UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re:
Mark Ceminsky, BKY No. 96-34722
d/b/a Ceminsky Trucking,

Debtor.

Mary Lefebvre, ADV No. 97-3195

Plaintiff,

v.

ORDER FOR JUDGMENT

Mark Ceminsky,

Defendant.

This matter came before the Court on April 7, 1998 for trial. Appearances are as noted in the record. The issue presented for trial is whether the Debtor's debt to the Plaintiff is non-dischargeable under 11 U.S.C. Section 523(a)(2)(A) based on a false representation made by the Debtor. The Court makes this ORDER based on the Federal and Local Rules of Bankruptcy Procedure.

I.
FACTS

Plaintiff Mary Lefebvre and Defendant/ Debtor Mark Ceminsky were married on October 10, 1981. In 1992, the Plaintiff filed for divorce. The parties stipulated to the terms of their marriage dissolution. Pursuant to their October 9, 1992 stipulation, the homestead(1) was awarded to the Debtor, subject to a $15,000 obligation secured by a non-interest bearing lien on the property in favor of the Plaintiff. On November 16, 1992, a stipulated Judgment and Decree was entered in Dakota County Court dissolving the Plaintiff and Debtor's marriage.

The parties were on friendly terms after their divorce. In order to assist the Plaintiff with the purchase of a town home, the Debtor gave her a gift letter in October 1992 and a check for $3,137.(2) He also gave her $1,200 in November 1992 by issuing her a check from the account of Ceminsky Trucking. The notation "loan" was written in the memo section of that check.

The Debtor subsequently experienced financial difficulties and needed to get a second mortgage on his home. On April 25, 1993, he went to the Plaintiff's home and asked her to sign a quitclaim

deed to enable him to obtain the financing. The Debtor prepared the handwritten quitclaim deed. Nothing on the deed indicated that the Plaintiff's lien would be released. However, the Debtor knew her lien would be released, but did not communicate this fact to the Plaintiff. The Plaintiff knew the Debtor needed money to fund his business and signed the quitclaim deed to help him obtain the needed funds.

The next day, Fleet Industrial Loan Company of Minnesota, Inc., the lender working with the Debtor on the second mortgage, drafted a quitclaim deed with language expressly releasing the Plaintiff's lien. The Debtor went to the Plaintiff's place of work and asked her to sign that deed. The Plaintiff knew that the lender drafted the second deed, and the lender would not use the deed the Debtor drafted. Again, the Debtor did not tell the Plaintiff that her lien would be released by signing the quitclaim deed. The Plaintiff signed that deed also.

The Debtor obtained the second mortgage in the amount of $27,285.06. He never directly received any funds from the lender. The lender paid, on the Debtor's behalf, the loan closing costs and certain marital debt. The remaining balance of $10,018.06 was paid to the Plaintiff on April 28, 1993 by check issued by the lender. The Debtor delivered this check to the Plaintiff and deposited the check into her checking account, after she endorsed it. The Plaintiff then issued the Debtor a check drawn on her checking account in the amount of $10,018.06. On August 22, 1996, Mr. Ceminsky filed for Chapter 13 bankruptcy protection. The case was converted to Chapter 7 on April 10, 1997.

II.
DISCUSSION

The Plaintiff argues that she is owed $15,000, which had been secured by a lien; and, that the Defendant defrauded her of the lien by misrepresenting the nature of the transaction and consequences of her signing the quitclaim deed. The Debtor asserts that he made no false representations to induce the Plaintiff to release her lien; and, that the Plaintiff knew her lien would be released by signing the quitclaim deed.

A. 11 U.S.C. Section 523(a)(2)(A)

The Plaintiff asserts that $15,000 is not dischargeable under 11 U.S.C. Section 523(a)(2)(A) which provides:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) 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, other than a statement respecting the debtor's or an insider's financial condition. . .

In order to prevail on her non-dischargeability action, the Plaintiff must establish the following elements:

> 1. The debtor made false representations;
> 2. The debtor knew the representations to be false at the time the debtor made them;
> 3. The debtor made the representations with the intention and purpose of deceiving the creditor;
> 4. The creditor actually relied on the debtor's representations; and
> 5. The creditor sustained the alleged injury as the proximate result of the making of the representations.

In re Anderson, 181 B.R. 943, 948 (Bankr.D.Minn. 1995), citations omitted.

The Plaintiff must demonstrate all five factors by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654 (1991).

1. False Representation Not Shown

A false representation can be made by either affirmative act or silence. The Plaintiff asserts that the Defendant, on two separate occasions, told her that signing the quitclaim deeds would not affect her lien. During the Plaintiff's testimony on direct examination, she specifically remembered details surrounding the signing of both deeds. She testified that the Debtor came to her home on April 25, 1993 and informed her that he was refinancing the house and needed her to sign a quitclaim deed. She stated that he told her the lien she had on the house would not be affected by signing the quitclaim deed, so she signed it. She then recalled that the next day, the Debtor came to her place of work and requested her to sign a quitclaim deed prepared by the lender to replace the deed she signed the day before. Again, she testified that the Debtor told her that her lien would not be affected by signing the deed, so she signed it. However, as the Plaintiff answered questions during cross examination and redirect examination, it became clear that she was very confused regarding the events and conversations that took place surrounding the signing of the two quitclaim deeds. Her memory of the events fluctuated from remembering two separate conversations regarding her lien to not remembering any discussions regarding the lien.

> James Lofstrom (Attorney for Plaintiff): Mr. Ceminsky has testified that he did specifically tell you that you were releasing your lien interest in um his home, is ah that true?
> Plaintiff: No it's not.
> Mr. Lofstrom: Did he ever discuss the lien interest with you?
> Plaintiff: No he didn't.

April 7, 1997, Trial Testimony of Mary Lefebvre.

The Plaintiff's confusion regarding the entire transaction is also evident in the testimony she gave during her deposition. At one point during her deposition, she stated that she did not remember any conversations with the Debtor regarding her lien. She also testified that she did not remember whether she had signed one or two quitclaim deeds and had no recollection of signing the deed prepared by the lender. She also made no mention of the Debtor coming to her home to have her sign the first quitclaim deed, even though she clearly remembered this event during the trial.

The Debtor consistently testified that he knew the Plaintiff's lien would be released by her signing either quitclaim deed and believed that the Plaintiff knew the same.

Based on the inconsistent testimony of the Plaintiff, she clearly has not established by a preponderance of the evidence that the Debtor made any affirmative false misrepresentations.

> Silence as to a material fact can also constitute a false representation:
>
> where the debtor has possession of material information that may bear on the creditor's willingness to extend a financial accommodation to him; knows that the creditor would consider it; fails to disclose it; creates or allows the creation of the semblance of a very different state of affairs; and reinforces that imposture by the withholding of the material information, the debtor has acted in a way to trigger Section 523(a)(2)(A).

In re Anderson, 181 B.R. at 951; see, In re Pommerer, 10 B.R. 935 (Bankr.D.Minn. 1981); In re Van Horne, 823 F.2d 1285 (8th Cir. 1987).

The Debtor knew that the Plaintiff's lien would be released by signing the quitclaim deed. However, he believed that the Plaintiff also knew her lien would be released. The Plaintiff cannot establish that the Debtor knew that she thought her lien would remain in place and that he intentionally created the impression that her lien would remain.

In fact, the evidence points to the opposite. While the first quitclaim deed had no language about the lien, the second quitclaim deed clearly stated that:

> This Deed also serves to release the lien created in that Judgment and Decree of Dissolution of Marriage filed in Dakota County District Court on November 16, 1992, File #F2-92-15404
> Plaintiff, Exhibit 3.

This language releasing her lien was not more than an inch above where she signed the deed. A cursory examination of the deed would have clearly revealed the lien release language. There is no evidence the Debtor attempted to conceal this language from the Plaintiff. Therefore, there also was no false representation by silence.

Because there were no false representations by the Debtor, the Plaintiff cannot prevail on her non-dischargeability action under 11 U.S.C. Section 523(a)(4)(A). Therefore, any debt owed by the Debtor to the Plaintiff was discharged in the Debtor's bankruptcy through the Order for Discharge entered July 29, 1997.

B. COSTS AND FEES

The Debtor asked for costs and attorney fees under F.R.Bankr.P. 9011 asserting that the Plaintiff's claims were brought to harass the Debtor, and there was no basis in law to justify the action. This Court finds no evidence that the claims of the Plaintiff were brought solely to harass the Debtor or that the claims were unfounded in law. Therefore, Debtor's motion for costs and attorney fees under F.R.Bankr.P. 9011 is denied.

In the Debtor's Answer, the Debtor also sought costs and fees under 11 U.S.C. Section 523(d). However, that section only allows recovery of costs and fees if the debt at issue is a consumer debt. The Debtor's entire theory of the case, on which he prevailed, was that the debt was a business loan. Therefore, costs and fees under 11 U.S.C. Section 523(d) would be inappropriate.

III.
DISPOSITION

Based on the foregoing analysis,

IT IS HEREBY ORDERED THAT:

1. Any debt owing to the Plaintiff, Mary Lefebvre was discharged in Debtor/Defendant Mark Ceminsky's Bankruptcy case though the discharge entered July 29, 1997.

2. The Debtor/Defendant's motion for costs and

fees is hereby DENIED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: By the Court:

Dennis D. O'Brien
Chief United States
Bankruptcy Judge

(1). The house is located in Dakota County and is legally described as: Lot 13, Block 3, Carrollton Estates 2nd Addition.
(2). The funds were required in the nature of a gift to qualify the Debtor for mortgage financing on the town home.