In the United States Bankruptcy Court

for the Northern District of Iowa

STEVEN MATTHEW RIZZIO *Debtor(s).*	Bankruptcy No. 97-00914C Chapter 7
KATHRYN J. WHITLOCK *Plaintiff(s)* vs. STEVEN MATTHEW RIZZIO *Defendant(s)*	Adversary No. 97-9115-C

ORDER RE DISCHARGEABILITY

On February 19, 1998, the above-captioned matter came on for trial pursuant to assignment. Plaintiff Kathryn J. Carney, formerly known as Kathryn J. Whitlock, appeared in person with Attorney Henry Nathanson. Debtor/Defendant also appeared in person with Attorney Richard Boresi. The time for filing briefs has now passed and this matter is ready for resolution. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I).

STATEMENT OF THE CASE

Debtor Steven Rizzio filed a voluntary Chapter 7 bankruptcy petition on April 1, 1997. Plaintiff filed this adversary complaint on June 16, 1997, objecting to the dischargeability of a debt under 11 U.S.C. §523(a)(2)(A). Plaintiff alleges that Debtor obtained $3,936.00 from Plaintiff by false pretenses, by making false representations, and/or by engaging in fraudulent conduct. Plaintiff seeks a determination that the debt owed to her by Debtor be declared nondischargeable pursuant to §523(a)(2)(A).

FINDINGS OF FACT

Debtor Steven Rizzio works at General Mills and resides in Cedar Rapids, Iowa. Plaintiff Kathryn Carney also works at General Mills and resides in North Liberty, Iowa. In 1993, Plaintiff and Debtor worked together at General Mills and referred to one another as friends.

Plaintiff bought her house seven years ago. Plaintiff's house is a large ranch with roofing on the front, back, and two sides. In 1993, Plaintiff decided she needed a new roof as the old roof was over thirty years old and becoming discolored. Because Plaintiff had no experience in the roofing business, she sought several estimates from roofers and relied on the expertise of those who bid the job.

Debtor testified that in addition to working at General Mills, he also had been a roofer for approximately ten years. Debtor worked with his brother for eight years and then independently for two years (1992 and 1993) under the name Rizzio Roofing. During the two-year period that Debtor worked on his own, Debtor claims he worked on approximately thirty roofs--fifteen roofs in 1992 and fifteen roofs in 1993. During the ten-year period that Debtor worked on roofs, he never roofed on a full-time basis. Debtor is presently no longer engaged in the roofing business.

Opposing counsel sought to impeach Debtor's testimony concerning his roofing experience. On cross-examination, he

testified the amount of gross sales in 1993 was $1,986.00. Debtor provided this testimony after refreshing his recollection by looking at his schedule C for his 1992 tax return. Plaintiff's roof alone grossed $3,819.00. Debtor did not file a schedule C in 1992; the other year Debtor claims to have completed fifteen roofing jobs under the name Rizzio Roofing.

On September 30, 1993, Debtor submitted a written bid to Plaintiff for $3,819.00 to re-shingle Plaintiff's entire roof. Of this amount, $2,744.00 was allocated to removing old layers of shingles and purchasing materials, including 25-year Asphalt Globe Super Seal Shingles, and $1,075.00 for labor to re-shingle Plaintiff's roof. Plaintiff accepted Debtor's bid on October 23, 1993. Debtor commenced work on the project shortly thereafter.

The parties dispute whether they signed the contract before Debtor began work. Plaintiff asserts that Debtor began work on the roof after the contract was signed. Debtor, however, contends that he began work on the roof before the contract was signed because Plaintiff complained of a leak in her roof around her fireplace, causing water damage to her living room. Debtor testified that he personally re-shingled the area of the roof around the fireplace (approximately one half of the front portion of the roof) on an expedited basis over a period of three days prior to the time the contract was signed. Debtor stated that during this three-day period, he tore off two layers of old shingles before he placed any new shingles on Plaintiff's roof. Both Plaintiff and Plaintiff's husband, Hugh Carney, denied the existence of any leaks around the fireplace.

Plaintiff asserts that the terms of the contract provided that Debtor was to remove all old shingles and replace them with new shingles. The new shingles were to be nailed rather than stapled. In addition, she alleges that Debtor agreed to remove all waste material from the site for $10 per load plus the dump fee. Defendant does not deny that all old shingles were to be removed though he appears to deny that nails were to be used. The parties dispute who held the dump fee receipts. Debtor asserts that he turned over the dump fee receipts to Plaintiff. Plaintiff, however, testified that she does not recall receiving any dump fee receipts. Plaintiff paid Debtor $2,744.00 down, $1,075.00 upon completion, and $117 in dump fees. In total, Plaintiff paid Debtor $3,936.00.

Debtor initially testified he was aware that Plaintiff's roof had two layers of old shingles prior to making the bid on September 30, 1993, because he had examined the roof. Later in his testimony, Debtor stated he was not aware that Plaintiff's roof had two layers of old shingles prior to making the bid. Defendant could have determined that the roof had two layers of shingles by simply lifting up the existing shingles. The Court concludes as a fact that prior to making the bid on September 3, 1993, Debtor knew he would have to remove two layers of old shingles in order to complete the job.

Shortly after Debtor started work on Plaintiff's roof, he underwent knee surgery for a sports injury to his left knee and was put on medical leave by General Mills. Debtor was off work from General Mills for six to eight weeks. In the interim, Debtor had Rod Morris, a temporary employee at General Mills, help him with Plaintiff's roof. Debtor had hired Morris to work on other roofs two months prior to beginning work on Plaintiff's roof.

The parties dispute the number of times Debtor was on the job site after his surgery. Plaintiff testified that Debtor and Morris were at her home almost every day except when it rained. Although Debtor's leg was in a steel brace, Plaintiff also testified that he was on the roof almost every day working along with Morris. Hugh Carney, Plaintiff's husband, who in 1993 was Plaintiff's boyfriend, frequently visited Plaintiff's home in October of 1993. Mr. Carney testified that he saw Debtor at Plaintiff's house several times a week for one month. Mr. Carney recalled seeing Debtor climb ladders with his knee in the brace and work on the peak of the roof nailing the cap. According to Mr. Carney's testimony, he never saw Morris at Plaintiff's house without Debtor after Debtor's surgery.

Debtor, on the other hand, testified that he was not at Plaintiff's home every day after surgery. Debtor stated that he was on crutches for one week after surgery and wore a steel brace for five weeks, making it difficult for Debtor to bend, lift, or climb. As a result, Debtor testified that Morris worked alone on the roof.

When asked if he was able to work on the roof after knee surgery, Debtor testified that he did go up on the roof after surgery two to three times per week but only stayed on the roof for thirty minutes each time as he couldn't bend his knee and could have easily fallen off the roof. When Debtor was not on the roof, he stated that he helped out by cleaning up the ground, driving the trailer to the dump, and bringing supplies to Morris.

Debtor testified that he divided the roof into portions and assigned Morris one portion to complete each day. Because of the large size of the roof, Morris was to complete one portion before starting the next portion. Debtor testified that he went to the site in the morning to assign Morris a portion to work on each day. According to Debtor, he instructed Morris that he was to remove, re-prep, re-sheet (if necessary), and re-shingle each portion. Debtor claims that Morris was removing old shingles in the morning when he was there assigning the daily portion. When Debtor came back in the afternoon, however, he never specifically checked Morris' work to make sure he was completing the removal because he had no reason to believe that Morris was not following his instructions.

Debtor testified that he took the trailer to the dump either every day or every other day. When asked what waste was there to dump if Morris was not removing the old shingles, Debtor responded that there would be cut off pieces of paper to dump. Debtor stated that the majority of the waste would come at the end of the job when they were capping the roof. Debtor claims he had no direct or constructive knowledge that Morris was not removing the old shingles.

When asked whether Debtor used staples or nails to attach the shingles to the roof, he responded that he only owned staple equipment and, therefore, staples were ordinarily used in his business. Plaintiff asked Debtor to come back within six months after the job was completed because some shingles were starting to lift. Debtor used nails to re-fasten those shingles.

On April 6, 1996, a wind storm blew some of Plaintiff's shingles off the front portion of her roof, exposing old, discolored shingles underneath. This was the first time Plaintiff became aware that Debtor had not removed the old shingles. Plaintiff hired Patrick Keil, owner of Keil's Maintenance, to repair the roof.

Keil's Maintenance is an Iowa City company that shingles approximately sixty residential roofs per year in addition to commercial roofs. Mr. Keil has been in the roofing business since 1990. According to Mr. Keil, 400 to 500 square feet of shingles were missing on Plaintiff's roof after the wind storm. After personally inspecting Plaintiff's roof, Mr. Keil found the following:

1) most of the shingles were fastened with two staples rather than the recommended four staples;

2) many staples were not long enough to make it through three layers of shingles and into the plywood;

3) 75% to 85% of Plaintiff's shingles were stapled rather than nailed; and

4) two other sides of Plaintiff's roof had three layers of shingles.

To replace the entire front portion of Plaintiff's roof, Mr. Keil had to first remove two layers of old shingles as well as the layer of shingles Debtor had laid in 1993. When asked to explain how it was possible that Mr. Keil had to remove three layers of shingles from the entire front portion of the roof before re-shingling if Debtor personally tore off two layers of old shingles around the fireplace, Debtor opined that Mr. Keil was either mistaken or lying.

Neither Mr. Keil nor Plaintiff personally inspected the back portion of the roof. Nonetheless, Plaintiff feels that it also has three layers of shingles. She bases this opinion on the fact that the back portion of the roof is rippled. Mr. Carney testified that he checked the back portion of the roof by lifting the shingles near the gutter line as well as by pulling shingles in four different places and found that it also had three layers of shingles.

In Mr. Keil's opinion, three layers of shingles does not allow the shingles to bond well. This may have contributed to the wind damage in 1996. Mr. Keil also stated that staples tend not to go through all three layers of shingles and into the plywood. In Mr. Keil's experience, shingles installed over old shingles wear less well with every new layer of shingles placed over the top of existing layers.

Mr. Keil replaced 1746 square feet of Plaintiff's roof, which is the entire front portion of the roof, at a total cost to Plaintiff of $3,982.25. Plaintiff was insured by American Family, who agreed to pay $3000.00 toward the repair costs. Plaintiff had to pay $982.25 out of her own pocket to repair the roof. Plaintiff still must replaced 2800 to 2900 square feet of Plaintiff's roof needing to be replaced. Mr. Keil estimated that it would cost approximately $4,930.00 to remove

the remainder of the three layers of shingles and re-shingle the remaining 2800 to 2900 square feet.

Plaintiff argues that her claim of $3,936.00 should be excepted from discharge pursuant to 11 U.S.C. §523(a)(2)(A). Debtor, however, denies that Plaintiff's claim was incurred through any misrepresentation, false pretense, or fraud. Debtor denies any intent to deceive Plaintiff and states that if the shingles were not removed, it was not intentional.

DISCHARGEABILITY PURSUANT TO §523(A)(2)(A)

Plaintiff bears the burden to prove the elements of her claim under 11 U.S.C. §523 by a preponderance of the evidence. See Grogan v. Garner, 498 U.S. 279, 290 (1991). Exceptions to discharge must be "narrowly construed against the creditor and liberally against the debtor, thus effectuating the fresh start policy of the Code. These considerations, however, 'are applicable only to honest debtors.'" In re Van Horne, 823 F.2d 1285, 1287 (8th Cir. 1987) (citations omitted).

Section 523(a)(2)(A) states:

> (a) A discharge under section 727 . . . 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.

11 U.S.C. §523(a)(2)(A) (1993).

This Court has held that to prevent discharge for fraud, a plaintiff "must establish actual or positive fraud involving moral turpitude or intentional wrong doing, and not merely implied fraud or fraud established by statute." In re Helmrichs, Bankr. No. 85-01083S, slip op. at 6 (Bankr. N.D. Iowa June 6, 1986). In this Circuit, a plaintiff proceeding under §523(a)(2)(A) must prove by a preponderance of the evidence the common law elements of actual fraud, which provide that: (1) the debtor made false representations; (2) at the time made, the debtor knew them to be false; (3) the representations were made with the intention and purpose of deceiving the creditor; (4) the creditor justifiably relied on the representations; and (5) the creditor sustained the alleged injury as a proximate result of the representations having been made. See Van Horne, 823 F.2d at 1287, as modified by Field v. Mans, 516 U.S. 59, 74-75 (1995) (holding that "§ 523(a)(2)(A) requires justifiable, but not reasonable, reliance"). The Court will analyze each of the five elements of fraud under §523(a)(2)(A).

Because the first and second elements under §523(a)(2)(A) address false representations and Debtor's knowledge of such representations, these two elements will be analyzed together. A false pretense refers to "an implied misrepresentation or conduct intended to create or foster a false impression." In re Cole, 164 B.R. 947, 949 (Bankr. N.D. Ohio 1993). In other words, debtor's conduct purposely conveys an impression but without oral representation. See id. A false representation, on the other hand, is "an expressed misrepresentation." See id. Bankruptcy courts have also found a debtor's silence regarding a material fact may constitute a false representation for purposes of §523(a)(2)(A). See Van Horne, 823 F.2d at 1288; see also Cole, 164 B.R. at 949.

Here, the contract specified that Debtor was to remove all old shingles before replacing them with new shingles. Debtor claims that he personally tore off two layers of old shingles on one half of the front portion of Plaintiff's roof due to a leak in the roof around the fireplace. Mr. Keil, however, testified that to successfully repair the damage caused by the 1996 wind storm, he had to remove two layers of old shingles from the entire front portion of the roof as well as the layer of shingles Debtor laid in 1993. Based upon the testimony and the demeanor of the witnesses at trial, the Court finds Mr. Keil's testimony regarding the number of layers of shingles on the front portion of Plaintiff's roof to be more credible. See In re Benich, 811 F.2d 943, 946 (5th Cir. 1987) (stating that "[t]he trial court is entitled to weigh the credibility of the witness"); In re Holzapfel's Sons, Inc., 249 F.2d 861, 864 (7th Cir. 1957) (stating that it is the bankruptcy court's duty to "weigh the evidence and judge the credibility of the witnesses").

A mere breach of contract does not remove a debt from dischargeability in bankruptcy. See In re Segala, 133 B.R. 261, 263 (Bankr. D. Mass. 1991). "A misrepresentation of intention, however, may constitute a false representation under §523." Id. The Court must conclude, based on the record as a whole, that Debtor knew he had not removed the existing layers of shingles before re-shingling the area of Plaintiff's roof around the fireplace. In so doing, he failed to disclose this fact to Plaintiff. By accepting payment from Plaintiff without disclosing to her that he had not completed the removal required by the contract, Debtor made a false representation, which he knew at the time was false. As such, Plaintiff has satisfied her burden of proof with respect to the first and second elements of §523(a)(2)(A).

The third element requires that Debtor intended to deceive Plaintiff. Because actual proof of intent is often difficult to obtain, a creditor may present circumstantial evidence from which intent may be inferred. See Van Horne, 823 F.2d at 1287; see also In re Newell, 164 B.R. 992, 995 (Bankr. E.D. Mo. 1994) (considering the surrounding circumstances when analyzing the third element under §523(a)(2)(A)); In re Edwards, 143 B.R. 51, 54 (Bankr. W.D. Pa. 1992) (holding that courts must look to the totality of circumstances to establish a debtor's intent). Although Debtor cites two Ohio cases regarding an inference of honest intent in favor of the debtor, this Court has previously held that debtors cannot rely on an "unsupported assertion of honest intent" to outweigh an inference that the debtor intended to deceive the plaintiff. In re Simpson, 29 B.R. 202, 211-12 (Bankr. N.D. Iowa 1983). The focus of this third element is on "whether the debtor's actions appear so inconsistent with [his] self-serving statement of intent that the proof leads the court to disbelieve the debtor.'" Van Horne, 823 F.2d at 1288 (brackets in original).

A fair evaluation requires this Court to conclude that Debtor's testimony is inconsistent and contradictory on significant issues. This Court can reach no other conclusion than that Debtor knew he had not removed the existing layers of shingles before re-shingling the area of Plaintiff's roof around the fireplace but never disclosed this fact to Plaintiff. Furthermore, Debtor went to Plaintiff's house within six months after the job was completed to re-fasten some shingles that were starting to lift. This would reveal the old shingles below and if Debtor were candid, he would have disclosed to Plaintiff at that time that neither Morris nor he had removed the old layers of shingles. Debtor denies any intent to deceive Plaintiff and states that if the shingles were not removed, it was not intentional. Debtor's silence, however, proves otherwise. Debtor's "unsupported assertion of honest intent" does not overcome the inference from the totality of the evidence that Debtor intended to deceive Plaintiff.

The fourth element requires that Plaintiff must have relied on Debtor's misrepresentations or false pretenses. See In re Maier, 38 B.R. 231, 233 (Bankr. D. Minn. 1984). Plaintiff had no experience in the roofing business, sought several estimates from roofers, and relied on Debtor's expertise in the roofing business. Debtor himself testified that Plaintiff relied on his expertise. Because Debtor remained silent concerning his failure to perform the removal, Plaintiff had no apparent reason to think that the old shingles had not been removed. Accordingly, Plaintiff justifiably relied on Debtor's expertise, satisfying the fourth element of §523(a)(2)(A).

The fifth element, the proximate cause element of § 523, requires "that the action of the debtor was the act, without which the [plaintiff] would not have suffered the loss complained of." Van Horne, 823 F.2d at 1288-89 (quoting Maier, 38 B.R. at 233). Plaintiff paid Debtor in the amount of $3,936.00 in exchange for Debtor's performance under the contract. As part of the contract price, Debtor was to remove all old shingles shingles and replace them with new shingles which were to be nailed in place and not stapled. Plaintiff asserts that Debtor did not perform his duties under the contract.

To support her assertion, Plaintiff relies on Mr. Keil's testimony. Mr. Keil stated: (1) 75% to 85% of Plaintiff's shingles were stapled rather than nailed, (2) most of the shingles were fastened with two staples rather than four, (3) a number of staples were not long enough to make it through three layers of shingles and into the plywood, and (4) the repair job required the removal of two layers of old shingles from the entire front portion of the roof as well as the layer of shingles Debtor had laid in 1993. The Court finds that Plaintiff suffered damages because Debtor failed to perform under the contract, which satisfies the final element of §523(a)(2)(A).

VICARIOUS LIABILITY

Although Debtor's actions alone satisfy the five elements of §523(a)(2)(A), the Court will discuss Debtor's vicarious liability for Morris' actions because both parties discussed vicarious liability in their briefs. The Eighth Circuit addressed the issue of a principal's vicarious liability for fraudulent acts of their agent in In re Walker, 726 F.2d 452 (8th Cir. 1984), where the court stated:

> [A]ctual participation in the fraud by the principal is not always required. If the principal either knew or should have known of the agent's fraud, the agent's fraud will be imputed to the debtor-principal. When the principal is recklessly indifferent to his agent's acts, it can be inferred that the principal should have known of the fraud.

Id. at 454.

The evidence presented demonstrates that Debtor should have known of Morris' failure to remove the old layers of shingles. According to Debtor's testimony, he was at Plaintiff's house with some frequency, which enabled him to oversee Morris' progress on the roof. See In re Walker, 53 B.R. 174, 182 (Bankr. W.D. Mo. 1985) (considering the fact that the "debtor was on the premises ... with some frequency" giving him the "occasion to view the inventory and status of operations of the business" to be relevant to the court's vicarious liability determination) remanded by 726 F.2d 452 (8th Cir. 1984). Debtor also testified that he and Morris were in constant contact even if Debtor was not on site at all times. See id. (considering the fact that the debtor had frequent access to his agent to be relevant to the court's vicarious liability determination). If Debtor had inquired, therefore, he could have learned that Morris was not removing the old layers of shingles before putting the new shingles down. See id.

Furthermore, Debtor should have known that Morris was not completing the required removal by examining the contents of the trailer that held the waste materials. Debtor testified that he took the trailer to the dump every or every other day. However, if Morris was not completing the required removal, there existed little, if any, waste to dump. Debtor's testimony poses the unresolved question of what was he dumping and charging Plaintiff a dump fee for?

As stated by the Eighth Circuit:

> The debtor who abstains from all responsibility for his affairs cannot be held innocent for the fraud of his agent if, had he paid minimal attention, he would have been alerted to the fraud.

Walker, 726 F.2d at 454. Assuming Debtor was truly unaware of Morris' failure to remove the old shingles, if Debtor would have supervised Morris and observed whether the trailer contained old shingles, he would have been alerted to the problem. Accordingly, Debtor is also liable for Morris' actions under a theory of vicarious liability.

DAMAGES

Periodically, the issue has been presented whether bankruptcy courts have jurisdiction to liquidate damages in adversary proceedings brought to determine the dischargeability of debts. See In re Heidenreich, Nos. 89-01123-M, 89-0233-M, 1998 WL 21652, at *2 (Bankr. N.D. Okla. Jan. 15, 1998). The majority of courts hold that bankruptcy courts have jurisdiction to liquidate damages against a debtor in connection with a dischargeability action. See In re Kennedy, 108 F.3d 1015, 1017-18 (9th Cir. 1997); In re Porges, 44 F.3d 159, 163-65 (2d Cir. 1995); In re McLaren, 3 F.3d 958, 965-66 (6th Cir. 1993); In re Hallahan, 936 F.2d 1496, 1507-08 (7th Cir. 1991). If bankruptcy courts did not have jurisdiction to liquidate damages, parties would be forced to litigate in multiple forums before completely resolving their dispute. See Heidenreich, 1998 WL 21652, at *2-3. The Court concludes it is most appropriate to resolve the issue of damages in this forum as all of the evidence has been presented here and it would be duplicative to require the parties to present this again in State Court.

Courts are divided on the appropriate measure of damages for debts excepted from discharge due to fraud. See In re Fasulo, 25 B.R. 583, 586 (Bankr. D. Conn. 1982). Some courts apply the out-of-pocket rule, which limits damages to the actual loss sustained. See id. Other courts apply the benefit-of-the-bargain rule, under which damages are "measured by the difference between the value of what the defrauded party received and the value of what he would have received had there been no fraudulent misrepresentations." Id. See, e.g., Bates v. Allied Mut. Ins. Co., 467 N.W.2d 255, 260 (Iowa 1991) ("Ordinarily, a successful plaintiff in a fraud action may only recover the benefit-of-the bargain....");

Robinson v. Perpetual Servs. Corp., 412 N.W.2d 562, 567 (Iowa 1987) ("Generally, a successful plaintiff in a fraud case is entitled only to the benefit of its bargain, unless additional out-of-pocket damages are necessary to make the plaintiff whole."). The advantage of the "benefit-of-the-bargain rule is that it prevents a person from committing fraud without the possibility of loss." Fasulo, 25 B.R. at 586 (quoting In re Wilson, 12 B.R. 363, 366 (Bankr. M.D. Tenn. 1981)). The Court finds the benefit-of-the-bargain rule to be the appropriate measure of damages in this case.

Plaintiff and Debtor entered into a contract under which Debtor was to completely remove all old shingles before re-shingling Plaintiff's roof. Plaintiff claims she suffered damages because Debtor did not perform what he promised to do under the contract. Plaintiff asserts that the $3,936.00 she paid Debtor ($2,744.00 down, $1,075.00 upon completion, and $117 in dump fees) reflects the actual amount of her damages. Although Debtor argues that the insurance proceeds should be taken into account when calculating damages, Debtor was not a party to the insurance contract and, therefore, has no right to mitigate. See State v. McCarty, 179 N.W.2d 548, 550 (Iowa 1970) (applying the rule res inter alios, which forbids the introduction of "evidence as to acts, transactions or occurrences to which [the] accused is not a party or is not connected"); Schonberger v. Roberts, 456 N.W.2d 201, 202 (Iowa 1990) (under the collateral source rule, a tortfeasor's obligation to restitution for an injury he or she caused is undiminished by any compensation received by the injured party). The insurance proceeds Plaintiff received from the 1996 wind storm have no relation to the fraud committed by Debtor in 1993. The Court concludes that the damages Plaintiff seeks to be excepted from discharge are appropriate and reasonable and awards damages at the contract amount of $3,936.00.

SUMMARY

Plaintiff has satisfied all requisite elements of her §523(a)(2)(A) claim by a preponderance of the evidence. The Court concludes Debtor knew he had not removed the old layers of shingles before re-shingling the area of Plaintiff's roof around the fireplace and failed to disclose this fact to Plaintiff. By accepting payment from Plaintiff without disclosing to her that he had not completed the removal required by the contract, Debtor made a false representation, which he knew at the time was false. Based upon the evidence presented at trial, the Court concludes that Debtor intended to deceive Plaintiff. Plaintiff justifiably relied on Debtor's expertise and suffered damages due to Debtor's failure to perform under the contract.

Even if the Court found that Debtor had not made a false representation, Debtor would be liable for Morris' conduct under a vicarious liability theory because Debtor should have known that Morris was not completing the required removal by examining the waste materials he was hauling to the dump. The Court finds that Plaintiff did not receive the benefit of the bargain and awards damages at the contract amount of $3,936.00.

WHEREFORE, Plaintiff's claim against Debtor is excepted from discharge pursuant to 11 U.S.C. §523(a)(2)(A).

FURTHER, the amount of Plaintiff's claim is $3,936.00.

FURTHER, judgment shall enter in favor of Plaintiff Kathryn J. Whitlock and against Defendant Steven Matthew Rizzio in the amount of $3,936 and interest at the rate of 10% from the date of filing of this adversary.

SO ORDERED this 7th day of April, 1998.

Paul J. Kilburg
U.S. Bankruptcy Judge