

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

In re:

DAYTON FULLER,

Debtor.

Case No.00-04155-TOM-7

ROBERT TURNER, JR.

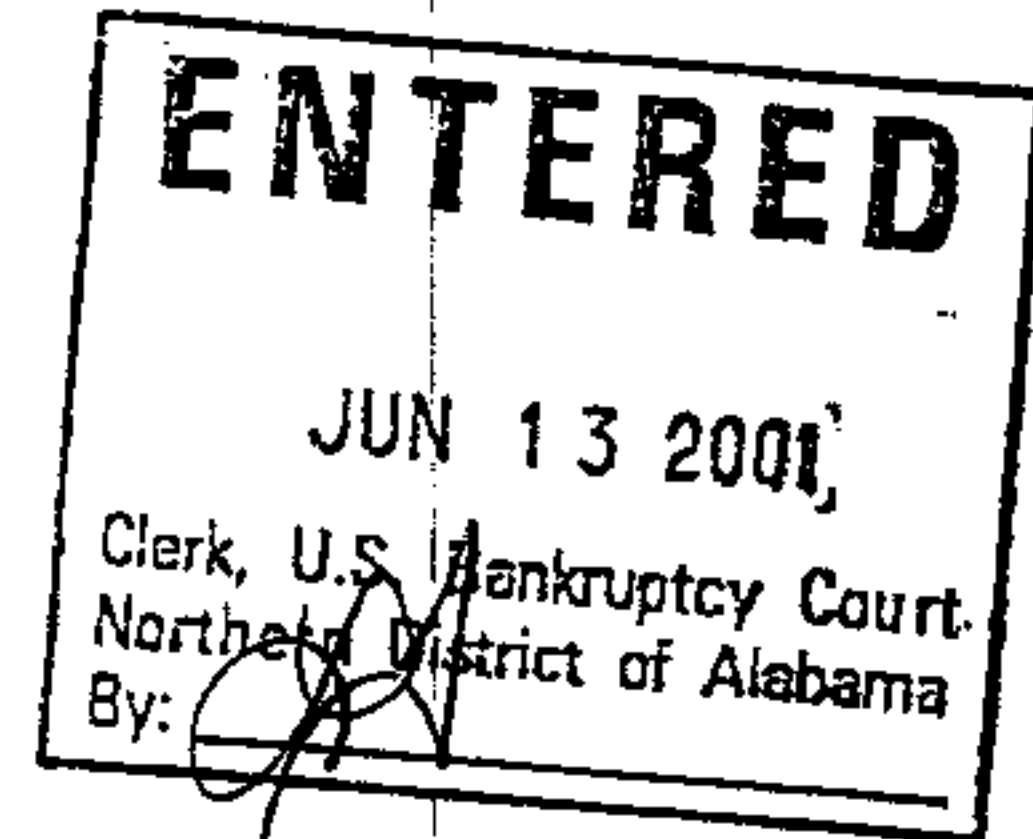
Plaintiff,

vs.

DAYTON FULLER,

Defendant.

A.P. No. 00-00292



JUDGMENT AND ORDER

In conformity with the Memorandum Opinion entered contemporaneously herewith, it is hereby

ORDERED, ADJUDGED, AND DECREED that the debt owed to Robert Turner, Jr. is determined to be **NONDISCHARGEABLE**.

Dated this 13th day of June, 2001.

Tamara O. Mitchell
TAMARA O. MITCHELL
United States Bankruptcy Judge

08/10/2001-33793
12:00 PM CERTIFIED
SHELBY COUNTY JUDGE OF PROBATE
013 CH 47.00

TOM: jdW

xc: Julia S. Stewart, counsel for Plaintiff,
David E. Hampe, Jr., counsel for Defendant/Debtor,
Andre' M. Toffel, Chapter 7 Trustee,
Dayton Fuller, Debtor.

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In re:

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d/b/a C & B HOMES

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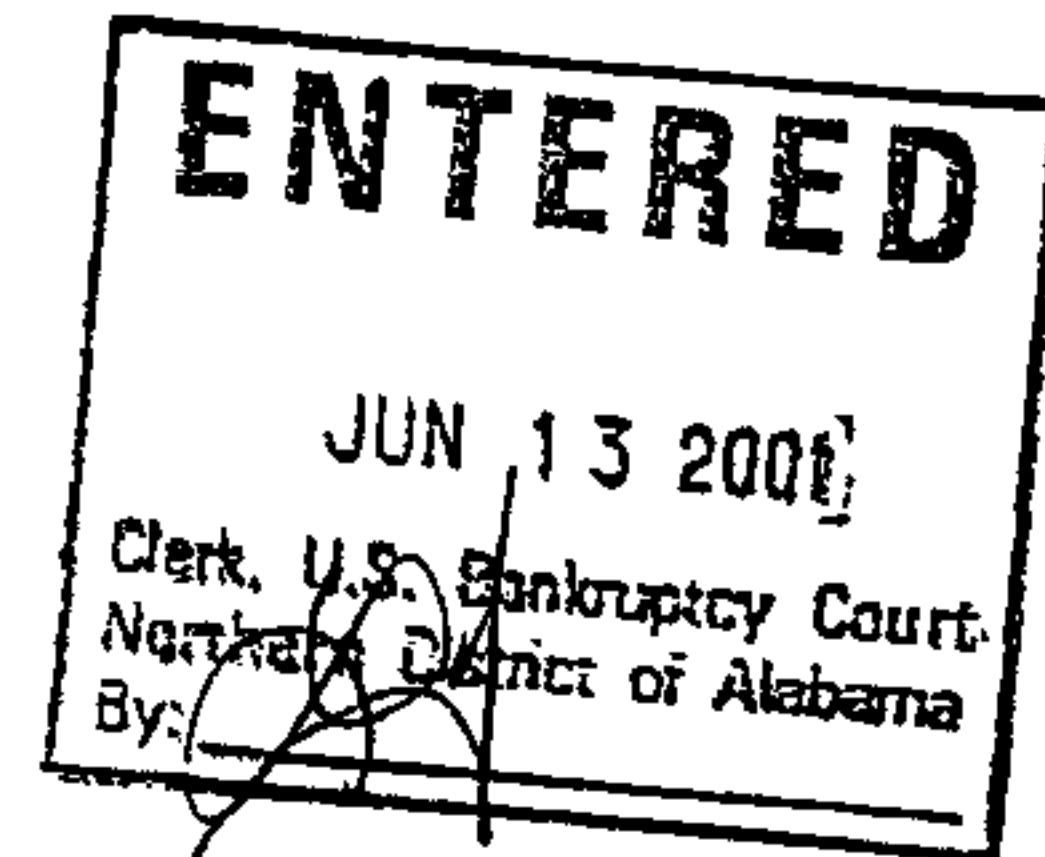
Plaintiff,

vs.

DAYTON FULLER,

Defendant.

A.P. No. 00-00292



MEMORANDUM OPINION

This matter comes before the Court on a Complaint to Determine Dischargeability of Debt filed by Robert Turner, Jr. on October 10, 2000. Appearing at the final hearing on May 22, 2001, were Julia S. Stewart, counsel for the Plaintiff Robert Turner, Jr. ("Plaintiff") and David E. Hampe, Jr., counsel for the Debtor/Defendant Dayton Fuller ("Debtor"). This Court has jurisdiction pursuant to 28 U.S.C. §§1334(b), 151, and 157(a)(1994)¹ and the district court's General Order Of Reference

¹ 28 U.S.C. § 1334(b) provides:

Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

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Dated July 16, 1984, As Amended July 17, 1984.² This is a core proceeding as set out in 28 U.S.C. §157(b)(2)(I).³ This Court must decide whether the debt owed to the Plaintiff is nondischargeable pursuant to 11 U.S.C. § 523(a)(2). This Court has considered the pleadings, testimony, and the law, and finds and concludes as follows.⁴

28 U.S.C. § 151 provides:

In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or by order of the district court.

28 U.S.C. § 157(a) provides:

Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for that district.

² The General Order of Reference Dated July 16, 1984, As Amended July 17, 1984 issued by the United States District Court for the Northern District of Alabama provides: The general order of reference entered July 16, 1984 is hereby amended to add that there be hereby referred to the Bankruptcy Judges for this district all cases, and matters and proceedings in cases, under the Bankruptcy Act.

³ 28 U.S.C. § 157(b)(2)(I) provides:

(b)(2)Core proceedings include, but are not limited to—
(I) determinations as to the dischargeability of particular debts[.]

⁴ This Memorandum Opinion constitutes findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52, applicable to adversary proceedings in bankruptcy pursuant to Federal Rule of Bankruptcy Procedure 7052.

I. FINDINGS OF FACT⁵

On October 16, 1998, Plaintiff and Debtor entered into a contract ("the Contract") whereby Debtor would construct a home for Plaintiff. (Plaintiff's Ex. 1). The Contract provided a purchase price of \$88,050 with a scheduled completion date of March 1, 1999. *Id.* At some point during Contract negotiations, Plaintiff testified that he asked Debtor if he had a builder's license and inquired about building permits.⁶ Plaintiff recalls that Debtor replied that he did have a builder's license and that he would obtain all required permits. Plaintiff testified that he would not have entered into the Contract with the Debtor if he had known that in fact, Debtor was not and is not a licensed builder.

In November of 1998, Debtor began work on the house as scheduled. Plaintiff also testified that Debtor obtained a permit and it was posted at the site. As the building continued, Plaintiff made payments to Debtor. These payments apparently were not tied to specific completion points because Plaintiff paid approximately \$78,050 and testified that the house was only 55% complete when he terminated the Debtor in July of 1999. By early Spring of 1999, work on the house began to stall and Plaintiff became concerned when the house was not finished by the scheduled completion date. Plaintiff went to the Shelby County Licensing Department to ensure that everything was in order. The Department did not have the Debtor listed as a licensed builder. The permit office located the permit application for Plaintiff's house and found that Carl Schoettlin's name was on the permit

⁵ Pursuant to Federal Rule of Evidence 201, the Court may take judicial notice of the contents of its own files. *See ITT Rayonier, Inc. v. U.S.*, 651 F.2d 343 (5th Cir. Unit B July 1981); *Florida v. Charley Toppino & Sons, Inc.*, 514 F.2d 700, 704 (5th Cir. 1975).

⁶ Debtor testified that this conversation never took place but this Court finds Plaintiff to be more credible because his memory and recollection seemed clearer.

application.

Carl Schoettlin is a friend of the Debtor who is a licensed builder and at some point, Debtor obtained a copy of Schoettlin's license card. (Debtor's Ex. 1). Debtor used Schoettlin's license number and name to obtain the building permit from Shelby County for Plaintiff's house. Debtor also signed Schoettlin's name on the permit application. (Plaintiff's Ex. 3). At trial, Debtor admitted using Schoettlin's number and signing his name on permit applications for several houses since 1997. Debtor testified that he had "blanket permission" to use Schoettlin's identity and/or license to obtain these permits. Schoettlin testified that he gave Debtor permission to use his card to build his first house in 1997 but gave no permission thereafter. Schoettlin also sent a letter to the American Arbitration Association declaring that he was unaware that Debtor had used his license to permit Plaintiff's house and that Debtor did not have permission to use his license on that occasion. (Plaintiff's Ex. 4).

When Plaintiff confronted Debtor about Schoettlin's name being on the permit, Debtor's response was, "Different people use different licenses." Plaintiff did not terminate Debtor at this point in hopes that the house would still be completed. When the house was not completed and work further slowed in mid-July of 1999, Plaintiff terminated Debtor. Many of the subcontractors Debtor had hired would not complete the job for fear of not being paid so Plaintiff and his father acted as the contractor and hired other subcontractors to finish the house. The house was finally completed the day before Plaintiff moved in on December 1, 1999.

Pursuant to the terms of the Contract, Plaintiff took the dispute with the Debtor to the American Arbitration Association. (Plaintiff's Ex. 1 ¶ 12). When contacted about the arbitration hearing, Debtor informed Plaintiff that he would not cooperate nor participate in the hearing in any

way. In his testimony at the trial of this proceeding, Debtor acknowledged that he had been given notice of the hearing but he did not attend. The arbitrator awarded Plaintiff \$45,145.67 in costs plus arbitration expenses and attorney's fees. (Plaintiff's Ex. 2). Debtor listed the arbitration award as a general unsecured debt in his bankruptcy schedules. (Bankr. Proceeding No. 1 Sched. F). Plaintiff then brought this adversary proceeding seeking to have this debt determined nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

II. CONCLUSIONS OF LAW

Section 523 of the Bankruptcy Code outlines the exceptions to discharge in bankruptcy proceedings. Exceptions to discharge are to be construed strictly against the objecting creditor in order to give effect to the fresh start policy of the Bankruptcy Code. *See Hope v. Walker (In re Walker)*, 48 F.3d 1161 (11th Cir. 1995), *Equitable Bank v. Miller (In re Miller)*, 39 F.3d 301 (11th Cir. 1994). Toward this goal, the objecting creditor bears the burden of proving the elements of nondischargeability by a standard of preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279 (1991). Plaintiff alleges that this debt is nondischargeable pursuant to § 523(a)(2)(A).⁷

Section 523(a)(2)(A) provides that a debt for money, property, services, or an extension,

⁷ 11 U.S.C. § 523 provides in part:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) 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[.]

renewal, or refinancing of credit will not be discharged 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. This Circuit has determined the elements of a § 523(a)(2)(A) claim to be “(1) the debtor made a false representation to deceive the creditor, (2) the creditor relied on the misrepresentation, (3) the reliance was justified, and (4) the creditor sustained a loss as a result of the misrepresentation.” *SEC v. Bilzerian (In re Bilzerian)*, 153 F.3d 1278, 1281 (11th Cir. 1998). *See also Field v. Mans*, 516 U.S. 59, 73-75, 116 S. Ct. 437, 445-446 (1995) (holding that section 523(a)(2)(A) requires justifiable, but not reasonable, reliance).

The first element is easily satisfied. Debtor made a false representation to deceive the Plaintiff when Plaintiff inquired about Debtor’s license. Plaintiff testified that when he asked Debtor if he had a builder’s license, Debtor replied that he was so licensed. In fact, Debtor knew that he was not licensed and testified to that effect. Although there is no direct evidence of Debtor’s intent to deceive other than the fact that he made the misrepresentation, circumstantial evidence of intent is sufficient. *See AT & T v. Mercer (In re Mercer)*, 246 F.3d 391, 409 (5th Cir. 2001) (en banc) (circumstantial evidence of intent in § 523(a)(2)(A) case is sufficient). *Cf. Huntington Center Partners, Ltd. v. Dupree (In re Dupree)*, 197 B.R. 928, 937 (Bankr. N.D. Ala. 1996) (circumstantial evidence of intent sufficient in § 727(a)(4) nondischargeability case). It is clear that Debtor made this misrepresentation in order to induce the Plaintiff to enter into the Contract. Debtor also knew that he would use Schoettlin’s license and sign Schoettlin’s name on the permit application, but Debtor did not disclose nor share this fact with Plaintiff. Whether Debtor had Schoettlin’s

permission to do so is of no import in this action.⁸

The second element is also satisfied. Plaintiff testified that he relied upon Debtor's representation that he was licensed in Alabama. Plaintiff further testified that he never would have hired Debtor had he known that Debtor was not licensed. This Court finds Plaintiff's testimony to be credible. Had Plaintiff been indifferent regarding Debtor's license, he never would have inquired about it during contract negotiations. The fact that Plaintiff did not terminate the Contract mid-stream when he learned of the misrepresentation is of no consequence. *See Central Nat'l Bank & Trust Company v. Liming (In re Liming)*, 797 F.2d 895 (10th Cir. 1986) (No waiver or estoppel applied when rather than call a loan that a bank learned had been obtained by fraud, the bank chose to execute a renewal note in an effort to keep the debtor afloat and "make the best of a bad situation.").

The third element is whether Plaintiff's reliance on Defendant's assertions was justifiable. In establishing the parameters of "justifiable reliance," the Supreme Court quoted from § 540 of the Restatement (Second) of Torts: "[t]he Restatement expounds upon justifiable reliance by explaining that a person is justified in relying on a representation of fact 'although he might have ascertained the falsity of the representation had he made an investigation.'" *Field v. Mans*, 516 U.S. 59, 70, 116

⁸ Debtor had a legal obligation to obtain a valid homebuilder's license himself before undertaking to build Plaintiff's home. ALA. CODE § 34-14A-5 (1997). Further, this Court notes that Alabama Code § 34-14A-14 (1997) provides in part:

[a]ny person who undertakes or attempts to undertake the business of residential home building without first having procured a valid license, which has neither expired or been revoked, required by the provisions of this chapter or who knowingly presents to, or files false information with the board for the purpose of obtaining the license or who violates any law or code adopted by a county commission under this chapter shall be deemed guilty of a Class C misdemeanor.

S. Ct. 437, 444 (1995). The Court goes on to quote an illustration from the Comments to § 540 of the Restatement (Second) of Torts:

Significantly for our purposes, the illustration is given of a seller of land who says it is free of encumbrances; according to the Restatement, a buyer's reliance on this factual representation is justifiable, even if he could have 'walk[ed] across the street to the office of the register of deeds in the courthouse' and easily have learned of an unsatisfied mortgage.

Id.

While it is true that Plaintiff could have learned of Defendant's falsehood by verifying Debtor's license with the proper authorities, the Plaintiff can not be charged with such a duty under the facts of this case. The Eleventh Circuit has held that:

[i]t is only where, under the circumstances, the facts should be apparent to one of plaintiff's knowledge and intelligence from a cursory glance, or he has discovered something which should serve as a warning that he is being deceived, that he is required to make an investigation of his own.

City Bank & Trust Co. v. Vann (In re Vann), 67 F.3d 277, 283 (11th Cir. 1995) (quoting W. Page Keeton, Prosser & Keeton on Torts § 108, at 752 (5th ed. 1984)). This is the only home Plaintiff has ever built. He had no reason not to rely on Debtor's assertion that he was licensed, especially given that Debtor had been building homes for several years. There was nothing to trigger any suspicions or indicate that Debtor was not licensed until it became apparent that the home would not be finished on schedule. Plaintiff's reliance was justified in this case.

The final element is whether the Plaintiff sustained a loss as a result of the misrepresentation. Plaintiff's loss arises from the Debtor's failure to finish the home and his attempts to discharge the obligation in bankruptcy which, without this procedure, would result in Plaintiff's expenditure of over \$120,000 to have an \$88,050 house built. Plaintiff paid Debtor approximately \$78,050 under

the Contract. Plaintiff's total arbitration award of \$47,488.57 was the only evidence of the amount of damage sustained by Plaintiff due to Debtor's breach and fraud.⁹ (Plaintiff's Ex. 2). Debtor put on no evidence to refute this amount and testified that he could not refute these figures. Plaintiff's award includes costs for subcontractors, arbitration fees and attorney's fees. This entire amount constitutes Plaintiff's damages and is due to be determined nondischargeable. *Cohen v. de la Cruz*, 523 U.S. 213 (1998) (Any liability arising from debtor's fraud, including attorney's fees, is nondischargeable under §523(a)(2)(A) even if it exceeds value obtained by the debtor.). *See also, Pleasants v. Kendrick (In re Pleasants)*, 219 F.3d 372 (4th Cir. 2000) (entire debt resulting from fraudulent inducement to contract based on contractor's misrepresentation that he was licensed declared nondischargeable); *Morlang v. Cox*, 222 B.R. 83, 86 (W.D. Va. 1998).

Even if this Court had not found that Debtor committed actual fraud by misrepresenting to the Plaintiff that he had a license, the debt could still be determined nondischargeable if he engaged in "false pretenses" and satisfied the other elements of § 523(a)(2)(A). "False pretense" in the context of 11 U.S.C. § 523(a)(2)(A) means:

any intentional fraud or deceit practiced by whatever method in whatever manner. False pretenses may be implied from conduct or may consist of concealment or non-disclosure where there is a duty to speak, and may consist of any acts, work, symbol or token calculated and intended to deceive. It is a series of events, activities or communications which, when considered collectively, create a false sense and misleading set of circumstances, or a false and misleading understanding of a transaction, by which a creditor is wrongfully induced by a debtor to transfer property or extend credit to the debtor. Silence or concealment as to a material fact can constitute false pretenses.

FCC Nat'l Bank v. Gilmore (In re Gilmore), 221 B.R. 864, 872 (Bankr. N.D. Ala. 1998) (citations

⁹ The arbitration hearing was held without the participation of Debtor. Although Debtor testified that he had notice of the time and place of the arbitration hearing, he chose not to attend.

omitted). This Court concludes that Defendant engaged in a false pretense when he presented Schoettlin's license when obtaining the building permit from Shelby County for the house. Debtor admitted at trial that he told Plaintiff that he would obtain all necessary permits for construction of the house. Debtor knew that to obtain the permit he would misrepresent to the County that he had a valid contractor's license. When Debtor presented Schoettlin's license to the County and signed Schoettlin's name to the permit application, his scheme was complete. (Plaintiff's Ex. 3). Debtor knew that he was not licensed but did not disclose to Plaintiff that he would be using a licensed contractor's name, license number and signature. Debtor also knew that the County would assume that he was licensed when he presented Schoettlin's number and Schoettlin's signature on the permit application.¹⁰ Debtor's conduct, including his lack of disclosure, constitute a scheme and through that scheme he obtained a permit by false pretenses. It was that permit that allowed him to begin construction on Plaintiff's house.

¹⁰ Debtor testified that he had permission to use Schoettlin's license number and had done so for years. Schoettlin testified that Debtor did not have permission to use his license number. Schoettlin's letter to the American Arbitration Association also indicates in no uncertain terms that Debtor did not have permission. (Plaintiff's Ex. 4). Regardless of whether Debtor had permission, assuming the identity of a licensed contractor in order to obtain permits was not intended nor is it permissible under the Alabama Code. The Code provides:

In the interest of the public health, safety, welfare, and consumer protection and to regulate the home building and private dwelling construction industry, the purpose of this chapter, and the intent of the Legislature in passing it, is to provide for the licensure of those persons who engage in home building and private dwelling construction, including remodeling, and to provide home building standards in the state of Alabama. The Legislature recognizes that the home building and home improvement construction industries are significant industries. Home builders may pose significant harm to the public when unqualified, incompetent, or dishonest home building contractors and remodelers provide inadequate, unsafe, or inferior building services. The Legislature finds it necessary to regulate the residential home building and remodeling construction industries.

ALA. CODE § 34-14A-1 (1997). *See also supra* page 4 and note 7.

The Debtor's silence when he knew he was creating a false impression leads this Court to the conclusion that he has engaged in false pretenses. As noted above, Plaintiff justifiably relied on Defendant's representations and/or omissions and was damaged as a result.

III. CONCLUSION

This Court finds that Plaintiff has satisfied all the elements of 11 U.S.C. § 523(a)(2)(A) under both a fraud theory and a false pretenses theory. Subsection (A) is expressed in the disjunctive so either theory is sufficient to deem this debt nondischargeable. Accordingly, it is hereby

ORDERED, ADJUDGED, AND DECREED that the debt owed to Robert Turner, Jr. is determined to be **NONDISCHARGEABLE**.

Dated this the 13th day of June, 2001.

/s/ Tamara O. Mitchell
TAMARA O. MITCHELL
United States Bankruptcy Judge

TOM:jdww

xc: Julia S. Stewart, counsel for Plaintiff,
David E. Hampe, Jr., counsel for Defendant/Debtor,
Andre' M. Toffel, Chapter 7 Trustee,
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