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IT IS SO ORDERED.



Beth A. Buchanan

Beth A. Buchanan
United States Bankruptcy Judge

Dated: April 13, 2012

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re)	
)	
ROBERT A. PARKER,)	Case No. 11-12329
)	Chapter 7
)	Judge Buchanan
Debtor)	
_____)	
LISA M. WELLS,)	Adversary Case No. 11-1082
)	
Plaintiff)	
)	
vs.)	
)	
ROBERT A. PARKER,)	
)	
Defendant)	
_____)	

ORDER REGARDING COMPLAINT TO
DETERMINE NONDISCHARGEABILITY OF DEBT

The issue before this Court is whether the Debtor's representation to his domestic relations attorney that he would pay her legal fee from a future withdrawal from his deferred

compensation fund, but then failed to do so, creates a non-dischargeable debt under 11 U.S.C. § 523(a)(2)(A). This Court finds that it does not.

This matter is before the Court on Plaintiff Lisa M. Wells' *Complaint to Determine Non-Dischargeability of Debt* [Docket Number 1] (the "Complaint") and Debtor-Defendant Robert A. Parker's *Answer* [Docket Number 5]. A trial was held on January 11, 2012.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and the general order of reference entered in this district. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

I. Findings of Fact

In early 2010, Plaintiff Lisa M. Wells ("Ms. Wells") was retained by the Debtor to replace his current attorney in a very contentious divorce and child custody matter.¹ Around this time, the Debtor was also talking to Lynn Lape ("Ms. Lape"), a bankruptcy attorney, in contemplation of filing a chapter 7 bankruptcy case, as his previous chapter 13 case had been dismissed for nonpayment and his house was in foreclosure. These facts concerning the Debtor's financial problems were not kept secret from Ms. Wells. Present with the Debtor during many of his meetings with Ms. Wells and Ms. Lape was the Debtor's girlfriend, Marleen Nikole ("Ms. Nikole").

On March 2, 2010, the Debtor signed a fee agreement (the "Fee Agreement") with Ms. Wells wherein the Debtor agreed to pay a retainer in the aggregate amount of \$2,600. The Debtor paid the retainer as agreed. The Fee Agreement states that "[a]ny payment schedule agreed upon between you and the attorney shall require payments to be made on or before the first of each month." Ms. Wells' time records indicate that the Debtor made monthly payments

¹ The Debtor was seeking custody of his two non-biological children. Ultimately, Ms. Wells was successful in obtaining this desired result for the Debtor.

of \$1,000 for the months of April, May, June, and July of 2010. By early August of 2010, Ms. Wells was spending more time on the Debtor's divorce case and the Debtor's monthly payments were not keeping up with her growing legal fee. Around this time, the Debtor and Ms. Wells reached an understanding that the Debtor, a fireman who is paid bi-weekly, would make a \$1,000 payment every two weeks, each time he received a paycheck. Ms. Wells was also encouraging the Debtor to file his bankruptcy petition, as evidenced by an August 4, 2010 email from Ms. Wells to the Debtor.²

Ms. Wells' time records indicate that the Debtor made the following payments: a total of \$2,500 in August, 2010; \$1,000 on September, 14, 2010; \$1,000 on October 12, 2010; \$1,000 on October 26, 2010, \$1,000 on November 9, 2010, \$1,000 on December 6, 2010, and a final payment of \$1,000 on January 19, 2011. The Debtor testified that he would come to Ms. Wells' law office to make the payments in person and that he made every promised \$1,000 payment (\$2,000 monthly) from August, 2010, until his final \$1,000 payment on January 19, 2011. Although the Debtor testified that he had receipts or cancelled checks for each payment made, these items were not introduced into evidence. The Debtor did present into evidence a receipt for a \$1,000 cash payment made on December 22, 2010. The receipt is signed by Crystal Went ("Ms. Went"), Ms. Wells' paralegal. Interestingly, this cash payment is not reflected on Ms. Wells' time records. For purposes of this adversary proceeding, we find that the Debtor was substantially, if not completely, current with his monthly payments to Ms. Wells.

In early October of 2010, the Debtor and Ms. Nikole were at Ms. Wells' law office preparing answers to interrogatories that had been served on the Debtor in the divorce

² The email stated in pertinent part: "When is the last time you spoke with Lynn Lape? I would strongly encourage you to continue to pursue your BK as soon as possible. Has it been filed?"

proceeding. During this process, Ms. Wells became aware that the Debtor, as a fireman, had a deferred compensation fund valued at approximately \$24,000 from which he could make a withdrawal to pay for unexpected emergencies, such as the payment of legal fees for a divorce. Although Ms. Wells initially testified on direct examination that “she did not even know what a deferred compensation fund was” and that “it was the Debtor’s idea” to use this fund as a source of money to pay her legal fee, she contradicted herself on cross-examination when she acknowledged that she did in fact understand the concept behind a deferred compensation fund. This Court finds that Ms. Wells’ testimony was not credible as to whose idea it was to make a withdrawal from the Debtor’s deferred compensation fund to pay her legal fee. In contrast, the Debtor and Ms. Nikole both offered credible testimony that it was Ms. Wells’ idea to use this fund as a source of money to pay her legal fee.

At that October 2010 meeting, the Debtor used Ms. Wells’ desk, computer, telephone, and printer in an attempt to initiate the application process to make a withdrawal from the deferred compensation fund. At the conclusion of the meeting, the results of the application process were not known by any of the parties. At the trial, the Debtor readily acknowledged that during the course of that meeting, he did expressly promise to pay Ms. Wells’ legal fee with the proceeds from the deferred compensation fund. The Debtor also offered credible testimony that he did intend to pay Ms. Wells with those funds at the time he made the promise. On October 7, 2010, the Debtor confirmed this promise in an email to Ms. Wells.³

Both Ms. Wells and Ms. Went testified that there were many other verbal representations made to each of them by the Debtor and Ms. Nikole that the deferred compensation fund would be used to pay Ms. Wells’ legal fee.

³ The email stated in pertinent part: “Yes I am planning on continueing [sic] paying the 1000.00 per pay and as soon as I get the deferred comp money its yours and you will be paid off.”

During this time period of November and December 2010, there were many things happening in the parties' lives. The Debtor's divorce proceeding was reaching a critical point. The Debtor's creditors were "chomping at his bit" and threatening to garnish his wages. Ms. Wells was in a car accident in November. She was also experiencing a difficult pregnancy and needed intravenous fluids. Ms. Wells delivered her baby on December 30, 2010. There were complications following the baby's birth. Also, at this time, the relationship between Ms. Wells and the Debtor began to sour, and, as described by the Debtor, "the wheels fell off." Ms. Wells was demanding more payments from the Debtor or she would withdraw from his case. Ms. Wells testified at the trial that she was only interested in working on cases where she was getting paid because she wanted to be able to take a maternity leave. The last time the Debtor met with Ms. Wells was in December, 2010.

Pursuant to Ms. Wells' Complaint, the final hearing date in the Debtor's divorce proceeding was on January 6, 2011.⁴

The process of obtaining the money from the Debtor's deferred compensation fund turned out to be more complicated than expected. The Debtor was asked to provide additional paperwork on three different occasions. Finally, and somewhat surprisingly, a direct deposit of \$21,805.03 was made into the Debtor's bank account on January 12, 2011. The Debtor was uncertain as to the exact date that he became aware of the deposit because it was a direct deposit and was not accompanied by a notice of any kind from the fund program.

On January 15, 2010, Ms. Nikole responded to an email from Ms. Wells and stated in pertinent part that "[d]eferred comp needed additional paperwork (which they have been sent)."

⁴ Ms. Wells' time records show no time entries between December 20, 2010 and January 13, 2011. Ms. Wells arranged for another attorney to stand in for her at the final hearing in the Debtor's divorce proceeding.

On January 17, 2010, the Debtor and Ms. Nikole went to the law office of Ms. Lape. Ms. Lape advised them that the Debtor should not have withdrawn the money from the deferred compensation fund because it had been “protected” but now that it had been withdrawn, it was no longer “protected.” She further advised the Debtor that since he had already withdrawn the money, he had to be very careful how he spent the money and that he should only spend it on “necessities and not debts” because the debts would be “taken care of in the bankruptcy.” Ms. Lape explained to the Debtor that any payments made to a creditor within ninety days of the filing of the petition could be considered a preferential transfer and that the recipient of those funds could be forced to return them. She characterized her advice as “standard.”

Immediately thereafter, the Debtor spent the \$21,000 amount on mortgage payments, car payments, tires for a vehicle, a bed, and a Verizon payment. He paid \$1,200 to Ms. Lape for her legal fees and his bankruptcy filing fee. The Debtor also paid \$1,000 to Ms. Wells.

On February 7, 2011, Ms. Wells filed a motion to withdraw from representing the Debtor (“Motion to Withdraw”) in the divorce proceeding. A hearing on the Motion to Withdraw was scheduled for February 28, 2011. On the advice of Ms. Lape, the Debtor did not attend the hearing. On March 1, 2011, a Magistrates’ Decision With Findings of Fact and Conclusions of Law (the “Decision”) was issued granting the Motion to Withdraw. The Decision was adopted by the Domestic Relations Judge and no objections were filed by the Debtor in the following fourteen day objection period.

On March 10, 2011, Ms. Wells, through her attorney, Robert L. Raper (“Mr. Raper”), filed a complaint in state court for payment of her outstanding legal fees in the amount of \$24,485.34.

On April 19, 2011, the Debtor filed his chapter 7 petition. The Debtor's Statement of Financial Affairs discloses the \$21,805 distribution from the fund as well as an explanation of the payments made by the Debtor.

The instant adversary proceeding was filed by Ms. Wells, through her attorney, Mr. Raper, on May 23, 2011, the day before the 341 meeting of creditors. Neither Ms. Wells nor Mr. Raper attended the 341 meeting.

II. Law And Analysis

A. Motion To Continue Trial Date

On January 10, 2012, at 4:18 p.m., Ms. Wells filed a motion to continue the trial scheduled to begin at 11:00 a.m. the next day, for reasons related to discovery. Pursuant to the Scheduling Order entered on October 28, 2011, the discovery cutoff date in this case was December 1, 2011 and all motions directed to discovery were to have been filed by December 1, 2011. At the beginning of the trial, this Court denied the motion to continue, because it was filed on the very eve of trial and because it was filed past the discovery cutoff date.

B. Preclusion

Ms. Wells contends that the Decision entered in the state court domestic relations proceeding granting her Motion to Withdraw has preclusive effect on the issue of dischargeability based on fraud. As explained below, this Court disagrees.

The Motion to Withdraw consists of three substantive sentences:

1. The undersigned filed a Substitution of Counsel on February 10, 2010 replacing Plaintiff's previous attorney, Hon. William Oswald.
2. Plaintiff signed a contract outlining the financial terms for representation.
3. As of this date, Plaintiff is in breach of said contract.

The relief sought in the Motion to Withdraw is for the state court to approve Ms. Wells' withdrawal from the representation of the Debtor in the state court action. The stated ground for withdrawal in the Motion to Withdraw is the Debtor's failure to pay Ms. Wells.

The Decision includes the following four "Findings of Fact":

1. On or about March 1, 2010, Husband entered into a written fee agreement with his attorney Lisa M Wells, Esq for representation for a divorce, as substitute counsel for the Plaintiff.
2. Husband had payment responsibilities under the terms of the agreement, which he has not honored.
3. Husband failed to honor the original fee agreement. To induce Ms. Wells to continue representation of Husband when he breached his fee agreement, Husband promised to pay his attorney a \$24,000 lump sum payment from his deferred compensation program. Ms. Wells then completed the divorce in accordance with this agreement. Then, Husband withdrew money from his deferred compensation program, but once again failed to honor the promise to pay his attorney.
4. Counsel's extrajudicial efforts to informally resolve the issue before the court were made to the satisfaction of the magistrate. Husband represented to his attorney that he would not consent to an agreed withdrawal by Ms. Wells, because he wanted to contest it in court.

As "Conclusions of Law," the Decision first cites a portion Rule 1.16 *Declining or Terminating Representation* (hereafter, "Rule 1.16") of the Ohio Rules of Professional Conduct. Specifically, the Decision cites five of the nine various grounds upon which a lawyer may withdraw from representing his client as follows:

. . . (b) (and) a lawyer may withdraw from the representation of a client if any of the following applies:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyers' services that the lawyer *reasonably believes* is *illegal* or *fraudulent*. . .

(3) the client has used the lawyer's services to perpetrate a crime or *fraud* . . .

(5) the client fails *substantially* to fulfill an obligation, financial or otherwise, to the lawyer regarding the lawyer's services and has been given *reasonable* warning that the lawyer will withdraw unless the obligation is fulfilled; . . . (and/or)

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client . . . (Italics emphasis in the original)

The Decision thereafter states in its entirety:

In this case, the issues in the divorce case were bitterly contested. At the time Plaintiff/Husband agreed to pay the balance due his attorney (\$24,000), he needed continued representation. The *Ohio Code of Professional Conduct* specifically permits an attorney to withdraw from representation when, as here a client has substantially failed to fulfill a financial obligation to an attorney. Considering the amount of the attorney fee remaining unpaid, and without benefit of Husband's presence and testimony, the undisputed facts in this case point at the very least to overreaching, if not outright fraud by Husband.

DECISION

The February 7, 2011 Motion to Withdraw filed by Lisa M. Wells, Esq., representing Plaintiff/Husband is well-taken, and is granted. Lisa M. Wells, Esq. is relieved from any further case responsibility in this matter, effective immediately.

The doctrine of issue preclusion, also known as collateral estoppel, applies to dischargeability litigation in bankruptcy proceedings. *Simmons Capital Advisors, Ltd. v. Bachinski (In re Bachinski)*, 393 B.R. 522, 534 (Bankr. S.D. Ohio 2008). The law of the state where the judgment was entered controls whether a state court judgment is afforded preclusive effect. *Sill v. Sweeney (In re Sweeney)*, 276 B.R. 186, 189 (B.A.P. 6th Cir. 2002). Under Ohio law, issue preclusion applies where:

1) [There is a] final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue; 2) The issue

[was] actually and directly litigated in the prior suit and must have been necessary to the final judgment; 3) The issue in the present suit [is] identical to the issue in the prior suit; [and] 4) The party against whom estoppel is sought was a party or in privity with the party to the prior action.

In re Bachinski, 393 B.R. at 535 (quoting *In re Sweeney*, 276 B.R. at 189)(further citations omitted). The party asserting issue preclusion has the burden of substantiating its applicability in the subsequent litigation. *In re Bachinski*, 393 B.R. at 535.

Ms. Wells has failed to meet her burden as to the second and third elements of issue preclusion.⁵ The stated basis of the state court's holding was that the Debtor "substantially failed to fulfill a financial obligation to an attorney." This is also one of the express reasons permitting withdrawal of counsel. *See* Ohio Prof. Cond. R. 1.16(b)(5). It is well understood that a failure to fulfill a promise to pay, standing alone, is not grounds for a finding of fraudulent intent under 11 U.S.C. § 523(a)(2)(A). *See, e.g., Ewing v. Bissonnette (In re Bissonnette)*, 398 B.R. 189, 194 (Bankr. N.D. Ohio 2008).

Assuming, *arguendo*, that the state court *also* granted the Motion for Withdrawal based on a finding of fraud,⁶ the Decision still would not have a preclusive effect. This Court notes that the state court injected the phrase "and/or" into its list of possible grounds for withdrawal under Rule 1.16(b), suggesting alternative grounds for the state court's ruling. When a final judgment is based on alternative findings of fact or conclusions of law, and at least one of the alternative findings is insufficient to support a non-dischargeability judgment, the judgment will not have a preclusive effect. *Custom Kilns, Inc. v. Pierron (In re Pierron)*, 448 B.R. 228, 237 (Bankr. S.D. Ohio 2011)(citing *In re Bachinski*, 393 B.R. at 539).

⁵ Based on this conclusion, the Court need not address the applicability of the first and fourth elements of issue preclusion.

⁶ While Rules 1.16 (b)(2) and (b)(3) do address fraud on the part of the client, this is generally understood to be a fraud perpetrated by the client on a third party, not a fraud perpetrated on the client's attorney.

Finally, the issue of fraud was not identical to the issue raised in the Motion to Withdraw nor was it necessary to rendering a final judgment. Ms. Wells was seeking to withdraw from representing the Debtor in the domestic relations case based on a breach of the contract between the Debtor and Ms. Well relating to Ms. Wells' representation of the Debtor in the domestic relations action. The Motion to Withdraw does not include an allegation that the Debtor committed a fraud upon her. The Motion to Withdraw does not request a judgment against the Debtor in the amount of the unpaid legal fees. The issue of fraud was not necessary to a determination that Ms. Wells was entitled to terminate her representation of the Debtor based on breach of contract or within the ethical constraints of the Ohio Rules of Professional Conduct. *See Hoffman v. Anstead (In re Anstead)*, 436 B.R. 497, 501-503 (Bankr. N.D. Ohio 2010)(finding no issue preclusion in actions under 11 U.S.C. §§ 523(a)(2), (4) and (6) where state court did not make any specific findings regarding the debtor's state of mind (*i.e.*, fraudulent intent) nor was the state court required to do so in order to enter judgment on the state law claims); *Lassonde v. Stanton (In re Stanton)*, 2010 Bankr. LEXIS 708 at *14-15, 2010 WL 757804 at *5 (Bankr. D.N.H. 2010)(finding that issue preclusion did not apply to action under 11 U.S.C. § 523(a)(2)(A) because the state court plea of assumpsit or breach of contract did not necessarily require proof of fraud so the issue before the state court was not identical to the issue in the dischargeability action).

Accordingly, this Court concludes that the state court Decision does not have preclusive effect on the issue of dischargeability based on fraud.

C. 11 U.S.C. §523(a)(2)

Section 523(a)(2)(A) of the Bankruptcy Code⁷ states in pertinent part:

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). Section 523(a)(2)(A) is written in the disjunctive; therefore, to prevail, the plaintiff need only show that the debt was obtained by one of the distinct categories of debtor misconduct set forth in § 523(a)(2)(A) and not all three. *Brann v. Oxford (In re Oxford)*, 440 B.R. 772, 777 (Bankr. W.D. Ky. 2010); *Schafer v. Rapp (In re Rapp)*, 375 B.R. 421, 433 (Bankr. S.D. Ohio 2007). While § 523(a)(2)(A) lists three distinctive grounds for non-dischargeability, the requirements for each overlap and are intended to serve the same goal, that being to “except from discharge any debt which arises from a debtor’s dishonest conduct, thereby implementing a fundamental bankruptcy policy that only those debts which are honestly incurred may be discharged.” *Farmers & Merchants State Bank v. Perry (In re Perry)*, 448 B.R. 219, 223 (Bankr. N.D. Ohio 2011)(citations omitted); *In re Rapp*, 375 B.R. at 429; *Adam v. Fletcher (In re Fletcher)*, 345 B.R. 592, 597 (Bankr. N.D. Ohio 2006).

Nonetheless, to further the fresh start policy of the Bankruptcy Code, “exceptions to discharge are to be strictly construed against the creditor.” *Rembert v. AT&T Universal Card Services, Inc. (In re Rembert)*, 141 F.3d 277, 281 (6th Cir. 1998). Accordingly, “each of the [§ 523(a)(2)(A)] grounds requires a showing of positive fraud; as opposed to fraud implied in law.” *In re Fletcher*, 345 B.R. at 597 (citing *In re Rembert*, 141 F.3d at 281). Positive fraud differs from implied fraud in that positive fraud requires scienter. *Id.* at 597. “Scienter involves

⁷ Unless otherwise indicated, the terms “Bankruptcy Code,” “Section” and “§” refer to Title 11 of the United States Code, 11 U.S.C. § 101 *et seq.*, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8.

moral turpitude or intentional wrong, and thus carries with it, a mental state embracing intent to deceive, manipulate or defraud.” *Id.* (citations and internal quotation marks omitted). The creditor bears the burden of proof of each element by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 287-88 (1991).

Ms. Wells contends that the debt owed to her for legal services performed on behalf of the Debtor is non-dischargeable under any of the three § 523(a)(2)(A) grounds. As proof of the Debtor’s culpability under one or more of these grounds, Ms. Wells points to the Debtor’s express representation at the October 2010 meeting in her law office where the Debtor promised to pay the legal fees owed to Ms. Wells from his deferred compensation fund. She points to the subsequent October 7, 2010 email from the Debtor where he confirmed his earlier, oral promise. She further alleges the Debtor and Ms. Nikole made many subsequent verbal promises to both her and to Ms. Went that the deferred compensation fund would be used to pay the legal fees. She also points to the January 15, 2011 email from Ms. Nikole, sent after the Debtor received the direct deposit of the deferred compensation funds, which indicated that additional paperwork needed to be submitted before the deferred compensation funds would be available to pay the Debtor’s obligation to Ms. Wells.

1. False Representation

In order to except a debt from discharge for a false representation, the creditor must prove that:

- (1) the debtor obtained [services] through a material misrepresentation that, at the time, the debtor knew to be false or made with gross recklessness as to its truth;
- (2) the debtor intended to deceive the creditor;
- (3) the creditor justifiably relied on the false representation; and,
- (4) [the creditor’s] reliance was the proximate cause of [the creditor’s] loss.

In re Rembert, 141 F.3d at 280-81.

The Debtor admits making representations to Ms. Wells that he would pay the legal fees owed to Ms. Wells from his deferred compensation fund. However, a statement of intent to perform an act in the future will not generally establish a false representation. *In re Oxford*, 440 B.R. at 777 (citing *In re Bucciarelli*, 429 B.R. 372 (Bankr. N.D. Ga. 2010)). Also, “a debtor’s statement of future intention is not necessarily a misrepresentation if intervening events cause the debtor’s future action to deviate from previously expressed intentions.” *Palmacci v. Umpierrez*, 121 F.3d 781, 787 (1st Cir. 1997)(citing 4 *Collier on Bankruptcy* ¶523.08[1][d], at 523-43).

This Court finds that the Debtor’s initial oral promise made in Ms. Wells’ office and the Debtor’s subsequent written confirmation on October 7, 2010 to pay the legal fees owed to Ms. Wells from his deferred compensation fund to have been true when made. This finding is supported by the Debtor’s credible testimony at trial as well as the credible, corroborating testimony of Ms. Nikole. Further, when the Debtor’s promise was made, it was uncertain to all in the room when—or even if—the Debtor would receive a distribution from his deferred compensation fund. This finding is also supported by Mr. Raper’s acknowledgment during closing argument that the Debtor probably had no intent to deceive Ms. Wells in October of 2010, but that the Debtor’s deceit occurred “as the representations went on.”

The January 15, 2011 email sent after the direct deposit of the Debtor’s deferred compensation fund was received likewise is not determinative. The direct deposit was made into the Debtor’s bank account, not Ms. Nikole’s bank account. While the Debtor testified that Ms. Nikole was authorized to communicate with Ms. Wells on his behalf, both the Debtor and Ms. Nikole offered credible testimony that neither of them were aware of the exact date that the direct deposit was made because it was not accompanied by any type of notice or acknowledgment. Accordingly, this Court concludes that the Debtor, neither directly nor

through Ms. Nikole, made a material misrepresentation that, at the time it was made, the Debtor knew to be false.

Turning to the second element of false representation, the creditor must show that the debtor intended to deceive the creditor. *In re Rembert*, 141 F.3d at 280. Whether a debtor intended to deceive a creditor is measured by a subjective standard. *Id.* at 281. When making this determination, “of utmost importance . . . is the credibility the court attaches to the testimony of the debtor and any other witnesses called to testify.” *In re Bissonnette*, 398 B.R. at 194 (citations omitted). Ultimately, the court must determine “whether the totality of the circumstances leads to the conclusion that it is more probable than not that the debtor had the requisite fraudulent intent.” *Id.* (citations and internal quotation marks omitted). “If there is room for an inference of honest intent, the question of nondischargeability must be resolved in favor of the debtor.” *In re Rapp*, 375 B.R. at 429 (citations and internal quotation marks omitted).

This Court finds that the Debtor did not intend to deceive Ms. Wells. This finding is supported by the Debtor’s credible testimony at the trial. The Debtor testified that he wanted to pay Ms. Wells because he was fighting for his children and he was concerned for their well-being. This finding is also supported by the fact that the Debtor made sizeable, regular payments to Ms. Wells comprising approximately two-thirds of the Debtor’s pay check not only during a time of financial crisis, but after Ms. Wells was no longer actively working on his case due to her own circumstances, and after Ms. Wells was refusing to meet with the Debtor in person. *See In re Bissonnette*, 398 B.R. at 194 (“[A]s a general rule, the greater the extent of a debtor’s performance, the less likely it will be that they possessed an intent to defraud.”).

This Court finds that the January 17, 2011 meeting between the Debtor and Ms. Lape was a critical turning point of events for the Debtor. Due to his dire financial situation, the Debtor may have considered the possibility of not using the deferred compensation fund to pay Ms. Wells prior to his meeting with Ms. Lape, however, this Court finds that the Debtor made the decision not to pay Ms. Wells from the deferred compensation fund only after meeting with Ms. Lape. It was only then that, based on the legal advice of Ms. Lape, the Debtor realized that this money, which was no longer protected from his creditors' reach, should be spent on necessities, not debts. Ms. Wells does not allege that the Debtor made any representations to pay her from the deferred compensation fund at any time after the Debtor's January 17, 2011 meeting with Ms. Lape.

Even after meeting with Ms. Lape, testimony revealed that the Debtor still intended to pay Ms. Wells, just not from the Debtor's deferred compensation fund. Indeed, the very next day after meeting with Ms. Lape, the Debtor paid \$1,000 to Ms. Wells. This is not deceitful behavior towards Ms. Wells. Moreover, the Debtor delayed the filing of his bankruptcy so that this payment to Ms. Wells, along with the other payments, would not be an avoidable preferential transfer. Again, this is not deceitful behavior towards Ms. Wells. In sum, this Court concludes that the Debtor never intended to deceive Ms. Wells.

Having determined that Ms. Wells failed to establish that the Debtor made a material misrepresentation which, at the time it was made, the Debtor knew to be false or that the Debtor intended to deceive Ms. Wells, it is difficult for this Court to analyze the remaining two elements of this cause of action because without a fraudulent misrepresentation there can be no justifiable reliance or proximate loss. *Owen v. Angst (In re Angst)*, 428 B.R. 776, 790 (Bankr. N.D. Ohio 2010). Theoretical difficulties aside, as explained below, Ms. Wells nonetheless has failed to

establish justifiable reliance and proximate loss stemming from the Debtor's (truthful) representations that he intended to pay the legal fees that he owed to Ms. Wells from his deferred compensation fund.

The Supreme Court has held that the proper measure of reliance in a § 523(a)(2)(A) action is not an objective "reasonable" reliance standard but rather a lesser "justifiable" reliance standard. *Field v. Mans*, 516 U.S. 59, 68 (1995).

Justifiable reliance can be found in the gray area that exists between actual and reasonable reliance. This standard of reliance requires more than mere actual reliance, but does not require the type of investigation required by reasonable reliance. . . . (It) is a more subjective standard . . . that takes into account the interactions between and experiences of the two parties involved. This standard . . . is a "fact-sensitive standard" that depends on "the circumstances of the particular case, rather than of the application of a community standard of conduct to all cases."

Liberty Sav. Bank, FSB v. McClintic (In re McClintic), 383 B.R. 689, 694 n2 (Bankr. S.D. Ohio 2008)(citations omitted).

[Moreover,] the matter seems to turn upon an individual standard of the plaintiff's own capacity and the knowledge which he has, or which may fairly be charged against him from the facts within his observation in the light of his individual case.

Field v. Mans, 516 U.S. at 72 (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 108, p. 717 (5th ed. 1984)). While "justifiable reliance" is a less onerous standard than "reasonable reliance," *Willens v. Bones (In re Bones)*, 395 B.R. 407, 432 (Bankr. E.D. Mich. 2008), this Court must bear in mind that exceptions to discharge "are to be strictly construed against the creditor." *In re Rembert*, 141 F.3d at 281.

Ms. Wells clearly had no actual (let alone justifiable) reliance on repayment from the Debtor's deferred compensation fund *prior* to early October 2010 when Ms. Wells initially suggested to the Debtor that his deferred compensation fund was a potential source of payment

of his legal fees. Nor could she have justifiably relied on repayment from the deferred compensation fund at any time *after* January 25, 2011 when Ms. Wells acknowledges that the Debtor informed her that he was unable to pay her from the deferred compensation fund based on advice of bankruptcy counsel. Plaintiff's Exhibit 13. Nor does this Court find that Ms. Wells' reliance on repayment from the Debtor's deferred compensation fund in the intervening time period was justified.

Despite Ms. Wells repeated protestations at the trial that she had been "screwed" by the Debtor, this Court finds it implausible to believe that Ms. Wells, especially as an attorney, could possibly have relied on the Debtor's promise to pay her, at some future date, from some hopeful distribution from the Debtor's deferred compensation fund. Taking into account the interactions between the parties, Ms. Wells knew that the Debtor was in dire financial circumstances and that he was contemplating filing bankruptcy. In fact, Ms. Wells encouraged the Debtor to file his bankruptcy petition "as soon as possible" as far back as August 2010. Plaintiff's Exhibit 16. While not dispositive, the Debtor's financial circumstances were a "red flag" that payment of the Debtor's attorney fees from any source was at risk. *See, e.g., Varble v. Chase (In re Chase)*, 372 B.R. 133, 138-39 (Bankr. S.D.N.Y. 2007)(holding that attorney who represented debtor in the debtor's divorce and child custody proceedings did not establish justifiable reliance on oral and written statements that debtor was going to pay for the attorney's services where attorney was aware that the debtor was on the verge of filing bankruptcy and even assisted debtor with finding a bankruptcy attorney)(citing *Carroll & Sain v. Vernon (In re Vernon)*, 192 B.R. 165, 172-73 (Bankr. N.D. Ill. 1996)(holding that law firm failed to establish the element of "justifiable reliance" where it was "on repeated and direct notice that Defendant was considering bankruptcy following the divorce" thereby posing "a threat to its fees, both those earned in the past and those

about to be earned”) and *Marra v. Kroen (In re Kroen)*, 280 B.R. 347, 354 (Bankr. D.N.J. 2002) (holding that attorney could not establish the necessary element of justifiable reliance where the attorney who represented the debtor in a divorce proceeding allegedly relied upon a promise by debtor that he would not seek to discharge the debt for legal fees in bankruptcy because an attorney should not “pin his hopes on a client’s promise—whether it be a promise to pay or to waive discharge—without fully recognizing the inherent financial risk in going forward with a long-term litigation”).

Moreover, Ms. Wells was aware that there was no guaranty that the Debtor would be entitled to receive a distribution from his deferred compensation fund. Ms. Wells knew that the Debtor was asked to provide additional paperwork, including attorney time sheets and a final divorce decree, in connection with the approval process. The conditional nature of the Debtor’s ability to receive a distribution from his deferred compensation fund combined with Ms. Wells’ personal knowledge of facts relating to the Debtor’s insolvency further undermine her assertion that a person in her capacity and with the personal knowledge that she possessed could have justifiably relied on repayment from the deferred compensation fund.

Lastly, assuming, *arguendo*, that Ms. Wells had established fraudulent intent by the Debtor and justifiable reliance on her part, Ms. Wells’ damages would be limited to those legal fees incurred after such fraud occurred. *In re Angst*, 428 B.R. at 790. To establish proximate cause, “[t]here must be a direct link between the alleged fraud and the creation of the debt.” *WebMD Practice Servs. v. Sedlacek (In re Sedlacek)*, 327 B.R. 872, 888 (Bankr. E.D. Tenn. 2005)(citations and internal quotation marks omitted). The Debtor received the direct deposit from his deferred compensation fund on January 12, 2011. Shortly thereafter, the Debtor met with his bankruptcy counsel and reached a decision not to pay Ms. Wells’ from the deferred

compensation fund as a result of that meeting. Ms. Wells was advised by the Debtor on or before January 25, 2011 that he was unable to pay her from the deferred compensation fund based on advice of bankruptcy counsel. Therefore, it is only in the period between January 12, 2011 (when the Debtor received the deferred compensation fund) and January 25, 2011 (when Ms. Wells was told she would not be paid with the deferred compensation funds) that any proximate damages could have resulted. Ms. Wells' time records indicate legal fees of \$650 incurred in this time period. Subtracting from this \$650 amount the Debtor's \$1,000 payment made to Ms. Wells on January 19, 2011, it would appear that Ms. Wells has proven no damages as a proximate cause of any alleged fraud by the Debtor. Accordingly, Ms. Wells has not sustained a case for non-dischargeability based on false representation.

2. False Pretenses

False pretense is similar to false representation except that false pretense involves an implied representation or conduct that is intended to create a false impression, rather than an express representation. *Coughlin Chevrolet, Inc. v. Thompson (In re Thompson)*, 458 B.R. 409, 421 (Bankr. S.D. Ohio 2011)(citations omitted). False pretense has been described as "a mute charade, where the debtor's conduct is designed to convey an impression without oral representation." *James v. McCoy (In re McCoy)*, 114 B.R. 489, 498 (Bankr. S.D. Ohio 1990)(citations and internal quotation marks omitted). A false pretense must nonetheless be "fostered willfully, knowingly, and by design; it is not the result of inadvertence." *Stevens v. Antonious (In re Antonious)*, 358 B.R. 172, 182 (Bankr. E.D. Pa. 2006). The remaining elements for false pretense are the same as false representation; therefore, the creditor must also prove materiality, intent, justifiable reliance and proximate cause. *Tweedie v. Hermoyian (In re*

Hermoyian), 2012 Bankr. LEXIS 482 at *79, 2012 WL 479186 at *26 (Bankr. E.D. Mich. Feb. 14, 2012).

Ms. Wells did not expressly articulate what conduct of the Debtor forms the basis for her claim of false pretenses. To the extent Ms. Wells believes the Debtor's actions in applying for a distribution from his deferred compensation fund and requesting additional information from Ms. Wells in support of that application fostered the impression that she would be paid from such funds, this Court does not find that such actions give rise to a claim for false pretenses for the simple reason that such impression was not false. For the reasons previously stated, this Court finds that the Debtor intended to repay Ms. Wells from his deferred compensation fund until such time as he was advised by bankruptcy counsel that the funds may be better spent on necessities rather than debts. The facts further show that the Debtor disavowed Ms. Wells of any impression that she would be paid from the deferred compensation fund shortly after meeting with his bankruptcy counsel. For the reasons previously discussed, to the extent that Ms. Wells justifiably relied on the impression that she would be paid from the deferred compensation fund in the brief period between the Debtor's meeting with his bankruptcy counsel and when he informed Ms. Wells that she would not be paid from the deferred compensation fund (which this Court does not find to be the case), there were no damages that resulted as a proximate cause of such reliance. Accordingly, Ms. Wells has not sustained a case for non-dischargeability based on false pretenses.

3. Actual Fraud

Actual fraud is defined even more broadly than false representation or false pretenses. *Mellon Bank, N.A. v. Vitanovich (In re Vitanovich)*, 259 B.R. 873, 877 (B.A.P. 6th Cir. 2001). As used in § 523(a)(2)(A), actual fraud is not limited to misrepresentations or misleading

omissions, but rather “encompasses ‘any deceit, artifice, trick, or design involving direct and active operation of the mind, used to circumvent and cheat another.’” *Id.* (quoting *McClellan v. Cantrell*, 217 F.3d 890, 893 (7th Cir. 2000)(citations omitted)). The critical inquiry in this regard is the debtor’s subjective intent at the time the debt is incurred. *Id.* (citing *In re Rembert*, 141 F.3d at 280-81). “Fraudulent intent may be inferred by examining the Debtor’s conduct to determine if he presented the Plaintiff with a picture of deceptive conduct, indicating an intent to deceive.” *JGR Assocs., LLC v. Brown (In re Brown)*, 442 B.R. 585, 601 (Bankr. E.D. Mich. 2011)(citations omitted).

For the reasons previously discussed, this Court finds that the Debtor did not intend to deceive or otherwise cheat Ms. Wells out of repayment of the legal services she provided to the Debtor. Accordingly, Ms. Wells has not sustained a case for non-dischargeability based on actual fraud.

III. Conclusion

For the foregoing reasons, this Court concludes that Ms. Wells has failed to prove any of the required elements of false representation, false pretenses, or actual fraud under § 523(a)(2)(A).

Within thirty (30) days of the entry date of this Order, the Debtor is hereby ORDERED to file with this Court and serve on Ms. Wells (1) a memorandum in support of the Debtor’s oral request at the trial for an award of attorneys’ fees pursuant to § 523(d) and (2) an itemization of time spent defending this Complaint. A certificate of service shall be appended to and served with the filings.

A response, if any, to the § 523(d) memorandum and itemization of time must be filed with this Court and served on the Debtor **within twenty-one (21) days** from the date of service

as set forth on the certificate of service attached to the § 523(d) memorandum and itemization of time. A certificate of service shall be appended to and served with the response.

A reply memorandum, if any, must be filed with this Court and served on Ms. Wells **within seven (7) days** from the date of service as set forth on the certificate of service attached to the response.

IT IS SO ORDERED.

copy to:

Robert A. Raper, Esq.
Robert F. Holmes, Esq.

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