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IT IS SO ORDERED.



*Charles M. Caldwell*  
Charles M. Caldwell  
United States Bankruptcy Judge

Dated: June 28, 2010

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

*In re:* Case No. 08-55631 :  
 :  
 Michael L. Smith :  
 Suzanne N. Smith, : Chapter 7  
 : Judge Caldwell  
 :  
 *Debtor(s).* :

Deborah Borders, :  
 :  
 *Plaintiff,* :  
 :  
 v. : **Adv. Pro. No. 08-2275**  
 :  
 Michael L. Smith :  
 Suzanne N. Smith, :  
 :  
 Defendants. :

**MEMORANDUM OPINION AND ORDER REGARDING PLAINTIFF’S  
DISCHARGEABILITY COMPLAINT (DOC. NO. 1)**

This Memorandum Opinion and Order serves as the Court’s findings of fact and conclusions of law. Ms. Deborah Borders (“Plaintiff”) seeks a determination that an alleged debt arising from a real estate transaction should not be discharged in this bankruptcy case commenced

on behalf of Michael L. and Suzanne N. Smith (“Defendants”). The Plaintiff asserts that the actions of the Defendants were fraudulent, violated fiduciary obligations and constituted a willful and malicious injury to the interests of the Plaintiff. The Court has determined that the Plaintiff has failed to sustain her burden of proof by a preponderance of the evidence. Further, the Court has determined that the Defendants have failed to establish entitlement to an award of damages on their counterclaims. A brief history illustrates the bases for this decision.

The Plaintiff was looking for a home after the death of her husband. He served as a minister, and the Plaintiff needed to find an alternative to the parsonage for herself and two minor children. When she was unable to qualify for a mortgage, she was referred by her sister, Ms. Pamela Tyson, to the Defendant, Michael L. Smith. He was a licensed real estate broker associated with Keller-Williams Company.

The Plaintiff phoned the Defendant, Michael L. Smith, in late June, 2005, and during the initial phone call the Defendant learned of the Plaintiff’s credit problems and a failed attempt to purchase a home through another brokerage. Shortly thereafter they met at a Keller-Williams Conference room, and discussed the Plaintiff’s credit issues, a referral to a credit repair specialist, and the need to remain in the Westerville school district after the death of Plaintiff’s husband, with monthly payments of between \$800.00 to \$900.00.

At the conclusion of this initial meeting the Defendant left his desk to obtain the phone number of a credit repair specialist. When he returned, the Plaintiff asked if he knew of any investors willing to purchase a home on her behalf. At that time she told the Defendant, Michael

L. Smith, she was willing to provide \$50,000.00 from life insurance proceeds to purchase a home. The Defendant responded that he would have to think about what could be done, and stated that he would contact her again.

After talking the matter over with his wife, the Defendant, Michael L. Smith, decided that he would assist the Plaintiff by purchasing a home in his name, and provide her an opportunity to ultimately purchase the home when she could qualify for a mortgage. The Defendant, Michael L. Smith, contacted the Plaintiff to set a second meeting at the Keller-Williams office. During that discussion the Defendant, Michael L. Smith, testified that he explained the terms by which he would purchase a home, and obtained a favorable response from the Plaintiff.

As a result, the Defendant, Michael L. Smith, identified and showed the Plaintiff approximately five homes. The Plaintiff chose 3021 Gannett Road, Columbus, Ohio 43231 (“Property”) from all those shown, and then the Defendant, Michael L. Smith, entered into negotiations for its purchase ultimately at the price of \$150,000.00. The Defendant, Michael L. Smith, consulted with the Plaintiff during this process to make sure that she was comfortable with the price, that was higher than the listing price, and to ensure that she still wanted the Property. After the negotiations were successfully concluded, the Defendant, Michael L. Smith, phoned the Plaintiff to set a third meeting in his office to finalize their arrangements regarding the Property. He then began preparing a document that outlined the terms they had discussed and agreed upon during the second meeting detailed above.

On or about July 15, 2005, the Plaintiff and the Defendant, Michael L. Smith, entered into what is captioned as a “Lease/Option” agreement (“Agreement”) for the purchase of the Property. The Agreement was prepared by the Defendant, Michael L. Smith, and appears to

have been signed by him and the Plaintiff. Neither side was represented by an attorney.

Regarding the acquisition of the Property the Agreement provides:

This agreement ... will go into effect if Michael Smith is able to secure a first mortgage on 3021 Gannett Rd Columbus Ohio 43231. Debra (sic) Borders shall **deposit with Michael L. Smith the sum of \$50,000.00 of which \$45,000.00 will go towards the purchase of 3021 Gannett Rd. Columbus Ohio 43231 and \$5,000.00 will go towards closing costs, prepaid items, lender discount points and administration fees** and shall be deposited with Michael L. Smith 3 days after the contract is fully executed and all terms are accepted by both the seller and Michael L. Smith. (emphasis supplied).

The lease/option payment terms of the Agreement include:

**Debra Borders will lease 3021 Gannett Rd Columbus Ohio 43231 with the option to purchase for a period not to exceed 36 months from the move in date.** The rent shall be \$900.00 per month, if rent is paid on or before the 1<sup>st</sup> of each month the rent shall be \$850.00. If the lease exceeds 24 months it shall increase by \$150.00 per month. (emphasis supplied).

The terms for the execution of the purchase option are as follows:

**Debra Borders shall have the right to purchase 3021 Gannett Rd. Columbus Ohio 43231 for \$150,000.00 and at that time \$45,000 will be credited towards the purchase price and Debra Borders will need to obtain a 1<sup>st</sup> mortgage in the amount of at least \$105,000.00. If Debra Borders fails to obtain a 1<sup>st</sup> mortgage or at any time pays rent later than 60 days past due date, she shall be considered in default and all money retained by Michael L. Smith shall be forfeited** and Debra Borders shall immediately vacate the property. (emphasis supplied).

To fund the Agreement the Plaintiff gave the Defendant, Michael L. Smith, two checks both dated July 16, 2005, one for \$5,200.00 and one for \$45,000.00. The Property was purchased in August, 2005, for \$150,000.00, and the Defendant, Michael L. Smith, received a real estate commission. Also, as part of the purchase both the Plaintiff and the Defendant, Michael L. Smith, executed a form "Agency Disclosure Statement".

The Plaintiff, and her two children lived in the Property between approximately August 10, 2005, and November 2007. During this period she made the rent payments, but payments became delinquent in approximately June, 2007, with a modification of survivor benefits. The Plaintiff then decided to remarry and relocate to Hartford, Connecticut. What purports to be an option to purchase was never exercised, and the Plaintiff vacated the property in November, 2007.

On June 13, 2008, the Defendant, Michael L. Smith, and his spouse filed bankruptcy under chapter 7 of the United States Bankruptcy Code (“Code”), and the instant adversary proceeding was commenced on September 12, 2008. In this adversary the Plaintiff alleges that the Defendants’ actions related to the Property were fraudulent, violated fiduciary obligations and constituted a willful and malicious injury. *11 U.S.C. Secs. 523(a)(2)(A), (4) and (6)*. In relevant part the Defendants respond that there was no fraud and/or intent to harm the Plaintiff. Also, the Defendants included a counterclaim for alleged damages to the Property, unpaid utility bills and rent.

First, the Court finds and concludes that the Defendant, Michael L. Smith’s wife, Suzanne N. Smith, was not a signatory to the Agreement, and the Plaintiff has failed to offer evidence of any fraudulent acts, representations, omissions, violations of trust and/or deliberate efforts to cause harm with reference to Mrs. Smith.

Second, the Court finds and concludes that the Plaintiff has failed to establish that there was a requisite express or technical trust arrangement to support a finding of fiduciary fraud under section 523(a)(4) of the Code. *Issacs Cars, Inc. v. Woods (In re Woods)*, 418 B.R. 226, 230 (Bankr. W.D. Ky. 2009) affirmed 2010 WL 2305484 (D.W.D. Ky. 2010). The Defendant, Michael L. Smith, was a realtor, but was not acting in that capacity in this transaction. Rather, he served as

a purchaser. This view is not altered by the fact that the parties executed an “Agency Disclosure Statement”. It is a standard form document to disclose the roles of real estate agents in purchase transactions; however, in 2005, the Defendant, Michael L. Smith, was the purchaser, not the Plaintiff.

Even assuming that there was a trust relationship, recovery is still precluded due to the Plaintiff’s failure to establish by a preponderance of the evidence that there was any underlying misrepresentation, fraud, and/or intent to cause harm on the part of the Defendant, Michael L. Smith. These factors are also prerequisites to a finding of non dischargeability under sections 523(a)(2)(A) and 523(a)(6) of the Code. *Rembert v. AT & T Universal Card Services, Inc. (In re Rembert)*, 141 F.3d 277, 280-281 (6<sup>th</sup> Cir. 1998), *cert. denied* 525 U.S. 978 (1998); *Kawaauhau v. Geiger*, 523 U.S. 57, 61-64 (1998); *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 463-466 (6<sup>th</sup> Cir. 1999); *Salem Bend Condominium Assoc. v. Bullock-Williams (In re Bullock-Williams)*, 220 B.R. 345, 347 (6<sup>th</sup> Cir. BAP 1998); *Beard v. Devore (In re Devore)*, 282 B.R. 643, 645-646 (Bankr. S.D. 2002).

Based upon the documents received into evidence and testimony, including an assessment of the credibility of the witnesses, the Court finds and concludes that the parties had the best of intentions. Together they were trying to find a way for the Plaintiff, with a poor credit rating, to acquire a home at a price she could afford and in area that would not require relocation of the children to other schools.

It was, however, the Plaintiff that suggested that the Defendant, Michael L. Smith, purchase the Property on her behalf, and it was the Plaintiff that told him she had a significant amount of insurance proceeds to consummate such a transaction. There is no evidence that the

Plaintiff was in any way pressured or forced to give the Defendant, Michael L. Smith, the funds, rather the Defendant, Michael L. Smith, credibly testified he attempted to make sure the Plaintiff understood under what terms he would enter into a purchase arrangement. Both parties had a lot to lose. The Defendant, Michael L. Smith, was placing his credit rating on the line, and the Plaintiff was parting with \$50,000.00.

The error in this case is not fraud, but rather entering into a poorly documented transaction that was lacking in detail and clarity as to the rights and responsibilities of the parties. Essential details such as responsibility for utilities, repairs and damages to the Property, the recovery of unpaid rent, what happens in case the Plaintiff was unable to obtain financing, etc. are all missing. The negative impact of this fundamentally flawed Agreement was exacerbated by the Plaintiff's decision to move without ever exercising what purports to be an option to purchase. Under the Agreement the Defendant, Michael L. Smith, was only obligated to provide a \$45,000.00 credit to the Plaintiff, if an when she exercised the purchase option. That step was never taken. There is no evidence that she was forced to move from the property, rather her departure was voluntary.

With reference to the Defendants' damages counterclaims, the Court has determined that the evidence is inconclusive due to the lack of data that shows the original condition of the Property. Further, as detailed above the Agreement fails to address issues of unpaid rent and utilities and damages to the Property. No damages will be awarded to the Defendants.

Accordingly, judgement is rendered in favor of the Defendants and against the Plaintiff, and the obligation is discharged.

**IT SO ORDERED.**

**Copies to:**

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