UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

****

In Re:	)	Case No. 3-92-277-DDO
	)	Chapter 7 Case
Ronald Dessin, a/k/a Ronald Dessin, and Joyce Dessin, a/k/a Joyce Dessin,	)	Adv. No. 3-92-090
Plaintiffs,	)	
vs.	)	ORDER
Harris Marine, Inc., d/b/a Harris Yacht Sales, and John F. (Jack) Harris	)	
Defendants.	)	

****

At St. Paul, Minnesota.

The matter before this Court is whether Defendant John F. Harris' debt to the Plaintiff in the amount of $110,000.00 is nondischargeable in bankruptcy pursuant to 11 U.S.C. Section 523(a)(2)(A). Appearances were as noted in the record. Based upon the testimony, exhibits received at trial, and upon all the records and files herein, the Court makes this Order pursuant to the Federal and Local Rules of Bankruptcy Procedure.

I.
FACTS

Defendant John F. Harris was the sole-owner of Harris Marine, Inc., located in Hudson, Wisconsin. Defendant contacted Plaintiffs Ronald and Joyce Dessin in their resident state of California, regarding the sale of a 1989 55' Bluewater Yacht. The Defendant knew that the Plaintiffs were seeking to purchase such a boat, and Harris had one for sale. Plaintiffs flew to Wisconsin to view the 55' Bluewater Yacht which had a "book value" of $249,000.00. The Defendant offered to sell the yacht for $176,348.00. Harris informed the Plaintiffs that the boat was a trade-in from a customer who bought a 1990 46' Jefferson from Harris Marine, Inc. Therefore, the Plaintiffs assumed that the Defendant had free and clear title to the boat since he was obligated to give them clear title when the transaction closed.

On October 10, 1990, the Plaintiffs entered into a purchase agreement with Harris Marine, Inc. The purchase agreement stated in part: "Title to the above purchase shall pass to the buyer when the payment for the equipment has been made full." In light this language, the Plaintiffs assumed that the Defendant was obligated to deliver clear title upon payment of the full purchase price.

Pursuant to the agreement, the Plaintiffs were required to place a $10,000.00 down payment which was deposited in the account of H.Y.S., Inc., at the Landmark Bank in Hudson, Wisconsin. The Plaintiffs inquired as to whether the deposit would be placed in a trust account. The Defendant informed them that the money would be placed in the company's corporate account.

Eager to finalize the transaction, Plaintiffs inquired as to where the company had its corporate account. An employee of Harris Marine, Inc., informed the Plaintiffs that the corporate account was located at the Midway National Bank in Minnesota. On or about October 29, 1990, before the closing of the transaction had been scheduled, the Plaintiffs made an additional deposit of $100,000.00 towards the purchase of the vessel. The transaction was accomplished by wire transfer to the corporate account of Harris Marine, Inc., at Midway National Bank. Harris did not ask for payment and was unaware that it was made. The Defendant was attending a boat show in Fort Lauderdale, Florida, at this time, and did not return until November 1, 1992.

On October 30, 1990, Shore Financial, a judgment creditor of Harris Marine, Inc., served a Garnishment Summons upon Midway National Bank regarding the corporate account. The Bank thereupon exercised a right of setoff of the account against a debt owing the Midway National Bank by Harris Marine, Inc. The bank removed $69,599.00 from the account which was subsequently closed. The Defendant testified that the remaining amount had been used for operating expenses in the ordinary course of business without his knowledge of the Plaintiff's $100,000.00 deposit. The $10,000.00 deposited in the Landmark Bank in Hudson, Wisconsin, had also been used for "operating expenses" in the ordinary course of business by the Defendant.

After the $100,000.00 was paid by Plaintiffs, they learned that the 1989 55' Bluewater Yacht was owned by one Richard Flynn and was subject to a mortgage with Maryland National Bank for $176,348.00. Upon learning these facts, the Plaintiffs requested the return of the $110,000.00. Due to the garnishment summons issued against the Midway National Bank account, and subsequent setoff by the Bank, the Defendant was unable to return the Plaintiffs' deposit. During this time period, Richard Flynn, who had intended to trade the Bluewater with Harris towards the purchase of a 1990 46' Jefferson Yacht, changed his mind. Thus, the Defendant was not in a position to close the transaction or return the Plaintiffs' money. Plaintiffs bring this adversary proceeding for a determination that the Defendant's debt in the amount of $110,000.00 is nondischargeable pursuant to 11 U.S.C. Section 523(a)(2)(A) based on fraud.

II.
ANALYSIS

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

financial conditions;

In order for the Plaintiffs to prevail in this action, the Court must find that:

(1) the debtor made false representations;
(2) that at the time he knew they were false;
(3) that he made them with the intention and purpose of deceiving the creditor;
(4) that the creditor relied on such representations;
(5) that the creditor sustained the alleged loss and damage as the proximate result of the representations having been made." Matter of Van Horne, 823 F.2d 1285 (8th Cir. 1987); In re Ophaug, 827 F.2d 340 (8th Cir. 1987).

Plaintiffs have the burden of proving each element of claim by preponderance of the evidence. 11 U.S.C. Section 523(a)(2)(A); Bankr. Proc. Rule 4005 (1993); Grogan v. Garner, 498 U.S. 279 (1990).

The Plaintiffs claim that the Defendant made knowingly false representations and defrauded them by: (1) telling the Plaintiffs that he owned the yacht free and clear of liens; (2) representing that the corporate account was similar to a trust account; and, (3) by inducing the Plaintiffs to provide him with "operating expenses" under false pretenses. The Defendant did not represent to the Plaintiffs that he had clear title to the yacht. The Defendant notified the Plaintiffs that the vessel had been taken as a trade for a 1990 46' Jefferson. The Plaintiffs testified at trial that they were aware of this fact, but assumed that the Defendant had free and clear title to the boat since he was obligated to give them clear title when the transaction closed. However, Plaintiffs' mere assumption does not create a false representation on the part of the Defendant. See In re Belfry, 862 F.2d 661, 663 (8th Cir. 1988); See also In Re Santore, 51 B.R. 122, 124 (Bkrtcy. D. N.J. 1985).

Plaintiffs argue that the language of the purchase agreement constitutes a false representation because the Defendant knew and did not inform them that the boat was owned by Richard Flynn. Further, Plaintiffs contend that the Defendant did not inform the Plaintiffs that there was a balance on the mortgage to Maryland National Bank in the amount of $176,348.00. Plaintiffs rely on the purchase agreement which stated in part: "Title to the above purchase shall pass to the buyer when the payment for the equipment has been made full." Although the language of the purchase agreement arguably obligates the seller to deliver clear title upon payment of the full purchase price, it does not represent current state of title or require its disclosure. See: Belfry, at 663. Therefore, the purchase agreement does not constitute a false representation on the part of the Defendant.

Plaintiffs contend that the Defendant also made a false representation by telling them that the Harris Marine, Inc., corporate account was similar to a trust account. However, the witnesses' testimony revealed that the Plaintiffs merely assumed the similarity from their own understanding, not from anything that the Defendant said regarding the nature of the account. In a bankruptcy context, there is a strong policy to require creditors to make use of protective devices rather than rest on hopes and understandings. Belfry, at 663. Plaintiffs did not ask the Defendant whether the corporate account was in fact similar to a trust account. Plaintiffs' own testimony at trial revealed that the information given by the Defendant regarding the corporate

account was that Plaintiffs' payment would be deposited into the Harris Marine, Inc., corporate account. Again, while it appears that Plaintiffs may have made certain assumptions regarding the nature of the account, the assumptions were the result of their misunderstanding, not of misrepresentations of the Defendant.

Finally, the Plaintiffs argue that the Defendant wrongfully induced them to provide Defendant with "operating expenses." However, the Defendant did not ask the Plaintiffs to wire the additional $100,000.00 to the account of Harris Marine, Inc., at Midway National Bank. The Plaintiffs on their own initiative sent the additional money . They were not deceived by the Defendant. In fact, the Defendant was attending a boat show in Fort Lauderdale, Florida, when the money was transferred by wire to Midway National Bank and was unaware of the $100,000.00 transfer by the Plaintiffs. Plaintiffs have failed to establish any wrongful inducement.

Additionally, Plaintiffs have failed to established that the Defendant made knowingly false representations or defrauded them, it is not necessary to analyze the other four of the five elements of nondischargeable fraud under Section 523(a)(2)(A). Matter of Van Horne, at 285. THEREFORE, IT IS HEREBY ORDERED: Defendant John F. Harris' debt to the Plaintiffs Ronald Dessin and Joyce Dessin in the amount of $110,000.00 is not excepted from discharge. The debt will be or has been discharged in Bankruptcy Case No. 3-92-277 as part of the general discharge under Section 727.

Let Judgment Be Entered Accordingly.

Dated this ______ day of February, 1993.

BY THE COURT:

DENNIS D. O'BRIEN
U.S. Bankruptcy Judge