

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of	:	Case No. 93-1377-C
	:	
WILLIAM D. PIERCE, JR., and	:	
DEBRA K. PIERCE, d/b/a	:	
PIERCE CONSTRUCTION,	:	Chapter 7
	:	
Debtors.	:	
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THEODORE K. DuPUY and	:	Adv. No. 93-93124
CYNTHIA A. DuPUY,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
WILLIAM D. PIERCE, JR. and	:	
DEBBIE K. PIERCE, both individually	:	
and d/b/a PIERCE CONSTRUCTION,	:	
	:	
Defendants.	:	

ORDER--MOTION FOR SUMMARY JUDGMENT

On June 16, 1994, a hearing was held on the Motion for Summary Judgment. Plaintiffs, Theodore K. and Cynthia A. DuPuy, were represented by their attorneys, Robert K. DuPuy and Jerrold Wanek. The Defendants, William D. Pierce, Jr. and Debra K. Pierce, individually and doing business as Pierce Construction, were represented by their attorney, Edward G. Parker. At the conclusion of the hearing, the Court took the matter under advisement. The Court now considers this matter fully submitted.

This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). The Court, upon review of the pleadings, briefs, and arguments of counsel, now enters its findings of fact and conclusions of law pursuant to Fed.R.Bankr.P. 7052.

FINDINGS OF FACT

1. Plaintiffs filed the Complaint to Determine Dischargeability of Debt on August 20, 1993. On December 15, 1993, the Court granted Plaintiffs' Motion for Relief to Amend Complaint. The amended complaint contended that Defendants' debt to Plaintiffs was nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) and (A)(6).

2. Defendants entered into an agreement with Plaintiffs wherein Plaintiffs would build a house in Des Moines, Iowa. The Complaint alleges that during the construction of the home, Plaintiffs discovered that the floor space would be substantially less than the 1440 square foot home for which they had contracted. When Plaintiffs notified Defendants of the problem, Defendants ceased construction on the home and threatened to sell it to another buyer.

3. In May of 1992, Plaintiffs and Defendants entered into a supplementary agreement by which the house would be completed. The Complaint alleges that Plaintiffs did not waive any of their claims regarding the size of the construction of the home in this agreement.

4. Plaintiffs closed on the home and received a warranty of construction through the FHA, which was guaranteed by Defendants. The Complaint alleges that after Plaintiffs moved into their home they discovered numerous construction defects. When Plaintiffs attempted to discover the names of the subcontractors in order to pursue the FHA warranty, the Complaint alleges that Defendants withheld from the Plaintiffs the names of the subcontractors.

5. On June 4, 1993, Defendants filed for bankruptcy relief under Chapter 7 of the United States Bankruptcy Code.

6. The debt owed by Defendants to Plaintiffs was scheduled as an unsecured nonpriority debt that was disputed and contingent.

7. Defendants moved for summary judgment on the grounds that there is no genuine issue of material fact as to whether Plaintiffs relied upon any misrepresentations that may have been made by the Defendants. Plaintiffs resist the motion.

DISCUSSION

A motion for summary judgment is governed by Fed.R.Civ.P. 56, made applicable to bankruptcy proceedings pursuant to Fed.R.Bankr.P. 7056, which provides in pertinent part:

The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is any genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed.R.Civ.P. 56.

In ruling on a motion for summary judgment, the Court's function is to determine whether a genuine issue as to any material fact exists, not to resolve any factual issues. Celotex Corp. v. Catrett, 477 U.S. 317, 330, 106 S.Ct. 2548, 2556 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-52, 106 S.Ct. 2505, 2509-11 (1986). The Court must deny summary judgment where there is a genuine issue as to any material fact and grant summary judgment where there is no such issue and the

movant is entitled to judgment as a matter of substantive law. Anderson, 477 U.S. at 247-52, 106 S.Ct. at 2506-11.

The party seeking summary judgment bears the initial burden of asserting that the pleadings, depositions, answers to interrogatories, admissions, and affidavits establish the absence of a genuine issue of material fact. Celotex Corp., 477 U.S. at 323, 106 S.Ct. at 2552. The ultimate burden of demonstrating the existence of a genuine issue of material fact, however, lies with the nonmoving party. 477 U.S. at 324, 106 S.Ct. at 2553. Any inferences to be drawn from the underlying facts contained in these materials must be considered in the light most favorable to the debtor. United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 994 (1962).

11 U.S.C. § 523(a)(2)(A) provides in relevant part:

- (a) A discharge under § 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.

To succeed in a § 523(a)(2)(A) claim, a creditor must prove the following elements:

- (1) the debtor made a false representation;
- (2) at the time made, the debtor it to be false;
- (3) the representation was made with the intention and purpose of deceiving the creditor;
- (4) the creditor relied on the representation; and
- (5) the creditor sustained the alleged injury as a proximate result of the representation having been made.

Matter of Van Horne, 823 F.2d 1285, 1287 (8th Cir. 1987). The standard of proof required under the § 523(a) exceptions to dischargeability is the ordinary preponderance of the evidence standard.

Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654 (1991). The creditor need not prove that his reliance on the fraudulent misrepresentation was reasonable. In re Ophaug, 827 F.2d 340, 343 (8th Cir. 1987).

Defendants argue that there is no genuine issue of material fact as to whether Plaintiffs relied upon any alleged misrepresentations. Reliance is the fourth element which must be proven to succeed on a § 523(a)(2)(A) dischargeability claim. Defendants argue that because Plaintiffs discovered the alleged discrepancy before closing and chose to complete the house and take possession despite the knowledge of the actual footage, there could have been no detrimental reliance upon any alleged representation regarding the square footage of the house. Therefore, Defendants conclude that if there is no genuine factual dispute as to this lack of reliance, Plaintiffs cannot sustain their burden of proving the elements of § 523(a)(2)(A) and Defendants are entitled to judgment as a matter of law on that claim.

Under Iowa law, a party defrauded in the making of a contract who discovers the fraud may continue with performance, as well as bring an action for damages sustained by the fraudulent conduct, if rescinding would cause loss of profit or actual injury. Christy v. Heil, 123 N.W. 2d 408, 411 (Iowa 1963). However, the injured party may not receive a material concession from the defrauding party after the fraud is discovered or fraud may be found to have been waived. United Forest Products Co. v. Baxter, 452 F.2d 11, 20 (8th Cir. 1971). Therefore, assuming the Plaintiffs could sustain their burden of proof in this matter, they may be entitled under Iowa law to collect damages from the Defendants, despite the fact that Plaintiffs chose to continue performance of the contract and take possession of the

home with full knowledge of the alleged deficiencies. Consequently, the mere fact that the Plaintiffs chose to proceed with performance does not mean that, as a matter of law, they suffered no damages as a result of detrimental reliance. Looking at the facts in a light most favorable to the Plaintiffs, the Court finds that, at this time, a genuine issue of material fact remains as to whether Defendants made knowing false representations intending to deceive the creditor, which were relied upon by the Plaintiffs to their detriment. Accordingly, the Court holds that this is an inappropriate matter for summary judgment.

ORDER

IT IS THEREFORE ORDERED that Defendants' Motion for Summary Judgment is denied.

Dated this 19th day of October, 1994.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE