

**United States Bankruptcy Court
Northern District of Illinois
Eastern Division**

Transmittal Sheet for Opinions

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Bankruptcy Caption: In Re: John and Rosalyn Robbins

Bankruptcy No.: 01 B 05725

Adversary Caption: Father & Sons Remodelers, Inc. v. John and Rosalyn Robbins

Adversary No.: 01 A 00667

Date of Issuance: October 22, 2001

Judge: Carol A. Doyle

Appearance of Counsel:

Attorney for Movant or Plaintiff: Steven R. Shamash

Attorney for Respondent or Defendant: Joseph Wrobel

Trustee or Other Attorneys:

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In Re:)	No. 01 B 05725
)	
JOHN AND ROSALYN ROBBINS,)	
)	
Debtors.)	
_____)	Honorable Carol A. Doyle
)	
FATHER & SONS REMODELERS, INC.,)	
)	
Plaintiff,)	
)	
v.)	Adversary No. 01 A 00667
)	
JOHN AND ROSALYN ROBBINS,)	
)	
Defendants.)	

MEMORANDUM OPINION AND ORDER

This matter is before the court on defendants John and Rosalyn Robbins' (the "Robbins" or "Debtors") Motion to Dismiss Adversary Complaint. Plaintiff Father & Sons Remodelers, Inc. ("Father & Sons") filed a Complaint Objecting to Discharge of Certain Debt pursuant to 11 U.S.C. § 523(a)(2)(A), alleging that the Robbins induced Father & Sons to perform under a contract by false pretenses.

Father & Sons alleges as follows: On July 15, 1997, Father & Sons and the Robbins executed a contract for the construction of an addition to Debtors' home, with the understanding that the Robbins would obtain mortgage financing to cover construction expenses. In January 1998, without notifying Father & Sons, the Robbins executed a contract with another contractor to construct the same

addition. In March 1998, Debtors asked Father & Sons to proceed with construction, indicating that financing was pending and funds for payment were available. Father & Sons then hired a subcontractor, who performed excavation work and laid a foundation in preparation for the addition. At the time the Robbins induced Father & Sons to perform, they possessed an intent not to pay for the services. Debtors subsequently breached the contract and had the other contractor complete the addition.

On July 2, 2001, Father & Sons filed a Complaint Objecting to Discharge of Certain Debt pursuant to 11 U.S.C. § 523(a)(2)(A). On July 27, 2001, the Robbins filed a Motion to Strike and Dismiss Adversary Complaint. The motion alleged that Father & Sons' complaint simply alleged a breach of contract, which is insufficient for nondischargeability under § 523(a)(2). On September 13, 2001, Father & Sons filed a Response to Defendants' Motion to Dismiss, alleging that the Robbins' motion was inadequate in form and on the merits.

The Robbins do not cite any provision of the Federal Rules of Civil Procedure in support of their motion. However, a court may look beyond the technical language employed in a motion to dismiss to reach the substance of a movant's contentions. Travel All Over the World, Inc. v. Kingdom of Saudi Arabia, 73 F.3d 1423, 1428-29 (7th Cir. 1996). Presumably, the Robbins' motion is based upon Rule 12(b)(6), failure to state a claim upon which relief can be granted. When considering a motion to dismiss, the court "must accept as true all the factual allegations in the complaint," Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 164 (1993), and must also construe the pleadings in the light most favorable to the plaintiff. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds, Davis v. Scherer, 468 U.S. 183

(1984); Pickrel v. City of Springfield, 45 F.3d 1115, 1118 (7th Cir. 1995); Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund, 25 F.3d 417, 420 (7th Cir. 1994). Because proof of intent can be difficult to obtain, circumstantial evidence of intent is permissible. See Haeske v. Arlington (In re Arlington), 192 B.R. 494, 498 (Bankr. N.D. Ill. 1996) (Squires, J.). When a plaintiff alleges circumstances constituting fraud, however, Rule 9(b) requires that the facts supporting the motion be stated with particularity. Fed. R. Civ. P. 9(b); see also Volpert v. Volpert (In re Volpert), 1994 WL 605894, at *1, 7 (Bankr. N.D. Ill. 1994) (Schmetterer, J.). Knowledge and intent, on the other hand, need only be averred generally. Fed. R. Civ. P. 9(b); see also Baltimore Spice Co. v. B.J. Packing, Inc. (In re B.J. Packing, Inc.), 1991 WL 335436, at *3 (Bankr. N.D. Ohio Dec. 5, 1991).

To prevail on a complaint to determine dischargeability for a false representation or false pretenses, Father & Sons must establish the following three elements: (1) the Robbins obtained money, property, services, or an extension, renewal or refinancing of credit from it by making representations that they either knew to be false or made with such reckless disregard for the truth as to constitute willful misrepresentation; (2) the Robbins acted with an intent to deceive; and (3) Father & Sons justifiably relied on the Robbins' false statements to its detriment. See Mayer v. Spanel Int'l, Ltd., 51 F.3d 670, 673-74 (7th Cir. 1994); Goldberg Sec., Inc. v. Scarlata (In re Scarlata), 979 F.2d 521, 525 (7th Cir. 1992); Federal Sign v. Fultz (In re Fultz), 232 B.R. 709, 720 (Bankr. N.D. Ill. 1999) (Squires, J.).

In this case, Father & Sons has asserted that the Robbins represented that they would and could pay for services to be rendered pursuant to the contract. Based upon the Robbins' execution of a similar contract with another contractor prior to the inducement, Father & Sons asserts that the

Robbins' representations were knowingly false or made with reckless disregard for the truth.

Furthermore, it concludes that the Robbins had an intent to deceive at the time the representations were made. Father & Sons asserts that it relied upon the representations, as evidenced by its partial performance under the contract. Moreover, it avers that its reliance on those representations was justifiable in light of the contract itself. As a result of the representations, Father & Sons incurred a financial detriment, reflected in a state court judgment for \$20,000.00, for the work performed and attorneys' fees.

The Robbins are correct in their assertion that a breach of contract, without more, is insufficient to make out a § 523(a)(2)(A) case. See In re Murphy, 190 B.R. 327, 333 (Bankr. N.D. Ill. 1995) (Barliant, J.). However, accepting Father & Sons' allegations as true, it was the subsequent inducement by the Robbins, not the mere execution of the contract, which formed the basis for the § 523(a)(2)(A) claim. Moreover, the existence of a contract with another contractor for the same work at the time of the representation constitutes circumstantial evidence of an intent by the Robbins to deceive. Therefore, Father & Sons has pled facts sufficient to satisfy the requisite elements of § 523(a)(2)(A) and the motion to dismiss is denied.

October 22, 2001

CAROL A. DOYLE
United States Bankruptcy Judge

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Plaintiff,)	
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JOHN AND ROSALYN ROBBINS,)	
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CERTIFICATE OF SERVICE

I, Kathleen K. Wachtel, certify that on October 22, 2001 I caused the attached Memorandum

Opinion and Order to be served on the persons listed below via U.S. First Class Mail:

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