UNITED STATES BANKRUPTCY COURT
DISTRICT OF IDAHO

In re: **Brandon Bruce Roberts and Hailey Eleese Roberts,** **Debtors.**	**Bankruptcy Case No. 16-40880-JDP**
Timber Steel Custom Buildings, LLC, **Plaintiff,** **vs.** **Brandon Bruce Roberts and Hailey Eleese Roberts,** **Defendants.**	**Adv. Proceeding No. 16-08039-JDP**

MEMORANDUM OF DECISION

Appearances:

Aaron Tolson, Tolson & Wayment, PLLC, Ammon, Idaho, Attorney for Plaintiff.

Ryan Farnsworth, Avery Law, Idaho Falls, Idaho, Attorney for Defendants.

Introduction

On December 23, 2016, Timber Steel Custom Buildings, LLC ("Plaintiff") commenced this adversary proceeding against chapter 7[1] debtors Brandon Bruce Roberts and Hailey Eleese Roberts ("Debtors"), requesting that the Court declare that its claim against Debtors is excepted from discharge under § 523(a)(2)(A) and § 523(a)(6). Dkt. No. 1. The parties both filed pretrial briefs, Dkt. Nos. 11, 19, and on August 24, 2017, the Court conducted a trial at which evidence and testimony was offered. Minute Entry, Dkt. No. 20. Closing arguments were submitted via briefs. Dkt. Nos. 22, 23, 24. Upon completion of the briefing, the Court took the matter under advisement.

[1] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532, all Rule references are to the Federal Rules of Bankruptcy Procedure, Rules 1001–9037.

Having considered the evidence, briefs, and arguments put forth, as well as the applicable law, this Memorandum sets forth the Court's findings, conclusions and reasons for its disposition of the matter. Rule 7052.

Facts[2]

Plaintiff is an Idaho building construction company. Paul E. Stierle, III, is the sole owner of Plaintiff. Brandon[3] testified that in 2009, he began working for Paul and his father, Digger Stierle, at their former companies.[4] Paul testified that Brandon started as a general laborer, but performed his job well and was advancing in the companies as "a lead man in the business."

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[2] To be sure, the parties' versions of the relevant facts, in some respects, vary significantly. Many of the fact-findings that follow were made by the Court based, at least in part, upon its judgment about the credibility of the witnesses and based upon the weight appropriately assigned to the evidence and testimony.

[3] For clarity, the Court may refers to parties by first names. No disrespect is intended.

[4] Paul testified that Brandon began employment on August 24, 2010. The difference in dates is not material to the Court's decision.

Paul testified that Plaintiff was formed in January 2013. At some unknown point thereafter, Brandon began his employment with Plaintiff.

A. Carpal Tunnel Issues

Paul testified that Brandon had developed carpal tunnel issues "from previous work." Brandon testified that during the first few years of working for the Stierles, he had complained to them about his carpal tunnel issues, but they told him not to get surgery to correct the issues because they needed him to work. Brandon testified that he delayed the surgery until he could no longer use his hands to work. He explained it was then that Digger asked him to have surgery on both wrists at the same time to see if they could run the company without him. Brandon testified that he underwent surgery on both wrists to correct the issues in January 2015.[5]

B. Workers' Compensation

Hailey, Brandon's wife, testified that Digger told Brandon that he

[5] Paul testified he thought the surgery was in November 2015, but when confronted with the dates of the checks made out to Brandon, he acknowledged he may have been confused on the timing of the surgery.

would qualify to receive unemployment and workers' compensation benefits during the time he could not work after the surgery. However, Brandon did not qualify for unemployment compensation as anticipated. As for workers' compensation, Paul testified that Brandon's original claim was denied because his time of employment did not justify the claim. But Paul disputed the denial of the claim. He testified that workers' compensation eventually approved Brandon's claim, but it caused the rates Plaintiff paid for workers' compensation to increase.

Brandon testified that following his surgery he received workers' compensation for about a month and a half in an amount which represented only about forty percent of his full-time wages. Brandon testified he then began working "light duty." *See* Ex. 205 (a photo dated March 5, 2015, of a job on which Brandon testified he worked). During that time, he received wages from Plaintiff for the limited time he was working, and a payment from workers' compensation that was a portion of the benefit he was previously being paid. *See* Ex. 100 (evidencing partial payments from Plaintiff). Brandon testified that there was a period of time

while he was on light duty that he was not receiving any workers' compensation because Plaintiff was not reporting the hours he was working to the compensation insurer. Apparently, a report was required for the insurer to calculate the amount Brandon was to be paid. Because of this, at some later time, Brandon testified he received a lump sump payment from the insurer of approximately $1,500. Brandon estimated that, in total, he received between three and four thousand dollars in workers' compensation.

C. Plaintiff's Payments to Brandon

Between January and May of 2015, Plaintiff made a number of payments to Brandon. Ex. 103. Paul testified that he approved payment of funds to Brandon because he needed them while he was recovering from surgery and he was a valued employee. Paul testified that the funds given to Brandon were intended to be a loan made with his agreement that Brandon's employment would continue, and that Brandon would pay back the loan with any proceeds he received from any workers' compensation settlement.

In contrast to this arrangement, Brandon testified that he never thought the funds he received from Plaintiff were a loan, and that he never promised to repay them. He testified that he thought the money from Plaintiff were wages to supplement his income while he was receiving only workers' compensation benefits.

There was no written agreement executed concerning these payments. Ex. 104 at 5. A notation included on the memo line on a number of the checks given by Plaintiff to Brandon states: "loan." Ex. 103. But Brandon testified that he believed the "loan" notation was written on the checks for tax purposes only because, he testified, it was a common practice by Plaintiff's management and staff to include inaccurate or even misleading memo lines on checks to "get around paying taxes." Paul testified that Plaintiff never issued checks with misleading memo notes to evade taxes; however, Isaac Herrera, another former employee of Plaintiff who now works with Brandon, testified he also saw checks issued by Plaintiff that contained misleading, if not false, memo lines.

Plaintiff's records indicate that only a few of the checks contained

"loan" in the memo line. Ex. 103 at 1. However, Digger sent a letter to Brandon indicating that he felt a number of the checks without "loan" in the memo line were also loans. Ex. 100. Plaintiff's records indicate that between January and June 2015, over $25,000 in checks were issued to Brandon, but this amount also appears to contain sums paid to him as wages. *Compare* Ex. 100 *and* Ex. 103. Debtors' bank statements from their only bank account from February 2015 to June 2015 indicate that the account balance was consistently at or below $1,000. *See* Ex. 201.

D. Post-Surgery, Brandon Discontinues Employment with Plaintiff

Brandon testified that he did not know that Paul or Digger intended the payments Plaintiff made to him to be loans until January 8, 2016. At some point after the surgery, Brandon returned to working full-time for Plaintiff. Brandon testified that in January 2016, there was a company meeting. At the meeting, Digger had Plaintiff's employees all sign a document indicating that their wages could be withheld to repay any outstanding loans they had with Plaintiff. Brandon testified he signed the paper because he assumed he had no loans with Plaintiff. This document

was not offered in evidence in the record. Brandon testified that after the meeting, he was called into Digger's office where Digger informed him that his wages were going to be cut in half. Because of this, Brandon decided to quit working for Plaintiff that same day.

E. Brandon's New Business

Brandon testified that, after his departure from his employment with Plaintiff, he had no other job opportunities lined up and he searched for employment on the internet. He testified that he obtained an offer for a job to commence three weeks thereafter. But during the interim time, Brandon testified he did "side work" that went well enough that he decided to decline the new position and, instead, to start his own construction business.

For his new business, Brandon changed and adopted the name of a prior side business he owned. Brandon testified that in January 2015, while still employed by Plaintiff, he formed a business to perform auto detailing. He testified that the business was intended to be a side business that he would do on the weekends and would only cost about $500 to start

up. While it was unclear how well the auto detailing business faired, when Brandon decided to start his own construction business, he simply changed the name of the auto detailing business to Trusst Buildings LLC. Brandon testified that he did this sometime in February 2016, and that his building contractor's license was approved on April 11, 2016, Ex. 200.

Paul testified that, in his opinion, it would take over ten thousand dollars to capitalize the type of construction business Brandon started. Because Plaintiff had provided roughly that amount to Brandon, Paul testified he felt Brandon used the funds Plaintiff provided him to start a new business to compete with Plaintiff.

F. Brandon's Work for Brent Stohl

One of the jobs Brandon worked on was for Brent Stohl ("Stohl"), a former customer of Plaintiff. While still employed by Plaintiff, Brandon was assigned to supervise and work with a crew that was completing a project for Stohl. Paul testified that a part of the project could not be finished while Brandon was employed because of the onset of winter weather. Paul testified that, at some point, communications between he

and Stohl ceased; it is unclear when that occurred. But some time thereafter, Paul sent an employee out to complete the Stohl project, who discovered that Brandon had already completed the work.

Brandon testified that about two months after he had quit working for Plaintiff, Stohl contacted him about doing some work. Brandon stated that he informed Stohl that he no longer worked for Plaintiff, and that he would have to contact Paul. But Brandon testified that, when he told Stohl this, Stohl informed him that he had some side jobs that he wanted Brandon to do. Brandon testified he worked for Stohl in March or April of 2016, and that the work took approximately three weeks to complete. The checks Stohl used to pay Brandon for this work are dated May 2016. Ex. 202.

Brandon testified he never spoke to Stohl about personally doing work for him while working for Plaintiff. Also, while it is unclear what exactly Brandon and his new company did for Stohl, Brandon testified that on at least one occasion the work he did was different from the type of work Plaintiff did. According to Brandon, Plaintiff only works on new

construction, while Brandon installed new siding on an old building for Stohl.

G. Plaintiff's Former Employees' Work for Brandon

Paul testified that three of his employees went to work for Brandon's company after Brandon quit. While Paul alleged that Brandon used Plaintiff's former employees to his benefit, Brandon insisted that he did not recruit these employees, but rather, they each approached him after discontinuing their employment with Plaintiff. He said that he had become friends with the employees while working for Plaintiff, and that after he left, they saw what he was doing with his new company and sought him out to see if they could work for him. Herrera, who was one of the three former employees of Plaintiff that went to work for Brandon, confirmed Brandon's testimony.

H. Plaintiff's Attempts to Collect the Funds Given to Debtors

Paul testified that, when Debtors did not repay the funds Plaintiff provided to them after Brandon's surgery, he sent the account to a collection agency. The collection agency filed suit against Brandon.

Brandon never responded to the complaint and a default judgment was entered against Brandon in September 2016 for $14,687.54. Ex. 105. Of that amount, $10,024.93 was for principal and $1,866.41 was for accrued interest on what Plaintiff alleged were the loans made to Brandon. Ex. 105. Brandon testified that while he looked for a lawyer to contest Plaintiff's suit, Debtors did not have the money to fund a defense.

On September 23, 2016, after entry of the default judgment against them in state court, Debtors filed a chapter 7 petition. *In re Roberts*, 16-40880-JDP, Dkt. No. 1.

Analysis and Disposition

Plaintiff argues its claim against Debtors should be excepted from discharge under two provisions of the Code: § 523(a)(2)(A), because Brandon obtained funds from Plaintiff through false pretenses, false representations, or actual fraud; and § 523(a)(6), because the debt is for damages for willful and malicious injury caused by Brandon to Plaintiff

and its business. Br. at 2, Dkt. No. 22.[6] Plaintiff argues that both exceptions apply because Brandon obtained the loans from Plaintiff without ever intending to repay them, but instead intended to use them to start a business to compete with Plaintiff. *Id*.

Debtors argue that the proof offered at the trial does not support Plaintiff's theory. Debtors' Br. at 2, Dkt. No. 23.

As discussed below, the Court agrees with Debtors that Plaintiff has not adequately proven the facts necessary to support an exception to discharge in this case under either § 523(a)(2)(A) or § 523(a)(6).

A. § 523(a)(2)(A)

Section 523(a)(2)(A) provides that a "discharge under section 727 . . . does not discharge an individual debtor from any debt . . . for money . . .

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[6] Plaintiff seeks an exception to discharge as against both Debtors. However, Plaintiff offered no proof at all that Hailey Roberts engaged in any of the conduct giving rise to an exception. If for no other reason, Plaintiff's claims against her lack merit. *See Saindon v. Gibson (In re Gibson)*, 95 IBCR 169, 172 (Bankr. D. Idaho 1995) (explaining that a claim will not be excepted from a spouse's bankruptcy discharge unless the spouse actively participated in the conduct upon which the nondischargeability finding is based (citing *Bank of Am. Idaho, N.A. v. McCarron (In re McCarron)*, 94 IBCR 52, 54 (Bankr. D. Idaho 1994))).

obtained by—false pretenses, a false representation, or actual fraud . . . ." To secure an exception to discharge under this Code provision, the creditor must, via competent evidence, establish five elements: "(1) the debtor made . . . 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; [and] (5) that the creditor sustained the alleged loss and damage as the proximate result of the misrepresentations having been made." *Ghomeshi v. Sabban (In re Sabban)*, 600 F.3d 1219, 1222 (9th Cir. 2010) (citing *Am. Express Travel Related Servs. Co. v. Hashemi (In re Hashemi)*, 104 F.3d 1122, 1125 (9th Cir. 1996)). "The creditor bears the burden of proving the applicability of § 523(a)(2)(A) by a preponderance of the evidence." *In re Sabban*, 600 F.3d at 1222. And "in order to avoid unjustifiably impairing a debtor's fresh start" the Ninth Circuit has held that "the exception should be construed strictly against creditors and in favor of debtors." *Id.*

Plaintiff argues that Brandon obtained the loans that form the basis of its claim by representing to Plaintiff that he would repay them, when in

reality, he intended to keep the funds to start his own business to compete with Plaintiff. Br. at 1–2, Dkt. No. 22. Debtors argue that Brandon never promised to repay the loans, did not think they were loans, and did not use the funds to start Brandon's business.

To be clear, Plaintiff's claim against Debtors derives from the default judgment entered against Brandon for the funds provided to him while he was unable to work. Based on that judgment, Brandon is indebted to Plaintiff. However, the critical question in this case is whether this debt is excepted from Debtors' discharge in bankruptcy because Debtors obtained those funds through false pretenses, false representations, or actual fraud.

Simply put, Plaintiff has failed to establish by a preponderance of the evidence that Brandon ever promised to repay Plaintiff the funds he received, much less that he lied to obtain the funds to start his own business.

1. Promise to Repay

No written agreement evidencing the alleged loans exists, and Paul

and Brandon's testimony regarding the terms of the arrangement concerning the payments from Plaintiff to Brandon is contradictory. The only evidence that Plaintiff's management intended that the payments be repaid was the word "loan" noted on some, but not all, of the Plaintiff's checks given to Brandon. But Brandon testified that when he saw "loan" written on the checks, he did not believe that meant Plaintiff intended them to be loans to him. Rather, he testified he believed that Plaintiff's employees noted "loan" on the checks as a misleading statement to avoid paying taxes, which, he testified, was a common practice of Plaintiff's employees. Herrera's testimony supported Brandon's statements.

The circumstances surrounding the transfer of the funds supports Brandon's assertion that he thought the funds were intended as support from a gratuitous employer to a valued employee while he recovered from surgery. Brandon put off having the surgery at Paul and Digger's request, and once Brandon could no longer work, Digger requested that he have both wrists repaired at once, which meant there would be a period of time that Brandon could not work. During the time Brandon could not work,

Brandon would have needed income to survive on workers' compensation, since the benefit payments would only provide a portion of his wages. Even Paul testified that he provided the funds to Brandon because he was a valued employee and he needed the money.

Other than the notations of "loan" on the memo lines of some of the checks, the only other indication that the funds may have been a loan was Brandon's failure to contest the complaint filed against him by Plaintiff to collect the debt. But the judgment entered in that action was a default judgment. And Brandon's testimony that he failed to contest the suit against him because he could not afford an attorney at that time seems credible as Debtors filed for bankruptcy relief shortly after the judgment was entered. *See* Ex. 103 (judgment entered on September 16, 2016); *In re Roberts*, 16-40880-JDP, Dkt. No. 1 (bankruptcy filed on September 23, 2016).

In sum, the evidence to support the theory that Brandon promised to repay the funds given to him by his employer, Plaintiff, is, at best, equivocal. At worst, the evidence actually supports Brandon's version of the facts. Thus, Plaintiff has failed to carry its burden to prove the first

element under § 523(a)(2)(A): that a false representation was made.

2. Intent to Use the Funds to Start a Business

Even if Brandon had represented that he would repay the funds given to him by Plaintiff, on this record, the Court cannot find he did not intend to do so at that time the funds were provided. Plaintiff's only argument is that Brandon did not intend to repay the funds because he always intended to keep the money to start his own business. Plaintiff argues this is evidenced by the fact that the funds given to Brandon were roughly equal to the cost to start up such a business, and by Brandon's conduct in soliciting work from Plaintiff's customers and recruiting its employees. But none of these assertions are borne out in the record.

First, following his surgery, Brandon returned to work for Plaintiff for almost nine months before quitting. He did not quit his job with Plaintiff until he was told his pay would be cut in half. Moreover, Brandon did not convert his auto detailing business into a construction business until a month or so after he quit, when he secured sufficient side work to persuade him that he could succeed in starting such a business.

That Brandon would return to work for Plaintiff for several months, and that he had a rational reason for quitting, tend to show he was not contemplating starting his own construction business when he received the funds from Plaintiff.

Second, Brandon did not stockpile the funds from Plaintiff, but used them to subsist. Because workers' compensation was paying him only a percentage of his wages, it is reasonable to assume Brandon needed the additional funds to live on after the surgery. His bank records indicate he never had more than $1,000 in his bank account during that time.

Alternatively, Plaintiff argues Brandon wrongfully used funds from the settlement check from workers' compensation that he had agreed to use to repay Plaintiff. But Brandon testified that settlement was only for approximately $1,500, which, according to Paul, would be far too little to start Brandon's business.

Finally, the evidence does not adequately prove that Brandon recruited Plaintiff's employees or solicited Plaintiff's customers. Instead, it shows that Plaintiff's employees sought employment with Brandon

because of their personal connections with him, and did not do so until after they left employment with Plaintiff. Moreover, the only evidence offered concerning Plaintiff's customers was the work Brandon did for Stohl. But while Brandon did work for Stohl prior to quitting, Plaintiff failed to submit any evidence to show Brandon solicited personal work from Stohl while still employed with Plaintiff. Rather, the record shows Brandon did not do any personal work for Stohl until a month or two after quitting his employment with Plaintiff, when Stohl contacted him.

Again, even had Plaintiff shown that Brandon promised to repay the funds, Plaintiff failed to carry its burden to show that Brandon did not intend to do so at the time the funds were given to him.

The debt Debtors owe Plaintiff is not excepted from discharge under § 523(a)(2)(A).

B. § 523(a)(6)

Section 523(a)(6) provides that a discharge under § 727 "does not discharge an individual debtor from any debt—for willful and malicious injury by the debtor to another entity or to the property of another entity."

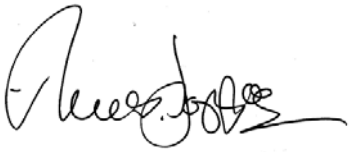
"[A] simple breach of contract is not the type of injury addressed by § 523(a)(6)[.]" *Snoke v. Riso (In re Riso)*, 978 F.2d 1151, 1154 (9th Cir. 1992). And "[a]n intentional breach of contract is excepted from discharge under § 523(a)(6) only when it is accompanied by malicious and willful tortious conduct." *Id.*

In the one paragraph dedicated to this discharge exception in its brief, Plaintiff failed to cite to any tort law, or to make any cognizable argument, that Brandon engaged in tortious conduct. At best, in asserting a § 523(a)(6) claim, the Court assumes Plaintiff is relying on the allegation that Brandon lied to obtain the loans so he could start up a competing business. As noted above, this argument is not supported by the record. Thus, the debt Debtors owe Plaintiff is not excepted from discharge under § 523(a)(6).

Conclusion

The debt Debtors owe Plaintiff is not excepted from discharge under § 523(a)(2)(A) or § 523(a)(6). A separate judgment will be entered.

Dated: October 17, 2017



Honorable Jim D. Pappas
United States Bankruptcy Judge