

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF CONNECTICUT

IN RE:	)	CASE NO.	09-30682 (JAM)
JAMES T. HARRIS AND	)		
ESCELENA D. HARRIS,	)		
	)	CHAPTER	7
DEBTORS.	)		
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DORA LEE BROWN,	)	ADV. PRO. NO.	12-03033
PLAINTIFF	)		
	)		
V.	)	ECF NO.	16
	)		
JAMES T. HARRIS,	)		
DEFENDANT.	)		
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**APPEARANCES**

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**MEMORANDUM OF DECISION ON COMPLAINT  
TO DETERMINE DISCHARGEABILITY OF DEBT**

Julie A. Manning, Chief United States Bankruptcy Judge

**I. INTRODUCTION**

Before the Court is the Amended Complaint of Dora Lee Brown (the "Plaintiff").

The Plaintiff seeks to have a judgment debt owed to her by Escelena's Construction L.L.C.

(“Escelena’s Construction”), deemed non-dischargeable as to the debtor, James T. Harris (the “Defendant”).<sup>1</sup>

The Complaint alleges that Escelena’s Construction served as the alter-ego of the Defendant. The Plaintiff asserts that because Escelena’s Construction had no separate mind, will, or existence of its own, the corporate veil should be pierced and the Defendant should be liable for the judgment debt. The Plaintiff further asserts that if the Defendant is found to be liable for the judgment debt, the debt should not be discharged because it was obtained by false pretenses, false representations or actual fraud.

A trial on the merits was held in this matter on June 2, 2014. At trial, each party called witnesses and introduced exhibits. For the reasons that follow, judgment will enter in favor of the Plaintiff and against the Defendant.

## **II. JURISDICTION**

The United States District Court for the District of Connecticut has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b), and the Bankruptcy Court derives its authority to hear and determine this matter pursuant to 28 U.S.C. § 157(a) and the Order of Reference of the United States District Court for the District of Connecticut dated September 21, 1984. This is a “core proceeding” pursuant to 28 U.S.C. §§ 157(a), (b)(2)(A), and (b)(2)(I).

Although piercing the corporate veil is a state law claim, this Court has authority to hear and decide this matter under the ‘public rights’ exception discussed in *Stern v. Marshall*, 131 S. Ct. 2594, 180 L.Ed.2d 475 (2011). See *Hyundai-Wai Machine America Corp., v. Nelson Rouette (In re Rouette)*, 500 B.R. 670, 676 (Bankr. D. Conn. 2013). In *Rouette*, the court held

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<sup>1</sup> The Amended Complaint dated July 29, 2012 (the “Complaint”) asserts a cause of action under 11 U.S.C. § 523(2)(A). The Plaintiff alleges that she relied upon the false pretenses, false representations or fraudulent intent of the Debtor and therefore the Court finds that the Plaintiff is seeking relief under 11 U.S.C. § 523(a)(2)(A).

that it had authority to consider and decide a veil-piercing claim in the context of a dischargeability action. *Id.* This Court concurs with and adopts the analysis in *Rouette*.

### **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Pursuant to Federal Rule of Civil Procedure 52, made applicable to this matter through Federal Rule of Bankruptcy Procedure 7052, below are the Court's findings of fact and conclusions of law.

#### **FINDINGS OF FACT**

##### **The parties and the home improvement contracts**

1. At all times relevant to the allegations in the Complaint: (i) the Plaintiff and the Defendant were residents of Connecticut (Testimony of the Plaintiff and the Defendant at June 2, 2014 trial); (ii) the Plaintiff was retired, had limited income, and was residing at 65 Asylum Avenue, New Haven, Connecticut (Complaint at ¶5; testimony of the Plaintiff at June 2, 2014 trial); and (iii) the Defendant was the Operations Manager for Escelena's Construction in addition to his job as Facilities Manager of Columbus House. (Testimony of the Defendant at June 2, 2014 trial; Plaintiff's Exhibit B at ¶¶1, 6).

2. Escelena Harris, the co-debtor in the pending Chapter 7 case and the wife of the Defendant (the "Defendant's Wife"), was the owner of Escelena's Construction. (Testimony of the Defendant and the Defendant's Wife at June 2, 2014 trial; Plaintiff's Exhibit B at ¶2; Plaintiff's Exhibit E at p. 1).

3. Escelena's Construction was formed to perform repair and restoration work at the Plaintiff's home in "a legal manner." (Testimony of the Defendant and the Defendant's Wife at June 2, 2014 trial).

4. The only work that Escelena's Construction ever performed during its existence was the repair and restoration work at the Plaintiff's home. (Testimony of the Defendant and the Defendant's Wife at June 2, 2014 trial; Plaintiff's Exhibit B at ¶8).

5. Although the Defendant's Wife kept the books and records of Escelena's Construction, she did not produce any of the books and records of Escelena's Construction at trial. (Testimony of the Defendant and the Defendant's Wife at June 2, 2014 trial).

6. Prior to entering into contracts with the Plaintiff, the Defendant met with the Plaintiff at her home to discuss repairs to the back door and back porch of her home. During the meeting, the Plaintiff told the Defendant that she had many additional home repair and restoration projects she wished to be completed at her home. The Defendant represented to the Plaintiff that he would perform the work at her home. (Testimony of the Plaintiff and the Defendant at June 2, 2014 trial).

7. The Plaintiff believed that the Defendant would personally complete the repair and restoration work on her home. The Plaintiff understood that the Defendant might require assistance to complete certain projects. The Plaintiff believed that if assistance was required, the Defendant would discuss this need with the Plaintiff and obtain her prior approval before allowing anyone else to perform work at her home. However, the Defendant utilized several subcontractors for projects at the Plaintiff's home without informing her that these individuals would be performing the work. (Testimony of the Plaintiff and the Defendant at June 2, 2014 trial).

8. On September 21, 2004, the Plaintiff entered into a contract with the Defendant, in his capacity as Operations Manager of Escelena's Construction, for interior and exterior repair and restoration work at her home. (Plaintiff's Exhibit C1).

9. The Plaintiff subsequently entered into ten additional contracts with the Defendant, in his capacity as Operations Manager of Escelena's Construction, for further repair and restoration work at her home. The ten additional contracts were entered into on various dates from October 23, 2004 through September 21, 2005. (Plaintiff's Exhibits C2 through C11).

10. The Defendant drafted all eleven contracts entered into with the Plaintiff. (Testimony of the Defendant at June 2, 2014 trial; Plaintiff's Exhibit B at ¶ 4).

11. Several of the contracts contained a representation that all work would be "... completed in a workman like manner according to standard practices." (Plaintiff's Exhibit C1, Plaintiff's Exhibit C2, Plaintiff's Exhibit C3, Plaintiff's Exhibit C4, Plaintiff's Exhibit C5, Plaintiff's Exhibit C6, Plaintiff's Exhibit C8, and Plaintiff's Exhibit C11). In addition, some of the contracts also represented that Escelena's Construction was a "Home Improvement Specialist[]". (Plaintiff's Exhibit C1, Plaintiff's Exhibit C3, and Plaintiff's Exhibit C4).

12. The contracts explicitly required the Plaintiff to "Please Make Check Payable To James Harris." (Testimony of the Defendant at June 2, 2014 trial; Plaintiff's Exhibit B at ¶17; Plaintiff's Exhibit C1; Plaintiff's Exhibit C2; Plaintiff's Exhibit C3; Plaintiff's Exhibit C5; Plaintiff's Exhibit C6; Plaintiff's Exhibit C8; and Plaintiff's Exhibit C11).

13. The Plaintiff issued each check "Payable to James Harris" for the services to be performed under each contract in advance of the work being completed. The Defendant received "monies detailed in the contracts . . . on or about the time of the execution of [each] contract." (Testimony of the Plaintiff at June 2, 2014 trial; Plaintiff's Exhibit B, at ¶17).

14. The payments made by the Plaintiff to the Defendant for all eleven contracts totaled \$50,524.13. (Plaintiff's Exhibits C1 through C11).

15. When the Defendant received payment from the Plaintiff, he cashed each check, and then used the cash to buy materials and to pay subcontractors. (Testimony of the Defendant and the Defendant's Wife at June 2, 2014 trial; Plaintiff's Exhibit B at ¶17).

16. The Defendant was paid from any funds remaining after purchasing materials and paying subcontractors. Although the Defendant was paid from the profits of Escelena's Construction, he never listed any income from Escelena's Construction on his personal tax returns. (Testimony of the Defendant at June 2, 2014 trial).

17. The Defendant and the Defendant's Wife presented contradictory evidence regarding the existence of a bank account for Escelena's Construction. The Defendant admitted in answers to interrogatories that Escelena's Construction had a bank account at Wachovia Bank. However, at trial, the Defendant and the Defendant's Wife both testified that Escelena's Construction did not have a bank account. (Testimony of the Defendant and the Defendant's Wife at June 2, 2014 trial; Plaintiff's Exhibit B at ¶13).

18. The Plaintiff paid the Defendant all of the amounts due under the contracts. However, certain work that was to be performed under the contracts remains unfinished, including the repair of a bathroom floor and the electrical connections for a water heater. (Testimony of the Plaintiff at June 2, 2014 trial).

#### **The State Court action and the multiple Bankruptcy Cases**

19. On December 15, 2006, the Plaintiff commenced an action against the Defendant and Escelena's Construction entitled *Dora Brown v. Escelena's Construction, et. al*, Docket No. NHH-CV07-5008409s, in the Connecticut Superior Court (the "State Court action"). In the State Court action, the Plaintiff asserted that the Defendant and Escelena's Construction

were liable to the Plaintiff for a breach of contract, violation of the Home Improvement Act, violation of the Connecticut Unfair Trade Practices Act, negligence, and unjust enrichment.

20. On May 7, 2008, a default judgment was entered in favor of the Plaintiff and against the Defendant and Escelena's Construction in the amount of \$55,889.13, plus costs (the "State Court judgment").<sup>2</sup>

### **The 2008 Chapter 13 Case**

21. On April 23, 2008, two weeks before the entry of the State Court judgment, the Defendant and the Defendant's Wife filed a Chapter 13 case in this Court (the "2008 Chapter 13 case"). The Chapter 13 Petition, Schedules, and Statement of Financial Affairs filed by the Defendant and the Defendant's Wife declared, under penalty of perjury, that the information contained in the filings was true and correct. However, the Schedules and the Statement of Financial Affairs did not list the Plaintiff as a creditor or the pending State Court action. (Testimony of the Defendant and the Defendant's Wife at June 2, 2014 trial; Plaintiff's Exhibit M).

22. On April 30, 2008, the Defendant and the Defendant's Wife amended their Schedule F to include the Plaintiff's attorney as a creditor, but did not amend their Schedule F to list the Plaintiff as a creditor. The Defendant and the Defendant's Wife also amended their Statement of Financial Affairs to list the State Court action. (Plaintiff's Exhibit M; Case No. 08-31268 ECF Nos.16 and 19).

23. The Defendant and the Defendant's Wife failed to disclose that the records of Escelena's Construction and their personal financial records were lost or destroyed in 2006 due to a flood in their home. At no time during the 2008 Chapter 13 case did the Defendant or the Defendant's Wife amend their Statement of Financial Affairs to disclose the loss or

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<sup>2</sup> It appears that the State Court judgment was not appealed.

destruction of the records. (Testimony of the Defendant and the Defendant's Wife at June 2, 2014 trial; Plaintiff's Exhibit M).

24. Because the Defendant and the Defendant's Wife could not confirm a Chapter 13 Plan, an order dismissing the 2008 Chapter 13 case was entered on November 18, 2008. (Case No. 08-31268, ECF No. 55).

#### **The 2009 Chapter 13 Case**

25. On March 20, 2009, the Defendant and the Defendant's Wife filed a second Chapter 13 Petition, Schedules, Statement of Financial Affairs, and Plan in this Court (the "2009 Chapter 13 case"), in which they declared, under penalty of perjury, that the information contained in the filings was true and correct. (Plaintiff's Exhibit A1; testimony of the Defendant and the Defendant's Wife at June 2, 2014 trial).

26. As was true in the 2008 Chapter 13 case, the Defendant and the Defendant's Wife failed to list the Plaintiff as a creditor despite the entry of the State Court judgment more than ten months before filing the 2009 Chapter 13 case. (Plaintiff's Exhibit A1).

27. As was also true in the 2008 Chapter 13 case, the Defendant and the Defendant's Wife failed to list the State Court action in their Statement of Financial Affairs. (Plaintiff's Exhibit A1).

28. On August 4, 2011, more than two years after filing the 2009 Chapter 13 case, the Defendant and the Defendant's Wife amended their Schedule F to list the Plaintiff as a creditor. (Plaintiff's Exhibit A2).

#### **The Pending Chapter 7 Case**

29. On January 25, 2012, the Defendant and the Defendant's Wife moved to convert the 2009 Chapter 13 case to a Chapter 7 case. The 2009 Chapter 13 case was converted

to Chapter 7 on January 30, 2012. The converted Chapter 7 case is the case presently before this Court and the case in which the instant adversary proceeding was commenced (the “pending Chapter 7 case”).

30. As was true in the 2008 Chapter 13 case and the 2009 Chapter 13 case, the Defendant and the Defendant’s Wife failed to disclose that the records of Escelena’s Construction and their personal financial records were lost or destroyed in 2006 due to a flood in their home. (Testimony of the Defendant and the Defendant’s Wife at June 2, 2014 trial; Plaintiff’s Exhibits A1).

31. On April 23, 2012, the Plaintiff commenced the instant adversary proceeding against the Defendant.

32. On May 2, 2014, just one month before the trial in this adversary proceeding, and more than two years after the 2009 Chapter 13 case was converted to Chapter 7, the Defendant and the Defendant’s Wife amended their Schedule C to reflect changes to the ownership of various tools at issue in the adversary proceeding. At no time did the Defendant or the Defendant’s Wife amend their Schedules or their Statement of Financial Affairs to disclose the State Court action, the pending adversary proceeding, or the two previous Chapter 13 cases filed in this Court. (Testimony of the Defendant at June 2, 2014 trial; Plaintiff’s Exhibit A3).

#### **The 2013 Chapter 13 Case**

33. On January 9, 2013, while this Chapter 7 case and adversary proceeding were pending, the Defendant and the Defendant’s Wife filed a third Chapter 13 case in this Court (the “2013 Chapter 13 case”), in which they declared, under penalty of perjury, that the information contained in the filings was true and correct. (Plaintiff’s Exhibit N).

34. At the time the 2013 Chapter 13 case was filed, the Defendant and the Defendant's Wife failed to disclose: (i) the pending Chapter 7 case on their petition, (Testimony of the Defendant and the Defendant's Wife at June 2, 2014 trial; Plaintiff's Exhibit A1; Plaintiff's Exhibit N); and (ii) this pending adversary proceeding on their Statement of Financial Affairs. (Plaintiff's Exhibit N).

35. The Defendant and the Defendant's Wife again failed to list the State Court action and the State Court judgment in their Statement of Financial Affairs. (Plaintiff's Exhibit N).

36. The Defendant and the Defendant's Wife again also failed to list the Plaintiff as a creditor. (Plaintiff's Exhibit N).

37. On May 2, 2014, just one month before trial, the Defendant and the Defendant's Wife amended their Schedule C to reflect changes to the ownership of various tools related to the allegations in this adversary proceeding. The exact same amended Schedule C was simultaneously filed in the pending Chapter 7 case. (Testimony of the Defendant at June 2, 2014 trial; Plaintiff's Exhibit A1; Plaintiff's Exhibit N; Case No. 13-30045 ECF No. 41).

38. At no time did the Defendant or the Defendant's Wife amend their Schedules or their Statement of Financial Affairs to disclose the State Court action, the State Court judgment, the 2008 Chapter 13 case, the 2009 Chapter 13 case, the pending Chapter 7 case, or the pending adversary proceeding. (Testimony of the Defendant at June 2, 2014 trial; Plaintiff's Exhibit N).

39. As was also true in the 2008 Chapter 13 case, the 2009 Chapter 13 case, and the pending Chapter 7 case, the Defendant and the Defendant's Wife failed to disclose the loss or destruction of the records of Escelena's Construction and their personal financial records

in 2006 due to a flood in their home. (Testimony of the Defendant and the Defendant's Wife at June 2, 2014 trial; Plaintiff's Exhibit N).

40. At trial, evidence was introduced to establish that the Defendant and the Defendant's Wife had two bankruptcy cases simultaneously pending before this Court—the pending Chapter 7 case and the 2013 Chapter 13 case. (Testimony of the Defendant and the Defendant's Wife at June 2, 2014 trial; Plaintiff's Exhibit A1; Plaintiff's Exhibit N).

41. This Court dismissed the 2013 Chapter 13 case with prejudice on July 15, 2014. (Case No. 13-30045, ECF No. 49).

### **CONCLUSIONS OF LAW**

The decision of the Court is based upon the evidence presented at trial and the credibility of the witnesses who testified at trial. “[T]he Bankruptcy Court, as the trier of fact, is in the best position to determine the credibility of witnesses and their testimony.” *In re Reilly*, 245 B.R. 768, 773 (B.A.P. 2d Cir.) *aff'd*, 242 F.3d 367 (2d Cir. 2000), *see also* Fed. R. Bankr. Pro. 8013 (explaining the weight given to a bankruptcy court judge's evaluation of the evidence at trial when being considered on appeal).

At trial, the Plaintiff introduced evidence that undermined the credibility of the Defendant. In their multiple bankruptcy cases before this Court, the Defendant and the Defendant's Wife filed documents under penalty of perjury that failed to include required information. The Defendant and the Defendant's Wife repeatedly failed to include an accurate list of creditors, to disclose the existence of the State Court action, and to disclose both the prior and simultaneously pending bankruptcy cases. A debtor who seeks the protection of the Bankruptcy Court is specifically required to provide such information to allow for the proper administration of the bankruptcy estate and to provide creditors with notice of the filing. The

failure of the Defendant and the Defendant's Wife to accurately provide this fundamental information in their multiple Petitions, Schedules, and Statements of Financial Affairs raises issues about their credibility.

Furthermore, the testimony of the Defendant and the Defendant's Wife at trial with regard to the existence of an Escelena's Construction bank account contradicts the Defendant's prior written response to an interrogatory. In response to the interrogatory, the Defendant stated that Escelena's Construction had a bank account at Wachovia Bank. At trial, the Defendant and the Defendant's Wife both testified that Escelena's Construction did not have a bank account. Such contradictory evidence raises further concerns about their credibility. As the United States Bankruptcy Court for the Northern District of New York recently noted in the case of *In re Shao Ke*, No. 09-32272, 2013 WL 4170250 (Bankr. N.D.N.Y. Aug. 14, 2013) *appeal denied, judgment aff'd sub nom. Shao Ke v. Jianrong Wang*, No. 5:13-CV-1203-GTS, 2014 WL 4626329 (N.D.N.Y. Sept. 15, 2014), the credibility of a witness in a non-dischargeability action is extraordinarily important.

'In weighing the credibility of witnesses, the Court must examine the evidence presented and evaluate the testimony, including variations in demeanor as well as changes in the tone of voice.' *Hamdorf v. Gritton (In re Gritton)*, 2003 Bankr.LEXIS 210, at \* 11-12 (Bankr. N.D. Iowa Mar. 13, 2003) (citing *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985)). The Court can assess credibility based upon the content of the testimony as well as the Court's own vast experience assessing the way people act. *Id.* at \*12 (citing *In re Carrigan*, 109 B.R. 167, 170 (Bankr. W.D. N.C.1989)). 'Where two permissible views of the evidence exist, it is the responsibility of the Court to weigh the evidence presented including the credibility of witnesses and make a choice between them.' *Id.* (citing *In re Waugh*, 95 F.3d 706, 712 (8th Cir.1996); *In re Dullea Land Co.*, 269 B.R. 33, 36 (B.A.P. 8th Cir.2001)).

*Id.*, at \*13.

After evaluating the evidence, the testimony of the witnesses, and assessing the credibility of their testimony, the Plaintiff's claims regarding the repair and restoration contracts

are more credible than the claims of the Defendant. Keeping in mind the issue of credibility, the Court now turns to the Plaintiff's alter-ego claim.

### **1. Alter-Ego Claim and Veil-Piercing**

The Plaintiff asserts that Escelena's Construction served as an alter-ego of the Defendant. The Plaintiff further asserts that the Defendant should be liable for the judgment obtained against Escelena's Construction in the State Court action.

To find liability under the alter-ego theory, Connecticut courts use a test corresponding to the requirements for piercing the corporate veil. *Zaist v. Olsen*, 154 Conn. 563, 578, 227 A.2d 552, 558 (1967); *Naples v. Keystone Bldg. and Dev. Corp.*, 295 Conn. 214, 232 (2010); *DeSantis v. Piccadilly Land Corp.*, 3 Conn. App. 310, 487 A.2d 1110, 1113 (1985). Piercing the corporate veil in Connecticut is "an equitable determination allowing for the enforcement of a judgment against a party not primarily liable." *Everspeed Enter. LTD v. Skaarup Shipping*, 754 F. Supp. 2d 395, 403 (D. Conn. 2010); *see also CSX Transp., Inc. v. Blakeslee*, No. 3:11-CV-533, 2012 WL 3985169, at \*5 (D. Conn. Sept. 11, 2012).

Circumstances under which the corporate veil is pierced occur when the corporation is controlled and dominated in a manner that requires liability to be imposed on the real actor. *Naples v. Keystone Bldg. and Dev. Corp.*, 295 Conn. 214, 231 (2010). The corporate veil is pierced "only under exceptional circumstances . . . where the corporation is a mere shell, serving no legitimate purpose, and used primarily as an intermediary to perpetuate fraud or promote injustice." *Id.* at 233. Piercing the corporate veil is a theory of liability only used in the most egregious cases because of its direct "opposition to the public policy of the state . . . concerning the formation and regulation of corporations." *Id.* at 233-34.

The Connecticut Supreme Court has recognized two tests when determining whether to pierce the corporate veil: the instrumentality rule and the identity rule.

The instrumentality rule requires, in any case but an express agency, proof of three elements: (1) Control, not mere majority or complete stock control, but complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; (2) that such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest or unjust act in contravention of [the] plaintiff's legal rights; and (3) that the aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of...

The identity rule has been stated as follows: If [the] plaintiff can show that there was such a unity of interest and ownership that the independence of the corporations had in effect ceased or had never begun, an adherence to the fiction of separate identity would serve only to defeat justice and equity by permitting the economic entity to escape liability arising out of an operation conducted by one corporation for the benefit of the whole enterprise.

*Naples*, at 232 (quoting *Angelo Tomasso, Inc. v. Armor Constr. & Paving, Inc.*, 187 Conn. 544, 552-54, 447 A.2d 406 (1982)).

Both tests need not be proven. "A court may properly disregard a corporate entity if the elements of *either* the instrumentality rule or identity rule are satisfied." *Litchfield Asset Mgmt. Corp. v. Howell*, 70 Conn. App. 133, 148 n.11, 799 A.2d 298, 310 (2002) (citing to *Angelo Tomasso, Inc. v. Armor Constr. & Paving, Inc.*, 187 Conn. 544, 553, 447 A.2d 406 (italics in original); *Saphir v. Neustadt*, 177 Conn. 191, 209-10, 413 A.2d 843 (1979), *Zaist v. Olson*, 154 Conn. 563, 578, 227 A.2d 552 (1967)), *overruled on other grounds by Robinson v. Coughlin*, 266 Conn. 1, 9, 830 A.2d 1114 (2003).

If the corporate veil of Escelena's Construction is pierced, then the debt it owes to the Plaintiff may be deemed nondischargeable in the Defendant's pending Chapter 7 case. In this case, the facts support piercing the corporate veil under the instrumentality rule.

### **i. Control of Finances, Business Practices, and Policies**

To succeed on her alter-ego claim, the Plaintiff must first show the Defendant had complete control of the corporation's finances, business practices, and policies. The evidence presented at trial established that the Defendant had full control over the finances of Escelena's Construction.

Although the Defendant's Wife testified that she maintained the books and records of Escelena's Construction, no evidence was presented at trial of her bookkeeping responsibilities or of her experience or knowledge of keeping books and records. Instead, the evidence established that the Defendant drafted the contracts between the parties, including the specific provision that required the Plaintiff to make all checks payable directly to him, not Escelena's Construction. The evidence also established that the checks were never deposited into an Escelena's Construction bank account. At best, only contradictory evidence was presented regarding the existence of such an account. The Defendant testified that he would cash the checks to purchase materials and pay subcontractors, and then any remaining funds would be paid to him. The evidence established that the Defendant had full control over the company's money and its use.

The evidence further established that the Defendant also exercised complete control over the business practices and policies of Escelena's Construction. The Defendant dictated how, when, and what work would be performed at the Plaintiff's home. The Defendant also determined the quality of the work to be performed and the materials to be used to perform the work. The Defendant decided if and when to use subcontractors. The Defendant determined the exact times to send subcontractors to the Plaintiff's home. The Defendant was also in charge of inspecting any work on the home and made the ultimate decision not to correct any work with

which the Plaintiff was not satisfied. The Defendant was in charge of every detail of how, when, and what work was completed at the Plaintiff's home, as well as the quality of work that was performed. All of these facts support the conclusion that the Defendant was in complete control of Escelena's Construction.

### **ii. To Perpetrate a Fraud/Wrong**

The Plaintiff must also show that the Defendant exercised control over Escelena's Construction in order to perpetrate a fraud or wrong against her. The evidence established Escelena's Construction was formed to perform the work at the Plaintiff's home. The evidence further established that the only work Escelena's Construction ever performed during its short existence was the work at the Plaintiff's home. The Defendant testified that he drafted all of the contracts for the repair and restoration work, including the provision in the contracts that required all payments be made directly payable to him and not Escelena's Construction. The Plaintiff's uncontroverted testimony established that all of her checks were made payable directly to the Defendant, but all of the work specified in the contracts was not performed or satisfactorily completed. The Defendant continued to enter into contracts with the Plaintiff, despite failing to complete prior projects. By controlling the day-to-day operations and finances of Escelena's Construction, requiring all payments be made payable directly to him, continuing to enter into contracts with the Plaintiff, and not completing the repair and restoration work required by the contracts, the Defendant perpetrated a fraud or wrong against the Plaintiff.

### **iii. Proximate Cause**

The Plaintiff must also show that the Defendant's control over the company proximately caused her injury. In this case, the Plaintiff suffered as a direct result of the Defendant's failure to abide by the contracts and complete work at her home in a "workmanlike

manner” in accordance with “standard practices.” By failing to complete the work in a workmanlike manner in accordance with standard practices, and in some cases failing to complete the work at all, the Plaintiff did not receive the benefit of home repair and restoration work in exchange for the significant sums she paid to the Defendant for such work.

Therefore, the Plaintiff has satisfied all of the elements of the instrumentality test. It is appropriate to pierce the corporate veil of Escelena’s Construction and the Defendant is liable to the Plaintiff for the debts owed to her by Escelena’s Construction. The Court must now determine whether the debt is non-dischargeable under 11 U.S.C. § 523(a)(2)(A).

## **2. Legal Standard and Elements of 11 U.S.C. § 523(a)(2)(A)**

11 U.S.C. § 523(a)(2)(A) excepts from discharge “any debt . . . for money [or] property to the extent obtained by . . . false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition.” 11 U.S.C. § 523(a)(2)(A). To obtain relief under 11 U.S.C. § 523(a)(2)(A), a creditor must allege and prove that (1) the debtor made the representations; (2) the debtor knew the representations were false at the time they were made; (3) the debtor made the representations with the intention and purpose of deceiving the creditor or inducing him to act to his detriment; (4) the creditor relied on the representations to his detriment; and (5) the false representations were the proximate cause of the creditor’s loss. *Michalek v. Ochs (In re Ochs)*, 516 B.R. 213, 218 (Bankr. D. Conn. 2014) (citing *AT&T Universal Card Services Corp. v. Williams (In re Williams)*, 214 B.R. 433, 435 (Bankr. D. Conn. 1997).

In order to prevail in an 11 U.S.C. § 523(a)(2)(A) action, the Plaintiff must prove its claims by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 286, 111 S. Ct.

654, 659, 112 L. Ed. 2d 755 (1991). Under this standard of proof, the trier of fact makes the ultimate determination.

**i. Defendant's false representations**

As to the first element of a § 523(a)(2)(A) claim, the Plaintiff must show that the Defendant made a false representation to the Plaintiff. The Second Circuit has included “a false representation, scienter, reliance, and harm” under the category of actual fraud. *Evans v. Ottimo*, 469 F.3d 278, 283 (2d Cir. 2006) (citing Restatement (Second) of Torts § 525). Bankruptcy Courts in this jurisdiction have applied the *Evans* decision in deciding that “actual fraud” by definition consists of “any deceit, artifice, trick or design involving direct and active operation of the mind, used to circumvent and cheat another—something said, done or omitted with the design or perpetrating what is known to be a cheat or deception.” *Conn. Attys. Title Ins. Co. v. Budnick (In re Budnick)*, 469 B.R. 158, 174 (Bankr. D. Conn. 2012) (quoting *McCarron v. Andrews (In re Andrews)*, 385 B.R. 496, 508 (Bankr. D. Conn. 2008)).

As noted above, several of the contracts represented that Escelena's Construction is a “Home Improvement Specialist[.]” However, as also noted above, Escelena's Construction was formed to perform the work at the Plaintiff's home—it had no prior construction experience at all. The contracts also represented that “[a]ll work [was] to be completed in a workmanlike manner according to standard practices.” The terms “workmanlike manner” and “standard practices” infer, at the very least, prior construction experience of which no evidence was presented. The Defendant also represented to the Plaintiff that he would perform the work at the Plaintiff's home. By representing: (i) Escelena's Construction as “Home Improvement Specialists”; (ii) that “[a]ll work [was] to be completed in a workmanlike manner according to standard practices”; and (iii) that he would perform the work at the Plaintiff's home, the

Defendant held out himself and Escelena's Construction as construction professionals capable of performing the agreed upon repair and restoration work. By representing himself and Escelena's Construction in such a way while actually lacking the proper qualifications, experience, or expertise, the Defendant made false representations to the Plaintiff. Therefore, the first element of a nondischargeability claim has been satisfied.

**ii. Defendant knew the representations to be false at the time they were made**

Next, the Plaintiff must show that the Defendant knew his representations were false at the time they were made to the Plaintiff. A Connecticut Bankruptcy Court has found that a "false representation" is established where a debtor makes a false statement, *knowing it to be false*, with the purpose of inducing the creditor to act to his detriment in reliance." *Peregrine Falcons Jet Team, A Nevada Corp. v. Miller (In re Miller)*, 282 B.R. 569, 576 (Bankr. D. Conn. 2002) (emphasis added).

The Defendant knew that the representation that he and Escelena's Construction were "Home Improvement Specialists" was false when he made it. The Defendant knew this representation was false because he knew that both he and Escelena's Construction did not have the required skills to complete a home repair and restoration project. The Defendant also knew that his representation to the Plaintiff that the work would be done in a "workmanlike manner" and in accordance with "standard practices" was false when he made it. The Defendant was not a construction professional and did not demonstrate any prior experience in the residential home repair and restoration business. In fact, as noted above, the Plaintiff was the only client Escelena's Construction ever had during its existence.

At the time the Defendant made these representations to the Plaintiff, he knew they were false, or at the very least, were reckless. Therefore, the second element of a nondischargeability claim has been satisfied.

**iii. The Defendant made representations with the intention and purpose of deceiving the Plaintiff**

The Plaintiff must also show that the Defendant acted with the intention and purpose of deceiving her or inducing her to act to her detriment. The Second Circuit has held that an “intent to deceive can be inferred from the totality of circumstances, including reckless disregard.” *Nat’l Union Fire Ins. Co. of Pittsburgh, PA v. Bonnanzio (In re Bonnanzio)*, 91 F.3d 296, 301 (2d Cir. 1996). Further, the Second Circuit has joined four other circuits in deciding that an “intent to deceive is an issue of fact.” *Id.* at 302. Because the Second Circuit in *Bonnanzio* determined that the intent to deceive is an issue of fact, the *Bonnanzio* court gave great deference to a bankruptcy court’s assessment of a debtor’s credibility. *Id.*

The representations that the Defendant and Escelena’s Construction were “Home Improvement Specialists” were made with the intention and purpose of deceiving the Plaintiff. The evidence shows that the Defendant misled the Plaintiff regarding his qualifications, abilities, and skills in the construction business. The Defendant also misled the Plaintiff regarding the prior experience of Escelena’s Construction—Escelena’s Construction had no prior experience. The actions of the Defendant demonstrate his intention to deceive the Plaintiff, or at the very least, a reckless disregard for the truth.

Even if the Defendant believed he was capable of completing the repair and restoration work on the Plaintiff’s home when entering into the first contract, he must have known after he failed to complete the first contract that he was unable to perform on future contracts. Entering into additional contracts with the Plaintiff, taking the Plaintiff’s money, and

making representations regarding the repair and restoration work shows that the Defendant more than recklessly disregarded the truth and intended to deceive the Plaintiff. Therefore, the third element of a nondischargeability claim has been satisfied.

**iv. The Plaintiff relied on the Defendant's representations to her detriment**

Fourth, the Plaintiff must prove that she relied on the Defendant's representations to her detriment. In *Field v. Mans*, the United States Supreme Court held that a finding of nondischargeability under § 523(a)(2)(A) required justifiable reliance, instead of reasonable reliance as found by lower courts. 516 U.S. 59, 74 (1995). Justifiable reliance on the part of a victim in a case of alleged misrepresentation requires only that "where, under the circumstances, the facts should be apparent to one of his knowledge and intelligence from a cursory glance, or he has discovered something which should serve as a warning that he is being deceived, that he is required to make an investigation of his own." *Id.* at 71-72.

The Plaintiff relied on Defendant's false representations that Escelena's Construction and the Defendant were "Home Improvement Specialists" and that all work would be performed in a "workmanlike manner" in accordance with "standard practices." The Plaintiff relied on these representations when she entered into the contracts for repair and restoration work at her home. She expected the work to be completed by a "Home Improvement Specialist," in a "workmanlike manner," and that "standard practices" in the residential construction industry would be followed.

The Plaintiff's reliance on the Defendant's representations that the repair and restoration work would be completed in accordance with the standards one would ascribe to a "Home Improvement Specialist" was reasonable under the circumstances. It is not reasonable to believe that any further inquiry was required. The Plaintiff's reliance on the Defendant's false

representations resulted in her sustaining money damages without receiving the quality repair and restoration work she paid for at her home. Therefore, the fourth element of a nondischargeability claim has been satisfied.

**v. The false representations were the proximate cause of the Plaintiff's loss**

Finally, the Plaintiff must show that the Defendant's false representations were the proximate cause of the Plaintiff's loss. *See Fed. Dep. Ins. Corp. v. Vincent A. Roberti (In re Roberti)*, 201 B.R. 614, 628 (Bankr. D. Conn. 1996). "Proximate cause is something more than speculation as to what the creditor might have done in hypothetical circumstances. Without a direct link between the alleged fraud and the creation of the debt, there is no proximate cause and the element is not satisfied." *Neal D. Frishberg v. Denise C. Janac (In re Janac)*, 407 B.R. 540, 547 (Bankr. S.D.N.Y. 2009) (internal quotations and ellipsis omitted).

In this case, the Plaintiff sustained monetary damages of roughly \$55,889.13 due to the Defendant's failure to perform and complete the contracted repair and restoration work. The Defendant's false representations were the reason why the Plaintiff believed quality repairs would be performed and completed at her home in exchange for payment. As such, the Defendant's conduct was a substantial factor in bringing about the Plaintiff's injuries. Therefore, the fifth element of a nondischargeability claim has been satisfied.

**IV. CONCLUSION**

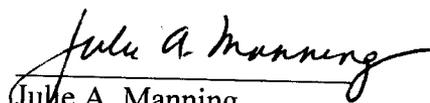
The Plaintiff has proven that the corporate veil of Escelena's Construction should be pierced and the Defendant should be liable for the debt owed to the Plaintiff. In addition, the Plaintiff has proven by a preponderance of the evidence that the debt should be deemed non-dischargeable under 11 U.S.C. § 523(a)(2)(A).

The debt owed to the Plaintiff in the amount of \$55,889.13, plus costs and interest from the date of the filing of the original Complaint (April 23, 2012), to the date of payment at the rate established by 28 U.S.C. § 1961, is deemed non-dischargeable. Judgment will enter in favor of the Plaintiff and against the Defendant.

**SO ORDERED.**

At New Haven, Connecticut this 12<sup>th</sup> day of February, 2015.

BY THE COURT,

  
Julie A. Manning  
Chief United States Bankruptcy Judge