IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
The Honorable Michael E. Romero

In re: THEOPHILUS SHAWN WILLIAMS, Debtor.	Case No. 18-11655 MER Chapter 13
EMESE WILLIAMS, Plaintiff. v. THEOPHILUS SHAWN WILLIAMS, Defendant.	Adv. Case No. 18-01197 MER

ORDER

After over two years of heated litigation before this Court, and several more before the District Court for Weld County, Colorado ("**Weld County District Court**"), the parties presented their remaining claims at trial. The record is now closed, and the Court is ready to submit its final ruling, closing at least one chapter of this saga.

BACKGROUND FACTS

The history of the parties' relationship and events preceding the underlying bankruptcy case have been detailed by this Court on numerous occasions.[1] For the sake of clarity, the Court will outline those facts again based on the record before it.

Plaintiff Emese Williams ("**Ms. Williams**") and Debtor-Defendant Theophilus Shawn Williams ("**Debtor**") were previously married and were parties to a dissolution of marriage action filed in the Weld County District Court.[2] Following the submission of the parties' Sworn Financial Statements,[3] the Weld County District Court entered written orders in the dissolution of marriage proceeding on May 23, 2017, and September 12, 2017.[4]

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[1] *See* ECF Nos. 23 and 82.

[2] *See* Exh. 3 ("**Stipulated Order**").

[3] *See* Exh. 9.

[4] *See* Stipulated Order and Exh. 2 (September 12, 2017 Order).

Through the Stipulated Order, Ms. Williams and Debtor agreed to sell their marital residence located at 10167 Falcon Street, Firestone Colorado ("**Property**"), and further agreed on a real estate agent for sale by a date certain with each party receiving 50% of the net sale proceeds from the Property after payment of all costs related to the sale.[5] Additionally, the Stipulated Order provided for Ms. Williams to receive $900 per month of rental income from the Property.[6] Ms. Williams and Debtor also agreed to equally divide the funds in the Debtor's 401(k) account, payable within 30 days of receipt of the proceeds from the sale of the Property.[7] Prior to the entry of the Stipulated Order, Ms. Williams filed a Notice of *Lis Pendens* with respect to the Property with the Weld County Clerk and Recorder.[8]

The Property was not listed for sale by the deadline set in the Stipulated Order, and as a result the Weld County District Court subsequently awarded Ms. Williams the first $24,800 of the proceeds from the sale of the Property, with the remaining sale proceeds to be divided equally.[9] With respect to the 401(k) account, the Weld County District Court found Debtor withdrew all of the funds from the account and failed to pay Ms. Williams her one-half share.[10] The court reduced Ms. Williams's share of the 401(k) account to a judgment in the amount of $7,121.50, with 8% annual interest.[11] With respect to the rental payments, the Weld County District Court likewise entered a judgment in Ms. Williams's favor in the amount of $4,500 with 8% annual interest.[12] The Weld County District Court's order required that Debtor satisfy those judgment debts, along with another judgment for past-due child support and maintenance payments, from the proceeds of the sale of the Property.[13]

By January 2018, the Property still had not been sold. In fact, Debtor moved back into the Property following the end of a tenancy in approximately February 2018[14]

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[5] Stipulated Order at p. 2.

[6] *Id.*

[7] *Id.* at p. 3.

[8] Exh. 4. The Court notes Exhibit 4 is a copy of the "Notice of Recordation of *Lis Pendens*" filed with the Weld County District Court. The Notice references a specific date and document number for the recorded *lis pendens*, but a copy of the recorded *lis pendens* was not provided to the Court. Given that the Debtor did not dispute a *lis pendens* had been filed, the Court will accept Exhibit 4 as evidence of the same.

[9] Exh. 2 at p. 1.

[10] *Id.* at p. 3. *See also* Exhs. 6, 7, and 8.

[11] Exh. 2. at p. 3.

[12] *Id.*

[13] *Id.*

[14] Exh. 5.

and refused to sign a listing agreement with realtor Kathryn Ruhl ("**Ruhl**").[15] As a result, Ms. Williams again sought relief from the Weld County District Court,[16] and in an order entered March 3, 2018, the court appointed Ruhl as the broker to handle to sale of the Property, ordered the parties to sign a listing contract, and ordered Ms. Williams and the Debtor to fully cooperate with Ruhl.[17] Before the next status hearing in the divorce proceedings, the Debtor commenced the underlying bankruptcy case.[18] The Property had not sold before the Debtor filed bankruptcy.[19]

By the time this matter reached trial, Ms. Williams had two remaining claims for relief against the Debtor: one seeking a determination of Ms. Williams's ownership in the Property, the other a determination of nondischargeability of the judgments entered by the Weld County District Court.[20] The Debtor, for his part, brought only one remaining counterclaim to trial,[21] seeking damages for an alleged violation of the automatic stay.

ANALYSIS

A. Ms. Williams's Claims Against the Debtor

1. Ms. Williams's Claim to Determine Ownership of the Property

Ms. Williams's first claim for relief seeks a determination of her ownership interest in the Property and its sale proceeds pursuant to § 541(d).[22] Ms. Williams also requests entry of judgment imposing an equitable trust over the Property to carry out the terms of the orders entered by the Weld County District Court. Section 541(d) of the Code provides "property of the estate" includes:

> Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate under [§ 541(a)(1) or (2)] only to the extent of the debtor's legal title

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[15] Exh. 10.

[16] *See* Exh. 1.

[17] Id.

[18] *See* ECF No. 1 in the underlying administrative case, Case No. 18-11655-MER.

[19] *See id.*

[20] *See* ECF Nos. 23 and 82.

[21] *See* ECF No. 23.

[22] Unless otherwise specified, all references herein to "Section," "§," and "Code" refer to Title 11 of the United States Code, 11 U.S.C. § 101, *et seq*.

> to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.[23]

"On its face, § 541(d) thus excludes from the estate property that the debtor holds in constructive trust for another."[24] Because the Weld County District Court awarded Ms. Williams $24,800 plus one-half of the remaining equity in the Property, Ms. Williams argues § 541(d) excludes her interest in the Property from property of the Debtor's bankruptcy estate. Ms. Williams further argues the imposition of a trust over her one-half of the remaining equity would remove it from the Debtor's bankruptcy estate. The Debtor, on the other hand, asserts the orders from the Weld County District Court are merely garden-variety spousal property division orders, which are subject to a Chapter 13 discharge pursuant to § 1328.

As the Court noted in its Order on the Debtor's Motion for Summary Judgment,[25] the Colorado Supreme Court in *In re Questions Submitted by the U.S. District Court for the District of Colorado* addressed the creation of an equitable trust at the time a dissolution of marriage action is filed.[26] There the Colorado Supreme Court stated:

> During the marriage, and absent any divorce action, the parties have their separate property and, possibly subject to an exception or two, can dispose of it as he or she desires. . . . [I]t has always been the law here—and still is—that in the dissolution proceeding a wife may be entitled to a division of the husband's property. That right, prior to the dissolution action and possibly subject to an exception or two, is completely inchoate.
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> However, at the time of the filing of the dissolution action in which the division of property will be later determined, a vesting takes place. This interest which has vested is inchoate only in the sense that, prior to the division, the property to be transferred to the wife has not yet been determined. Upon and after the filing of the action, the rights of the wife are analogous to those of a wife who can establish a resulting trust, irrespective of a divorce action, in the property of the husband. We use this analogy because we are not saying that after the filing of the divorce action it is necessary for both spouses to enter into the conveyance of property held in the name of only one. Upon the filing of the action the court may protect this vested interest of the wife pending the division order, even though the property to be transferred to her has not yet been determined.[27]

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[23] 11 U.S.C. § 541(d).

[24] *In re Ebel*, 155 B.R. 510, 514 (D. Colo. 1992).

[25] ECF No. 82.

[26] 517 P.2d 1331 (Colo. 1974) (en banc).

[27] *Id.* at 1335.

With respect to the Property at issue, prior to the dissolution action, Ms. Williams merely had an inchoate interest therein because it was titled solely in the Debtor's name. Upon commencing the dissolution action, however, the inchoate interest vested in Ms. Williams, and the Weld County District Court's final orders thereafter governed the extent of Ms. Williams's interest in the Property. Moreover, while a non-debtor's equitable interest in property may not *always* result in such interest property being excluded from a creditor's reach,[28] in this case Ms. Williams's vested interest became an encumbrance of record upon filing the *lis pendens.* As in the Colorado Supreme Court's hypothetical, the *lis pendens* represents the Weld County District Court's efforts to "protect this vested interest of the wife pending the division order[.]"[29] The Debtor would have been unable to unilaterally dispose of the Property because of the outstanding *lis pendens*. The anti-alienation powers coupled with Ms. Williams's vested interest powers constitute an equitable interest in the Property that Debtor does not hold.

Therefore, the Court determines Ms. Williams's interest in the Property is not property of the estate and is valued at 50% plus $24,800 of the equity therein. To the extent necessary, Ms. Williams is granted relief from the automatic stay to return to the Weld County District Court in order to effectuate this order.

2. Ms. Williams's Claim to Determine Nondischargeability of Debts

In her second claim for relief,[30] Ms. Williams seeks an order providing the amounts owed to her by Debtor as determined by the Weld County District Court are nondischargeable pursuant to § 523(a)(2)(A). Section 523(a)(2)(A) provides an exception from discharge for 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.[31]

As previously stated by the Court, "'[t]o provide a basis for excepting a debt from discharge, the [d]ebtor's alleged fraud must have existed at the time the debt was

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[28] *See In re Harms*, 7 B.R. 398 (Bankr. D. Colo. 1980) (finding a vested interest resulting from a dissolution proceeding, without a recorded *lis pendens* or other form of perfection, was avoidable pursuant 11 U.S.C. § 544(a)).

[29] *In re Questions Submitted by the U.S. District Court for the District of Colorado*, 517 P.2d at 1335.

[30] The Court notes Ms. Williams's original Complaint contained four claims for relief. *See* ECF No. 1. Her second and third claims for relief were dismissed. *See* ECF No. 23. While the Amended Complaint states "The Second Claim for Relief and Third Claim for Relief have been deleted," for the sake of clarity the Court will refer to what is titled as the "Fourth Claim for Relief" as the second claim.

[31] 11 U.S.C. § 523(a)(2)(A).

incurred."[32] As such, in order for Ms. Williams to succeed in her § 523(a)(2) claim, she must show Debtor had no intention of complying with the Stipulated Order *before* it was entered on May 23, 2017. Mere unwillingness to comply with the terms after the fact is insufficient to establish nondischargeability, but "[t]he court may consider not only the debtor's conduct at the time of the representations, but may consider subsequent conduct, to the extent that it provides an indication of the debtor's state of mind at the time of the actionable representations."[33]

As evident by the language of the statute, a successful claim under § 523(a)(2)(A) may be proved by demonstrating false pretenses, a false representation *or* actual fraud. The common thread is a debtor's intent to defraud a creditor.[34] The Bankruptcy Appellate Panel for the Tenth Circuit explained the § 523(a)(2)(A) framework as follows:

> To sustain a claim for false representation under Section 523(a)(2)(A), the claimant must prove by a preponderance of the evidence that: 1) the debtor made a false representation; 2) with the intent to deceive the creditor; 3) the creditor relied on the false representation; 4) the creditor's reliance was [justifiable]; and 5) the creditor was damaged as a result. *Fowler Bros v. Young (In re Young),* 91 F.3d 1367, 1373 (10th Cir. 1996). Intent to deceive can be inferred from the totality of the circumstances. *Copper v. Lemke (In re Lemke),* 423 B.R. 917, 922 (10th Cir. BAP 2010) (citing *Young,* 91 F.3d at 1375).
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> False pretenses under Section 523(a)(2)(A) are implied misrepresentations intended to create and foster a false impression. Unlike false representations, which are express misrepresentations, false pretenses include conduct and material omissions. . . . False pretenses can be "defined as any series of events, when considered collectively, that create a contrived and misleading understanding of a transaction, in which a creditor is wrongfully induced to extend money or property to the debtor." *Stevens v. Antonious (In re Antonious),* 358 B.R. 172, 182 (Bankr. E.D. Pa. 2006) (citing *Rezin v. Barr (In re Barr),* 194 B.R. 1009, 1019 (Bankr. N.D. Ill. 1996)).
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> A claimant may also sustain a claim under Section 523(a)(2)(A) by proving that the debtor engaged in actual fraud. . . . Actual fraud occurs "when a debtor intentionally engages in a scheme to deprive or cheat another of

[32] *Young v. Young (In re Young)*, 181 B.R. 555, 558 (Bankr. E.D. Okla. 1995).

[33] *In re Mowdy*, 526 B.R. 63, 79 (Bankr. W.D. Okla. 2015) (citing *Wolf v. McGuire (In re McGuire)*, 284 B.R. 481, 492-93 (Bankr. D. Colo. 2002)).

[34] *Bank of Cordell v. Sturgeon (In re Sturgeon)*, 496 B.R. 215, 223 (10th Cir. BAP 2013).

property or a legal right." *Id.* at 690 (quoting *Mellon Bank, N.A. v. Vitanovich (In re Vitanovich),* 259 B.R. 873, 877 (6th Cir. BAP 2001)).[35]

Ms. Williams asserts her claim against the Debtor is nondischargeable under all three theories of nondischargeability of § 523(a)(2)(A), and the Court will address each in turn.

a. Nondischargeability Based on False Representations

Ms. Williams asserts the Debtor made false representations with respect to the value of his 401(k) accounts and the withdrawals therefrom, as well as his failure to cooperate with listing the Property for sale. After reviewing the evidence presented to the Court, however, Ms. Williams has not established the Debtor made false representations with the intent to deceive her.

With respect to the Debtor's agreement to cooperate in the sale of the Property, Ms. Williams has not provided sufficient evidence to show the Debtor made false representations *prior to* the entry of the Stipulated Order. Ms. Williams did not present specific representations the Debtor made that were false with respect to the Property during the relevant time frame. Instead, the evidence presented shows the Debtor agreed to cooperate with efforts to sell the home and actually did attempt to sell the home. By May 2017 the Debtor had received an offer for sale of the Property, but the sale was not completed due to the *lis pendens* filed by Ms. Williams and her refusal to agree to the sale. While the Court recognizes the Stipulated Order required the Debtor to cooperate with Ms. Williams with respect to sale, and in fact he failed to do so in early 2018, the evidence does not support a finding he did not intend to fulfill his agreement to sell the Property and split the proceeds at the time the Stipulated Order was entered.

As to representations concerning the 401(k) account, Ms. Williams asserts the Debtor misrepresented the loans against, and other withdrawals from, the 401(k) account to mislead her into believing the value of the account was much lower. The evidence presented, however, showed the Debtor provided Ms. Williams with a copy of the account statement for the period ending on July 26, 2016[36] during the dissolution proceeding. Ms. Williams does not allege, and the evidence does not support, that this statement was in any way manipulated by the Debtor or showed false information. Instead, the statement conspicuously disclosed the value of assets in the 401(k) account as well as any outstanding loans against it. Moreover, the Stipulated Order provided Ms. Williams with an equal division of the value of the funds in the account as of the date of the order, which is to be paid out of proceeds from the sale of the Property. In other words, whether the Debtor represented there was $500 or $5,000 in the account, Ms. Williams would still have been entitled to the same one-half share of whatever was there.

[35] *Id.* at 222–23.

[36] Exh. 8.

Accordingly, the Court finds Debtor did not make false representations concerning the value of the 401(k) account. Alternatively, the Court finds Ms. Williams's damages could not have arisen from any alleged misrepresentations. As such, Ms. Williams's claim based on false representations must fail.

b. Nondischargeability Based on False Pretenses

As with her allegations of the Debtor's false representations, Ms. Williams asserts the Debtor engaged in false pretenses concerning the value of his 401(k) account and his intent to cooperate with the sale of the Property. Ms. Williams points specifically to Debtor's Sworn Financial Statement submitted in the dissolution proceeding,[37] which omitted the existence of the 401(k) account entirely. Ms. Williams also emphasizes the Debtor's failure to advise her of the withdrawals from the 401(k) account prior to entering into the Stipulated Order. As stated above, however, Ms. Williams indicated she received a copy of the Debtor's 401(k) statement, which she relied upon in negotiating the property division. Moreover, the Stipulated Order provided the amounts to be paid to Ms. Williams were to be paid from the sale proceeds from the Property,[38] and at that time the Debtor was actively seeking to sell the Property and had a contract for the sale at or near the time the Stipulated Order was entered. As such, the Court finds any omissions made by the Debtor with respect to the value of the account or withdrawals therefrom were not intended to defraud Ms. Williams.

As to the failure of the Debtor to cooperate with the sale of the Property, Ms. Williams again highlights the Debtor's refusal to enter into a mutually agreed upon listing agreement but fails to consider the Debtor's own attempts at selling the Property. Ms. Williams points to the Debtor's refusal to cooperate with Ruhl after the Stipulated Order was entered as evidence he did not intend to comply with such order, however, the Debtor made efforts to effectuate a sale of the Property, albeit with a broker of his own, which took place around the time the Stipulated Order was entered. The Court finds this evidence indicates Debtor's good faith intent with respect to the sale of the Property at the time he agreed to the Stipulated Order. As such, the Court finds Ms. Williams failed to meet her burden of establishing the Debtor wrongfully induced her to entered into the stipulated property division by any conduct or omissions.

c. Nondischargeability Based on Fraud

Finally, Ms. Williams alleges the Debtor engaged in actual fraud when entering into the Stipulated Order. Ms. Williams again argues as supporting her claim the Debtor's withdrawals from his 401(k) account, failure to accurately disclose the amount of funds within the account, failure to cooperate in the sale of the Property, and Debtor's refusal to pay Ms. Williams's share of rental payments received from the Property. Ms. William asserts the Debtor's actions show an intentional scheme to defraud her of the Property and funds she was owed in the dissolution case.

[37] Exh. 9.

[38] Stipulated Order at p. 3.

For the reasons stated above with respect to the 401(k) account and the sale of the Property, the Court finds Ms. Williams failed to meet her burden of establishing the Debtor acted with fraudulent intent with respect to his obligations under the Stipulated Order. While ultimately the Debtor did not comply with the Stipulated Order, his actions and the circumstances at and more closely surrounding the time such order was entered do not support a finding of his unwillingness to comply.

As to the Debtor's failure to submit to Ms. Williams the $900 from the rental income from the Property, the Court likewise finds Ms. Williams did not meet her burden of establishing the Debtor had fraudulent intent at the relevant time. The Debtor testified although the tenant of the Property paid all rent due from April 2017 through the end of his tenancy in February of 2018, all the funds he received after the property management company deducted their fees were forwarded straight to the mortgage company. According to the Debtor, the monthly rent amount was $2,000, while the management agreement provided for a 10% fee to be deducted as payment for their services.[39] The Court fines this testimony credible. Taking judicial notice of the Debtor's schedules filed in the administrative case,[40] after payment of the monthly mortgage, there was no "rental income" left to be paid to Ms. Williams.[41] While the Debtor's understanding of the Stipulated Order may have been incorrect as demonstrated by the subsequent monetary award for the failure to turn over the $900 per month, Ms. Williams has not met her burden of establishing the Debtor never intended to comply with the Stipulated Order.

B. The Debtor's Counterclaim Against Ms. Williams

In the Debtor's sole remaining counterclaim, he alleges Ms. Williams exercised control over property of the estate in violation of § 362(a)(3) by causing the Weld County Child Support Enforcement System and Family Registry to refuse and return $4,359.72 in domestic support obligation payments by Debtor. Section 362(a)(3) provides "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate" is a violation of the automatic stay.[42] In Chapter 13 cases, property of the estate includes not only the property included under § 541(a), but also "earnings from services performed by the debtor after commencement of the case, but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first."[43]

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[39] Exh. 12.

[40] *See Hutchinson v. Hahn*, 402 F. App'x 391, 394-95 (10th Cir. 2010).

[41] The Court notes this would be the case without taking into consideration any repair expenses needed for the Property during the tenancy.

[42] 11 U.S.C. § 362(a)(3).

[43] 11 U.S.C. § 1306(a)(2).

At trial Geoffrey Shirley ("**Shirley**"), an enforcement supervisor for Weld County Child Support Services, testified that while an obligee such as Ms. Williams could refuse to cash a payment, Weld County cannot prevent a payment from actually being sent out from the child support division.[44] Shirley further testified child support payments received from obligors are first applied to the current month's payment obligations, and then to any arrearages owed. Shirley testified any excess received over the current obligation and past arrearage amounts would be returned to the obligor and would not be applied to future payments not yet due.

Shirley testified his department had extensive communications with the parties in this case. Although he was not aware of Ms. Williams ever asking for payments to be returned or otherwise refusing payments, he confirmed the Debtor requested on several occasions for payments to be returned to him, generally due to multiple simultaneous wage deduction orders with the Debtor's employers. As relevant herein, the Payment Record shows payments or partial payments returned to the Debtor after the Petition Date on thirteen occasions.[45] While Shirley testified some of these returned payments were initiated by the Debtor, on several occasions funds were returned to the Debtor due to the department's policy not to enforce or apply excess payments to arrears balances when the obligor has filed bankruptcy, regardless of whether the arrears are for pre-petition or post-petition obligations.[46]

The Court found Shirley to be knowledgeable of the Payment Record and the parties in this case, and his testimony to be credible. Shirley's testimony established Ms. Williams did not exercise any control over the Debtor's domestic support obligation payments, and the Debtor failed to present any other evidence Ms. Williams caused the domestic support obligations payments to be refused or returned. As such, the Debtor's counterclaim must fail.

CONCLUSION

While the Court's Order does not resolve all matters between the parties, it does conclude the issues before this Court. The remaining issues will be addressed by the Weld County District Court. Accordingly, for the foregoing reasons,

IT IS HEREBY ORDERED judgment shall enter in favor of Ms. Williams on her claim under § 541(d) for determination her interest in the Property is not property of the Debtor's bankruptcy estate.

IT IS FURTHER ORDERED judgment shall enter in favor of the Debtor on Ms. Williams's claim for a determination of nondischargeability of debt under § 523(a)(2)(A).

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[44] *See* Exh. A ("**Payment Record**").

[45] *See id.* at pp. 1-4.

[46] Shirley later testified the department's policy has now changed such that excess payments received by an obligor in bankruptcy can be applied to post-petition arrears instead of being returned.

IT IS FURTHER ORDERED judgment shall enter in favor of Ms. Williams on Debtor's claim for damages for violation of § 362(a)(3).

IT IS FURTHER ORDERED this opinion shall constitute the Court's findings of facts and conclusions of law pursuant to Fed. R. Civ. P. 52(a) (made applicable by Fed. R. Bankr. P. 7052), and the Court will separately enter a final judgment pursuant to Fed. R. Civ. P. 58(a) (made applicable by Fed. R. Bankr. P. 7058).

Dated January 8, 2021

BY THE COURT:

Michael E. Romero, Chief Judge
United States Bankruptcy Court