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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In Re
KEITH & KIMBERLY MARSH,
Debtors.

Chapter 7
Case No. 05-15360-PHX-SSC
Adversary No. 05-985

DAVID ROMO,
Plaintiff,
v.
KEITH & KIMBERLY MARSH,
Defendant.

MEMORANDUM DECISION
(Opinion to Post)

I. PRELIMINARY STATEMENT

Plaintiff, David Romo, commenced an adversary proceeding against Keith and Kimberly Marsh, the Debtors, on November 28, 2005, to determine whether a debt due and owing to him was nondischargeable under 11 U.S.C. §523(a)(2)(A). The Defendants filed an Answer on January 20, 2006. The Court held a trial on June 26, 2006. At the conclusion of the trial, the Court took this matter under advisement. This Decision shall constitute the Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52, Bankruptcy Rule 7052. The Court has jurisdiction over this matter, and this is a core proceeding. 28 U.S.C. §§1334 and 157 (West 2006).

1 **II. FACTUAL DISCUSSION**

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3 On August 19, 2005, the Debtors filed their petition for relief under Chapter
4 7. Prior to the petition date, on May 11, 2004, the Debtors sold a 2002 Mitsubishi Gallant¹ to
5 David Romo for the amount of \$9,500. Mr. Romo paid for the vehicle with two cashiers
6 checks, one in the amount of \$6,000; the other for \$2,500. Pursuant to their agreement, the
7 remaining consideration of \$1,000 was to be paid upon Mr. Romo's receipt of the title to the
8 vehicle.

9 Mr. Romo took possession of the vehicle immediately, and proceeded to have
10 the vehicle insured. Mr. Romo testified that the Debtors informed him that it would take
11 about three months to obtain the title to the vehicle. The sales contract between the parties,
12 however, is silent on this issue. The contract only states that "\$1,000 will be collected upon
13 delivery of the title of the car." There is no indication of a time-line for the delivery of the
14 title.

15 At the time Mr. Romo purchased the vehicle, he knew the vehicle was
16 encumbered by a lien in the amount of approximately \$14,000.² After Mr. Romo purchased
17 the vehicle, the Debtors continued to make the payments to the lienholder.³ The Debtors
18 made payments of approximately \$6,164, from May 2004, when vehicle was purchased by
19 Mr. Romo, until April 2005.

20 The Debtors testified that they had initially been informed by the lienholder
21 that Mr. Romo would be able to use his own insurance on the vehicle. However, the
22

23 ¹ The vehicle was in fairly good condition with only about 21,726 miles. *See* Exhibit A.

24 ² *See* Exhibit 1. According to the "Transaction History Detail Print," the principal balance
25 due on the loan as of May 12, 2004 was \$14,668.72.

26 ³ No documentation was provided as to the identity of the actual lienholder. Pursuant to
27 the Debtors testimony, the lien is held by "WFS." The Court directed the Chapter 7 Trustee to
28 investigate whether "WFS" had, in fact, noted their lien on the title. Based upon the Trustee's
investigation, it appears that "WFS" did note their lien on the title.

1 lienholder later determined to place its own insurance ("forced placed insurance") on the
2 vehicle, charging the Debtors an additional amount of \$1,259.00 on August 5, 2004, and
3 \$1,125.00 on May 20, 2005. The Debtors eventually were unable to make any further
4 payments to the lienholder, and the vehicle was repossessed by the lienholder in August 2005.
5 Subsequently, the lienholder sold the vehicle for \$7,600.

6 7 **III. LEGAL DISCUSSION**

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9 Pursuant to 11 U.S.C. § 523(a)(2)(A), a monetary debt is nondischargeable
10 "to the extent obtained by false pretenses, a false representation, or actual fraud." In the Ninth
11 Circuit, to prove nondischargeability under §523(a)(2)(A), the Plaintiff needs to show that
12 "(1) that the debtor made the representations; (2) that at the time he knew they were false; (3)
13 that he made them with the intention and purpose of deceiving the creditor; (4) that the
14 creditor justifiably relied on such representations; and (5) that the creditor sustained alleged
15 loss and damage as the proximate result of such representations." In re Diamond, 285 F.3d
16 822 (9th Cir. 2002); In re Slyman, 234 F.3d 1081 (9th Cir. 2000); In re Ettell, 188 F.3d 1141,
17 1144 (9th Cir. 1999); In re Hashemi, 104 F.3d 1122, 1125 (9th Cir. 1996); In re Eashai, 87
18 F.3d 1082 (9th Cir. 1996). The Plaintiff must establish nondischargeability by a
19 preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 284, 111 S.Ct. 654, 657-58,
20 112 L.Ed.2d 755 (1991). The Plaintiff bears the burden of proof, by a preponderance of the
21 evidence, on all elements of a Section 523(a)(2)(a) request that certain debt be deemed
22 nondischargeable. Grogan v. Garner, 498 U.S. 279, 284, 111 S.Ct. 654, 657-58, 112 L.Ed.2d
23 755 (1991).

24 The Debtors and Mr. Romo, the Plaintiff, entered into a contract for the sale
25 of a vehicle, as evidenced by a sales contract⁴ executed by all of the parties. Pursuant to the
26 agreement, the Debtors represented to Mr. Romo that they would deliver title to the vehicle,

27 _____
28 ⁴ See Exhibit A.

1 at which point he would deliver the remaining \$1,000 of the purchase price. There is no
2 language, however, indicating that they would deliver title within three months, as alleged by
3 the Plaintiff. No doubt, the Plaintiff expected to receive, and the Debtors hoped to transfer,
4 the title within a reasonable period of time. However, based upon the evidence and testimony
5 of the parties, the Court concludes that no representations were made indicating the title
6 would be delivered within three months. Therefore, there is no evidence that the Debtors
7 made false representations, let alone that the false representations were material.

8 The Court also concludes that the Debtors did not have the requisite intent to
9 defraud. For a debt to be excepted from discharge, the debtor must actually intend to defraud
10 the creditor In re Tsurukawa, 258 B.R. 192 (9th Cir. BAP 2001). However, direct evidence
11 of an intent to deceive is rarely shown. Hence, intent may be "inferred and established from
12 the surrounding circumstances." In re Hultquist, 101 B.R. 180 (9th Cir. BAP 1989); In re
13 Anastas, 94 F.3d 1280 (9th Cir. 1996); In re Dakota, 284 B.R. 711 (Bankr.N.D.Cal. 2002).
14 Because no single objective factor is dispositive, assessment of intent is, thus left, to the fact-
15 finder. In re Jacks, 266 B.R. 728 (9th Cir. BAP 2001). The intent to defraud a creditor is a
16 finding of fact. In re Rubin, 875 F.2d 755, 759 (9th Cir. 1989).

17 There is no doubt that the facts of this case are unfortunate. The evidence
18 reflects that during the course of the year from when the vehicle was sold to the Plaintiff, to
19 when it was repossessed, the Debtors continued to make payments to the lienholder.
20 Unfortunately, the forced placed insurance of the lienholder more than doubled the payments
21 on the Debtors' obligation, and made it difficult for the Debtors to payoff the obligation. The
22 Debtors also testified credibly that at the same time as they were trying to resolve the title
23 issue, they incurred a number of unanticipated obligations that forced them to stop paying the
24 lienholder on the vehicle and ultimately caused them to file their bankruptcy petition. The
25 Debtors testified that they attempted to borrow money from family members, but were unable
26 to procure any assistance. The vehicle was eventually repossessed and sold by the lienholder.

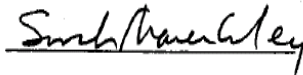
1 The Court concludes that the Debtors were proceeding in good faith and did not intend to
2 defraud the Plaintiff. In this case, the Plaintiff has not carried his burden of proof on all
3 elements of his claim, and his debt must be discharged.

4
5 **IV. CONCLUSION**

6 Based upon the foregoing, the Court concludes that the Plaintiff has failed to
7 establish all the elements of §523(a)(2)(A). Specifically, the Court finds that the Debtors did
8 not make false representations and did not have the requisite intent to defraud. The entire
9 debt owed to the Plaintiff is discharged.

10 The Court will execute a separate order incorporating this Memorandum
11 Decision.

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16 DATED this 18th day of September, 2006.

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18 Honorable Sarah Sharer Curley
19 United States Bankruptcy Judge