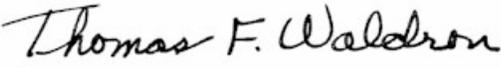


This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.

Dated: October 30, 2006

  
Thomas F. Waldron  
United States Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON

In re: DEAN SHEPHERD  
DEBORAH L. SHEPHERD,

*Debtors*

Case No. 06-30924  
Adv. No. 06-3233

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ROBERT J. WEHRLE-EINHORN  
JUANITA L WEHRLE-EINHORN,

*Plaintiffs*

Judge Waldron  
Chapter 13

v.

DEAN SHEPHERD  
DEBORAH L. SHEPHERD,

*Defendants*

**DECISION GRANTING IN PART,  
DENYING IN PART, MOTION OF  
DEFENDANTS TO DISMISS  
COMPLAINT**

DATED AT DAYTON, OHIO this 30th Day of October, 2006:

Background

On July 31, 2006, the Plaintiffs, Robert J. Wehrle-Einhorn and Juanita L. Wehrle-Einhorn, filed an adversary proceeding captioned *Complaint Objecting to Dischargeability of Debt*. (Doc. 1) The complaint seeks relief under 11 U.S.C. §§ 523(a) and 727. The complaint alleges Mr. Shepherd fraudulently misrepresented his intention to complete a home construction contract for a garage and attached patio and the Plaintiffs relied on these misrepresentations to their detriment. On September 14, 2006, the Defendants, Dean Shepherd and Deborah L. Shepherd filed a *Motion Of Defendants To Dismiss Complaint and Memorandum in Support*. (Doc. 7). After the court granted additional time for a response to the motion (Doc. 10), the Plaintiffs filed a response on October 24, 2006. (Doc. 12)

### **Jurisdiction**

This court has jurisdiction pursuant to 28 U.S.C. § 1334 and the Standing Order of Reference entered in this District. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

### **Standard of Review**

The Defendants' *Motion* (Doc. 7) seeks to dismiss the Plaintiffs' complaint for failure to state a claim upon which relief can be granted. See Federal Rule of Civil Procedure 12(b)(6), applicable by Bankruptcy Rule 7012. As this court has previously noted, a movant seeking a dismissal based solely on the allegations in the complaint must overcome an onerous standard, which is generally favorable to the non-moving party, in this proceeding, the Plaintiffs:

The standard for determining a motion to dismiss imposes stringent requirements on the movant. A motion to dismiss must not be granted unless it appears beyond doubt that the movant is unable to prove any set of well-pleaded facts in support of the claim which would entitle the

movant to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957); *Eubanks v. CBSK Fin. Group, Inc.*, 385 F.3d 894, 897 (6th Cir.2004); *Talbot v. Ohio Student Loan Comm'n (In re Stall)*, 125 B.R. 754, 756 (Bankr.S.D.Ohio 1991).

*In re Strahm*, 327 B.R. 319, 320 (Bankr. S.D. Ohio 2005). The court is required to consider well-pleaded facts, but not unwarranted inferences or legal conclusions, as true. *Eubanks v. CBSK Financial Group, Inc.*, 385 F.3d 894, 897 (6th Cir. 2004).

### **Issue**

Does the Plaintiffs' complaint state well pled causes of action upon which relief can be granted under 11 U.S.C. §§ 523 and 727 as to either, or both, of the named Defendants?

### **11 U.S.C. § 727 Cause of Action**

. The Defendants filed a chapter 13 and, therefore, are not seeking a chapter 7 discharge (§ 727). Moreover, the substance of the Plaintiffs' complaint seeks to have a particular debt allegedly owed to them found non-dischargeable and does not seek to have the Debtors' discharge denied. The cause of action under 11 U.S.C. § 727 will be DISMISSED as to both Defendants.

### **11 U.S.C. § 523(a)(2)(A) Cause of Action<sup>1</sup>**

The Defendants argue the facts alleged in the complaint do not rise to the level of fraud under § 523(a)(2)(A); however, the allegations in the complaint, which the court must assume are true for purposes of ruling on Defendants' *Motion* (Doc. 7), do state a legally cognizable claim. The Sixth Circuit has stated the elements for a claim under § 523(a)(2)(A):

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<sup>1</sup> The complaint only refers to "523(a)"; however, the allegations in the Plaintiffs' complaint (Doc. 1), as discussed further in this section, refer to the elements of 11 U.S.C. § 523(a)(2)(A).

In order to except a debt from discharge under § 523(a)(2)(A), a creditor must prove the following elements: (1) the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was 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) its reliance was the proximate cause of loss.

*In re Rembert*, 141 F.3d 277, 280 -281 (6th Cir. 1998) (footnote and citations omitted).

In carefully reviewing the complaint, the Plaintiffs assert these elements. See particularly, but not exclusively, Paragraphs 40 – 51 (Doc. 1).

The Defendants also argue that the contract was between the Plaintiffs and a separate entity, Shepherd's Building, Inc. The Plaintiffs' complaint asserts the agreement was with Mr. Shepherd individually. Again, at this stage of this adversary, pursuant to the previous discussed standard of review, the court cannot dismiss the § 523(a)(2)(A) cause of action, as the court must consider these allegations as true for purposes of ruling on the Defendants' *Motion* (Doc. 7). The court cannot consider facts which may be presented at the time of trial.

The Defendants also argue that, even assuming the debt is nondischargeable under § 523(a)(2)(A), the debt would be discharged when the chapter 13 plan was completed. This is no longer an accurate statement of the law. Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, § 523(a)(2) debts can no longer be discharged in chapter 13. See 11 U.S.C. § 1328(a)(2). This new provision was effective as of October 17, 2005. Since the Defendants filed for chapter 13 relief on April 20, 2006, this change applies to these Defendants. The motion (Doc. 7) will be DENIED as to the defendant Dean Shepard.

### **Deborah Shepherd**

The Defendants asserts the complaint does not assert a cause of action against Deborah Shepherd. A review of the complaint (Doc.1) establishes that the vague recitations in the complaint (Doc. 1) concerning Deborah Shepard do not, even in connection with the favorable standard employed in determining a motion to dismiss, set forth a well pled cause of action under § 523(a)(2)(A) against Deborah Shepard. The court also considered the plaintiffs' arguments that "[i]t would be inappropriate to dismiss Mrs. Shepard as a party to this proceeding while she is a party to the bankruptcy proceeding", that she was a corporate shareholder, officer and employee, of the corporate entity, allegedly subject to having it corporate veil pierced, and that "[i]t is inappropriate for plaintiffs to make preferences among Defendants." The Defendants' motion to dismiss (Doc. 7) is GRANTED as to Deborah Shepard.

The court notes that no part of this decision should be construed as an indication of any final determination by the Court of this adversary proceeding, which presents complicated issues of law and fact, upon which the Plaintiffs have the burden of proof.

### **Conclusion**

The Defendants' *Motion of Defendants to Dismiss Complaint and Memorandum in Support*. (Doc. 7) is **GRANTED IN PART AND DENIED IN PART**. The court has simultaneously entered an order consistent with this decision and a separate order requiring filings and setting a pretrial conference.

c:

Robert J. Wehrle-Einhorn and Juanita L. Wehrle-Einhorn, 1554 Benson Drive, Dayton, Ohio 45406 (Plaintiffs)

Dean Shepherd and Deborah L. Shepherd, 1102 Patterson Road, Dayton, Ohio 45420 (Debtors/Defendants)

Jerry A. Meadows, Esq., 580 Lincoln Park Boulevard, Suite 244, Dayton, Ohio 45429 (Atty. for the Debtors/Defendants)

Jeffrey M. Kellner, Esq., (Chapter 13 Trustee), Scott G. Stout, Esq., (Staff Attorney for the Chapter 13 Office), 131 North Ludlow Street, Suite 900, Dayton, Ohio 45402

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