NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In the Matter of	:	Case No. 11-11617/JHW
Tracy L. Purington	:	
Debtor	:	
Filomena Boccella	:	Adv. No. 11-1757
Plaintiff	:	
v.	:	**OPINION**
Tracy L. Purington	:	
Defendant	:	

APPEARANCES[1]: Filomena Boccella
5018 Moss Mill Road
Egg Harbor Township, New Jersey 08215
Plaintiff Pro Se

Tracy L. Purington
1043 Old Zion Road
Egg Harbor Township, New Jersey 08234
Defendant/Debtor Pro Se

The plaintiff, Filomena Boccella, brings this action against the debtor, Tracy Purington, alleging that the debtor committed fraud and theft by deception with respect to a contract to perform renovations on the plaintiff's home. Although the original adversary cover sheet captioned the matter as an objection to the debtor's overall discharge under 11 U.S.C. § 727, the plaintiff's allegations and objections to the debtor's ability to discharge her claim are

[1] Both parties appeared pro se.

more in line with a quest for nondischargeability of the debt alleged to be due to the plaintiff under 11 U.S.C. § 523. Because the element of intent to deceive the plaintiff by the debtor has not been established on this record, the relief sought by the plaintiff in this adversary complaint is denied.

FACTS AND PROCEDURAL HISTORY

This action stems from a dispute over construction and renovation work that the plaintiff, Filomena Boccella, hired the debtor, Tracy L. Purington, and her company, Green Mountain Construction, to perform in 2009. Ms. Boccella sought to have her roof replaced, certain interior work performed, and a large addition, approximately 22' x 21.5', added to her home. She noticed the debtor's advertisement in a local newspaper under the heading of "Additions, Repairs & Remodeling." The advertisement suggested that the name of the debtor's construction company was "A-1 Jacking & Leveling",[2] and that the company performed various types of construction work, including "sill plate, sheet rock, renovs, painting, kits & baths, roofs, windows & siding." Exh. P-13. The plaintiff responded to the ad and met with the debtor several times. She was shown several albums of pictures of previous work done by the debtor, as well as some references, but she did not contact any of the references. She believed that the debtor was a licensed, insured, and fully functional

[2] The debtor explained that A-l Jacking and Leveling was not the business name of her company, but that it actually meant that her company specialized in, and had particular expertise with, jacking and leveling.

contractor. At first, the plaintiff testified that the debtor assured her that "she was registered and she was licensed and insured,"[3] but she later testified that she did not recall asking the debtor whether she was registered or licensed prior to starting the job.[4]

The debtor extended a proposal to the plaintiff in the name of Green Mountain Construction d/b/a Tracy Purington to replace the roof, renovate the plaintiff's kitchen and bathroom, sheetrock two existing bedrooms, and build a new addition onto the home, for a total price of $45,000, which the plaintiff accepted on May 21, 2009. Work was to commence on the day after Memorial Day and was to be completed by July 16, 2009.

The plaintiff tendered the initial down payment of $8,000, and the debtor began work on the property. The debtor applied for and obtained a permit from the township to re-shingle the plaintiff's roof, listing the contractor as "4 Leaf Clover", a company owned by the debtor's brother-in-law, Robert Hibbert. The company was not known to the plaintiff and had no other connection to the job. The application was signed by Hibbert, and contained his Contractor's License Number and Federal Employee ID Number. The debtor acknowledged that her company, Green Mountain Construction, was not licensed in New

[3] T30-22 to 23

[4] T44-14 to 15

Jersey.[5] She testified that she believed she could "pull" the roofing permit as a subcontractor using her brother-in-law's name and license. A second permit for the addition to the home was applied for in the name of the owner, Filomena Boccella.

Work on the project began on or about May 26, 2009. The debtor brought four workers to the project, two of whom were friends of her brother-in-law and one was her "girlfriend's boyfriend", who she testified had been doing construction work for twenty-five years. The debtor relied on "word of mouth" to bring these workers to the job. The workers removed the old roof and replaced damaged portions of the wood sheathing. The roof was reshingled but the workers did not complete all of the associated work for the reroofing.

In addition to the replacement of the roof, the workers took down the sheet rock and insulation from the kitchen and two bedrooms, cleaned out and removed the mold from these rooms, removed the tile from the kitchen and bathroom, and began the excavation work necessary for the addition. According to the plaintiff, many problems arose as the work progressed,

[5] The debtor began operating the sole proprietorship known as Green Mountain Construction in November 1996 in the State of Maine. She testified that the name was properly registered as a construction contractor in Maine, but acknowledged that she did not register the company with the State of New Jersey after moving to New Jersey in late 2008, even though she continued to use the name as a sole proprietor.

including poor workmanship and lack of professionalism by the workers. The problems described by the plaintiff included the following:

1. The new roof was defective and incomplete. During the job, it rained heavily, and the roof leaked in several places. At one point, the foot of one of the workers working on the roof broke through to the bathroom ceiling. As well, the wrong roof shingles were initially delivered to the plaintiff's home. The parties agree that the shingles delivered were the wrong color, but the plaintiff also alleged that the shingles were the wrong style and manufacturer. She testified that the debtor had "verbally" agreed to provide a higher quality textured shingle, but "then she pulled the bait-and-switch" and delivered a product by a different manufacturer.[6] The shingles were sent back and replaced with shingles of the correct color, but still made by the same manufacturer. It appears that the parties ultimately agreed to install the replacement shingles, with an adjustment in the contract price from $45,000 to $43,000.

2. The excavation work for the addition was undertaken by a subcontractor, Totoro, Inc., hired by the debtor, whose principal

[6] T33-4 to 6.

was the debtor's husband's childhood friend.[7] The work began before a permit for the addition was issued by the Township. The plaintiff complains that the excavation work was extremely shallow and substandard. When the Township reviewed the proposed plan, seventeen violations were found, including that the footings needed to be deeper, the new foundation required a drain and the crawl space required vents and a minimum depth. According to the debtor, the work was preliminary, and was intended only to rip out the roots of plants and prepare the ground for more extensive excavation.

3. As part of the preparation for the addition, a hole was made into the crawl space of the home to serve as the connector for the addition. The hole exposed a portion of the crawl space to the elements, and mud invaded the interior of the space while the interior was exposed.

4. Different workers seemed to show up each day to work on the job, and the workers rarely seemed to have the proper tools. The workers left the interior premises in a shambles, necessitating the

[7] The plaintiff complained that the defendant specifically told her that no subcontractors would be used, although the "General Provisions" section of the contract provided that the "Contractor may at its discretion engage subcontractors to perform work hereunder, provided Contractor shall fully pay said subcontractor and in all instances remain responsible for the proper completion of this Contract." ¶ 3.

plaintiff and her house-mate to engage in additional demolition and clean-up activities.

Notwithstanding these problems, on June 1, 2009, pursuant to their agreement, the plaintiff tendered to the debtor the next installment payment of $9,000. Thereafter, the relationship between the parties rapidly deteriorated. A few days after the work commenced, the plaintiff left a message on the debtor's answering machine, complaining to the debtor that the debtor and her workers were "in over their heads, the workmanship is horrible, the roof still leaks," and questioning when the project would be finished.[8] The plaintiff asked for some ($10,000) of her money back, but the debtor declined to cancel the contract. According to the debtor, when she returned to the plaintiff's home on June 8 and again on June 11, 2009 to continue working on the property, Kristen Distler, the plaintiff's house-mate, threatened her and her employees with physical harm,[9] at which point the debtor left the job site.

Approximately a week later, on June 18, 2009, the debtor filed two complaints against Kristen Distler with the Mullica Township Police Department. Counter-charges were later filed by Ms. Boccella, alleging that the debtor had committed theft by deception by creating a false impression that

[8] T45-17 to 19.

[9] Exh. P-4; P-5. With respect to the June 8, 2009 incident, Ms. Purington stated that Ms. Distler threatened "to slit her and her workers throat and shoot them if they did anything wrong." Exh. P-4.

certain work could and would be performed. The parties went to mediation. Ultimately, both sides agreed to drop their respective charges and the matter was dismissed.

On August 27, 2009, Ms. Boccella filed a civil complaint and order to show cause against Tracy Purington, Dave Appleby, Robert A. Hibbert, Doe Insurance Companies, Tom Doe of Totoro, Inc. and Tru Pro Industry in the New Jersey Superior Court, Law Division, Atlantic County, case number L-3364-09. With the consent of the parties, the state court referred the matter to arbitration. Both parties testified that they met with the two assigned arbitrators separately, they were not sworn in, and they were not afforded an opportunity to cross-examine witnesses. Around the same time, on September 22, 2009, the debtor recorded a construction lien claim against the plaintiff's residence in the amount of $26,000.

On November 3, 2010, the arbitrators reported in favor of Ms. Boccella, granting her an award in the amount of $24,200, representing a full refund of monies paid, plus $6,300 for the cost of repairing the roof and $900 for half the cost of a dumpster used by the parties. The debtor was directed to remove the construction lien against Ms. Boccella's property. On January 21, 2011, the plaintiff moved for confirmation of the arbitration award. On February 17, 2011, Judge Kane in the New Jersey Superior Court granted Ms. Boccella's motion as to David Appleby and Green Mountain Construction, but denied her

motion to confirm the arbitration award as to Ms. Purington because of her bankruptcy filing, which occurred on January 20, 2011. On April 21, 2011, the Superior Court ordered that the lien on Ms. Boccella's property be released.

In the debtor's bankruptcy filing, she scheduled Ms. Boccella as a general unsecured creditor with a claim of $26,000 for breach of contract. On Schedule I, the debtor stated that she had been employed for the last two years as a waitress for the Trump Taj Mahal Casino and that her husband was unemployed and disabled. The debtor reported that she had earned approximately $3,500 in each of the last three years.[10] The debtor also listed her ownership interests in three businesses: Green Mountain Construction (1995-2008); Star Florist (1996-1997); and Appleby Development, Inc. (no specified dates).[11] The debtor's case proceeded as a no-asset case, and a Report of No Distribution was filed by the Chapter 7 trustee.

On May 3, 2011, Ms. Boccella commenced this adversary proceeding pro se against the debtor to "object/block the entry of the bankruptcy discharge, due to the fact that the defendant committed consumer fraud and theft by

[10] The debtor explained that she reported only approximately $3,500 as income for 2009, despite receiving $17,000 from the plaintiff, because she factored in her work expenses and determined that there was no net profit from that job.

[11] The debtor's disclosure in her Statement of Financial Affairs ("SOFA") that her interest in Green Mountain Construction ended in 2008 obviously conflicts with her 2009 contract with the plaintiff. The debtor testified that the 2008 date was a clerical error on her petition that she missed.

deception." Adv. Complaint at 1. The plaintiff checked the box on the adversary cover sheet indicating that she was objecting to the debtor's discharge under 11 U.S.C. § 727(c),(d),(e). However, she did not cite to any of the applicable provisions under section 727(a), other than to assert that the debtor has failed to disclose certain income to the court in her petition. Instead, Ms. Boccella's complaint is focused on her belief that the debtor perpetrated a theft by deception and fraud upon her, raising allegations more in line with a claim of nondischargeability under 11 U.S.C. § 523(a)(2).

In her complaint, Ms. Boccella alleges that the debtor's actions violated the New Jersey Consumer Fraud Act, and that the debtor committed theft by deception and fraud. She claims that Ms. Purington placed an advertisement in the newspaper misrepresenting herself and/or her business as a licensed, registered, insured and competent home improvement contractor, even though her business was neither registered, licensed, insured, nor qualified to perform the type of work which she solicited.[12] The plaintiff further alleges that the debtor violated state regulations by not providing, in the signed contract, a notice informing the plaintiff of her right to cancel the contract within three

[12] The debtor testified that she was insured for this job. T21-14. In an unmarked exhibit, the debtor offered a copy of a sheet that purported to show that Green Mountain Construction was insured by the Ohio Casualty Group between September 21, 2008 and September 21, 2009. She did not renew the policy when it lapsed. At some point, Ms. Boccella filed a claim with Peerless Insurance as the insurer for Green Mountain Construction which was denied because the insurance policy had been canceled for nonpayment of premium, effective October 15, 2008. The debtor did not know who Peerless Insurance was. On this record, I am not able to determine whether insurance was in effect during the period of this contract.

days of signing. In addition, the plaintiff claims that the debtor improperly substituted inferior roofing shingles for the ones paid for by Ms. Boccella. Lastly, the plaintiff contends that the debtor improperly filed for a permit on the plaintiff's home under the debtor's brother-in-law's name.

In response, the debtor contends that she has already "been to court" with respect to Ms. Boccella's claims of theft by deception and that such claims were dismissed. She insists that she did not commit consumer fraud and asserts that she was forced to discontinue work on Ms. Boccella's home because of the threats made against her. She claims that the $17,000 paid by the defendant represented compensation for work actually completed on the project. She further states that she did not switch the shingles that Ms. Boccella expected would be used on the project for inferior shingles, but claims that only the color of the original shingles was incorrect and that the shingles were changed to the correct color. When Ms. Boccella was still unhappy with the replacement shingles, the contract price was reduced by $2,000 to accommodate her.

On October 4, 2011, the day before trial, the plaintiff filed a two page document captioned as an "Amendment to Adversary Proceeding Cover Sheet"

which sought to expand the allegations and causes of actions asserted by the plaintiff against the debtor.[13]

DISCUSSION

Before we address the main issue raised in the plaintiff's complaint, we must consider two threshold matters. First, we must determine what impact, if

[13] The amended two page cover sheet listed ten separate allegations/causes of actions:

> 1) [11] U.S.C. § 727(c),(d),(e) object to discharge;
>
> 2) Violations of provisions set forth in 11 U.S.C. § 109(h) by Debtor;
>
> 3) [11] U.S.C. § 523(a)(2) Debtor uses false pretenses, makes false representation and commits actual fraud therefore creditor has ability to not have debt or claim of the Debtor discharged and have the bankruptcy petition dismissed/defeated;
>
> 4) To have creditor obtain a (declaratory judgment);
>
> 5) To have creditor recover money/property from Debtor;
>
> 6) To have Debtor be audited due to presumption of abuse under [11] U.S.C. 707(b);
>
> 7) To invoke the penalty for making false statements or concealing property under provisions set forth in 18 U.S.C. 152 and 3571;
>
> 8) To revoke the order of confirmation filed with the New Jersey Superior Court of Atlantic County on January 27, 2011 under docket number: ATL-L-3364 09 and to restore to active calendar all claims against Debtor Tracy L. Purington-Appleby;
>
> 9) 11 U.S.C. § 544 have trustee enter a complaint against Debtor to avoid transfer of property by Debtor; and
>
> 10) To have creditor obtain judgment by default.

any, the arbitration award has on our determination here. Second, in light of the plaintiff's last minute attempt to amend her adversary complaint, we must clarify the cause of action actually before the court.

I. Impact of Arbitration Award.

As noted, the plaintiff's civil action was initially referred to arbitration. The plaintiff and the debtor/defendant both appeared before an assigned panel of two arbitrators. Both parties have testified that consideration of the matter was brief. The parties were not sworn in, and there was no opportunity for cross-examination. The arbitrators apparently met with each of the parties separately. In effect, there was no opportunity to test the information presented by either party. A copy of the "Report and Award of Arbitrators" was presented to the court, but the report is conclusory, and the underlying record was not presented. The arbitrators' report identifies the matter simply as a "claim by homeowner against contractor: contractor not licensed; no proper permits."[14] With no further discussion or explanation, the arbitrators awarded the plaintiff a full refund of the amount that she had paid ($17,000) plus an additional $6,300 for the repair of the roof and $900 to cover half of the cost of

[14] This statement is included in the section in which the arbitrators purport to render "the following award(s) for the reasons set forth." It is unclear if this language was intended as a recital of the cause of action or an actual finding by the panel.

the dumpster[15] used by the defendant. There was no mention of either common law fraud or the New Jersey Consumer Fraud Act. The arbitration award was confirmed by the Superior Court as to the other defendants, but not as to the debtor, because the automatic stay was triggered by the debtor's earlier bankruptcy filing. If the arbitrators' award reflects a determination that the debtor was not properly licensed and that the proper permits were not obtained, we must determine whether the arbitrators' award in this case as against the debtor would have preclusive effect.

As a general matter, the preclusive effect of a state court judgment in federal court is determined by state law. Lance v. Dennis, 546 U.S. 459, 466, 126 S. Ct. 1198, 1202, 163 L.Ed.2d 1059 (2006) ("Congress has directed federal courts to look principally to state law in deciding what effect to give state-court judgments."). The Full Faith and Credit statute, 28 U.S.C. § 1738, provides in relevant part that the "records and judicial proceedings of any court of any such State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." See, e.g., Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280, 293, 125 S. Ct. 1517, 1527, 161 L.Ed.2d 454 (2005) ("The Full Faith and Credit Act, . . . requires the federal court to

[15] According to the contract, the debtor was to pay for half of dumpster to be used in the construction. Ms. Boccella asserted that she paid $1,258.35 for the dumpster and that she never received Ms. Purington's share. It is unclear on this record why the arbiters' award of $900 would represent half of this amount.

'give the same preclusive effect to a state-court judgment as another court of that State would give.'"). In this instance, rather than a state court judgment or court judicial proceeding, we have only an unconfirmed arbitration award as against the debtor. "'Section 1738 does not by its terms apply to the findings of an arbitrator, and the Supreme Court has held that section 1738 preclusive effect need not be given to an unreviewed arbitration award.'" Walzer v. Muriel Siebert & Co., Civ. No. 04–5672, 2010 WL 3174458, *5 (D.N.J. Aug. 10, 2010) (quoting N.L.R.B. v. Yellow Freight Sys., Inc., 930 F.2d 316, 319 (3d Cir. 1991) (citing MacDonald v. City of West Branch, 466 U.S. 284, 288, 104 S. Ct. 1799, 1802 (1984) ("federal courts are not required by statute to give res judicata or collateral-estoppel effect to an unappealed arbitration award"))). See also 18B, Charles Alan Wright, et al., Federal Practice & Procedure, Jurisd. § 4475.1 n.6 (2d ed. 2002) ("Arbitral awards, unreviewed by any court, are not such judgments as are entitled to recognition under the full faith and credit statute."). "Any decision to accord preclusive effect thus must be a matter of a judicially fashioned preclusion rule. " 18B, Charles Alan Wright, et al., Federal Practice & Procedure, Jurisd. at § 4475.1 n.6. Cf. In re Kaplan, 143 F.3d 807, 815 (3d Cir. 1998) ("Generally applicable res judicata rules must sometimes be adapted to fit the arbitration context.").

In New Jersey, an arbitration award is not afforded the weight of a court judgment unless and until it is confirmed by the New Jersey Superior Court. See N.J.S.A. 2A:23A-18 ("Upon the granting of an order confirming, modifying

or correcting an [arbitration] award, a judgment or decree shall be entered by the court in conformity therewith and be enforced as any other judgment or decree."). See also Shtab v. Greate Bay Hotel and Casino, Inc., 173 F.Supp.2d 255, 261 (D.N.J. 2001) ("An arbitration award is not considered 'final' for purposes of issue preclusion absent judicial confirmation of the award, and, for this reason, unconfirmed arbitral awards have been denied preclusive effect in subsequent litigations"); Gruntal & Co., Inc. v. Steinberg, 854 F.Supp. 324, 337 (D.N.J. 1994) ("Absent judicial confirmation, an arbitration award will not result in a 'final judgment' and cannot, therefore, have preclusive effect on subsequent litigation."). But see Sheet Metal Workers Intern. Ass'n Local Union No. 27, AFL-CIO v. E.P. Donnelly, Inc., 673 F.Supp.2d 313, 320 (D.N.J. 2009) ("Judicial proceedings ordinarily accord preclusive effect to arbitrations that have already adjudicated the same claims or defenses, even when the award is unconfirmed."); Nogue by Nogue v. Estate of Santiago, 224 N.J. Super. 383, 386-87, 540 A.2d 889, 891 (App. Div. 1988) (citing to the Restatement, Judgments, 2d §§ 83, 84). There may be appropriate circumstances where an unreviewed or unconfirmed arbitration award may still be given res judicata or collateral estoppel effect.

In this case, however, it is clear that it would be inappropriate to give preclusive effect to the arbitration award entered in favor of the plaintiff and against the debtor. First, both res judicata and collateral estoppel principles require, in effect, that the parties "have their day in court." As to res judicata,

or claim preclusion, a plaintiff is precluded "from relitigating the same claim against the same parties, provided the claims have been 'fairly litigated and determined.'" Carino v. Allstate Financial Servs., LLC, 2011 WL 1364150, *3 (N.J. App. Div. Apr. 12, 2011) (quoting First Union Nat'l Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 352, 921 A.2d 417, 423 (2007)). In a similar vein, application of collateral estoppel is premised upon a party having had a "full and fair opportunity to be heard." Id. at *4. As noted above, both parties described their arbitration experience as very brief, with little if any opportunity to present evidence, cross examine witnesses, make legal arguments, or offer rebuttal. There is no real indication that either party had their day in court. Many of the procedural elements typically present in a judicial proceeding were simply not present during this particular arbitration process. Cf. Nogue by Nogue v. Estate of Santiago, 224 N.J. Super. 383, 387, 540 A.2d 889, 891 (App. Div. 1988) (considering whether the parties had a right "to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties").

More significantly, the arbitration process did not resolve the issue of whether the debtor committed any act constituting "false pretenses, a false representation, or actual fraud," which would cause any debt due to the plaintiff from the debtor to be nondischargeable under 11 U.S.C. § 523(a)(2)(A). No preclusive effect may be applied to the unconfirmed arbitration award

entered against the debtor to resolve the plaintiff's nondischargeability complaint.

II. Impact of the Amended Complaint.

As previously noted, the cover sheet attached to the plaintiff's original adversary complaint cited only to 11 U.S.C. § 727, yet the allegations raised in the actual complaint were more in line with a nondischargeability action pursuant to § 523. On October 4, 2011, the day before the trial of this matter, Ms. Boccella filed a two page document captioned as an "Amendment to Adversary Proceeding Cover Sheet" seeking to expand the allegations and causes of action asserted against the debtor.

Rule 7015, which makes Rule 15 of the Federal Rules of Civil Procedure applicable in adversary proceedings, permits a party to amend a pleading with the written consent of its adversary or with the approval of the court. Fed.R.Bankr.P. 7015. In the absence of written consent, the court retains discretion to grant or deny a proposed amendment. In re NorVergence, Inc., 424 B.R. 663, 701 (Bankr. D.N.J. 2010). If there is no evidence "'of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.'", Bivings v. Wakefield,

316 Fed.Appx. 177, 180 (3d Cir. 2009) (quoting Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L.Ed.2d 222 (1962)), the bankruptcy court "should freely give leave when justice so requires." Fed.R.Bankr.P. 7015. See, e.g., Bivings v. Wakefield, 316 Fed.Appx. 177, 180 (3d Cir. 2009) (granting request to amend in the absence of undue delay, bad faith or futility); Belekis v. Burberry Ltd., No. Civ.A. 99–2964, 2001 WL 34047386 (D.N.J. Dec. 14, 2001) (allowing the addition of another cause of action where there was no change in the damages sought and no additional discovery was needed). But see Parker v. F.D.I.C., 447 Fed.Appx. 332, 337 (3d Cir. 2011) (denying leave to amend complaint on eve of trial to add defendants); Galicia v. Country Coach, Inc., 324 Fed.Appx. 687, 689 (9th Cir. 2009) (denying leave to add a new claim on eve of trial as prejudicial); Romero v. Drummond Co., 552 F.3d 1303, 1318-19 (11th Cir. 2008) (same).

The attempted amendment here, filed approximately five months after the original complaint, on the day before trial, sought to expand the plaintiff's complaint to include several newly asserted causes of action. The first amended cause of action, seeking to deny the debtor her discharge under 11 U.S.C. § 727(c,d,e), is consistent with the plaintiff's original adversary cover sheet. But as we noted at the outset, the plaintiff's factual allegations are actually more in line with a nondischargeability action under § 523. The third amended cause of action remedies this inconsistency by expressly asserting a new cause of action under 11 U.S.C. § 523(a)(2), which is consistent with the

actual arguments made by the plaintiff in this matter. The plaintiff will be permitted to amend her complaint to include this cause of action. The other alleged causes of action included in the plaintiff's last minute amendment raise a host of new issues, including alleged credit counseling violations under § 109(h), a presumption of abuse under § 707(b), and an assertion that false statements were made in violation of Title 18. As well, the plaintiff seeks the avoidance of transfers under § 544 and the reinstatement of the state court proceedings against the debtor.

No justification has been offered to explain the undue delay in presenting this lengthy list of last minute amendments. Moreover, we have here only an amendment of the cover sheet to the plaintiff's adversary complaint, listing the proposed new causes of actions, with no factual foundation provided, either in the pleading or at trial. Allowing the plaintiff to amend her complaint in such a manner, on the eve of trial, would unduly prejudice the debtor. With the exception of the § 523 nondischargeability cause of action, the plaintiff's proposed amendments to the complaint are denied.

This determination leaves us with only one remaining cause of action before the court: whether the asserted debt due to the plaintiff from the defendant, arising out of the construction contract between the parties, is nondischargeable under 11 U.S.C. § 523(a)(2)(A).

III. Nondischargeability Under 11 U.S.C. § 523(a)(2)(A).

The burden under 11 U.S.C. § 523(a)(2)(A) is on the plaintiff to prove her case by a preponderance of the evidence. See Grogan v. Garner, 498 U.S. 279, 288, 111 S. Ct. 654, 660, 112 L.Ed.2d 755 (1991) ("Congress intended the ordinary preponderance standard to govern the applicability of all the discharge exceptions."); In re Treadwell, 637 F.3d 855, 860 (8th Cir. 2011) (preponderance standard applies to § 523(a)(2)(A)); In re Hilley, 124 Fed. Appx. 81, 82 (3d Cir. 2005). Section 523(a)(2)(A) protects debts obtained through fraud from discharge if the debt is "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).

Section 523(a)(2)(A) conditions nondischargeability on the plaintiff's ability to establish that the debt in question was obtained as the result of the debtor's false pretenses, false representations or actual fraud. The purpose behind this provision is "'to prevent a debtor from retaining the benefits of property obtained by fraudulent means and to ensure that the relief intended for honest debtors does not go to dishonest debtors.'" In re Sabban, 600 F.3d 1219, 1222 (9th Cir. 2010) (citations omitted). Section 523(a)(2)(A) was designed to cover those frauds which involve "moral turpitude or intentional

wrong"; "'fraud implied in law which may exist without imputation of bad faith or immorality, is insufficient.'" In re Bailey, 34 Fed.Appx. 150, *1, 2002 WL 494325 (5th Cir. 2002) (quoting In re Allison, 560 F.2d 481, 483 (5th Cir. 1992)); In re Reath, 368 B.R. 415, 422 (Bankr. D.N.J. 2006).

Section 523(a)(2)(A) does not define the terms "false pretenses", "false representation" or "actual fraud," nor does it expressly refer to the typical common law fraud elements, such as the plaintiff's reliance, the materiality of the misrepresentation or the debtor's intent.[16] Nonetheless, in applying section 523(a)(2)(A), courts have routinely inferred that a plaintiff must establish intent, reliance and materiality. See, e.g., Field v. Mans, 516 U.S. 59, 68, 116 S. Ct. 437, 443, 133 L.Ed.2d 351 (1995) (courts have "routinely requir[ed] intent, reliance, and materiality before applying § 523(a)(2)(A)"); In re Softcheck, No. 08-23844(RTL), 2009 WL 4747527, *6 (Bankr. D.N.J. Dec. 4, 2009). False pretenses, which "includes implied misrepresentations or any conduct intended to create and foster a false impression," has been defined as:

> [A] series of events, activities or communications which, when considered collectively, create a false and misleading set of circumstances, or false and misleading understanding of a transaction, in which a creditor is wrongfully induced by the debtor to transfer property or extend credit to the debtor....
>
> A false pretense is usually, but not always, the product of multiple events, acts or representations undertaken by a debtor which

[16] In contrast, section 523(a)(2)(B) specifically requires the debt to be incurred through the use of a written statement: (1) regarding the debtor's financial condition; (2) that was materially false; (3) upon which the plaintiff had reasonably relied; and (4) which the debtor made or published with the intent to deceive the creditor. In re Cohn, 54 F.3d 1108, 1114 (3d Cir. 1995).

> purposely create a contrived and misleading understanding of a transaction that, in turn, wrongfully induces the creditor to extend credit to the debtor. A "false pretense" is established or fostered willfully, knowingly and by design; it is not the result of inadvertence.

In re Polaschek, No. 08–81311, 2012 WL 1569611, *5 (Bankr. C.D.Ill. May 3, 2012) (quoting In re Hanson, 432 B.R. 758, 771 (Bankr.N.D.Ill. 2010)). See also In re Suarez, No. 08-15732, 2010 WL 1382110, *15 (Bankr. D.N.J. Apr. 5, 2010) (false pretenses or a false representation involves creating a "false impression" or making a "false or misleading statement about something"). Actual fraud "'consists of any deceit, artifice, trick, or design involving direct and active operation of the mind, used to circumvent and cheat another--something said, done or omitted with the design of perpetrating what is known to be a cheat or deception.'" RecoverEdge L.P. v. Pentecost, 44 F.3d 1284, 1293 (5th Cir. 1995) (quoting 4 Lawrence P. King, Collier on Bankruptcy ¶ 523.08[5] at 523-57 to -58 (15th Ed. Rev. 1994)). See also McClellan v. Cantrell, 217 F.3d 890, 893 (7th Cir. 2000); In re Bashlow Realty Co. v. Zakai, No. 08-2040, 2010 WL 1529568, *7 n.1 (Bankr. D.N.J. Apr. 14, 2010) (identifying actual fraud as "more expansive than a mere misrepresentation").

To satisfy her burden under section 523(a)(2)(A), the plaintiff must therefore demonstrate that the debtor:

(a) obtained money, property or services;
(b) after falsely representing a material fact, opinion, intention or law;
(c) that the debtor knew at the time was false (or was made with reckless disregard for its truth);
(d) the debtor intended that the plaintiff rely on that statement;

(e) the plaintiff actually relied on the statement and the reliance was justified, and
(f) the plaintiff sustained damages as the proximate result of the false representation.

See In re Softcheck, No. 08-23844(RTL), 2009 WL 4747527, *6-7 (Bankr. D.N.J. Dec. 4, 2009) (discussing the elements of § 523(a)(2)(A)). There is no question here that the debtor incurred a debt to the plaintiff. The focus here is whether the debtor entered into the contract with the plaintiff, and performed the contract, with an intent to deceive the plaintiff. The elements required to be established to support a nondischargeability finding will be reviewed in turn.

A. Material Misrepresentation.

To establish nondischargeability under § 523(a)(2)(A), the plaintiff must show that the debtor made a "material" misrepresentation of a fact, opinion, intention or law. In re Ingalls, No. 08-31908, 2010 WL 624089, *2-3 (Bankr. D.N.J. Feb. 19, 2010). See also In re Cohen, 191 B.R. 599, 604 (D.N.J. 1996), aff'd, 106 F.3d 52 (3d Cir. 1997), aff'd, 523 U.S. 213, 118 S. Ct. 1212, 140 L. Ed.2d 341 (1998); In re Dinter, No. 93-3823, 1993 WL 484201, *5 (D.N.J. Nov. 19, 1993), aff'd, 31 F.3d 1171 (3d Cir. 1994). The false representation must be sufficiently material to have caused the plaintiff to act where she would not have done so had she known the truth. In re Dunston, 146 B.R. 269, 275 (D.

Colo. 1992). See also Haxby v. National Boulevard Bank of Chicago, 90 B.R. 340 (N.D. Ill. 1988); In re Evans, 181 B.R. 508, 515 (Bankr. S.D. Cal. 1995).

"In cases specifically involving contractor-debtors, there are usually two ways to establish misrepresentation or fraud under section 523(a)(2)(A): (1) to show that the contractor executed the contract never intending to comply with its terms, or (2) to demonstrate that the contractor intentionally misrepresented a material fact or qualification when soliciting the work." In re Wiszniewski, No. 09–11102, 2010 WL 3488960, *5 (Bankr. N.D.Ill. Aug. 31, 2010). A contractor's general representations regarding his expected work performance and the actual quality of that workmanship do not qualify as misrepresentations for purposes of section 523(a)(2)(A). For example, in Wiszniewski, the court determined that contractual language stating that the work would be performed "in a professional manner according to standard practices," and an oral representation that a higher quality floor would be installed, qualified as "broken promises," but not misrepresentations. The court explained:

> Neither of these statements constitutes a misrepresentation under section 523(a)(2)(A). As to the written provision in the contract, language in a sales agreement stating that a contractor will complete a construction project in a workmanlike manner according to specifications or industry standards does not amount to a misrepresentation just because the contractor breaks that promise. Similarly, the Defendant's oral representation that "new" and "upgraded" subflooring would be needed—and his subsequent failure to install that subflooring—constituted a broken promise, not a misrepresentation.

> Although the Defendant's failure to install the new subflooring and generally complete the work according to standard practices may amount to a breach of contract, more than mere nonperformance is required to show a misrepresentation under section 523(a)(2)(A).

Id. at *6 (internal citations omitted). In the absence of something more, poor quality workmanship does not equate with a misrepresentation. See, e.g., In re Henderson, 423 B.R. 598, 622 (Bankr. N.D.N.Y. 2010) ("Substandard performance or a mere breach of the construction contract do not rise to the level of fraud necessary to except the debt from discharge."); In re Rodruck, No. 07–01872–LMJ7, 2010 WL 1740792 (Bankr. S.D.Iowa April 28, 2010); In re Horton, 372 B.R. 349, 358 (Bankr. W.D.Ky. 2007) ("proof of the performance of substandard work [cannot be equated] with proof of fraudulent intent. Moreover, such a precedent could not feasibly exist without elevating nearly every breach of contract action to a level of actionable fraud."); In re Barr, 194 B.R. 1009, 1019 (Bankr. N.D.Ill. 1996) (a "botched job", without more, is not the same as a misrepresentation).

Here, we have more than poor quality workmanship. In her advertisement, and in her initial presentations to the plaintiff, the debtor presented herself as an experienced, qualified and competent building contractor. While there may not have been specific discussion about the registration and insurance status of the debtor's company, or about the identity or experience of the workforce associated with the company, there is no doubt that the debtor painted a picture of her company as an established

enterprise that was qualified to accomplish the work being solicited. While the debtor had construction experience, primarily in the State of Maine, she had just returned to New Jersey permanently in November 2008, several months before meeting with the plaintiff. She had engaged in only one minor job, which may have required painting basement walls. She had no workforce in place, and had not registered her company as a construction contractor in New Jersey. These facts combine to establish that the debtor materially misrepresented herself and her company to the plaintiff.

B. Knowledge That the Representation Was False.

Another element required to be shown to establish a cause of action for nondischargeability under § 523(a)(2)(A) is that at the time that the debtor made the representations or omissions, she knew that those representations were false, or that they were made with gross recklessness as to their truth. In re Cohen, 191 B.R. 599, 605 (D.N.J. 1996).

There is no question that at the time the debtor presented herself and her company as a qualified, competent construction contractor, she knew that her business enterprise was not properly registered, and she did not have a particular workforce in place. The debtor testified that when she contracted with the plaintiff, she was engaging in the process of completing the necessary paperwork to register her company. She obviously understood the state

requirements in that regard, and chose to advertise her services and enter into a contract before she met the threshold requirements. I can conclude that the debtor knew that her presentations to the plaintiff about her qualifications and her established capacity to do the work were false.

C. Intent to Deceive.

The primary focus of our attention in this case is whether the plaintiff has established by a preponderance of the evidence that the debtor intended to deceive her in presenting her qualifications and in contracting with her to perform renovations and construction work on the plaintiff's residence. The issue of intent requires actual or positive intent. In re Carey, No. 08-24396, 2010 WL 936117, *1 (D.N.J. Mar. 11, 2010). "At the time of the representation, [a debtor] must have intended by his representation to deceive the plaintiff." Id. See also In re Chen, 227 B.R. 614, 626 (D.N.J. 1998) (stating that "the intent to deceive under § 523(a)(2)(A) . . . requires proof of a higher level of intent than the mens rea that must be found" under the state law provision that prohibits the knowledgeable making of false statements to obtain unemployment benefits); In re Nahas, 181 B.R. 930, 933 (Bankr. S.D. Ind. 1994); In re Young, 181 B.R. 555, 558 (Bankr. E.D. Okla. 1995); In re Woodall, 177 B.R. 517, 523 (Bankr. D. Md. 1995). The intent to deceive may be inferred from the surrounding facts and circumstances of the case. In re Reynolds, 193 B.R. 195, 200 (D.N.J. 1996); In re Nahas, 181 B.R. at 933. "The focus 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."' " In re Reynolds, 193 B.R. 195, 200-01 (D.N.J. 1996) (quoting In re Horne, 823 F.2d 1285, 1287 (8th Cir. 1987)). A showing of reckless indifference to the truth of the representations coupled with the knowledge that it would induce the action to be taken is also sufficient to satisfy an intent to deceive. In re Cohen, 185 B.R. 171, 177 (Bankr. D.N.J. 1994). See also In re Phillips, 804 F.2d 930, 934 (6th Cir. 1986); In re Horst, 151 B.R. 563, 568 (Bankr. D. Kan. 1993).

Here, we have no evidence to suggest that the debtor entered into this contract with the plaintiff, "never intending to comply with its terms." While the workmanship on the job was unsatisfactory, and the manner in which the debtor obtained her workers for the project is highly problematic, the record reflects that she attempted to proceed with the performance of the contract. Materials were ordered, permits were obtained or applied for, workers were engaged and demolition at the work site was commenced. A new roof was partially installed, albeit unsatisfactorily. The degree of work commenced and performed belies any unspoken intention not to perform in accordance with the contract requirements.

I have found that the debtor knowingly misrepresented material aspects of her business to the plaintiff. Nevertheless, I am convinced by the debtor's

testimony that she believed that she and her workers, retained from familiar sources, could perform the work contractually undertaken in a competent and professional manner. She had several years of construction experience in the State of Maine. She exerted some effort to satisfy the plaintiff regarding the type of shingles to be used on the roof. Accepting the plaintiff's version of facts regarding the shingles, i.e., that the debtor promised to install a superior type of shingle, but breached that promise by ordering an inferior type, the debtor negotiated with the plaintiff, and got the plaintiff to accept a lower price on the contract. I am also convinced that if the relationship between the parties had not broken down completely following the altercation between Ms. Distler and the debtor, the debtor would have attempted to fix the problems on the job, and to complete the job to the satisfaction of the plaintiff. The likelihood is that she would not have been successful in doing so, but that is not the issue. The issue is whether the debtor intended to deceive or defraud the plaintiff.

To further support her contention that the debt due from the debtor to her should be declared nondischargeable, the plaintiff asserts that the debtor violated the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 et seq. ("NJCFA" of the "Act"), at least in so far as her failure to comply with certain regulatory requirements imposed by the Act. The plaintiff is correct to note that regulatory violations were committed by the debtor, which may qualify as violations of the NJCFA. However, such violations do not supply the missing

element of intent to deceive necessary to declare the debt to the plaintiff nondischargeable.

To the extent that a party is able to establish "(1) an unlawful practice, (2) an 'ascertainable loss,' and (3) 'a causal relationship between the unlawful conduct and the ascertainable loss,'" under the Act, it may recover damages, treble damages and reasonable attorneys' fees. Cox v. Sears Roebuck & Co., 138 N.J. 2, 15, 647 A.2d 454, 461 (1994). See also Ulokameje v. Content, 2012 WL 75136, *6 (N.J. App. Div. Jan. 11, 2012). A regulatory violation of the Contractors' Registration Act, N.J.S.A. 56:8-136 et seq. ("CRA"), which was enacted in 2004 as an addendum to the New Jersey Consumer Fraud Act. Murnane v. Finch Landscaping, LLC, 420 N.J. Super. 331, 336, 21 A.3d 637, 460 (App. Div. 2011), is considered to be an unlawful act under the CFA. N.J.S.A. 56:8-146(a) ("It is an unlawful practice and a violation of [the CFA] to violate any provision of this act."). See also Napolitano v. Haven Homes Inc., No. 10–1712, 2012 WL 253175, *9 (D.N.J. Jan. 26, 2012) ("any violation of the Contractor's Registration Act is a per se violation of the CFA"). Under the CRA, all home improvement contractors must be both registered and insured. The Act expressly states that "no person shall offer to perform, or engage, or attempt to engage in the business of making or selling home improvements" unless they are first registered with the state. N.J.S.A. 56:8-138(a). In addition, the Act requires annual registration for all home improvement contractors, N.J.S.A. 56:8-138(b), defined under the Act to include any "person

engaged in the business of making or selling home improvements."[17] N.J.S.A. 56:8-137. Each contractor is required to "prominently display their registration numbers . . . in all advertisements distributed within this State, on business documents, contracts and correspondence with consumers of home improvement services in this State, and on all commercial vehicles" used by the contractor. N.J.S.A. 56:8-144(a). The registration requirement is strictly applied. Municipalities are not permitted under state law to issue a permit to any contractor who is not registered under the CRA. N.J.S.A. 56:8-147(b).

The debtor has acknowledged that she failed to register with the State after she returned to New Jersey and commenced advertising and working as a home improvement contractor. At the time that she entered into the home improvement contract with the plaintiff, she was not registered. Therefore, she could not and did not properly display her registration number in her advertisements and on her vehicles, as required by state law. These failures constitute a violation of the CRA, and qualify as an unlawful practice under the Consumer Fraud Act.

As well, it can be readily determined that the debtor's contract violates the CRA in other ways. The CRA requires all home improvement contracts in excess of $500 to include certain provisions, such as:

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[17] "Home improvements" are specifically defined to include any work involving "remodeling, altering, renovating, repairing, restoring, modernizing, moving, demolishing, or otherwise improving or modifying of the whole or any part of any residential or non-commercial property." N.J.S.A. 56:8-137.

> (1) The legal name, business address, and registration number of the contractor;
>
> (2) A copy of the certificate of commercial general liability insurance required of a contractor pursuant to section 7 of this act and the telephone number of the insurance company issuing the certificate; and
>
> (3) The total price or other consideration to be paid by the owner, including the finance charges.

N.J.S.A. 56:8-151(a). The contract must include a "conspicuous notice printed in at least 10-point bold-faced type" that notifies the consumer of their ability to cancel the contract at any time before midnight of the third business day after receiving a copy of the contract. N.J.S.A. 56:8-151(b).

It is not disputed that the registration number, a copy of the insurance certificate and the insurer's telephone number were not included in the contract between the parties. Nor is there no evidence that the 3-day review provision was "conspicuously" included in the contract. Each of these omissions also constitutes a violation of the CRA, which qualifies as an unlawful practice under the NJCFA.

While the other elements of a successful cause of action under the NJCFA might be established, i.e., an ascertainable loss and a casual connection between the unlawful conduct and the ascertainable loss,[18] the

[18] A question is presented as to whether the plaintiff's ascertainable losses were occasioned as a result of the debtor's regulatory violations. Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 560, 964 A.2d 741, 751 (2009) ("a plaintiff

primary missing element, for purposes of a nondischargeability complaint under § 523(a)(2)(A), is the element of intent to deceive. Regulatory violations which constitute unlawful practices under NJCFA are subject to a standard of strict liability, and intent is not an element. Allen v. V and A Bros., Inc., 208 N.J. 114, 133, 26 A.3d 430, 442 (2011); Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 556, 964 A.2d 741, 748-49 (2009); Cox v. Sears Roebuck & Co., 138 N.J. 2, 18, 647 A.2d 454, 462 (1994); Ulokameje v. Content, 2012 WL 75136, *6 (N.J. App. Div. Jan. 11, 2012). Therefore, the fact that the debtor violated the NJCFA does not entitle the plaintiff to a claim under the Act that is nondischargeable through the debtor's bankruptcy case.

In light of my conclusion that the critical element of intent to deceive has not been established against the debtor by a preponderance of the evidence in this case, I need not review the other aspects required to be shown to establish

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who cannot prove the causal link between the asserted regulatory violation and his loss cannot find relief within the CFA"). The damages asserted by the plaintiff appear to be contractual in nature, relating to the debtor's poor workmanship and failure to complete the contracted job. There may not to be a causal connection between the regulatory violations and the plaintiff's actual damages. See, e.g., Kort v. Van Aswegen, 2011 WL 5137833, *1 (N.J. App. Div. Nov. 1, 2011). (The regulatory violations committed by the contractor were not the cause of the plaintiffs' losses.). See also Czmyr v. Avalanche Heating and Air Conditioning, Inc., 2011 WL 519871 (N.J. App. Div. Feb. 16, 2011) (concluding that the plaintiff did not suffer an ascertainable loss attributable to the CRA/CFA violations); Dream Builders v. Estate of Paton, 2010 WL 1924776 (N.J. App. Div. May 14, 2010) (the defendant did not suffer a loss as a result of the contractor's violation of regulations requiring it to include its registration number and the insurer's telephone number in the contract and to reduce all change orders to writing).

nondischargeability, including justifiable reliance by the plaintiff, and damages proximately resulting from the false representations

I am certainly sympathetic to the serious hardships endured by the plaintiff and her house-mate as a result of the failure of this project occasioned by the actions and inactions of the debtor, and recognize that the debtor clearly incurred a debt to the plaintiff as a matter of breach of contract. However I cannot conclude that all of the elements required to be shown to establish nondischargeability under section 523(a)(2)(A) have been met on this record.

CONCLUSION

The plaintiff's request to declare the debt due to her from the debtor as nondischargeable under 11 U.S.C. § 523(a)(2)(A) is denied. The complaint shall be dismissed with prejudice.

An order has been entered herewith.

Dated: May 29, 2012

JUDITH H. WIZMUR
CHIEF JUDGE
U.S. BANKRUPTCY COURT