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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

IN RE: SAMUEL LOUIS MAGEE

CASE NO. 9101816EEJ

WICKES LUMBER COMPANY

PLAINTIFF

VS.

ADVERSARY NO. 9100174

SAMUEL LOUIS MAGEE D/B/A
SAM'S SERVICE CO. &
SAM'S BUILDING SERVICE

DEFENDANT

Ross E. Henley
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Attorney for Plaintiff

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Attorney for Defendant

Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION

This matter came on for hearing upon the complaint of Wickes Lumber Company to determine the dischargeability of its claim against the Defendant, Samuel L. Magee, pursuant to 11 U.S.C. §§ 523(a)(2)(A), 523(a)(4), and 523(a)(6). At the close of the Plaintiff's presentation of evidence supporting its claim of nondischargeability, this Court dismissed the complaint upon the Defendant's motion pursuant to Rule 7041(b) of the Federal Rules of Bankruptcy Procedure. In rendering its judgment the Court orally made certain findings of fact and conclusions of law which appear in the record, and in so doing reserved the right to supplement its

findings by way of a written memorandum opinion. A final judgment in the form of an Order Dismissing Objection To Discharge was entered on January 5, 1993. Therefore, in accordance with the Court's previous ruling, this memorandum opinion will serve as a supplement to its findings of fact and conclusions of law rendered orally at the time of hearing.

FINDINGS OF FACT

The Plaintiff, Wickes Lumber Company, is a building supply company with a store located in Pearl, Rankin County Mississippi. The Defendant, Samuel Magee, entered the construction business in 1989, building a total of five small residences for speculative sale prior to his bankruptcy filing in 1991. During the time that Magee was building houses he purchased building materials from Wickes.

On April 10, 1989 Magee executed a credit agreement with Wickes whereby credit was extended for the purchase of materials. Testimony was presented at trial by Jerry Geimer, the manager of Wickes at the time of the purchases, that in order to obtain a line of credit from Wickes, the customer is required to complete a credit application, a credit check is run on the applicant, and a recommendation is made by the local store to the corporate office, where the application is ultimately approved or disapproved. Additional testimony was presented that when a job is started, Wickes usually asks whether the job is financed, and if so "then we check on it." No testimony was given showing a specific course of

conduct followed by Wickes when supplying materials on financed projects.

Magee purchased from Wickes materials used in the construction of each of his houses, and Magee paid Wickes for all materials purchased prior to September 30, 1990¹.

Between October 3, 1990 and November 17, 1990 Wickes supplied materials to Magee which were incorporated into the final house constructed by the Debtor. Security Savings and Loan Association financed the construction of the house, and obtained a valid first deed of trust on the property. During construction of the house, Magee made three draws from the loan proceeds, on October 15, 1989, October 26, 1989 and November 16, 1989. At the time of each draw, Magee executed a form affidavit stating that at the time of execution there were no unsatisfied claims for payment or liens for materials or labor used in the improvement of the property. The last sentence of the affidavit appears as follows:

This affidavit is given to induce Chicago Title Insurance Company to issue title insurance policy or policies.

During the trial Jerry Geimer, Wickes' manager, testified that he

¹ Copies of the following checks executed by Magee and made payable to Wickes in the total amount of \$ 48,080.85 were admitted into evidence at trial:

- a. Check dated August 8, 1989 in the amount of \$ 45.32;
- b. Check dated September 15, 1989 in the amount of \$ 7,935.95;
- c. Check dated November 11, 1989 in the amount of \$ 10,753.68;
- d. Check dated February 6, 1990 in the amount of \$ 3,671.21;
- e. Check dated April 17, 1990 in the amount of \$ 10,434.46;
- f. Check dated June 8, 1990 in the amount of \$ 3,237.44;
- g. Check dated June 29, 1990 in the amount of \$ 11,849.20, and;
- h. Check dated September 11, 1990 in the amount \$ 153.59.

first became aware of the existence of the affidavits during the week of the trial.

Monthly invoices representing charges for the October and November purchases were received by Magee, but were not paid in accordance with the terms listed on the invoices. Magee admitted during his testimony that he did not pay Wickes from each draw for materials attributable to that draw. He explained that the usual course of conduct between the parties was for Magee to pay Wickes on his total outstanding bill on all projects either upon making a draw, or after completion of a project when he received proceeds from the sale of a house.

Magee testified that he was ultimately unable to pay Wickes because he was unable to sell the house. On December 21, 1990 Wickes filed a lien notice in the Office the Chancery Clerk for Hinds County, Mississippi.

Wickes obtained a default judgment against Magee in the County Court of Rankin County, Mississippi on March 15, 1991 in the amount of \$ 16,847.83. On May 10, 1991 Magee filed his petition for relief under Chapter 7 of the Bankruptcy Code. The automatic stay was lifted on May 29, 1991 to allow Security Savings and Loan Association, the construction lender, to foreclose on the property. On July 29, 1991 Wickes commenced this adversary proceeding seeking a determination of the dischargeability of its claim against Magee based on 11 U.S.C. §§ 523(a)(2)(A), 523(a)(4) and 523(a)(6)².

² Hereinafter, all code sections refer to the Bankruptcy Code found at Title 11 of the United States Code unless specifically noted otherwise.

CONCLUSIONS OF LAW

The Plaintiff must prove its case in a § 523 dischargeability action by the preponderance of evidence. Grogan v. Garner, 498 U.S. 279 (1991). Additionally, the issue of whether a particular debt is nondischargeable under the Bankruptcy Code is a matter of federal law. Id.; Allison v. Roberts (Matter of Allison), 960 F.2d 481, 483 (5th Cir. 1992).

§ 523(a)(2)(A)

The first basis asserted by Wickes for finding its claim nondischargeable is that the Debtor committed fraud within the meaning of § 523(a)(2)(A) which provides in relevant part as follows:

11 USC § 523

§ 523. Exceptions to discharge.

(a) A discharge under section 727, ... 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 ...

Wickes alleges that Magee committed fraud by execution of the affidavits in connection with each of the three draws made on the construction loan proceeds. In order for its claim to come within § 523(a)(2)(A) Wickes must show that Magee made a misrepresentation that was: 1) a knowing and fraudulent falsehood,

2) describing past or current facts, 3) and that Wickes relied upon the representation. Allison v. Roberts (Matter of Allison), 960 F.2d 481, 483 (5th Cir. 1992).

No evidence was presented showing that Wickes ever relied upon or even was aware of the existence of the affidavits prior to extending credit to Magee. To the contrary, the manager of Wickes at the time credit was extended testified that he did not know of the affidavits until the week of trial. Vague testimony was given that Wickes generally makes inquiry regarding financing, but no evidence of reliance by Wickes on any specific representations was offered as evidence to support its claim.

Furthermore, no evidence was offered that Magee made any representation to Wickes that was presently false at the time it was made. Magee testified that he intended to pay Wickes when he sold the house.

The second requirement is that the misrepresentation be of past or current acts; a promise to perform acts in the future is not considered a qualifying misrepresentation merely because the promise subsequently is breached. A debtor's misrepresentations of his intentions, however, may constitute a false representation within the meaning of the dischargeability provision if, when the representation is made, the debtor has no intention of performing as promised.

Id. at 484 (citations omitted).

It is the opinion of this Court that Wickes has failed to establish the necessary elements to support a ruling that its claim against the Debtor is nondischargeable under § 523(a)(2)(A).

§ 523(a)(4)

The second basis asserted by Wickes for its claim of nondischargeability is § 523(a)(4), which excepts from discharge any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny". No evidence was presented to support a finding of embezzlement or larceny. Instead, Wickes argues that execution of the affidavits amounted to fraud or defalcation while acting in a fiduciary capacity.

In order for a debt to be nondischargeable based on the "fraud or defalcation while acting in a fiduciary capacity" exception there must be a fiduciary relationship arising out of an express trust. An implied trust is insufficient to render a debt nondischargeable under § 523(a)(4). Furthermore, the trust must have been in existence prior to the act of wrongdoing. Boyle v. Abilene Lumber, Inc. (Matter of Boyle), 819 F.2d 583, 588 (5th Cir. 1987); Murphy & Robinson Investment Co. v. Cross (Matter of Cross), 666 F.2d 873, 881 (5th Cir. 1982); Carey Lumber Co. v. Bell, 615 F.2d 370, 374 (5th Cir. 1980); Angelle v. Reed (Matter of Angelle), 610 F.2d 1335, 1341 (5th Cir. 1980).

In support of its position, Wickes cites Custer v. Dobbs (In re Dobbs), 115 B.R. 258 (Bankr. Idaho 1990). In re Dobbs involved a complaint based on §§ 523(a)(2)(A) and 523(a)(4) to determine dischargeability of a debt where a contractor entered into an agreement to custom build a home for the plaintiffs, and failed to satisfy the claims of subcontractors and materialmen from the proceeds of the loan. The court in In re Dobbs found that

while the debt was nondischargeable under § 523(a)(2)(A) as a result of certain events surrounding the final draw on the construction loan, neither the documents executed by the parties, nor applicable statutes were sufficient to create a fiduciary relationship. Id. at 265. Furthermore, the ruling by the court that the debt was nondischargeable under § 523(a)(2)(A) was based on a finding that while there was no showing of the requisite present intent to defraud as to draws made early in the project, there was evidence that at the time the final draws were made the builder was aware that he was in serious financial trouble. Despite knowledge of his financial situation, in the four day period between depositing the final draw and filing his bankruptcy petition the builder had used the funds to pay numerous bills unrelated to the project, including living expenses.

Wickes has offered no evidence to support a finding of an express consensual fiduciary relationship between Wickes and Magee. Certainly the agreement whereby a line of credit was established with Wickes did not create a fiduciary relationship, but merely an open account.

Wickes also asserts that a fiduciary relationship is created by the provisions of Miss. Code Ann. § 85-7-183 (1972)³

³ Miss. Code Ann. § 85-7-183 (1972) provides as follows:

No contractor or master workman except as hereinafter provided, shall have the right to assign, transfer, or otherwise dispose of in any way, the contract or the proceeds thereof, to the detriment or prejudice of the subcontractors, journeymen, laborers, and materialmen as declared hereinbefore and all such assignments, transfers, or dispositions shall be subordinate to the said rights of the subcontractors,

However, this section provides no support for Wickes argument since it applies to a situation where there is an owner-contractor relationship, and subcontractors and materialmen have no lien rights absent privity of contract with the owner. The statute is designed to provide a measure of protection to those who are without lien rights. Wickes was fully able under Mississippi law⁴ to file its notice of lien on Magee's property, but simply chose not to do so until its lien position had become worthless.

The Fifth Circuit Court of Appeals dealt with the issue of whether a trust within the meaning of § 523(a)(4) arises by virtue of statute most recently in Coburn Co. of Beaumont v. Nicholas (Matter of Nicholas), 956 F.2d 110 (5th Cir. 1992), wherein the court held that the Texas Construction Trust Fund Statute⁵ "creates fiduciary duties encompassed by 11 U.S.C. § 523(a)(4) only to the extent that it defines wrongful conduct under the statute." Id. at 114. In so holding, the court found that under the Texas statute, mere failure to pay subcontractors and materialmen, absent proof of fraud, does not bring the debt within the scope of § 523(a)(4).

journeymen, laborers and materialmen, as well as the owner, Provided, however, that this section shall not apply to any contract or agreement where the contractor or the master workmen shall enter into a solvent bond conditioned as provided for in the following section.

⁴ Miss. Code Ann. §§ 85-7-131 to 157 (1972)

⁵ Tex. Prop. Code Ann. § 162.001 (West Supp. 1992).

The Court is of the opinion that there has been no showing of a fiduciary relationship between Wickes and Magee, and therefore Wickes has not proved its claim under § 523(a)(4).

§ 523(a)(6)

Finally, Wickes claims that Magee's actions with respect to Wickes are sufficient to render Wickes' claim nondischargeable under § 523(a)(6), which provides in pertinent part as follows:

11 USC § 523

§ 523. Exceptions to discharge.

(a) A discharge under section 727 ... of this title does not discharge an individual debtor from any debt-

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity ...

"Section 523(a)(6) is based on tort principles rather than contract. It is designed to compensate the injured party for the injury suffered while not allowing the debtor to escape liability for a 'willfull [sic] and malicious' injury by resort to the bankruptcy laws." Friendly Finance Service v. Modicue (In re Modicue), 926 F.2d 452 (5th Cir. 1991) (citations omitted). Thus § 523(a)(6) does not except from discharge damages arising out of a breach of contract, but instead excepts from discharge only those damages caused by willful and malicious conduct. Id. at 453. Therefore the issue is whether Wickes' claim for sums owed by Magee on open account were a result of willful or malicious conduct by Magee.

The controlling standard for determining whether Magee's conduct was "willful and malicious" within the meaning of § 523(a)(6) is the interpretation of the term contained in Collier on Bankruptcy which has been adopted by the United States Fifth Circuit Court of Appeals:

In order to fall within the exception of section 523(a)(6), the injury to an entity or property must have been willful and malicious. An injury of an entity or property may be a malicious injury within this provision if it was wrongful and without just cause or excuse, even in the absence of personal hatred, spite or ill-will. The word 'willful' means 'deliberate or intentional,' a deliberate and intentional act which necessarily produces harm and is without just cause or excuse, may constitute a willful and malicious injury.

3 Collier on Bankruptcy, 523.16 at 523-128 (15th ed. 1983); Kelt v. Quezada (Matter of Quezada), 718 F.2d 121,123 (5th Cir. 1983) cert. denied, 467 U.S. 1217 (1984); Seven Elves, Inc. v. Eskenazi, 704 F.2d 241, 245 (5th Cir. 1983); Petty v. Dardar (Matter of Dardar), 620 F.2d 39, 40 (5th Cir. 1980); Vickers v. Home Indemnity Co., 546 F.2d 1149, 1150 (5th Cir. 1977). See also Federal Deposit Insurance Corp. v. Lefevre (In re Lefevre), 131 B.R. 588, 602 (Bankr. S.D. Miss. 1991); Guaranty Corp. v. Fondren (In re Fondren), 119 B.R. 101, 105 (Bankr. S.D. Miss. 1990); Meridian Production Ass'n. v. Hendry (In re Hendry), 77 B.R. 85 (Bankr. S.D. Miss. 1987); Berry v. McLemore (In re McLemore), 94 B.R. 903, 906 (Bankr. N.D. Miss. 1988).

Wickes argues that Magee's execution of the false affidavits along with his failure to pay Wickes with the loan proceeds amounts to willful and malicious conduct whereby Wickes

was deprived of its lien on the property. In support of its position Wickes offers two cases, Cheek v. Lowe's Of Georgia (In re Cheek), 17 B.R. 875 (Bankr. M.D. Ga. 1982) and Vessel v. La Brant (In re La Brant), 23 B.R. 367 (Bankr. N.D. Ill. 1982), neither of which is on point.

In re Cheek involved a debtor's execution of a knowingly false affidavit upon the completion of construction of his home and prior to obtaining permanent financing, which affidavit, pursuant to a Georgia statute, has the effect of dissolving all liens on the property. In holding that the debt was nondischargeable pursuant to § 523(a)(6) the court found that the intentional destruction of liens by the debtor amounted to a wrongful and malicious act. The court also noted that the debtor could be subject to criminal liability for his actions. Mississippi has no similar statute which can effectively destroy a lien by affidavit, and furthermore, Wickes did not bother to give notice of its lien until the entire construction loan had been disbursed.

Likewise, In re La Brant involved a complaint under §§ 523(a)(2)(A) and 523(a)(6) to determine the dischargeability of a debt where the debtor, a contractor, persuaded the plaintiff, a subcontractor, not to file a mechanic's lien on the property in question. The contractor promised payment upon closing if the subcontractor would not file a lien, stating that a lien would only delay the closing. Based on the contractor's promise, the subcontractor delayed filing the lien. At the loan closing the contractor assured the owners and the closing officer that the

subcontractor would be paid from the closing proceeds. However, upon receipt of the loan proceeds, he failed to pay the subcontractor. In finding that the debt was nondischargeable under § 523(a)(6) the court stated that the "... Defendant engaged in a course of activities to hinder and delay the collection of the debt by making false representations to the Defendant and the purchasers of the home, and but for Defendant's fraud Plaintiff could have filed a timely mechanic's lien and protected her interest." In re La Brant, 23 B.R. 367, 369-70. No evidence was introduced to show that Magee persuaded Wickes not to avail itself of its rights under Mississippi law. Wickes, for whatever reason, chose not to file a lien notice until after the house was completed.

Testimony from Magee was received at trial regarding the course of conduct between Magee and Wickes. Magee testified that while the credit agreement stated that he would be billed monthly with payment due by the tenth of each month, that he did not ordinarily pay according to the terms of the agreement. Wickes' manager also testified that while customers are billed once a month with payment due by the tenth of each month, that Wickes will usually ship materials to a customer until the account becomes sixty days overdue. Magee further testified that upon making a draw or closing the loan on a house, he would sometimes use the proceeds to pay Wickes to date on more than one project. Magee testified that the course of conduct between Wickes and Magee on the final house was not unusual, except that he was unable to sell the house, resulting in a foreclosure by Security Savings.

In order for Wickes' claim to be nondischargeable under § 523(a)(6), Magee's actions must have been both "intentional and deliberate," and "without just cause or excuse." Clearly Magee's actions were intentional and deliberate. No evidence was offered showing that he was unaware that he had signed the affidavits, or that he was unaware that he owed Wickes for materials supplied. However, in light of the evidence presented regarding the parties' past course of conduct, this Court is of the opinion that Magee's actions do not meet the second prong of the test. Although the Court does not condone the methods employed by Magee in satisfying the claims of laborers and materialmen, Wickes did, in fact, tacitly agree to Magee's methods by virtue of its course of conduct. Wickes chose to continue supplying materials to Magee after his account became delinquent, and furthermore chose not to avail itself of the protections afforded under Mississippi law.

CONCLUSION

Based on the foregoing finding of fact and conclusions of law in addition to those appearing in the record, the opinion of this Court is that Wickes has failed to meet its burden of proof under §§ 523(a)(2)(A), 523(a)(4) and 523(a)(6) of the Bankruptcy Code, and therefore its complaint should be dismissed.

Dated this the 28 day of January, 1993.


UNITED STATES BANKRUPTCY JUDGE