UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
DONALD EDWIN MAY and	)	CASE NO. 13-32459 HCD
SERITA MAY,	)	CHAPTER 7
	)	
DEBTORS.	)	
	)	
	)	
SUN ENTERPRISES, INC.,	)	
	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 13-3064
	)	
DONALD EDWIN MAY,	)	
	)	
DEFENDANT.	)	

Appearances:

Michael K. Banik, Esq., counsel for plaintiff, Banik & Renner, 217 South Fourth Street, Elkhart, Indiana 46516; and

Mark P. Telloyan, Esq., counsel for defendant, O'Brien & Telloyan, P.C., Post Office Box 449, South Bend, Indiana 46624-0449.

MEMORANDUM OF DECISION

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

Before the court is the Motion for Summary Judgment ("Motion") filed by the plaintiff Sun Enterprises, Inc. ("Sun" or "plaintiff"), against the chapter 7 defendant Donald Edwin May ("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. The defendant, by counsel, filed a Response to Sun's summary judgment motion. For the reasons given in this Memorandum of Decision, the court denies the plaintiff's Motion for Summary Judgment.[1]

[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).

BACKGROUND

In 2011 in the Circuit Court of Boone County, Commonwealth of Kentucky, the plaintiff brought suit against four defendants – Donald Edwin May (this debtor), Don Wayne Hoffman, 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.[3] 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 August 22, 2013, 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. May's actual fraud against Sun," R. 7 at 5, and under § 523(a)(6) on the ground that "Mr. May 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 sworn testimony in the Affidavit, the plaintiff insisted it presented undisputed facts demonstrating that the debtor's actions created a nondischargeable debt.

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

[3] In his Response, May stated that he had no knowledge of the Kentucky trial, since the Summons for the trial was sent to Elite RV, and May did not work there after June 1, 2011. He did not attend and was not represented at the state court trial by counsel. *See* R. 19 at 6.

Bell's Affidavit described the underlying circumstances. *See* R. 6, 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 Edwin May.[4] Bell declared that May, 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. May 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 representations and paid monies to Elite for that purpose. However, May and the others told Bell conflicting stories regarding the work for which he had contracted. In particular, Bell asserted, May 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 third instead. On January 14, 2011, however, May e-mailed Bell to tell him that the bottom third "was not painted the pattern agreed upon per the contract on 11/2/2010." *Id.* at 2-3, ¶ 12. On January 19, 2011,

[4] 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.

Hoffman e-mailed Bell a quote for $4,000.00 to fix the stripes they did incorrectly. 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 May 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. Neither Stafford nor May could not find any receipts for the parts, but Stafford explained that Hoffman must have used a credit card to pay for the parts.

Bell then described May's fraudulent representation to him:

> 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.

Id. at 3, ¶ 14. May 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 May 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. Bell did not state that May individually made those misrepresentations.

No other specific allegations were made about May. Bell reported that May and Stafford assured him that everything was fine but that they could not find the paperwork for the parts ordered. Stafford later sent an invoice with the company name marked out and with a list of parts for "Prevost" RVs instead of "Country Coach" RVs. Bell claimed that the invoice was "another false representation from Stafford," *id*. at 4, ¶ 18, and 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 May, Hoffman, and Stafford that they needed the initial payment to purchase the parts. May 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 May 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 a Response to Plaintiff's Motion for Summary Judgment, and supported it with his own Affidavit. *See* R. 19 and Ex. A. In the Response, he asserted that genuine issues of material fact and of law remain unresolved. He presented factual disagreements concerning his own role and actions, arguing that some events were misrepresented and that key facts were omitted. He also raised numerous legal challenges to the plaintiff's summary judgment motion.

May specifically stated that he was an employee of Elite RV, handling customer service; he worked for Elite 48 weeks, until June 1, 2011, and earned approximately $11,000. Although he described the many repairs done to Sun's RVs by the technicians at Elite, he said his customer service role was defined by answering the phone, tracking down information, and sending emails. He had nothing to do with painting RVs or sending out invoices, he stated. Moreover, he had no significant part in Bell's visit to Elite. May denied telling Bell that Sun's initial payment would be used to purchase RV parts, because he had nothing to do with the financial affairs of Elite. He also denied telling Bell that the wiring was completed, but admitted that he may have made a "good-faith prediction" that the wiring repairs would be finished by Wednesday, "based on the information he was given by others." *Id.* at 6. However, he insisted that he did not intentionally damage the wires or knowingly lie about the condition of the RVs.

The defendant also challenged the reasonableness of the plaintiff's reliance on Elite RV's services. He described the condition of the 1997 Silver Unit, when it arrived at Elite: It had "no front cap, no windshield, no entrance door, extensive structural damage, and a bent axle." *Id.* at 7. May claimed it was too big a job for Elite. According to May, the plaintiff "should have been aware that it would take more

money to fix it than provided for in the contract." *Id.* He then argued that there were unresolved issues of material fact that should lead the court to deny the plaintiff's summary judgment motion.

After pointing out the plaintiff's failure to plead the § 523(a)(2)(A) standard of proof properly, its failure to plead fraud with particularity, and possible service of process issues, May challenged Sun's commingling of the actions of three individual employees and their employer, a corporate entity, in order to prove the fraudulent conduct and liability of each individual, jointly and severally. The defendant then asked the court to deny the plaintiff's Motion for Summary Judgment and to set the matter for trial. The plaintiff did not reply, and the court took the matter under advisement.

DISCUSSION

The plaintiff's Motion for Summary Judgment on its Complaint seeks a judgment that the debt at issue is nondischargeable under § 523(a)(2)(A) and (a)(6) of the Bankruptcy Code. 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 moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. *See Celotex*, 477 U.S. at 323. If the moving party satisfies its initial burden, then the nonmoving party must "go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). The court neither weighs the evidence nor assesses the credibility of witnesses. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 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.

In this case, the plaintiff claimed that May's debt to Sun was excepted from his discharge as a matter of law, and the defendant responded that there were genuine issues of material fact and of law which required a trial. When challenging a debtor's right to discharge a debt, "[p]rinciples of bankruptcy jurisprudence dictate that exceptions to discharge are to be construed strictly against a creditor and liberally in favor of the debtor." *In re Pawlak*, 467 B.R. 462, 468 (Bankr. W.D. Wis. 2012) (citing *In re Chambers*, 348 F.3d 650, 654 (7th Cir. 2003); *In re Scarlata*, 979 F.2d 521, 524 (7th Cir. 1992)). In order to succeed under § 523(a), the party objecting to the discharge of the debt bears the burden of proof by a preponderance of the evidence. *See Grogan v. Garner*, 498 U.S. 279, 291, 111 S. Ct. 654, 112 L.Ed.2d 755 (1991).

The court therefore considers whether the plaintiff bore its initial burden of demonstrating the basis for its Motion under § 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 323. 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 May himself emailed Bell to inform him that the bottom third of the Black Unit had not been painted in the pattern Bell had requested. May also advised Bell that the parts had been ordered but that Bell needed to sent more money, perhaps $10,000. May was also one of several Elite employees (including Stafford and Hoffman) who kept requesting more payments for parts, who assured Bell that the work was going well, and who told him the electrical wiring on the Black Unit had been completed. Bell also accused "someone" of intentionally damaging the wires on the Black Unit.

In his Response, May denied telling Bell that his down payment would be used to purchase parts for the two Sun RVs or that the electrical wiring repair was finished. He also insisted that he didn't deliberately damage the wires or knowingly lie about the condition or progress of the repairs. He stated that he was a customer service representative who sent emails, answered the phone, and tracked down information.

The court finds that the defendant, as nonmovant, by his Affidavit and references to evidence on file, designated specific facts showing that there are genuine issues for trial. *See* Fed. R. Civ. P. 56(c)(4). The defendant, by declaration, challenged the plaintiff's allegations that he made a false representation or willful misrepresentation intending to deceive Sun. He also questioned whether the plaintiff could claim it justifiably relied on the defendant's false representations. The court finds that the plaintiff has not succeeded in proving that there is no genuine issue of material fact under § 523(a)(2)(A).

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 May. In fact, the Complaint did not refer to any subsection of § 523(a). Count I, its only count, was based upon "May's misrepresentations, conversion and fraud, which acts caused damages to Sun." R. 1 at 3. Those allegations of May'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 May specifically. Bell also pointed to an intentionally altered invoice sent to him, but it was sent by Stafford, not May. Neither Bell's Affidavit nor the other exhibits identified any intentional act or any willful and malicious injury done directly by May 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 May 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 Motion for Summary Judgment filed by Sun Enterprises, Inc., against Donald Edwin May 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