

In the United States Bankruptcy Court  
for the  
Southern District of Georgia  
Brunswick Division

In the matter of:	)	
	)	Adversary Proceeding
THOMAS STORY MCNEAL	)	
(Chapter 7 Case <u>92-20019</u> )	)	Number <u>92-2027</u>
	)	
<i>Debtor</i>	)	
	)	
	)	
LANG PLANNING MILL, INC.	)	
	)	
<i>Plaintiffs</i>	)	
	)	
	)	
v.	)	
	)	
THOMAS STORY MCNEAL	)	
	)	
<i>Defendant</i>	)	

**MEMORANDUM AND ORDER**

Plaintiff filed this adversary proceeding on April 27, 1992, alleging that it was defrauded by Debtor and that the Debtor's obligation should be non-dischargeable. A trial was conducted on April 8, 1993. Upon consideration of the evidence adduced at the hearing, the documentation submitted by the parties, and the applicable authorities, I make the following Findings of Fact and Conclusions of Law.

## FINDINGS OF FACT

Debtor filed for bankruptcy in 1992. Debtor's business, Tom McNeal Construction Company, Inc., also filed for bankruptcy, but that case was dismissed.

On May 10, 1991, Debtor filed a disbursement request with First Federal Savings Bank of Brunswick to obtain funds to build a home on property Debtor owned. In the disbursement request, Debtor certified that all prior bills had been paid, that materialmen had been satisfied, and that no liens encumbered the property. The disbursement request and certification was signed by "Thomas S. McNeal, Contractor," the Debtor. *See* Plaintiff's Exhibit "1". Debtor submitted approximately thirteen requests for payment during May, June, July, and August as Debtor was building the home.

Plaintiff supplied Debtor with various materials for the home. The materials were delivered in June of 1991. *See* Invoices, Plaintiff's Exhibit "2". The invoices reflect that "Tom McNeal Construction" was billed for the supplies. Plaintiff claims that it was defrauded by Debtor, who falsely certified that all materialmen had been paid. Plaintiff claims that it is still owed \$4,030.76. First Federal, which had a first lien on the property, foreclosed and extinguished Plaintiff's materialmen's lien on the property.

Debtor argues that the obligation in favor of Plaintiff is a corporate debt of Plaintiff's construction company and not a debt owed by Debtor individually. Further, Debtor claims that he did not fraudulently obtain property from Plaintiff as the certification was submitted to First Federal.

## CONCLUSIONS OF LAW

Debts obtained by fraud are non-dischargeable in a bankruptcy proceeding.

Section 523 of the Bankruptcy Code provides in pertinent part:

- (a) A discharge . . . 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 representing the debtor's or an insider's financial condition.

11 U.S.C. §523(a)(2)(A). The burden of proof in non-dischargeability actions is upon the plaintiff excepting to discharge to show by a preponderance of the evidence that a discharge is not warranted. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed 2d 755 (1991). The preponderance of the evidence standard, instead of the clear and convincing evidence standard should apply to all of the exceptions to discharge, including the exception to discharge for debts involving a debtor's fraud.

In order to preclude the discharge of a particular debt because of fraud, a creditor must prove the following:

- (1) The debtor made a false representation with the purpose and intention of deceiving the creditor;
- (2) The creditor relied upon such representation;

- (3) The reliance was reasonably founded; and
- (4) The creditor sustained a loss as a result of the representation.

In re Hunter, 780 F.2d 1577, 1579 (11th Cir. 1986); In re Phillips, 804 F.2d 930 (6th Cir. 1986); In re Lacey, 85 B.R. 908 (Bankr. S.D.Fla. 1988). *See also* In re Mullet, 817 F.2d 677 (10th Cir. 1987) (Reliance must be reasonable); In re Kimzey, 761 F.2d 421, 423 (7th Cir. 1985) (Plaintiff must demonstrate reliance on the debtor's representations; In re Dobbs, 115 B.R. 258, 265 (Bankr. D.Idaho 1990); Matter of Carpenter, 53 B.R. 724, 729 (Bankr. N.D.Ga. 1985) (actual fraud).

In order to be non-dischargeable the objecting creditor must show that property was obtained by fraud in the inception. In re Marazino, 67 B.R. 394 (Bankr. D.Kan. 1986). In other words, the original debt must have been incurred through fraudulent conduct. *See* In re Barney, 186 B.R. 105 (Bankr. N.D. Ohio 1987). The intent to deceive must be present at the time the goods and services are obtained not later. Pitt, 121 B.R. at 495.

I conclude that Plaintiff has not met its burden of proof in this case. First, the Plaintiff did not extend credit to Debtor based on any false representation. Plaintiff supplied Debtor's corporation with goods and services on open account under the ordinary business practices of the parties. No fraud was involved in the transaction. After credit was extended, Debtor signed a contractor's affidavit representing that all supplies and materialmen had been paid which was false. However, Plaintiff did not rely on the affidavit

in providing services or goods to Debtor or his corporation. The affidavit was prepared for the construction lender, who relied on the statement in advancing funds to Debtor and his corporation. There is no evidence that the lender sustained a loss and the lender is not a party to this action.

In light of the foregoing, I conclude that the obligation of Debtor to Plaintiff is discharged in this bankruptcy proceeding. Defendant's counterclaim is also dismissed.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the obligation of Debtor, Thomas Story McNeal, to Plaintiff, Lang Planning Mill, Inc., in the approximate amount of \$4,030.76, is discharged in this bankruptcy proceeding.

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Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This \_\_\_\_ day of May, 1993.