UNITED STATES BANKRUPTCY COURT
DISTRICT OF IDAHO

In Re: **CHRISTOPHER DARRELL HENDERSON,** **Debtor.**	**Bankruptcy Case 10-42274-JDP**

ZIONS FIRST NATIONAL BANK, **Plaintiff,** **vs.** **CHRISTOPHER DARRELL HENDERSON,** **Defendant.**	**Adv. Proceeding No. 11-08035-JDP**

MEMORANDUM OF DECISION

Appearances:

Lane V. Erickson, RACINE, OLSON, NYE, BUDGE & BAILEY, CHTD., Pocatello, Idaho, Attorney for Plaintiff.

Aaron J. Tolson, Ammon, Idaho, Attorney for Defendant.

Introduction

Plaintiff Zions First National Bank ("Plaintiff") commenced this adversary proceeding against Defendant Christopher Darrell Henderson ("Defendant"), alleging that a debt arising from the Defendant's guaranty of a loan should be excepted from discharge pursuant to §§ 523(a)(2)(A) and (B).[1] A trial was held on July 12, 2012, after which the parties filed written closing arguments. The Court has considered the testimony and evidence presented, the arguments of counsel, as well as the applicable law. This Memorandum constitutes the Court's findings of fact and conclusions of law, and explains the Court's decision in this action. Fed. R. Bankr. P. 7052.

Findings of Fact

Defendant, along with his father, Darrell Henderson, owned

[1] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101 – 1532, all rule references are to the Federal Rules of Bankruptcy Procedure, Rules 1001 – 9037, and all "Civil Rule" references are to the Federal Rules of Civil Procedure.

Yamaha of Blackfoot, Inc. ("Blackfoot Yamaha"). Darrell[2] was President of the business, and Defendant acted as Vice President. Defendant's wife, Kimberly, worked at Blackfoot Yamaha as a bookkeeper, first full-time, and then later on, part-time as needed. Kimberly had no ownership interest in the business.

In April 2006, Blackfoot Yamaha urgently needed additional capital and applied for and obtained a Small Business Administration ("SBA") loan through Plaintiff ("the Loan"). Ex. 100. This was not the first loan Blackfoot Yamaha had obtained through Plaintiff; Blackfoot Yamaha was already making payments to Plaintiff on other loans at the time the SBA loan was obtained. Plaintiff described the Loan as a "standard form" SBA express loan. In order to obtain the Loan, the SBA required personal guarantees from Chris and Kimberly, as well as Darrell and his wife, Shari. *Id*. Defendant understood Blackfoot Yamaha would not receive the Loan absent the personal guarantees, and Defendant felt pressure to get the

[2] The Court refers to parties by their first names for clarity. No disrespect is intended.

Loan finalized.

Plaintiff brought the Loan paperwork to Blackfoot Yamaha so that the necessary signatures on the guarantees could be obtained. Exh. 101-02. On April 15, 2006, Defendant took the documents home with him to discuss with Kimberly and obtain her signature on the guarantee. During the discussion, Kimberly expressed reluctance to sign the guarantee because of the financial condition of the business. Regardless, on April 17, 2006, Defendant signed her name on the guarantee, returned the paperwork to Plaintiff, and the Loan was approved in the amount of $50,000. The SBA form did not require that Kimberly's signature be notarized or acknowledged. Exh. 102.

Kimberly worked occasionally as a bookkeeper for Blackfoot Yamaha after the Loan was made, during which time she made loan payments to Plaintiff on behalf of the business. However, the record does not establish whether she ever made a payment on the Loan at issue.[3]

[3] The testimony and record do not clearly establish whether Kimberly was working full or part-time at Blackfoot Yamaha at the time the Loan was funded. However, the Court concludes that this fact is immaterial. There is evidence that

In the Fall of 2008, Defendant and Kimberly began divorce proceedings. In checking her credit during the pendency of the divorce action, Kimberly discovered the guarantee on the $50,000 Loan by Plaintiff to Blackfoot Yamaha. On March 18, 2009, she informed Plaintiff in writing that the signature on the personal guarantee was not hers.[4] Exh. 103. She followed up by filing a police report, as well as further correspondence with Plaintiff. Exh. 104.

Blackfoot Yamaha closed its doors in August 2009. On December 23, 2010, Defendant filed a chapter 7 bankruptcy petition. BK Dkt. No. 1. It does not appear that he listed the personal guarantee on the debt owed to Plaintiff in his schedules. *Id*. However, Plaintiff filed a proof of claim for the debt owed. Claims Reg. No. 7-1. On April 1, 2011, Plaintiff commenced this adversary proceeding, seeking that the debt owed to

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she paid money to Plaintiff on behalf of Blackfoot Yamaha after the Loan funded, Exh. 200, but it is unclear to what those payments may be ascribed. Thus, the Court can not infer whether Kimberly had knowledge of the Loan at that point.

[4] Kimberly's letter to Plaintiff references Loan No. 9003, however the loan at issue is No. 9004. While the letter is incorrect, there does not appear to be any actual confusion by the parties as to which loan is at issue.

Plaintiff by Defendant be declared nondischargeable under §§ 523(a)(2)(A) and (B).

Conclusions of Law and Disposition

In most cases, a debtor's prime motivation in filing a voluntary chapter 7 petition is to secure a discharge of his or her debts pursuant to § 727(a), thereby enabling the debtor to gain a financial fresh start. In light of this, one of the harshest sanctions the Court may impose against a debtor in a bankruptcy case is the denial of discharge. Because the sanction is serious, the statutory requirements for either denying a discharge generally under § 727, or in the context of § 523(a), excepting a particular debt from discharge, are strictly construed in favor of debtors. *Petro Concepts, Inc. v. Mundt (In re Mundt)*, 10.1 IBCR 8, 12 (Bankr. D. Idaho 2010); *Jett v. Sicroff (In re Sicroff)*, 401 F.3d 1101, 1104 (9th Cir. 2005). "The reasons for denial of discharge must be real and substantial rather than technical and conjectural." *In re Mundt*, 10.1 IBCR at 12 (quoting *Sterling Int'l, Inc. v. Thomas (In re Thomas)*, 03.3 I.B.C.R. 178, 181 (Bankr. D. Idaho 2003)). Plaintiff must prove the necessary elements by a preponderance of

the evidence. *Grogan v. Garner*, 498 U.S. 279, 286 (1991); *Searles v. Riley (In re Searles*), 317 B.R. 368, 376 (9th Cir. BAP 2004).

A. Section 523(a)(2)(A).

Plaintiff requests that the Court deem the Loan and his personal guarantee thereon excepted from discharge based on § 523(a)(2)(A). That Code provision excepts from an individual debtor's discharge any debt for money, property, services or credit, to the extent obtained by false pretenses, a false representation, or actual fraud.[5] § 523(a)(2)(A); *Murray v. Woodman (In re Woodman)*, 451 B.R. 31, 37 (Bankr. D. Idaho 2011). A creditor asserting a claim under § 523(a)(2)(A) bears the burden of

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[5] More precisely, the statute provides:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt —
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> * * * * *
>
> (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.

proving, by a preponderance of the evidence, five elements: (1) that the debtor made representations; (2) that at the time he or she knew were false; (3) that the debtor made the representations with the intention and purpose of deceiving the creditor; (4) that the creditor justifiably relied on such representations; and (5) that the creditor sustained the alleged loss and damage as the proximate result of the misrepresentations having been made. *Id*. (citing *Am. Express Travel Related Servs. Co. v. Hashemi (In re Hashemi*), 104 F.3d 1122, 1125 (9th Cir. 1996)); *Boise City/Ada Cnty. Hous. Auth. v. O'Brien (In re O'Brien)*, 11.3 IBCR 117, 117 (Bankr. D. Idaho 2011).

Evidence of Defendant's knowledge of falsity of representations, and of his fraudulent intent, may be established through circumstantial evidence based on Defendant's own course of conduct. *In re O'Brien,* 11.3 IBCR at 118 (citing *Cowen v. Kennedy (In re Kennedy)*, 108 F.3d 1015, 1018 (9th Cir. 1997)).

Here, when Defendant signed Kimberly's name on the loan guarantee and returned it to Defendant, Defendant thereby represented to Plaintiff that Kimberly had agreed to be personally liable for the Loan.

Although Defendant testified that he signed the paperwork for Kimberly with her knowledge and consent and at her request, the Court determines that such testimony is not credible, and entitled to no weight.[6]

First, Defendant testified that he took the Loan guarantee home, and that he and Kimberly discussed it on two successive nights. Defendant quite frankly acknowledged that Kimberly was opposed to signing the gurantee "at first," but Defendant claims she later agreed to do so. Of course, Kimberly flatly denied this account of the facts. However, even if

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[6] Defendant makes much of the fact that Kimberly, in her role as a bookkeeper at times, occasionally signed checks on behalf of Blackfoot Yamaha even though she was not a signatory on the account. Exhs. 200-203. The Court deems such evidence of extremely limited relevance given the issues at hand. The management of Blackfoot Yamaha had established a course of dealing with Kimberly as the bookkeeper allowing her, when necessary, to sign checks. Her obligation to honor the personal guarantee on the Loan is a far different matter. First, there was no evidence submitted to suggest any course of dealing between the parties whereby Defendant could sign business documents on behalf of Kimberly. Second, the fact that Defendant took the documents home to Kimberly to obtain her signature shows the Court that Defendant knew he needed Kimberly's signature on the guarantee. Third, while Idaho law supports one spouse's right to sign a contract on behalf of his spouse, *see* Idaho Code § 32-912, Defendant knew, and the Plaintiff's agent confirmed, that Plaintiff would not allow Defendant to sign the guarantee for Kimberly. As such, testimony concerning Kimberly's practices concerning the Blackfoot Yamaha checking account is not helpful to Defendant here.

Kimberly did, in fact, eventually agree to sign the paperwork, why didn't she sign the guarantee while it was at her home? Instead, Defendant's testimony was that he took the papers home on April 15th and 16th, and the Loan documents bear an April 17 date. In other words, according to the date on the guarantee, Defendant signed it for Kimberly the day after their conversations about it.

For her part, Kimberly testified that, at the time of these events, she was aware of some of the details concerning the financial health of Blackfoot Yamaha, and that she was apprehensive about the company's prospects. She testified that the business ran "in the red" much of the time, and she had concerns about its ability to repay the Loan. She also understood the nature of her obligations under the guarantee. Indeed, the Court found Kimberly's testimony to be a cogent explanation of her reasons for not wanting to personally guarantee the Loan.

Second, Defendant repeatedly stressed that he was under pressure to get the Loan. He acknowledged that was aware that Plaintiff would require Kimberly to sign her own name on the guarantee, and that he was

concerned about signing it for her, but that the business needed the Loan proceeds to pay bills, and that it was urgent to get the Loan finalized.

Third, the Court finds the relevant time line better supports Kimberly's testimony as to the facts than Defendant's. As noted above, the evidence shows that Defendant likely signed Kimberly's name on the gurantee the same day the Loan was approved and funded, after two nights of discussion with Kimberly about the need for her guarantee of the Loan. If Kimberly indeed agreed to sign the guarantee, it is likely she would have simply signed the guarantee herself while it was at her house.

Moreover, while Defendant emphasized that Kimberly worked occasionally at Blackfoot Yamaha after the Loan went through, the Court finds this evidence, at best, equivocal as to whether Kimberly indeed authorized Defendant to sign the guarantee. Since the business already had at least one other loan with Plaintiff, when Kimberly thereafter wrote an occasional check to Plaintiff, the Court can not necessarily assume Kimberly realized that the new financing with Plaintiff had been achieved.

Finally, Kimberly testified that she discovered her apparently forged

personal guarantee when the Loan to Plaintiff appeared on her personal credit report she obtained while attempting to refinance the home during the divorce. The timing of her discovery of the guarantee on her credit report, followed by her subsequent conversations, letter, meeting, and follow-up paperwork sent to Plaintiff, all suggest that Kimberly immediately went to work on resolving the issue of the forged guarantee once she became aware of its existence. Indeed, Kimberly even went so far as to file a police report alleging the forgery, although it does not appear the police ever seriously investigated her allegation.

All of these circumstances show the Court that Kimberly did not consent to Defendant's signing the personal guarantee on her behalf. As a result, Plaintiff has proven that Defendant made a representation to Plaintiff (that Kimberly had signed the guarantee on the Loan), which he knew was false at the time, with the intention of deceiving Plaintiff so that it would extend the Loan to Blackfoot Yamaha.

Under § 523(a)(2)(A), Plaintiff must also prove that it justifiably relied upon Defendant's false representations. *In re O'Brien*, 11.3 IBCR at

119 (citing *Field v. Mans*, 516 U.S. 59, 74-75 (1995)). Justifiable reliance measures the creditor's conduct based on the particular circumstances, rather than in comparison to an objective, community standard. *Id*. Moreover, no duty to investigate the reliability of a debtor's representations is imposed upon a creditor unless "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." *Id*. (citing *Field v. Mans*, 516 U.S. at 71-72.)

Here, the testimony is uncontroverted that Plaintiff would not have approved the Loan without Kimberly's personal guarantee. As an SBA loan, Plaintiff's evidence established that a personal guarantee from the principals of Blackfoot Yamaha, and from their spouses, was a condition for the Loan. Moreover, since the Loan was approved and funded, it is clear that Plaintiff relied on Defendant's implicit representation that Kimberly had signed the guarantee.

Defendant notes that Plaintiff's reliance was suspect because the loan officer was willing to drop off financial documents at the business,

and allow them to be returned with unverified, non-notarized signatures at a later time. While possibly imprudent, considering the relationship and history of dealings of the parties, to the Court, that practice does not render Plaintiff's reliance unjustified.

Finally, Plaintiff must prove that it sustained loss and damage as the proximate result of the misrepresentations having been made. It is evident from the record before the Court that Plaintiff would not have approved the Loan absent Kimberly's signature on the personal guarantee. By signing for her, Defendant induced Plaintiff to accept the financial risk associated with the Loan, and now that the Loan is in default, Plaintiff has one fewer sources of payment for the balance due on it.[7]

Accordingly, the Court finds that all elements of § 523(a)(2)(A) have been met, and the debt obligation to Plaintiff based upon the Loan is declared nondischargeable.

B. Section 523(a)(2)(B).

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[7] Although specific proof was not offered into evidence, it appears undisputed that Plaintiff agreed to release Kimberly from any liability on the disputed guarantee.

Although the Court deems the Loan debt excepted from discharge under § 523(a)(2)(A), it will nevertheless consider whether Plaintiff also established an exception to discharge under § 523(a)(2)(B) is warranted. In this provision, the Code excepts from discharge:

> any debt . . . for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by . . . use of a statement in writing –
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> (i) that is materially false;
> (ii) respecting the debtor's or an insider's financial condition;
> (iii) on which the creditor to whom the debtor is liable for such money, property, services or credit reasonably relied; and
> (iv) that the debtor caused to be made or published with intent to deceive . . . .

§ 523(a)(2)(B). The Ninth Circuit has restated the requirements necessary to prove a § 523(a)(2)(B) claim as: (1) a representation of fact by the debtor; (2) that was material; (3) that the debtor knew at the time to be false; (4) that the debtor made with the intention of deceiving the creditor; (5) upon which the creditor relied; (6) that the creditor's reliance was reasonable; and (7) that damage proximately resulted from the representation. *In re*

Mundt, 10.1 IBCR at 12 (citing *Candland v. Ins. Co. of N. Am. (In re Candland),* 90 F.3d 1466, 1469 (9th Cir. 1996)); *Wells Fargo Bank Northwest, N.A. v. Covino (In re Covino)*, 04.3 IBCR 99, 105 (Bankr. D. Idaho 2004).

Plaintiff's claim for relief under § 523(a)(2)(B) fails. A"threshold requirement [for an exception to discharge under § 523(a)(2)(B)] is that the representation must be in the form of a written statement concerning the debtor's [or an insider's] financial condition." *In re Covino*, 04.3 IBCR at 105 (quoting *Tallant v. Kaufman (In re Tallant)*, 218 B.R. 58, 69 (9th Cir. BAP 1998)); *In re Mundt*, 10.9 IBCR at 13. Plaintiff did not prove this point.

Kimberly is an "insider" of the Defendant-debtor as defined in § 101(31)(A)(i). *Miller Ave. Prof'l and Promotional Servs., Inc. (In re Enter. Acquisition Partners, Inc.)*, 319 B.R. 626, 632 (9th Cir. BAP 2004) (citing *Miller v. Schuman (In re Schuman)*, 81 B.R. 583, 585 (9th Cir. BAP 1987)). Thus, Plaintiff must demonstrate that the subject false statement concerned the financial condition of either Defendant, as the debtor, or Kimberly, as an insider.

The documents submitted to the Court include the promissory note

evidencing the Loan, the personal guarantee signed by Defendant, as well as the guarantee allegedly signed by Kimberly. These documents are all preprinted forms to which the signatures were affixed. In other words, none of the documents contain any specific representations or other details concerning the financial condition of Defendant or Kimberly. Rather, the documents in the record are all intended to document the parties' promise to repay the Loan. The phrase "respecting the debtor's or an insider's financial condition" has been interpreted narrowly. *Barnes v. Belice (In re Belice)*, 461 B.R. 564 (9th Cir. BAP 2011). Accordingly, the Court concludes the threshold requirement under § 523(a)(2)(B) has not been met. *See Eugene Parks Law Corp. Defined Benefit Pension Plan v. Kirsch (In re Kirsch)*, 973 F.2d 1454, 1457 (9th Cir. 1992) (rejecting an argument for liability under § 523(a)(2)(B) because documents did not provide information about debtor's net worth or overall financial condition); *Gamble v. Overton (In re Overton)*, 09.1 IBCR 19 (Bankr. D. Idaho 2009).

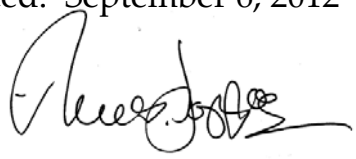
Conclusion

In giving Plaintiff a guarantee that he had signed, rather than

Kimberly, Defendant made a knowingly false representation to Plaintiff, upon which it justifiably relied in making the Loan to Blackfoot Yamaha. Defendant's debt to Plaintiff for the Loan is therefore excepted from discharge under § 523(a)(2)(A). However, Plaintiff did not prove that the debt should be excepted from discharge under § 523(a)(2)(B).

Counsel for the parties shall cooperate in the submission of an appropriate, approved form of judgment for entry by the Court.[8]

Dated: September 6, 2012



[8] While Plaintiff seeks entry of a money judgment in this case, the record is unclear as to the proper amount of that judgment. The Loan was for $50,000. Exh. 100. The register of claims filed in the bankruptcy case indicates a proof of claim was filed by Plaintiff for $63,541.19. Claims Reg. No. 7-1. Plaintiff's agent, Mr. Wankier, testified that interest had accrued on the Loan in the amount of "approximately" $7,700. Finally, Plaintiff's brief states that the debt owed is $57,000.

If the parties are will to stipulate to the amount due for inclusion in a money judgment, the Court is inclined to enter one. However, if the parties can not so stipulate, counsel should alert the Court, and instead, the Court will enter a judgment determining the debt to be excepted from discharge, in whatever amount is due. Plaintiff will then be required to proceed in state court if it desires a money judgment.

Honorable Jim D. Pappas
United States Bankruptcy Judge