

**United States Bankruptcy Court
District of New Mexico**

Document Verification

Case Title: Mary Romero v. Michael Anthony Gonzales
Case Number: 03-01303
Nature of Suit:
Judge Code: S
Reference Number: 03-01303 - S

Document Information

Number: 30
Description: Memorandum Opinion in support of judgment awarding partial relief.
Size: 18 pages (37k)

Date Received: 02/10/2006 02:35:16 PM	Date Filed: 02/10/2006	Date Entered On Docket: 02/10/2006
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Court Digital Signature

[View History](#)

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Filer Information

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:

MICHAEL ANTHONY GONZALES,
Debtor.

No. 7-03-13011 SA

MARY HELEN ROMERO,
Plaintiff,

v.

Adv. No. 03-1303 S

MICHAEL ANTHONY GONZALES,
Defendant.

**MEMORANDUM OPINION IN SUPPORT OF
JUDGMENT AWARDING PARTIAL RELIEF**

Mary Helen Romero (sometimes "Plaintiff") filed an action against Michael Anthony Gonzales (sometimes "Defendant") seeking damages for a house and personal property delivered to Mr. Gonzales under an alleged promise of marriage and not returned to her. She also sought to have the award of damages held nondischargeable under §523(a)(2), (4) and (6). The matter was tried to the Court on November 10, 2004. At the conclusion of Plaintiff's case and in response to Defendant's motion to dismiss, the Court dismissed the count under §523(a)(4), took under advisement the dismissal of the §523(a)(6) count, and denied the motion to dismiss the §523(a)(2) count. Having considered the evidence and the arguments of counsel, the Court grants the relief requested under §523(a)(2) and §523(a)(6) but only as to the tractor and the other personal property listed below.

Facts

Following her husband's death in June 1995, Ms. Romero received approximately \$30,000 from life insurance proceeds and from retirement funds and vacation/sick pay that had belonged to her husband. She used these funds in May 1997 to make a down payment on the purchase from her brother of a house and lot with a street address of 1833 Patrick NW, Albuquerque, New Mexico. Due to credit problems, she ended up with a mortgage note, co-signed by her brother and sister-in-law, for approximately \$102,000 with a fairly high interest rate of 11.875%. She failed to make the May 1998 real estate tax payment, and by no later than October 1999, she was delinquent on the loan as well.

This was not the only instance in which Ms. Romero had difficulties in making payments on real estate. She owned an historical house at 1611 Griegos N.W. in Albuquerque. In December 1999 she filed a chapter 7 case (07-99-17180 MA, District of New Mexico). On March 8, 2000, a stipulated stay relief order was entered which allowed Ms. Romero seven months to get caught up on her mortgage payments on the Griegos house (doc 14). Despite Ms. Romero's renting out the property in order to make the mortgage payments, she was still delinquent in July 2000 when the mortgagee Flagstar Bank commenced a foreclosure action. In October 2000, Ms. Romero filed a chapter 13 case (13-00-15663 MA, District of New Mexico) and subsequently confirmed a plan in

order to save the Griegos house. However a stipulated order modifying the stay was entered on May 1, 2002, allowing Flagstar to continue with its foreclosure action (doc 41), and in March 2003 the chapter 13 case was dismissed after Ms. Romero essentially had stopped making her plan payments (doc 50). Summarizing, Ms. Romero appears for whatever reason to have been incapable of managing her finances sufficiently well to hold on to her real estate.

In August 1995 Ms. Romero met Mr. Gonzales and they began a relationship. Their versions of the relationship differ. Ms. Romero described spending several nights a week with him at his house on Espejo Northeast in Albuquerque, keeping overnight toiletries at his house, although throughout the entire period, Ms. Romero also continued to spend several nights a week staying at her mother's house to care for her. Mr. Gonzales denied that she kept things at the Espejo house, and generally insisted that they spent only occasional nights together, and then only for sex. She testified that almost immediately he asked her to marry him, and continued asking her over time. She also described vacations together and claimed that he bought her an engagement ring. Mr. Gonzales insisted that she bought the ring herself. He also testified that there had never been talk of marriage, and that the relationship was primarily one for (non-monogamous) sex and friendship. Ms. Romero testified that Mr. Gonzales had spent

many hours over a period of years caring for the Patrick house, the Griegos house and her mother's house. Mr. Gonzales agreed, but testified that he did all that work merely because Ms. Romero and her mother needed it. The parties also agreed that for more than a year prior to April 2001 1833 Patrick was rented out, and that Mr. Gonzales dealt with the tenants, collected the rent, paid the mortgage (or at least was supposed to) and generally managed the property; and that when the tenants moved out in March 2001 Mr. Gonzales moved into 1833 Patrick and rented out his house on Espejo.

During this period Ms. Romero suffered significant health problems. In November 1997 she was the victim of a hit and run accident that slammed her into a telephone pole. Her injuries left her with vertigo and depression, and she was away from work for a year. She had been on Prozac since 1992; now her doctor increased the Prozac. Whether from the Prozac, the accident or other reasons, Ms. Romero became a very different person, unable to assert herself. That personality change ended in 2001, when her doctor took her off Prozac. This testimony was uncontradicted; indeed, Mr. Gonzales testified that he criticized Ms. Romero for being so dependent on the Prozac.

On March 2, 1998, less than a year after Ms. Romero purchased the property, Mr. Gonzales recorded a warranty deed to 1833 Patrick in his name. The testimony about how that happened

is particularly conflicting. Ms. Romero testified that she had wanted to refinance the Patrick house, but due to her poor financial condition was unable to do so on her own. She stated that Mr. Gonzales had suggested that his name be placed on the deed because he would be able to secure refinancing at a more favorable rate. He also stated that a friend's wife was a realtor and that the friend's wife would help them obtain a mortgage at a lower rate of seven percent. In pursuit of this plan Ms. Romero obtained the signatures of her co-owners on the warranty deed. Plaintiff's Ex. O. Then the evening before Ms. Romero was to deliver the deed, Ms. Romero realized that Mr. Gonzales intended to leave her name off the deed entirely and gain sole ownership of the Patrick property. According to Ms. Romero, Mr. Gonzales stated that because the two were planning to marry, placing the property in his name would be inconsequential, as Ms. Romero would gain a half interest in the property upon consummation of the marriage.¹ Ms. Romero began to question Mr. Gonzales about what was happening, at which point he became threatening, suggesting that he would hurt Ms. Romero as well as himself if the property was not deeded to him. Ms. Romero stated

¹ Under New Mexico law, this statement is incorrect. Property owned by one spouse prior to marriage is considered separate property of that spouse. "'Separate property' means...property acquired by either spouse before marriage...." N.M.S.A. 40-3-8 (1999 Repl.); Hollingsworth v. Hicks, 57 N.M. 336, 338, 258 P.2d 724 (1953).

that because she loved Mr. Gonzales and believed that he intended to marry her, and also because she believed his threat to hurt himself, she deeded the property to him.

Mr. Gonzales' testimony contradicts nearly every aspect of Ms. Romero's testimony. Mr. Gonzales stated that he was lying on the bed when Ms. Romero entered the bedroom and threw the deed to the house on his lap. She stated that she was behind on the real estate taxes and could no longer afford the home and would lose it in a foreclosure. She insisted that Mr. Gonzales be responsible for all further financial responsibilities associated with the property. Mr. Gonzales understood this to mean that he would then be responsible for paying the taxes and making all future mortgage payments. Mr. Gonzales testified that he did not want the house at the time it was given to him, but that once he was handed (or thrown) the deed, he was obligated to make the payments.² Mr. Gonzales' trial exhibits show that after the

² Part of Mr. Gonzales' testimony on this issue, elicited by his counsel, is as follows (Tr., November 10, 2004, 2.22 pm):
Mr. Gonzales: "I didn't know - if I had known then that I did not have to pay for this house and all, I would not have taken it. "It [the deed] had my name on it and I thought I was responsible for it...."

[Mr. Gonzales then explained that it was not until he spoke with Mr. Goldberg, who asked him if had recorded the deed, did he learn that he had no obligation to pay.]

Mr. Gonzales: "I did not want to go through another bankruptcy. All I did was what I was supposed to do and I started making the mortgage payments."

Mr. Goldberg: "So you thought you had to accept the deed?"

Mr. Gonzales: "That is what I thought; I had no choice."

property was deeded to him, he paid \$1,466.59 to the Bernalillo County Treasurer for back taxes owed on the Patrick property. Mr. Gonzales also stated at trial that from the time the property was transferred, he made mortgage payments of approximately \$1500/month for nearly three years. He also refinanced the property, taking out about \$19,000 in equity.

The testimony by each party regarding Ms. Romero's requests to have the property deeded back to her is also quite contradictory. Ms. Romero testified that between 2000 and 2001 she repeatedly asked Mr. Gonzales to return the property to her because he had become abusive. Mr. Gonzales stated that he could only remember one time when Ms. Romero had asked for the return of the Patrick property. This request occurred following an incident in which Ms. Romero's son saw Mr. Gonzales at a concert with another woman. Mr. Gonzales testified that following her request, he had offered to give the property back to Ms. Romero. The condition he imposed was that she compensate him for alleged expenditures on property taxes, mortgage payments, and home improvements. Mr. Gonzales estimated that this would require a payment of approximately \$15,000, although he only requested \$12,000 from Ms. Romero.

Ms. Romero testified that while she had asked Mr. Gonzales numerous times to return the property, she took no formal action until January 2003. She stated that she had hoped Mr. Gonzales

would return the property on his own accord, but eventually decided to file a civil lawsuit. Mr. Gonzales filed his bankruptcy petition prior to the resolution of the state court proceedings. Ultimately the mortgagee initiated a foreclosure action and the property was purchased at the foreclosure sale by a friend of Ms. Romero's, who paid about \$143,000 for it. That was a sum that was beyond the ability of Ms. Romero to raise.

Ms. Romero also contends that Mr. Gonzales improperly took possession of and kept or disposed of numerous items of personal property that she had left at 1833 Patrick, after Mr. Gonzales had moved into that property and she had moved out.³ (Defendant has asserted all along that many of the items had been gifts or payments to him.) Following a physical altercation between the two parties in October 2001, Ms. Romero recovered some of her personal property from 1833 Patrick. After the foreclosure sale of the property in September 2003, she recovered more of the personal property, but not all of it.

Ms. Romero's testimony focused mostly on a yard tractor which she had purchased and was kept at 1833 Patrick. This tractor was used to maintain the various parcels of property on Patrick. Ms. Romero testified that after the October 2001 altercation the tractor was still at 1833 Patrick, but that just

³ Ms. Romero testified also that Mr. Gonzales used her vehicles for transportation and showed them off to co-workers and friends.

before or after the foreclosure sale, Mr. Gonzales's brother removed the tractor to Mr. Gonzales' father's house and she has not seen it since. Mr. Gonzales agreed that the tractor was still at his father's house.

The parties disagreed about the value of the tractor. Initially Ms. Romero thought the tractor was not worth anything, then "learned" that vehicles like that do not lose their value. (Given that a 1949 Ford tractor might be approaching the status of an antique, perhaps Ms. Romero is correct.) In 1995 she traded a Ford Mustang for the tractor; each vehicle was worth \$3,000 according to Ms. Romero and the former owner of the tractor. Plaintiff's Ex. B; Defendant's Ex. L, page 78. Mr. Gonzales testified at trial that the tractor was not working when he first encountered it, that he put \$100 into it to get it working, and that he used it on various of the properties. He further testified that the tractor needs a new engine because the head is cracked (and is therefore only useful for cutting weeds) and three tires, and is worth maybe \$100. Given the conflicting testimony, including Ms. Romero's trial testimony that her daughter and others used the tractor on the Patrick properties, the Court finds, by a minimal preponderance of the evidence, that the tractor is worth the \$3,000.

The items that Ms. Romero did not recover, and the yard-sale value of those items, based on Ms. Romero's candid testimony in

her deposition (Defendant's Ex. L, pp. 80-86), are her ex-husband's tools (\$500), pots and pans (\$20), piano keyboard (\$100), picture of an eagle (\$30), wooden desk (\$50), personal clothing (\$0), telescope (\$10), tires for the pick up truck (\$200), automobile CD player (\$25), light fixtures (apparently two of them at \$5 each - page 84, lines 9-15), a "decorative" Coke (the soft drink) (\$5), damage to the glass top table (\$10), area rugs (\$30), window coverings (\$30), eagle belt buckle (\$20), amethyst ring (\$50), and the air conditioner from the trailer in the backyard (\$100), for a total of \$1,190. Ms. Romero's values may have been a little low for some items - for example, virtually every yard sale has clothing for sale, suggesting that the clothing certainly had some value - but since there was no additional testimony or evidence about these values, and since the Court has no reason to question her overall estimate, the Court finds that the total value of the missing personal property, exclusive of the Ford tractor, was \$1,190.

Analysis

11 U.S.C. § 523(a)(2)(A) provides that a discharge under § 727 does not discharge an individual debtor from any debt "for money, property, services, or an extension, renewal, or refinancing of credit, 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;..." To establish a violation of this subsection, a plaintiff must show (1) a false statement, (2) intentionally uttered, (3) upon which the plaintiff justifiably relied, Field v. Mans, 516 U.S. 59, 74-75 (1995) ("justifiable" rather than "reasonable" reliance suffices to establish the reliance element of "actual fraud"), (4) which causes (5) the loss. See, e.g., Missouri v. Audley (In re Audley), 275 B.R. 383, 388 (10th Cir. B.A.P. 2002). Plaintiff bears the burden of coming forward with evidence and of persuasion on each element. Id.

The evidence establishes that Mr. Gonzales misled Ms. Romero into believing, or allowed her to continue to believe, that he intended to marry her, with the result that she transferred to him the real property at 1833 Patrick. The Court has reached this result by comparing the testimony and by reviewing the exhibits and the adjudicative facts of which the Court took judicial notice.

The Court finds that Ms. Romero's evidence was more credible than that of Mr. Gonzales. For example, the parties and documents are clear that Ms. Romero and Mr. and Ms. Sanchez executed a deed transferring 1833 Patrick to Mr. Gonzales. Ms. Romero's testimony about how that came about is consistent internally and consistent with typical human behavior in this society. On the other hand, Mr. Gonzales' testimony that Ms. Romero simply threw the deed to 1833 Patrick on his lap and told

him it was his problem to deal with, and that he believed that he was thereby obligated to own and take care of the property, is inconsistent with the behavior one would expect from someone who was a homeowner, who managed and rented property, who got property refinanced for more than it was originally mortgaged for, etc. The Court also finds credible Ms. Romero's testimony that Mr. Gonzales (in the Court's words) exercised some of the classic methods of controlling behavior over Ms. Romero, and that she was intent on a romantic relationship leading to marriage while he was manipulating her to obtain her real property and use of her vehicles.⁴ And the Court also finds Ms. Romero credible when she testifies that she was on Prozac, that the heavier doses of Prozac made her less able to stand up for herself, and that she finally began to be able to assert herself when she got off the Prozac sometime in 2001. The effects of the Prozac, together with Ms. Romero's difficult circumstances (the deaths, the automobile accident, the time away from work) and perhaps her personality, potentiated the influence of Mr. Gonzales' controlling behavior and false statements on a psychologically weakened Ms. Romero. Based on these findings, the Court concludes that Mr. Gonzales intentionally misrepresented facts and the state of their relationship, upon which

⁴ To be clear, Mr. Gonzales' alleged role as a sexual servicer for Ms. Romero is not a basis for finding him liable to Ms. Romero.

misrepresentations Ms. Romero justifiably relied, to her detriment.⁵ The Court also finds that Ms. Romero, despite her psychological condition, did ask for the property back several times, and that in effect Mr. Gonzales refused to return it. The fact that Ms. Romero did not actually sue Mr. Gonzales until 2003 does not constitute a waiver of her rights, nor estoppel by acquiescence. See Scott v. Jordan, 99 N.M. 567, 572, 661 P.2d 59, 64 (Ct. App. 1983). Nothing in Ms. Romero's conduct suggests that she tacitly consented to his keeping the property from her or that he could fairly infer from her behavior that she no longer asserted an interest in the property.

However, what Ms. Romero's losses were that were caused by the misrepresentations is less obvious. Concerning 1833 Patrick, it appears clear that Ms. Romero was not and would not have been able to maintain the property. She already had a track record of losing the Griegos property despite renting it out. For this property it appears that the rents were routinely less than the mortgage payment and taxes, at least when there were rental payments being made. Ms. Romero also filed a chapter 7 in 1999 (07-99-17180 MA) and a chapter 13 in 2000 (13-00-15663 MA) that failed. In April 2003 she was forced to file her second chapter 13 case (13-03-12937 MA). When she turned 1833 Patrick over to

⁵ The Court finds that even without taking into account the Prozac factor, Ms. Romero justifiably relied on Mr. Gonzales' deception.

Mr. Gonzales in March 1998, about a year after she had purchased, she was already behind on the payments, including the real estate taxes.⁶ Indeed, one of the reasons for deeding the property to Mr. Gonzales (with or without her name on the new deed) was to obtain a lower interest rate. Ms. Romero had the burden to prove that she could have continued to pay for 1833 Patrick and thus preserve the property, or that had she not turned it over to Mr. Gonzales (or promptly gotten it back when she asked), there was enough equity in the property for her to have sold it and realized some equity, and that she would have done so. There was no such proof presented (despite the conclusory statement on page 75 of the deposition, Defendant's Ex. L). Maybe the co-signers on the mortgage would have helped, but there is no evidence that they did anything but lend their good credit standing to her. Nor was there any evidence that if Ms. Romero had come back into possession of 1833 Patrick, she would have sold it before much of her equity had been used up. In fact, her track record strongly suggests otherwise. Thus, regardless of why Mr. Gonzales ended up with 1833 Patrick and what he did with it afterward, he cannot be charged with Ms. Romero's ultimate loss of that property.

⁶ However, the Court also finds that the property was not deeded to Mr. Gonzales to save it from a tax foreclosure. The documents in evidence do not support that assertion by Mr. Gonzales.

The personal property is a different story. Since that property was already paid for, the only issue is whether Mr. Gonzales improperly prevented the return of that property. The Court finds that he did. Ms. Romero attempted to get the tractor back, but Mr. Gonzales successfully resisted those efforts, and the tractor ended up at his father's house. Similarly, Ms. Romero's lack of access to 1833 Patrick, coupled with the conflicts between the parties, allowed Mr. Gonzales to prevent Ms. Romero from recovering the other personal property that she is still missing.

Ms. Romero asserted an alternative basis for holding these debts nondischargeable. Section 523(a)(6) excepts from discharge any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity;..." C.I.T. Financial Services, Inc. v. Posta (In re Posta) held that the intentional conversion of property may be nondischargeable under § 523(a)(6). Posta, 866 F.2d 364 (10th Cir. 1989). In this instance, Mr. Gonzales' refusal to return to Ms. Romero her personal property, or to give her access to it, constitutes a form of conversion.⁷ The Court finds and concludes that Mr.

⁷ "Conversion by detention. Conversion by detaining a chattel in a way that is adverse to the owner or other lawful possessor. ● Merely to possess a chattel without title is not conversion. The defendant must have shown an intention to keep it in defiance of the plaintiff." B. Garner (ed.), Black's law Dictionary (7th Ed.), (West Group 1999), at 333.

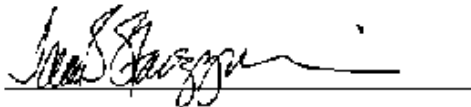
Gonzales injured Ms. Romero by keeping her personal property from her. He intentionally kept the property, and he knew that his actions would injure her.

Mr. Gonzales argued that the complaint described only a marriage theory of fraud and therefore Ms. Romero should not be able to recover under other grounds because they were not described at all, or were not described before the time limits ran. The original complaint in paragraph 8 alleges, "Alternatively, Defendant wrongfully converted the subject property to his own use after having lawfully obtained possession of it." Paragraphs 4 and 6 described respectively the real property and the personal property. The complaint described the actions of the Defendant and the property at issue to have put him on sufficient notice of the causes of action which have been pursued.

As a result, Ms. Romero is entitled to a judgment for the personal property in the amount of \$1,190. She is also entitled to a judgment for \$3,000 for the tractor, although, because of the paucity of evidence about its value, Mr. Gonzales may, in lieu of paying the \$3,000, deliver to her the tractor in the same condition it was on the date of the foreclosure sale in September 2003.

Conclusion

For the foregoing reasons, Plaintiff Mary Helen Romero will be awarded a judgment against Defendant Michael Anthony Gonzales, for (a) \$1,190 for various items of personal property, and (b) \$3,000 for a certain 1949 Ford tractor, but Mr. Gonzales may, in lieu of being obligated to Ms. Romero for the \$3,000, return the tractor to Ms. Romero (at a site within Bernalillo County, New Mexico to be designated by her within seven (7) calendar days of the entry of this judgement), within seven (7) calendar days of the delivery location designation by Ms. Romero, in the condition it was on September 17, 2003 (the date of the foreclosure sale) together with (c) interest at the rate of 1.22%⁸ from September 17, 2003, and (d) costs of this action. Plaintiff will be awarded no damages in connection with the real property at 1833 Patrick N.W.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on February 10, 2006, a true and correct copy of the foregoing was electronically transmitted, faxed, delivered, or mailed to the listed counsel and/or parties.

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⁸See 28 U.S.C. § 1961(a) for interest rate determination.

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