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UNITED STATES BANKRUPTCY COURT  
IN AND FOR THE DISTRICT OF ARIZONA

**In Re**  
**SHERI WALTHER,**  
**Debtor.**  

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**NANCY APRIL,**  
**Plaintiff,**  
**v.**  
**SHERI WALTHER,**  
**Defendant.**  

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**Chapter 7 Proceedings**  
**Case No. 08-BK-13199-PHX-CGC**  
**Adv. No. 09-00003-CGC**  
  
**UNDER ADVISEMENT DECISION**  
**RE DISCHARGEABILITY**

**I. Introduction**

Nancy April and Debtor Sheri Walther are both casualties of the Phoenix housing market crash. The Debtor borrowed money from Ms. April to complete a remodel of her home with the intention of refinancing the debt upon completion of the renovations allowing her to repay the loan. However, by the time the time the contractors completed the remodel, Arizona’s real estate market was beginning to crumble. The Debtor could not refinance her loans and her income decreased. Eventually, she stopped payments to Ms. April.

The Court must decide if the debt to Ms. April nondischargeable under §523(a)(2)(A).

1 **II. Background and Facts**

2 The controversy centers on the Debtor’s home located at 6514 East Larkspur Dr., Scottsdale,  
3 AZ 85254 (“Property”). The Debtor, a mortgage broker, purchased the Property with her then-  
4 husband in 2005 where she and her daughter continue to live. In late 2007, at the height of the real  
5 estate boom the Debtor decided to remodel the Property. To finance the remodel, the Debtor  
6 obtained a loan from M&I Bank (“M&I Loan”).

7 The M&I Loan, dated November 5, 2007, was for \$850,000. Key conditions of the M&I  
8 Loan required the Debtor to: 1) pay off the existing lien of \$755,000; 2) retain \$99,000 in an escrow  
9 account to pay the contractor for the remodel (“Escrow”); and 3) contribute just over \$21,000 to the  
10 Escrow. In addition to the M&I Loan the Debtor needed an additional \$40,000 to complete other  
11 aspects of the remodeling project.

12 Ms. April is a loan broker moonlighting as a hard money lender providing high-interest short  
13 term loans. The Debtor and Ms. April met in December 2006 through a mutual acquaintance to  
14 complete a mortgage loan transaction for one of the Debtor’s clients. The Debtor asked Ms. April  
15 to lend her the additional \$40,000 needed from the remodel.

16 In the Fall of 2007, Ms. April agreed to make the loan (“April Loan”). The Debtor and Ms.  
17 April agree that: 1) the April Loan was for \$40,000; 2) the Debtor made \$4,500 in payments; 3) the  
18 Debtor used a portion of the loan to close on the M&I Loan; and 4) the deed of trust (“Deed of  
19 Trust”) was executed on November 2, 2007, but not recorded until August 5, 2008. Ms. April and  
20 the Debtor disagree on other terms of the April Loan.

21 Ms. April contends that the April Loan was intended as a three month loan to be used for  
22 construction purposes only. Ms. April testified that she would never have made the loan if she knew  
23 the Debtor would use it to fund the Escrow as required by M&I Loan. Ms. April believes that the  
24 Debtor refused to record the Deed of Trust because she intended to: 1) deceive her and M&I and 2)  
25 sell the Property with the Deed of Trust unrecorded so she could avoid repayment of the April Loan.

26 The Debtor contends that neither the Deed of Trust or note associated with the April Loan  
27 (“Note”) specify that the funds must be used to fund construction on the Property. Further, argues  
28 the Debtor, even though part of the \$40,000 was deposited into the Escrow, she used all of the April

1 Loan to pay for construction because the Escrow funds were used to pay her contractor. The Debtor  
2 states that she always intended to repay the April Loan, but simply could not.

3 There are two key documents in this matter - the Note and the Deed of Trust. Key terms of  
4 the Note include:

5 Amount: \$40,000  
6 Dated : October 31, 2007  
7 Funding Date: November 1, 2007  
8 Repayment Sechedule:  
9 First 90 Days  
10 Payments: \$500  
11 Interest: 15%  
12 Days 91-180  
13 Payments: \$600  
14 Interest: 18%  
15 Past 181 Days  
16 Payments: \$667  
17 Interest: 20%  
18 Due Date: November 1, 2008  
19 Other Terms: Entire amount due upon default  
20 No restrictions on the use of the funds.

21 Key terms of the Deed of Trust include:

22 Dated: October 31, 2007  
23 Notarized: November 2, 2007  
24 Recorded: August 5, 2008  
25 Other Terms: No restrictions on the use of funds.  
26 "Recorded at the request of Sherri Walther"  
27 "When recorded mail to: 14844 N Greenhurst Ave., Fountain Hills,  
28 AZ 85268."  
No instructions on who is to record the Deed of Trust.

19 The Court tried the matter on October 26, 2009 where both the Debtor and Ms. April  
20 testified. After the completion of post-trial briefing the Court took the matter under advisement.

### 21 **III. Analysis**

22 Ms. April asks that her debt be excepted from discharge under 11 U.S.C. §523(a)(2)(A):  
23 Under §523(a)(2)(A) a debt is not dischargeable "for money, property, services, or an extension,  
24 renewal, or refinancing of credit, to the extent obtained by -- false pretenses, a false representation,  
25 or actual fraud, other than a statement respecting the debtor's or an insider's financial condition."  
26 To prevail the creditor "must establish: (1) a misrepresentation of fact by the debtor, (2) that the  
27 debtor knew at the time to be false, (3) that the debtor made with the intention of deceiving the  
28 creditor, (4) upon which the creditor relied, and (5) that was the proximate cause of damage to the

1 creditor." *In re Cossu*, 410 F.3d 591, 596 (9th Cir. 2005); *See also In re Sabban*, 384 B.R. 1, 5 (9th  
2 Cir. BAP 2008). "The creditor bears the burden of proof to establish all five of these elements by  
3 a preponderance of the evidence." *In re Weinberg*, 410 B.R. 19, 35 (9th Cir.BAP 1991).

4 Elements (1), (2) and (3) when read together mean that a creditor must establish "evidence,  
5 that a debtor knowingly made a false representation, either express or implied, with the intent of  
6 deceiving the creditor." *In re Brown*, 217 B.R. 857, 861 (Bankr.S.D.Cal 1998). The question here  
7 is did the Debtor make a false representation with the intent of deceiving Ms. April?

8 Ms. April claims that the Debtor misrepresented herself by claiming that she would use the  
9 funds for construction purposes only and repay the April Loan within three months. Moreover, Ms.  
10 April claims that the Debtor intentionally caused the Deed of Trust not to be recorded for two  
11 reasons: 1) to obtain the M&I Loan and 2) to sell the Property with the Deed of Trust unrecorded  
12 to avoid repayment of the April Loan. Ms. April claims that if she knew the April Loan would be  
13 used to fund the Escrow she would never have made the loan.

14 Ms. April has not supported her claims by the preponderance of the evidence. The evidence  
15 shows that although a portion of the April Loan were used to fund the Escrow, a condition for  
16 closing the M&I Loan, the Debtor used the funds in the Escrow account to fund construction.  
17 Simply put, the money lent was used to pay the contractor - the exact purpose allegedly promised  
18 by the Debtor. Additionally, the wording of the Note does not support Ms. April's claim. The terms  
19 of the Note contemplate a payment schedule lasting beyond three months - a term clearly  
20 inconsistent with a promise of payoff within three months. Moreover, the due date on the Note -  
21 November 1, 2008 - is a full year after the signing of the Note. Again, this is inconsistent with Ms.  
22 April's position. Further, the Note and Deed of Trust contain no restrictions on the use of funds.  
23 The Court concludes that the Debtor did not misrepresent the use of the April Loan or when the it  
24 would be repaid.

25 There is insufficient evidence that the Debtor caused the Deed of Trust not be recorded. Yes,  
26 the Deed of Trust was not recorded until August 2008. But, there is no credible evidence why. The  
27 Deed of Trust does not show that either party is responsible for recording the Deed of Trust,  
28 although that obligation usually runs with the party for whose benefit it is given - the lender. What

1 the Deed of Trust does show is that "[w]hen recorded mail to: 14844 N Greenhurst Ave., Fountain  
2 Hills, AZ 85268" - Ms. April's address. Ms. April knew or should have know within days that the  
3 deed of trust was not recorded; yet, she took no action. Moreover, once Ms. April discovered that  
4 the Deed of Trust was not recorded there was nothing preventing her from recording the Deed of  
5 Trust. As noted, the record is barren as to why this series of events occurred as they did. As such,  
6 Ms. April has not met her burden of proof.

7 Ms. April has not shown such an intent by the Debtor to defraud her. Ms. April testified that  
8 she knew she was taking a risk when she loaned the Debtor. Such is the nature of a short term  
9 construction loan. The Debtor testified that she asked for the April Loan so she could remodel the  
10 Property. The Debtor did remodel the Property. Furthermore, the Debtor initially performed under  
11 the Note by repaying \$4,500 to Ms. April. This is an indication that the Debtor had an "honest  
12 intent" to repay the debt. *See In re Miller*, 310 B.R. 185, 197 (Bankr.C.D.Cal. 2004). Unfortunately  
13 for Ms. April and the Debtor, the housing market crashed and the Debtor could not refinance her  
14 home to repay Ms. April. Ms. April took a known risk and lost. This does not equate to deception  
15 on the part of the Debtor.

#### 16 **IV. Conclusion**

17 Ms. April has not shown false representation by the Debtor with the intention of deceiving  
18 Ms. April. Having failed to show a false representation with an intent to deceive, there is no need  
19 to consider whether the Creditor relied on the representation or wether the alleged loss was a result  
20 of such representation. Accordingly, Ms. April's request for an exception to discharge under  
21 §523(a)(2)(A) is denied. Debtor's counsel is to upload a form of judgment..

22  
23 So ordered.

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25 DATED: March 24, 2010

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28 Charles G. Case II  
UNITED STATES BANKRUPTCY JUDGE

1 **COPY** of the foregoing mailed by the BNC and/or  
sent by auto-generated mail to:

2  
3 NANCY APRIL  
4 14844 N. GREENHURST AVENUE  
5 FOUNTAIN HILLS, AZ 85268,  
6 Debtor

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