UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

ISABELLA L. PAUL,
Debtor.

Chapter 7
Case No. 08-11390

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY,

Plaintiff,

v.

Adv. No. 08-90120

ISABELLA L. PAUL,
Defendant.

APPEARANCES:

Laura L. Silva, Esq.
Attorney for Debtor/Defendant
670 Franklin Street
Schenectady, NY 12305

DelBello Donnellan Weingarten Wise & Wiederkehr, LLP
Attorneys for Plaintiff
One North Lexington Avenue
White Plains, NY 10601

Evan Wiederkehr, Esq.

Hon. Robert E. Littlefield, Jr., Chief United States Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

Before the court is the complaint of Old Republic National Title Insurance Company ("Republic" or "Plaintiff") against Isabella Paul ("Paul" or "Debtor") seeking a determination that a ceratin debt is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).[1] Based on the

[1]Unless otherwise noted, all statutory references herein are to the Bankruptcy Code, 11 U.S.C. §§ 101 to 1532.

record and for the reasons set forth below, the court determines that the Plaintiff has not established by a preponderance of the evidence that the Debtor's obligation should be excepted from discharge.

The court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(a), (b)(1), (b)(2)(I), and 1334(b). The following are the court's findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52, as made applicable by Rule 7052 of the Federal Rules of Bankruptcy Procedure.

FACTS

The following facts were either stipulated to by the parties or not controverted at trial. In or about 2000, the Debtor filed a certificate of doing business as Altech Contracting in the Office of the Rensselaer County Clerk. In July 2005, the Commissioners of the State Insurance Fund ("State Insurance Fund") commenced an action in the New York State Supreme Court for Albany County against the Debtor, d/b/a Altech Contractor, asserting, *inter alia*, the failure to pay required worker's compensation premiums (the "2005 Lawsuit"). The Debtor was served with the summons and complaint. The State Insurance Fund secured a judgment in the amount of approximately $67,000.00 against the Debtor, d/b/a Altech Contractor, in connection with the 2005 Lawsuit in October 2005 (the "2005 Judgment"). The 2005 Judgment was transcribed in the Rensselaer County Clerk's office that same month. In April 2006, the Debtor submitted an answer and a two page letter to the Supreme Court in connection with 2005 Lawsuit. Sometime during 2006, the Debtor appeared at the Rensselaer County Clerk's office and requested that a judgment and lien search be done for her, her husband, and Altech Contracting.

In 2007, the Debtor and her husband sold real property located in Rensselaer County

known as 83 Calhoun Drive, Troy, New York (the "Troy Property"), to Michael A. Cannizzo and Jill A. Cannizzo. The Plaintiff issued a title insurance policy to the Canizzos in connection with the conveyance that insured the acquisition of title to the Troy Property from the Pauls. The title search conducted by the Plaintiff as part of the issuance of the title policy failed to reveal the 2005 Judgment against the Debtor. As part of the closing, the Debtor and her husband executed an affidavit of title that provided, in relevant part:

> This Affidavit is made by Owner(s) in connection with the mortgage refinance of the Insured Property . . . and is . . . given to [Plaintiff] to induce them to insure title to the Insured Premises.
>
> . . . Owner(s) have/had no debts . . . or liabilities that could give rise to or result in a lien or a claim of lien against said property.

(Pls.' Ex. I.) The closing occurred on July 20, 2007, and the Pauls realized net proceeds of approximately $51,944.87. The 2005 Judgment was not satisfied as of the closing date. Ultimately, Plaintiff paid $25,000 to the State Insurance Fund in order to remove the 2005 Judgment as a lien and encumbrance against the Troy Property.

On April 30, 2008, the Debtor commenced her bankruptcy case by filing a chapter 7 petition.[2] Plaintiff is listed on Schedule F of the petition as a creditor holding an unsecured claim in the amount of $25,000. The State Insurance Fund is also listed on Schedule F of the petition as a creditor holding an unsecured claim in the amount of $67,054.34.

Plaintiff commenced this adversary proceeding by complaint filed on August 5, 2008. A trial was conducted before this court on June 15, 2009. The Plaintiff produced three witnesses: Evelyn Ankers, one of its claim representatives; Gregory J. DeJulio, First Deputy Rensselaer

[2]The petition on its face is dated May 1, 2008.

County Clerk; and the Debtor. Richard C. Miller, Esq., the Debtor's real estate attorney, testified on behalf of the Debtor, as did the Debtor herself.

On direct examination by Debtor's counsel, Attorney Miller testified as follows:

Q. Okay. Now in connection with the closing you served as title agent, correct?

A. Yes.

Q. Okay. And as part and parcel of that closing Old Republic Title requires a title affidavit?

A. Yes.

Q. Okay. And is that a document that's just routinely circulated during the closing and signed by the individuals?

A. It's a document that's part of the usual package of documents. In this case there weren't that many documents because there wasn't a bank involved. It was cash financing . . . . but it is a standard document that is signed at closing.

Q. Okay. And Ms. Paul signed that document?

A. Yes.

(Trial Tr. (No. 19) 63-64, June 15, 2009.)

On cross-examination by Plaintiff's counsel, Attorney Miller further testified as follows:

Q. Mr. Miller, at the time of the closing you represented Ms. Paul, correct?

A. Yes.

Q. And as an attorney representing Ms. Paul you would explain to her the import of the documents that she was executing at the closing, correct?

A. All the documents that were signed were shown to both of the Pauls and that particular document was one of them, yes.

(Tr. 64.)

On redirect, Attorney Miller stated:

Q. To your recollection at the closing did Mr. or Mrs. Paul ask you to explain what the affidavit of title meant?

A. I can't recollect exactly. It was a longer closing than was expected late in the day on a Friday. I do–I will say that Mrs. Paul was typically pretty careful, she typically did read documents that she signed. But I don't know that she asked any question specifically about the affidavit.

Q. And was Ms. Paul given copies of all of the documents at closing?

A. Not at the closing because there was a certain—because the closing had taken longer than expected there was a certain urgency to try to get checks deposited in the bank so that funds could be provided to the Pauls.

And so we adjourned the closing after we were done. I think it was supposed to start at three and I think we were there until about 4:45 and we left to try to get to HSBC before 5:00 when it closed.

(Tr. 65-66.)

On direct examination by her attorney, Mrs. Paul testified as follows:

Q. Okay. When you were at the closing did Mr. Miller go over all of the documents that you signed as you signed them?

A. No. No.

Q. How would you describe the closing?

A. Well as I've said before, our attorney Mr. Miller was here, I was here, Allen was here, and then Mr. Cannizzo was here, Jill Cannizzo was there, and then their attorney, and I don't remember his name, I know, I think it was Mr. Casey, Senior, it was an older gentleman, he was there.

And the way we did it was Rick would hand me a paper and say sign this and I would sign on top of my name, then I'd hand it down, then he'd hand it to him and have–and we went all the way around the table.

And I remember everybody had to give a copy of their license and Rich I think went out and did, you know, copies of the licenses.

And that was it. And then like the Cannizzos were asked well you have to write this check and you have to do this and they were doing their thing. And we just like all went around and when it was over we just shook hands and

> we all left.
>
> And when we left we didn't really have anything, we didn't even have all the money from the closing. We just because, you know, it was as Rich Miller just said, it was Friday night and everything was, you know, it was just, I don't know, it wasn't, you know, a leisurely thing or anything.
>
> And I didn't–I just like, you know, did what Rich told us to do, sign here, sign here, we all did it. I mean I wasn't the only one just signing, everybody was signing. So nobody was taking the time to read or explain anything to –as far as I remember that's the way it went.

(Tr. 71-72.)

At the conclusion of the trial, the court directed the parties to file post-trial memoranda of law in support of their positions and, subject to the foregoing, took the matter under advisement.

ARGUMENTS

Plaintiff asserts that the Debtor was aware of the 2005 Judgment, pointing to the judgment search she and her husband obtained against themselves individually and the Debtor's d/b/a in 2006, and the answer and letter the Debtor submitted on her own behalf to the Supreme Court acknowledging the existence of the 2005 Judgment. Thus, Plaintiff concludes that by failing to disclose the existence of the 2005 Judgement in the affidavit of title, Paul made a false representation which it relied upon to its detriment. Plaintiff relies on the testimony of Debtor's real estate counsel as confirmation that Paul knowingly and purposefully executed the affidavit of title which contained the false representation.

Alternatively, the Plaintiff contends that even if the Debtor was not aware of the contents of the affidavit, she should be held accountable. The Plaintiff argues that "in analogous situations concerning the filing of a statement of financial condition, the courts have repeatedly held that signing a document without reading it or validating its content constitutes a reckless

disregard for its accuracy sufficient to support an intent to deceive." (Pl.'s Post Trial Mem. 14 (citing *In re Kelly,* 163 B.R. 27 (Bankr. E.D.N.Y. 1990); *In re Rodriquez,* 29 B.R. 537 (Bankr. E.D.N.Y. 1980); *In re Anderson*, 10 B.R. 607 (Bankr. S.D. Fla. 1981)).

The Debtor responds by stating that Plaintiff failed to carry its burden at trial, arguing that the Plaintiff's heavy reliance on the affidavit of title signed by the Debtor is misplaced. Paul asserts that she was neither told of nor realized the import of the affidavit when it was presented to her at the closing. Debtor recounts that the closing was held late on a Friday afternoon with papers being handed to her with the direction to sign and pass it on. She states there was no intent to defraud and, in any event, she was unaware of the 2005 Judgment.

DISCUSSION

No one disputes the veracity of the Plaintiff's claim against the Debtor. The issue presented is whether the claim should be covered by the Debtor's discharge. The public policy promoted by bankruptcy allows the "honest but unfortunate" debtor the opportunity to obtain a fresh start. *Cohen v. de la Cruz*, 523 U.S. 213, 217, 118 S.Ct. 1212, 140 L.Ed.2d 341 (1998). That policy is achieved, in part, by the discharge of certain preexisting debts. *See* 11 U.S.C. § 523. Consistent with the Code's policy of granting a discharge to all but the dishonest debtor, exceptions to discharge are to be narrowly construed against the creditor and in favor of the debtor. *See In re Bonnanzio*, 91 F.3d 296, 300 (2d Cir. 1996).

Section 523(a)(2)(A) of the Bankruptcy Code excepts debts from discharge "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by . . . false pretenses, a false representation, or actual fraud . . . . 11 U.S.C. § 523(a)(2)(A).

> 'To sustain a prima facie case under Section 523(a)(2)(A) of the Bankruptcy Code, a creditor must establish [that]: (1) the debtor made a false representation;

> (2) the debtor knew the representation was false at the time it was made; (3) the representation was made with the intent to deceive the creditor; (4) the creditor justifiably relied on the representation; and (5) the creditor was injured by the representation and suffered damages as a result.' *In re Gonzalez*, 241 B.R. 67, 71-72 (S.D.N.Y.1999) (citations omitted) . . . . '[T]he debtor's conduct must involve moral turpitude or intentional wrong; mere negligence, poor business judgment or fraud implied in law . . . is insufficient.' *In re Gonzalez*, 241 B.R. at 71 (citation omitted). Under the above standard, false representations must have been "knowingly and fraudulently made" and with intent to deceive. *Id.* at 74 (citations omitted).

Eurocrafters, Ltd. v. Vicedomine (In re Vicedomine), No. 1:04-CV-855GLS, 2005 WL 1260390, at *4 (N.D.N.Y. May 18, 2005). To prevail, a creditor must prove each of the elements of § 523(a)(2)(A) by a preponderance of the evidence. *See Grogan v. Garner*, 498 U.S. 279, 288-89, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991).

The evidence adduced at trial leads the court to conclude that the first, fourth, and fifth elements of § 523a)(2)(A) have been established. A false representation was made in that the affidavit of title does not reference the 2005 Judgment. The Plaintiff justifiably relied upon the title search as well as the affidavit of title in issuing a policy of title insurance for the Troy Property, and the Plaintiff ultimately paid $25,000 to remove the 2005 Judgment as an encumbrance against the Troy Property. What remains in dispute are the second and third elements of § 523(a)(2)(A). More specifically, the questions to be answered are whether the Debtor knew about the 2005 Judgment at the time of the 2007 closing, and whether she was aware of the contents of the affidavit of title and executed the same with the requisite intent to deceive. Both of these prongs must be answered in the affirmative for the Plaintiff to prevail.

The court will first address the second prong. A debtor's intent may be inferred from the totality of the circumstances, as direct evidence of a debtor's state of mind is usually not available. *People of the State of New York v. Suarez (In re Suarez)*, 367 B.R. 332, 349 (Bankr.

E.D.N.Y. 2007) (citations omitted). " 'Intent to deceive may be inferred when the totality of the circumstances presents a picture of deceptive conduct by the debtor, which indicates that he did intend to deceive and cheat the [creditor.]' " *Id.* (quoting *Hong Kong Deposit and Guar. Co. v. Shaheen (In re Shaheen)*, 111 B.R. 48, 53 (S.D.N.Y.1990)).

On cross-examination, Paul acknowledged that she signed the affidavit of title and that she is, in general, a careful person. However, her testimony regarding the frenetic nature of the closing went unchallenged. Paul stated credibly that the closing was not leisurely, that papers were passed around and when she was directed to sign a document, she did. During this process nobody took the time to read or explain anything to her or alert her to the import of any of the documents. Attorney Miller's testimony painted a similar picture. Contrary to the Plaintiff's assertions, Attorney Miller did not concur that the documents were explained to Paul or anyone else. When he was specifically asked to corroborate that he had explained the significance to Paul of the documents that she was about to sign, he merely replied that the documents were shown to the Debtor. Nor was there any testimony that copies of the closing documents were provided to the Debtor in advance of or at the closing. Attorney Miller could not even recall if the Debtor had asked any questions about the meaning of the affidavit of title. Perhaps this was because, as Attorney Miller explained, the closing was late on a Friday, took longer than expected, and the parties were endeavoring to get to the bank before it closed.

The Plaintiff's position is that in connection with executing the affidavit of title, the Debtor should have disclosed the existence of the 2005 Judgment. However, the undisputed proof establishes that the Debtor did not read the affidavit of title prior to signing it, nor did anyone explain its contents and their import to her. Thus, the Debtor had no knowledge of the

misrepresentation made in the affidavit of title. While the Debtor may have been reckless or negligent in executing the affidavit of title without reading it, fraudulent intent requires proof of an intent to deceive, and this has not been established. Plaintiff has failed to establish that the Defendant engaged in conduct that was purposefully deceptive or misleading. Thus, the court cannot make a finding that the Debtor's conduct constituted actual fraud or deceit as required by § 523(a)(2)(A).

Plaintiff asserts that even if the Debtor did not knowingly execute the affidavit containing the false representation, by signing it without reading it, the Debtor evidenced a reckless disregard sufficient to support an intent to deceive. Plaintiff's reliance on *Kelly*, *Rodriquez*, and *Anderson* to support its position, however, is misguided; the cases are all distinguishable. Each of these cases involves an objection to discharge under § 523(a)(2)(B) based upon a false statement in writing regarding the debtor's financial condition which the debtors knew the creditors would rely upon in issuing them credit.

The debtors in *Kelly* signed an incomplete mortgage loan application but saw the completed version prior to closing. The debtors knew that the application would be completed and then given to the bank, and that the bank would rely on the information set forth in the application in deciding whether to grant them a loan. In *Rodriquez*, the debtor applied for a business loan. To effectuate the loan agreement, the debtor signed a financial statement indicating he was the sole owner of real property valued at $650,000. In fact, the debtor had transferred the property to his wife some time prior to the preparation and signing of the statement. The court concluded that a representative of the lending company either completed the statement at the debtor's request or did it independently. In any event, the debtor saw the

completed application, knew of its contents, and signed it. The *Anderson* case involved a debtor who refinanced a loan with a credit union. The debtor claimed that he had not read the loan application that he signed, which had inaccurate information concerning his current liabilities. In all three cases, the courts found an intent to deceive and/or a reckless disregard equivalent to intent and deemed the subject debts to be nondischargeable.

In the instant case, we have a debtor who signed a document at a hurried closing, did not see it in advance of the closing, was not given an explanation of its content, and was not alerted to the importance of it by any of the professionals at the closing, In the three cases offered by Plaintiff, the offending document was an affirmative financial statement knowingly submitted by the respective debtors to induce a loan. Here, the affidavit of title was one of a myriad of papers contained within a routine closing.

The remaining element under § 523(a)(2)(A) is whether the Debtor knew the representation was false at the time it was made. Because the Plaintiff has not established that in signing the affidavit of title the Debtor had the requisite intent to deceive, the court need not determine whether the Debtor had knowledge of the 2005 Judgement at the time of the 2007 closing.

For the reasons set forth herein, the court dismisses the complaint.

It is so ORDERED.

Dated: October 7, 2010
Albany, New York

/s/ Robert E. Littlefield, Jr.

Hon. Robert E. Littlefield, Jr.
Chief United States Bankruptcy Judge