UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

NICOLE SBARBATI — Case No. 01-15975 K

Debtor

JAY M. FISHER, JR.

Plaintiff

-vs- — AP No. 02-1001 K

NICOLE SBARBATI
aka Nicole Conway

Defendant

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Attorney for Plaintiff

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After trial, the Court finds that the Plaintiff's evidence falls far, far short of the requisite burden of proof[1] in several regards. So far short, in fact, that the Court might have

[1]The burden is "fair preponderance." *Grogan vs. Garner*, 489 U.S. 279 (1991).

awarded attorneys fees and costs against the Plaintiff under 11 U.S.C. § 523(d), had the Debtor presented evidence of her good intentions.

The Court finds the following:

1. There is no proof that the pool was defective when the Debtor said that it was in good working order. The only evidence offered is that the water bills were "abnormally high," according to the Plaintiff, and so the pool had to have been leaking when the Debtor owned it. Only by a far cry might the Court conclude therefrom that the Debtor knew the bills were higher than they should have been and if so, knew that the difference was a leak, rather than, for example, evaporation. The Plaintiff's assertion that the bills were "abnormally high" while the Debtor owned the property is simply too circumstantial to prove fraud.

2. There is no proof that the Debtor's promise to deliver the pool in good working order was a "false promise," rather than a "broken promise." Bankruptcy is intended to relieve debtors of promises that they did not or could not keep despite having honest intentions. Only a "false promise" - - a promise that the promisor has no intention of keeping at the time it is made - - could conceivably constitute fraud. Not only is there no evidence that the Debtors' promises were false, the pool was cleaned as agreed. (The Debtor's two promises regarding the pool were: 1. It will be cleaned. 2. It will be in proper order. Perhaps she had no intention of performing one of two promises, but such surmise is not proof. Rather, performance of one of two promises operates in her favor.)

3. There is no proof that the Debtor knew the difference between Gunite and cement when she said that the pool was Gunite. And there is no evidence that the Plaintiff would

not have bought the house had he known the truth.[2]

It must be emphasized that this is not a "pool" case, it is a "house" case. Plaintiff bought a house, not a pool. He had ample opportunity to satisfy himself that all of the major reasons that he was buying this house for this price were as they were claimed to be. Furnace, roof, plumbing, pool, foundation, etc., etc.,

Clearly he did not do so. Rather, he sued the Debtor over the pool, and he won. That means that the Debtor had contract liability. When she filed for bankruptcy relief, he sued her here in this Court for fraud. The exceptions to "buyer beware" are not *ipso facto* "fraud." "Buyer beware" is still the law in New York real estate transactions between private owners, except as to (1) concealment of a defect, and (2) knowingly false answers to specific questions. The Plaintiff's state court judgment established a contract liability that survived his acceptance of a deed. But a breach of contract that does not merge in a deed is not necessarily "fraud." This pool defect (if it existed at the time in question) could not have been concealed from an inspection had the Plaintiff chosen to perform one. This case rests entirely on the evidentiary effect of what the Plaintiff claims were "abnormally high" water bills received by the Debtor; such slender "proof" raises questions of frivolousness, in the filing of the Complaint. However, the Defendant's request for attorney's fees and costs is denied in light of her failure to present any evidence of her honest intentions.

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[2] This writer presided over the claims process in the 1990 (year) *Kayak* pools cases. A Kayak affiliate was Masterpiece Pools, an inground pool manufacturer. This writer takes judicial notice that pool salespersons do not all tell the truth always about the process they will use. Consequently, not all homeowners with pools are correctly informed about what they paid for and what they got. To prove fraud on this Debtor's part would require proof that she knew it was not Gunite. There was no such proof presented.

The Complaint is dismissed on the merits, for insufficient proof of fraud.

Dated: Buffalo, New York
October 29, 2002

/s/ Michael J. Kaplan

U.S.B.J.