

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
HARRISON DIVISION**

In re: SPENCE HAROLD WILLIS, Debtor

**Case No. 3:04-bk-71344
Chapter 7**

JOHN AND DEBBIE BERRY

PLAINTIFFS

vs.

AP No. 3:04-ap-07161

SPENCE HAROLD WILLIS

DEFENDANT

MEMORANDUM OPINION

On June 18, 2004, the plaintiffs, John and Debbie Berry, filed their adversary proceeding to determine the dischargeability of a debt owed by the debtor, Spence Harold Willis. The debtor answered the adversary proceeding on July 28, 2004. After a number of continuances, the Court heard the adversary proceeding on April 13, 2006. At the conclusion of the trial, the Court found the debt non-dischargeable and reserved the issue of damages. This Court has jurisdiction over the adversary proceeding under 28 U.S.C. § 1334 and 28 U.S.C. § 157, and it is a core proceeding under 28 U.S.C. § 157(b)(2)(I). For the reasons stated below and on the record, the Court grants the plaintiffs' complaint and finds the entire referenced debt non-dischargeable in the debtor's bankruptcy case.

At the conclusion of the trial on April 13, 2006, the Court granted the relief requested in the plaintiffs' adversary proceeding and found the debt non-dischargeable based on findings of fact and conclusions of law stated on the record and incorporated by reference in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court found that the debtor obtained money by false pretenses, a false representation, or actual fraud pursuant to 11 U.S.C. § 523(a)(2)(A).¹ The Court did not determine the amount of the

¹ Section 523(a)(2)(A) states, in relevant part:

(a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt--

debt at the hearing, but found that, at a minimum, the “money obtained” in the amount of \$36,500.00, which is the amount the plaintiffs paid to the debtor, was non-dischargeable. The plaintiffs put on proof that as a result of the debtor’s actions with regard to the construction of the plaintiffs’ residential structure, they incurred breach of contract damages in the total amount of \$82,513.19, which includes the \$36,500.00 paid to the debtor. Pls’ Ex. 5. This figure did not include a reasonable attorney’s fee. The Court reserved the damages issue and allowed the parties ten days to bring to the Court’s attention any cases in support of their respective positions regarding the inclusion of the additional breach of contract damages in the damage award. The attorney for the plaintiffs supplied a letter brief to the Court on April 19, 2006.

In 1998, the Supreme Court ruled on a similar issue involving liability arising from a debtor’s fraudulent actions. *Cohen v. De la Cruz*, 523 U.S. 213 (1998). In *Cohen*, the debtor collected \$31,382.50 for rent payments in excess of the level permitted under a rent control statute. The bankruptcy court found that the debtor had committed actual fraud and that the action was an “unconscionable commercial practice” under the New Jersey Consumer Fraud Act. As a result, the court awarded treble damages in the amount of \$94,147.50. The issue before the Supreme Court was whether § 523(a)(2)(A) excepts from discharge the included punitive damages (the award of treble damages).

The Supreme Court held that any debt for money, to the extent the money was obtained by fraud, “encompasses any liability arising from money, property, etc., that is fraudulently obtained, *including . . . other relief that may exceed the value obtained by the debtor.*” *Id.* at 224 (emphasis added). The Court stated that,

an obligation to pay treble damages satisfies the threshold condition that it constitutes a “debt.” A “debt” is defined in the Code as “liability on a

(2) for money, property, services, or an extension, renewal, or refinancing of credit, 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.

claim,” § 101(12), a “claim” is defined in turn as a “right to payment,” § 101(5)(A), and a “right to payment,” we have said, “is nothing more nor less than an enforceable obligation.” *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 559, 110 S. Ct. 2126, 2131, 109 L. Ed. 2d 588 (1990). Those definitions “reflec[t] Congress’ broad . . . view of the class of obligations that qualify as a ‘claim’ giving rise to a ‘debt,’” *id.*, at 558, 110 S. Ct., at 2130-2131, and they plainly encompass treble damages: An award of treble damages is an “enforceable obligation” of the debtor, and the creditor has a corresponding “right to payment.”

Id. at 218. The Court said that the phrase ‘to the extent obtained by’ “makes clear that the share of money, property, etc., that is obtained by fraud gives rise to a nondischargeable debt. Once it is established that specific money or property has been obtained by fraud, however, ‘any debt’ arising therefrom is excepted from discharge.”

Id.

That is the situation in the present case. The Court found that the plaintiffs paid the debtor \$36,500.00 toward the construction of a residential structure, and that this amount was obtained by false pretenses, a false representation, or actual fraud pursuant to 11 U.S.C. § 523(a)(2)(A). In order to correct the work performed by the debtor and complete the structure, the plaintiffs were required to pay an additional \$46,013.19. Under the principal set forth in *Cohen*, that any debt arising therefrom is excepted from discharge, the Court finds the entire debt relating to the breach of contract non-dischargeable.

The plaintiffs also ask for their attorney fees. According to the Eighth Circuit Court of Appeals, attorney fees provided by contract can become part of a non-dischargeable debt under § 523(a)(2)(A). *Alport v. Ritter (In re Alport)*, 144 F.3d 1163, 1168 (8th Cir. 1998). Although the construction contract in this case does not provide for attorney fees to the prevailing party in the event of a contract dispute, Arkansas law does. According to the Arkansas Code, in any civil action to recover on breach of contract, “the prevailing party may be allowed a reasonable attorney’s fee to be assessed by the court and collected as costs.” Ark. Code Ann. § 16-22-308 (1999). The plaintiffs in this case

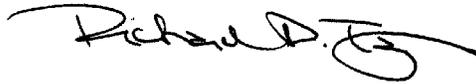
proved that a breach of contract occurred and were the prevailing party at trial. Accordingly, the Court assesses a reasonable attorney's fee of \$5000.00 for the prosecution of this action to be collected as costs.

A judgment in the amount of \$87,513.19 will be entered by the Court concurrent with this Memorandum Opinion in accordance with Federal Rule of Bankruptcy Procedure 9021.

IT IS SO ORDERED.

April 25, 2006

DATE



RICHARD D. TAYLOR
UNITED STATES BANKRUPTCY JUDGE

cc: Spence Harold Willis
Gail Inman-Campbell