UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

JOSEPH VICEDOMINE and TRICIA VICEDOMINE, d/b/a LAKE ANNE COFFEE HOUSE, d/b/a LAKE ANNE EXECUTIVE SUITES, d/b/a SMUGGLERS COVE, d/b/a TEMP CLUB, INC.,

Chapter 7

Case No.: 02-15586

Debtors.

ATLANTIC REALTY OF THE OUTER BANKS, INC.,

Plaintiff,

Adv. Pro. No.: 02-90326

v.

JOSEPH VICEDOMINE and TRICIA VICEDOMINE, d/b/a LAKE ANNE COFFEE HOUSE, d/b/a LAKE ANNE EXECUTIVE SUITES, d/b/a SMUGGLERS COVE, d/b/a TEMP CLUB, INC.,

Defendants.

APPEARANCES:

Joseph Vicedomine and Tricia Vicedomine, *Pro Se*
95 Gundrum Pt. Rd.
Averill Park, NY 12018

Nolan & Heller, LLP
39 North Pearl Street
Albany, NY 12207
Attorneys for the Plaintiff

Francis J. Brennan, Esq.

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

Memorandum-Decision and Order

This matter comes before the court on a November 15, 2002 adversary complaint (the "Complaint") filed by Atlantic Realty of the Outer Banks, Inc. ("Atlantic Realty" or "Plaintiff"). Plaintiff seeks a determination that a certain debt allegedly owed to it by Joseph and Tricia Vicedomine (the "Debtors") is

nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).[1] In addition, in the event Plaintiff prevails on its first cause of action, Plaintiff also requests that the court award attorney's fees and expenses in the amount of $9,634.92.

Jurisdiction

This matter is a core proceeding to determine the dischargeability of a particular debt under 28 U.S.C. § 157(b)(2)(I). The court has jurisdiction over this core proceeding under 28 U.S.C. §§ 157(a), (b)(1), (b)(2), (b)(2)(I) and 1334(b).

Facts[2]

The following constitute the court's findings of fact under Fed. R. Civ. P. 52, made applicable to this proceeding by Fed. R. Bankr. P. 7052.

1. Debtors filed a joint Chapter 7 petition on August 30, 2002, listing Atlantic Realty as a Schedule F (Creditors Holding Unsecured Nonpriority Claims) creditor with a claim in the amount of $18,000.

2. On November 15, 2002, Plaintiff filed the Complaint seeking to except a debt in the amount of $27,464.94 (the "Debt") allegedly owed to it by Debtors pursuant to a November 23, 2001 Exclusive Property Management Agreement ("Agreement").[3] (Pl.'s Ex. 1.)

3. On December 12, 2002, Debtors filed an Answer which controverts the pertinent allegations in the Complaint.

4. Pursuant to the court's February 4, 2003 Scheduling Order, Plaintiff filed a Joint Stipulation of Facts on August 29, 2003 (the "Stipulation"), which provided for execution in parts; Debtors filed their executed counterpart on September 2, 2003.

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[1] The Complaint includes a second cause of action for a dischargeability determination pursuant to § 523(a)(6); however, after considering the testimony elicited at trial, Plaintiff withdrew the same.

[2] The following recitation of facts is lengthy, but necessary in order to clearly convey the pivotal terms of the parties contractual relationship and the Debtors' intent, since both considerations are grounds for a determination under § 523(a)(2)(A).

[3] Tricia Vicedomine did not sign the Agreement, and her testimony at trial was excused by both parties by reason of her unavailability at the time of trial; however, the parties stipulated and agreed that she will adopt any and all testimony given by Joseph Vicedomine in this proceeding as her own. Further, the parties stipulated and agreed that she will be bound by this Memorandum, Decision & Order. (Stip. ¶ 23.) Accordingly, all references herein are to Debtors collectively.

5. The parties proceeded to trial on September 9, 2003, and the court heard the testimony of three witnesses: (1) Joseph Vicedomine; (2) Myra Ladd-Bone, Owner and President of Atlantic Realty; and (3) Nancy Beasley, Property Manager of Atlantic Realty.

6. Plaintiff is a corporation organized and existing under the laws of the State of North Carolina with its principal place of business in Dare County, North Carolina. (Stip. ¶ 1.) Mss. Ladd-Bone and Beasley testified that Plaintiff's services include residential and commercial real estate sales, cottage and condominium rentals, and property management within the Outer Banks of North Carolina.[4]

7. In November 2001, Debtors employed Plaintiff as the sole and exclusive agent to rent, lease, manage and operate the Property. (*Id.* ¶ 6.) The terms and conditions of Plaintiff's employment are fully set forth in the Agreement (Pl.'s Ex. 1), which is the standard form brokers' agreement used by Atlantic Realty. Once an owner lists their property with Atlantic Realty, it immediately begins advertisements, solicitation of rentals, booking, and confirmation of rentals. In this case, Atlantic Realty promptly began advertising the Property via its website and 2002 Vacation Catalog. (Pl.'s Ex. 8, at 54.)

8. Pursuant to the terms of the Agreement, Plaintiff was employed for a period of twelve (12) months beginning on January 1, 2002.

9. In exchange for obtaining rentals, Plaintiff was to receive a commission equal to 17% of the gross rental income.

10. The section of the Agreement entitled "Agents Responsibilities" provides in part:

> The [O]wner hereby authorizes the Agent to perform such acts and take such steps as are necessary in the Agent's opinion to operate, manage, and lease the property to the Owner's best advantage including, but not limited to:
>
> . . . .
>
> 4. To make the necessary repairs and replacement to preserve, maintain, and protect Owner's property. . . . Agent agrees to coordinate maintenance provided that Owner shall be solely responsible for all costs of such maintenance, repairs, or replacements. Owner agrees to reimburse Agent in full within 14 days of billing . . . .
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> . . . .
>
> 6. To transfer Tenant in the event the property is unavailable due to fire, condemnation, delays in construction, long term mechanical breakdown of [sic] governmental action. Confirmed reservations which cannot be honored because property is unavailable for any reason whatsoever are in breach of contract with Tenant. Owner will reimburse all payments to Agent immediately and further

[4] The testimony referenced in this decision is based on the court's recollection and review of the tape recording of the trial. Neither party ordered a trial transcript.

agrees to a 25% compensation, if called for, in other comparable accommodations for Owner's Tenant or reimbursement should none be available. **The Agent's fee is earned when the reservation is confirmed therefore the fees are not reimbursed to Owner.**

. . . .

10. To maintain an accurate accounting of all monies managed on behalf of the Owner. Agent is authorized to place all advanced rent payments and security deposits in an interest bearing account [the "Escrow"]. . . . Monthly statements of receipts, expenses, and charges will be remitted to Owner, less Agent's fee on [advanced payments] when Tenant has executed (signed) a Rental Contract with payment. Tenant's final payment will be disbursed to Owner following rental occurrence. No payments will be made in excess of amounts permitted by the [North Carolina Vacation Rental Act (N.C. Gen. Stat. §§ 42A-1 et seq.)] or before the date established by the Act for disbursement. All rental amounts due Owner shall be distributed on or before the 10th of the month following Agents deposit of such monies. . . .

. . . .

15. The [Agent] will lease, market and manage the [Owner's] property in compliance with the North Carolina Vacation Rental Act . . . .

(Pl.'s Ex. 1.)

11. The section of the Agreement entitled "Owners Responsibilities" provides in part:

In return for Agent's services, Owner does hereby agree to the following terms and conditions:

. . . .

2. To reimburse Agent for any expense incurred in operating, managing, and maintaining the property including, but not limited to, general expenses, court costs, attorney fees, and maintenance and supply expenses.

. . . .

4. To honor all leases procured by Agent under the terms of this contract, whether or not Owner has been notified. Owner authorizes Agent to accept reservations for the contract period up to 13 months in advance. . . .

. . . .

14. Notify Agent when listing property "For Sale" and Listing Agent will follow Atlantic Realty policy for showing homes for sale. In the event of the sale or exchange of the subject property during the term of this [A]greement, the sale or

> exchange will be contingent upon Buyer's acceptance of all terms and conditions of this contract and assumption of the same by the Buyer. The Owner agrees to require as a condition of any listing contract or contract for sale that the Buyer of the Property will be required to honor this Agreement. . . . The Owner agrees to notify the Agent immediately upon entering into such a contract for sale and the Agent agrees to cooperate with the Owner and allow Owner to comply with the [North Carolina Vacation Rental] Act. . . .
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> 15. If Agent has grounds to believe that Owner is in default of a deed or trust or mortgage encumbering the property or a lien has been filed or acquired against the property, Agent may hold any advance rent in Agent's trust account instead of disbursing rent to the Owner. Agent will hold the advanced rent until the default has been cured, the lien canceled, or the Tenant has occupied the property under the rental agreement, whichever shall occur first.

(*Id.*) (emphasis omitted.)

12. As referenced by the Agreement, rental or management of privately owned, residential property for vacation rental in North Carolina is governed by the North Carolina Vacation Rental Act (the "Act") (N.C. Gen. Stat. §§ 42A-1 et seq. (2004)),[5] which provides in pertinent part:

> (b) Except as otherwise provided . . . if, at the time the tenant is to begin occupancy of the property, the landlord or real estate broker cannot provide the property in a fit and habitable condition or substitute a reasonably comparable property in such condition, the landlord and real estate broker shall refund to the tenant all payments made by the tenant.

N.C. Gen. Stat. § 42A-17 (2004) (Accounting; reimbursement).

> (a) The grantee of residential property voluntarily transferred by a landlord who has entered into a vacation rental agreement for the use of the property shall take his or her title subject to the vacation rental agreement if the vacation rental is to end not later than 180 days after the grantee's interest in the property is recorded in the office of the register of deeds. If the vacation rental is to end more than 180 days after the recording of the grantee's interest, the tenant shall have no right to enforce the terms of the agreement unless the grantee has agreed in writing to honor such terms, but the tenant shall be entitled to a refund of payments made by him or her . . . .

N.C. Gen. Stat. § 42A-19 (2002) (Transfer of property subject to a vacation rental agreement).

13. There was a completed rental of the Property in April 2002. (Stip. ¶ 14.) The rental was for the period of March 30, 2002 through April 6, 2002 at a weekly rate of $1,095. (Defs.' Ex. 1.)

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[5] As requested by Plaintiff at trial, the court takes judicial notice of the Act under Fed. R. Evid. 201(d).

14. In addition, Atlantic Realty accepted and confirmed rental reservations for the Property for the following periods in 2002: (1) June 1-8, with an advance rent payment by the tenant of $1,077.30 on January 30, 2002; (2) June 8-15, with an advance rent payment by the tenant of $1,833.30 on March 15, 2002; (3) June 15-22, with an advance rent payment by the tenant of $2,049.30 on December 31, 2001; (4) July 6-13, with an advance rent payment by the tenant of $2,481.30 on December 22, 2001 (5)August 3-10, with an advance rent payment by the tenant of $2,596.18 on April 18, 2003; and (6) August 10-31, with an advance rental payment by the tenant of $6,771.53 on February 28, 2002. (Stip. ¶ 17; Pl.'s Ex. 5.) Debtors testified that they first learned of the confirmed rental reservations in April 2002.

15. Once Plaintiff received an advance rent deposit and placed the money in Escrow, it would have disbursed the Escrow for the following items, but not in a set order: (1) Plaintiff's 17% commission or management fees; (2) payment of maintenance and repair costs; and (3) rental amounts due to the Owner. Beginning on or about January 31, 2002, Atlantic Realty charged its 17% management fees against the rental deposits received according to the Agreement and remitted the following payments to Debtors: (1) $3,722.20 by check dated January 31, 2002; (2) $2,092.51 by check dated March 5, 2002; (3) $2,860.55 by check dated April 4, 2002; and (3) $1,004.80 by check dated April 30, 2002. (Stip. ¶ 18; Pl. Ex. 2.) All of the foregoing payments were made payable to Debtors jointly, who executed and negotiated the checks. (Stip. ¶ 19.)

16. In addition, Plaintiff hired various individuals and entities to perform maintenance on the Property, paid the maintenance costs, and included the same on each monthly Rental Management Statement forwarded to Debtors. The May 21, 2002 Rental Management Statement, which reported income and expenses for the period of January 1, 2002 through May 21, 2002, listed total expenses paid of $2,763.94. (Pl.'s Ex. 6.)

17. The Agreement does not contain any provision requiring Debtors, at any time, to inform Plaintiff of the existence of a secured loan on the Property and, if one exists, to verify the status of the same.

18. On or about May 3, 2000, Debtors entered into a Note and Deed of Trust (the "Note")[6] that encumbered the Property and secured a loan in the original principal amount of $450,000 by Mortgage and Equity Funding Corporation. (Stip. ¶ 10.) The Deed of Trust and Note were subsequently assigned to Wells Fargo Bank Minnesota, N.A. ("Wells Fargo"), with Option One Mortgage Corporation servicing the loan. (*Id.* ¶ 11.)

19. In May 2001, approximately six months prior to the parties' execution of the Agreement, Debtors defaulted on the Note by failing to pay the monthly installment due on May 1, 2001 and each and every monthly installment thereafter (the "Default"). (*Id.* ¶ 12.) As a result of the Default, on December 18, 2001, Wells Fargo commenced a foreclosure proceeding in the General Court of Justice, Superior Court Division, Currituck County, North Carolina, against Debtors (the "Foreclosure Proceeding") (*Id.* ¶ 13; Pl.'s Ex. 4.) On May 23, 2002, Wells Fargo was the successful bidder at the foreclosure sale (Stip. ¶ 16), but an upset bid was filed on June 3, 2002. The August 6, 2002 Final Report and Account of Foreclosure Sale (3rd Party Sale) lists a secured obligation of

[6] The Stipulation refers to a Mortgage; however, the certified copies of the foreclosure documents from the Office of the Clerk of the Currituck County Superior Court, North Carolina consist of a Deed of Trust and Adjustable Rate Note. (Pl.'s Ex. 4.)

$518,637.96, total costs of $394.56, and proceeds of sale totaling $519,032.52. (Pl.'s Ex. 4.) Debtors listed the Foreclosure Proceeding under Paragraph 5 of the Statement of Financial Affairs, but they valued the Property at $600,000.

20. Debtors testified[7] that they understood the secured lender's right to foreclose in the event of default. However, they were faced with a defunct business venture in April 2001 and became unemployed as of June 2001; thus, they were unable to make the approximate $5,000 monthly installment payment on the Property. They immediately relocated from Virginia to New York, and both began substitute teaching at a rate of $70 per day, or $2,800 gross per month beginning in September 2001. Under these circumstances, they were unable to cure the Default.

21. They further testified that they had listed the Property for sale immediately upon receipt of foreclosure notices from Wells Fargo,[8] and that the Foreclosure Proceeding was delayed several times on consent because they had presented Wells Fargo with pending offers to purchase and contracts for the Property. The North Carolina Special Proceeding Docket references the following: (1) Petition for Hearing on December 18, 2001; (2) Motion for Continuance on January 25, 2002; and (3) Order of Continuance on March 7, 2002. (Pl.'s Ex. 4.) In support of their testimony, Debtors produced three offers to purchase and contracts, which were admitted into evidence without objection from Plaintiff: (1) Offer to Purchase and Contract for $590,000 dated January 13, 2002, brokered by Sun Realty of Nags Head, Inc., which included a Vacation Rental Addendum disclosing the Agreement with Atlantic Realty (Defs.' Ex. 2); Offer to Purchase and Contract for $589,000 dated March 9, 2002, brokered by BD&A Realty and Construction (Defs.' Ex. 3); and (3) Offer to Purchase and Contract for $460,000 dated April 16, 2002 (Defs.' Ex. 4). According to Debtors, one of the three contracts fell through at the closing table because the purchaser learned of the Foreclosure Proceeding and determined that he could purchase the Property for less "on the courthouse steps."

22. Debtors had listed the Property in 2000 or 2001, but they did not receive any offers on the Property between May 2001 and November 2001. Debtors stated that they entered into the Agreement because they believed they needed to have confirmed rentals in order to make the Property marketable since the majority of individuals who purchase property in the Outer Banks of North Carolina do so for investment purposes only. They further testified that the prime real estate market in the Outer Banks of North Carolina is from December to June. This testimony, however, was controverted by that of Ms. Ladd-Bone, who stated that the market is strong year-round with purchasers who are interested in either investment properties or second homes. Furthermore, in the twenty-one years she has owned Atlantic Realty, she has only seen one property that has been profit generating; most rental properties in the Outer Banks of North Carolina are "in the red."

23. Debtors admit that they did not inform Plaintiff of the Default prior to execution of the Agreement; however, they apparently were not cognizant of Plaintiff's right to withhold payments in the event

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[7] The court found Debtors were credible; their testimony was consistent with the evidence presented, and was not, in important instances, shaken by the testimony of Mss. Ladd-Bone and Beasley, whose testimony was nonetheless equally compelling.

[8] They could not recall the exact dates of the foreclosure notices, but the earliest notice contained in the record of the Foreclosure Proceeding is dated December 14, 2001. (Pl.'s Ex. 4.)

of a default under a deed of trust or mortgage. Plaintiff admits that it did not inquire into the existence or status of the Debtors' ownership interest and Note until May 2002. There is a dispute, however, as to whether Debtors, or their realtor, ever disclosed the Default or Foreclosure Proceeding to Plaintiff. Debtors contend that they did give Atlantic Realty notice on several occasions, but Atlantic Realty claims that it did not learn about either the Default or the Foreclosure Proceeding until May 2002, when an employee arrived at the Property and found it stripped of all personal belongings, furniture, and fixtures. Atlantic Realty, therefore, did not exercise its right to withhold advance rent in it's trust account. Ms. Beasley confirmed that, if she had learned of the situation in her capacity as Property Manager, she would have discontinued rentals.

24. Debtors acknowledged that they understood that, under the terms of the Agreement, they were entitled to receive rental monies from the Plaintiff regardless of whether the Property sold or was foreclosed. However, although unaware of the Act, they believed the Agreement would have been honored by the new owner(s) of the Property as a matter of course if the Property had sold before expiration of the Agreement. Moreover, they testified that they used the rental monies received from Atlantic Realty to make improvements on the Property, including leveling of the pool, because the Property did not pass inspection and was not marketable; they did not provide receipts for any of the alleged services rendered.[9]

25. The Act speaks only to voluntary transfers of property. An owner who obtains title through a foreclosure proceeding is not subject to the provisions of the Act.[10] Because the rental reservations could not be honored, Plaintiff cancelled its vacation rental agreements and refunded the full amount of each deposit to the tenants; in total, the Plaintiff refunded $18,572.50. (Pl.'s Ex. 7.)

26. Plaintiff alleges damages of $27,464.94, which are apportioned as follows: (1) refunds of deposits to tenants totaling $18,572.50; (2) earned management fees totaling $6,128.50; and (3) maintenance costs and expenses totaling $2,763.94.

Arguments

It is Plaintiff's position that the Debt should be excepted from discharge pursuant to § 523(a)(2)(A) because the Agreement was tainted by fraud on the part of Debtors, who misrepresented that the Property would be available for seasonal rental and management by Plaintiff for a period of twelve months beginning on January 1, 2002. Plaintiff contends that Debtors knew this was false because they: (1) understood that the Note was in default in May 2001, approximately seven months prior to the Agreement with Atlantic Realty; (2) knew they were incapable of curing the Default; (3) understood that their interest

[9] Plaintiff brought to the court's attention at trial that Debtors did not comply with its discovery demands to produce checking account and credit card statements. Based on the evidence, Debtors' expenditure of the funds is unclear.

[10] *See* discussion of N.C. Gen. Stat. § 42A-19 (2004) at pp. 5-6 *infra*.

in the Property would be terminated by a foreclosure sale; and (4) knew, or should have known, that a foreclosure sale was imminent because, despite their intention to sell the Property, they had not received any offers on the Property between May 2001 and November 2001. Plaintiff further contends that it justifiably relied on the false statement in continuing to accept rentals, remitting checks to Debtors, and continuing to fund necessary maintenance on the Property. Finally, Plaintiff argues that its reliance on Debtors' statement was the proximate cause of its damages, because if Plaintiff had known of the Default, it would not have continued to accept rentals and provide services under the Agreement.

Alternatively, Plaintiff contends that the Debt should be excepted from discharge pursuant to § 523(a)(2)(A) because, by failing to inform Plaintiff of the Default, Debtors conveyed the false impression that the Property would be available for the full term of the Agreement. Because the availability of the Property was integral to the Agreement, Plaintiff argues that Debtors should have disclosed the Default, and their failure to do so constitutes false pretenses within the meaning of the statute.

Debtors respond to Plaintiff's accusations of fraud by stating that they attempted to perform in compliance with the Agreement by immediately listing the Property for sale in order to procure a new owner who would honor the Agreement without interruption. They assert that their intentions in November 2001 were to sell the Property subject to the Agreement, satisfy the Note in full, and realize approximately $80,000 in equity. They suggest that any inference of fraudulent intent is negated by the existence of equity in the Property, which they regrettably forfeited once the foreclosure sale was consummated. Moreover, they insist that they informed Plaintiff of both the Foreclosure Proceeding and the Property listing on several occasions. While they acknowledge that the foreclosure sale prevented them from carrying out the full term of the Agreement, they argue that the non-dischargeability of debts must be based on a clear misrepresentation of existing facts rather than an expectation of future performance. Debtors present themselves as truthful, but unfortunate. It is their position that damages caused by a breach of the Agreement, without unequivocal evidence of fraud, do not merit the relief requested.

Discussion

A creditor seeking to except a debt from discharge under § 523(a) must prove the necessary elements by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 286 (1991). "Exceptions to discharge must be strictly and literally construed against the creditor and liberally construed in favor of the honest debtor." *In re Spar*, 176 B.R. 321, 326 (Bankr. S.D.N.Y. 1994) (citations omitted).

In this case, Plaintiff relies upon § 523(a)(2)(A), which bars discharge from debts for money or services obtained by "false pretenses, a false representation, or actual fraud . . . ." This provision "gives creditors an opportunity to prove that particular debts arose through impermissible means, and advances the basic principle of bankruptcy law that relief only inures to the debtor with clean hands." *Hess v. Mastrodonato*, 2001 U.S. Dist. LEXIS 24571, at *6 (W.D.N.Y. November 19, 2001) (citing *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)).

In order to prevail on a cause of action for false representation, a creditor is required to prove five elements: (1) that the debtor made a false representation; (2) that at the time the representation was made, the debtor knew it was false; (3) that the debtor made the representation with the intention and purpose of deceiving the creditor; (4) that the creditor relied on such representation; and (5) that the creditor sustained the alleged loss and damage as a proximate result of the representation having been made. *Hess*, 2001 U.S. Dist. LEXIS 24571, at *7 (citations omitted); *In re Mitchell*, 27 B.R. 45, 50 (Bankr. S.D.N.Y. 1998) (citations omitted); *Fellows, Read & Assocs., Inc. v. Reider*, 194 B.R. 734, 737 (S.D.N.Y. 1996), aff'd without op., 116 F.3d 465 (2d Cir. 1997); *In re Braizblot*, 194 B.R. 14, 19 (Bankr. E.D.N.Y. 1996) (citing *In re Spar*, 176 B.R. 321, 326 (Bankr. S.D.N.Y. 1994)). With respect to the fourth element, *i.e.*, reliance, the Supreme Court has ruled that the creditor's reliance on fraudulent misstatements need only be justifiable for the creditor to recover. *Field v. Mans*, 516 U.S. 59, 74-75 (1995). The failure to prove any of the five elements is fatal to the plaintiff's case. *In re Spar*, 176 B.R. at 326 (citing *In re Gans*, 75 B.R. 474, 483 (Bankr. S.D.N.Y. 1987)).

Alternatively, under a theory of false pretenses, a creditor must prove that "there was a series of events, activities, or communications which created a false and misleading set of circumstances or understanding of a transaction" which induced the creditor to deal with the debtor. *Hess*, 2001 U.S. Dist. LEXIS 24571, at **7-8 (citing *In re Reid*, 237 B.R. 577, 586 (Bankr. W.D.N.Y. 1999); *In re Luppino*, 221 B.R. 693, (Bankr. S.D.N.Y. 1998)). "'False pretenses' for purposes of Section 523(a)(2)(A) . . . may be defined as conscious deceptive or misleading conduct calculated to obtain, or deprive another of, property. It is the practice of any scam, scheme, subterfuge, artifice, deceit or chicane in the accomplishment of an unlawful objective." *In re Kovler*, 249 B.R. 238, 261 (Bankr. S.D.N.Y. 2000).

Here, it is generally not disputed that Debtors made the representation that the Property would be available for rental and management by Plaintiff from January 1, 2002 through December 31, 2002; Plaintiff justifiably relied on the representation in accepting rental reservations, continuing maintenance on the Property, and remitting checks to Debtors; and Plaintiff suffered a loss because Debtors lost ownership of the Property. Thus, Plaintiff has established, inasmuch as Debtors have conceded, three of the five requisite elements of nondischargeability pursuant to § 523(a)(2)(A). However, Plaintiff has failed to establish the second and third elements, namely falsity and scienter.

The second element requires either actual knowledge of falsity or "reckless indifference to the truth" at the time the statement was made. *In re Spar*, 176 B.R. at 327. Based on the facts and circumstances of this case, the court finds that Debtors did not have actual knowledge that the statement was false when made. The court need not determine, however, whether Debtors acted recklessly by entering into the Agreement when they were seven months late on the Note because, no matter how this issue is decided, Plaintiff has not shown that Debtors harbored the requisite fraudulent intent to prevent discharge of the Debt under § 523(a)(2)(A).

The scienter element can be inferred from the totality of the circumstances because direct proof of a debtor's state of mind is generally not available. *Id.* at 328 (citations omitted). However, the permissible

inference will be negated where the debtor comes forward with some evidence that he did not intend to deceive the plaintiff. *Id.* (citations omitted). In this case, the totality of the circumstances indicates that Debtors' motives for entering into the Agreement were pure, but their reliance on a forthcoming sale of the Property was misplaced given the duration of the Default and the ticking of the clock.

At the time of execution of the Agreement, Debtors were the titled owners of the Property, and the Foreclosure Proceeding had not yet been commenced. Although they acknowledged that a continued default would inevitably lead to foreclosure, their statements at trial suggest that they considered such an outcome to have been unlikely. Debtors testified that they had a good faith belief the Property would sell subject to the Agreement; thus, all scheduled reservations would have been honored and uninterrupted. This belief did not exist in a vacuum since Debtors had hired a realtor; in fact, they entered into the first contract for sale just two months after execution of the Agreement. In compliance with the Agreement, that contract included a Vacation Rental Addendum which required the prospective purchasers to honor the Agreement. For these reasons, the court does not find merit in Plaintiff's argument that Debtors could not have held a reasonable belief that the Property would have sold because they had received no offers between May 2001 and November 2001. As discussed at trial, any number of factors could have contributed to the lack of offers during this time period, including poor judgment in selecting a broker or an inflated list price. Without the broker's testimony, any conclusion as to the lack of offers is purely speculative.

Moreover, Debtors had a vested interest in preventing a foreclosure sale because they held substantial equity in the Property.[11] The Foreclosure Proceeding, although not entirely unforeseen, intervened with their attempts to sell the Property and salvage the situation. While it is true that Debtors obtained services and money from Plaintiff, the court is unconvinced that their objective was to defraud

[11] Debtors testified that the fair market value of the Property was approximately $600,000 in 2001-2002. Although they did not provide an appraisal, their testimony is supported by the satisfaction of the entire amount of the secured obligation through the Foreclosure Proceeding. At a minimum, the Property was worth $519,032.52.

Plaintiff when they entered into the Agreement. Although sale of the Property did not materialize, the court is persuaded by their testimony that they hired Plaintiff in order to generate future rentals and ensure the marketability of the Property.

Finally, Plaintiff's theory of fraud based on false pretenses must also fail. During trial, Plaintiff acknowledged that Debtors did not have a duty to disclose the Default either under North Carolina law or the terms of the Agreement. Post-trial, however, Plaintiff conversely argues that Debtors had an obligation to disclose the Default because Plaintiff could not have independently discovered the same. Clearly, if the Agreement had imposed this affirmative duty on Debtors, then their failure to do so would have been indicative of fraudulent intent. This is not the case.[12] Fraud cannot be ascribed to Debtors based on their silence alone. Debtors hired a realtor, listed the Property, and entered into three contracts for sale; these actions are inconsistent with an agenda of deceit. Rather, Debtors testified that they entered into the Agreement for the legitimate purpose of ensuring the marketability of the Property. In sum, their actions do not evidence a "conscious orchestration of deceptive or misleading conduct" calculated to obtain, or deprive Plaintiff, of property. *In re Kovler*, 249 B.R. at 261.

Conclusion

For the foregoing reasons, the court concludes that Plaintiff has failed to sustain its burden under § 523(a)(2)(A). After reviewing the evidence, the court is left with a breach of contract case that does not give rise to a claim for fraud under § 523(a)(2)(A). As such, the Debt is dischargeable and the Complaint is, therefore, dismissed.

Dated:
Albany, New York

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

[12] The court is somewhat dismayed at the lack of due diligence exhibited by Plaintiff. Ms. Ladd-Bone testified that she understood the Act applied only to voluntary transfers of real property; therefore, the rights of tenants under a vacation rental agreement would be terminated in the event of foreclosure. Nonetheless, Atlantic Realty utilized an Agreement, which is the standard form used in the ordinary course of Plaintiff's business, that failed to protect against this contingency.