SO ORDERED.

SIGNED this 02 day of May, 2006.

JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In Re:	
EARL C. MILLS,,	**CASE NO. 03-43341**
	CHAPTER 7
DEBTOR.	
THOMAS C. REVELL, SR.,	
PLAINTIFF,	
v.	**ADV. NO. 04-7027**
EARL C. MILLS,	
DEFENDANT.	

MEMORANDUM AND ORDER GRANTING
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This is an adversary proceeding brought by Plaintiff, Thomas C. Revell, Sr. (hereafter Plaintiff or Revell), against Debtor, Earl C. Mills (hereafter Debtor or Mills), objecting to

Debtor's discharge of Plaintiff's claim pursuant to 11 U.S.C. § 523(a)(2)(A).[1] The matter is before the Court on Defendant's Motion for Summary Judgment. For the reasons stated below, the Court grants Defendant's motion.

I. JURISDICTION.

This Court has jurisdiction pursuant to 28 U.S.C. § 157(a) and § 1334(b).[2] A complaint objecting to the dischargability of a particular debt is a core proceeding that this Court may hear and determine as provided in 28 U.S.C. § 157(b)(2)(I). The parties have stipulated that venue is proper in this District, and that the Court has jurisdiction over the parties.[3]

II. SUMMARY JUDGMENT STANDARDS.

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law."[4] In applying this standard, the Court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party.[5] An issue is "genuine" if "there is sufficient

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[1]This case was filed before October 17, 2005, when most provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 became effective. All statutory references to the Bankruptcy Code are to 11 U.S.C. §§ 101 - 1330 (2004), unless otherwise specified. All references to the Federal Rules of Bankruptcy Procedure are to Fed. R. Bankr. P. (2004), unless otherwise specified.

[2]*Also see* July 10, 1984 Standing Order of the United States District Court for the District of Kansas that exercised authority conferred by § 157(a) to refer to the District's bankruptcy judges all matters under the Bankruptcy Code and all proceedings arising under the Code or arising in or related to a case under the Code.

[3]Doc. 64, Pretrial Order ¶ 6.

[4]Fed. R. Civ. P. 56(c), which is made applicable to adversary proceedings pursuant to Fed. R. Bankr. P. 7056.

[5]*Lifewise Master Funding v. Telebank,* 374 F.3d 917, 927 (10th Cir. 2004); *Loper v. Loper (In re Loper),* 329 B.R. 704, 706 (10th Cir. BAP 2005).

evidence on each side so that a rational trier of fact could resolve the issue either way."[6] A fact is "material" if, under the applicable substantive law, it is "essential to the proper disposition of the claim."[7]

The moving party bears the initial burden of demonstrating an absence of a genuine issue of material fact and entitlement to judgment as a matter of law.[8] In attempting to meet that standard, a movant who does not bear the ultimate burden of persuasion at trial need not negate the other party's claim; rather, the movant need simply point out to the court a lack of evidence for the other party on an essential element of that party's claim.[9]

If the movant carries this initial burden, the nonmovant who would bear the burden of persuasion at trial may not simply rest upon his pleadings; the burden shifts to the nonmovant to go beyond the pleadings and "set forth specific facts" that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant.[10] To accomplish this, sufficient evidence pertinent to the material issue "must be identified by reference to an affidavit, a deposition transcript, or a specific exhibit incorporated therein."[11] Finally, the Court notes that summary judgment is not a "disfavored procedural shortcut;" rather, it is an important

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[6]*Thom v. Bristol-Myers Squibb Co.*, 353 F.3d 848, 851 (10th Cir. 2003) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

[7]*Id.* (citing *Anderson,* 477 U.S. at 248).

[8]*Id.* (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986)).

[9]*Id.* (citing *Celotex,* 477 U.S. at 325).

[10]*Id.* (citing Fed. R. Civ. P. 56(e)).

[11]*Diaz v. Paul J. Kennedy Law Firm*, 289 F.3d 671, 675 (10th Cir. 2002).

procedure "designed to secure the just, speedy and inexpensive determination of every action."[12] The parties have stipulated that the law of the District of Columbia and Maryland, where the Settlement Agreement was signed, and the United States Bankruptcy Code govern this case.

III. FINDINGS OF FACT.

Debtor complied with D. Kan. LBR 7056.1 by beginning his motion with a statement of uncontroverted facts, submitted in numbered paragraphs, with specific reference to the portions of the record upon which he relied. Plaintiff's response does not comply with the rule, which requires, in part, that

> A memorandum in opposition to a motion for summary judgment must begin with a section that contains a concise statement of material facts about which the party contends a genuine issue exists. Each fact in dispute must be numbered by paragraph, refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, state the number of movant's fact that is disputed.

Instead, his brief includes seven numbered paragraphs labeled, "Issues of Fact," which apparently are alleged to be in controversy. He totally fails to include a statement of facts, set forth in numbered paragraphs, that reference the record.[13] None of the movant's numbered

[12]*Celotex,* 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

[13]Plaintiff's Opposition to Defendant's Motion for Summary Judgment (Doc. 69), under the heading "Issues of Fact," identifies seven questions, as follows: (1) Whether Dr. Mills intended to honor his agreement to pay Plaintiff at the time he entered into the Settlement Agreement; (2) whether Dr. Mills misrepresented his intention to pay Plaintiff the agreed sum; (3) whether Dr. Mills misrepresented the need to avoid a judgment being taken against him in order to induce Plaintiff to accept the settlement; (4) whether Dr. Mills was represented by counsel and whether he was afforded the opportunity to have counsel review the Settlement Agreement; (5) whether Dr. Mills misrepresented his stated belief that his was a moral obligation to Plaintiff; (6) whether Plaintiff sustained damages as a result of Dr. Mills' fraudulent misrepresentation; and (7) whether Dr. Mills still intends to meet his moral obligation to Plaintiff by executing a Reaffirmation Agreement.

paragraphs are expressly controverted.[14] In accordance with the applicable rule, therefore, the Court finds that the material facts are those to which the parties stipulated in the Pretrial Order,[15] and those stated in Defendant's memorandum in support of his motion.[16]

Debtor, a neurosurgeon, performed spinal surgery on Revell in December, 1996, at a time when Debtor did not have professional liability insurance. Revell claims he was severely injured as a result of the surgery, and brought a civil action seeking a multi-million dollar judgment

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[14]An affidavit of John J. Sellinger, Plaintiff's counsel, is attached to Plaintiff's Opposition to Defendant's Motion for Summary Judgment. (Doc. 69). No affidavit is provided by Plaintiff. Even if the court adopted the facts stated in that affidavit, assuming they had been presented to the Court in a form consistent with D. Kan. LBR 7056.1, those facts would not change the Court's decision on this Motion for Summary Judgment. The facts stated in the affidavit include: That at the time of settlement it was important to Dr. Mills that he not have a judgment taken against him; that not having a judgment would allow him to get on his feet and establish his practice in Kansas; that in the underlying medical malpractice case, Plaintiff alleged that he was totally disabled as a result of Dr. Mill's negligence in performing spinal surgery, and that Dr. Mills therefore faced a potential multi-million dollar verdict and judgment if the case had gone to trial; that Plaintiff made concessions regarding the payment of the settlement to help Dr. Mills and put him in a position where he would in turn be able to meet his obligation to Plaintiff; that Plaintiff was aware of Dr. Mills' past financial difficulties and that there was a potential that Dr. Mills would file bankruptcy because of his IRS debt; that Dr. Mills appeared quite sincere in recognizing his "moral obligation" to Plaintiff and stating his intent to meet that obligation; that Dr. Mills was urged to have the Settlement Agreement reviewed by counsel; and that if Dr. Mills had not assured Plaintiff and his counsel of his honest intention to meet his obligation to Plaintiff, the case would not have been settled and would have proceeded to trial. The affidavit does controvert Dr. Mills' statement of fact that Revell, during the settlement negotiations, was aware of Dr. Mills' prior bankruptcy filing, notwithstanding the Pretrial Order stipulation to the contrary. *See* n.18, below. Again, even if this fact was considered "controverted" under applicable rules, it would not alter this Court's decision.

[15]Doc. 64.

[16]Mills includes in his Memorandum in Support of Summary Judgment, the following statements, which are supported by his attached affidavit: When he signed the Settlement Agreement, he "had absolutely no intention of misleading, misrepresenting or defrauding Mr. Revell;" "he did not fraudulently induce Mr. Revell to enter into the Settlement Agreement;" and "all of his representations to Mr. Revell during this time were honest and sincere." (Doc. 69). Although Plaintiff did not controvert these statements, the Court has disregarded these portions of the affidavits because they are merely reargument of his case. "[U]ltimate or conclusory facts . . . cannot be used on a summary judgment motion. Similarly, the mere reargument of a party's case or denial of an opponent's allegations will be disregarded." 10B Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2738 (3d ed. 1989).

against Debtor in the Superior Court for the District of Columbia.[17] These damages were alleged to have been caused by medical negligence; Revel made no allegations in his malpractice action in any way relating to fraud. On June 5, 2001, the first day of the negligence trial, Plaintiff and Defendant agreed to settle the malpractice lawsuit for $500,000.

The Settlement Agreement was drafted by Mr. Sellinger, Plaintiff's counsel. Mills was not represented by counsel. Mills claimed he did not have sufficient assets to immediately pay the $500,000 settlement, so the parties agreed that Mills would pay Plaintiff $2,000 per month for approximately two years, or about $46,000, and would then pay a lump sum in the amount of $454,000 on June 15, 2003. The Settlement Agreement further provided that Revell could file a Consent Judgment for $500,000, which Mills executed and delivered contemporaneously with the Settlement Agreement, if Mills was more than 30 days late in making any payment.

Although Mills was constantly up to 30 days late in making most or all of the monthly payments, he did in fact make all the payments until June 15, 2003, when he failed to make the lump-sum payment required. As a result, Plaintiff filed the Consent Judgment on November 10, 2003, and it was entered in favor of Plaintiff Revell, and against Defendant Mills, in the amount of $500,000.

During the negotiations leading up to the signing of the Settlement Agreement, Plaintiff, Plaintiff's counsel, and Mills discussed the fact that Mills lacked assets to pay the potential settlement, and had substantial debts, including his liability to the Internal Revenue Service (IRS) that had exceeded $600,000 in taxes, alone, during the 1987-1988 time frame. Debtor

[17]*See* Attachment A to Revell's Complaint (Doc. 1), which is a copy of the Settlement Agreement that is discussed at length, below.

disclosed that he had insufficient assets to pay either the IRS claim or the $500,000 settlement. Mills also disclosed that he had previously filed a Chapter 11 bankruptcy in August 1990, which had been dismissed in January 1995.[18] Further, as noted below, Plaintiff and his lawyer were well aware that Mills might file for bankruptcy relief in the future.

Before the Settlement Agreement was negotiated and signed, in June 2001, Mills had already moved to Kansas and obtained a Kansas medical license, in October 2000. The IRS issued a Notice of Intent to Levy in November 2003, for the collection of the federal taxes which by then exceeded $1.6 million. Mills' instant bankruptcy, which he contends he filed primarily because of the IRS notices, was filed on November 18, 2003.

Plaintiff seeks to have excepted from discharge this $500,000 medical malpractice judgment on the basis that Mills promised, in writing, that "regardless of the fact of his filing of a bankruptcy petition," that he would not "seek to have this debt discharged in bankruptcy." The Settlement Agreement expressly stated that "Mills considers the undertaking set forth herein to be both a legal and a moral obligation, and agrees that his obligation to Revell shall not be discharged by any bankruptcy proceeding." Mills has apparently had a change of heart concerning both that moral and legal obligation, as he now seeks an order from this Court that he

[18]Although Plaintiff does not properly controvert this fact, pursuant to the procedure required by D. Kan. LBR 7056.1, the affidavit of his counsel attached to his response claims that the prior bankruptcy was not disclosed. The Court finds this curious, because the stipulations inserted into the Pretrial Order, which Pretrial Order was the responsibility of Plaintiff's counsel to prepare, in conjunction with input from Defendant's counsel, indicate the following stipulation #6: "During the negotiations to settle the state court malpractice lawsuit, the Plaintiff, Plaintiff's counsel and Defendant discussed Defendant's substantial debts, including his substantial debts to the Internal Revenue Service, and his prior bankruptcy filing. (Emphasis added). That noted, even if the Court were to consider this a controverted fact, for purposes of this summary judgment motion, this single fact would not change the Court's decision.

has no legal obligation, and he has apparently made no effort to reaffirm what he previously admitted was a "moral" obligation.

III. CONCLUSIONS OF LAW.

A. Controlling law.

A debtor under Chapter 7 of the Bankruptcy Code is generally granted a discharge from all debts that arose before the filing of the bankruptcy petition. Exceptions to discharge are to be strictly construed in favor of debtors.[19] The objecting creditor, here Revell, bears the burden of proving by a preponderance of the evidence that the debtor's taxes are nondischargeable.[20]

Plaintiff Revell alleges this debt is nondischargable under § 523(a)(2)(A).[21] That statute provides:

> (a) A discharge under section 727 . . . 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 prevail on his dischargabilty complaint, Plaintiff Revell must establish the following five elements, by a preponderance of the evidence: (1) Mills made a false representation; (2) the false representation was made with intent to deceive; (3) Revell relied upon the representation;

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[19]*Dalton v. Internal Revenue Service (In Re Dalton)*, 77 F.3d 1297, 1302 (10th Cir. 1996); 4 *Collier on Bankruptcy* ¶ 523.05 (Alan N. Resnick & Harry J. Sommer, eds.-in-chief, 15th ed. Rev. 2005) (stating exceptions are "liberally" construed in favor of debtors). Future citations to this treatise are to paragraph number only.

[20]*Grogan v. Garner*, 498 U.S. 279, 291 (1991); 4 *Collier on Bankruptcy* ¶ 523.04.

[21]The Pretrial Order relies only on § 523(a)(2)(A) for the non-discharge of the debt. (Doc. 64). Significantly, Plaintiff does not object to discharge under § 523(a)(6). In other words, Revell does not claim that Mills willfully or maliciously caused his injuries.

(4) Revell's reliance was justifiable; and (5) the misrepresentation caused Revell to sustain a loss.[22]

B. Parties' Positions.

Plaintiff's theory of recovery is that Mills fraudulently induced him to enter into the Settlement Agreement by falsely promising that he would never seek to discharge the $500,000 settlement in any future bankruptcy proceeding.[23] Revel argues that Mills substantially benefitted from entering into the Settlement Agreement, rather than having an immediate medical malpractice judgment entered against him for potentially millions of dollars, because the settlement allowed Mills to obtain hospital privileges in Kansas, where he had recently obtained a medical license. Although he presents no evidence in support of his theory, Revell infers that perhaps Mills might not have been able to obtain hospital privileges if there had been a recent malpractice judgment entered against him, whereas he would be able to obtain those same privileges if he was making payments under a Settlement Agreement.

Revell also argues that Mills was substantially benefitted by entering into the Settlement Agreement, because it allowed him to continue to practice neurosurgery, a well-paid occupation, again inferring (without any evidence in support) that Mills would not have been able to practice medicine if a judgment had been entered. Revell also claims he was harmed, as a result of Mills' misrepresentation, because he accepted a lesser settlement amount than the potential judgment, and he acceded to low monthly payments. Finally, Revell suggests that Mills' decision to now seek discharge of the debt, by defending against this Adversary Proceeding and by not

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[22]*Fowler Bros. v. Young (In re Young),* 91 F.3d 1367, 1373 (10th Cir. 1996); *Field v. Mans*, 516 U.S. 59, 74-75 (1995).

[23]Pretrial Order, Doc. 64, p. 5.

reaffirming the debt, notwithstanding his promise to the contrary, is proof that Mills never intended to pay the settlement, and thus the promise was necessarily false when made.

Debtor, on the other hand, contends he is entitled to summary judgment because Plaintiff has not presented facts from which a rational trier of fact could rule in his favor on the elements required to establish this exception to discharge. Primarily, Mills urges that Plaintiff has not shown any facts to establish that he made the representation (to never attempt to evade payment through bankruptcy) with intent to deceive. Mills also argues Revell cannot show evidence of detriment or damage caused by the alleged misrepresentation, or that he justifiably relied upon the alleged misrepresentation.

C. Mills' Failure to Keep his Promise not to Seek Discharge of the Settled Malpractice Claim does not Render the Debt Nondischargable.

Plaintiff's claim is not rendered nondischargable solely because Debtor breached the promise he made in the Settlement Agreement that he would not seek to discharge the debt in any future bankruptcy. First, Debtor's promise, standing alone, was not a misrepresentation for purposes of § 523(a). It is well established that a promise or declaration of future conduct is not considered a misrepresentation merely, or necessarily, because the promise is subsequently breached.[24] As a commentator explains:

> The failure to perform a mere promise is not sufficient to make a debt nondischargable, even if there is no excuse for the subsequent breach. A debtor's statement of future intention is not necessarily a misrepresentation if intervening events cause the

[24] *Randle v. Highfill (In re Highfill)*, 336 B.R. 701, 706 (Bankr. M.D. N.C. 2006) (holding agreement by debtor in separation agreement that he would hold spouse harmless from certain debts in the future did not fit within § 523(a)(2)(A), when debtor made payments to the creditors for two years following the divorce).

> debtor's future actions to deviate from previously expressed intentions.[25]

"In order to be actionable under § 523, a 'representation must be one of existing fact and not merely an expression of opinion, expectation or declaration of intention.'"[26] Stated differently, "[g]enerally, the misrepresentations must be of past or current acts; a promise to perform acts in the future is not considered a qualifying misrepresentation merely because the promise subsequently is breached."[27] It is possible that the statement of intent was true when made, and the failure to perform was because of intervening events.[28] Under these authorities, the statement in the Settlement Agreement that the debt would not be discharged in bankruptcy is not a misrepresentation for purposes of § 523.

Revell is thus required to establish that Debtor had no intention of paying the settlement when he signed the agreement agreeing to do so. In order to carry this burden, however, Plaintiff is not required to produce direct evidence that Debtor did not intend to pay the debt. Because direct proof of intent is seldom available, the court in a dischargeability proceeding may infer the debtor's intent or lack of intent from the surrounding facts and circumstances.[29]

But Revell has supplied no direct or circumstantial evidence to establish that Mills intended, from the outset, not to pay the debt. If Revell could, or had in his papers, demonstrated,

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[25]4 *Collier on Bankruptcy* ¶ 523.08[1][d].

[26]*Hoyt v. Hoyt (In re Hoyt)*, 277 B.R. 121, 132 (Bankr. N. D. Okla. 2002) (quoting *In re Schwartz & Meyers*, 130 B.R. 416, 423 (Bankr. S.D.N.Y. 1991)).

[27]*Mozeika v. Townsley (In re Townsley)*, 195 B.R. 54, 61 (Bankr. E.D. Tex. 1996).

[28]*See Goldberg Sec., Inc. v. Scarlata (In re Scarlata)*, 979 F.2d 521, 525 (7th Cir. 1992).

[29]*In re Highfill*, 336 B.R. at 707.

for example, that Mills did have the ability to pay the judgment, then this argument might have been sufficient to at least defeat summary judgment. Revell makes no attempt to demonstrate, through argument, let alone evidence, that Mills had more assets than he had stated, and that Revell would have been able to collect more, through garnishment, execution, or otherwise, had he not succumbed to Mills' promise not to seek discharge of the debt.

In other words, if Revell had obtained a multi-million dollar judgment, and could have collected more than the $46,000 that Mills paid over the two-year period post-settlement (or collected it more quickly), then the misrepresentation that induced Revell to accept those lower payments—that he would never attempt to discharge the debt---could well have caused Revell damages. But Revell never makes that case in trying to defeat this summary judgment motion.[30]

Further, as devastating as it is to Mr. Revell, a blameless victim of uninsured negligence, Debtor's agreement to not discharge Revell's debt in a subsequent bankruptcy proceeding is void as against public policy. Courts have consistently held that an individual debtor's agreement to

[30]Although Revell never raises the subject in his papers, Debtor's Exhibit 2, which is the Proof of Claim that IRS filed in the main case, shows that as of the date of filing, Debtor owed IRS $1,610,354.29. The Court is further aware, as a result of another Adversary Proceeding (Case No. 04-7012, *Mills v. States*), which recently concluded in this Court, that it would have been difficult for Revell to demonstrate that he would have been able to collect more. On March 16, 2006, in that Adversary Proceeding, this Court entered an Agreed Judgment finding that Debtor's "federal income tax liabilities relating to the 1987 through 1998 tax years are not dischargeable pursuant to 11 U.S.C. § 523(a)(1)(C)." (Doc. 75, ¶ 3) The parties in that case had stipulated that Mills owed IRS $1,727,813 as of the date of filing this bankruptcy for those 1987-1998 tax obligations. IRS' Proof of Claim showed Mills owed $95,792.72 in additional priority claims due for a civil penalty from the first quarter of 1998 and for taxes for years 2000-2002. If IRS had been unsuccessful, over the prior 15 years, in collecting over a million dollar's worth of federal income taxes and interest against this Debtor, it is unlikely that Revell would have had more success.

waive the benefit of a future bankruptcy discharge is unenforceable.[31] Such agreements offend the public policy of providing a fresh start for individual debtors.[32]

Further, the Code enumerates several exceptions to discharge; a prepetition waiver is not one of them.[33] Rather, the Code provides for either a waiver of discharge of all debts under §727(a)(10) or a waiver of the discharge of a specific debt by satisfaction of the reaffirmation requirements of §524(c).[34] Debtor's agreement that his debt to Plaintiff would not be discharged in a later bankruptcy proceeding cannot, alone, form the basis for denial of discharge, because it is void as contrary to public policy.

D. Plaintiff Cannot Sustain his Burden to Establish Fraudulent Inducement of the Settlement as Basis for Nondischarge of Plaintiff's Claim.

The Settlement Agreement, in addition to containing the void promise not to discharge the debt, also includes a statement that Mills intended to pay the debt in full. Although Debtor's expression of intent not to discharge the debt, standing alone, cannot be the basis for denial of discharge, "a promise of future action or declaration of intent constitutes a representation for

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[31]*Trump v. Trump (In re Trump),* 309 B.R. 585, 593 (Bankr. D. Kan. 2004) (holding prepetition agreements to waive the benefits of a bankruptcy discharge are void, and is thus not bound by language in parties marital agreement); *Hayhoe v. Cole (In re Cole),* 226 B.R. 647, 651 n.6 (9th Cir. BAP 1998); *In re Weitzen,* 3 F. Supp. 698 (S.D.N.Y. 1933) (holding that the bankruptcy scheme would "in the natural course of business be nullified in the vast majority of debts arising out of contracts, if this were permissible," and that result would be repugnant to the object of the statute).

[32]*Marra, Gerstein & Richman v. Kroen (In re Kroen),* 280 B.R. 347, 352 (Bankr. D.N.J. 2002,) *(citing In re Cole,* 226 B.R. at 651).

[33]*In re Cole*, 226 B.R. at 653.

[34]*In re Kroen,* 280 B.R. at 352 (holding that "[t]he appropriate mechanism for saving a debt from discharge is to comply with the post-petition reaffirmation procedure dictated by the Code in § 524").

purposes of § 523(a)(2)(A), [when] ... at the time the promise of future action was made, the debtor had no intention of performing as promised."[35] One commentator has stated:

> A misrepresentation by a debtor of his or her intention to perform contractual duties, however, may be a false representation under section 523(a)(2)(A). Thus, section 523(a)(2)(A) may make a creditor's claim nondischargeable if the debtor had no intention of performing any of the obligations under the contract. This intent may be inferred from the fact that the debtor failed to take any steps to perform the contract.[36]

Because Mills was making a statement of future intentions when he signed the Settlement Agreement containing language promising to pay the settlement amount in full and promising not to seek discharge of the debt, it is possible that Mills' statements were untrue when made, and therefore actionable under § 523(a)(2)(A).

Plaintiff relies upon *Zarate v. Baldwin*,[37] where the Court of Appeals for the Tenth Circuit affirmed the bankruptcy court's determination that a creditor's state court judgment arising from negligent medical treatment was excepted from discharge under section 17(a)(2) of the Bankruptcy Act, the predecessor to Code § 523(a)(2)(A). In June 1972, a $60,000 state court malpractice judgment, incorporating the terms of an agreement, was entered in favor of Zarate against debtor Baldwin. The judgment stated the cause of action was for simple negligence and provided for repayment over several years. The judgment recited that the "debt shall not be provable or dischargeable in bankruptcy."

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[35] *In re Highfill*, 336 B.R. at 707.

[36] 4 *Collier on Bankruptcy* ¶ 523.08[1][d].

[37] *Zarate v. Baldwin (In re Baldwin)*, 578 F.2d 293 (10th Cir. 1978).

Baldwin had previously received a bankruptcy discharge, and was ineligible to again seek discharge until May 1975. About a month after again becoming eligible, in June 1975, when $48,850 of the $60,000 judgment remained due, Baldwin filed a bankruptcy petition, and the judgment creditor sought a determination of nondischargability. The bankruptcy court found that Baldwin misrepresented his intent to pay the debt in full and not to seek discharge in bankruptcy, that Zarate relied upon the misrepresentation, and the debt was not dischargeable.

The Tenth Circuit construed the waiver of discharge as a representation that Baldwin intended to pay the debt in full and affirmed the bankruptcy court. In denying discharge, the court relied on debtor's insistence that the agreement state the claim was for "simple negligence," thereby paving the way for discharge of the debt; that the payment schedule permitted Baldwin to avoid enforceable liability for the greater share of the debt or any interest thereon until he was again eligible to seek discharge; that Baldwin ceased to make payments immediately after he became eligible to file another bankruptcy; and that Baldwin had sought discharge within about a month after he became eligible. The Tenth Circuit also noted that "Zarate's claim is not for Baldwin's malpractice; it is for the property she forewent by entering into the settlement agreement in reliance on Baldwin's false representations."[38]

The uncontroverted facts in this case are clearly distinguishable from *Baldwin*. Here, there is no evidence that Debtor requested that the Settlement Agreement include a recitation of the factual basis of the malpractice claim to assure the dischargeability of the underlying liability. It is also uncontroverted that Mills did not have sufficient assets to pay the entire settlement amount at the time the case was settled, and that Revell knew that. Further, there is no evidence

[38] *Id*. at 295.

that the payments were purposely structured so that the majority due would be dischargeable in a subsequent bankruptcy—although that is certainly the impact. Finally, there is no evidence that Revell "forewent" anything by entering into the settlement agreement, since there is no evidence Mills had the ability to pay the agreed amount, or anything higher than that amount.

Furthermore, Debtor paid $46,000 to Revell before filing his bankruptcy petition, when nothing legally barred him from refiling immediately. Unlike the debtor in *Baldwin*, Mills could have filed for bankruptcy the day after he entered into this Settlement Agreement, or the day before. Mill's prior bankruptcy, filed in 1990, had been dismissed, and therefore there was no statutory bar to re-filing at the time Settlement Agreement was negotiated. It is also unconverted that one of the primary reasons for Debtor's filing of the present bankruptcy was that IRS had issued a Notice of Intent to Levy, the first step towards filing blanket liens on property and then levying against wages, bank accounts, and other property, and commencing foreclosure on real estate. There is no evidence that the bankruptcy was filed primarily for the purpose of discharging Plaintiff's claim, and Plaintiff does not suggest he had even started garnishment or execution proceedings. Plaintiff has simply failed to produce direct or circumstantial evidence to support a finding that Mills negotiated the Settlement Agreement with the purpose of avoiding substantial payments until after a time when he planned to again file for bankruptcy.

In addition to his reliance on *Baldwin*, Plaintiff asserts "that we now know that Dr. Mills did not and does not intend to honor his agreement not to seek discharge."[39] In support of that "fact," Plaintiff argues that Dr. Mills benefitted from the settlement, while Plaintiff incurred substantial detriment. Revell also relies on Mills' decision not to reaffirm his debt as further

[39]Doc. 69, p. 5.

"evidence that Dr. Mills did not meet his obligation to pay Mr. Revell."[40] The Court finds these contentions, even if supported by admissible evidence and considered together with Mills' breach of his promises, would not defeat summary judgment. Neither benefit to Dr. Mills nor his subsequent failure to reaffirm the debt evidence a misrepresentation or intent to deceive at the time the Agreement was signed. Plaintiff has failed to show the existence of a controverted issue of fact concerning Dr. Mill's intention at the time of the settlement.

The Court therefore finds, based upon the uncontroverted facts, that Plaintiff cannot sustain his burden to show that Debtor, when negotiating the Settlement Agreement, misrepresented his intent to honor his commitment even if he filed a subsequent bankruptcy. Rather, the uncontroverted facts support a finding that Debtor's statements were probably true when made, but intervening events caused Debtor not to fulfill his commitment. The first element required by Plaintiff to sustain his nondischargeability complaint, that Debtor made a misrepresentation of present intention, is not evidenced by the uncontroverted facts. Likewise, and for the same reasons, the same facts fail to establish the second element, that Debtor made his statement of intent to pay falsely, and with the intent to deceive.

Even if Plaintiff could somehow prove the first four elements of non-discharge, Plaintiff has failed to sustain his burden of proof on the last element, that the misrepresentation caused Revell to sustain a loss. Had Revell not entered into the Settlement Agreement with Mills, Revell argues the malpractice case would have gone to trial and he would have obtained a multi-million dollar money judgment. That is certainly possible, given that Mills was not represented by

[40] *Id*. at p. 6.

counsel in that suit and Revell was apparently able to show significant damages. But that judgment would also have been dischargeable in this bankruptcy.[41]

Again, the parties have stipulated that there were no fraud or willfulness allegations made in the underlying malpractice claim, and Revell never argues that such a malpractice judgment entered after a full trial would not have been dischargeable. Thus, the only loss Mills' misrepresentation caused Revell to sustain is that a smaller judgment will be discharged instead of a larger judgment. In both cases, the judgment was for simple negligence, as harmful as that negligence was to Revell, and in both instances, the judgments are equally dischargeable.[42]

For these reasons, the Court sustains Debtor's motion for summary judgment on Plaintiff's claim that his judgment is not dischargable under 11 U.S.C. § 523(a)(2).

IV JUDGMENT.

The foregoing constitute Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A judgment for Defendant based upon this ruling will be entered on a separate document as required by Federal Rule of Bankruptcy Procedure 9021 and Federal Rule of Civil Procedure 58.

IT IS SO ORDERED.

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[41]*In re Baldwin*, 578 F.2d at 295 (citing *In re Byrne*, 296 F. 98 (2d Cir. 1924)).

[42]*Archer v. Warner*, 538 U.S. 314 (2003) (holding that while a settlement agreement creates a contractual obligation, the debt retains its character as a debt arising from the original, allegedly wrongful, conduct of the debtor).