Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: May 14, 2018

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

IN RE:

JOHN EARL CARPENTER AND ORA S. CARPENTER,	**CASE NO. 17-13270-NPO**
DEBTORS.	**CHAPTER 13**
IRRIGATION EQUIPMENT, INC.	**PLAINTIFF**
VS.	**ADV. PROC. NO. 17-01055-NPO**
JOHN CARPENTER, ORA CARPENTER, AND LOCKE D. BARKLEY, TRUSTEE	**DEFENDANTS**

MEMORANDUM OPINION AND ORDER
DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

There came on for consideration the Plaintiff's Motion for Summary Judgment (the "Motion") (Adv. Dkt. 6)[1] filed by Irrigation Equipment, Inc. ("Irrigation"); the Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment (the "Brief") (Adv. Dkt. 8) filed by Irrigation; the Plaintiff's Statement of Undisputed Facts in Support of its Motion for Summary Judgment (the "Statement of Undisputed Facts") (Adv. Dkt. 15) filed by Irrigation; the

[1] Citations to the record are as follows: (1) citations to docket entries in the above-referenced adversary proceeding (the "Adversary") are cited as "(Adv. Dkt. ____)"; and (2) citations to docket entries in the above-styled bankruptcy case (the "Bankruptcy Case") are cited as "(Bankr. Dkt. ____)".

Response Opposing Motion for Summary Judgment (the "Response") (Adv. Dkt. 16) filed by the debtors, John Carpenter ("John Carpenter") and Ora Carpenter ("Ora Carpenter" or, together with John Carpenter, the "Carpenters"); and the Rebuttal to Response Opposing Motion for Summary Judgment (the "Rebuttal") (Adv. Dkt. 18) filed by Irrigation in the Adversary.

Irrigation attached one exhibit to the Motion, which is marked as "Exhibit A" (Adv. Dkt. 6-1), three exhibits to the Statement of Undisputed Facts, which are not marked (Adv. Dkt. 15-1 to 15-3), and one exhibit to the Rebuttal, which is also unmarked (Adv. Dkt. 18 at 4-6).[2] The Carpenters attached four exhibits to the Response (Adv. Dkt. 16-1 to 16-4), which are marked as Exhibits A-D (Adv. Dkt. 16-1 to 16-4).[3]

Jurisdiction

The Court finds that it has subject matter jurisdiction pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (I), and (O). Notice of the Motion was proper under the circumstances.

Facts[4]

A. Water Well

In January or February 2010, John Carpenter contacted Irrigation about installing a water well on approximately forty (40) acres of farm land (the "Farm") owned by the Carpenters in Sunflower County, Mississippi. (Irrig. Ex. B). John Carpenter spoke with an Irrigation salesman,

[2] Irrigation's marked exhibit will be referred to as "(Irrig. Ex. A)" (Adv. Dkt. 6-1), and its unmarked exhibits will be referred to as "(Irrig. Ex. B)" (Adv. Dkt. 15-1), "(Irrig. Ex. C)" (Adv. Dkt. 15-2), "(Irrig. Ex. D)" (Adv. Dkt. 15-3), and "(Irrig. Ex. E)" (Adv. Dkt. 18 at 4-6).

[3] The Carpenters' exhibits will be referred to as "(Carp. Ex. A)" (Adv. Dkt. 16-1), "(Carp. Ex. B)" (Adv. Dkt. 16-2), "(Carp. Ex. C)" (Adv. Dkt. 16-3), and "(Carp. Ex. D)" (Adv. Dkt. 16-4).

[4] The following findings of fact and conclusions of law are made pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

David Westrope, who advised him to obtain a well permit from the Yazoo Mississippi Delta Joint Water Management District ("YMD") in Stoneville, Mississippi. John Carpenter applied for the permit and also applied for a grant from the United States Department of Agriculture ("USDA") to fund the installation cost. (Irrig. Ex. D).

On February 24, 2010, John Carpenter spoke with Mallory Chism ("Mallory Chism"), an Irrigation employee, who gave him a written job proposal (Irrig. Exs. C & D at 7) providing specifications for a water well and quoting an estimated cost of $10,765.25, plus tax, for drilling and installation. After he received a letter from YMD, dated March 23, 2010, authorizing the drilling of a water well on the Farm (Irrig. Ex. D at 8), John Carpenter informed Mallory Chism to proceed with the installation and showed her its proposed location on the Farm, which Mallory Chism marked by staking two red flags in the ground (Irrig. Ex. C).

On April 21, 2010, Irrigation issued a Job Work Order (the "Work Order") (Irrig. Ex. D at 9) for a "10" PVC well with 15hp single phase submersible." On April 26, 2010, Irrigation installed the water well (the "Water Well") pursuant to the Work Order at the location selected by John Carpenter. Irrigation filed State Well Reports (Irrig. Ex. D at 10-13) with the Mississippi Department of Environmental Quality that same day. On May 16, 2010, Irrigation sent an invoice to John Carpenter in the amount of $9,365.00 plus sales tax of $655.55 (the "Invoice") (Irrig. Ex. D at 14). The Invoice includes a finance charge of one and one-half percent (1.5 %) per month for any payment made more than thirty (30) days from the date of the Invoice.

The USDA approved John Carpenter's grant application in an amount sufficient to pay for the Water Well (the "Grant Money"), but deducted from the Grant Money the amount that John Carpenter owed the USDA, resulting in a net payment to John Carpenter of only $6,120.00. (Irrig. Ex. E). John Carpenter tendered the $6,120.00 payment from the USDA to Irrigation, but

Irrigation allegedly refused to accept it as full payment. (Adv. Dkt. 16). Eventually, John Carpenter deposited these funds into his personal checking account. (*Id.*). On February 23, 2011, Irrigation filed the Notice of Construction Lien (Carp. Ex. B at 13) against the Farm in the office of the Chancery Clerk of Sunflower County, Mississippi, under §§ 85-7-133 to -157 of the Mississippi Code.[5]

B. State Court Action

On March 25, 2011, Irrigation filed a complaint against John Carpenter to recover payment on an "open account" (the "State Court Complaint") (Carp. Ex. B) in the Circuit Court of Sunflower County, Mississippi (the "Circuit Court") in Cause No. 2011-0095 (the "State Court Action"). Irrigation also sought in the State Court Complaint to execute its construction lien against the Farm and so named as additional defendants Ora Carpenter, who held an ownership interest in the Farm, and Community Bank, North Mississippi, which held a deed of trust on the Farm.

Irrigation alleged in the State Court Complaint that it installed the Water Well at the direction of John Carpenter and was owed a balance of $11,288.06, plus interest. Attached to the State Court Complaint was the affidavit of John P. Chism ("John Chism"), the president of Irrigation, and an account statement, reflecting accrued interest of $1,436.83 from June 30, 2010, to February 28, 2011. (Carp. Ex. B). In the request for relief, Irrigation asked for a judgment against John Carpenter in the amount of $11,288.06, plus attorney's fees, and for an order for the sale of the Farm to enforce its lien.

[5] After the Fifth Circuit Court of Appeals held that Mississippi's "stop payment notice" procedure was unconstitutional, the Mississippi legislature in 2014 rewrote Mississippi's construction lien law. *See Noatex Corp. v. King Constr. of Houston, L.L.C.*, 732 F.3d 479 (5th Cir. 2013). Most of the events outlined in this discussion took place before the law was repealed.

1. Discovery Order

During discovery, the Carpenters failed to respond in a timely manner to Plaintiff's First Set of Interrogatories and Request for Production of Documents propounded by Irrigation, and, therefore, Irrigation filed a Motion to Compel Response to Discovery Requests (the "Motion to Compel") on December 11, 2015. (Carp. Ex. C at 2-3). On January 11, 2016, the Circuit Court entered the Order to Compel Response to Discovery Requests and Request for Production (the "Discovery Order") (Adv. Dkt. 1-1 at 6-7), instructing the Carpenters to respond to Irrigation's discovery requests by February 16, 2016, and awarding Irrigation $1,237.50, in its attorney's fees for its prosecution of the Motion to Compel.

The Carpenters filed the Response to Plaintiff's Request for Production on February 4, 2016, asserting that they could not locate the bank statement showing the deposit of the Grant Money into their account or the grant application submitted to the USDA. The Carpenters never supplemented their discovery responses.

2. State Court Judgment

On November 10, 2016, Irrigation filed its Request for Admissions. On January 30, 2017, Irrigation filed the Notice of Certain Facts deemed to Have Been Admitted by Defendant, alleging that the Carpenters had failed to respond to the Request for Admissions within the proper time frame and asking the Circuit Court to deem the requests admitted. Irrigation then filed the Motion for Default Judgment, or Alternatively, Summary Judgment, which the Circuit Court initially denied but reconsidered pursuant to the Order Granting Plaintiff's Motion to Reconsider and/or Alternatively, Granting Summary Judgment and Final Judgment (the "State Court Opinion") (Carp. Ex. C) entered on March 13, 2017.

The Circuit Court found that there was no genuine issue of material fact that John Carpenter entered into a verbal contract with Irrigation for the drilling and installation of the Water Well, that the Water Well was working and functional, and that John Carpenter "is obligated to fulfill his obligations under the contract." (Carp. Ex. C at 7). In reaching these findings, the Circuit Court deemed as true the matters set forth in the Request for Admissions, including that: (1) John Carpenter or someone acting on his behalf caused the Water Well to become operational; (2) water actually flows from the Water Well; and (3) the Water Well is used in farming operations. (Carp. Ex. C at 7). These admissions negated defenses articulated by John Carpenter in his deposition that Irrigation drilled the Water Well without his consent "through a farm service agent authorization," that he did not owe Irrigation for the Water Well, and that service on the Water Well was never activated. (Carp. Ex. C at 2).

In the State Court Opinion, the Circuit Court rejected Irrigation's argument that the debt for its services was an "open account" under § 11-53-81 of the Mississippi Code, and, as a result, found that Irrigation was not entitled to its attorney's fees.[6] Contemporaneously with the State Court Opinion, the Circuit Court entered the Final Judgment in Favor of Plaintiff Against John E. Carpenter (the "State Court Judgment") (Carp. Ex. D) in the amount of $28,363.51, plus interest from the date of the judgment at a rate of one and one-half percent (1.5%) per month until paid, with all court costs assessed against John Carpenter.

[6] The Circuit Court determined that the statute applicable to an open account did not apply because there was only a single transaction between Irrigation and John Carpenter. *Franklin Collection Serv. v. Stewart*, 863 So. 2d 925, 930 (Miss. 2003) (defining an open account as "an account based on continuing transactions between the parties which have not closed or been settled). The Circuit Court also denied, without further discussion, Irrigation's request for execution of its lien.

C. Bankruptcy Case

The Carpenters filed a joint voluntary petition for relief (Bankr. Dkt. 1) under chapter 13 of the Bankruptcy Code on September 1, 2017, and a Chapter 13 Plan (Bankr. Dkt. 21) on September 15, 2017. Shortly thereafter, Irrigation filed proof of claim 8-1 ("POC 8-1") (Claim #8-1) in the amount of $31,545.84 and proof of claim 9-1 ("POC 9-1") (Claim #9-1) in the amount of $1,402.50. POC 8-1 is based on the State Court Judgment rendered against John Carpenter in the amount of $28,363.51. In an itemization attached to POC 8-1, Irrigation calculates accrued interest at the rate of one and one-half percent (1.5%) per month for the months of March, 2017, through August, 2017, of $2,650.35, and court costs of $531.98.[7] POC 9-1 is based on attorney's fees of $1,237.50 awarded in the Discovery Order. Irrigation calculates accrued interest, calculated at the rate of eight percent (8%) per annum from January 11, 2016, until September 5, 2017, of $165.00.[8]

On October 1, 2017, the Carpenters filed the Objection to Secured Claim (the "Claim Objection") (Bankr. Dkt. 42), asking the Court to avoid Irrigation's judgment lien and treat its claims as unsecured. Irrigation filed the Response to Objection to Secured Claim of Irrigation Equipment, Inc. (Bankr. Dkt. 53), asserting that the Carpenters failed to provide a factual basis to avoid its judgment lien. The Carpenters filed the Amended Chapter 13 Plan (Bankr. Dkt. 45) on October 17, 2017. Irrigation filed the Objection to Modified Chapter 13 Plan (the "Plan Objection") (Bankr. Dkt. 58) on October 30, 2017, and the chapter 13 trustee filed the Objection

[7] $28,363.51 + $2,650.35 + $531.98 = $31,545.84.

[8] $1,237.50 + $165.00 = $1,402.50.

to Confirmation (the "Confirmation Objection") (Bankr. Dkt. 97) on November 14, 2017. These contested matters were resolved later by agreement of the parties.[9]

D. Adversary

On November 28, 2017, Irrigation filed the Complaint to Deny Discharge (the "Adversary Complaint") (Adv. Dkt. 1) against the Carpenters, alleging that its "claims arise from debts for money obtained by false pretenses, false representations and actual fraud, and should not be discharged pursuant to 11 U.S.C. § 523(a)(2)(A)." (Adv. Compl. ¶ 5). Irrigation maintained that the Carpenters falsely and knowingly represented they would transfer the Grant Money to Irrigation for the installation of the Water Well. (Adv. Compl. ¶ 6). According to Irrigation, the Carpenters applied for, and received the full amount of the Grant Money but never transferred the Grant Money to Irrigation.[10] (Adv. Compl. ¶ 7). Irrigation contended that it justifiably relied on their misrepresentation "because it is common practice for farms to apply for and receive USDA grants for . . . irrigation well installations," and it would not have agreed to install the Water Well if it had known the Carpenters had no intention of transferring the Grant Money. (Adv. Compl. ¶¶ 9-10). In the prayer for relief, Irrigation asked the Court "to enter an order finding that [POC] 8-1 and [POC] 8-2 [sic] are nondischargeable" and awarding its costs and attorney's fees in bringing the Adversary Complaint. (Adv. Compl. at 4). In the Bankruptcy Case, Irrigation filed a Suggestion to Hold Objection in Abeyance (the "Abeyance Motion") (Bankr. Dkt. 113), asking the Court to hear the Claim Objection at the same time as the Adversary because "[t]he facts in each case would be similar, if not identical."

[9] *See infra* at 9.

[10] Later, Irrigation acknowledged that the Carpenters did not receive the full amount of the Grant Money. (Irrig. Ex. E).

E. Confirmation of Chapter 13 Plan

On November 30, 2017, the Carpenters filed the Second Amended Chapter 13 Plan (the "Amended Plan") (Bankr. Dkt. 115) in the Bankruptcy Case. Among other matters, the Amended Plan proposed to pay the claims of Irrigation in full, with interest at the rate of five percent (5%) per annum. On December 13, 2017, the Court entered the Agreed Order (the "Agreed Order") (Bankr Dkt. 128) in the Bankruptcy Case. In the Agreed Order, the parties in interest agreed that the Amended Plan resolved the Claim Objection filed by the Carpenters, the Plan Objection filed by Irrigation, and the Confirmation Objection filed by the chapter 13 trustee and that it rendered moot the Abeyance Motion filed by Irrigation. The parties further agreed that a hearing on the confirmation of the Amended Plan could proceed before final adjudication of the Adversary, and "any order confirming the [Amended] Plan would not affect the rights and defenses of the parties as they relate to the Adversary." (Bankr. Dkt. 128 at 2). On January 18, 2018, the Carpenters, acting *pro se* while represented by counsel, filed the Objection to 3rd Amended Chapter 13 Plan (the "*Pro Se* Plan Objection") (Bankr. Dkt. 143). After a hearing, the Court entered an order striking the *Pro Se* Plan Objection (Bankr. Dkt. 160), and, later, on February 22, 2018, entered an order allowing counsel for the Carpenters to withdraw as their attorney in the Bankruptcy Case. (Bankr. Dkt. 167).

F. Motion

Meanwhile, on January 18, 2018, Irrigation filed the Motion and Brief in the Adversary, alleging that there is no genuine issue in dispute and that it is entitled to summary judgment as a matter of law declaring that POC 8-1 and POC 9-1 are excepted from discharge under 11 U.S.C.

§ 523(a)(2)(A).[11] On February 2, 2018, Irrigation filed the Statement of Undisputed Facts, and the Carpenters filed their Response opposing the Motion. Irrigation filed the Rebuttal on February 15, 2018.

Discussion

At issue before the Court is whether Irrigation is entitled to judgment as a matter of law declaring that the debts owed Irrigation for breach of contract and attorney's fees are nondischargeable pursuant to § 523(a)(2)(A) and § 1328(c)(2).

A. Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure ("Rule 56"), as made applicable to adversary proceedings by Rule 7056 of the Federal Rules of Bankruptcy Procedure, provides in relevant part 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." FED. R. CIV. P. 56(a). Summary judgment is properly entered when the "depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials" show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c)(1)(A); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is viewed as an important process through which parties can obtain a "just, speedy and inexpensive determination of every action." *Id.* at 327 (citations & quotation omitted).

The moving party bears the initial burden of proof to specify the basis upon which summary judgment should be granted and identify portions of the record that demonstrate the absence of a

[11] Hereinafter, all code sections refer to the U.S. Bankruptcy Code found at Title 11 of the United States Code, unless otherwise noted.

genuine issue of material fact. FED. R. CIV. P. 56(c)(1); *see also Celotex*, 477 U.S. at 322. Once the initial burden is met, the burden of production shifts to the nonmovant who then must come forward with specific facts, supported by the evidence in the record, upon which a reasonable factfinder could find a genuine fact issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[C]onclusory allegations" or "unsubstantiated assertions" do not meet the nonmovant's burden. *Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co*., 530 F.3d 395, 399 (5th Cir. 2008). Summary judgment may be granted, after adequate time for discovery, against a nonmovant who "has failed to make a sufficient showing on an essential element of [the] case with respect to which [the party] has the burden of proof." *Celotex*, 477 U.S. at 323.

Even if the standards of Rule 56 have been met, the Court "has the discretion to deny motions for summary judgment and allow parties to proceed to trial so that the record might be more fully developed for the trier of fact." *Hall v. Desper (In re Desper)*, No. 09-05051-NPO, 2010 WL 653864, at *6 (Bankr. S.D. Miss. Feb. 9, 2010); *see also Firman v. Life Ins. Co. of N. Am.*, 684 F.3d 533, 538 (5th Cir. 2012) (quoting *Anderson*, 477 U.S. at 255); *River Region Med. Corp. v. Wright*, No. 3:13-cv-793-DPJ-FKB, slip op. at 4-6 (S.D. Miss. Aug. 5, 2014) (affirming interlocutory order denying summary judgment); *Kunin v. Feofanov*, 69 F.3d 59, 62 (5th Cir. 1995); *Black v. J.I. Case Co.*, 22 F.3d 568, 572 (5th Cir. 1994); *Veillon v. Expl. Servs., Inc.*, 876 F.2d 1197, 1200 (5th Cir. 1989). Accordingly, this Court has previously denied summary judgment to allow the parties to develop the facts at trial. *Good Hope Constr., Inc. v. RJB Fin., LLC (In re Grand Soleil-Natchez, LLC)*, No. 12-00013-NPO (Dkt. 437), at *33 (Bankr. S.D. Miss. Aug. 13, 2013).

B. Dischargeability

Usually, "all debts arising prior to the filing of the bankruptcy petition will be discharged." *United States v. Coney*, 689 F.3d 365, 371 (5th Cir. 2012) (citing *Bruner v. United States (In re Bruner)*, 55 F.3d 195, 197 (5th Cir. 1995)). However, "Congress has provided that certain types of liabilities are excepted from the general rule of discharge" to "ensure that the Bankruptcy Code's 'fresh start' policy is only available to 'honest but unfortunate debtor[s].'" *Id.* (citations omitted). Section 523 of the Bankruptcy Code outlines these exceptions to the general rule. *See* 11 U.S.C. § 1328(c) (a discharge granted under § 1328(b) does not discharge any debt "of a kind specified in section 523(a)"). "Exceptions to discharge must be strictly construed against the creditor and liberally construed in favor of the debtor." *Country Credit, LLC v. Kornegay (In re Kornegay)*, Adv. No. 11-00042-KMS, 2012 WL 930818, at *3 (Bankr. S.D. Miss. Mar. 19, 2012). For that reason, the creditor bears the burden of proof of establishing by a preponderance of the evidence that the debt in question is nondischargeable. *Grogan v. Garner*, 498 U.S. 279, 286 (1991); *RecoverEdge L.P. v. Pentecost*, 44 F.3d 1284, 1292 (5th Cir. 1995).

In the Adversary Complaint, Irrigation seeks a finding of nondischargeability based on § 523(a)(2)(A). Section 523(a)(2)(A) covers oral misrepresentations or omissions and excepts from discharge a 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.

11 U.S.C. § 523(a)(2)(A). The U.S. Supreme Court has recognized a distinction between false pretenses/false representations and actual fraud. *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581, 1586 (2016) ("Congress did not intend 'actual fraud' to mean the same thing as 'a false

representation' . . . ."). Satisfaction of the elements of either false pretense/false representation or actual fraud is sufficient to support a finding of nondischargeability under § 523(a)(2)(A).

1. False Pretenses and Representations

A debtor's representation is false or made under a false pretense within the meaning of § 523(a)(2)(A) if it was: (1) a knowing and fraudulent falsehood; (2) describing past or current facts; (3) that the creditor relied upon. *AT&T Universal Card Servs. v. Mercer (In re Mercer)*, 246 F.3d 391, 403 (5th Cir. 2001). The first element requires a false representation or words or actions that constitute false pretenses. *Hiner v. Koukhtiev (In re Koukhtiev)*, 576 B.R. 107, 129 (Bankr. S.D. Tex. 2017). With regard to the third element, the appropriate standard is not whether an objectively reasonable person would have relied on the false representation but whether the creditor's reliance was justifiable from a subjective standpoint. *Field v. Mans*, 516 U.S. 59, 76 (1995). Under the justifiable reliance standard, the creditor has no duty to investigate the truth or falsity of a statement unless the falsity of the representation is readily apparent. *In re Mercer*, 246 F.3d at 418.

2. Actual Fraud

The U.S. Supreme Court has held that "[t]he term 'actual fraud' in § 523(a)(2)(A) encompasses forms of fraud, like fraudulent conveyances schemes, that can be effected without a false representation." *Ritz*, 136 S. Ct. at 1586. To establish that a debt is nondischargeable based on actual fraud, the creditor must prove: (1) the debtor committed actual fraud; (2) the debtor obtained money, property, services, or credit by the actual fraud; and (3) the debt arises from the actual fraud. *Id.* at 1587-88. With regard to the first element, "actual fraud" requires wrongful intent. *Id.* at 1586. "It denotes any fraud that 'involv[es] moral turpitude or intentional wrong.'" *Id.* (quoting *Neal v. Clark*, 95 U.S. 704, 709 (1877)). Because a debtor rarely admits that he

intended to deceive a creditor, and, thus, direct evidence of wrongful intent is hardly ever available, a subjective intent to deceive can be inferred from "[r]eckless disregard for the truth or falsity of a statement combined with the sheer magnitude of the resultant misrepresentation." *Norris v. First Nat'l Bank (In re Norris)*, 70 F.3d 27, 30 n.12 (5th Cir. 1995) (citation & quotation omitted); *see also Farmers & Merchs. State Bank v. Perry (In re Perry)*, 448 B.R. 219, 226 (Bankr. N.D. Ohio 2011) ("'[W]illful blindness' does not provide a defense to an action brought under § 523(a)(2)(A), and may instead be used as a factor indicative of fraud.") (citation & quotation omitted). "[A]n honest belief, even if unreasonable, that a representation is true and that the speaker has information to justify it does not amount to an intent to deceive." *Gen. Elec. Capital Corp. v. Acosta (In re Acosta)*, 406 F.3d 367, 372 (5th Cir. 2005) (citing *Palmacci v. Umpierrez*, 121 F.3d 781, 788 (1st Cir. 1997)).

C. *Rooker-Feldman* Doctrine & Collateral Estoppel

Irrigation bases its Motion almost entirely on the findings and conclusions of the Circuit Court. In support of its nondischargeability claim, Irrigation attached as exhibits to the Adversary Complaint the Discovery Order (Adv. Dkt. 1-1 at 6-7), the State Court Opinion (Adv. Dkt. 1-1 at 8-14), and the State Court Judgment (Adv. Dkt. 1-1 at 15) entered by the Circuit Court in the State Court Action, as well as discovery responses (Adv. Dkt. 1-1 at 1-5) filed by the Carpenters in the State Court Action and a pleading (Adv. Dkt. 1-1 at 6) filed by Irrigation in the State Court Action. Additionally, Irrigation attached the Affidavit of John P. Chism dated January 18, 2018 (the "First Chism Affidavit") (Adv. Dkt. 6-1) to the Motion and the Affidavit of John P. Chism dated February 15, 2018 (the "Second Chism Affidavit") (Adv. Dkt. 18) to the Rebuttal. The First Chism Affidavit and the Second Chism Affidavit are the only exhibits submitted by Irrigation that did not originate in the State Court Action. The Court considers as a preliminary matter the applicability of the

closely-related doctrines of *Rooker-Feldman*[12] and collateral estoppel to the matters before the Circuit Court in the State Court Action.

The ultimate determination of the dischargeability of a debt under bankruptcy law—specifically, under § 523(a)—rests within the exclusive jurisdiction of the bankruptcy court, but the doctrines of *Rooker-Feldman* and collateral estoppel prevent a bankruptcy court from reconsidering the same facts and issues "actually and necessarily" litigated by a state court. *Gupta v. E. Idaho Tumor Inst., Inc. (In re Gupta)*, 394 F.3d 347, 349-50 (5th Cir. 2004); *Gauthier v. Cont'l Diving Servs., Inc.*, 831 F.2d 559, 561 (5th Cir. 1987). Thus, even though nondischargeability is "independent of the issue of the validity of the underlying claim," these doctrines can provide an alternative basis to satisfy the elements of a nondischargeability claim. *Grogan*, 498 U.S. at 289; *Raspanti v. Keaty (In re Keaty)*, 397 F.3d 264, 270 (5th Cir. 2005). The opposite is also true—elements of a nondischargeability claim "that have not been actually and necessarily litigated or that are not discernable from the record, must also be determined by [the bankruptcy court] after hearing all relevant evidence . . . ." *Harold V. Simpson & Co. v. Shuler (In re Shuler)*, 722 F.2d 1253, 1256 (5th Cir. 1984).

The *Rooker-Feldman* doctrine provides that a federal district court lacks the jurisdiction to hear a collateral attack on a state court judgment or to review final determinations of state court decisions. *Shankle v. Shankle (In re Shankle)*, 476 B.R. 908, 912 (Bankr. N.D. Miss. 2012); *see Union Planters Bank v. Salih*, 369 F.3d 457, 462 (5th Cir. 2004) ("inferior federal courts do not have the power to modify or reverse state court judgments"). The Discovery Order and the State

[12] The doctrine derives from two U.S. Supreme Court decisions, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

Court Judgment were not appealed and became final. This Court will not litigate again what are final judgments from the State Court Action.

Collateral estoppel or issue preclusion "bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). When giving preclusive effect to a state court judgment, federal courts must apply the issue preclusion rules of the state that rendered the judgment. *Shimon v. Sewerage & Water Bd. of New Orleans*, 565 F.3d 195, 199 (5th Cir. 2009) (citing *Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 523 (1986)). Here, the State Court Judgment was entered by a Mississippi state court, and so this Court applies the Mississippi law of issue preclusion. *Pancake v. Reliance Ins. Co. (In re Pancake)*, 106 F.3d 1242, 1244 (5th Cir. 1997). Under Mississippi law, a party is collaterally estopped from raising an issue that was "(1) actually litigated in the former action; (2) determined by the former action; and (3) essential to the judgment in the former action." *Gibson v. Williams, Williams & Montgomery, P.A.*, 186 So. 3d 836, 845 (Miss. 2016) (citation omitted). The requirement that an issue be "actually litigated" for collateral estoppel purposes simply requires that the issue is raised, contested by the parties, submitted for determination by the court, and determined. *In re Keaty*, 397 F.3d at 272.

Irrigation and the Carpenters were opposing parties in the State Court Action in which the Circuit Court issued the Discovery Order and later rendered the State Court Judgment. The findings of the Circuit Court in the Discovery Order requiring the Carpenters to pay attorney's fees and in the State Court Judgment holding that John Carpenter breached a verbal contract with Irrigation, will not be disturbed by this Court.

These findings, however, do not satisfy the elements of Irrigation's nondischargeability claim under § 523(a)(2)(A). There are no findings by the Circuit Court that the Carpenters made any false representation, engaged in any conduct that constitutes a false pretense, or committed actual fraud. To prevail on its breach of contract claim under Mississippi law, Irrigation only had to show, by the preponderance of the evidence, (1) the existence of a valid and binding contract; and (2) that John Carpenter breached the contract. *Bus. Comm., Inc. v. Banks*, 90 So. 3d 1221, 1224-25 (Miss. 2012). To establish the existence of a contract, Irrigation only had to show an offer, acceptance, and consideration. *Putt v. City of Corinth*, 579 So. 2d 534, 538 (Miss. 1991). The Circuit Court concluded that Irrigation met its burden of proof as to these elements of its contract claim. Its award of damages to Irrigation, however, does not implicate a finding of fraud. Moreover, as the Carpenters point out, the Circuit Court could not have based its award of damages on fraud because Irrigation made no allegations of fraud in the State Court Complaint. Other than the existence of a debt owed Irrigation, the State Court Judgment and the Discovery Order establish no other element of Irrigation's § 523(a) claim. The Court, therefore, focuses its discussion below on whether the new evidence submitted by Irrigation entitles it to summary judgment.

D. POC 8-1

In the Adversary Complaint, Irrigation seeks a declaration that POC 8-1 is a nondischargeable debt of not only John Carpenter but also Ora Carpenter. The Carpenters filed a joint petition for relief in the Bankruptcy Case pursuant to § 302(a). Spouses routinely file joint bankruptcy petitions, but joint administration simply means that their estates are combined for purely administrative functions using a single docket. 2 COLLIER ON BANKRUPTCY ¶ 302.02[1][b] (16th ed. 2018). For example, in a typical jointly administered case, there is only one meeting of creditors, one claims register, and one discharge hearing, if required. Despite the joint

administration, however, the estates of the spouses remain separate and distinct unless they are substantively consolidated under § 302(b). Absent substantive consolidation, the property of one debtor is protected from claims of the other debtor's creditors. Here, the estates of John Carpenter and Ora Carpenter have not been substantively consolidated under § 302(b). Accordingly, John Carpenter's creditors may look only to his assets for satisfaction of their claims; Ora Carpenter's creditors may look only to her assets. Because the sole basis for POC 8-1 is the State Court Judgment, in which the Circuit Court awarded damages for breach of contract in favor of Irrigation against John Carpenter but not Ora Carpenter, the Court examines the summary judgment evidence separately as to each.

1. Ora Carpenter

In the State Court Opinion, the Circuit Court identifies Ora Carpenter as a co-defendant in the State Court Action and a joint owner of the Farm but does not find her liable for any damages. There is no evidence in the summary judgment record from the State Court Action that Irrigation even communicated with Ora Carpenter about the Water Well or that she was a party to the transaction. The State Court Judgment, therefore, does not establish a debt owed by Ora Carpenter to Irrigation.

John Chism alleged in the First Chism Affidavit that the "Debtors"—both John Carpenter and Ora Carpenter—falsely represented that they would transfer the Grant Money to pay for the Water Well. (First Chism Aff. at 2). But his affidavit testimony is devoid of any facts indicating that Ora Carpenter owed the debt. The first step in any analysis of § 523(a) is determining whether the debt in question is actually owed. *See Zimmer v. Zimmer (In re Zimmer)*, 27 B.R. 132, 134 (Bankr. S.D. Ohio 1983) (dismissing adversary complaint in absence of evidence that debt was

actually owed). The Court finds that Irrigation has failed to satisfy its summary judgment burden on this critical element of its claim.

2. John Carpenter

The Court also finds that Irrigation has not met its burden of showing that it is entitled to summary judgment against John Carpenter. John Chism swore in the First Chism Affidavit that John Carpenter promised to transfer the Grant Money to Irrigation; John Carpenter swore in his own affidavit that he did not. Then, in the Second Chism Affidavit, John Chism testified that he learned from an unnamed employee of USDA that John Carpenter received only $6,120.00 of the Grant Money. In other words, John Carpenter did not receive the full amount of the Grant Money, as Irrigation had alleged in the Adversary Complaint. (Adv. Compl. ¶ 7).

Summary Judgment is inappropriate when the parties present conflicting versions of the same events, and especially when the moving party's version changes during the summary judgment process. Moreover, the allegedly false representation made by John Carpenter—his promise to transfer the USDA grant money to Irrigation at a future date—does not describe a past or current fact. Generally, a debtor's promise to perform some act in the future does not qualify as a false representation for purposes of § 523(a)(2) merely because the debtor subsequently breaches the promise. *Allison v. Roberts (In re Allison)*, 960 F.2d 481, 484 (5th Cir. 1992). Moreover, assuming John Carpenter promised to pay Irrigation from the Grant Money, which he denied, Irrigation must show that he made this promise with the "intention and purpose to deceive," which requires proof that John Carpenter never intended to pay Irrigation any of the Grant Money when he made that promise. *RecoverEdge L.P.*, 44 F.3d at 1293. Yet evidence that John Carpenter

offered to pay Irrigation $6,120.00, the portion of the Grant Money he actually received,[13] creates a genuine dispute that precludes summary judgment. Also, there is the issue as to whether Irrigation's reliance on John Carpenter's alleged false representation was justifiable, given its direct involvement in the USDA grant application process.

E. POC 9-1

Irrigation seeks a declaration that POC 9-1 is a nondischargeable debt of the Carpenters[14] in the amount of $1,420.50. The award in the Discovery Order is the result of sanctions imposed against the Carpenters for a discovery violation. Although the Discovery Order does not cite any legal authority, it appears the Circuit Court imposed the sanctions pursuant to Rule 37(a)(4) of the Mississippi Rules of Civil Procedure ("Rule 37(a)(4)"), which provides that if a motion for an order compelling discovery is granted:

> [T]he court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

MISS. R. CIV. P. 37(a)(4). There is no mention in the Discovery Order of any false representation, false pretense, or actual fraud committed by the Carpenters, and no such finding was required for

[13] In the Rebuttal, Irrigation suggests that evidence of John Carpenter's offer to pay Irrigation $6,120.00 constitutes an inadmissible settlement offer under Rule 408 of the Federal Rules of Evidence ("Rule 408"). Rule 408 bars evidence of settlement offers when offered to prove or disprove the validity or amount of a disputed claim but not when offered for a different purpose. *Thomas v. Rice (In re Rice)*, 526 B.R. 631, 643-44 (Bankr. N.D. Miss. 2015). Here, the evidence is admissible for the purpose of showing whether John Carpenter intended to pay Irrigation any of the Grant Money.

[14] Unlike the State Court Judgment, the Discovery Order awards attorney's fees against both John Carpenter and Ora Carpenter, and, therefore, it is unnecessary to examine the summary judgment evidence separately.

the Circuit Court to impose sanctions against the Carpenters under Rule 37(a)(4). The State Court Opinion mentions the Discovery Order but does not discuss the underlying conduct that warranted sanctions. There is no summary judgment evidence that indicates the Circuit Court awarded sanctions because of fraudulent conduct of the Carpenters.

Irrigation does not treat POC 9-1 as a debt separate from POC 8-1 for purposes of determining its dischargeability under § 523(a)(2)(A). This treatment implies a belief by Irrigation that POC 9-1 is nondischargeable for the sole reasons that POC 8-1 is nondischargeable. There is some support for this contention. The Fifth Circuit in *Gober v. Terra + Corp. (In re Gober)*, 100 F.3d 1195, 1208 (5th Cir. 1996), recognized that the status of ancillary obligations, such as attorney's fees, depends on that of the primary debt. In other words, when the primary debt is nondischargeable, the attorney's fees accompanying compensatory damages are likewise nondischargeable. *Id.*

Later, in *Cohen v. De La Cruz*, 523 U.S. 213 (1998), the U.S. Supreme Court held that for purposes of § 523(a)(2), "any debt" arising from a judicial determination of fraud is likewise excepted from discharge and, in the case before it, "any debt" included attorney's fees awarded to the creditor under state law. *Id.* at 223. The U.S. Supreme Court found that because the creditor's nondischargeable claim arose under the state's rent control statute, the award of attorney's fees pursuant to a related statute providing for recovery of attorney's fees in actions for violations of the state's rent control statute was also excepted from discharge. *Id.* at 218. *Cohen* recognizes an exception to discharge for attorney's fees where there is a connection between a statute authorizing the attorney's fee award and the statute establishing the debtor's primary liability.

Here, the Circuit Court awarded attorney's fees based on the violation of a procedural rule rather than a contract or statute providing for recovery of attorney's fees related to the

compensatory damages awarded in the State Court Judgment.[15] A question, therefore, arises as to whether Irrigation must satisfy the elements of § 523(a)(2) with respect to POC 9-1 alone or whether the dischargeability of POC 9-1 depends solely on the dischargeability status of POC 8-1.

In its Motion, Irrigation made no attempt to treat POC 9-1 as a separate claim, and, thus, there is no summary judgment evidence that would support a finding that the award of attorney's fees was for conduct that supports an exception to discharge under § 523(a)(2)(A). Even if Irrigation is correct in its treatment of POC 9-1 as an ancillary obligation of POC 8-1, however, the Court already has found that Irrigation failed to satisfy its summary judgment burden with respect to POC 8-1.

Conclusion

Because Irrigation asked the Court to resolve factual disputes, such as whether Ora Carpenter owed a debt for breach of contract and whether John Carpenter and/or Ora Carpenter intended to deceive Irrigation, the Court finds that the Motion should be denied. The Court also notes that "[e]ven if the standards of Rule 56 are met, a court has discretion to deny a motion for summary judgment if it believes that 'the better course would be to proceed to a full trial,'" so that the record might be more fully developed at trial. *Firman*, 684 F.3d at 538; *River Region Med. Corp.*, No. 3:13-cv-793-DPJ-FKB, slip op. at 4-6; *see also Kunin*, 69 F.3d at 62; *Black*, 22 F.3d at 572; *Veillon*, 876 F.2d at 1200.

IT IS, THEREFORE, ORDERED that the Motion is hereby denied.

##END OF OPINION##

[15] Irrigation's position would be stronger, for example, if the Circuit Court had awarded the attorney's fees under Mississippi's open account statute.