UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

PAUL FANELLI — CASE NO. 99-66115

Debtor

JOHN W. NEWTON, d/b/a
MOHAWK VALLEY TREE EXPERTS

Plaintiff

vs. — ADV. PRO. NO. 00-80021A

PAUL FANELLI

Defendant

APPEARANCES:

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Attorneys for Plaintiff
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Of Counsel

GUSTAVE J, DE TRAGLIA, JR., ESQ.[1]
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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

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[1] Attorney DeTraglia represented the Debtor/Defendant throughout the adversary proceeding and up to the initial date of trial, July 19, 2000. Attorney DeTraglia indicated that, on that date, he had discovered a conflict of interest that would preclude him from participating in the trial. He requested that the trial be adjourned to allow the Debtor/Defendant to retain new trial counsel. The Court granted Attorney DeTraglia's request to withdraw and re-scheduled the trial for September 13, 2000. The Debtor/Defendant did not retain new counsel and on the adjourned trial date, he advised the Court that he would proceed pro se.

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

John W. Newton d/b/a Mohawk Valley Tree Experts ("Newton") commenced the instant Adversary Proceeding against the Debtor, Paul Fanelli ("Debtor"), pursuant to Sections 727(a)(2)(A), 727(a)(2)(B) and 523(a)(2)(A) of the U.S. Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code") on February 14, 2000. In his adversary complaint ("Complaint") Newton generally objects to the Debtor's discharge in bankruptcy and more particularly objects to the discharge of the Debtor's alleged liability arising from a contract dispute between Newton and the Debtor, as more fully discussed *infra*. The Debtor filed answers on February 22, 2000 and March 8, 2000. Following discovery, a trial was conducted before this Court on September 13, 2000, in Utica, New York, after which the parties were afforded the opportunity to submit post-trial memoranda of law. On October 20, 2000, the Debtor submitted a post-trial Memorandum of Law ("Debtor's Memo") at which time the matter was taken under submission for decision.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this Adversary Proceeding pursuant to 28 U.S.C. § 1334(b) and 28 U.S.C. § 157(a), (b)(1), (b)(2)(B), (I), (J) and (O).

FINDINGS OF FACT

The dispute herein centers around the timing of an oral subcontract ("Newton Contract"). The Debtor, in his capacity as a general contractor, hired Newton's tree removal service to clear trees on an unimproved parcel of land owned by third party Joseph Carbone ("Carbone"). While the Debtor and Newton generally agree on the overall circumstances surrounding the origination of the Newton Contract, the Debtor and Newton disagree on the date of its origination, the amount of consideration, the dates of performance and the alleged breach of the same.

The Debtor and Carbone entered into a written contract ("Carbone Contract") dated October 15, 1999, for the cutting and clearing of trees on an unimproved parcel of land owned by Carbone ("Carbone lot"). *See* Debtor's Exhibit 1. As consideration for the Carbone Contract, Carbone was to pay the Debtor $1,750 as a down payment to commence work, $875 once the initial tree removal was complete and the balance of $875 when all of the work was complete for a total contract price of $3,500. A notation in the Debtor's handwriting on the face of the Carbone Contract indicates that the Debtor received an initial cash down payment of $1,750 from Carbone on October 26, 1999. At some point thereafter, the Debtor met with Newton at the Carbone lot and entered into an oral agreement, namely the Newton Contract, whereby Newton would be "subcontracted" to perform certain of the Debtor's responsibilities under the Carbone Contract. The Debtor and Newton agree that oral contracting has been the customary and preferred method of doing business between the parties for more than ten years.

On November 16, 1999, the Debtor filed for protection under Chapter 7 of the Code. Absent from the schedules filed with the Debtor's original petition was any reference to Newton, the Newton Contract, Carbone or the Carbone Contract. On January 13, 2001, however, the Debtor amended his schedules to include "John Newton d/b/a Mohawk Valley Tree Expt." as a

creditor holding an unsecured, non-priority claim in the amount of $3,000 incurred as "balance due on account."[2] Debtor's Amended Schedule F. Newton did not file a proof of claim in the Debtor's case.

The Debtor's Account

At trial, the Debtor testified that on October 9, 1999, he orally agreed with Carbone to perform the work that was later memorialized as the Carbone Contract. It was the Debtor's testimony that having secured the oral agreement from Carbone, the Debtor sought out Newton over the weekend of October 9, 1999, to secure his services in performing the agreed-to tree and brush removal. The Debtor testified that on or around the second weekend of October 1999 he met with Newton at the Carbone lot, described the lot clearing project and agreed to pay Newton to perform the tree and brush clearing required under the Carbone Contract. The Debtor's testimony alleged that after he and Newton entered into the Newton Contract, the Debtor and Carbone memorialized the Carbone Contract on October 15, 1999. Furthermore, the Debtor testified that on October 26, 1999, Carbone paid the Debtor $1,750 in cash as the down payment to begin performance of the Carbone Contract. The Debtor further testified that on that same date he paid Newton the $1,750 received from Carbone so that Newton would begin performance of the Newton Contract.

According to the Debtor's testimony, performance of the Newton Contract began on October 29, 1999 and continued over the weekends of October 29 and 30, 1999, November 5 and

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[2]The Debtor amended his current income schedule on January 25, 2001 and on February 9, 2001 for purposes that are not germane to the instant Proceeding.

6, 1999 and November 12 and 13, 1999.[3] According to the Debtor's testimony, he refused Newton's request for the balance due under the Newton Contract on November 13, 1999, because performance of the Newton Contract was not complete on that date.[4] The Debtor testified that Newton returned to work on the Carbone lot on November 20, 1999, several days postpetition, and once again requested payment of the balance due on the Newton Contract. At this time, the Debtor testified he requested proof from Newton that Mohawk Valley Tree Experts was covered by a contractors' insurance policy and when Newton failed to produce such proof, the Debtor asked Newton to cease working on the Carbone lot. According to the Debtor's testimony, on or about November 21, 1999, Carbone repudiated the Carbone Contract upon determining that the lot clearing was not proceeding as expected and hired another contractor to complete the work.[5]

Newton's Account

Darla Newton, Newton's wife and the office manager for his tree removal service, testified at trial that the Debtor first contacted Newton's business office in November 1999 regarding the work to be subcontracted on the Carbone lot. Newton contends that thereafter on November 19, 1999, three days after the Debtor filed bankruptcy, he and the Debtor met at the

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[3]The Court notes that in his Memorandum of Law submitted on October 20, 2000, the Debtor asserts that Newton began work on the Carbone lot on October 24, 1999. Debtor's Memo, at ¶ 8.

[4]The Court notes that in his Memorandum of Law submitted October 20, 2000, the Debtor asserts that Newton requested the balance due during several meetings between "November 1st - November 4th or 5th 1999." Debtor's Memo, at ¶¶ 12, 13.

[5]The Court notes that in his Memorandum of Law submitted on October 20, 2000, the Debtor asserts that Carbone "visits site on....November 6th 1999, and the morning of November 7th 1999. Upon inspection of the building lot Mr. Carbone decides not to pay any additional money to Defendant [Debtor] or Plaintiff [Newton]." Debtor's Memo, at ¶¶ 14, 15.

Carbone lot, entered into the Newton Contract, and that pursuant to its terms, the Debtor agreed to pay Newton $3,500 upon completion of the work, specifically, tree cutting and brush mulching. Newton testified that he understood total consideration for the Carbone Contract to be $7,000, rather than $3,500, and that he would receive one-half of this sum upon completion of the Newton Contract.

Newton testified at trial that he commenced work at the Carbone lot on Friday, November 26, 1999, and continued over that and the following two weekends until the Newton Contract was generally completed. At trial, Newton specifically recalled the commencement date of performance because it was the day after Thanksgiving 1999. Newton's wife corroborated Newton's testimony as to the date performance of the Newton Contract had begun. On direct examination, Darla Newton specifically recalled hosting Larry Brooks, a laborer employed by Newton, Brooks' fiancé and Brooks' child for Thanksgiving dinner and Brooks, his fiancé and child spending the night at the Newton household so that Newton and Brooks could begin clearing the Carbone lot early the following day.

Newton additionally recalled continuing the clearing of the Carbone lot the following weekend, December 3 and 4, 1999. Newton testified that he specifically recalled doing so because he was working on the Carbone lot on December 3, 1999, a date he recalls because it was his wife's birthday. Darla Newton's testimony also recounted that Newton had worked on the Carbone lot during the weekend of her birthday. Darla Newton testified at trial that she specifically recalled Newton working on the Carbone lot that weekend "because it was my birthday and we went out to dinner and we had to go home early because he [Newton] had to work on the [Carbone] job..." *See* Testimony of Darla Newton, *John W. Newton d/b/a Mohawk*

Valley Tree Experts v. Fanelli (In re Fanelli), Ch. 7 Case No. 99-66115, Adv. Pro. No. 00-80021 (Bankr. N.D.N.Y. September 13, 2000, Gerling, C.J.).

James Dean ("Dean"), an acquaintance of both Newton and the Debtor, testified at trial that as of December 1999 Newton was involved in a tree clearing project on what was described as the Carbone lot.[6] Dean further testified on cross-examination by the Debtor that during either the first or second week of December he had gone to the Carbone lot, inspected Newton's work and spoke to Newton at the work site. Dean testified that upon surveying the Carbone lot, Newton's truck and wood chipper were at the work site and it appeared as though "they [Newton and his laborers] had just gotten done doing [the tree and brush clearing]...". *See* Testimony of James Dean, *John W. Newton d/b/a Mohawk Valley Tree Experts v. Fanelli (In re Fanelli)*, Ch. 7 Case No. 99-66115, Adv. Pro. No. 00-80021 (Bankr. N.D.N.Y. September 13, 2000, Gerling, C.J.).

Newton testified that he and three laborers, namely "Timmy Sorrell, Mike East, Larry Brooks," completed performance of the Newton Contract on Saturday, December 11, 1999. *See* Testimony of John W. Newton, *John W. Newton d/b/a Mohawk Valley Tree Experts v. Fanelli (In re Fanelli)*, Ch. 7 Case No. 99-66115, Adv. Pro. No. 00-80021 (Bankr. N.D.N.Y. September 13, 2000, Gerling, C.J.). At that time, Newton contends that the Debtor began evading him in his attempt to secure payment for the work completed at the Carbone lot. Both Newton and his wife testified that as of the date of trial, Newton had not been paid for the work performed and Newton had not spoken to the Debtor since Friday, December 10, 1999, the day before the

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[6]At trial the parties generally referred to the Carbone lot as "the property on Stonegate Road in New Hartford."

Newton Contract was allegedly completed.

ARGUMENTS

Newton argues that the Debtor's liability resulting from the Newton Contract is non-dischargeable on three grounds. First, Newton contends that the Newton Contract is a postpetition contract and is, thus, ineligible for discharge through the Debtor's bankruptcy. Second, Newton asserts that the Debtor has "masterminded" a scheme whereby the Debtor purposefully entered into the Newton Contract, postpetition, with the intent of claiming it as a prepetition liability and secreting the cash paid to him by Carbone from the Court, the Chapter 7 trustee and Newton. *See* Complaint, at ¶¶ 9-18. Newton asserts that the Debtor's conduct in procuring the Newton Contract amounts to fraud and is thus nondischargeable pursuant to Code § 727(a)(2)(A) and/or (B). Finally, Newton maintains that since the Debtor concealed the filing of his bankruptcy petition and represented an ability to pay Newton at the time he procured the Newton Contract, the liability is nondischargeable pursuant to Code § 523(a)(2)(A).

The Debtor contends that the liability resulting from the Newton Contract was incurred prepetition, was not the result of fraud and is dischargeable as an unsecured, non-priority claim in the Debtor's bankruptcy case. The Debtor contends that Newton's assertion that this is a postpetition contract is simply an attempt to enable Newton to pursue a claim against the Debtor outside the protections of the bankruptcy process.

DISCUSSION

Pursuant to Code § 727(b), a Chapter 7 discharge discharges a debtor from debts that arose prior to the date of the order for relief.[7] *See* Code § 727(b). "Thus, the initial inquiry must be addressed to the debt which is sought to be declared nondischargeable by the Plaintiff...". *Resolution Trust Corp. v. Haught (In re Haught)*, 120 B.R. 233, 235 (Bankr. M.D. Fla. 1990). This is necessarily so because "if a creditor seeks to have a debt which arose postpetition declared to be nondischargeable...the question is moot...since, as noted, only debts which arose prior to the commencement of the case are discharged by virtue of § 727(b) of the Bankruptcy Code." *Id., citing In re Peltz*, 55 B.R. 336 (Bankr. M.D. Fla. 1985); *see e.g., In re Hicks*, 144 B.R. 419, 420 (Bankr. E.D. Ark. 1992)("Debts incurred after the date of the filing of the chapter 7 petition, although they may appear on a list of creditors, are not discharged."); *In re White*, 133 B.R. 206, 209 (Bankr. S.D. Ind. 1990)("[T]he Court notes that a discharge under Chapter 7 discharges a debtor only from debts that arose prepetition or that are deemed to have arisen prepetition. Thus, most claims arising postpetition are not discharged in Chapter 7, even if they arose during the pendency of the bankruptcy proceeding.")(citation omitted); *In re Moffitt*, 146 B.R. 364, 370 (Bankr. S.D. Tex. 1992)("Of course if the transaction that created the debt occurred post-petition the obligation would not be discharged by a later discharge in a Chapter 7 case. The discharge relates to obligations in existence at the date of the filing of the case, in a Chapter 7 case. Thus, if the activity creating the...[liability] occurred post-filing, the obligation arising therefrom would simply be not discharged. This is different from being

[7]"A voluntary case under a chapter of this title is commenced by the filing...of a petition under such chapter...[and t]he commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter." Code § 301

non-dischargeable.").

In the instant case, a determination of whether the Newton Contract is a prepetition liability of the Debtor subject to discharge or a postpetition liability not subject to discharge turns on the credibility of the witnesses, testimony, and evidence presented at trial. It is this Court's responsibility to weigh such credibility and determine, in the first instance, when the Newton Contract arose. *See generally, Martin v. Key Bank of New York, N.A.*, 208 B.R. 799, 804 (N.D.N.Y. 1997, Scullin, J.), *cert. denied*, 519 U.S. 1150, 117 S. Ct. 1083 (1997)("[D]eterminations of credibility are not only one of the trial court's responsibilities, but perhaps that court's most important responsibility, 'because the trial judge is in the best position to evaluate a witness's demeanor and tone of voice as well as other mannerisms that bear heavily on one's belief in what the witness says.'"), *quoting Donato v. Plainview-Old Bethpage Cent. Sch. Dist.,* 96 F.3d 623, 634 (2d Cir. 1996). The inescapable truth relative to the instant Proceeding is that both the Debtor and Newton have presented to the Court a factual scenario which is most pecuniarily beneficial to that party's respective interests, and the Court must determine which scenario has been most credibly presented. To this end, the Court finds that the Newton Contract was, in fact, a postpetition contract and is not subject to discharge under Code § 727.

The Court found Newton's and Darla Newton's testimony at trial regarding the timing of the events to be an accurate and more likely account of the circumstances surrounding the creation of the Newton Contract. Both Newton and his wife related the dates of performance under the contract to specific dates in relation to other recollected events occurring during that time period. For instance, the first week of tree clearing on the Carbone lot was recalled because

Larry Brooks, Brooks' fiancé and their child spent the night at the Newton household for the express purpose of enabling Brooks and Newton to begin work at the Carbone lot early the next morning. Furthermore, the second week of performance, during the first weekend of December 1999, was recalled because Darla Newton's birthday fell on one of those days. As noted above, Darla Newton testified at trial that she specifically recalled Newton working on the Carbone lot that weekend "because it was my birthday and we went out to dinner and we had to go home early because he had to work on the [Carbone] job..." *See* Testimony of Darla Newton, *John W. Newton d/b/a Mohawk Valley Tree Experts v. Fanelli (In re Fanelli)*, Ch. 7 Case No. 99-66115, Adv. Pro. No. 00-80021 (Bankr. N.D.N.Y. September 13, 2000, Gerling, C.J.). The additional support of the testimony of James Dean lent credence to Newton's version of events. In this regard, Dean testified that he was on the Carbone lot during early December when Newton had still been working on the job. This places Newton on the Carbone lot some two to three weeks after the Debtor contends he ordered him to cease working.

The Court finds both the Debtor's testimony and conduct to be equally incredible. Most of the Debtor's testimony at trial was inconsistent with his conduct up until the date of trial. For instance, while the Debtor testified at trial that the Carbone Contract remained unperformed to some extent by both he and Carbone, the Debtor never scheduled the Carbone Contract as a liability, income expectancy or executory contract within his bankruptcy case. Furthermore, in his direct testimony the Debtor testified that he wanted Newton to do the work for a low price because Carbone and his wife were "very good friends of mine [the Debtor]" and that "there was nothing in it for me [the Debtor]." *See* Testimony of Debtor, *John W. Newton d/b/a Mohawk Valley Tree Experts v. Fanelli (In re Fanelli)*, Ch. 7 Case No. 99-66115, Adv. Pro. No. 00-80021

(Bankr. N.D.N.Y. September 13, 2000, Gerling, C.J.). However, on cross-examination by Newton's counsel, the Debtor revealed that there was, in fact, something "in it" for him, namely $500 of the $3,500 Carbone Contract price. Moreover, the Debtor neglected to schedule Newton as a creditor in the schedules filed with his original petition on November 16, 1999, yet at trial the Debtor testified that he was advised by his former bankruptcy attorney specifically "to file bankruptcy against John Newton." *See id.* In addition, having failed to schedule his obligation to Newton with his original schedules, the Debtor amended his schedule in January 2000 to include a liability to Newton in the amount of $3,000. The Debtor testified at trial that consideration for the Newton Contract was $3,000 and that Newton was paid $1,750 in cash on or about October 26, 1999. A layman's analysis of the Debtor's contention would reveal, assuming the Debtor's rendition of the circumstances surrounding the Newton Contract, that the amended schedule either admittedly inflated the claim or was in some sense speciously filed.

According to the Debtor's testimony, performance of the Newton Contract began on October 29, 1999 and took place over the weekend of October 29 and 30, 1999. However, in his post-trial Memorandum of Law, the Debtor asserts that "Mr. Newton begins work, tree felling, brush chipping, log clearing, on October 24th 1999..." which date is two days prior to when the Debtor previously alleged Carbone paid the Debtor the initial $1,750. Debtor's Memo, at ¶ 8. Furthermore, the Debtor testified that on November 6, 1999, Carbone appeared at the Carbone lot when the Debtor alleges Newton was working and "said everything looked good...Mr. Carbone said 'looks great' and left..." *See* Testimony of the Debtor, *John W. Newton d/b/a Mohawk Valley Tree Experts v. Fanelli (In re Fanelli)*, Ch. 7 Case No. 99-66115, Adv. Pro. No. 00-80021 (Bankr. N.D.N.Y. September 13, 2000, Gerling, C.J.). However, in his post-trial

Memorandum of Law, the Debtor contends "Mr. Carbone (lot owner) visits site on...Saturday, November 6th 1999, and the morning of November 7th 1999. Upon inspection of the building lot Mr. Carbone decides not to pay any additional money to Defendant or Plaintiff." Debtor's Memo, at ¶¶ 14, 15.

In sum, the Court found the Debtor's overall relation of the timing of events vague and uncertain when compared to the pointed recollection of Newton, Darla Newton and James Dean regarding the events and circumstances surrounding the Newton Contract. Admittedly, the testimony of Brooks and Carbone would have assisted the Court's analysis on this point but the parties failed to produce either individual at trial and the Court cannot speculate as to what their testimony would have been. Nonetheless, the Court finds the Debtor's contentions disingenuous and is not inclined to grant the Debtor a discharge on a liability that was clearly incurred subsequent to the order for relief. Having weighed the evidence and testimony presented at trial, the Court finds that the Newton Contract was procured and entered into postpetition and is therefore not subject to discharge pursuant to Code § 727. Having determined that the subject contract may give rise to a postpetition liability, the question of nondischargeability of that potential liability in the Debtor's case is rendered moot. *See Haught*, 120 B.R. at 235.

As a final matter, the Court must briefly turn its attention to the issue of Newton's standing to object to the Debtor's discharge pursuant to Code § 727(a) in light of the Court's finding that the Newton Contract arose postpetition. The right to seek denial of a discharge pursuant to Code § 727(a) is reserved exclusively to the chapter trustee, the U.S. Trustee or a creditor of the bankrupt estate. *See* Code § 727(c)(1). Thus, an entity other than the chapter trustee or U.S. Trustee has standing to object to a debtor's discharge only if that entity is a

"creditor" within the meaning of Code § 727(c)(1). *See e.g., Putnam County Savings Bank v. Bagen (In re Bagen)*, 185 B.R. 691, 694 (Bankr. S.D.N.Y. 1995)("A party objecting to a debtor's discharge...has standing if that party is a 'creditor' within the meaning of the Code..."); *Compagnone v. Compagnone (In re Compagnone)*, 239 B.R. 841, 842 (Bankr. D. Mass. 1999)("In order to have standing to object to the Debtor's discharge...the Plaintiff must be a 'creditor' within the meaning of the Bankruptcy Code."). For purposes of the instant Proceeding, a "creditor" is defined by the Code as an entity possessing a right to payment or an equitable remedy giving rise to a right to payment against the debtor, which right arose at or before the order for relief. *See* Code § 101(5)(A), (B) and (10)(A); *see e.g., Ferraro v. Phillips (In re Phillips*), 185 B.R. 121, 128 (Bankr. E.D.N.Y. 1995)("The term 'creditor' includes those entities claiming a right to payment on a debt that arose pre-petition...")(citation omitted). If an entity does not have an enforceable right to payment at the time the bankruptcy case is commenced, "it cannot be a creditor in bankruptcy and, thus, lacks the requisite standing [to object to the debtor's discharge]." *Bagen*, 185 B.R. at 695; *see also, District 5, United Mine Workers of America v. Weiss (In re Weiss)*, 129 B.R. 51, 55 (Bankr. W.D. Pa. 1991)("[P]laintiffs have standing to object to debtor's discharge only if they had a right to payment by debtor that arose at or prior to the entry of the order for relief."). As it is clear to the Court that Newton's potential right to payment arose postpetition, Newton is disqualified as a creditor of the Debtor's bankrupt estate and consequently lacks standing to challenge the Debtor's discharge pursuant to Code § 727(a).

Based on the foregoing, it is hereby

ORDERED that Newton's First Cause of Action is sustained to the extent that said Cause of Action seeks a determination that the Newton Contract was entered into postpetition, and it

is further

ORDERED, that Newton's First Cause of Action is denied for lack of standing to the extent that said Cause of Action seeks to deny the Debtor's discharge pursuant to Code § 727(a)(2)(A) or Code § 727(a)(2)(B), and it is further

ORDERED that Newton's Second Cause of Action is rendered moot to the extent that said Cause of Action seeks a determination that liability arising from the Newton Contract is nondischargeable in the Debtor's bankruptcy case pursuant to Code § 523(a)(2)(A), and it is further

ORDERED that any liability incurred by the Debtor resulting from the Newton Contract shall not be subject to or affected by the Debtor's general discharge in bankruptcy, and it is further

ORDERED that the Debtor's amended petition and schedules filed on January 13, 2000, be and hereby are amended, *nunc pro tunc*, whereby all references to John Newton d/b/a Mohawk Valley Tree Experts as being a creditor of the Debtor or as holding any claim against the bankrupt estate shall be expunged.

Dated at Utica, New York

this 23rd day of April 2001

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge