

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

In Re:	)	
	)	
HERMAN DENNIS MOELLENHOFF,	)	Case No. 12-40544-705
	)	Judge Kathy A. Surratt-States
	)	Chapter 7
Debtor.	)	
	)	
EVELYN HOGAN, individually, and as Trustee,	)	<b>Adversary No. 12-4064-659</b>
of the Evelyn M. Hogan Trust dated	)	
July 28, 1995,	)	<b>PUBLISHED</b>
Plaintiff,	)	
	)	
-v-	)	
	)	
HERMAN DENNIS MOELLENHOFF,	)	
	)	
	)	
Defendant.	)	

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The matter before the Court is the Complaint for Determination of Dischargeability of a Debt Under 11 U.S.C. Section 523(a)(2)(A) and in the Alternative 11 U.S.C. Section 523(a)(2)(B), Answer of Debtor/Defendant to Complaint of Evelyn Hogan, an individual, for Determination of Dischargeability of a Debt Under 11 USC Section 523(a)(2)(A), or in the Alternative USC Section 523(a)(2)(B), Answer of Debtor/Defendant to Complaint of Evelyn Hogan, as Trustee of the Evelyn M. Hogan Trust Dated July 29, 1995, for Determination of Dischargeability of a Debt Under 11 USC Section 523(a)(2)(A), or in the Alternative USC Section 523(a)(2)(B), Trial Brief of Plaintiff Evelyn Hogan, Plaintiff's Proposed Findings of Fact and Conclusions of Law, Plaintiff's Proposed Joint Stipulation of Uncontested Facts and Trial Brief of Defendant. A trial was held on August 14, 2012, at which Debtor appeared in person and by counsel and Plaintiff Evelyn Hogan appeared in person and by counsel. The matter was taken under submission. Upon consideration of the record as a whole, the Court issues the following **FINDINGS OF FACT**:

Debtor Herman Dennis Moellenhoff (hereinafter "Debtor") filed a Voluntary Petition under

Chapter 7 of the Bankruptcy Code on January 25, 2012. Debtor has been in the real estate business for over 28 years. Plaintiff Evelyn Hogan (hereinafter "Plaintiff Hogan") and her late husband conducted several real estate deals with Debtor in the past. Plaintiff Hogan estimates that she has done more than six business deals with Debtor. Typically, Debtor would borrow money from Plaintiff Hogan and her husband to buy and/or renovate a property, Debtor would grant Plaintiff Hogan and her late husband a security interest in the property and Debtor would present Plaintiff Hogan and her late husband with a note and recorded first priority deed of trust. Debtor repaid all loans when the subject property was sold, and all interim interest payments were made in accordance with the negotiated terms.

In late November 2007, Debtor called Plaintiff Hogan, now a widow, and asked if she would be interested in having a Deed of Trust<sup>1</sup> on a four-family property he owned in fee simple absolute, free and clear of all liens, in exchange for a loan of \$92,000.00 at 6.25% interest. Debtor represented that the property was worth much more than \$92,000.00 though neither Plaintiff Hogan nor Debtor can recall exactly what Debtor represented to be the property's value. Plaintiff Hogan informed Debtor that she was interested, she would transfer the money from her money market account and would write him a check. On November 28, 2007, Plaintiff Hogan gave Debtor a check in the amount of \$92,000.00 and Debtor executed a two-year Note in the amount of \$92,000.00 at 6.25% interest in favor of Plaintiff Hogan (hereinafter "Note"). See Pl. Ex. 3. Under the terms of the Note, Debtor was to make monthly interest payments of \$479.16. See Pl. Ex. 3. Debtor also presented Plaintiff Hogan with a Deed of Trust which purported to grant Plaintiff Hogan a security interest in a property located at 5830 Nottingham, St. Louis, MO (hereinafter "Property"). Debtor executed the Deed of Trust; no other party executed the Deed of Trust. See Pl. Ex. 4. Debtor told Plaintiff Hogan that he would file the Deed of Trust with the recorder of deeds.

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<sup>1</sup>The Court notes that Plaintiff Hogan contends that Debtor promised to grant Plaintiff Hogan a First Priority Deed of Trust. Debtor states that there were no discussions as to priority.

Debtor did not record the Deed of Trust executed on November 28, 2007 in favor of Plaintiff Hogan. Debtor did not own the Property individually, and the Property was not free and clear of all liens. Rather, Debtor owned the Property with his wife, and, on October 30, 2007, Debtor and his wife executed a recorded Deed of Trust in favor of Eagle Bank and Trust Company of Missouri (hereinafter "Eagle Bank") which granted Eagle Bank a lien on the Property to secure a loan from Eagle Bank. See Pl. Ex. 6. Debtor describes the Deed of Trust in favor of Eagle Bank as a purchase money Deed of Trust. Debtor claims that he used the money received from both Eagle Bank and Plaintiff Hogan to improve the Property.

Debtor made all interest payments throughout the life of the Note, but was unable to pay the balance when the Note matured in November 2009. Plaintiff Hogan extended the Note because up to and until that date, Debtor had not missed any interest payments.

The Property was sold on or about September 8, 2010 for approximately \$280,000.00. At some point between February and May of 2011, Debtor stopped making the interest payments to Plaintiff Hogan. Plaintiff Hogan filed suit against Debtor in St. Louis County and she obtained a judgment in her favor on November 9, 2011 in the amount of \$92,000.84 plus accrued interest in the amount of \$29.22, plus attorney's fees and costs in the amount of \$6,035.62, for a total judgment of \$98,064.84 (hereinafter "State Court Judgment"). Pl. Ex. 1. On November 29, 2011, Plaintiff Hogan assigned the State Court Judgment to the Evelyn M. Hogan Trust. Plaintiff Hogan is the Trustee and beneficiary of the Evelyn M. Hogan Trust, and thus she brings suit both individually and in her capacity as Trustee of the Evelyn M. Hogan Trust.

Debtor made an oral motion to dismiss Plaintiff Hogan in her individual capacity because Plaintiff Hogan assigned her interest in the State Court Judgment to the Evelyn M. Hogan Trust therefore, Debtor believes that the only real party in interest is Plaintiff Hogan in her capacity as Trustee of the Evelyn M. Hogan Trust. Debtor argued that Plaintiff Hogan cannot simultaneously bring suit as an individual and as Trustee of the Evelyn M. Hogan Trust. The Court denied Debtor's

motion.

Plaintiff Hogan argues that Rule 74.12 of the Missouri Rules of Civil Procedure requires that execution on an assigned judgment must be issued in the name of the original assignor for the use of the assignee, therefore, Plaintiff Hogan must appear in her individual capacity as the original assignor of the State Court Judgment and as beneficiary of the Evelyn M. Hogan Trust. Plaintiff Hogan argues that though she assigned the State Court Judgment, she did not assign or otherwise forfeit her right to seek recourse for the fraud committed against her. Plaintiff Hogan further argues that this debt should be excepted from discharge under both Section 523(a)(2)(A) and Section 523(a)(2)(B).

Debtor argues that the Note has little evidentiary value because there is no representation in the Note that Plaintiff Hogan would have a first priority lien against the Property thus the Note must speak for itself. Debtor does not dispute that Debtor owes Plaintiff Hogan the amount of the State Court Judgment. Debtor, however, argues that when Plaintiff Hogan assigned the State Court Judgment to the Evelyn M. Hogan Trust, the legal right to the entitlement of payment changed from an individual to a trustee. Therefore, Debtor argues that Plaintiff Hogan, the individual, transferred all her rights and interest in the State Court Judgment to the Evelyn M. Hogan Trust, and as such, Plaintiff Hogan the individual has no interest in the matter at hand. Debtor further argues that because only Plaintiff Hogan as Trustee of the Evelyn M. Hogan Trust is entitled to bring the action before this Court, Plaintiff Hogan as Trustee of the Evelyn M. Hogan Trust cannot prove the elements required to except this debt from discharge because no dealings ever occurred between Debtor and Plaintiff Hogan as Trustee of the Evelyn M. Hogan Trust. Debtor argues that an individual cannot transfer the right to seek recourse for personal torts and for fraud to a third party, just like the right to collection for a personal affront cannot be transferred to a third party under the law. Therefore, Debtor insists that Plaintiff Hogan cannot appear simultaneously as an individual and as Trustee of the Evelyn M. Hogan Trust, give evidence of what transpired as the individual,

but seek recourse as the Trustee.

### **JURISDICTION**

This Court has jurisdiction of this matter pursuant 28 U.S.C. §§ 151, 157 and 1334 (2012) and Local Rule 81-9.01(B) of the United States District Court for the Eastern District of Missouri. This is a core proceeding under 28 U.S.C. § 157(b)(2)(l) (2012). Venue is proper in this District under 28 U.S.C. § 1409(a) (2012).

### **CONCLUSIONS OF LAW**

This Court will first discuss Plaintiff Hogan's appearance in the dual capacity as individual and as Trustee of the Evelyn M. Hogan Trust. The Court will then determine whether the debt for the State Court Judgment should be excepted from discharge.

Debtor first argues that Plaintiff Hogan, the individual, does not have standing. Second, Debtor argues that Plaintiff Hogan cannot properly appear in multiple capacities in that Plaintiff Hogan attempts to appear as an individual and as a Trustee of the Evelyn M. Hogan Trust, present argument and testimony as an individual but have consideration of that testimony by this Court be for the benefit of the entity that Debtor believes is the real party in interest, the Evelyn M. Hogan Trust. The Court will address the challenge to standing first.

"Standing requires that the person seeking an adjudication be the proper party to request that adjudication." *Rion v. Spivey (In re Springer)*, 127 B.R. 702, 705 (Bankr. M.D. Fla. 1991). "The party asserting standing must have a personal stake in the outcome of the controversy and suffer, or be threatened with, some actual injury." *Id.* (citing *E.F. Hutton & Co., Inc., v. Hadley*, 901 F.2d 979, 984 (11th Cir. 1990)).

Analysis of standing requires the examination of both constitutional requirements and prudential considerations. To satisfy constitutional requirements, three factors must be present: (1) the party asserting standing must have suffered actual injury or been threatened with injury, (2) the injury must be traceable to the objectionable conduct, and (3) the relief requested must be likely to redress the injury. To satisfy

prudential considerations, three additional factors must be met: (1) the party asserting standing must be asserting his own rights and not the rights of a third party, (2) the injury must be particular to the litigant and not just a generalized grievance, and (3) the injury must fall within the zone of interests the statute is designed to protect.

*Id.* at 705-6 (citation omitted); see also *In re Balanced Plan, Inc.*, 257 B.R. 921, 923 (Bankr. W.D. Mo. 2001).

Here, Plaintiff Hogan has a significant financial stake in the outcome of this adversary as the individual who is the beneficiary of the Evelyn M. Hogan Trust. The financial injury faced by Plaintiff Hogan is directly traceable to whether Debtor obtained the loan from Plaintiff Hogan by intentionally making false representations to induce Plaintiff Hogan and thus whether this debt is dischargeable. Therefore, Plaintiff Hogan seeks redress for her financial dealings with Debtor. Debtor does not dispute that the subject Note and representations were all made by Debtor to Plaintiff Hogan. On this basis, the inquiry as to the constitutional requirements of standing are satisfied.

As to the prudential considerations, at the outset, the second and third requirements are readily satisfied in that the injury is particular to Plaintiff Hogan because she has lost a considerable investment and Plaintiff Hogan seeks to have a debt excepted from discharge on the basis that she believes her decision to enter into this transaction with Debtor was induced by false representations made by Debtor. The facts of this case are clearly within the zone of interest that Section 523(a)(2) was designed to redress.

The crux of Debtor's challenge however, lies with the first prudential requirement that Plaintiff Hogan must assert her rights and not the rights of a third party. There are essentially two layers to this inquiry. The first is whether Plaintiff Hogan is asserting her rights, the rights of the Evelyn M. Hogan Trust, or both. And, if Plaintiff Hogan is asserting both her rights as an individual, which includes her rights as beneficiary of the Evelyn M. Hogan Trust, as well as the rights of the

Evelyn M. Hogan Trust in which capacity Plaintiff Hogan appears as Trustee, is this merger of simultaneous interests and evidence permissible under the law. The Court will address the foregoing collectively.

Rule 17(a)(1) of the Federal Rules of Civil Procedure, as incorporated by Federal Rule of Bankruptcy Procedure 7017, states: “[a]n action must be prosecuted in the name of the real party in interest”... A party that is a trustee of an express trust or is authorized by statute “may sue in [the party’s] own name[ ] without joining the person for whose benefit the action is brought.” Fed. R. Civ. P. 17(a)(1)(E),(G) (2012); Fed. R. Bankr. P. 7017 (2012). Bankruptcy Rule 4007(a) authorizes a creditor to file a dischargeability complaint. Fed. R. Bankr. P. 4007(a) (2012). A “creditor” is defined under Section 101(10), in relevant part, as “an entity that has a claim against the debtor that arose at the time of or before the order of relief concerning the debtor.” 11 U.S.C. § 101(10)(A) (2012). Moreover, a “claim” is defined as a right to payment or a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment. See 11 U.S.C. § 101(5) (2012). Further, Rule 74.12(b) of the Missouri Rules of Civil Procedure states: “[a]n execution on an assigned judgment shall issue in the name of the original assignor but shall be endorsed by the judge or clerk to be for the use of the assignee.” Mo. R. Civ. P. 74.12(b) (2012).

It has been Debtor’s contention that because Plaintiff Hogan, the individual, assigned the State Court Judgment to the Evelyn M. Hogan Trust, only the Evelyn M. Hogan Trust is a creditor that may file a complaint to obtain a determination of the dischargeability of any debt in Debtor’s case. Therefore, Debtor has argued that this Court should dismiss Plaintiff Hogan, the individual, from the Complaint. And, should this Court dismiss Plaintiff Hogan from the Complaint, the Complaint in its entirety would need to be dismissed because the Complaint sounds in fraud and Debtor committed no fraudulent acts against the Evelyn M. Hogan Trust. As indicated before, the Court rejects this argument.

Section 101(5) defines a claim as a right to payment or a right to an equitable remedy for

breach of performance if such breach gives rise to a right to payment. See 11 U.S.C. § 101(5) (2012). Further, Rule 74.12(b) of the Missouri Rules of Civil Procedure states: “[a]n execution on an assigned judgment shall issue in the name of the original assignor but shall be endorsed by the judge or clerk to be for the use of the assignee.” Mo. R. Civ. P. 74.12(b) (2012). Plaintiff Hogan, the individual, has a claim because she is the beneficiary of the Evelyn M. Hogan Trust and in order to execute an assigned judgment in Missouri, the execution must issue in the name of the original assignor. Plaintiff Hogan, the individual, is the original assignor. Therefore, Plaintiff Hogan has a claim under the Bankruptcy Code insofar that she has a right to an equitable remedy for Debtor’s breach of performance in satisfying the State Court Judgment and under Missouri law, she has the right to pursue payment in her individual capacity for the benefit of the Evelyn M. Hogan Trust. So too, she has an equitable claim to avoid the discharge of the State Court Judgment insofar that she alleges that the debt was incurred based on false representations made by Debtor to induce Plaintiff Hogan to enter into the subject transaction and she is the beneficiary of the Evelyn M. Hogan Trust which holds the State Court Judgment.

The Bankruptcy Code defines a creditor as one who, among other things, holds a claim. 11 U.S.C. § 101(10)(A) (2012). Having determined that Plaintiff Hogan holds a claim in her individual capacity, it follows that Plaintiff Hogan, in her individual capacity, is a creditor.

Bankruptcy Rule 4007(a) authorizes a party to prosecute an action, and provides that any creditor “may file a complaint to obtain a determination of the dischargeability of any debt.” Fed. R. Bankr. P. 4007(a) (2012). Because Plaintiff Hogan, in her individual capacity, is a creditor, Plaintiff Hogan is authorized under Bankruptcy Rule 4007(a) to bring forth this adversary complaint. As such, Plaintiff Hogan, the individual, is a real party in interest authorized by statute, Bankruptcy Rule 4007(a), to sue in her individual capacity. See Fed. R. Civ. P. 17(a)(1)(G) (2012); Fed. R. Bankr. P. 7017(2012); *but see In re Springer*, 127 B.R. at 706)(where the trustee of the trust to which the judgment was assigned was deemed the creditor of the debtor and thus the proper party



to bring suit under bankruptcy rule 4007(a)).

There is no dispute that Plaintiff Hogan can bring forth this adversary complaint in her capacity as Trustee of the Evelyn M. Hogan Trust. There is no basis for this Court to conclude that Plaintiff Hogan is restricted from acting simultaneously as Trustee of the Evelyn M. Hogan Trust and as an individual. Therefore, the Court concludes that Plaintiff Hogan is permitted to bring forth this adversary proceeding both in her individual capacity, and her capacity as Trustee of the Evelyn M. Hogan Trust; Plaintiff Hogan the individual is a real party in interest and has standing to pursue this Complaint and Plaintiff Hogan as Trustee of the Evelyn M. Hogan Trust is also a real party in interest and has standing to pursue this Complaint.

The Court will now address the merits of the matter. Under Section 523(a)(2)(A), a debtor cannot obtain a discharge from any debt “for money, property, services...to the extent obtained by – 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) (2012). To establish fraud pursuant to Section 523(a)(2)(A), a creditor must prove the following elements by a preponderance of the evidence:

1. The debtor made a representation.
2. The debtor knew the representation was false at the time it was made.
3. The representation was deliberately made for the purpose of deceiving the creditor.
4. The creditor justifiably relied on the representation.
5. The creditor sustained the alleged loss as the proximate result of the representation having been made.

*In re Maurer*, 256 B.R. 495, 500 (B.A.P. 8th Cir. 2000) (citations omitted). For the purposes of Section 523(a)(2)(A), a false representation may be made by omission. See *In re Lane*, 104 Fed. Appx. 608, 609 (8th Cir. 2004) (citing *In re Maurer*, 256 B.R. at 500). “To establish fraud, a representation must be made deliberately and intentionally with the intent and purpose of deceiving.” See *In re Glen*, 427 B.R. 488, 494 (B.A.P. 8th Cir. 2010) (citing *Lindau v. Nelson (In re*

*Nelson*), 357 B.R. 508, 513 (B.A.P. 8th Cir. 2006)). “Intent can be inferred from circumstantial evidence.” *In re Hoffman*, 475 B.R. 692, 701(Bankr. D. Minn. 2012) (citation omitted).

There is no dispute that Debtor represented that he owned the Property individually, in fee simple absolute, free and clear of all liens, and that he would secure repayment of the Note by granting Plaintiff Hogan a secured interest in the Property by way of a recorded Deed of Trust. There is also no dispute that Debtor represented that he would satisfy the Note in full. Debtor knew the representation he made that he owned the Property individually, in fee simple absolute, free and clear of all liens was false at the time he made this representation. The record is clear that on October 30, 2007, Debtor and his wife, with whom he owned the Property, obtained a loan from Eagle Bank for which both Debtor and his wife executed a recorded Deed of Trust, which granted Eagle Bank a secured interest in the Property. Within one month of entering into this agreement with Eagle Bank, Debtor approached Plaintiff Hogan. As such, Debtor knew at the time that he approached Plaintiff Hogan that he could not independently grant Plaintiff Hogan a secured interest in the Property. Further, Debtor did not record the Deed of Trust that he executed in favor of Plaintiff Hogan, despite representing to her that he would. Debtor has been in the real estate business for over 28 years and therefore, Debtor’s experience in real estate transactions serves as further proof that Debtor knew the falsity of his representations to Plaintiff Hogan, particularly that an unrecorded Deed of Trust is of no consequence. Thus, there is no dispute that the representations made by Debtor to Plaintiff Hogan were false, and that Debtor knew they were false at the time he made them.

This Court further concludes that Debtor made these false representations for the deliberate purpose of deceiving Plaintiff Hogan. Plaintiff Hogan and Debtor had similar real estate transactions in the past and thus, Debtor presented Plaintiff Hogan with terms that were similar to previous transactions with the sole purpose of deceiving Plaintiff Hogan and inducing her into loaning him \$92,000.00. Debtor told Plaintiff Hogan that he would record the Deed of Trust to

secure repayment of the Note and Plaintiff Hogan justifiably relied on this representation, as well as the representation that he owned the Property individually, in fee simple absolute, free and clear of all liens. In all of the prior transactions between Debtor and Plaintiff Hogan, Debtor did own all the subject properties and the loans made by Plaintiff Hogan to Debtor were secured through recorded first priority deeds of trust. And, in the past transactions, Debtor took the initiative to record all previous deeds of trust executed by Debtor in favor of Plaintiff Hogan. Debtor also repaid all previous loans made by Plaintiff Hogan. Debtor intended to deceive Plaintiff Hogan through the various false representations and Plaintiff Hogan justifiably relied on Debtor and the false representations that he made.

Finally, there is no dispute that but for the representation that Debtor owned the Property individually, free and clear of all liens, that he could and would grant Plaintiff Hogan a secured interest in the Property by recording a Deed of Trust and that he would repay the Note, Plaintiff Hogan would not have entered into this transaction. Thus, Plaintiff Hogan sustained the loss of her investment as a proximate result of the false representations made by Debtor.

This Court further concludes that the absence of any reference in the Note to the Deed of Trust or that Plaintiff Hogan would receive a first priority lien against the Property is immaterial to this Court's evaluation under Section 523(a)(2)(A) because there is no dispute that these false representations were made, that Debtor did not own the Property individually and that despite knowing that Debtor could not independently grant Plaintiff Hogan a secured interest in any capacity, he represented as much with the purpose of deceiving and inducing Plaintiff Hogan to loan him money. Debtor further knew that Plaintiff Hogan would be influenced by the manner in which prior transactions between Debtor and Plaintiff Hogan took place, and that she would entrust Debtor to comport himself in the same manner. Therefore, by separate order, judgment will be entered in favor of Plaintiff Hogan and the debt for the State Court Judgment in the amount of \$98,064.84 will be excepted from discharge pursuant to Section 523(a)(2)(A). Having ruled for

Plaintiff Hogan on Count I, the Court finds it unnecessary to reach the alternative relief requested in Count II.

*Kathy A. Surratt - States*

KATHY A. SURRATT-STATES  
United States Bankruptcy Judge

DATED: December 7, 2012  
St. Louis, Missouri

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