

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

ENTERED

FEB 28 '02

IN RE:

David M. Harrelson and wife,
Kami W. Harrelson,

Debtors.

Case No. 00-12939C-7G

U.S. Bankruptcy Court
Greensboro, NC
AJR

Beverly Wall Sulek,

Plaintiff,

v.

Adversary No. 01-2015

David M. Harrelson and
Kami W. Harrelson,

Defendants.

MEMORANDUM OPINION

This adversary proceeding came before the court on February 5, 2002, for trial. Thomas B. Kakassy appeared on behalf of the plaintiff and Jason Knight and Jeffrey P. Farran appeared on behalf of the defendants.¹

NATURE OF PROCEEDING

This is a dischargeability proceeding brought under § 523(a)(2)(A) of the Bankruptcy Code based upon alleged fraud on the part of the defendant that occurred while the plaintiff and

¹Although Kami W. Harrelson is named as a defendant, plaintiff's evidence was directed only against David W. Harrelson and no showing of any grounds for a dischargeability claim against Kami W. Harrelson were presented by the plaintiff. This action therefore is being dismissed as to Kami W. Harrelson without further discussion, and references in this opinion to "defendant" refer only to David M. Harrelson.

defendant were engaged to be married. The claim involves the purchase of a residence by the defendant. The plaintiff alleges that by representing that he would transfer her a half interest in the residence following the closing, the defendant induced plaintiff to assume debt so that defendant could qualify for the loan needed to purchase the residence. Plaintiff alleges that although she asked the defendant to transfer an interest in the residence to her several times following the closing, he never did so. When the engagement of the parties ended in July of 1997 and the plaintiff moved from the residence, the residence was still in defendant's name and no interest in the residence was ever conveyed to the plaintiff. The fraud alleged by the plaintiff is that the defendant never intended to deed her an interest in the residence and that his promise to do so was made with the intent to deceive the plaintiff. Based upon such conduct, the plaintiff alleges that she has a claim against the defendant that is nondischargeable under § 523(a)(A)(2).

FACTS

The plaintiff and defendant met in June or July of 1995. Both were unmarried at the time. They started dating in August of 1995. In November of 1995, the plaintiff and defendant began living together in an apartment in Greensboro. After approximately six months, plaintiff and defendant moved to Winston-Salem where they shared an apartment. In May of 1996, the defendant proposed

marriage and the parties became engaged. During this period both parties were employed and in February of 1996, they opened a joint bank account and thereafter deposited their pay checks into the joint account and paid their expenses from that account.

In June of 1996, plaintiff and defendant began to discuss the purchase of a home. It was decided that the defendant would apply for the loan needed to purchase the home. In order to improve defendant's financial statement, the plaintiff used her credit cards to payoff approximately \$6,600.00 of defendant's credit card and other debt. Defendant thereafter applied for and obtained a mortgage loan of \$131,100.00.

On January 31, 1997, the defendant closed on the purchase of a residence located in Waterford Meadow subdivision in Kernersville, North Carolina. The residence was one that the parties had agreed to purchase from Fortis Homes pursuant to a purchase agreement that both the plaintiff and the defendant had signed on September 25, 1996. The purchase price of the home was \$138,000.00. The \$7,610.00 required for the down payment and closing costs was paid from the parties' joint account. The \$131,100.00 mortgage loan was in defendant's name alone and the deed to the home also was to the defendant alone.

Shortly after the closing the plaintiff and defendant moved into the newly purchased home. Various appliances and accessories for the home were purchased by the plaintiff. The cost of these

items and all but one of the monthly payments on the mortgage were paid for by checks drawn on the joint account. During the period when these payments were made both parties were depositing their pay checks into the joint account. The parties lived together in the home for approximately six months until July or August of 1997. At that point, the parties "cut ties" and the plaintiff moved from the residence. At that point the residence was still in the defendant's name alone. Following the split up of the parties, the defendant obtained a second mortgage on the residence and used the loan proceeds to pay off various debts. However, according to the plaintiff, only \$3,000.00 of the debt that she had assumed was paid by the defendant. When defendant filed his Chapter 7 case, he still owned the residence and it remained subject to the first and second mortgages which secured indebtedness that exceeded the value of the residence.

DISCUSSION

Section 523(a)(2)(A) is operative where there has been "false pretenses, a false representation, or actual fraud" on the part of the debtor. Generally, the elements which must be established in order to prevail on a claim under § 523(a)(2)(A) are: (1) that the debtor made representations; (2) that at the time of making the representations, the debtor knew they were false; (3) that the debtor made such representations with the intention and purpose of deceiving the creditor; (4) that the creditor relied on the

representation; and (5) that the creditor sustained a loss as a result of that reliance. E.g. Booker, 165 B.R. 164 (Bankr. M.D.N.C. 1994); In re Showalter, 86 B.R. 877 (Bankr. W.D. Va. 1988); In re Criswell, 52 B.R. 184 (Bankr. E.D. Va. 1985). In order to prevail, a plaintiff must prove these elements only by a preponderance of the evidence. See Combs v. Richardson, 838 F.2d 112, 116 (4th Cir. 1988).

The representation alleged by the plaintiff in the present case is that prior to the purchase of the residence, the defendant represented that he would transfer an interest in the residence to the plaintiff. While the plaintiff may have assumed that an interest would be deeded to her, the plaintiff's testimony failed to show that any such representation was made by the defendant before he acquired the residence. Plaintiff thus failed to establish one of the essential elements of her claim under § 523(a)(2)(A).

Plaintiff also failed to show that the defendant had any intention of misleading or deceiving the plaintiff when he proposed to the plaintiff or when the residence was acquired. To the contrary, the evidence tended to show that when the residence was selected and purchased the parties had been living together for more than a year and were enjoying a good relationship and that both of them anticipated and intended that they would be married and reside in the residence permanently as a married couple. The

parties, in fact, did move into the residence and did live there for six months, apparently enjoying a satisfactory relationship for most of that period and continuing to plan for their wedding. Unfortunately, the relationship foundered, the engagement was terminated and the parties went their separate ways. As might be expected, the parties disagree about the cause of the breakup. The plaintiff maintains that the defendant became involved with another woman, while the defendant says that the plaintiff's unreasonable jealousy and possessiveness caused the split. However, the fact that the breakup occurred, even if caused by the defendant, is insufficient to establish that the defendant secretly intended to mislead and deceive the plaintiff seven months earlier when the parties were happily engaged to be married. Moreover, while defendant's refusal to deed an interest to plaintiff following the breakup may indicate that the defendant is not trustworthy and lacks a sense of fairness, it does not establish fraud on his part.

Having failed to establish a false representation on the part of the defendant or that the defendant had the intention of deceiving and misleading the plaintiff when he proposed to her or at the time that the residence was acquired, the plaintiff is not entitled to relief under § 523(a)(2)(A) of the Bankruptcy Code. The result is that any claim that the plaintiff has against the defendant arising out of the purchase of the residence and plaintiff's expenditures after the residence was purchased are

subject to the discharge which the defendant will receive in his Chapter 7 case. Accordingly, a judgment will be entered contemporaneously with the filing of this memorandum opinion dismissing this adversary proceeding with prejudice.

This 27th day of February, 2002.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

ENTERED

FEB 28 '02

U.S. Bankruptcy Court
Greensboro, NC
AJR

IN RE:)
)
David M. Harrelson and wife,) Case No. 00-12939C-7G
Kami W. Harrelson,)
)
Debtors.)
)
_____)
)
Beverly Wall Sulek,)
)
Plaintiff,)
)
v.) Adversary No. 01-2015
)
)
David M. Harrelson and)
Kami W. Harrelson,)
)
Defendants.)
)

JUDGMENT

In accordance with the memorandum opinion filed contemporaneously herewith, the relief sought by the plaintiff is denied and this adversary proceeding is dismissed with prejudice.

This 27th day of February, 2002.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge