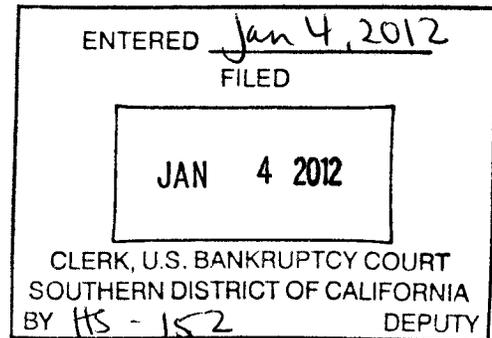


1 **WRITTEN DECISION - NOT FOR PUBLICATION**



9 UNITED STATES BANKRUPTCY COURT

10 SOUTHERN DISTRICT OF CALIFORNIA

11 In re) Case No. 10-11967-PB7
12 JAMES WILKIE CARPENTER,) Adv. No. 10-90465
13 Debtor.) MEMORANDUM DECISION
14)
15 NORMAN W. MITCHELL,)
16 Plaintiff,)
17 v.)
18 JAMES WILKIE CARPENTER,)
19 Defendant.)
20)

21 This matter came on regularly for trial on plaintiff's
22 complaint objecting to the dischargeability of the debt owed to
23 Mr. Mitchell by debtor Carpenter. Plaintiff alleges that the
24 debt owed by Carpenter was the product of Carpenter's fraud.

25 The Court has subject matter jurisdiction pursuant to
26 28 U.S.C. § 1334 and General Order No. 312-D of the United States

1 District Court for the Southern District of California. This is
2 a core proceeding under 28 U.S.C. § 157(b)(2)(I).

3 The debt owed by Carpenter to Mitchell arose out of a real
4 estate transaction in which Mitchell purchased the rights to a
5 piece of property in Nevada through an all-inclusive note and
6 trust deed (AITD), by which Mitchell promised to pay to Carpenter
7 \$230,000, which included an unpaid amount of \$182,750 owed to the
8 mortgagee, Long Beach Mortgage. Mitchell was to make payments to
9 Carpenter, and Carpenter was to remit the monthly payment to
10 Long Beach while keeping the difference. The arrangement began
11 around June, 2003.

12 Mr. Mitchell made the monthly payment to Mr. Carpenter and
13 his realty business. At some point in the Summer of 2004,
14 Mr. Carpenter did not make the payments to the mortgagee, which
15 resulted in a notice of default being served on Mr. Mitchell.
16 Mr. Mitchell originally alleged in both his state court suit and
17 this proceeding that Mr. Carpenter received the payments from
18 Mr. Mitchell but did not forward the necessary amounts to the
19 mortgagee, thereby triggering the default (Complaint, para. 17);
20 (State Court Complaint, para. 12).

21 At trial, Mr. Mitchell testified that he sold the property
22 after the notice of default and that Mr. Carpenter and his
23 firm submitted a payoff demand which included claimed amounts
24 not subsequently allowed. In any event, Mr. Mitchell sued
25 Mr. Carpenter in Nevada State Court in December, 2004. The
26 matter was referred for arbitration, and an award was entered

1 in Mr. Mitchell's favor. In its entirety, the Arbitration Award
2 explained:

3 Upon scrutinizing the beneficiary demand
4 it appears that \$11,619.40 in charges were
5 attributable to the Defendant's failure to
6 perform its obligations under the original
7 agreement. They include late charges, NSF
8 charges (not proved), legal/professional
9 fees, foreclosure fees and beneficiary payoff
10 (not proved). Additionally, Plaintiff did
11 not provide an appraisal or other evidence to
12 prove the value of the property at the time
13 of the Plaintiff's sale of the property.
14 However, it is clear the property was sold
15 under distressed conditions created by the
16 breach. Also, it is unrebutted that a
17 \$385,000 offer was extended on the property
18 in the summer, 2004. The Arbitrator
19 therefore awards \$5,000.00 damages for loss
20 of property value for a total of \$16,619.40.

21 No damages for moving or future rental
22 are awarded. Those expenses would have
23 occurred had plaintiff sold the property in
24 any event.

25 The Arbitrator's Award was dated November 23, 2005. On
26 May 1, 2008 - 2 ½ years later - the state court entered a default
judgment against Mr. Carpenter, at the request of Mr. Mitchell's
attorney. It awarded Mr. Mitchell:

 The principal sum of \$16,619.40,
together with interest accruing on the
principal amount at the legal rate of 10% per
month from April 16, 2007 to the date of the
default, until paid in full, [sic] of suit in
the amount of \$233.00 and costs of the
preparation of the legal documents needed in
the prosecution of this action in the amount
of \$1,000.00

Curiously, the default was filed April 6, 2007--10 days after
interest was to commence running--yet the interest phrase
was written to run "from April 16, 2007 to the date of the

1 default" The language of the default judgment was drafted
2 by Mr. Mitchell's attorney. Mr. Mitchell asserts he is owed
3 \$828,632.84, plus interest, on his \$16,619.40 default judgment,
4 presumably because of the interest provision.

5 Section 523(a)(2)(A) provides that:

6 (a) A discharge under section 727 . . . of this title does
7 not discharge an individual debtor from any debt - . . .

8 (2) for money, property, services, or an extension,
9 renewal or refinancing of credit, to the extent obtained
10 by -

11 (A) false presences, a false representation,
12 or actual fraud, other than a statement respecting
13 the debtor's or an insider's financial condition;
14 . . .

15 In the Ninth Circuit, to prove actual fraud a creditor must
16 establish each of the following elements:

- 17 (1) That the debtor made the representations;
- 18 (2) That at the time he made them he knew they were false;
- 19 (3) That he made them with the intention and purpose of
20 deceiving the creditor;
- 21 (4) That the creditor relied on such representations; and
- 22 (5) That the creditor sustained the alleged loss and
23 damage as the proximate result of the representations
24 having been made.

25 In re Britton, 950 F.2d 602, 604 (9th Cir. 1991); In re Kirsh,
26 973 F.2d 1454, 1457 (9th Cir. 1992). A false pretense involves
an implied misrepresentation or conduct which creates and fosters
a false impression, while a false representation is an express
misrepresentation that induces conduct. In re Grant, 237 B.R.
97, 113 (Bankr. E.D. Va. 1999); In re Haining, 119 B.R. 460,

1 463-464 (Bankr. D.Del. 1990). But the difference between fraud,
2 false pretense, and false representation is nuanced, and the test
3 for proving any one of them is essentially the same.

4 When analyzing knowledge and intent, the Court must keep
5 in mind that reckless indifference to the truth may support a
6 section 523(a)(2) claim. See In re Arm, 175 B.R. 349, 354
7 (9th Cir. BAP 1994). Further, a debtor's silence or omission
8 of a material fact can constitute a false representation which
9 is actionable under section 523(a)(2)(A). In re Eashai, 87 F.3d
10 1082, 1088-1089 (9th Cir. 1996). In order to find liability for
11 fraud based upon omission or silence, however, there must be a
12 duty to disclose. Id. But nondisclosure of a material fact in
13 the face of a duty to disclose can establish the requisite
14 reliance and causation for actual fraud under the Code. In re
15 Apte, 96 F.3d 1319, 1323 (9th Cir. 1996). And in a business
16 transaction such a duty can arise. The Apte court cited section
17 551 of the Restatement (Second) of Torts (1976) for the
18 proposition that the parties in a business transaction have a:

19 duty to exercise reasonable care to disclose to
20 the other before the transaction is consummated
21 . . . facts basic to the transaction, if [a party]
22 knows that the other is about to enter into it
23 under a mistake as to them, and that the other,
because of the relationship between them, the
24 customs of the trade or other objective
circumstances, would reasonably expect a
disclosure of those facts.

24 Apte, 96 F.3d at 1324.

25 Finally, the Court notes the often repeated directive that
26 the burden a creditor bears in a non-dischargeability action is

1 high. As a result, Mr. Mitchell bears the burden of proving each
2 element of fraud by a preponderance of the evidence. Grogan v.
3 Garner, 498 U.S. 279, 290 (1991). And, in order to avoid
4 unjustifiably opposing a debtor's fresh start, the Ninth Circuit
5 has held that exceptions to discharge "should be construed
6 strictly against creditors and in favor of debtors." In re
7 Klapp, 706 F.2d 998, 999 (9th Cir. 1983).

8 As noted, Mr. Mitchell argued at trial that his claim was
9 based on Mr. Carpenter having submitted a beneficiary demand on
10 the sale of the real property that included sums the arbitrator
11 later concluded Mr. Carpenter had failed to prove he was entitled
12 to claim. Mr. Mitchell characterized it as holding the sale of
13 the property "hostage" for the amounts Mr. Carpenter set out in
14 his beneficiary demand. The beneficiary demand Mr. Carpenter
15 submitted included all of the following:

16	Unpaid Principal Balance:	\$230,000.00
	Interest, 6/6/2003, deferred	
17	and defaulted payments:	14,150.77
	Accumulated Late Charges:	2,396.00
18	Accumulated NSF Charges:	141.00
	Legal/Professional Fees:	4,875.00
19	Escrow Advance:	6,095.88
	Foreclosure Fees and/costs:	4,057.40
20	Property Inspection:	705.33
	Beneficiary Pay Off:	150.00
21		<hr/>
		\$262,571.38

22
23 As already noted, the Arbitrator concluded the "late charges,
24 NSF charges (not proved), legal/professional fees, foreclosure
25 fees and beneficiary payoff (not proved)" were not allowed
26 because those charges "were attributable to the Defendant's

1 failure to perform its obligations under the original agreement."
2 The disallowed charges totaled \$11,619.40. The Arbitrator
3 necessarily allowed the interest charges for "deferred and
4 defaulted payments" of \$14,150.77, as well as the escrow advance
5 of \$6,095.88 and property inspection fee of \$705.33, together
6 with the unpaid principal balance of \$230,000. The Arbitrator
7 did assess \$5,000 against the money due Mr. Carpenter for loss
8 of market value of the home because of selling with a notice of
9 default pending. Also, Mr. Carpenter testified he turned around
10 and paid off the underlying note then held by Option One of over
11 \$192,000.

12 Mr. Mitchell asks this Court to find that Mr. Carpenter's
13 acts of including in the beneficiary demand sums the arbitrator
14 later concluded were not proven as expenses incurred were
15 fraudulent. The Court acknowledges that Mr. Mitchell had to
16 go along in order for the escrow to close before a foreclosure
17 could be completed. However, that does not render the claim
18 fraudulent. Moreover, the same arbitrator allowed Mr. Carpenter
19 over \$14,000 in "Interest, 6/6/2003 deferred and defaulted
20 payments", while denying late charges and unproven NSF fees.

21 It is difficult for the Court to reconcile the multiple
22 facets of the Arbitrator's Award, given the other facts already
23 mentioned. In addition, Mr. Carpenter testified briefly that
24 he believed Mr. Mitchell had breached their AITD agreement by
25 nonpayment of taxes, and that Carpenter was trying to get
26 Option One (the noteholder) to reconcile the payment history

1 on the debt. All of which means that plaintiff Mitchell has
2 failed to meet his burden of proving by a preponderance of the
3 evidence that Mr. Carpenter engaged in fraudulent acts causing
4 Mr. Mitchell to lose money as a result of those fraudulent acts,
5 totalling \$11,619.40 in disallowed portions of the beneficiary
6 demand, plus \$5,000 for loss of market value in sale of the
7 property under the duress of a pending foreclosure, all before
8 whatever post-judgment interest might actually be authorized and
9 permissible under applicable Nevada law.

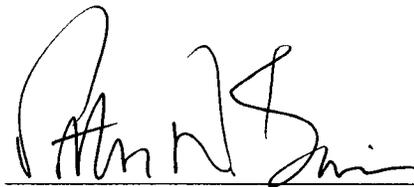
10 Accordingly, counsel for Mr. Carpenter shall prepare and
11 lodge a separate form of judgment consistent with the forgoing
12 within twenty-eight (28) days of the date of filing of this
13 Memorandum Decision.

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1 With his answer to the complaint, Mr. Carpenter included
2 a counterclaim for the alleged abuse of process by not effecting
3 proper service of process, thereby causing Mr. Carpenter's fees
4 and expenses to be unnecessarily increased. Mr. Carpenter
5 provided no evidence in support of his counterclaim, and, to
6 the extent it could otherwise stand independent of 11 U.S.C.
7 § 523(d), the Court finds and concludes it is without basis.
8 Judgment in favor of Mr. Mitchell on the counterclaims shall be
9 entered by the Court.

10 IT IS SO ORDERED.

11 DATED: JAN - 4 2012



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14 PETER W. BOWIE, Chief Judge
United States Bankruptcy Court

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