the defendant's] facts because she lacks sufficient information to do so, those facts are deemed undisputed." (citations omitted)).

[4] The Affidavit of Exemption, which simply states that Defendant was exempt from providing proof of workers' compensation insurance as required by Tennessee Code Annotated section 13-7-211 because he stated that he was performing work on his own property in his own town and county of residence [see Doc. 40-1] does not rebut the averments in Defendant's and Mr. Holderfield's Affidavits. Plaintiffs incorrectly assert in their brief that "Defendant's affidavit alone is insufficient to show that no genuine issue of material fact exists as to his involvement in the construction of the Barnsley Dwelling." [Doc. 39 at p. 4.]

Indeed, Plaintiffs' Response exemplifies a non-moving party's ineffective attempt to rest on the mere allegations of his pleading. Plaintiffs' arguments are without merit and/or unsupported by the record. The Court disagrees with Plaintiffs' argument that Defendant's name on the Building Permit as owner gives rise to a genuine dispute of fact concerning Defendant's knowledge and involvement in the construction on the Barnsley Property, and the chimney specifically. The Building Permit relates only to a single point in time; i.e., the August 10, 2009 through February 10, 2010 – the effective dates of the Building Permit. [*See* Doc. 28-6 Ex. C; Doc. 40-1 Ex. A.] Even if the Court were to find that the Building Permit creates an issue of fact as to Defendant's status as owner and/or his responsibility for the project, without more, the Building Permit does not prove fraudulent concealment, which requires proof that Defendant affirmatively acted to conceal material facts in contravention of a duty to disclose. Plaintiffs could have disputed such material facts by supplying affidavits of persons with knowledge or contrary deposition testimony of Defendant.

Simply, Plaintiffs have offered no proof as to any element of fraudulent concealment – the elements of which they acknowledge in their Response [Doc. 39 at pp. 3-4]: an affirmative action by Defendant to conceal or an unmet duty owed by Defendant to disclose material facts and that Plaintiffs could not have discovered the cause of action despite the exercise of reasonable care and diligence. *See Shadrick v. Coker*, 963 S.W.2d 726, 735 (Tenn. 1998). Plaintiffs' mere recitation of the elements of fraudulent concealment without record evidence to rebut Defendant's proof in the form of affidavits and discovery responses does not create a genuine issue of material fact to preclude summary judgment.

Even if the Court were to agree with Plaintiffs that "Defendant's action of crossing out 'Contractor' and replacing it with 'Homeowner' [on the Building Permit] does not absolve him

of the responsibilities he agreed to when he signed the [Building] Permit and its accompanying covenant[5]" [Doc. 39 at p. 5], such a breach of promise does not give rise to an action under § 523(a)(2)(A), which provides proof – none of which Plaintiffs have provided – that Defendant possessed the requisite fraudulent intent or that Plaintiffs justifiably relied on any fraud perpetrated by Defendant. Simply, Defendant's breach of his responsibilities under the Building Permit do not equate to proof sufficient to satisfy § 523(a)(2)(A).

Finally, Plaintiffs' reliance in their Response on *Hendon v. Oody (In re Oody)*, 249 B.R. 482, 489 (Bankr. E.D. Tenn. 2000), and *Helton v. Lawson*, No. E2018-02119-COA-R3-CV, 2019 WL 6954180 (Tenn. Ct. App. Dec. 18, 2019), is misplaced. Although Plaintiffs correctly note that the court denied summary judgment in *In re Oody* because the debtor had submitted an affidavit that "directly contradicted [her statements and schedules in] the record[]" [Doc. 39 at p. 4], here, no such contradictions exist. Plaintiffs simply rest on their own unsworn allegations. They also argue that under *Helton*, by obtaining the Building Permit in his name and signing the covenant on the Building Permit and the Affidavit of Exemption, Defendant was representing that he was involved in and responsible for construction at the Barnsley Property. [Doc. 39 at 6.] *Helton*, however, addressed workers' compensation issues and the question of whether the plaintiff was an employee or an independent contractor. *See Helton*, 2019 WL 6954180, at *8.

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[5] The covenant that Plaintiffs reference states:

> The applicant of this permit does hereby covenant and agree to comply with the building / fire codes and all other ordinances of this jurisdiction, pertaining to said building and site. and to construct the proposed building or structure or to make the proposed change or alteration in accordance with the plans and specifications submitted herewith, and certify that the information and statements give on this application, drawings, and specifications are to the best of their knowledge, true and correct. it is understood and agreed by the applicant that any error, misstatement, or misrepresentation of fact, either with or without intention on his part, such as might, if known cause a refusal of this application or any altercation or change in plans made without approval of the Building Inspector subsequent to the issuance of the building permit, shall constitute sufficient grounds for revocation of such permit.

[Docs. 28-6 Ex. C; 40-1 Ex. A.]

Here, there are no issues concerning workers' compensation or even the question of whether Defendant is an employee of SDG. The *Helton* decision has no bearing on this case.

The record before the Court is unrefuted by Plaintiffs. Defendant provided affidavits and documentary evidence, as well as discovery responses, in support of his Summary Judgment Motion, while Plaintiffs provided no evidentiary proof, not even their own affidavits asserting the necessary element of reasonable reliance. Accordingly, because Defendant supplied unrebutted proof, the Court accepts his factual statements, which compel the entry of summary judgment in favor of Defendant. The Court, therefore, directs the following:

1. The Motion for Summary Judgment, as amended on April 22, 2022 [Doc. 33], is GRANTED.

2. The Complaint filed on June 30, 2021 [Doc. 1], is DISMISSED with prejudice.

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