



Based on the pleadings and exhibits attached thereto, as well as the depositions and affidavits on file, the following facts are undisputed. In 1974 plaintiffs purchased a house from defendant, who bought and sold real estate for investment purposes. On May 30, 1980 plaintiffs loaned defendant Twenty Thousand and No/100 (\$20,000.00) Dollars, evidenced by deed to secure debt conveying plaintiffs an interest in real estate located on Wilmington Island, Chatham County, Georgia as security for the loan. According to the deed, the loan was to be repaid 90 days from May 30, 1980.<sup>2</sup> On June 2, 1980 defendant duly recorded the deed in the Chatham County, Georgia Superior Court Clerk's office. The deed provides in pertinent part:

THIS Deed to Secure Debt is expressly subject to that certain Deed to Secure Debt to First Federal Savings and Loan Association recorded in Deed Book 109-S, Page 129 and any default in said first Deed to Secure Debt shall constitute a default in this instrument giving rise to the right of exercise of all remedies otherwise herein contained.

Defendant failed to pay the May 30, 1980 loan in 90 days, but made quarterly interest payments in the amount of One Thousand and No/100 (\$1,000.00) Dollars to plaintiffs until, as discussed below, the loan was renewed in 1986.

In 1984 defendant asked plaintiffs to allow her to substitute as security for the May 30, 1980 loan a security deed dated May 2, 1984, executed by Fred Mackey, Jr., which conveyed to

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<sup>2</sup>No note was executed in connection with the May 30, 1980 loan.

defendant an interest in certain real estate known as Lot 7 Scarborough Subdivision, Twelve Oaks Drive, Chatham County, Georgia (the Mackey deed) as security for a debt Mackey owed defendant. Plaintiffs complied by releasing their interest in the Wilmington Island property. Defendant did not assign the Mackey deed to plaintiffs. Plaintiffs did not attempt to verify that defendant assigned the Mackey deed.

In 1986 defendant requested an additional loan from plaintiffs. At this point, the principal owed on the May 30, 1980 loan remained outstanding. Defendant represented that the additional loan would be secured by her interest in certain real estate and storage buildings located in Savannah, Georgia known to the parties as the "Island Self-Storage" property. On April 1, 1986 plaintiffs loaned defendant an additional Twenty-Five Thousand and No/100 (\$25,000.00) Dollars. Defendant executed a promissory note of even date for Fifty-Five Thousand and No/100 (\$55,000.00) Dollars. The April 1, 1986 note comprises a renewal of the May 30, 1980 loan of Twenty Thousand and No/100 (\$20,000.00) Dollars, the additional loan of Twenty-Five Thousand and No/100 (\$25,000.00) Dollars, and Ten Thousand and No/100 (\$10,000.00) Dollars defendant owed Mrs. Munch in connection with a joint investment.<sup>3</sup> The April

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<sup>3</sup>Mrs. Munch deposed that she paid \$6,300.00 to defendant as part of a joint investment in the purchase of a house. When the house was sold, according to Mrs. Munch, defendant agreed to pay Mrs. Munch \$10,000.00 from the sale proceeds for Mrs. Munch's investment. (Deposition of Robert Munch and Isabel Munch, October 8, 1992, pp. 45-51).

1, 1986 note provides that defendant will repay the loan in one year with interest thereon at the rate of 15% per annum. The note also states, "THIS NOTE is secured by Island Self Storage."

On November 6, 1987 defendant executed another note, renewing the April 1, 1986 note, due and payable in 6 months with interest thereon at the rate of 15% per annum. The November 6, 1987 note provided in part as follows:

Security:	
Secured by a Second Mortgage on Lot No. 7	
Twelve Oaks Drive	\$20,000.00
Mabel Sanders Savannah Bank check	
#_____ to be held by Holder	<u>35,000.00</u>
Total	\$55,000.00

The total amount of this note \$55,000.00 is secured by my [Mabel Sander's] interest in the Island Self-Storage.

Interest on the total amount of \$55,000.00 to be paid monthly at the rate of 15% per annum from my share of the income from Island Self-Storage.

Defendant did not pay the November 6, 1987 note when it came due. On April 7, 1988 defendant executed another renewal note, due and payable in six months, with interest thereon at the rate of 15% per annum. The April 7, 1988 note contains the same representations concerning security as the November 6, 1987 note. Defendant failed to pay the April 7, 1988 note when it came due. On April 6, 1989 defendant executed a third renewal note, due and payable on October 6, 1989, with interest thereon at the rate of 15% per annum, which also contains the same representations as the prior renewal notes concerning the collateral. Defendant has failed to make any

payments toward the principal obligation, but made regular monthly interest payments of Six Hundred Eighty-Seven and 50/100 (\$687.50) Dollars until May 1991, a total of 49 such payments in all.

Defendant deposed that at the time she executed the November 6, 1987 renewal note she owned no interest in the Island Self-Storage property, that she had not assigned the Mackey deed to plaintiffs, and that there were no funds to cover the check indicated on the face of the note. Deposition of Mabel Sanders, December 18, 1991, pp. 50-52. She further stated in her deposition that she knew plaintiffs wanted the debt to be secured. Sanders deposition, p. 52. Plaintiffs deposed that they relied exclusively on defendant's representations in making each loan and renewal, undertaking no action to verify any of defendant's representations, nor consulting a lawyer. Deposition of Robert Munch and Isabel Munch, October 8, 1992, pp. 21-22, 24-25, 26-28, 34-35.

Plaintiffs filed a lawsuit against defendant in the Superior Court of Chatham County, Georgia. On July 2, 1991 they obtained a judgment by default against defendant in the amount of Sixty-Three Thousand Two Hundred Four and 80/100 (\$63,204.80) Dollars. Defendant filed the underlying Chapter 7 case on April 21, 1992.

#### **MEMORANDUM OF LAW**

Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with affidavits, if any, show that there is no genuine issue as any material fact and that the moving party is entitled to a judgment as a matter of law." Federal Rule of Civil Procedure (FRCP) 56, made applicable by Federal Rule of Bankruptcy Procedure (FRBP) 7056. "[A] party moving for summary judgment bears the initial burden of showing by reference to the record, that there is not a genuine issue of material fact." Velten v. Regis B. Lippert, Intercat, Inc., 985 F.2d 1515, 1523 (11th Cir. 1993). See also Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.E.2d 265 (1986). "If this showing is made, the burden shifts to the nonmoving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991). "When a motion for summary judgment is made and supported as provided in this rule [FRCP 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." FRCP 56(e). The evidence is reviewed "in a light most favorable to the opponent of the motion. All reasonable doubts and inferences should be resolved in favor of the opponent." Amey, Inc. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1502 (11th Cir. 1985) (citation omitted), cert. denied, 475 U.S. 1107, 106 S.Ct. 1513, 89 L.E.2d 912 (1986).

Section 523(a)(2)(A) excepts from discharge

[a]ny debt--

. . .

(2) for money . . . or [a] . . . renewal, . .  
. 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[.]

11 U.S.C. §523(a)(2)(A). A debt is nondischargeable under §523(a)(2)(A) only if: 1) the debtor made a false representation; 2) with the purpose and intention of deceiving the creditor; 3) the creditor relied on such representation; 4) the reliance was reasonably founded; and 5) the creditor was injured as a result of the false representation. In re: Hunter, 780 F.2d 1577, 1579 (11th Cir. 1986). Plaintiffs bear the burden of proof that an exception to discharge applies, which must be shown a preponderance of the evidence. FRBP 4005; Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.E.2d 755 (1991). Thus, plaintiffs must prove by a preponderance of the evidence each of the Hunter elements of the §523(a)(2)(A) exception to discharge in order to prevail on their complaint. Any one of the transactions described above can be the basis of a determination of nondischargeability if the Hunter factors are shown.<sup>4</sup>

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<sup>4</sup>Section 523(a)(2)(A) applies by its terms not only to the original loan of \$20,000.00 on May 30, 1980, but to the subsequent loans of \$25,000.00 and \$10,000.00 and each renewal of the total outstanding debt. In this case, therefore, there are five transactions which could possibly render the subject debt, or a part thereof, nondischargeable pursuant to §523(a)(2)(A): 1) the May 30, 1980 loan of \$20,000.00; 2) the April 1, 1986 loans of

### DEFENDANT'S MOTION

The sole basis for defendant's motion for summary judgment is her contention that plaintiffs did not exercise "reasonable reliance" on her representations that the subject debt would be secured and that she was financially capable of repaying the loans. She alleges plaintiffs did not verify her ownership of the property pledged as collateral by requesting a title certificate, did not take into consideration whether defendant could make payments on the mortgage held by First Federal on the property purportedly securing the original loan, did not procure financial statements of defendant's assets and credit history, and did not verify that the property promised as collateral actually secured the debt. Defendant quotes portions of plaintiffs' deposition in support of her contentions. She contends there is no genuine dispute regarding these allegations, upon which she bases her argument that as a matter of law plaintiffs did not exercise reasonable reliance.

Plaintiffs contend in their cross-motion for summary judgment that their reliance on defendant's representations was reasonable. In support, plaintiffs rely on their personal affidavits, in which they aver that they were good friends with defendant, that they have no experience in the real estate business,

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\$25,000.00 and \$10,000.00 and the renewal of the original \$20,000.00 loan; 3) the November 6, 1987 renewal of the total outstanding debt obligation of \$55,000.00; 4) the April 7, 1988 renewal; and the April 6, 1989 renewal.

that they had no reason not to trust defendant, and that they would not have made any loan to defendant had they known it would be unsecured. As reasonable reliance is a question of fact, In re: Collins, 946 F.2d 815, 817 (11th Cir. 1991); accord In re: Woolum, 979 F.2d 71, 76 (6th Cir. 1992), cert. denied, \_\_\_ U.S. \_\_\_, 113 S.Ct. 1645, 123 L.Ed.2d 267 (1993); Matter of Bonnett, 895 F.2d 1155, 1157 (7th Cir. 1989); In re: Lansford, 822 F.2d 902, 904 (9th Cir. 1987); In re: Watson, 958 F.2d 977, 978 (10th Cir. 1992), plaintiffs have established a genuine issue of material fact as to whether their reliance on defendant's representations was reasonable. Resolving all doubts and inferences in plaintiffs' favor, plaintiffs may have "reasonably" relied on defendant's representations. Defendant does not argue that she is entitled to summary judgment based on the absence of any other Hunter factor. Thus, summary judgment for defendant would be inappropriate.

#### **PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT**

Plaintiffs contend their motion for summary judgment should be granted based on defendant's false representation that the November 6, 1987 renewal note of Fifty-Five Thousand and No/100 (\$55,000.00) Dollars was secured by defendant's interest in the Island Self-Storage property, the Mackey deed, and a check for Thirty-Five Thousand and No/100 (\$35,000.00) Dollars, and based on the same alleged false representations in the subsequent renewal notes. As plaintiffs bear the burden of proof at trial regarding each of the Hunter elements of the §523(a)(2)(A) exception to

discharge, to prevail on their motion plaintiffs must prove there is no genuine issue of material fact concerning each of the Hunter factors. In support of their motion, plaintiffs rely on defendant's deposition testimony that at the time of the November 6, 1987 renewal note she owned no interest in the Island Self Storage property or the Mackey deed, and there were insufficient funds to cover the check. In support of plaintiffs' contention that defendant intended to deceive them in representing that the debt was secured, plaintiffs rely on defendant's admission that she knew plaintiffs wanted the debt to be secured, yet executed the November 6, 1987 renewal note knowing that her representations regarding security were false. In support of plaintiffs' contention that they relied on defendant's representations, plaintiffs rely on their personal affidavits which say so. In support of plaintiffs' contention that their reliance on defendant's representations was reasonable, they rely on their personal affidavits asserting that they were friends with defendant, had no experience in real estate matters, had no reason to doubt defendant's word, and would not have knowingly made an unsecured loan to defendant. In support of plaintiffs' contention that they sustained a loss as a result of defendant's representations, they rely on the fact that they are now unsecured creditors in defendant's Chapter 7 case, rather than secured claim holders.

On the issue of reasonable reliance, defendant's motion for summary judgment and plaintiffs' cross-motion for summary

judgment together establish that a genuine issue of material fact concerning whether plaintiffs' reliance on defendant's representations in connection with the November 6, 1987 renewal note, and subsequent notes, was reasonable. To that extent, summary judgment for plaintiffs would be inappropriate. However, as it pertains to the November 6, 1987 renewal note and subsequent renewals, plaintiffs' evidence that there is no genuine issue of material fact regarding the existence of each of the other Hunter elements of the §523(a)(2)(A) exception is sufficient to pierce defendant's pleadings, shifting the burden to defendant to set forth specific facts which show that a genuine issue of material fact exists. FRCP 56(e). Defendant admitted in her deposition that she made false representations in connection with the November 6, 1987 renewal note; defendant's intent to deceive plaintiffs is inferred from her admitted knowledge that plaintiffs desired a secured loan and that she falsely represented that the November 6, 1987 renewal note was secured, In re: Kimzey, 761 F.2d 421, 424 (7th Cir. 1985) ("[I]ntent to deceive may logically be inferred from a false representation which the debtor knows or should know will induce another to make a loan."); plaintiffs stated under oath that they relied on defendant's representations in making the loan; and plaintiffs were injured as a result of their reliance on defendant's representations in that they now hold an unsecured claim in defendant's Chapter 7 case, rather than a secured claim. Plaintiffs' evidence in support of their motion is uncontroverted

and based on the undisputed facts established thereby they prevail as a matter of law. Accordingly, summary judgment in favor of plaintiffs on these issues is appropriate. FRCP 56(e).

It is therefore ORDERED that defendant's motion for summary judgment is denied;

further ORDERED that plaintiffs' cross-motion for summary judgment is granted in part and denied in part as follows: on the issues of whether defendant made a false representation in connection with the November 6, 1987 renewal note and all subsequent renewal notes, whether plaintiffs relied on such representations, whether defendant intended to deceive plaintiffs, and whether plaintiffs were injured as a result, plaintiffs' motion is granted; on the issue of whether plaintiffs' reliance on defendant's representations in connection with the November 6, 1987 renewal note was reasonable, plaintiffs' motion is denied;

further ORDERED that trial of this adversary proceeding will be limited solely to the issue of whether plaintiffs' reliance on defendant's representations in connection with the November 6, 1987 renewal note and subsequent renewal notes was reasonable.<sup>5</sup>

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<sup>5</sup>However, summary judgement is limited to the issues discussed above as they pertain to the November 6, 1987 renewal note and subsequent notes. Should plaintiffs pursue a determination at trial that the subject debt, or any part thereof, is excepted from discharge under §523(a)(2)(A) based on any transactions between the parties prior to November 6, 1987 (see note 4, supra), plaintiff must establish each of the Hunter factors for such transaction.

JOHN S. DALIS  
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia  
this 3rd day of June, 1993.