UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
DONALD WAYNE HOFFMAN,	)	CASE NO. 12-32626 HCD
	)	CHAPTER 7
DEBTOR.	)	
	)	
	)	
SUN ENTERPRISES, INC.,	)	
	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 12-3070
	)	
DONALD WAYNE HOFFMAN,	)	
	)	
DEFENDANT.	)	

Appearances:

Michael K. Banik, Esq., counsel for plaintiff, 217 South Fourth Street, Elkhart, Indiana 46516; and Donald Wayne Hoffman, *pro se* defendant, 52256-4 Ideal Beach Road, Elkhart, Indiana 46514.

MEMORANDUM OF DECISION

At South Bend, Indiana, on August 11, 2014.

Before the court is the Second Amended Motion for Summary Judgment ("Motion") filed by the plaintiff Sun Enterprises, Inc. ("Sun" or "plaintiff"), against the chapter 7 debtor Donald Wayne Hoffman ("debtor" or "defendant"). In the Motion Sun requests the entry of a judgment of nondischargeability pursuant to 11 U.S.C. § 523(a)(2)(A) and § 523(a)(6) as a matter of law. In response, the defendant has filed an Affidavit on his own behalf. For the reasons given in this Memorandum of Decision, the court denies the Second Amended Motion for Summary Judgment.[1]

BACKGROUND

[1] The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

The relevant background information, presented thoroughly in the court's Memorandum of Decision of September 27, 2013, is set forth more succinctly herein. In that earlier decision the court denied the plaintiff's Amended Motion for Summary Judgment. This Second Amended Motion was filed to remedy the problems in the earlier motion.

In 2011 in the Circuit Court of Boone County, Commonwealth of Kentucky, the plaintiff brought suit against four defendants – Donald Wayne Hoffman (this debtor), Donn May, Neal Robbins Stafford, and their employer, Elite RV Services, LLC.[2] Sun alleged incomplete and improper workmanship in the repair and restoration of two recreational vehicles ("RVs") owned by the plaintiff. Neither the defendants nor any counsel representing them appeared at the bench trial against them. The state court found for the plaintiff on each claim: breach of contract, negligent and intentional misrepresentation, conversion, fraud, and fraud in the inducement. On October 25, 2011, Sun obtained a judgment against the defendants jointly and severally in the amount of $194,592.47 plus court costs. The plaintiff then authenticated the Kentucky judgment in Indiana for the purpose of collection.

The debtor filed a voluntary chapter 7 bankruptcy petition on July 23, 2012, and Sun timely filed its Complaint Objecting to Discharge of Debt. In the Motion and accompanying Memorandum now before the court, Sun asserted that the Affidavit of Robert E. Bell, Jr., Vice President of the plaintiff, fully established that this debtor's obligation to Sun was excepted from his discharge as a matter of law. It claimed entitlement to judgment under two sections of the Bankruptcy Code: under § 523(a)(2)(A) "due to Mr. Hoffman's actual fraud against Sun," R. 24 at 5, and under § 523(a)(6) on the ground that "Mr. Hoffman both willfully and maliciously engaged in actions including, but not limited to fraud, conversion and breach of his fiduciary duty causing intentional injury to Sun Enterprises" and "knowingly converted assets belong[ing] to Sun while acting in a fiduciary capacity causing injury to Sun." *Id.* at 6. Through Bell's

[2] The three individuals subsequently filed voluntary chapter 7 bankruptcy petitions in this court.

sworn testimony in the Affidavit, the plaintiff insisted it presented undisputed facts demonstrating that the debtor's actions created a nondischargeable debt.

Bell's Affidavit described the underlying circumstances. *See* R. 23, Ex. A. Bell met an Elite RV representative at an RV rally in Louisville, Kentucky. The representative told Bell that Elite RV repaired RVs in Elkhart, Indiana. Bell then contracted with Elite RV for specific repairs to two of Sun's RVs: a 1998 Country Coach Concept RV (the "Black Unit") and a 1997 Country Coach Concept RV ("the Silver Unit"). Sun paid an initial sum of $30,000.00 for the two RVs so that Elite could order the necessary parts to begin making repairs. Sun agreed to pay the final amount upon delivery of the Black Unit on December 4, 2010, and of the Silver Unit on March 5, 2011. Bell believed that Stafford, Hoffman, and May were either owners, employees, or agents of Elite, and he relied on their representation that the down payment was necessary for ordering the many needed parts.

In his Affidavit Bell attributed the following actions and conduct to the defendant Donald Wayne Hoffman.[3] Bell declared that Hoffman, as an owner, employee, or agent of Elite RV, interacted with Bell at various times while the plaintiff's two RVs were being repaired by Elite RV. Hoffman and the others advised Bell that many parts needed to be ordered and that a down payment for those orders was necessary. Bell stated that he relied on their representation and paid monies to Elite for that purpose. However, Hoffman and the others told Bell conflicting stories regarding the work for which he had contracted. In particular, Bell asserted, Hoffman and the others gave different reports with respect to the repair to the paint on the Black Unit, depending on which man he reached by phone.

On December 30, 2010, Bell learned from Stafford that they found Bondo, a type of automotive repair putty or filler, on the stripped bottom third of the Black Unit. Bell rejected Stafford's estimated price of $5,500.00 to add new stainless steel rather than to repair the area, and Stafford agreed to paint the bottom

[3] With its Motion, Sun proffered written exhibits that verified the contractual documents and emails between the parties. Also included were documents filed in state court, including affidavits in support of the damages claims, and the Boone County Circuit Court's Trial Order and Judgment. The copies of the photographs, however, were not of a sufficient quality to be helpful to the court's review.

third instead. However, Elite painted that section with the wrong stripes, and on January 19, 2011, Hoffman e-mailed Bell a quote for $4,000.00 to fix the stripes they did improperly. Bell declared that he was sent more invoices for paint costs to cover the incorrect stripes, was "double billed," and received a substandard quality paint job on the Black Unit and no paint work on the Silver Unit. However, he did not attribute those actions specifically to Hoffman in his Affidavit.

On February 25, 2011, Bell made an unannounced visit to the Elite RV shop. When he asked Stafford to explain the ordering inconsistencies, Stafford blamed Hoffman, who was out of town. Stafford reported that Hoffman ran the business. However, when Stafford called Hoffman in front of Bell, Hoffman yelled at Stafford over the phone and then hung up on Stafford. In addition, Hoffman refused to answer when Stafford called Hoffman back. Neither Stafford nor May could find any receipts for the parts, but Stafford explained that Hoffman must have used a credit card to pay for the parts.

Bell described Hoffman's fraudulent representation to him:

> When I reached and questioned Hoffman about the money and the parts, he sent an e-mail to me advising that my parts were on order, but that he needed money from me in order for them to be shipped (these representations were made in spite of the fact that Hoffman and Stafford had previously told me that the two skids full of my parts had already been delivered to and received by Elite). When I questioned May regarding the parts for my units, he advised that I simply needed to send more money ($10,000 was suggested), but assured me that my parts were on order.

R. 23, Ex. A at 3, ¶ 14. Hoffman and the others also told Bell that the electrical work on the Black Unit RV was going well, and later reported falsely that the wiring was completed.

> May and Hoffman specifically represented to me that even though they did not have the manual for the electrical wiring for my 1998 Black Unit, they were using the wiring pattern from the 1997 Silver Unit as the pattern needed for the 1998 Black Unit. These statements were false. No electrical work was completed on the 1998 Black Unit in spite of the representations by Hoffman and May that work had been done. In fact, several expensive electrical items from the 1997 Silver Unit were cut out of the 1997 Silver Unit and tossed into the 1998 Black Unit's electrical bays.

Id. at 3-4, ¶ 15. Bell declared that "[t]he electrical wiring for the 1998 Black Unit was intentionally damaged while it was in the possession of Elite RV." *Id.* at 4, ¶ 16. He gave this specific description of the damage:

> Someone cut off the ends of 984 electrical connections on the 1998 Black Unit. I know the specific number because once I re-obtained possession of the units, I had to trace 984 electrical wires throughout the RV, one by one, to re-connect each wire in order to make the RV safe and functional. I spent eight months tracing these damaged and unmarked wires throughout the various parts of the RV and completing other repairs that Elite was contracted to do in order to make the unit saleable and functional once I took it back from Elite. I relied on the representations of Stafford, Hoffman and May regarding this electrical work. Stafford, Hoffman and May knowingly lied to me about the electrical work and repeatedly requested that I send more and more money to Elite.

Id. at 4, ¶ 16.

During his unannounced visit to the Elite RV facilities on February 25, 2011, Bell also could see that no work was done on the Silver Unit. Pieces were removed without permission and no paint work or repairs were performed. Also, the Black Unit was in great disrepair, despite the assurances of Hoffman and the others that the work was progressing well: several body panels were off, wires were hanging out, the fuel tank was removed, and expensive repairs reported to have been done clearly had not been undertaken. Stafford blamed Hoffman for the misrepresentations, and Hoffman conveniently was not present and could not be contacted by phone.

No other specific allegations were made about Hoffman. Bell insisted that Sun was forced to pay more money simply to get the units "back to where they started before the Defendants caused damages." *Id.* at 5, ¶ 20. He also maintained that he was given 11 different completion dates for the Black Unit, and that "[e]ach of these promises was a lie or misrepresentation since Stafford, May and Hoffman knew that almost no work was done and the whole electrical system had been gutted." *Id.* at 5, ¶ 21.

Bell declared that he paid substantial sums to Elite RV ($12,790.00 on the Black Unit and $29,660.43 on the Silver Unit) based on the representations of Hoffman, Stafford, and May that they needed the initial payment to purchase the parts. Hoffman and the others kept asking for more money to order more parts for the two RVs. However, Bell insisted that, in the end, he never received any parts and he knew that his payments were not used for the purposes that Hoffman, Stafford, and May had represented to him.

Nevertheless, he did not attribute those false representations to Hoffman alone or directly, but rather to all three individuals collectively.

Bell stated that Sun tried those facts before the Boone County Circuit Court in Kentucky on October 25, 2011, and obtained a judgment in favor of Sun in the amount of $194,592.47. The judgment was never challenged, and was certified for collection against the defendants in Elkhart County, Indiana. Bell affirmed those representations to this court.

The defendant filed an Affidavit in response to Sun's summary judgment motion. In it he responded specifically to Bell's Affidavit. *See* R. 27. Hoffman described himself as a working manager at Elite RV, not a stockholder or an owner. He was not at the Louisville, Kentucky show when Bell met Elite RV employees. He stated that Neal Stafford was the Operations Manager and decision maker of the company and that Stafford always asked customers for a down payment when a coach was being repaired. Sun's 1998 Black Unit needed a lot of parts, he explained. However, because Country Coach was no longer in business, Elite could not obtain Country Coach parts. According to Hoffman, Prevost was a similar style of coach and its parts, when modified, were thought to work on Sun's Country Coach RVs. *See id.*, ¶ 3.

> The parts were going to be used off a Prevost coach, again because Country Coach parts were not available. Mr. Bell did not want the Prevost parts on his coach. The parts department kept searching for parts. I Donald Hoffman was not a manager over the financials or parts department of Elite RV. I have no knowledge of where the money was used. I was not an overseer of this department.

Id., ¶ 4. Hoffman declared he never ran Elite RV; he was a working manager, "working the floor."

Hoffman also pointed out that no wiring diagrams were available for the Country Coach RVs after the company went out of business, and for that reason they used the 1998 Black Unit "to compare where the burnt wiring was supposed to connect to." *Id.*, ¶ 6. However, their wire tracing led to more burnt wires above the fuel tank. Stafford informed Hoffman and the others that they had gotten approval to remove the fuel tank and to continue to repair the wiring. Hoffman said they explained to Bell that the process would take a while. He noted that Bell himself stated that it took eight months to trace the wires.

Hoffman declared that he didn't believe he had told Bell that the wiring repairs were completed, particularly because of the extent of the burnt wires. However, the parts department, not he, ordered parts, he said, and Hoffman knew that the only parts they had located were the Prevost parts that Bell did not want.

> The progress on Mr. Bell's coach was slowed significantly when Elite RV fell under financial hardship and Neal [Stafford] laid off many of the employees. I do not know if this information was ever relayed to Mr. Bell. Neal was supposed to be keeping in contact with him.

Id., ¶ 7. Hoffman signed the Affidavit and filed it with the court. The plaintiff did not submit a Reply.

DISCUSSION

As the court stated in its previous Memorandum of Decision, this court's review of a motion for summary judgment is governed by Rule 56 of the Federal Rules of Civil Procedure, made applicable in this court by Rule 7056 of the Federal Rules of Bankruptcy Procedure. The court renders summary judgment only if the record shows that "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056; *see Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The party moving for summary judgment bears the initial burden of "inform[ing] the . . . court why a trial is not necessary." *Modrowski v. Pigatto*, 712 F.3d 1166, 1168 (7th Cir. 2013).

If the moving party satisfies its initial burden, "the nonmovant must then 'make a showing sufficient to establish the existence of an element essential to that party's case.'" *Id.* (quoting *Celotex*, 477 U.S. at 322). Moreover, the nonmoving party "must 'go beyond the pleadings' (e.g., produce affidavits, depositions, answers to interrogatories, or admissions on file), *id.* at 324, to demonstrate that there is evidence 'upon which a jury could properly proceed to find a verdict' in her favor." *Modrowski,* 712 F.3d at 1169 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986)). Summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the

burden of proof at trial." *Celotex,* 477 U.S. at 322. If the party fails to respond to the motion, Rule 56(e) permits the court to "grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it." Fed. R. Civ. P. 56(e)(3); *see also Johnson v. Gudmundsson*, 35 F.3d 1104, 1112 (7th Cir. 1994).

In this case, the defendant did respond to the plaintiff's Second Amended Motion, and specifically to the Bell Affidavit, by providing his own Affidavit. The court therefore considers whether the plaintiff bore its initial burden of demonstrating the basis for its Motion pursuant to § 523(a)(2)(A) and § 523(a)(6) and of identifying evidence which shows that there is no genuine issue of material fact. *See Celotex*, 477 U.S. at 322. If the plaintiff is successful, the defendant then must set forth specific facts showing that there is a genuine issue for trial. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986).

The plaintiff first claimed its right to summary judgment pursuant to § 523(a)(2)(A) of the Bankruptcy Code. Under that statute, a debtor is not discharged "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 . . . .

11 U.S.C. § 523(a)(2)(A). To succeed under § 523(a)(2)(A), a plaintiff has the burden of proving by a preponderance of the evidence that the debt owed to it by the defendant was obtained by actual fraud, false pretenses, or misrepresentation. *See McClellan v. Cantrell*, 217 F.3d 890, 893-94 (7th Cir. 2000) (stating that fraud is not limited to misrepresentations and misleading omissions); *Matter of Bero*, 110 F.3d 462, 465 (7th Cir.1997) (setting forth burden of proof). The plaintiff must establish that (1) the defendant made a false representation or omission, which he either knew was false or made with such reckless disregard for the truth as to constitute willful misrepresentation; (2) the defendant acted with an intent to deceive or defraud the plaintiff; and (3) the plaintiff justifiably relied on the defendant's false representation to its detriment. *See*

In re Davis, 638 F.3d 549, 553 (7th Cir. 2011) (citing *Ojeda v. Goldberg*, 599 F.3d 712, 716-17 (7th Cir. 2010); *Matter of Maurice*, 21 F.3d 767, 774 (7th Cir. 1994)).

In his Affidavit, Bell declared that Hoffman gave reports to Bell that conflicted with the progress reports of Stafford and May and sent emails presenting quotes and asking for more money for shipments of parts. When Bell made his unannounced visit, Stafford told Bell that Hoffman ran the business and was to blame for the ordering inconsistencies. Bell accused Hoffman of the following false representations:

> 1. Hoffman emailed Bell that parts were ordered but not paid for; however, previously Hoffman and Stafford had reported that two skids of parts already had been delivered to Elite.
>
> 2. Hoffman (and Stafford and May) said the electrical repairs were going well and later were completed; however, no electrical work was completed on the 1998 Black Unit.
>
> 3. Hoffman said he used the wiring pattern from the Silver Unit to fix the Black Unit; however, the electrical wiring for the Black Unit was intentionally damaged by someone at Elite.

See R. 23, Ex. 1 at ¶¶ 13-17. Bell accused Hoffman, along with Stafford and May, of intentionally damaging the electrical wiring and of leaving one or both Units in great disrepair. He also asserted that "Stafford, Hoffman and May knowingly lied to me about the electrical work and repeatedly requested that I send more and more money to Elite." *Id.,* at ¶ 16. Finally, Bell claimed that the eleven completion dates were misrepresentations, since "Stafford, May and Hoffman knew that almost no work was done and the whole electrical system had been gutted." *Id.,* at ¶ 21.

Challenging Bell's Affidavit, the defendant responded that he was a working manager, not a decision maker or a manager of operations, parts, or finances. He also explained that Stafford, the company's decision maker, always requested a down payment on parts orders when RVs were being repaired. In addition, he informed the court that Country Coach was no longer in business, and for that reason Elite had no wiring manuals or parts for Sun's two RVs. However, Bell didn't want Prevost parts, he said. Hoffman also reported that there were many burned wires and that the progress of repairing the RVs slowed further when Elite began struggling financially and was required to lay off employees.

The court first finds that the plaintiff has affirmed that Hoffman (as well as Stafford and May) made false representations and lies; that he misrepresented that parts were on order with the intent of deceiving Bell so that Bell would pay more money for those parts; and that the plaintiff justifiably relied on the defendant's false representations to its detriment. However, Bell's declarations seldom focused on Hoffman's conduct alone to demonstrate that his own actions were fraudulent, that his own statements were lies, and that he personally intended to deceive the plaintiff. *See In re Kontrick*, 295 F.3d 724, 737 (7th Cir. 2002), *aff'd*, *Kontrick v. Ryan*, 540 U.S. 443, 124 S. Ct. 906, 157 L.Ed.2d 867 (2004) (stating that intent "is normally a question of fact and often not susceptible to summary judgment"). Moreover, Hoffman's Affidavit challenged Bell's assertions and presented a different, equally plausible perspective on the circumstances. For those reasons, the court finds that there are genuine issues of material fact concerning whether actual fraud was committed at all; whether Hoffman made misrepresentations to Bell knowing they were false or recklessly made; and whether Hoffman acted with an intent to defraud Sun. In addition, the affidavits and other record evidence do not make clear the intent of the parties at the time they entered into the contract, and that intent is crucial to determining whether fraud or breach of contract was established. *See In re Davis*, 638 F.3d at 554 (citing *United States ex rel. Main v. Oakland City University*, 426 F.3d 914, 917 (7th Cir. 2005) ("failure to honor one's promise is (just) breach of contract, but making a promise that one *intends* not to keep is fraud").

The court further determines that the defendant's responses to Bell's Affidavit raised material factual disputes concerning the alleged misrepresentations made by Hoffman. The defendant gave plausible replies to the plaintiff's allegations of misrepresentations and challenged any suggestion by the plaintiff that the defendant acted with an intent to deceive Sun. The court finds that there are genuine issues of material fact concerning the defendant's intent, issues that are best determined at a trial rather than on summary judgment. In fact, there are material issues concerning who made particular misrepresentations, when they were made, and whether they reflected the defendant's fraud and intent to deceive. There are also material

questions concerning whether Sun's reliance on Hoffman's false representations was justifiable. Consequently, the court finds that summary judgment cannot be granted under § 523(a)(2)(A). *See, e.g., In re Stover*, 2012 WL 4867407 at *4 (Bankr. S.D. Ind. Oct. 12, 2012) (finding that, "given the fact sensitive nature of the circumstantial evidence needed to prove intent," summary judgment should not be granted).

The plaintiff also seeks summary judgment under § 523(a)(6) of the Bankruptcy Code, which excepts from discharge any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." *See Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S. Ct. 974, 140 L.Ed.2d 90 (1998); *Jendusa-Nicolai v. Larsen*, 677 F.3d 320, 321-24 (7th Cir. 2012). The *Kawaauhau* Court concluded that "§ 523(a)(6)'s compass cover[ed] . . . only acts done with the actual intent to cause injury" and not "acts, done intentionally, that cause injury." *Id.* It then held "that debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." *Id.* at 64. To succeed under § 523(a)(6), then, a plaintiff must establish, by a preponderance of the evidence, these elements: "(1) an injury caused by the debtor (2) willfully and (3) maliciously." *First Weber Group, Inc. v. Horsfall*, 738 F.3d 767, 774 (7th Cir. 2013).

The court determines that the plaintiff cannot succeed on its § 523(a)(6) claim. First, it finds that the plaintiff's Complaint Objecting to Discharge of Debt did not allege a willful and malicious injury caused by Hoffman. In fact, the Complaint did not refer to any subsection of § 523(a). Count I, its only count, was based upon "Hoffman's misrepresentations, conversion and fraud, which acts caused damages to Sun." R. 1 at 3. Those allegations of Hoffman's conduct are most closely aligned with elements of § 523(a)(2)(A). Moreover, Count I simply described "acts, done intentionally, that cause injury," but not willful or malicious injury. Therefore it would fail under the *Kawaauhau* test described above. The court concludes that no § 523(a)(6) claim was raised in the Complaint, and it declines to consider a new legal theory raised in the Summary Judgment Motion that was not contained in the Complaint.

In any case, the record before the court cannot sustain a § 523(a)(6) claim. Only two intentional acts were charged. Bell declared that intentional damage was done to the Black Unit's electrical wiring, but it was done by "someone" at Elite, not by Hoffman specifically. Bell also pointed to an intentionally altered invoice sent to him, but it was sent by Stafford, not Hoffman. Neither Bell's Affidavit nor the other exhibits identified any intentional act or any willful and malicious injury done directly by Hoffman to Sun or its property. *See Kawaauhau*, 523 U.S. at 61 (stating that "nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury"). The allegations against Hoffman refer to false statements, not to willful and malicious damage done by him to Sun and its RVs. Therefore, having found neither a § 523(a)(6) claim in the Complaint nor a demonstration of the required factors for proving the nondischargeability of debt under § 523(a)(6), the court concludes that the plaintiff's § 523(a)(6) claim fails as a matter of law.

CONCLUSION

For the reasons presented in this Memorandum of Decision, the Second Amended Motion for Summary Judgment filed by Sun Enterprises, Inc., against Donald Wayne Hoffman is denied pursuant to 11 U.S.C. § 523(a)(2)(A) and § 523(a)(6). A trial limited solely to the plaintiff's § 523(a)(2)(A) claim will be set by separate order.

SO ORDERED.

/s/ HARRY C. DEES, JR.
Harry C. Dees, Jr., Judge
United States Bankruptcy Court