

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Roanoke Division

IN RE: DENNIS E. WHITE)	
LAURA BEATRIZ WHITE)	
)	
Debtors)	Chapter 7
)	Case No. 07-71909
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)	
CARL A WILLIAMS)	
KIMBERLY KRISTIAN WILLIAMS,)	
)	
Plaintiffs,)	
)	
v.)	Adversary Proceeding
)	08-07011
DENNIS E. WHITE)	
LAURA BEATRIZ WHITE)	
)	
Defendants.)	

DECISION AND ORDER

At Roanoke in said District this 21st day of August, 2008:

This matter is before the court on the Defendants' motion to dismiss for failure to state a claim upon which relief can be granted. The court has reviewed the arguments of both parties and for the reasons stated below, the Defendants' motion to dismiss is GRANTED in part.

BACKGROUND

Dennis E. White and Laura Beatriz White (herein "Defendants"), filed for bankruptcy protection under Chapter 7 of the United States Bankruptcy Code on November 30, 2007. On March 1, 2008, Carl A. Williams and Kimberly Kristian Williams (herein "Plaintiffs") filed the above-captioned adversary proceeding to determine dischargeability of certain debts

pursuant to 11 U.S.C. § 523(a)(2), (a)(4), and (a)(6). (Compl. ¶ 27). The alleged debts claimed by the Plaintiffs arise out of renovation and construction services contemplated in an agreement reached between the Defendants and Plaintiffs. The Plaintiffs pray for a determination that damages resulting from the Plaintiffs' causes of action listed as counts one through five in the complaint be determined nondischargeable pursuant to section 523(a).

The Defendants subsequently filed this motion to dismiss Counts I, II, and III for failure to state a claim upon which relief can be granted arguing that the causes of action alleged by the Plaintiffs are not nondischargeable under section 523(a) of the Bankruptcy Code.

DISCUSSION

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) should be granted only if, “after accepting all well-pleaded allegations in the plaintiff’s complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff’s favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief.” Edwards v. City of Goldsboro, 178 F.3d 231, 244 (4th Cir. 1999) (internal quotations and citations omitted).

The Defendants request that counts I, II, and III be dismissed for failure to state a claim upon which relief can be granted.

A. Count I (Breach of Contract)

Count I of the complaint alleges that the Defendants breached their contract with the Plaintiffs for renovation and construction services by failing to meet obligations under the contract, failing to meet deadlines, and making additional misrepresentations to the Plaintiffs to

induce their continued reliance. (Compl. ¶ 31.)

Debt arising from a simple breach of contract is not excepted from discharge pursuant to either section 523(a)(2), (a)(4), or (a)(6).

A simple breach of contract claim will not support a determination of nondischargeability pursuant to section 523(a)(2)(A).¹ It is well established that “[a] breach of contract does not by itself, establish misrepresentation for purposes of 11 U.S.C. § 523(a)(2)(A). However, if a debtor enters into a contract with no intent to fulfill the terms of the contract and later defaults, the contract may provide a basis for a nondischargeability claim based on fraud.” Parker v. Grant (In re Grant), 237 B.R. 97, 112-13 (Bankr. E.D. Va. 1999). The Plaintiffs’ complaint includes separate counts for a breach of contract claim and a fraud claim.

Section 523(a)(4) denies the discharge with regard to any debt “for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.” Again, a simple breach of contract in itself does not amount to fraud. Claims of embezzlement and larceny arise from tortious conduct, not a breach of contract. Therefore, a breach of contract will not support a determination of nondischargeability under section 523(a)(4).

Finally, a breach of contract claim is insufficient for a finding of nondischargeability pursuant to section 523(a)(6). The Court of Appeals for the Ninth Circuit has explained that, “[i]t is well settled that a simple breach of contract is not the type of injury addressed by § 523(a)(6). An intentional breach of contract is excepted from discharge under § 523(a)(6) only when it is accompanied by malicious and willful tortious conduct.” Snoke v. Riso (In re Riso), 978 F.2d 1151, 1154 (9th Cir. 1992).

¹ Section 523(a)(2)(A) is the only relevant subsection of section 523(a)(2) to this matter.

Because a simple breach of contract claim will not support a determination of nondischargeability pursuant to section 523(a)(2)(A), (a)(4), or (a)(6), the breach of contract count in the Plaintiffs' complaint is dismissed as failing to state a claim upon which relief can be granted.

B. Count II (Fraud)

Count II of the Plaintiffs' complaint alleges that the Defendants knowingly made false statements with the intention of inducing the Plaintiffs to enter into a contract with Defendants. (Compl. ¶ 53). This count also alleges that the Defendants' conduct was wanton, willful, and reckless and in disregard for the Plaintiffs' rights. (Compl. ¶ 57). The Defendants argue that Count II alleges nothing more than a breach of a written contract and should be dismissed as being dischargeable.

Bankruptcy Code section 523(a)(2)(A) provides that a debtor will not receive a discharge from any debt "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) (2006). In Marunaka Dainichi Co. v. Yamada (In re Yamada), 197 B.R. 37 (Bankr. E.D. Va. 1996), the court provided that:

The elements for finding a debt nondischargeable under § 523(a)(2)(A) are: (1) the debtor made misrepresentations, (2) at the time they were made, the debtor knew the representations were false, (3) the debtor made the misrepresentations with the intention and purpose of deceiving the creditor, (4) the creditor relied on the representations, and (5) the creditor sustained loss and damage as the

proximate result of the misrepresentations.

Id. at 39. The fact that these elements may happen to arise from the act of entering into a contract does not necessarily make any claim arising therefrom a breach of contract claim. The court in Yamada, for instance, found sufficient facts to except from discharge under section 523(a)(2)(A) a debt created when the “debtor obtained 32,500,000 yen (used to purchase the Pennsylvania Avenue real estate) from the plaintiff by signing the documents comprising the agreement.” Id. After an analysis of the elements required for a finding of nondischargeability under section 523(a)(2)(A), the court found that “[b]ecause debtor has not overcome the inference that he intended to deceive plaintiff when he entered into the agreement, the court finds that all of the elements of section 523(a)(2)(A) have been met.” Id. at 40.

Similar to the facts in Yamada, the Plaintiffs in this case have alleged that the Defendants intended to deceive the Plaintiffs when they entered into the contract by making knowingly false statements regarding the quality of the work to be done, the time frame for the work to be done, and the licensure of the contractors doing the work, among other things. (Compl. ¶¶ 17, 25). Furthermore, the Plaintiffs in this case have alleged the remaining elements necessary for finding a debt nondischargeable under section 523(a)(2)(A): the fact that the Plaintiffs relied on the Defendants’ representations and the fact that the Plaintiffs sustained damages as a proximate result. Therefore, taking the Plaintiffs’ well-pleaded allegations as true and drawing all reasonable inferences from those facts in the Plaintiffs’ favor, it appears to the court that the Plaintiffs could establish the elements necessary for a finding of nondischargeability pursuant to section 523(a)(2)(A) under their fraud count. With regard to count II of the Plaintiffs’ complaint, the Defendants’ motion is denied.

C. Count III (Violation of the Virginia Consumer Protection Act)

Count III of the complaint alleges that the Defendants violated provisions of the Virginia Consumer Protection Act in their transactions with the Plaintiffs. (Compl. ¶¶ 58 - 65). A violation of a state consumer protection act is not per se nondischargeable under section 523(a)(2), (a)(4), or (a)(6). If the elements necessary for a finding of nondischargeability pursuant to section 523(a)(2), (a)(4), or (a)(6) are present in what amounts to a violation of the state's consumer protection act, then the debt arising from the state consumer protection act violation could be determined nondischargeable. Because count III of the Plaintiffs' complaint alleges sufficient facts under the standard applied to a motion to dismiss to support actual fraud, false misrepresentation, and willful and malicious injury in the Defendants' alleged violations of the Virginia Consumer Protection Act, the Defendants' motion to dismiss count III is denied.

For the reasons discussed above, it is:

ORDERED:

That the Defendants' motion to dismiss Plaintiffs' counts II and III is DENIED, and the Defendant's motion to dismiss Plaintiffs' count I is GRANTED. It is

FURTHER ORDERED:

That a pre-trial conference in the above-captioned adversary proceeding will be held on September 4, 2008 at 3:00 p.m. in the Bankruptcy Courtroom, Second Floor, Old Federal Building, Corner of Second Street and Church Avenue, Roanoke, Virginia.

Copies of this order are directed to be sent to counsel for the Plaintiffs, Darren T. Delafield, Esquire; and to counsel for the Defendants, Michael Dean Hart, Esquire.

