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FILED

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

SEP 30 1986

CLERK, U.S.
BANKRUPTCY COURT
CASE NO.

In re:

Case Number:

JAMES E. LESTER

WF7-86-00453

Debtor.

SCHUETTE BUILDING CENTERS, INC.,

Plaintiff,

Adversary Number:

v.

86-147-7

JAMES E. LESTER, d/b/a
Town & Country Homes
of Minocqua, Inc.,

Defendant.

ORDER

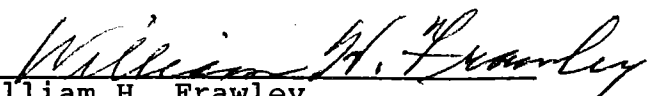
The court having this day entered its memorandum opinion,
findings of fact, and conclusions of law;

NOW, THEREFORE, IT IS ORDERED that the obligation owed by
the debtor to Schuette Building Centers, Inc., is found to be a
dischargeable debt.

IT IS FURTHER ORDERED that the complaint filed by Schuette
Building Centers, Inc., is hereby dismissed.

Dated: September 30, 1986

BY THE COURT:


William H. Frawley
U.S. Bankruptcy Judge

cc: Attorney Sharon M. Gisselman
Attorney Daniel D. Scrobell

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of Minocqua, Inc.,

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MEMORANDUM OPINION,
FINDINGS OF FACT, AND CONCLUSIONS OF LAW

Schuette Building Centers, Inc., (Schuette), by Sharon M. Gisselman, has initiated this proceeding pursuant to 11 U.S.C. § 523(a)(2)(A) and Bankruptcy Rule 4007 seeking to except a debt from discharge. The debtor appears by Daniel D. Scrobell and contests the complaint. The parties on July 30, 1986, entered into a written stipulation stating all the relevant facts in this proceeding and have submitted the issues to the court for determination through briefs.

The court will accept the stipulation of July 30, 1986, as a true statement of the facts. In re Marcott, 30 B.R. 633 (Bankr.

W.D. Wis. 1983). The debtors began purchasing building materials from Schuette in October of 1979, on open account. The debtor's account became delinquent and on April 25, 1982, the debtor executed a promissory note to Schuette for \$6,166.97. This note provided for monthly payments to Schuette in the amount of \$300.00.

Schuette continued to extend credit to the debtor on open account. The debtor did make some monthly payments on the account; however, the past due balance increased to the sum of \$13,569.40 in June of 1984. On June 4, 1984, Schuette commenced a civil action against the debtor for the open account and the promissory note dated April 25, 1982. In attempting to resolve the matter, the debtor agreed to turn over certain real estate to Schuette and consented to an entry of default judgment against him in the amount of \$6,927.80. As a part of this agreement, Schuette agreed to accept monthly payments in the amount of \$300.00 and agreed that it would not take action to enforce collection of the judgment so long as the monthly payments were made. The debtor was apparently not able to make the monthly payments and filed for relief under Chapter 7 of the Bankruptcy Code on February 26, 1986.

Schuette alleges that the debtor obtained credit by the use of false pretenses, false representations, or actual fraud. It contends that the obligation owed by the debtor should be excepted from discharge. Section 523(a)(2)(A) of the Bankruptcy Code provides:

§ 523. Exceptions to discharge.

(a) A discharge under section 727, 1141, 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;

In order to have a debt excepted from discharge under § 523(a)(2)(A) the plaintiffs must show that:

1.) The debtor obtained money ... through representations known to be false or made with reckless disregard for the truth amounting to willful misrepresentation;

2.) The debtor had an intent to deceive;
and,

3.) The creditor actually and reasonably relied on the representation.

Matter of Platt, 47 B.R. 70, 71 (Bankr. W.D. Wis. 1985). The plaintiffs have the burden of proving all of the elements of the exception. In re Pauli, (Bankr. W.D. Wis. Adv. 385-0353-7, Sept. 5, 1986).

Exceptions to discharge are construed strictly against creditors and liberally in favor of debtors. Gleason v. Thaw, 236 U.S. 558 (1915). "This doctrine is intended to fulfill the Congressional objective of providing debtors with a new opportunity of life and a clear field for future efforts unhampered by the pressure and discouragement of pre-existing debt." In re Hofkens, (Bankr. E.D. Wis. Adv. #85-0109, June 30, 1986). Hence, Schuette is required to show fraud by clear and convincing evi-

dence in order to meet its burden of proof. In re Newman, 13 B.R.128 (Bankr. E.D. Wis. 1981).

Schuette argues that the debtor implicitly misrepresented his ability to pay for the credit extended on the open account. Schuette also argues that the debtor implied that there was an ability to pay the indebtedness when the April 25, 1982, promissory note was executed. Finally, Schuette alleges that the debtor misrepresented his ability to pay when the debtor agreed to make monthly payments of \$300.00 in exchange for Schuette's promise not to enforce collection of the judgment. The court disagrees.

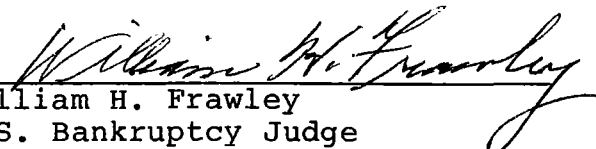
It is very doubtful that any of the representations of the debtor could be said to amount to fraud or willful misrepresentation. Certainly there was no intent to deceive. Finally, to the extent that Schuette could actually rely on the representations of the debtor, it is clear by Schuette's own actions that such reliance was not reasonable. Schuette should have become aware of the debtor's financial difficulties as early as 1982. In fact, Schuette was put on notice of the debtor's financial problems on April 25, 1982, when the promissory note was executed. Schuette was further made aware of the debtor's financial problems when it deemed it was necessary to commence the June 4, 1984, civil action. Schuette took a judgment against the debtor to protect itself from the debtor's financial difficulties. There could not have been "actual and reasonable reliance" by Schuette on a misrepresentation of the debtor. Instead, Schuette

is in the business of selling business materials. It makes money by selling building supplies. Schuette made a calculated business risk in extending credit to the debtor. It is the conclusion of the court that the debt owed to Schuette should not be excepted from discharge.

This opinion shall constitute findings of fact and conclusions of law in accordance with Bankruptcy Rule 7052.

Dated: September 30, 1986.

BY THE COURT:



William H. Frawley
U.S. Bankruptcy Judge