IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
HARRISON DIVISION

IN RE: JAMES AND KATHY HALEY, Debtors **No. 3:08-bk-72913**
Ch. 7

ROBERT CARMICHAEL **PLAINTIFF**

v. **3:09-ap-7015**

JAMES MICHAEL HALEY **DEFENDANT**

MEMORANDUM OPINION AND ORDER

On January 30, 2009, the plaintiff, Robert Carmichael, filed a complaint to determine the dischargeability of a debt under 11 U.S.C.§ 523(a)(2) and (a)(4). At trial, Carmichael announced he was no longer pursuing the § 523(a)(4) allegations. The debtor filed an answer on February 18, 2009, denying the material allegations of the complaint. The Court held a trial on the merits on July 29, 2009, and at the conclusion of the trial took the matter under advisement. For the reasons stated below, the Court denies the plaintiff's complaint.

Jurisdiction

The Court has jurisdiction over this matter under 28 U.S.C. § 1334 and 28 U.S.C. § 157, and it is a core proceeding under 28 U.S.C. § 157(b)(2)(I). The following opinion constitutes findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

General Background

On February 24, 2006, the plaintiff and H&H Hotrods entered into an agreement to restore and customize a 1965 Ford Mustang owned by the plaintiff. The agreement was signed by the plaintiff, Carmichael, and the debtor, James Haley, as "Business Owner"

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by D Tafoya

and is sometimes referred to as the California agreement because it was executed and performed in whole or part in California. Among other things, the agreement states: "H&H Hotrods will construct/build/assemble the type of car to the specs we have previously discussed." (Pls.' Ex. 1.) Between February 24 and August 19, 2006, the plaintiff paid $37,150.00 for work pursuant to the agreement. In August, the debtor informed the plaintiff that the work was substantially completed. Discussion ensued between the parties for the debtor to perform additional cosmetic work on the vehicle. The debtor requested permission to take the vehicle to Arkansas, where he was setting up a new business, in order to proceed with cosmetic restoration of the vehicle, including paint and the installation of a new interior. The new agreement was referred to as a "change order" or the "Arkansas contract" [change order] and was executed on August 28, 2006, by James Haley, H&H Custom Hotrods, and Robert Carmichael. The change order required the debtor to paint the vehicle and do interior work, at the conclusion of which the vehicle would be a "complete turnkey." The estimated cost referred to in the change order was $28,000.00, which was to be paid in five monthly installments beginning August 25, 2006, and the estimated time for completion was January 2007. The change order was in addition to what had previously been agreed to have been performed under the California agreement. Carmichael permitted the debtor to take the vehicle to Arkansas and made five separate monthly payments totaling $25,889.00. The first payment was made on August 25, 2006, and the last payment was made on January 22, 2007.

The plaintiff alleges the vehicle was not restored pursuant to the agreements and contends that he is entitled to a non-dischargeable judgment under 11 U.S.C. § 523(a)(2) in the amount of $83,000.00, which was the cost of restoration charged to him by Mickey's Collision Center, the company that eventually completed the restoration after the plaintiff took possession of the vehicle from the debtor, along with his costs and attorney's fees.

Findings of Fact and Conclusion of Law

Section 523(a)(2)(a) of the Bankruptcy Code states that discharge is not available to a debtor for any debt for money, property or services obtained by "false pretenses, false representation, or actual fraud, other than a statement respecting the debtor's or insider's financial condition." 11 U.S.C. § 523(a)(2)(a). Under this section, in order to prevail, the plaintiff, Carmichael, must prove by a preponderance of the evidence the following:

1. that the debtor made a representation;

2. that at the time the debtor knew that the representation was false;

3. that the debtor made the representation deliberately and intentionally with the intention and purpose of deceiving the creditor;

4. that the creditor justifiably relied on such representation; and

5. that the creditor sustained the alleged loss and damage as a proximate result of the representation having been made.

Merchants Nat'l Bank of Winona v. Moen, (*In re Moen*), 238 B.R. 785, 790 (B.A.P. 8th Cir. 1999)(quoting *Thul v. Ophaug*, 827 F.2d 340 (8th Cir. 1987)). Unless there is sufficient proof as to each element, judgment cannot be entered for the plaintiff.

The plaintiff first contends that the debtor improperly represented himself as the owner of H&H Hotrods. Although the California agreement was signed by the debtor as "business owner," there was little other evidence as to whether Haley was the owner in whole or in part of H&H Hotrods, even though according to the debtor's testimony, a person named Honse had some right, title, claim, or interest in the business. In fact, the only testimony about any ownership interest was when the debtor stated that Mr. Honse left "in the middle of the night" and was supposed to have purchased or been purchasing H&H Hotrods, but failed to do so and left the business. Therefore, it is unclear to what extent, if any, the debtor had an ownership interest in H&H Hotrods.

In any event, the Court is satisfied the plaintiff did not actually rely on any

representations of the debtor that the debtor was the owner of H&H Hotrods. The plaintiff became aware that there was some issue or problem with the ownership of the business when the debtor requested that Carmichael no longer make checks payable to H&H Hotrods, and instead make the payments to "Sand Twister Motorsports." The August 19 and August 25, 2007, payments in the amounts of $700.00 and $5000.00, respectively, were made to Sand Twister Motorsports. (Pls.' Ex. 2.) The testimony was unrebutted that the debtor advised the plaintiff that there were some problems with the checks in the H&H Hotrods account, and some ownership issues. Therefore, the plaintiff was on notice at that time that the debtor may not have been the business owner or otherwise in complete control of the business, yet he continued to deal with the debtor. At all relevant times, the plaintiff was, as a practical matter, treating the California agreement and the change order as contracts with the debtor, individually. Even if one assumes that the debtor had no ownership interest in H&H Hotrods, there is no evidence to reflect that the plaintiff sustained any damage as a result of the debtor not being the owner of H&H Hotrods. Therefore, the plaintiff failed to carry his burden as to this alleged misrepresentation of ownership interest.

The plaintiff also contends that the debtor falsely stated that the California agreement was completed prior to the debtor's request to take the vehicle to Arkansas. To the extent any statements in that regard were made to the plaintiff that may have been false, the Court finds that the plaintiff did not rely on those statements. In support of this finding, the Court notes that the plaintiff lived approximately three miles from the H&H Hotrods shop and it was uncontroverted that the plaintiff often went to the shop to check on the progress of the work. In fact, the plaintiff saw the vehicle no less than one week prior to its removal to Arkansas, and after that visit permitted its removal to Arkansas for the debtor to perform cosmetic work on the vehicle.

The Court further finds that the vehicle was substantially complete as required by the California agreement. The plaintiff introduced an exhibit that shows an itemization prepared by the debtor reflecting work the debtor claims had been done under the

California agreement, reflecting a total price of $25,842.89 that was paid on February 24, 2006. (Pls.' Ex. 1, p. 4.) However, some discrepancies from the debtor's itemization were noted by Mickey Fortner, the owner of Mickey's Collision Center in Conway, Arkansas. Fortner was with the plaintiff when he picked up the vehicle in Flippin, Arkansas, and took it to Conway to complete the project. Fortner testified that the VariShock front suspension was done, but some additional work was needed to replace the shock absorbers. The debtor, however, testified that the additional work was performed. Fortner also claimed he never saw the steering pump, which was listed on Plaintiff's Exhibit 1. The debtor testified that it was possible that the steering pump could have been removed and not with the vehicle when the plaintiff picked up the vehicle. This is consistent with the inaccurate "inventory" of parts and items returned to the plaintiff with the car, which included some items that did not even belong to this particular vehicle. Therefore, it is not surprising that some items that *should* have gone with the vehicle may not have been included. However, the Court cannot surmise whether the steering pump was purchased and paid for by the debtor.

Also, according to Fortner, at the time the vehicle was picked up by Fortner, the motor was not completely installed; it needed some fuel lines, electrical work, and radiator heater hoses; and there was no transmission mount and the transmission was on a block of wood. (Both parties knew that the motor was not in the car when it left California, and it was understood that the motor was to be installed it at a later time.) Fortner also testified that the fans were not installed, the drive shaft was a foot short, and, although the front brakes were intact, there were no linings or master cylinder. The debtor claimed that he did install wiring for the lights and the electric fans and the relays were with the vehicle. The debtor also explained that because this was a "custom" shaft that it could have been cut short at the factory.

Even if one assumes that Fortner's testimony regarding the alleged deficiencies is correct and the debtor's testimony in contradiction is false, it is simply unclear whether some or all of the deficiencies were inconsistent with the California agreement, which states that

the debtor was to assemble the car "to the specs we have previously discussed." There is no evidence of exactly what those specs were. Furthermore, Fortner acknowledged that the rest of the items reflected on Plaintiff's Exhibit 1 under the California agreement were, in fact, completed.

Therefore, the Court finds that the items that were allegedly incomplete are not necessarily in contravention of the California agreement. Further, there is no evidence in the record to reflect exactly what the cost would have been to cure the "deficiencies" referred to by Fortner. Although Plaintiff's Exhibit 12 reflecting the work performed by Fortner may contain charges for curing some of the alleged deficiencies, the Court is not able to isolate with specificity the "deficiencies" referred to in Plaintiff's Exhibit 1, page 4, with the work performed and reflected in Plaintiff's Exhibit 12. Stated otherwise, there was no direct evidence as to exactly what work was performed by Fortner that should have been performed pursuant to the California agreement. Hence, the plaintiff has failed to carry his burden of proof in that regard.

The Court will now turn its attention to the allegations referencing the change order. (Pls.' Ex. 3.) The substance of the plaintiff's allegation is that he was being assured by the debtor that work was being done in Arkansas pursuant to the change order. Based on those assertions and representations, which the plaintiff contends were false, he continued to send monthly payments to the debtor.

Like the first contract (the California agreement), the change order entered into between the parties is vague and incomplete in many respects without specific terms and conditions of a project such as this. The key features of the change order include the cost of the paint and body work as *estimated* at $28,000.00. The change order required five equal monthly payments beginning August 25, 2006. (The plaintiff paid $25,889.00, but refused to make further payments when he became disenchanted with the progress on the vehicle.) Another key phrase in the change order reads, "the *estimated* time for completion shall be January, 2007." The debtor testified that he needed approximately

three more months to complete the vehicle when the plaintiff picked it up in April 2007. Although the timing was not to the plaintiff's liking, there was simply no time limit or penalty clause reflected in the agreement that required completion by a date certain.

The testimony with respect to the amount of progress done on the vehicle is equally vague. The plaintiff testified that the debtor was assuring him that progress was being made on the car while the installment payments were being made from August 2006 to January 2007. The debtor testified that he did a lot of work during that period, and this testimony was uncontroverted. Furthermore, the plaintiff was requesting additional work from time to time, including new fenders, new hood, new doors, and a new locking system. There was no testimony by the plaintiff that the debtor told him that certain *specific* things were being done to the car that were in fact not being performed. The statements of progress made by the debtor were general and broad in nature; the debtor was telling him that work was progressing. Such statements are not sufficiently precise enough to conclude that the debtor was attempting to defraud the plaintiff. As stated, uncontroverted testimony proved that some work was, in fact, performed on the doors, fenders, quarter panel, trunk, dash, and other miscellaneous items when the debtor was indicating that progress was being made. This is "some progress," and in that sense the Court cannot find that statements of progress were false or made with the intent to deceive. The plaintiff was obviously wanting to get the project completed, but had not included any specific deadlines in the agreement. While one could certainly conclude that the vehicle *should* have been completed by April 2007 based on the estimated completion date of January 2007, and that three months was beyond a reasonable period for completion, at worst, this would be deemed a breach of contract and does not prove that the debtor was defrauding the plaintiff when he said work on the vehicle was "progressing." Again, it is important to note that some of the delay was a result of changes being requested by the plaintiff.

Furthermore, even if the debtor's representations of completion were fraudulent, the plaintiff has failed to prove damages resulting from the change order. Although the

plaintiff completed the vehicle at a cost of $83,000.00, it was without question a much different vehicle than envisioned by the original change order. Substantial revisions and changes were made during the pendency of the rebuild with Fortner at Mickey's Collision Center, which resulted in the ultimate price for the rebuild. Additionally, "turnkey" may mean different things to different people and there is no absolute definition. It is telling that another Mustang that had been restored "turnkey" by Fortner was done at a cost of approximately $9000.00, substantially less than the $83,000.00 paid for the rebuild of the plaintiff's vehicle. It is also obvious that this was a "work in progress" at all stages, whether the vehicle was with the debtor or in Fortner's shop.

Conclusion

In summary, the plaintiff has failed to prove all of the elements as required under *In re Moen* to prove this debt is non-dischargeable in the debtor's bankruptcy. With regard to the California agreement, the plaintiff has failed to prove that any representation regarding the debtor's ownership of the business was false or, even if the representation was false, that the plaintiff justifiably relied on any such representation to his detriment. With respect to the allegations of failing to complete the California agreement, the plaintiff acknowledged that the agreement was "substantially complete" and permitted the debtor to take the vehicle to Arkansas, effectively waiving any claim he had as to the vehicle being incomplete. Further, even if one assumes that some of the work was not completed as represented by the debtor under the California agreement, there is no proof of what exact damages proximately resulted from any "misrepresentation of completion."

With regard to the change order, the plaintiff likewise failed to carry his burden of proof as to alleged fraudulent representations by the debtor relating to the progress of work on the vehicle. The terms and conditions of the contract were vague, incomplete, and ambiguous. Both the time of completion and cost were "estimated." Furthermore, whatever damages there were would not total the $83,000.00 claimed by the plaintiff; the $83,000.00 included substantial changes and additions from the change order. Exactly what amount related to the changes and what amount, if any, related to the change order

is unclear from the testimony and other evidence presented at trial.

It is understandable that the plaintiff was anxious and upset with the lack of progress on this vehicle and believed, perhaps appropriately so, that the vehicle should have been further along than it was in early 2007. Regardless, the actions (or lack of action) by the debtor do not rise to the level of being "fraudulent" such that the Court can find that the debtor's debt to the plaintiff is non-dischargeable. Accordingly, the Court denies the plaintiff's complaint.

IT IS SO ORDERED.

September 25, 2009
DATE

Ben Barry
BEN T. BARRY
UNITED STATES BANKRUPTCY JUDGE

cc: Stephen L. Gershner
Paul Bayless