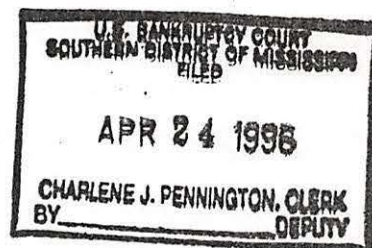


IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION



IN RE: JAMES W. GANDY

CASE NO. 9401809JEE

JIM REMBERT

PLAINTIFF

VS.

ADVERSARY NO. 940267JEE

JAMES W. GANDY

DEFENDANT

David W. Baria
403 South State Street
Jackson, MS 39201

Attorney for Plaintiff

John A. Allen
P.O. Box 13219
Jackson, MS 39236-3219

Attorney for Defendant

Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION

This adversary proceeding came on for hearing upon the Complaint filed by the Plaintiff, Jim Rembert, against the Defendant, James W. Gandy. In his complaint, Mr. Rembert seeks a judgment denying a discharge in bankruptcy to Mr. Gandy pursuant to Bankruptcy Code § 727.¹ Alternatively, Mr. Rembert seeks a judgment of nondischargeability as to his claim against Mr. Gandy pursuant to Bankruptcy Code § 523(a)(2)(A) or § 523(a)(6).

After considering the evidence presented at trial along with the arguments of counsel as presented by memorandum briefs and being otherwise fully advised in the premises, the Court holds that

¹ Hereinafter, all code sections refer to the Bankruptcy Code found at Title 11 of the United States Code unless specifically noted otherwise.

Mr. Rembert has failed to meet his burden of proof under both §§ 727 and 523 of the Bankruptcy Code and, therefore, his complaint should be dismissed with prejudice. In so holding, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

This adversary proceeding involves a dispute arising out of Mr. Gandy's performance under a contract entered into by Mr. Gandy and Mr. and Mrs. Rembert for construction management services to be performed by Mr. Gandy in the construction of a home for the Remberts.

Mr. Gandy is a building design and construction management professional. He is employed by the University of Mississippi Medical Center in Jackson, Mississippi as a construction coordinator. In addition to his job at UMC, Mr. Gandy also performs design and construction management services on residential projects.

Mr. Rembert is an environmental consultant. In October of 1991, Mr. Rembert came to Jackson, Mississippi to work with a company named Environmental Protection Systems where he also performed professional services for the University of Mississippi Medical Center. Through their work at UMC, Mr. Gandy and Mr. Rembert met. In August of 1994, Mr. Rembert started his own company as an environmental consultant in the area of industrial related hygiene matters.

In October of 1992, Mr. Gandy and Mr. and Mrs. Rembert entered into two separate contracts relating to the construction of a home for the Remberts. The first contract was for the design of the home by Mr. Gandy. Under the terms of the design contract, Mr. Gandy was to be paid a design fee in exchange for his design services. The second contract was for construction management services to be performed by Mr. Gandy relating to the construction of the home. Under the terms of the construction management contract, Mr. Gandy was to manage and oversee all aspects of work on the project, but was not to function as a general contractor. The Remberts, and not Mr. Gandy, were to have a direct contractual relationship with subcontractors performing work on the home. Mr. Rembert testified at trial that he was listed as the general contractor on the building records. The cost to build the house was estimated at \$ 175,000 plus Mr. Gandy's management fee of \$ 12,250.

The evidence presented at trial shows that Mr. Gandy did design a home for the Remberts pursuant to the terms of the design contract and was paid in accordance with the terms of the contract. Construction of the home then commenced some time in the summer months of 1993. Mr. Gandy received his first payment under the terms of the construction management contract in June of 1993. He received a second payment in September of 1993, and two payments in October of 1993. From the evidence presented at trial, it appears that after October of 1993, Mr. Gandy received no further payments for construction management services.

Both Mr. Gandy and Mr. Rembert testified that a pier type foundation was designed for the house. Originally the house was designed for a stick built method of construction, that is, a method of construction whereby all materials are shipped to the job site and cut and assembled at the job site. However, at some point after installation of the pier foundation and upon Mr. Gandy's recommendation, Mr. Rembert made the decision to switch to a wood truss system for the house. When using a wood truss system, a manufacturing company fabricates beams and trusses off-site in accordance with information provided to the manufacturer. The product is then shipped to the job site and assembled as part of the house framing. The beams and trusses are a finished product and should not be altered without instructions from the manufacturer. Alteration of the beams and trusses can affect the structural integrity of the building.

Mr. Gandy testified that after the original plans had been sent to the beam and truss manufacturer, he became aware that some of the dimensions and locations of the constructed piers varied from the original plans. Upon becoming aware of the variations, Mr. Gandy sent updated, "as-built", information to the manufacturer. He testified that he did not inform Mr. Rembert of this situation because he did not consider it to be a major problem. In contrast to Mr. Gandy's testimony, a representative of Rogers Manufacturing Corporation, the beam and truss distributor, testified that he never received the "as-built" information from Mr. Gandy regarding the foundation.

The evidence presented at trial shows that the initial materials from the beam and truss vendor arrived at the job site some time in late October or early November, 1993. It is not clear how much work progressed during November and December of 1993 and January of 1994. However, the events that are at the heart of the dispute occurred in February, 1994.

A company named G & C Enterprises was hired as the framing contractor on the job. The complaint states that G & C was hired in February of 1994. The checks for payments made to G & C also indicate that G & C first received payment for services in February of 1994. G & C Enterprises initially discovered a problem with the beams when attempting to set them. Mr. Gandy testified that he contacted the distributor, Rogers Manufacturing, and resolved the situation, which was merely a problem with the numbering of the beams. Mr. Gandy further testified that Mr. Rembert was made aware of the numbering problem. He also testified that up until the first floor subflooring had been installed, he was not aware of any other major problems encountered by the framing contractor.

Mr. Gandy testified that after the subflooring was down, he observed that some trusses had been cut. He spoke with the framing contractor. The framing contractor told him that the trusses were not the correct length so he cut them to fit. Mr. Gandy stated that the situation concerned him because cutting the materials voids the manufacturer's warranty, unless the members are repaired properly, and also can affect the structural integrity of

the building. Mr. Gandy stated that he did not inform Mr. Rembert of the situation at this point because he was trying to find a resolution to the problem before going to him.

George Greg McWilliams, of G & C Enterprises, also testified at trial regarding the framing of the house. His father owns the framing company and he simply works for his father. Mr. McWilliams, along with his father, worked on the Rembert's house, although his father was not called to testify. In contradiction to Mr. Gandy's testimony, Mr. McWilliams testified that Mr. Gandy told him to cut the trusses and make them fit. In evaluating the testimony of Mr. Gandy and Mr. McWilliams regarding whether Mr. Gandy instructed the framing contractor to cut the trusses or whether the framing contractor made the decision on its own to cut the trusses, the Court finds Mr. Gandy's testimony to be more credible. Therefore, the Court finds as a factual matter that Mr. Gandy did not instruct the framing contractor to cut the trusses to make them fit.

According to Mr. Gandy, approximately one week elapsed between his discovering the problem of the cut trusses, and Mr. Rembert discovering the problem. Mr. Rembert also testified that he had not been out to the job site for approximately one week prior to discovering the problem because he had been out of town. According to Mr. Rembert's testimony, he discovered the problem while visiting the job site on February 17, 1994. He observed that the installed beams and trusses had been altered, and in his opinion, they had been altered significantly. He returned to the

job site with his wife on February 19, 1994 and again observed the alterations to the beams and trusses in addition to other problems with the placement of the piers. At this point Mr. Rembert called Mr. Gandy and arranged a meeting with him on February 22, 1994.

On February 22, 1994, Mr. Rembert and Mr. Gandy met at the job site and looked at the situation together. Prior to this time Mr. Gandy had not discussed the problems with Mr. Rembert. During the February 22 meeting, Mr. Rembert informed Mr. Gandy that he had already arranged a meeting for the next day, February 23, 1994 among himself; his wife; a neighbor, who also is an architect; the representative from Rogers Manufacturing, the beam and truss distributor; an attorney; George McWilliams, the owner of G & C Enterprises; and Mr. Gandy.

Mr. Rembert fired Mr. Gandy approximately three weeks after the February 23, 1994 meeting. At the time Mr. Gandy was fired, construction had proceeded to the point that the first floor perimeter studs and interior walls were up. Mr. Rembert testified that after meeting with various professionals, the decision was made to stop construction and demolish the structure down to the foundation.

Some time thereafter the Remberts filed suit in state court against Mr. Gandy and G & C Enterprises. On June 17, 1994, Mr. Gandy filed his Chapter 7 petition for relief. Mr. Rembert then commenced the present adversary proceeding on November 30, 1994, seeking a denial of Mr. Gandy's discharge under § 727 or, alternatively, an adjudication that his claim against Mr. Gandy is

nondischargeable pursuant to § 523(a)(2)(A) or § 523(a)(6). Mr. Rembert claims damages in the amount of \$ 300,000.

In his complaint, Mr. Rembert claims that Mr. Gandy negligently ordered the framing contractor to alter the beams and trusses and intentionally concealed the negligent construction from Mr. Rembert with false representations so that he could continue to receive payments from the Remberts. Mr. Rembert alleges that Mr. Gandy's actions amount to false pretenses, false representations or actual fraud under § 523(a)(2)(A) and that his actions resulted in willful and malicious injury to Mr. Rembert under § 523(a)(6). The complaint also alleges that Mr. Gandy should be denied a discharge under § 727 because Mr. Gandy is not insolvent if Mr. Rembert's claim against Mr. Gandy is excluded from the calculation. Finally, the complaint alleges that Mr. Gandy should be denied a discharge under § 727 because Mr. Gandy filed his Chapter 7 petition for relief for the sole purpose of frustrating Mr. Rembert's claim.

CONCLUSIONS OF LAW

In order for Mr. Rembert to prevail on either his § 727 claim or his § 523 claims, he must prove his case by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 286, 111 S.Ct. 654, 659, 112 L.Ed.2d 755 (1991).

Denial of Discharge under § 727

In his complaint, Mr. Rembert alleges that Mr. Gandy should be denied a discharge under § 727 of the Bankruptcy Code

because Mr. Gandy filed his Chapter 7 petition for relief in bad faith. Mr. Rembert alleges that Mr. Gandy's bad faith is evidenced by the fact that Mr. Gandy is not insolvent if Mr. Rembert's claim against Mr. Gandy is excluded from the calculation. Counsel for Mr. Rembert also elicited testimony from Mr. Gandy at trial that the sole reason he filed the present bankruptcy was the pendency of the Remberts' state court lawsuit against him.

Section 727 of the Bankruptcy Code sets forth a specific list of grounds upon which a Chapter 7 debtor may be denied a discharge. Neither bad faith filing or solvency of the debtor are listed as grounds for a § 727 denial of discharge. If proven, bad faith and solvency may be grounds for the dismissal of a Chapter 7 petition. However, the Court would point out that in considering the solvency of a debtor, the creditor does not get to exclude his own claim against the debtor from the calculation. Furthermore, the Court makes no finding regarding Mr. Gandy's good faith, or lack thereof, in filing his Chapter 7 petition for relief. The Court has before it a request for relief under § 727 of the Bankruptcy Code, not a motion to dismiss.

The Court holds that Mr. Rembert has failed to show by a preponderance of the evidence that Mr. Gandy has committed any of the acts specified in § 727 of the Bankruptcy Code. Therefore, Mr. Rembert's request for relief under § 727 will be dismissed with prejudice.

Dischargeability of Debt under § 523(a)(2)(A)

In Mr. Rembert's complaint, he alternatively requests that the Court find that his claim against Mr. Gandy is nondischargeable pursuant to § 523(a)(2)(A) of the Bankruptcy Code, which provides 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;

Regarding the nature of claims that are nondischargeable under § 523(a)(2)(A), the Fifth Circuit Court of Appeals has recently stated:

As a general matter, § 523(a)(2)(A) "contemplates frauds involving 'moral turpitude or intentional wrong; fraud implied in law which may exist without imputation of bad faith or immorality, is insufficient.'"

Recoveredge v. Pentecost, 44 F.3d 1284, 1292 (5th Cir. 1995) (quoting Allison v. Roberts (In re Allison), 960 F.2d 481, 483 (5th Cir. 1992) (footnote omitted) (quoting 3 Collier on Bankruptcy ¶ 523.08[4], at 523-50 (Lawrence P. King et al. eds., 15th ed. 1989))).

Under § 523(a)(2)(A), Mr. Rembert must prove his claim by showing either actual fraud or by showing false pretenses or false representations. Under an "actual fraud" theory, Mr. Rembert must prove that: 1) Mr. Gandy made representation; 2) at the time the representations were made Mr. Gandy knew that they were false; 3) that Mr. Gandy made the representations with the purpose and intent to deceive Mr. Rembert; 4) that Mr. Rembert relied on the representations; and 5) the Mr. Rembert sustained losses as a proximate result of Mr. Gandy's representations. Recoveredge v. Pentecost, 44 F.3d 1284, 1293 (5th Cir. 1995). In order to prove false pretenses or false representations under § 523(a)(2)(A), Mr. Rembert must show that Mr. Gandy made a misrepresentation that: 1) was a knowing and fraudulent falsehood; 2) describing past or current facts, 3) that was relied upon by Mr. Rembert. Id. at 1293; Allison v. Roberts (Matter of Allison), 960 F.2d 481, 483 (5th Cir. 1992).

Based on the evidence presented at trial, the Court finds that Mr. Rembert has failed to prove under an "actual fraud" theory that Mr. Gandy made any representation to Mr. Rembert with the actual intent to deceive him. Neither has Mr. Rembert shown that he relied to his detriment on any representation made by Mr. Gandy. To the contrary, Mr. Rembert discovered the faulty construction before Mr. Gandy informed him of the situation and proceeded to set up a meeting with several individuals present in order to plan remedial action.

The Court also finds that Mr. Rembert has not met his burden of proof under the "false pretenses or a false representation" theory. The Court accepts as true Mr. Gandy's testimony that he discovered the problem approximately one week before Mr. Rembert discovered the problem, and that his intention was not to conceal the situation, but to try to assess the situation and to find a solution before approaching Mr. Rembert. Also, Mr. Rembert has not shown that he relied to his detriment on any misrepresentation made by Mr. Gandy. The evidence shows that Mr. Gandy received no payments under the terms of construction management contract after October of 1993.

As he has failed to meet his burden of proof, Mr. Rembert's request for relief under § 523(a)(2)(A) will also be dismissed with prejudice.

Dischargeability of Debt under § 523(a)(6)

Finally, Mr. Rembert seeks a finding by this Court that his claim against Mr. Gandy is nondischargeable pursuant to § 523(a)(6) of the Bankruptcy Code. Section 523(a)(6) provides 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, 453 (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 to another or the property of another that are caused by willful and malicious conduct. Id. at 453.

Mr. Rembert claims that Mr. Gandy ordered the framing contractor to alter the beams and trusses, knowing that such actions constituted negligent construction, and then engaged in a course of conduct to affirmatively conceal the negligent construction. Mr. Rembert asserts that these alleged actions constituted willful and malicious conduct by Mr. Gandy within the meaning of § 523(a)(6).

The controlling standard adopted by the Fifth Circuit Court of Appeals for determining whether Mr. Gandy's conduct was "willful and malicious" within the meaning of § 523(a)(6) is as follows:

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 excessive [sic], 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 leads to injury. Therefore, a wrongful act done intentionally, which necessarily produces harm and is without just cause or excuse, may constitute a willful and malicious injury.

Kelt v. Quezada (Matter of Quezada), 718 F.2d 121, 123 (5th Cir. 1983) cert. denied, 467 U.S. 1217 (1984)(citing 3 Collier on Bankruptcy, 523.16 at 523-128 (15th ed. 1983)(emphasis added). See also 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).

As previously stated, the Court finds Mr. Gandy's testimony to be credible that he did not tell the framing contractor to cut the beams and trusses. The Court also accepts his testimony that he discovered the problem only a week prior to his meeting with Mr. Rembert and was attempting to resolve the situation when Mr. Rembert contacted him. The Court finds that Mr. Rembert has not proved his allegations that Mr. Gandy instructed the framing contractor to cut the beams and trusses then proceeded to conceal his actions from Mr. Rembert.

It is clear that serious problems existed with the construction of the house. Both parties and all witnesses agree on that point. However, if Mr. Gandy is liable for the damages suffered by Mr. Rembert as a result of the faulty construction, such liability would arise out of a breach of his contractual

duties under the construction management contract². As case law clearly holds, § 523(a)(6) applies to tortious conduct and not simply to liability arising out of a breach of contract. Friendly Finance Service v. Modicue (In re Modicue), 926 F.2d 453 (5th Cir. 1991).

For the foregoing reasons, the Court finds that Mr. Rembert has failed to meet his burden of proof under § 523(a)(6). Therefore, this portion of the complaint will also be dismissed with prejudice.

A separate final judgment dismissing Mr. Rembert's complaint will be entered in accordance with Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

THIS the 24th day of April, 1996.


UNITED STATES BANKRUPTCY JUDGE

² The Court makes no findings regarding Mr. Gandy's liability for the faulty construction under the terms of the construction management contract whereby Mr. Gandy was acting in the capacity of a construction manager and not a general contractor.

U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI
FILED
APR 24 1996
CHARLENE J. PENNINGTON, CLERK
BY DEPUTY

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

IN RE: JAMES W. GANDY

CASE NO. 9401809JEE

JIM REMBERT

PLAINTIFF

VS.

ADVERSARY NO. 940267JEE

JAMES W. GANDY

DEFENDANT

FINAL JUDGMENT OF DISMISSAL

Consistent with the Court's opinion dated contemporaneously herewith, it is hereby ordered and adjudged that the complaint filed by Jim Rembert against James W. Gandy in the above styled adversary proceeding shall be, and hereby is, dismissed with prejudice.

SO ORDERED this the 24th day of April, 1996.


UNITED STATES BANKRUPTCY JUDGE