

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

In re:)	
)	
KEVIN SHANNON,)	Case No. 20-10372-BFK
)	Chapter 7
)	
Debtor.)	
_____)	
)	
ROBERT COPYAK AND DONG)	Adversary Proceeding
PHUONG LE,)	No. 20-01045-BFK
Plaintiffs,)	
)	
V.)	
)	
KEVIN C. SHANNON,)	
)	
Defendant.)	
_____)	

JUDGMENT ORDER

This matter came before the Court for a trial on the merits on April 23, 2021, on the Plaintiff's Complaint to Determine Nondischargeability of Debt. Docket No. 1. Robert Copyak and Dong Phuong Le, Plaintiffs, Jesse I. Winograd, counsel for the Plaintiffs, and Kevin C. Shannon, *pro se* Defendant, appeared remotely for the hearing. For the reasons stated in the Courts' Findings of Fact and Conclusions of Law (Docket No. 44), it is

ORDERED:

1. Judgment is granted on Count I of the Amended Complaint in favor of the Plaintiffs and against the Defendant in the amount of **\$618,773.54** plus interest at the federal judgment rate from the entry of the judgment until paid, and an award of attorney's fees and costs.

2. The foregoing judgment will be declared to be non-dischargeable on Count II of the Amended Complaint under 11 U.S.C. § 523(a)(2)(A).
3. Count III under 11 U.S.C. § 523(a)(4) is dismissed without prejudice.
4. The Plaintiffs may submit an Affidavit of their attorney's fees and costs within 10 days of the entry of the Judgment Order in this action. The Defendant may file an Objection to the reasonableness of the fees within 10 days thereafter. The Court will rule on the reasonableness of the legal fees without a further hearing. Any award of attorney's fees and costs will be non-dischargeable under 11 U.S.C. § 523(a)(2)(A).
5. The Defendant is advised that he may appeal the Judgment Order by filing a Notice of Appeal with the Clerk of the Bankruptcy Court within 14 days after the entry of the Judgment Order.
6. The Clerk will mail copies of this Order, or will provide cm-ecf notice of its entry, to the parties below.

Date: Jun 4 2021
Alexandria, Virginia

/s/ Brian F Kenney
Brian F. Kenney
United States Bankruptcy Judge

Entered On Docket: June 7, 2021

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Pro se Defendant

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Defendant.)	
_____)	

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

This matter came before the Court on April 23, 2021, for a trial on the merits. The Plaintiffs, Robert Copyak and Dong Phuong Le, were present and represented by counsel, Jesse Winograd. The Defendant, Kevin C. Shannon, was present and represented himself, *pro se*. For the reasons stated below, the Court will enter a judgment in favor of the Plaintiffs and against the Defendant in the amount of \$618,773.54, plus interest at the federal judgment rate from the entry of the judgment, and will declare the judgment to be non-dischargeable under Bankruptcy Code Section 523(a)(2)(A).

Findings of Fact

The Court, having heard the evidence, makes the following findings of fact.

A. The Plaintiffs' Contract with Shannon Remodeling & Restoration, LLC.

1. The Plaintiffs are husband and wife, residing at [REDACTED], [REDACTED] (“the Property”). They purchased the Property in 2003.
2. The Defendant is the 100% owner of Shannon Remodeling & Restoration, LLC (“Shannon Remodeling”).
3. In 2014, the Plaintiffs decided to remodel their home. They interviewed seven to ten contractors, checked the contractors’ references, and visited other properties remodeled by the contractors.
4. The Plaintiffs were introduced to Mr. Shannon by Kevin Schmauder, of the Schmauder Group, which holds a general contractor’s license in D.C.
5. Mr. Schmauder, who started in the landscaping business, was uncomfortable handling a project of this scope, so he recommended Mr. Shannon to the Plaintiffs.
6. The Plaintiffs visited at least one of Mr. Shannon’s job sites. When they met with Mr. Shannon, Mr. Shannon represented to them: (a) that he was fully licensed in D.C. and (b) that he had the skills and the wherewithal to complete the project in a workmanlike manner. Specifically, Mr. Shannon represented to the Plaintiffs that he had particular expertise in remodeling older homes. On the licensing issue, Mr. Shannon represented to the Plaintiffs that he had worked as a general contractor on one other home in D.C., thereby implying that he was fully licensed in D.C.
7. Mr. Shannon further represented to the Plaintiffs that the project could be completed by an estimated completion date of December 2015.
8. Mr. Schmauder stayed involved for the landscaping portion of the project, but otherwise, Shannon Remodeling was the general contractor.

9. Mr. Schmauder testified that “he [Mr. Shannon] led us all [that is, the Plaintiffs and Mr. Schmauder] to believe that he could complete the job.”

10. On April 1, 2015, the parties entered into a Remodeling Contract (“the Contract”). Pl. Ex. 1.¹

11. The Contract identifies Shannon Remodeling & Restoration, LLC, as the contractor with a Virginia general contracting license. *Id.* at 1. It also identifies Schmauder Group, LLC, as holding the D.C. general contracting license. *Id.*

12. Although Mr. Shannon testified that he understood Schmauder Group to be the general contractor, and Shannon Remodeling a subcontractor, Mr. Schmauder, Mr. Copyak and Ms. Le all testified more convincingly that Shannon Remodeling was the general contractor, and Schmauder Group was a subcontractor for the landscaping portion of the job.

13. The Contract did not have a completion date (“TBD”), but the parties orally agreed on a completion date of December 1, 2015. They later agreed on an extension to December 24, 2015. Mr. Shannon represented to the Plaintiffs that he could complete the project by that date.

14. The Contract provided that “the Contractors” (meaning, Shannon Remodeling and Schmauder Group) would “obtain and pay for all trade and construction permits. . . .” *Id.* at 1.

15. The parties agreed on a fixed price of \$594,816.00 for the work. *Id.* at 5.

16. The Plaintiffs financed the contract with TD Bank. They made initial payments to Shannon Remodeling totaling \$90,000.00 from April to July 2015, which they withdrew from savings and their retirement accounts. Pl. Ex. 3.

¹ The Plaintiffs’ Exhibits will be referred to as “Pl. Ex. ___.” The Defendant did not submit any Exhibits.

17. After the initial \$90,000.00 in out-of-pocket deposits, the parties submitted construction draw requests, which were required to have invoices attached for materials purchased, to TD Bank. Pl. Ex. 6.

18. The Plaintiffs paid the Defendant an additional \$275,000.00, plus \$4,827.54 for two Change Orders. Pl. Ex. 3.

B. Delays in the Project.

19. The project started suffering from delays in August 2015, after the Plaintiffs had paid the \$90,000.00 in deposits and an additional \$65,000.00 from a TD Bank draw.

20. The Plaintiffs requested a build schedule from the Defendant, which he supplied in August 2015. This build schedule called for a completion date of December 24, 2015, which the Plaintiffs reluctantly accepted.

21. The Plaintiffs later requested another build schedule, which the Defendant supplied to them. This time, the completion date was pushed back to May 2016.

22. By December 2015, the Plaintiffs had paid the Defendant over \$300,000.00, more than half of the entire project budget.

23. In February and March 2016, after the Plaintiffs had taken another draw from TD Bank, they started asking questions about the status of the project. The rough-in was not completed and more than half of the budget had been spent.

24. Mr. Shannon requested another construction draw, but the Plaintiffs told him that he needed to get caught up and finish up the rough-in before they submitted another draw request.

25. In June 2016, the Plaintiffs requested Mr. Schmauder to return and assess the status of the project, which he agreed to do. Mr. Schmauder found that the work was

“unfinished,” “exposed,” and “un-permitted.” The Property was exposed to the elements and this led to rats entering the home. The lack of permitting for the plumbing, electrical, and mechanical work would, in Mr. Schmauder’s view, cause the Property to fail D.C. inspections. Although the project had a building permit, which the Architect pulled at the start, it had no permits for the plumbing, electrical, or mechanical work. Mr. Shannon and Shannon Remodeling are not licensed as plumbers, electricians, nor to perform mechanical work in the District of Columbia.

26. Mr. Schmauder sent an e-mail to the Defendant on September 19, 2016, requesting information on the licensing of the tradesman. Pl. Ex. 45. Mr. Shannon did not respond satisfactorily to the Plaintiffs.

27. In December 2016, the Plaintiffs were demanding “real action.” Pl. Ex. 44. They informed Mr. Shannon that his “assumed abandonment of the project” was unacceptable. *Id.*

28. The Plaintiffs assert that Mr. Shannon abandoned the project; Mr. Shannon says he was fired. It is not disputed that Mr. Shannon did not return to the project. The Plaintiffs and Mr. Schmauder compiled a list of the tasks that were not completed. Pl. Ex. 24.

29. In an effort to get the construction back on track, Mr. Schmauder purchased windows and doors for the project. Mr. Shannon signed two Confessed Judgment Promissory Notes for these items, but the Notes were never paid. Pl. Exs. 40, 41.

C. The Plaintiffs Hire Another Contractor.

30. In July 2017, the Plaintiffs engaged another contractor, Four Brothers, LLC, to complete the work.

31. Stuart Pumpelly of Four Brothers testified that the majority of the work that had been performed by Shannon Remodeling was not up to Code and would not pass D.C. inspection.

D. The Plaintiffs' Claimed Damages.

32. The Plaintiffs paid Four Brothers **\$144,731.80** for corrections to the work performed by Shannon Remodeling. Pl. Ex. 25.

33. The Plaintiffs introduced into evidence without objection a statement of their direct damages, that is, amounts they paid where the services were not performed or where the work was unusable and had to be replaced, totaling **\$241,145.81**. Pl. Ex. 27.

34. The Plaintiffs, therefore, have suffered direct damages in the amount of **\$385,877.61** (the total of Exhibits 25 and 27).

35. In addition, the Plaintiffs claim indirect, or consequential damages, as follows:

- **\$128,895.93** – “Added carrying costs.” This amount is for the interest paid on the TD Bank loan for the top three floors of the home that the Plaintiffs were not able to use.
- **\$104,000.00** – “Lost rental income.” This was for rent for the basement (the house was to be divided into 2 separate units) that the Plaintiffs lost from June 2016 through August, 2020, at the rental rate of \$2,000.00 per month.
- **\$26,947.84** – “Storage Costs.” This is for additional storage costs incurred.
- **\$101,774.00** – Ms. Le’s lost earnings. Ms. Le testified that she spent approximately 60% of her work weeks dealing with Mr. Shannon, and that she nearly lost her employment dealing with these issues.²

36. The Defendant did not introduce any evidence, and elected not to testify, in this adversary proceeding.

² The Plaintiffs’ Affidavit supporting the consequential damages was not introduced into evidence. It was used, however, to refresh their recollections as they were testifying. It is found at Docket No. 10, Ex. 1, in this adversary proceeding.

37. In his opening and closing arguments, Mr. Shannon suggested that he was terminated as a result of a “hostile work environment” created by the Plaintiffs. The Court saw no evidence of this, and in any event, the Court cannot fault the Plaintiffs for being upset or even angry with the lack of progress on their home.

38. Mr. Shannon also suggested that the delays were due, at least in part, to two change orders on the contract (“the Change Orders”). He did not, however, introduce any evidence as to how the Change Orders caused any significant delays.

E. The Defendant Files for Bankruptcy.

39. Mr. Shannon filed a Voluntary Petition under Chapter 7 with this Court on February 5, 2020. Case No. 20-10372-BFK.

40. The Plaintiffs timely filed this adversary proceeding on June 15, 2020.

Conclusions of Law

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and the Order of Reference entered by the U.S. District Court for this District on August 15, 1984. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I) (determinations as to the dischargeability of particular debts) for Counts II and III, and a non-core proceeding under 28 U.S.C. § 157(c) as to Count I. The Defendant has consented to the entry of a final judgment by this Court on the non-core portion of the case. *Wellness Int’l Network, Ltd. v. Sharif*, 575 U.S. 665, 670-71 (2015); Docket No. 4, Initial Scheduling Order, ¶ 5 (requiring any objection to the entry of a final order by the Bankruptcy Court to be filed within 30 days of entry of the Scheduling Order and promptly set for a hearing).

The burden of proof is on the Plaintiffs to prove their case by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991).

There are three Counts in the Plaintiffs' Amended Complaint. The Court will address each Count, below.

I. Count I – D.C. Consumer Protection Act.

The Property in this case is located in the District of Columbia. The Contract specifies D.C. law as the applicable law. Pl. Ex. 1, Terms and Conditions, ¶ 15. All of the work was performed in D.C. The Court, therefore, will apply D.C. law.

The D.C. Consumer Protection Act (“CPA”) provides that it shall be a violation of the Act to, among other things, misrepresent: (a) that goods or services have characteristics that they do not have; (b) that a person has approval, status or certifications that he or she does not possess; (d) that goods or services are of a particular standard or quality when they’re not; (e) any material fact which has a tendency to mislead; (f) by failing to state a material fact if such failure has the tendency to mislead; or (p) that repairs, alternations or modifications have been made and receiving remuneration therefore, when they have not been made. D.C. Code § 28-3904(a), (b), (d), (e), (f), (p). Count I of the Amended Complaint specifically relies on Section 28-3904(e), the prohibition on any misrepresentation “as to a material fact which has a tendency to mislead. . . .”

Section 28-3905(k)(2)(A)(i) of the CPA provides that a consumer may bring an action seeking relief and may recover “[t]reble damages, or \$1,500 per violation, whichever is greater, payable to the consumer. . . .” The Plaintiffs in this action have elected to proceed to recover their actual damages (direct and consequential) but have not sought treble damages.

A. Mr. Shannon’s Personal Liability.

The Amended Complaint added allegations in support of a veil-piercing theory of liability against the Defendant. Docket No. 23 at ¶¶ 35 (“At all times Mr. Shannon and Shannon

Remodeling & Restoration LLC were indistinguishable from each other”), 36 (“At all times Kevin C. Shannon and Shannon Remodeling & Restoration Services LLC failed to observe any corporate formalities and were for all intents and purposes alter egos of one another.”)

The Court finds it unnecessary to address the issue of veil-piercing. Rather, Mr. Shannon is directly liable as the individual who personally made the above misrepresentations to the Plaintiffs. The Court finds that Mr. Shannon made the following material misrepresentations:

- That he was a licensed general contractor in D.C.
- That he possessed, or was able to timely procure, licenses for plumbing, electrical and mechanical work in D.C.
- That he possessed the skills and ability to handle a renovation project of this scope.
- That he could complete the project in a timely way consistent with the owners’ expectations.

B. The Plaintiffs’ Damages.

(i) Direct Damages

The Plaintiffs proved by a preponderance of the evidence that they suffered **\$241,145.81** (Pl. Ex. 27), plus **\$144,731.80** (Pl. Ex. 25), in direct damages, for a total of **\$385,877.61**. The Defendant did not challenge these damage amounts at the trial.

The Court further finds that these damages were proximately caused by the Defendant’s above-stated misrepresentations. The Court, therefore, will award the Plaintiffs a Judgment in these amounts.

(ii) Consequential Damages

In *Levermore v. Smith*, Civ. A. No. 87-2518-OG, 1988 WL 110607 (D. D.C. Oct. 12, 1988), the U.S. District Court for the District of Columbia stated the law of consequential damages as follows:

Consequential damages are recoverable in a breach of contract case if the damages were foreseeable and within the contemplation of the parties at the time that the contract was formed. *Hadley v. Baxendale*, 156 Eng.Rep. 145 (1854); see Restatement (Second) of Contracts § 351(1) (1981) (“Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.”); see also J. Calamari & J. Perillo, *Contracts* §§ 14-5 to 14-7 (1977). Those damages must be reasonably certain in their nature and in respect to the causes from which they proceed. Restatement (Second) of Contracts § 352 (1981) (“Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.”); J. Calimari, *supra* at § 14-8. The certainty required extends to the amount of damages. J. Calamari, *supra* at § 14-8. Moreover, the quality of evidence necessary to establish the certainty of the damages must be of a higher caliber than is needed to establish most factual issues in a lawsuit. *Id.*

Id. at *5,

The Court will address the Plaintiffs’ claims for consequential damages as follows:

- **\$128,895.93** – “Added carrying costs.” These additional carrying costs would have been within the contemplation of the parties and were foreseeable. Mr. Shannon, as an experienced person in the construction and renovation trades, would have understood from the outset that if he failed to complete the job in a timely way the Plaintiffs would suffer additional carrying costs.
- **\$104,000.00** – “Lost rental income.” Mr. Shannon understood from the outset that the Plaintiffs sought to divide the Property into two living spaces, and that the loss of use of the upper floors would cause them to have to stay in the basement, and consequently lose the income stream from the basement. The lost rental income was within the contemplation of the parties and was foreseeable.

- **\$26,947.84** – “Storage Costs.” Storage costs were within the contemplation of the parties and were foreseeable. However, Mr. Copyak only testified that the Plaintiffs utilized a storage unit and did not detail the monthly storage costs or the period of time during which storage was necessary. The Court will disallow the claim for Mr. Copyak’s and Ms. Le’s storage costs as consequential damages.
- **\$101,774.00** – Ms. Le’s lost earnings. Although these losses were real to the Plaintiffs, the Court finds that these costs were not within the contemplation of the parties. The Court will disallow the claim for Ms. Le’s lost earnings as consequential damages.

The Court will, therefore, award the Plaintiffs an additional **\$232,895.93** in consequential damages.

The Court further finds that these consequential damages were proximately caused by the above misrepresentations.

C. Attorney’s Fees.

Section 28-3905(k)(2)(B) of the CPA provides for the recovery of reasonable attorney’s fees. Attorney’s fees generally follow the non-dischargeable nature of the judgment. *In re Uzaldin*, 418 B.R. 166, 172 (Bankr. E.D. Va. 2009) *citing Silansky v. Brodsky, Greenblatt & Renehan (In re Silansky)*, 897 F.2d 743 (4th Cir. 1990). In this case, because the Court finds that the judgment is non-dischargeable under Section 523(a)(2)(A) (*See Part II, below*), any award of attorney’s fees will likewise be non-dischargeable.

The Plaintiffs will submit an Affidavit of Attorney’s Fees within 10 days of the entry of the Judgment Order. The Defendant will be entitled to object to the reasonableness of the Plaintiffs’ fees in writing within 10 days thereafter.

II. Count II – Section 523(a)(2)(A).

Bankruptcy Code Section 523(a)(2)(A) excepts debts from the debtor’s discharge that were incurred by fraudulent misrepresentations or by actual fraud. To prevail, the plaintiff “must prove four elements: (1) a fraudulent misrepresentation; (2) that induces another to act or refrain from acting; (3) causing harm to the plaintiff; and (4) the plaintiff’s justifiable reliance on the misrepresentation.” *Foley & Lardner v. Biondo (In re Biondo)*, 180 F.3d 126, 134 (4th Cir. 1999). Although promises to perform in the future generally cannot form the basis of a fraud claim, a claim for fraud can be maintained where it is alleged that the defendant made a promise without the present intent to perform. *Structured Invs. Co. v. Dunlap (In re Dunlap)*, 458 B.R. 301, 333-34 (Bankr. E.D. Va. 2011); *Soheily v. Vuong (In re Vuong)*, 353 B.R. 860, 866 (Bankr. E.D. Va. 2006).

As noted above, the Court finds that the Defendant made the following material misrepresentations to the Plaintiffs:

- That he was a licensed general contractor in D.C.
- That he possessed, or was able to timely procure, licenses for plumbing, electrical and mechanical work in D.C.
- That he possessed the skills and ability to handle a renovation project of this scope.
- That he could complete the project in a timely way consistent with the owners’ expectations.

Further, having heard the Plaintiffs’ testimony, the Court finds that the Plaintiffs justifiably relied on the Defendants’ misrepresentations. *Field v. Mans*, 516 U.S. 59, 73-75 (1995).

Finally, the Court finds that the above direct damages and consequential damages were proximately caused by the Defendant's misrepresentations.

The Judgment granted to the Plaintiffs under Count I above will be declared to be non-dischargeable under section 523(a)(2)(A).

III. Count III – Section 523(a)(4).

Count III of the Amended Complaint is a claim under Section 523(a)(4), which provides for an exception to a debtor's discharge where the debt is the product of embezzlement. Embezzlement is defined under D.C. law as "the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come." *Moore v. United States*, 160 U.S. 268, 269-70 (1895); *U.S. v. Whitlock*, 663 F.2d 1094, 1107 (D.C. Cir. 1980); *In re Nwatulegwu*, Adv. Pro. No. 13-10011, 2013 WL 6507564 (Bankr. D.C. Dec. 12, 2013).

Having granted the Plaintiffs a judgment under Counts I and II, above, the Court finds it unnecessary (and potentially confusing and duplicative) to address Count III at this juncture of the case. The Court, therefore, will dismiss Count III without prejudice.³

Conclusion

The Court, therefore, will enter a separate Judgment Order under which:

- A. Judgment will be granted on Count I of the Amended Complaint in favor of the Plaintiffs and against the Defendant in the amount of **\$618,773.54**, plus interest at the federal judgment rate from the entry of the judgment until paid, and an award of attorney's fees and costs.

³ The Court says without prejudice here because, in the event that the Defendant appeals and the judgment under Counts I and II is reversed for any reason, the Plaintiffs may renew their request for entry of a judgment on Count III. The one area where there appears that there was an embezzlement is where the Plaintiffs paid \$15,000.00 for an HVAC system that was never delivered to their home. Pl. Ex. 7.

- B. The foregoing judgment will be declared to be non-dischargeable on Count II of the Amended Complaint under 11 U.S.C. § 523(a)(2)(A).
- C. Count III under 11 U.S.C. § 523(a)(4) will be dismissed without prejudice.
- D. The Plaintiffs may submit an Affidavit of their attorney's fees and costs within 10 days of the entry of the Judgment Order in this action. The Defendant may file an Objection to the reasonableness of the fees within 10 days thereafter. The Court will rule on the reasonableness of the legal fees without a further hearing. Any award of attorney's fees and costs will be non-dischargeable under 11 U.S.C. § 523(a)(2)(A).
- E. The Defendant is advised that he may appeal the Judgment Order by filing a Notice of Appeal with the Clerk of the Bankruptcy Court within 14 days after the entry of the Judgment Order.
- F. The Clerk will mail copies of these Findings of Fact and Conclusions of Law, together with the separate Judgment Order, or will provide cm-ecf notice of their entry, to the parties below.

Date: Jun 4 2021

Alexandria, Virginia

Copies to:

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/s/ Brian F Kenney

Brian F. Kenney
United States Bankruptcy Judge

Entered On Docket: June 7, 2021

Kevin Shannon



Pro se Defendant