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UNPUBLISHED  
IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF UTAH

In re	)	Bankruptcy Case No. 86C-03924
	)	
CARVEL R. SHAFFER and	)	
BONNIE J. SHAFFER,	)	
	)	
Debtors.	)	Chapter 7
	)	
LUCILLE S. EGGETT, PEGGY ANN	)	
EGGETT-EK and BOYD EGGETT,	)	
	)	
Plaintiffs,	)	Civil Proceeding No. 86PC-1063
	)	
vs.	)	
	)	
CARVEL R. SHAFFER,	)	
	)	
Defendant.	)	R U L I N G

This matter comes before the Court upon a request for a ruling on uncalendared cross motions for summary judgment. Plaintiffs filed this action for a determination that a judgment which they obtained in the Third Judicial District Court for the State of Utah is nondischargeable. That action arose out of a purchase of property by the plaintiffs from AFCO Development Corporation. Following a trial on the merits, Judge Sawaya entered the following Findings of Fact:

1. On April 3, 1981, Afco Development Corporation, a Utah corporation, conveyed to Plaintiffs Lucille S. Eggett and Peggy Ann Eggett-Ek, by Warranty Deed, certain property situate in Salt Lake County, State of Utah, and more particularly described as all of Lot

130, Glenmoor Country Estates, No. 1, Plat "A", according to the official plat thereof on file and of record in the office of the Salt Lake County Recorder, State of Utah. Plaintiffs were each present in the offices of Afco Development along with their real estate agent, John Lachhead, and Defendant Carvel Shaffer, attorney at law, who was then a Vice-President of Afco Development Corporation.

3. Prior to April 3, 1981, John Lachhead had asked Carvel Shaffer which title company Mr. Shaffer wished to close the sale of the real property in question. Mr. Shaffer told Mr. Lachhead that since Mr. Shaffer was an attorney, the closing would take place in the offices of Afco Development Company and would be performed by Mr. Shaffer.

4. The conduct of Defendant, Carvel Shaffer, in directing that he close the transaction together with Defendant's representation on April 3, 1981, that a Preliminary Title Report and Policy of Title Insurance were prepared and would be delivered at a later date to Plaintiffs constitute a representation by Defendant that the property conveyed was unencumbered.

5. Said representation was false in that on April 3, 1981, and thereafter, there existed an encumbrance on said real property held by Deseret Federal Savings & Loan Association, a Utah corporation, as against Afco Development Corporation.

6. Said false representation was made by Defendant in the course of his business, profession or employment based upon his position as an Attorney-at-Law and as an officer of Afco Development Corporation.

7. In making said representation Defendant failed to exercise reasonable care or competence in obtaining, communicating or failing to communicate the information concerning the representation.

8. The false representation negligently made by Defendant was of an existing material fact and was made by Defendant in violation of his duty of care to insure the accuracy and validity of the representation.

9. Plaintiffs reasonably relied upon the false representation made by Defendant by paying the purchase price, to-wit: \$10,820.32.

10. As a result of the conduct of Defendant described above, Plaintiffs were damaged in the sum of \$10,820.32.

Based on those Findings, the court concluded that the defendant's conduct constituted "negligent misrepresentation" and entered judgment against the defendant in the amount of \$14,495.61.

The defendant takes the position herein that a finding of negligent misrepresentation does not form the basis of a cause of action pursuant to § 523(a)(2)(A) of the Bankruptcy Code. The Court agrees. That section provides:

(a) A discharge under section 727 . . . 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 insider's financial condition[.]

To establish a cause of action under this section, the plaintiff must demonstrate the following by clear and convincing evidence:

(1) the debtor made a false representation or willful misrepresentation;

- (2) the representation was made with the intent to deceive the creditor;
- (3) the creditor relied on the representation;
- (4) the creditor's reliance was reasonable; and
- (5) the creditor sustained a loss as a result of the debtor's representation.


First Bank of Colorado v. Mullet (In re Mullet), 817 F.2d 677, 680 (10th Cir. 1987); Driggs v. Black (In re Black), 787 F.2d 503 (10th Cir. 1986). See also, John Deere Co. v Iverson (In re Iverson), 66 B.R. 219 (Bkrtcy. D. Utah 1986); North Park Credit v. Harmer (In re Harmer), 61 B.R. 1 (Bkrtcy. D. Utah 1984).

In Black, the Tenth Circuit held that a "creditor must establish that a materially false writing was made knowingly with the intent to deceive." 787 F.2d at 506. A cause of action under § 523(a)(2)(A) requires a showing of intentional misrepresentation. Negligent misrepresentation is insufficient.

Accordingly, defendant's motion for summary judgment will be granted, unless the plaintiffs amend their complaint within 20 days to state a cause of action under § 523(a).

DATED this 27 day of July, 1988.

BY THE COURT:

  
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GLEN E. CLARK, CHIEF JUDGE  
UNITED STATES BANKRUPTCY COURT