UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

STEPHEN G. GINSBURG — CASE NO. 00-61583

Debtor — Chapter 7

KENNETH E. KEENEY, INDIVIDUALLY
and d/b/a KEN'S

Plaintiff

vs — ADV. PRO. NO. 00-80139A

STEPHEN G. GINSBURG

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**

The Court considers herein the adversary proceeding commenced on July 11, 2000, by Kenneth E. Keeney ("Plaintiff") seeking a denial of dischargeability of a debt incurred by Stephen G. Ginsburg ("Debtor") pursuant to § 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. §§ 101-

1330 ("Code"). Issue was joined by the filing of an answer on August 10, 2000.

The adversary proceeding was originally scheduled for trial on October 13, 2000, in Utica, New York. The trial was consensually adjourned to February 14, 2001, and again to June 13, 2001. The Court heard testimony from both parties on June 13, 2001. At the close of the Plaintiff's proof, the Debtor moved for dismissal of the complaint. In lieu of closing arguments, the parties were afforded an opportunity to file post-trial memoranda of law. The matter was submitted for decision on July 11, 2001.

JURISDICTIONAL STATEMENT

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

FACTS

Debtor filed a petition pursuant to chapter 7 of the Code on April 3, 2000. Debtor lists Plaintiff as an unsecured creditor involving a motor vehicle purchase in 1998 in the amount of $5,900. *See* Schedule F, included with Debtor's petition.

At the trial, the Debtor testified that he had purchased a 20 foot 1998 Bayliner ("Boat") from the Plaintiff in April 1998. The Debtor could not recall the purchase price of the Boat. He testified that at the time of the transaction he received "whatever I needed to register the boat," but he could not recall whether that included a certificate of title. He later sold the Boat to a third

party.

According to the Plaintiff, he asked that the Debtor execute a promissory note with respect to the purchase of the Boat. He and the Debtor had had prior dealings with one another for which Plaintiff had not required a promissory note; however, because of the amount involved with this particular transaction he had asked that the Debtor sign a promissory note.[1] It was Plaintiff's testimony that he expected the Debtor to register the Boat and list Plaintiff as a lienholder on its title. Plaintiff admitted that although the usual turn around time for the New York State Department of Motor Vehicles ("DMV") to process registration paperwork was 30-90 days, he had not received anything back from the DMV during the three month period following the sale of the Boat.

On or about August 6, 1998, Plaintiff also sold the Debtor a 1990 Ford Taurus ("Vehicle") for $2,000. The Debtor testified that he had never registered the Vehicle, and it was later returned to the Plaintiff and sold by him. Plaintiff acknowledged at trial that he had arranged to have the car picked up in late October 1999 and that he had resold it in early November 1999.

In connection with the August 6, 1998, transaction, Plaintiff testified that he had voided the promissory note executed in connection with the sale of the Boat and had had the Debtor sign a new note reflecting the amount owed on both the sale of the Boat and the Vehicle.[2] Upon

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[1] At the trial, Plaintiff testified that he did not have a copy of the promissory note with him or any other paperwork concerning the sale and could not recall the purchase price of the Boat. He also could not recall whether a trade-in had been involved or whether it was an outright sale.

[2] Plaintiff did not have a copy of the second promissory note to offer into evidence. He did admit into evidence a copy of the Retail Certificate of Sale and the Vehicle Registration/Title Application on the Vehicle, which he had completed and signed. *See* Plaintiff's Exhibit 1. On the front of the form there is a section which is "To be completed by a Registered New York State

questioning by the Court, Plaintiff acknowledged that at the time he sold the Vehicle to the Debtor in August 1998 he did not inquire about whether the Debtor had noted Plaintiff's lien on the title to the Boat when he registered it with the DMV.

On September 9, 1999, Plaintiff obtained a Judgment by Confession in the amount of $8,501, plus costs from the Debtor. In the Affidavit of Confession of Judgment, sworn to by the Debtor on September 2, 1999, Debtor acknowledged having sold the Boat to a third party without paying the Plaintiff the amount owed on the Boat. He agreed that he owed the Plaintiff $8,251, plus $250 in attorney's fees.[3] The Debtor testified that he knew he owed Plaintiff the money and had spoken to the Plaintiff on several occasions about the debt. According to the Debtor, at the time of the Confession of Judgment he had been trying to obtain refinancing on his house. He further testified that if the refinancing had been approved he had promised to use some of the proceeds to pay Plaintiff. He was unable to obtain refinancing, but in January 2000 he obtained a mortgage on a new house. Upon questioning by Plaintiff's counsel, Debtor acknowledged that as part of the mortgage closing there were instructions from the mortgagee that a portion of the proceeds from the mortgage loan was intended to be used to pay the Plaintiff. However, when the closing occurred and the existing mortgage was paid off, there was no money left to pay Plaintiff.

Dealer or DMV Staff Only." Plaintiff testified that he was a registered New York State dealer. However, he did not identify himself on the form as holding a lien on the Vehicle. *See id.*

[3] In his Complaint, the Plaintiff refers to a debt of $8,516 with interest from September 2, 1999. The Confession of Judgment acknowledges a total debt of $8,501 plus interest.

ARGUMENTS

Plaintiff argues that Debtor induced him to forbear collection efforts to recover the amount due for the purchase of the Boat and Vehicle by executing a Confession of Judgment. He contends that because of the Debtor's representations that he would pay him out of proceeds from the refinancing of his old house or from the proceeds of the mortgage on his new house, Plaintiff did not pursue collection efforts to recover monies owed to him by Debtor. Plaintiff asserts that Debtor executed the Confession of Judgment solely to hinder and delay collection efforts until Debtor filed for bankruptcy protection. As such, Plaintiff argues that the debt owed to him by Debtor should be excepted from discharge pursuant to § 523 (a)(2)(A) of the Code.

Debtor responds to Plaintiff's allegations by asserting that he did not defraud Plaintiff in executing the Confession of Judgment as he intended to pay the outstanding debt owed to Plaintiff when Debtor mortgaged his home. Debtor also asserts an affirmative defense that Plaintiff's cause of action was previously litigated in State Court whereby Plaintiff received a judgment against Debtor and Plaintiff should, therefore, be barred from re-litigating the same issue in Bankruptcy Court.

DISCUSSION

As a threshold matter, the Court will consider the applicability of collateral estoppel to Plaintiff's cause of action alleging non-dischargeability of the debt arising under Code § 523(a)(2)(A). Collateral estoppel "bars a party from relitigating in a second proceeding an issue

of fact or law that was litigated and actually decided in a prior proceeding, if that party had a full and fair opportunity to litigate the issue in the prior proceeding and the decision of the issue was necessary to support a valid and final judgment on the merits." *Metromedia Co. v. Fugazy*, 983 F.2d 350, 365 (2d Cir.1992). The doctrine of collateral estoppel is applicable to bankruptcy dischargeability proceedings. *Grogan v. Garner,* 498 U.S. 279, 284 n.11 (1991). For a bankruptcy court to "apply collateral estoppel in a dischargeability proceeding, the requisite elements of a [Code] § 523 (a) claim must have been specifically decided by the state court.," *In re Halperin,* 215 B.R. 321, 336 (Bankr. E.D.N.Y. 1997) (citation omitted). The movant asserting collateral estoppel as a defense must sustain the burden of supplying the court with a "'record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action.'" *Id.,* quoting *In re Tobman,* 107 B.R. 20, 23 (Bankr. S.D.N.Y. 1989). "Absent such a record, the Court will not draw any inferences or make any assumptions regarding the [state court] decision." *Halperin,* 215 B.R. at 337 (citation omitted).

In the instant proceeding, the Debtor raises an affirmative defense that Plaintiff should be barred from re-litigating the non-dischargeability of the debt based on the Confession of Judgment. The Debtor points out that "[n]o fraud was claimed in the state proceeding." *See* Debtor's Answer at ¶ 8. There is nothing in the record to indicate that there was any litigation or that an action was commenced in state court by the Plaintiff prior to the execution of the Confession of Judgment. Indeed, "confession of judgment" is defined as "a judgment taken against a debtor by a creditor based on the debtor's written consent." BLACK'S LAW DICTIONARY 293 (7th ed. 1999). There was never any state court determination on the merits of Plaintiff's claim that the Debtor made a false representation or committed actual fraud. The Affidavit of

Confession of Judgment, signed by te Debtor, represents merely an acknowledgment by the Debtor that he had not turned over the proceeds from the sale of the Boat and still owed $8,251 to the Plaintiff in connection with the two transactions, as well as attorneys fees. It is for the bankruptcy court to determine whether or not that debt is dischargeable pursuant to Code § 523(a)(2)(A). *See Grogan v. Garner*, 498 U.S. at 284 and n.10.

Code § 523(a), in pertinent part, provides that "[a] discharge under section 727 . . . of this title does not discharge an individual debtor from any debt . . . (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by (A) false pretenses, a false representation, or actual fraud . . . ." 11 U.S.C. § 523(a)(2)(A). The legislative intent and case law interpreting this statutory provision indicates that "such exceptions to discharge of a debt are to be strictly construed against the creditor and liberally in favor of an honest debtor" for the purpose of advancing bankruptcy law's fundamental objective of providing a debtor with a fresh start. *In re Kurtz,* 213 B.R. 253, 258 (Bankr. N.D.N.Y. 1997). A creditor seeking to render a debt nondischargeable pursuant to Code § 523(a)(2)(A) carries the burden of proving five elements by a preponderance of the evidence in order to preclude discharge of the debt in question: "(1) the debtor made a representation; (2) the debtor knew the representation was false; (3) the representation was made with intention of deceiving creditor; (4) the creditor relied on representation; and (5) the creditor thereby suffered damage or loss complained of." *In re Lokotnicki,* 232, B.R. 583, 586 (Bankr. W.D.N.Y. 1999) (citation omitted).

The most difficult element of fraud for a creditor to establish is that the debtor intended to defraud the creditor at the inception of the transaction.

"Actual fraud," as the term is employed in Section 523(a)(2)(A),

> is defined as "any deceit, artifice, trick or design involving direct and active operation of the mind, used to circumvent and cheat another - something said, done or omitted with the design of perpetrating what is known to be a cheat or deception." *Wilcoxon Constr., Inc. v. Woodall (In re Woodall)*, 177 B.R. at 523, citing *Stanley H. Silverblatt Elec. Contractor, Inc. v. Marino (In re Marino)*, 139 B.R. 380, 383 (Bankr. D. Md. 1992). "[T]he fraud must have existed at the time of, and been the methodology by which, the money, property or services were obtained." *Woodall*, 177 B.R. at 523. Later misrepresentations are irrelevant for purposes of determining dischargeability under Section 523(a)(2)(A). *Id.* at 524. In addition, the fraudulent conduct must involve moral turpitude or intentional wrongdoing as opposed to fraud implied in law. *Id.;* (citations omitted).

Spinoso v. Heilman (In re Heilman), 241 B.R. 137, 150 (Bankr. D.Md. 1999). As noted by the court in *Farina v. Balzano (In re Balzano)*, 127 B.R. 524 (Bankr. E.D.N.Y. 1991),

> A bare promise to be fulfilled in the future, which is not carried out, does not render a consequent debt nondischargeable under section 523(a)(2)(A). It is insufficient under § 523(a)(2)(A) simply to show that debtor left unfulfilled a prior oral representation or promise. Were this showing sufficient, virtually every oral obligation would give rise to a nondischargeable debt under § 523(a)(2)(A). A fraudulent promise under § 523(a)(2)(A) requires proof that at the time the debtor made it, he or she did not intend to perform as required.

Id. at 531 (citation omitted).

There is nothing in the record to indicate that at the time that the original transaction occurred in April 1998 the Debtor made any misrepresentations to the Plaintiff on which Plaintiff relied in selling him the Boat. While the Plaintiff in his Complaint alleges that the Debtor misrepresented that he would file the necessary documents to perfect a security interest in both the Boat and the Vehicle, there was nothing in the testimony at trial to support the allegation. Plaintiff testified that based on his prior dealings with the Debtor, he expected him to submit the

registration application for the Boat to DMV with Plaintiff's lien noted on the application. However, there was no testimony from either the Plaintiff or the Debtor to indicate that the Debtor made any such representation. Furthermore, even if their exchange had included a promise by the Debtor to register the Boat with Plaintiff's lien listed on the title, as Plaintiff testified was his understanding, there is also no proof that there was any intention on the Debtor's part to deceive the Plaintiff. There is also some question whether the Plaintiff's reliance on what he considered to be a promise by the Debtor was justifiable considering the fact that he made no effort to verify with DMV that the registration of the Boat included a notation of the Plaintiff's lien before entering into the subsequent sale of the Vehicle to the Debtor. Accordingly, the Court must deny Plaintiff's request that the debt be determined to be non-dischargeable based on the representations made by the Debtor at the time of the sale of the Boat.

In the alternative, Plaintiff also argues that the debt should be determined to be nondischargeable based on alleged misrepresentations made by the Debtor to the Plaintiff following the entry of the Judgment by Confession on September 9, 1999. It is the Plaintiff's contention that in reliance on the Debtor's promise to use the proceeds from the refinancing of his old house or the proceeds from the financing of the Debtor's new house to pay the Plaintiff, Plaintiff did not take any further measures to enforce the Judgment.

As noted above, Code § 523(a)(2)(A) excepts from discharge a debt for, *inter alia*, "the 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). Subsequent to obtaining the Judgment by Confession, Plaintiff had a present right to collect on the acknowledged debt. His forbearance to do so based on the Debtor's representations to him that he would receive payment

from the proceeds of the refinancing/financing of the Debtor's house arguably constituted a further extension of credit to the Debtor and, therefore, the debt falls within the parameters of Code § 523(a)(2)(A). *See generally, In re Horwitz,* 100 B.R. 395, 401 (Bankr. N.D.Ill. 1989) (finding that reliance on a statement by the debtor that there were sufficient funds in his account to cover a check written to the creditor constituted an extension of credit and fell within the purview of Code § 523(a)(2)(A)). However, as the Plaintiff presented no evidence that the representations were made by the Debtor when he confessed to the judgment were intended to cheat or deceive the Plaintiff, the Plaintiff again has failed to meet his burden of proof. The Debtor testified that he was unsuccessful in his efforts to obtain refinancing and while he fully expected that the Plaintiff would receive payment from the proceeds of the mortgage loan on the new house, apparently there were insufficient monies to make such a payment at the time of the closing in January 2000. The Court finds the Debtor's explanation credible. Without proof of actual fraud or an intent to deceive the Plaintiff, the Court must again conclude that it must deny the relief sought by the Plaintiff.

Based on the foregoing, it is hereby

ORDERED that the relief sought in the Plaintiff's Complaint with respect to a determination of nondischargeability of the debt owed to him pursuant to Code § 523(a)(2)(A) is denied; and it is further

ORDERED that the motion made on behalf of the Debtor at the close of Plaintiff's proof at the trial to dismiss the Complaint is granted.

Dated at Utica, New York

this 5th day of October 2001

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge