UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MICHAEL H. ROSSI
JOYCE A. ROSSI

CASE NO. 96-62166

Debtors

Chapter 7

EDWARD A. LUCARELLI

Plaintiff

vs.

ADV. PRO. NO. 96-70210A

MICHAEL H. ROSSI

Defendant

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,

CONCLUSIONS OF LAW AND ORDER

This proceeding is before the Court upon the Complaint of Edward A. Lucarelli ("Plaintiff"), filed August 12, 1996. Issue was joined by the filing of an Answer on behalf of Michael H. Rossi ("Rossi") and Joyce A. Rossi ("Mrs. Rossi") (jointly referred to as the "Debtors") on September 6, 1996. On September 16, 1997, the Court issued an Order joining Carolyn J. Cooley, chapter 7 trustee ("Trustee"), as a party defendant. Pursuant to an Order of the Court on February 5, 1997, Mrs. Rossi was dropped as a named defendant.

In his Complaint, Plaintiff identifies eight causes of action for which relief is sought: (1) a declaration that the sale of certain equipment to Rossi as null and void based on allegations of lack of consideration and Plaintiff's lack of competence, as well as undue influence, deception, and fraud; (2) a declaration that the equipment still in Rossi's possession as being held in trust for the benefit of the Plaintiff and requiring the equipment be returned to the Plaintiff pending the outcome of the trial; (3) an award of damages to the Plaintiff based on the alleged wrongful acquisition and sale or disposition of the equipment based on the Plaintiff's loss of its use; (4) an award of damages based on the Plaintiff's inability to earn a living as a contractor based on his having been deprived of the use and possession of the equipment; (5) an award of damages in the amount of $250,000 as a result of Plaintiff's alleged mental and physical pain and suffering; (6) an award of punitive damages to punish and deter Rossi from "like conduct;" (7) a denial of Debtors' discharge pursuant to § 727 of the Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code"), and (8) a denial of discharge of all debts found to be due from Debtors to Plaintiff as a result of their actions and conduct pursuant to Code § 523.

A trial of the adversary proceeding was conducted in Utica, New York, on September 17,

1997, continued on September 19, 1997 and concluded on January 16, 1998.[1] The Court reserved on Rossi's and the Trustee's motions to dismiss the Complaint for failure to state a cause of action made at the conclusion of the Plaintiff's case. The Court also reserved on Plaintiff's motion to amend the pleadings to conform to the proof in what the Court described as a "blunderbuss approach" covering any and all causes of action that the evidence might support. In lieu of closing arguments, the parties were afforded an opportunity to file memoranda of law. The matter was submitted for decision on February 27, 1998. However, at the request of Plaintiff's counsel, the date was extended until April 13, 1998,[2] to allow both parties the opportunity to obtain and review the transcripts of the trial.[3]

JURISDICTIONAL STATEMENT

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

FACTS

[1] On November 21, 1997, the Court signed an Order requiring that Mrs. Rossi personally accept service of a subpoena compelling her to testify on January 16, 1998. No other testimony was heard that day.

[2] Plaintiff was given until April 1, 1998, to submit his memorandum of law. Rossi was then to file his memoranda of law within ten days of receipt of Plaintiff's memorandum of law. According to the docket, a memorandum of law was filed on behalf of Rossi on April 13, 1998.

[3] For purposes of this discussion, the transcript of the hearing on September 17, 1997, will be referred to as "Tr. A"; that of the hearing on September 19, 1997, as "Tr. B", and that of the hearing on January 16, 1998, as "Tr. C".

Plaintiff is a 59 year old man with a history of depression which, according to his brother, John Lucarelli ("J. Lucarelli"), usually manifested itself in the winter months. *See* Tr. B at 73. In 1983 Plaintiff purchased a farm located at Fosters Corners Road, Durhamville, New York. *See* Tr. B at 119. In 1989 he was hospitalized at the Veterans Administration Hospital ("VAH"), *see* Tr. B at 73, and again in late 1990 or early 1991 for his depression, *see* Tr. B at 75. Following his release from the VAH in 1991, he purchased a new bulldozer ("Bulldozer") and backhoe ("Backhoe") (hereinafter collectively referred to as "the Equipment") for use in construction work. *See* Tr. B at 79. According to the testimony, Rossi first became acquainted with the Plaintiff sometime in April or May 1992. *See* Tr. A at 14-15.

Plaintiff acknowledged that he began drinking sometime after he got out of the VAH in 1991. *See* Tr. B at 138. He testified that he was drinking between six and twelve bottles of beer per day at that time. Walter Hiscox ("Hiscox") testified that in February 1992 he opened the Five Star General Store in Durhamville, and between 1992 and sometime in 1993 Plaintiff usually purchased a case of beer there on a daily basis. *See* Tr. B at 172. Hiscox' employee, Ronald Cochran, remembered Plaintiff coming into the store from February 1992 "basically for the next maybe a year" on an average of five days/week to purchase between a 12 pack and a case of beer. *See* Tr. B at 180. Rossi testified that in the summer of 1992 Plaintiff admitted that he was drinking approximately a case of beer on a daily basis. *See* Tr. A at 27, 31.

According to Audrey White ("Mrs. White"), who first became acquainted with the Plaintiff following his release from the VAH in 1991, she saw the Plaintiff almost everyday between 1991 and 1992. *See* Tr. at 28. She testified that in 1992 Plaintiff "started to let himself go, wear dirty clothes. He would sit in his truck 24 hours a day * * * He was starting to get rough

looking. He was starting to let his beard grow out and his hair grow long. And he wasn't bathing." *See* Tr. B at 30-31. In 1993 she observed the Plaintiff going into Durhamville to buy beer and cigarettes almost daily, first in his pickup truck and later driving his backhoe. *See* Tr. B at 37. It was Mrs. White's testimony that she stopped having much contact with the Plaintiff in 1993 as he "started hibernating" and would never leave his truck.[4] *See* Tr. B at 34.

Mrs. White recalled seeing Rossi bring the Plaintiff beer and cigarettes in 1992. However, Rossi denies bringing him beer until sometime in the latter part of 1993. Joseph Barbano, who operates the Central Distributing Company in Oneida, New York, recalled that Rossi bought beer from him between 1993 and 1994, usually purchasing between six and ten cases per week. *See* Tr. A at 96. According to Barbano, Rossi indicated to him that he was buying the beer for a "very rich older man" and all he had to do "is take care of his affairs, keep him in booze, and I'm going to get everything he's got." *See* Tr. A at 97. Rossi acknowledged having been asked by the clerk at Central Distributing why he was buying so much beer. *See* Tr. B at 190. Rossi testified that he had wanted to say "'It's none of your business' but I told him something to answer a question, just to answer a question. I mean [sic] nothing by what I said." *See id.* Rossi further explained that the question had upset him, that he was "scared and I thought maybe somebody in the community would see me buying it and thinking that I was drinking again, which I wasn't."[5] *See id.* at 190-91.

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[4] According to Rossi, Plaintiff's truck broke down in September 1993, and remained in the Plaintiff's driveway until January 1994 when it was sold to Lyle Perkins, an acquaintance of Rossi's, for $1,500. *See* Tr. A at 26 and Tr. B 61-62.

[5] Rossi admitted being an alcoholic. *See* Tr. A at 21. He testified that he had stopped drinking on November 16, 1983. *See* Tr. A at 34.

Paul Grossman ("Grossman") testified that he made a visit to the Plaintiff in April or May of 1993 and found him sitting in the front seat of his truck. *See* Tr. A at 121. He described the Plaintiff as a disheveled, unkempt man, unshaven, shabbily clothed. *See id.* However, James Brocker ("Brocker"), a caseworker for the Oneida County Department of Social Services, testified that he visited the Plaintiff on September 16 and September 28, 1993, and noted no change in Plaintiff's appearance from a prior visit he had had with him on October 22, 1991, when he described Plaintiff as appearing "healthy." *See* Tr. A at 157, 161. He saw no evidence that the Plaintiff had been drinking in September 1993. *See* Tr. A at 162. Brocker testified that he had a conversation with the Plaintiff and concluded that the Plaintiff was wrestling with whether he should sell his real property.[6] *See* Tr. A at 160. In his report following the September 28, 1993 visit Brocker observed, "Mr. Lucarelli suffers from periodic depression. However, he is currently taking actions and making decisions that evidence the ability to manage his own affairs." *See* Plaintiff's Exhibit J.

Rossi testified that sometime in the summer of 1993 Plaintiff asked him whether he would be interested in purchasing the Equipment. *See* Tr. A at 60. Plaintiff denied having made such an offer, but also admitted that he didn't know how the Transaction had occurred. *See* Tr. B at 132. Rossi acknowledged his belief that the Plaintiff had been drinking when he made the offer. *See* Tr. at 79. It was Rossi's testimony that he had some money set aside and offered to pay $9,500 for the Bulldozer and $5,000 for the Backhoe and also to assume the balance owed on the

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[6] At that time, Plaintiff had a purchase offer on a portion of his real property. According to Brocker's report, Plaintiff intended to keep 25 acres and place a "double-wide" on it. *See* Plaintiff's Exhibit J. Plaintiff allegedly refused to vacate the premises in connection with a prior contract for the sale of the real property in 1989. *See* Tr. B at 97-98. The 1993 sale also failed to close because Plaintiff refused to leave. *See* Tr. B at 102, 145.

Bulldozer. See Tr. A at 60. The Plaintiff denied receiving any money from Rossi, however. *See* Tr. B at 139. Admitted into evidence was a receipt signed by Plaintiff and Rossi whereby Rossi paid $9,500 and assumed the responsibility for remaining payments on a Model 450G Dozer "on this 12th day of October 1993." *See* Rossi's Exhibit 1. The receipt is dated November 12, 1993. *See id.* A second document, also dated November 12, 1993, and identified by Rossi as a "Bill of Sale," indicates that the Plaintiff received a downpayment of $2,200 from Rossi on "12 October 1993" and that "upon payment of the remaining $2,800 balance, he will assume ownership of my John Deere Model 210-C Backhoe." *See* Rossi's Exhibit 2. Another document, dated November 8, 1993, and identified by Rossi as the "Purchaser's Copy," references the sale of a John Deere Backhoe "in return for payment of $2,800 . . . along with the $2,200 . . . I have previously paid." *See* Rossi's Exhibit 3. A fourth document, dated November 12, 1993, states "In return for my Model 450G Dozer, Ed Lucarelli have [sic] agreed to the purchase offer made by Michael Rossi on . . . the 12th of October for a sum of $9,500 cash and the understanding that Mike Rossi will assume the remaining payments."[7] *See* Rossi's Exhibit 4. All four documents are signed by Rossi and the Plaintiff; the line for the signature of a witness is unsigned. Rossi explained that the reason for the discrepancy in the dates was that the documents executed at the time of the actual transaction in October 1993 contained misinformation. Both parties allegedly tore them up and new documents were executed a month after the actual transfer. *See* Tr. A at 65. Rossi testified that Plaintiff was not drinking when he signed the documents. *See* Tr. A at

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[7] Rossi provided evidence that in January 1994 he applied to a loan from Oneida Valley National Bank, using the Equipment as collateral. He testified that he used the proceeds to pay off the balance owed on the Bulldozer to John Deere Credit of $2,364.09. *See* Rossi's Exhibits 6 and 7.

79. Plaintiff remembered signing the documents on two or three different occasions and indicated that he had not read them." *See* Tr. B at 133. There was also testimony by Dominic Mauro ("Mauro") that sometime in the latter part of 1993 at a time when there was snow on the ground, Rossi asked Mauro to accompany him to Plaintiff's house to videotape the transaction between Rossi and the Plaintiff. *See* Tr. A at 115-116. According to Mauro, the Plaintiff "didn't want any part of it . . . ." *See* Tr. A at 109.

The Plaintiff testified that he did not know how the sale of the Equipment ("Transaction") had happened. He "[j]ust signed them away, I guess." *See* Tr. B at 132. When asked on cross-examination by the Trustee why he signed the papers that Rossi asked him to sign, he responded "I don't even know why I did it." *See* Tr. B at 152. Rossi admitted that he knew it was a good deal and explained that if he had not bought the Equipment, someone else would have. *See* Tr. A at 93. In April 1994 Rossi sold the Bulldozer for $34,000. *See* Plaintiff's Exhibit G. According to their Federal tax return for 1994, the Debtors realized $22,300 in capital gains with respect to the sale of the Bulldozer. *See* Rossi's Exhibit 8. At the time the Debtors filed their Petition, they were still in possession of the Backhoe.

J. Lucarelli testified that he went to visit Plaintiff in the summer of 1993 when he was told by a mutual acquaintance that Plaintiff was drinking beer and sleeping in his truck. *See* Tr. B at 82. J. Lucarelli found his brother in his truck drinking and unresponsive. *See id.* He again attempted to see his brother around Christmas of 1993 but Plaintiff refused to allow him in the house. *See* Tr. B at 83. He also tried to see the Plaintiff in the spring of 1994 but was refused admittance to Plaintiff's house. *See* Tr. B at 84. It was not until the end of 1994 between Christmas and New Year's that he again saw the Plaintiff. *See* Tr. B at 86. According to J.

Lucarelli, Plaintiff told him at that time that "That crook, Rossi, he took my equipment, never gave me a penny. He stole everything, my tools, everything." *See* Tr. at 87. J. Lucarelli testified that he stopped by Rossi's house to speak to him and when he found no one home he called Rossi and spoke to him about what had occurred. *See* Tr. B at 87-88. In response to a note J. Lucarelli left on his door telling him to stay away from the Plaintiff, Rossi acknowledged that he stopped buying beer for the Plaintiff in late December 1994 or early January 1995. *See* Tr. A at 48.

In January 1995 J. Lucarelli contacted the Oneida County Department of Social Services asking that someone visit his brother. As a result, on January 18, 1995, Brocker attempted to see the Plaintiff but was told by the Plaintiff to come back another day as he was not feeling well. *See* Plaintiff's Exhibit K. On January 20, 1995, Brocker, J. Lucarelli, Jerald J. Measman ("Measman") and one of Plaintiff's friends were permitted to enter Plaintiff's house. Brocker indicated in his report of the visit that Plaintiff was "preoccupied with the fact that he had signed over his heavy duty equipment to a friend/neighbor (Steve(?) Rossi) and now he was out $80,000. We asked if he had received any money or services at all. He said no but the guy did keep him supplied with food and beer. We also asked if he had actually signed over the title. He said yes . . . ."

Measman performed a mental health evaluation on Plaintiff during the January 20th visit and recommended that J. Lucarelli be encouraged to pursue guardianship for Plaintiff for *inter alia* assistance in the management of his property and financial affairs. *See* Plaintiff's Exhibit L.

On May 7, 1996, the Debtors filed a voluntary petition ("Petition") seeking relief pursuant to chapter 7 of the Code. Schedule F attached to the Petition lists Plaintiff and J. Lucarelli as

holding a claim of $250,000. According to the Statement of Affairs, a lawsuit had been commenced by Plaintiff against Rossi in state court prior to commencement of the bankruptcy case. The Debtors also acknowledge in the Statement of Affairs that they are holding certain property on behalf of Plaintiff, including "truck model tool box, salamender [sic] heater, two batteries, set of tires [sic] chains, small chain saw, two tool boxes . . . two tires and one large socket set."

DISCUSSION

At the trial, Plaintiff requested permission to amend his Complaint to conform to the proof. The Complaint, as originally filed, requests *inter alia* a determination of nondischargeability pursuant to Code § 523 and a denial of the discharge of the Debtors pursuant to Code § 727 without identifying the specific subsections for which Plaintiff intended to present proof. In response to an objection by the Debtors' counsel to a question posed to Mrs. Rossi, Plaintiff's counsel made an offer of proof in which he argued that during the course of the trial he had learned that the Debtors had refinanced their house "to pay off the Oneida Valley National Bank and secure this entire debt so they could use exemption . . . ." *See* Tr. C at 77. On that basis, he wished to inquire further about that particular transaction. The Court indicated that as there was no such allegations in the Complaint, Plaintiff would need to move to amend his Complaint.

Rule 15(b) of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), as incorporated by Rule 7015 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."),

> allows a party to amend its pleadings to conform to the proof received into evidence. The decision of whether to allow such an amendment is left to the discretion of the . . . judge. *See Grand Light & Supply Co., Inc. v. Honeywell, Inc.*, 771 F.2d 672, 680 (2d Cir. 1985). When such a motion is made after the start of trial, however, it should be granted only 'if the party against whom the amendment is offered will not be prejudiced by the amendment.' *Hillburn by Hillburn v. Maher,* 795 F.2d 252, 264 (2d Cir. 1986), *cert. denied*, 479 U.S. 1046, 107 S.Ct. 910, 93 L.Ed.2d 859 (1987).

Fisher v. Vassar College, 70 F.3d 1420, 1449 (2d Cir. 1995).

At the trial, the Court observed to Plaintiff's counsel that "I don't know how anybody defending this complaint could be expected to prepare a defense when you blind-side him now with these allegations regarding the fraudulent dissipation of equity in a property as a pre-bankruptcy planning tool, or something along those lines." *Id.* The Court also indicated that it could not "create causes of action under some guise of equity that don't exist in the statute." *See* Tr. B at 167.

Although the matter may only have come to light as a result of the admission of the Residential Loan Application at trial, the Court finds that allowing the Plaintiff to amend his Complaint to add an additional fraud claim would be highly prejudicial to the Debtors who had no notice of any such allegations against them and appropriately raised objections to any testimony concerning the matter on the grounds of relevance. Furthermore, except for the exhibit and innuendoes by the Plaintiff, there was insufficient testimony elicited at trial for the Court to make any findings in this regard. The suggestion that the transaction was somehow fraudulent or preferential is a matter more appropriately raised by the Trustee. Therefore, the Court will deny the Plaintiff's motion to amend his Complaint.

Plaintiff's seventh cause of action seeks a determination that the Debtors are not entitled

to a discharge pursuant to Code § 727 without specifying the basis for the relief sought. The Plaintiff directs the Court to the fact that there is no reference in Schedule D of the Debtors' Petition to a mortgage with Oneida Valley Bank executed by the Debtors in February 1996 and suggests that the Debtors made a false oath in this regard. In Schedule D the Debtors list a "1992 Mortgage First" with Oneida Valley Bank in the amount of $72,000, identified by the account number 49904375. This is the same account number or "Lender Case Number" as that found on the Residential Loan Application, dated February 26, 1996, in which the Debtors sought to refinance their mortgage and to consolidate some of their other debts. *See* Plaintiff's Exhibit N. This does not rise to the level of a false oath in connection with their Petition which would warrant a denial of their discharge pursuant to Code § 727(a)(4). Furthermore, the Plaintiff has failed to direct the Court to any other subsection of Code § 727 for which proof was offered at trial. Therefore, the Court will grant Rossi's and the Trustee's motions to dismiss Plaintiff's seventh cause of action seeking a denial of the Debtors' discharge pursuant to Code § 727.

Plaintiff's second cause of action seeks a declaration from the Court that the Equipment was held in trust by Rossi for the benefit of the Plaintiff. Indeed, a constructive trust may be imposed as a "'remedy for wrongdoing to prevent unjust enrichment'."[8] *See United Food &*

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[8] "[T]he doctrine of unjust enrichment is designed to prevent one person from retaining property or benefits to which he is not entitled. . . . In other words, again, a person is not allowed to profit or enrich himself unfairly at another person's expense. * * * Unjust enrichment can occur in any type of relationship . . . whether it's between friends, neighbors, or just people living together. Unjust enrichment occurs when one person obtains benefits which in fairness belong to another person." *In re Shear*, 123 B.R. 247, 250 (Bankr. N.D.Ohio 1991) (quoting instructions given to the jury in a State Court action in the case).

Commercial Worker's Union Local 1995 v. Eldridge (In re Eldridge), 210 B.R. 188, 192 (Bankr. N.D. Ala. 1997), quoting *Freeman v. Frick (In re Frick)*, 207 B.R. 731, 734 (Bankr. N.D. Fla. 1997) (citations omitted).

With respect to the Backhoe, there was evidence that Rossi paid $5,000 for it. Although there was testimony indicating that it had originally been purchased by the Plaintiff for $30,000, there was no evidence of its value at the time of the Transaction or that Rossi had sold it and had profited by its purchase. With respect to the Bulldozer, however, there was evidence that the Debtors showed a capital gain from its sale of over $22,000.

Unfortunately for the Plaintiff, the law is clear that even if the Court were to find it appropriate to impose a constructive trust with respect to either piece of Equipment, any debt arising thereunder would be dischargeable pursuant to Code § 523(a)(4) which is applicable only to debts arising out of express or technical trusts. *See In re Eldridge*, 210 B.R. at 192. The latter require "(1) a declaration of affirmative trust duties, (2) a segregating trust res, and (3) an intent to create a trust relationship." *Id.* (citations omitted). No such evidence of the existence of an express or technical trust was presented at the trial. Therefore, the Court need not determine whether a constructive trust based on unjust enrichment should be imposed with respect to the Bulldozer as any debt arising thereunder would be dischargeable.

The Court is left with consideration of the Plaintiff's first cause of action which alleges a lack of consideration, lack of competence, as well as undue influence, deception and fraud.

> [W]hile it has often been said that fraud cannot or should not be precisely defined, the books contain many definitions, such as unfair dealing; malfeasance, a positive act resulting from a wilful intent to deceive; an artifice by which a person is deceived to his hurt; a wilful, malevolent act, directed to perpetrating a wrong to the rights of others; anything which is calculated to deceive,

> whether it is a single act or a combination of circumstances, or acts or words which amount to a suppression of the truth, or mere silence; deceitful practices in depriving or endeavoring to deprive another of his known right by means of some artful device or plan contrary to the plain rules of common honesty; the unlawful appropriation of another's property by design; and making one state of things appear to a person with whom dealings are had to be the true state of things, while acting on the knowledge of a different state of things. Fraud has also been said to consist of conduct that operates prejudicially on the rights of others and is so intended; a deceitful design to deprive another of some profit or advantage; or deception practiced to induce another to part with property or to surrender some legal right, which accomplishes the end desired. Fraud therefore, in its general sense, is deemed to comprise anything calculated to deceive, including all acts, omissions and concealments involving a breach of legal or equitable duty, trust, or confidence justly reposed, resulting in damage to another, or by which an undue and unconscientious advantage is taken of another.

See In re Shanahan, 151 B.R. 44, 46-7 (Bankr. W.D.N.Y. 1993), quoting 27 AM. JUR.2D, Fraud and Deceit § 1. Applicable to the matter herein is the view that "'[t]o secure the possession of property by means of a contract made with its owner by one who at the time knew him to be incapable of entering into a contract constitutes a fraud.'" *See Sander v. Savage*, 78 N.Y.S. 189, 192 (N.Y. Appel. Div. 1902), quoting *Baird v. Howard*, 51 Ohio St. 57, 65, 36 N.E. 732, 734 (S.Ct. 1894).

It is the Plaintiff's position that at the time of the sale of the Equipment he was incapable of acting on his own behalf and the transaction would not have occurred but for the undue influence, deception and fraud of Rossi. *See* ¶ 17 and 22 of the Complaint. "'A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect * * * (b) he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition.'" *Ortelere v. Teachers' Retirement Board*, 25

N.Y.2d 196, 204, 250 N.E.2d 460, 465, 303 N.Y.S.2d 362, 369 (1969), quoting RESTATEMENT, 2D, CONTRACTS (T.D. No. 1, April 13, 1964), s. 18C.

While the court in *Ortelere* indicated that "nothing less serious than medically classified psychosis should suffice or else few contracts would be vulnerable to some kind of psychological attack," *see Ortelere*, 25 N.Y.2d at 206, 250 N.E.2d at 466, 303 N.Y.S.2d at 370, the courts have recognized that under certain circumstances a disability that falls short of psychosis may still be a predicate for avoiding a contract. *See, e.g., Blatt v. Manhattan Medical Group, P.C.*, 131 A.D.2d 48, 52 (1st Dept. 1987) (stating that "it may be that an individual who has not demonstrated a clinically classified psychosis may still be able to rescind a contract in some instances."). In making the determination, the Court must consider not only whether Plaintiff's mind was "'so affected as to render him wholly and absolutely incompetent to comprehend and understand the nature of the transaction,'" *see id.*, quoting *Aldrich v. Bailey*, 132 N.Y. 85, 89, 30 N.E. 264 (1892), but also whether the agreement with Rossi to sell the equipment was "the result of impulsive or irrational behavior beyond his control and that defendants [Rossi] knew, or should have known, that he did not possess the proper capacity to enter into contracts . . . ." *See id.*

In making a determination whether to avoid the Transaction, which apparently occurred on or about October 12, 1993, based on the sale documents, the Court must consider more than simply the isolated Transaction. In this case, Rossi first became acquainted with the Plaintiff in the spring of 1992. At that time, the Plaintiff was drinking approximately a case of beer per day. According to White, it was in 1992 that the Plaintiff "started to let himself go," taking no pride in his appearance and isolating himself from others by remaining in his truck for lengthy

periods of time. Mrs. Rossi testified that "given the things I witnessed that preceding years between the problems he was relating to in dealing with his own family and with giving away horses, it didn't seem like Mr. Lucarelli was the kind of person who would be making business deals with." *See* Tr. C at 61. Certainly, there is no evidence that the Plaintiff was psychotic. There was, however, testimony that he suffered from episodes of depression and was not always capable of managing his own affairs. On September 28, 1993, Brocker concluded that the Plaintiff was able to manage his own affairs based on his conversation with the Plaintiff that day. Brocker also indicated that he had not seen any evidence that day that the Plaintiff had been drinking. At the time the sale of the Equipment was first discussed, Rossi acknowledged that Plaintiff had been drinking. While an intoxicated man may be competent to enter into a contract, depending upon the effect the alcohol has on his understanding and mental capacity, *see McKeon v. Van Slyck*, 223 N.Y. 392, 399, 119 N.E. 851, 852 (1918), the Court cannot condone an individual taking advantage of someone under the influence of alcohol. As an alcoholic himself, Rossi should have been aware of the impact alcohol has on one's cognitive abilities. His attempt to take advantage of what he considered to be a good deal can only be viewed as overreaching under the circumstances. While Rossi denied that the Plaintiff had been drinking when he signed the documents memorializing the Transaction, he also admitted that not all the documents were executed contemporaneously with the Transaction. Rossi himself was uncomfortable enough about the Transaction that he attempted to videotape it. Rossi also admitted that he began to purchase beer for the Plaintiff subsequent to the Transaction. Most telling in this regard is Rossi's response to a question from Barbano concerning the beer he was buying subsequent to the Transaction. Rossi did not dispute that he had told Barbano, as well as Barbano's employee,

Nelson Van Vorst, that he was buying beer for a "very rich old man" and all he had to do "is take care of his affairs, keep him in booze, and I'm going to get everything he's got." In this case, Rossi sold the Bulldozer and realized a profit of over $22,000. Proof of inadequate consideration suggests fraud. *See Matter of Gebauer*, 79 Misc.2d 715, 730 (N.Y. Sur. Ct. 1974).

The Court finds that Rossi induced the Plaintiff to part with the Equipment with the intent to deprive him of profit in connection with its later sale. It is the opinion of the Court that Rossi was aware of the Plaintiff's incapacity resulting from his depression and excessive intake of alcohol and intended to and did, in fact, take advantage of it. Under the circumstances, the Court is persuaded that the sale of the Bulldozer was fraudulent based on the Plaintiff's incapacity and the inadequate consideration paid by Rossi for the Bulldozer.

Although the Plaintiff denies having received any money for the Equipment, the testimony indicates that on at least two separate occasions the Plaintiff signed documents acknowledging payment by Rossi of $9,500 in cash. In addition, Rossi has provided evidence that he paid off the balance owed by the Plaintiff in connection with the Bulldozer in the amount of $2,364.09. Accordingly, the Court finds that if a basis for nondischargeability exists, the Plaintiff is entitled to recover the difference between the sale price of the Bulldozer, namely $34,000, and $11,864.09, or $22,135.81, plus interest at the rate of nine percent from October 12, 1993, pursuant to § 5004 of the New York Civil Practice Law and Rules.

Having determined that the Transaction involving the sale of the Bulldozer was fraudulent, the Court must then consider whether the debt arising therefrom is nondischargeable pursuant to Code § 523(a)(2)(A) as alleged in the Plaintiff's eighth cause of action. Important in this analysis is the question of whether an "intent to defraud" was present or at least

presumable from the circumstances. *See In re Powell*, 213 B.R. 306, 309 (Bankr. W.D. Va. 1997). Constructive fraud which requires "neither actual dishonesty nor intent to deceive" is insufficient to establish that the debt is nondischargeable pursuant to Code § 523(a)(2)(A). 1990 WL 290144 at *39; *see also Tobkin v. Waltrip (In re Waltrip)*, 139 B.R. 492, 496 (N.D. Cal. 1991) (noting that "only fraud involving bad faith or immorality meets the statutory requirement."); *Powell*, 213 B.R. at 309 (indicating that "actual fraud involves moral turpitude and does not include fraud implied in law which may exist without imputation of bad faith or intentional wrong."). Generally, a determination of intent requires a Court to draw inferences from the circumstances surrounding the transaction. *See In re Bonnanzio*, 91 F.3d 296, 301 (2d Cir. 1996); *see also HBE Leasing Corp. v. Frank*, 48 F.3d 623, 639 (2d Cir. 1995 (noting that fraudulent intent may be inferred from the circumstances surrounding the transaction, including the relationship between the parties, the haste or unusual nature of the transaction). In this case, not only do the surrounding circumstances support the conclusion that the Transaction was fraudulent, but also the Court heard testimony which indicated that Rossi himself had expressed his intent to "get everything he's [Plaintiff's] got" by keeping him in booze. Rossi befriended the Plaintiff in late 1992 and observed the Plaintiff's deterioration over the next year and a half. As discussed above, the evidence supports a finding that he recognized an opportunity and intentionally took advantage of the Plaintiff's incapacity to deprive him of the Equipment and the profit derived from the eventual sale of the Bulldozer. Under these circumstances, the Court concludes that a claim in the amount of $22,135.81 is determined to be nondischargeable pursuant to Code § 523(a)(2)(A).

Even assuming that the Plaintiff's third and fourth causes of action seeking damages

based on the Plaintiff's loss of use of the Equipment and his alleged "inability to earn a living as a contractor" fit within some recognizable subsection of Code § 523(a), the Court finds no basis for such an award. At the trial, the Plaintiff acknowledged that he had not used the equipment for sometime except to drive the Backhoe to the store to purchase beer and cigarettes. Plaintiff also expressed some doubts about his ability to safely operate the equipment because of his health. It appears that Rossi's purchase of the Equipment was not the direct cause for the Plaintiff's "inability to earn a living as a contractor." There was no evidence presented at the trial to establish when the Plaintiff became able to operate the Equipment and but for the fact that he was without the Equipment would have been able to work as a contractor. In fact, it was the Plaintiff's testimony that "I don't think I can [go back to work as a contractor] anymore." *See* Tr. B at 153.

Plaintiff's fifth cause of action seeks an award of damages in the amount of $250,000 as a result of Plaintiff's alleged mental and physical pain and suffering. Again assuming some nexus to Code § 523(a), the Court notes that according to the testimony elicited at trial, Plaintiff suffered from depression as early as 1991 and began drinking beer in excess sometime in 1992. White testified that the Plaintiff began "to let himself go" in 1992, and the testimony indicates that the Plaintiff was drinking in excess of twelve cans of beer per day prior to Powell, the Transaction. While the testimony and the evidence presented indicated that the Plaintiff was upset about the loss of the Equipment and that he was at a loss to explain just how and why he sold the Equipment, there was nothing presented to the Court to establish a basis for granting Plaintiff an award of $250,000 for mental and physical pain and suffering as a direct result of the Transaction.

Finally, the Plaintiff's sixth cause of action seeks an award of punitive damages to punish and deter Rossi from "like conduct." Although the Code does not expressly authorize the award of punitive damages by a bankruptcy court, the courts that have examined the issue have found no impediment to such a determination in a nondischargeability context. *See In re Criswell*, 52 B.R. 184, 204 (Bankr. E.D.Va. 1985) (citations omitted).

Whether to impose punitive damages is a matter of the Court's discretion, *see id.* at 206 (citations omitted), and requires the Court to examine state law. *See id.* at 204.

> In New York, punitive damages are generally confined to unusual cases exhibiting malice, fraud oppression, insult, wantonness or other aggravated factors which effect a public interest (citations omitted). * * * [A]n award of punitive damages must be based on "quasi-criminal conduct or of such utterly reckless behavior" or a demonstrated "malicious intent" to injure the plaintiff, or gross wanton or wilful fraud or other morally culpable conduct (citations omitted).

Deborah S. v. Diorio, 153 Misc.2d 708, 710, 583 N.Y.S.2d 872, 875 (N.Y. City Civ. Ct. 1992), *aff'd as modified,* 160 Misc. 2d 210 (N.Y.Sup. App. Term 1994). In the instance where fraud has been established, punitive damages generally are not appropriate unless the party has "committed a flagrant and malicious fraud, frequently associated with a general scheme against the public or other parties." *Wayne County Vinegar & Cider Corp. v. Schorr's Famous Pickled Products, Inc.*, 118 Misc.2d 52, 65, 460 N.Y.S.2d 209, 218 (N.Y.City Civ.Ct. 1983) (citation omitted).

Based on the facts presented at the trial, the Court concludes that Rossi's actions were not in the nature of a "flagrant and malicious fraud." He saw an opportunity to take advantage of what he perceived as a good deal. While the Court does not condone Rossi's overreaching, it does not find that his actions rise to a level which would warrant punitive damages.

Based on the foregoing, it is hereby

ORDERED that judgment be entered in favor of the Plaintiff on his first cause of action in the amount of $22,135.81, plus interest at the rate of 9% per annum from October 12, 1993, to May 7, 1996; it is further

ORDERED that with respect to the Plaintiff's eighth cause of action, the debt arising from said judgment is deemed nondischargeable pursuant to Code § 523(a)(2)(A); it is further

ORDERED that consistent with the discussion herein, Plaintiff's second, third, fourth, fifth, sixth and seventh causes of action are dismissed; it is finally

ORDERED that Rossi return to the Plaintiff the equipment listed in the Debtors' Statement of Affairs as belonging to the Plaintiff and in their possession at the time the Petition was filed, within 15 days of the date of this Order.[9]

Dated at Utica, New York

this 9th day of July 1998

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

[9] As indicated above, there was no proof of inadequate consideration in connection with that particular portion of the Transaction involving the sale of the Backhoe. However, the Court would suggest that the parties consider the possibility of crediting a portion of the judgment against Rossi in exchange for the return of the Backhoe.