

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

In re: : Case No. 05-73544
: :
TOBIAS HAROLD ELSASS, : Chapter 7 (Judge Preston)
: :
Debtor. : SSN: XXX-XX-8185

JOHN C. CAMPBELL :
: :
and : :
: :
HARRIETT LYNNE CAMPBELL, : :
: :
Plaintiffs, : :
: :
v. : Adv. Pro. No. 05- _____
: :
TOBIAS HAROLD ELSASS, : :
: :
Defendant. : :

COMPLAINT TO DETERMINE DISCHARGEABILITY

For their complaint against Debtor-Defendant Tobias Harold Elsass (“Defendant”), John C. Campbell and Harriett Lynne Campbell (“Plaintiffs”) hereby state as follows:

1. This adversary proceeding is commenced by Plaintiffs under Rule 7001(6) of the Federal Rules of Bankruptcy Procedure for a determination of non-dischargeability of a debt owed by Defendant to Plaintiffs pursuant to 11 U.S.C. §523(a)(2)(A).

2. This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §1334, 28 U.S.C. §157, and the order of reference entered by the District Court.

3. Venue is proper in this district by virtue of 28 U.S.C. §1409(a), as this proceeding arises in and relates to a case under the Bankruptcy Code pending in this district.

4. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I).

5. On September 5, 2001, Plaintiffs filed a complaint against Defendant in the Franklin County Common Pleas Court (“Common Pleas Court”) in case number 01CVH-09-8643, which complaint included a claim of fraud.

6. On January 11, 2002, the Common Pleas Court entered judgment for Plaintiffs by default and set the case for a hearing on damages before a Magistrate on February 12, 2002.

7. The Common Pleas Court Magistrate filed his Magistrate’s Decision on February 14, 2002, finding “a *prima facie* showing of the elements of fraud to exist” and awarding Plaintiffs compensatory and punitive damages totaling \$92,126.53. A copy of the Magistrate’s Decision is attached hereto as Exhibit A.

8. Defendant filed his objections to the Magistrate’s Decision on February 27, 2002.

9. On April 11, 2002, the Common Pleas Court filed its decision and order (“decision and order”) overruling Defendant’s objections to the Magistrate’s Decision and adopting the Magistrate’s Decision. A copy of the decision and order is attached hereto as Exhibit B.

10. Defendant filed his notice of appeal of the decision and order on May 13, 2002.

11. On May 15, 2002, the Common Pleas Court entered its Judgment Entry (“judgment entry”) granting judgment for Plaintiffs against Defendant in the sum of \$92,126.53, including an award of punitive damages for fraud, plus interest and costs (“Common Pleas Court judgment”). A copy of the judgment entry is attached hereto as

Exhibit C.

12. Defendant's appeal of the decision and order was dismissed October 24, 2002.

13. Defendant has no further right of appeal of the decision and order or the Common Pleas Court judgment.

WHEREFORE, Plaintiffs demand judgment against Defendant determining that that the Common Pleas Court judgment is non-dischargeable pursuant to 11 U.S.C. §523(a)(2)(A), and for such other and further relief as this Court may deem just and proper.

/s/ J. Steven Martin

J. Steven Martin (0011879)
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Attorney for Plaintiffs John C.
Campbell and Harriett Lynne Campbell

EXHIBIT A

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

John C. Campbell, et al.,	□	Case No. 01CVH09-8643
Plaintiffs,	□	JUDGE MCGRATH
vs.	□	MAGISTRATE MCCARTHY
Tobias H. Elsass, etc.,	□	
Defendant	□	

MAGISTRATE'S DECISION

Rendered February 14, 2002.

On February 12, 2002, this matter came on before this Magistrate for a damages hearing pursuant to the Court's Order of Reference entered herein on January 10, 2002. This is an action on a promissory note. The complaint also contains allegations of fraud. Plaintiff, John C. Campbell, offered testimony at the hearing. Defendant was not present at the hearing.

Mr. Campbell testified that he, along with his wife, made a sale of certain realty to defendant. In order to purchase the property, defendant was to have executed a promissory note and delivered a mortgage on the property to plaintiffs. Defendant did execute and deliver his promissory note in the principal amount of \$50,083.14. He did not, however, execute or deliver to plaintiffs a mortgage on the property. Campbell contacted defendant a number of times, but no executed mortgage was ever provided to him. Additionally, after making the agreed monthly interest-only payments on the note, defendant ceased making payments with the May 1, 2001 payment.

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On the matter of the promissory note, it is clear that defendant owes the entire principal amount plus interest that accrued after June 1, 2001. Thus, on the note, it is found defendant owes plaintiffs \$52,126.53 and judgment should be entered accordingly.

On the matter of the fraud claim related to the never-delivered mortgage, Campbell testified that not only did he make requests for the mortgage that were ignored, he has also suffered personal financial hardship caused by the nonpayment of the note and the inability to pursue remedies under the expected and bargained-for mortgage. He related that he has had to default on a payment on a 401(k) loan he had taken out.

In consideration of the matter of the claim for punitive damages, the Magistrate is mindful of the Franklin County Court of Appeals pronouncements in White Oak Communities v. Russell (11-9-99) Franklin App. No. 98AP-1563, unreported. In that case, the court observed:

In order to award punitive damages due to fraud, (third party plaintiff) must have demonstrated, in addition to proving the elements of the tort itself, "that the fraud is aggravated by the existence of malice or ill will, or must demonstrate that the wrongdoing is particularly gross or egregious." Charles R. Combs Trucking, Inc. v. International Harvester Co. (1984), 12 Ohio St. 3d 241, 466 N.E.2d 883, paragraph three of the syllabus. Malice requires that "the defendant possessed either (1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." Cabe v. Lunich (1994), 70 Ohio St. 3d 598, 601, 640 N.E.2d 159. A bare case of fraud or constructive fraud does not warrant the assessment of exemplary or punitive damages. Logsdon v. Graham Ford Co. (1978), 54 Ohio St. 2d 336, 339, 376 N.E.2d 1333.

Further, in considering the issues at hand, the Magistrate shall take judicial notice "of the rules of the supreme court of this state and the decisional . . . law of this state." Civ. R. 44.1(A), in part. In so doing, the Magistrate notes Columbus Bar Ass'n. v. Elsass (1999), 86 Ohio St. 3d 195 and Columbus Bar Ass'n. v. Elsass (1995), 74 Ohio St. 3d 174 wherein it appears defendant has been suspended from the practice of law on three occasions. The execution of the note with plaintiff and the non-delivery of the mortgage occurred while defendant was a licensed attorney¹ and adds to the overall character of defendant's egregious conduct practiced herein.

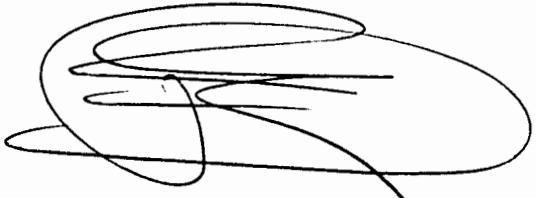
In many other cases involving the non-payment of a note and non-delivery of a mortgage punitive damages may not be appropriate. Here, however, defendant was on red alert concerning the conduct of an attorney demanded by the supreme court. Perhaps he had an explanation as to why he refused to deliver the mortgage as agreed, but none was forthcoming. Based upon the evidence and the overall circumstances presented, the conclusion must be drawn that a fraud was committed² and that defendant's behavior was ill motivated being in conscious disregard of others and the substantial harm that could be caused them. Upon consideration, the Magistrate finds a prima facie

¹ It appears defendant's second suspension order was lifted merely six weeks prior to the transaction involving plaintiffs.

² Fraud is defined as: (1) a representation or, where there is a duty to disclose, concealment of a fact; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation or concealment; and (6) a resulting injury proximately caused by the reliance. Williams v. Aetna Fin. Co. (1998), 83 Ohio St. 3d 464. Moreover, defendant was in default and is therefore deemed to have admitted the factual allegations of the complaint. Ohio Valley Radiology Associates, Inc. v. Ohio Valley Hosp. Ass'n (1986), 28 Ohio St. 3d 118 and see, Civ. R. 8 (D).

showing of the elements of fraud to exist in this case and would grant the claim for punitive damages and assess them against defendant in the amount of \$40,000.

Counsel for plaintiffs shall prepare the necessary judgment entry in accordance with Loc. R. 25.



Timothy P. McCarthy, Magistrate

Copies to:

J. Steven Martin,
Counsel for Plaintiffs

Tobias H. Elsass,
Defendant

Robbin Linton,
Magistrates' Secretary

EXHIBIT B

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

John C. Campbell, et al.,

Plaintiffs,

v.

Tobias H. Elsass, et al.,

Defendants.

Case No. 01CVH-09-8643

Judge McGrath

**DECISION AND ORDER OVERRULING DEFENDANT'S OBJECTIONS TO
MAGISTRATE'S DECISION, FILED FEBRUARY 27, 2002**

and

**DECISION ADOPTING MAGISTRATE'S DECISION, RENDERED
FEBRUARY 14, 2002**

Rendered this 10th day of April, 2002.

McGRATH, J.

This matter is before the Court upon defendant's objections to Magistrate McCarthy's Decision rendered February 14, 2002. Plaintiff filed a Memorandum Contra. The court has reviewed all memorandum filed in this matter.

A hearing on this matter was conducted before Magistrate McCarthy on February 12, 2002 pursuant to this court's Order of Reference for a damages hearing. Plaintiffs obtained a default judgment against defendants on January 11, 2002. Magistrate McCarthy found that plaintiffs were entitled to payment on a promissory note in the amount of \$52,126.53. Magistrate McCarthy also found that a prima facie showing of the elements of fraud existed in this case and assessed an amount of \$40,000 in punitive damages.

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Defendant objects to the Magistrate's Decision contending that Magistrate McCarthy erred in awarding punitive damages. Defendant states that an award of punitive damages is not "appropriate nor supported by Ohio Case Law and must be set aside." Plaintiff states that defendant has offered no authority or other support for his position and that defendant has not complied with Civ. R. 53(E)(3)(b). The court agrees.

Civ. R. 53(E)(3)(b) states that "[o]bjections shall be specific and state with particularity the grounds of objection." In addition, Civ. R. 53 (E)(4)(b) provides that in ruling on objections, "[t]he court may adopt, reject, or modify the magistrate's decision, hear additional evidence, recommit the matter to the magistrate with instructions, or hear the matter." Civ. R. 53(C)(2) sets forth the various powers a magistrate may use in order to render a decision. Included are the powers to rule on the admissibility of evidence, examine witnesses under oath, and call parties to the action and examine them under oath.

Upon review, the court finds that the Magistrate considered all the relevant facts and rendered correct conclusions of law. Magistrate McCarthy's Decision discussed the Tenth District's position on punitive damages and the Ohio Supreme Court's position on the definition of fraud. Magistrate McCarthy discussed the facts and the law and determined that a prima facie case of fraud existed and that punitive damages in the amount of \$40,000 were warranted. Defendant fails to provide any argument or rationale to support this objection. Accordingly, the Court **OVERRULES** defendant's objections and **ADOPTS** Magistrate McCarthy's Decision rendered February 14, 2002.

IT IS SO ORDERED.



Patrick M. McGrath, Judge

Copies to:

J. Steven Martin
Counsel for Plaintiffs

Tobias H. Elsass
Defendant

EXHIBIT C

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

JOHN C. CAMPBELL, et al.,

Plaintiffs,

v.

TOBIAS H. ELSASS dba
DON ASH PROPERTIES, et al.,

Defendants.

CASE NO. 01CVH-09-8643

JUDGE MCGRATH

MAGISTRATE MCCARTHY

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JUDGMENT ENTRY

Upon Plaintiff's Motion for Default Judgment, judgment herein was granted by default on January 11, 2002 on the issue of liability only. The Court referred the matter to Magistrate McCarthy for a determination of damages to be paid by Defendants, which came on for hearing on February 12, 2002. On February 14, 2002, Magistrate McCarthy filed his Magistrate's Decision, recommending judgment for Plaintiffs in the sum of \$52,126.53, plus interest, plus an award of punitive damages in an amount of \$40,000. The Magistrate's Decision was adopted by the Court's order entered April 10, 2002.

It is therefore ORDERED that judgment be and hereby is entered for Plaintiffs John C. Campbell and H. Lynn Campbell aka Harriett L. Campbell against Defendants (i) Tobias H. Elsass dba Don Ash Properties, (ii) Tobias H. Elsass, and (iii) Don Ash Properties, jointly and severally, in the sum of \$92,126.53, plus interest and costs of this proceeding. The Court expressly finds that there is no just cause for delay in the entry of

this judgment.

IT IS SO ORDERED.

PATRICK M. MCGRATH, JUDGE

SUBMITTED BY:



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