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U.S. Bankruptcy Appellate Panel of the Tenth Circuit

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NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE VICTOR MICHAEL CASCIO, Debtor.	BAP No. KS-05-016
BLUE RIDGE BANK AND TRUST CO., Plaintiff – Appellant, v. VICTOR MICHAEL CASCIO, Defendant – Appellee.	Bankr. No. 01-20231-7 Adv. No. 01-06035 Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of Kansas

Before BOHANON, CORNISH, and BOULDEN,[1] Bankruptcy Judges.

CORNISH, Bankruptcy Judge.

Blue Ridge Bank & Trust Co. ("Bank") appeals the bankruptcy court's order holding that Victor Michael Cascio's (the "Debtor") obligation to the Bank was not excepted from the Debtor's discharge. Finding no clear error, we affirm.

BACKGROUND

The Debtor was a customer of the Bank for over 36 years, during which

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

[1] Hon. Judith A. Boulden, United States Bankruptcy Judge, United States Bankruptcy Court for the District of Utah, sitting by designation.

time the Debtor incurred and paid off many loans. From time to time, the Debtor submitted written financial statements to the Bank. On September 23, 1994, the Debtor submitted a written financial statement to the Bank, and then again on April 7, 1995, the Debtor reaffirmed the accuracy of the same financial statement (the "Financial Statement"). The Financial Statement listed the following assets, among others:

• notes receivable (unsecured)	*ARA	$ 480,000
• other assets:	VICCO/Cadast	$1,100,000

The Financial Statement indicated that the Debtor and his wife's net worth was $2,081,200.[2]

Thereafter, on January 11, 1996, the Bank made three loans to the Debtor and his wife: (1) $291,525 ($101,433 new money) to refinance existing loans and cover year end overdrafts of the Debtor's business, Urban Living Two, Inc.; (2) $100,000 to provide a working capital line of credit; and (3) $295,000 to pay off an existing loan at United Missouri Bank, which paid off the second mortgage on the Debtor's residence.[3] The Debtor subsequently defaulted on the loans and did not repay some of the account overdrafts. The Bank filed suit and obtained a judgment in state court against the Debtor in the amount of $776,923.13, plus interest. On the date of his bankruptcy petition, the Debtor owed the Bank $658,605.94.[4]

The Bank then commenced an adversary proceeding against the Debtor, seeking to except the Debtor's indebtedness to it from the Debtor's discharge

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[2] Financial Statement at 1, *in* Appellant's Appendix at 252.

[3] Discount Committee Meeting Minutes at 3, *in* Appellant's Appendix at 409.

[4] Memorandum Opinion and Order at 2, *in* Appellant's Appendix at 508A.

under 11 U.S.C. § 523(a)(2)(B).[5] The bankruptcy court heard the adversary complaint on May 21, 2004. The Debtor and the Bank's President appeared as the only witnesses. In alleging that the Financial Statement was materially false, the Bank claimed that the Debtor did not have a note receivable from ARA. The Bank offered an affidavit of an ARA officer to support this claim. The Bank also alleged that the value of the Debtor's interest in Cadast was not $1,100,000, and in support offered an affidavit of a Cadast officer (the Debtor's mother). Also presented were bankruptcy schedules, which were not filed but were submitted to the Bank as part of settlement negotiations, that valued the Kdast [sic] asset at $110,000 and omitted the ARA asset.[6] The Bank argued that the Debtor intended to deceive the Bank with the false Financial Statement and the Bank reasonably relied on that Financial Statement when extending the loans.

The Debtor conceded that he did not have a note receivable from ARA, but he argued that he was owed $480,000 from ARA pursuant to an asset sale and employment agreement, and the Bank was aware that his claimed asset was based on the asset sale and employment agreement. The Debtor further stated that his interest in Cadast was at least the amount represented on the Financial Statement, based on the sale value of properties rather than the book value represented in his mother's affidavit, and that the amount listed on the unfiled bankruptcy schedules had been a typographical error.

On December 20, 2004, the bankruptcy court entered its Memorandum Opinion. The bankruptcy court found that the Bank had proven by the preponderance of the evidence that the Financial Statement was materially false, because the ARA contract should not have been characterized as a note

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[5] All future statutory references in text are to the Bankruptcy Code, unless otherwise indicated.

[6] Appellant's Appendix at 417-19.

receivable. However, the bankruptcy court found that the evidence was insufficient to establish, by a preponderance of the evidence, that the Debtor had the requisite intent to deceive or that the Bank had reasonably relied on the Financial Statement. As a result, the debt to the Bank was dischargeable.[7]

JURISDICTION

This Court has jurisdiction over this appeal. The bankruptcy court's judgment is a final order subject to appeal under 28 U.S.C. § 158(a)(1).[8] The Bank timely filed its notice of appeal under Federal Rule of Bankruptcy Procedure 8002, and the parties have consented to this Court's jurisdiction because they have not elected to have the appeal heard by the United States District Court for the District of Kansas.[9]

STANDARD OF REVIEW

The bankruptcy court's determinations regarding intent to deceive and reasonable reliance are findings of fact.[10] A bankruptcy court's "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses."[11] "A finding of fact is 'clearly erroneous' if it is without factual support in the record or if the appellate court, after reviewing all the evidence, is left with a definite and firm conviction

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[7] Memorandum Opinion and Order at 2-3, *in* Appellant's Appendix at 508A-09.

[8] An order is final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945).

[9] 28 U.S.C. § 158(c)(1); Fed. R. Bankr. P. 8001(e).

[10] *Leadership Bank v. Watson (In re Watson)*, 958 F.2d 977, 978 (10th Cir. 1992); *Anderson, Clayton & Co. v. Wingfield (In re Wingfield)*, 15 B.R. 647, 649 (W.D. Okla. 1981).

[11] Fed. R. Bankr. P. 8013; *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

that a mistake has been made."[12]

DISCUSSION

The Bank objected to the dischargeability of the Debtor's debt to it under § 523(a)(2)(B), which provides:

> (a) A discharge under . . . this title does not discharge an individual debtor from any debt–
> . . .
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by–
>
> . . .
>
> (B) use of a statement in writing–
>
> (i) that is materially false;
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> (ii) respecting the debtor's or an insider's financial condition;
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> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
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> (iv) that the debtor caused to be made or published with intent to deceive[.][13]

If any one of these elements is not met, the debt is dischargeable.[14]

There is no question that the Financial Statement is a statement in writing respecting the Debtor's financial condition.[15] The Debtor did not appeal the bankruptcy court's determination that the Financial Statement was materially

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[12] *Manning v. United States,* 146 F.3d 808, 812 (10th Cir. 1998) (quotation omitted); *accord Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985).

[13] 11 U.S.C. § 523(a)(2)(B).

[14] *First Bank v. Mullet (In re Mullet)*, 817 F.2d 677, 680 (10th Cir.1987), *abrogated in part on other grounds, Field v. Mans*, 516 U.S. 59, 63 n.4 (1995)). *See also Equitable Bank v. Miller (In re Miller)*, 39 F.3d 301, 304 (11th Cir. 1994).

[15] *Cadwell v. Joelson (In re Joelson)*, 307 B.R. 689, 696 (10th Cir. BAP 2004) (adopting the narrow interpretation that defines a statement of financial condition to be a statement of a debtor's net worth, overall financial health, or ability to generate income).

false.[16] The only issues left before this Court are whether the bankruptcy court erred when it found that the Bank did not reasonably rely on the Financial Statement and that the Debtor did not make the Financial Statement with the intent to deceive.

A. Reasonable Reliance

In order to exempt a debt from a debtor's discharge under § 523(a)(2)(B), a creditor must prove that it relied on the false financial statement and that its reliance was reasonable. "'[The] standard of reasonableness places a measure of responsibility upon a creditor to ensure that there exists some basis for relying upon debtor's representations. . . . [T]he reasonableness of a creditor's reliance will be evaluated according to the particular facts and circumstances present in a given case.'"[17] When evaluating the facts and circumstances of the case, a bankruptcy court may consider, among other things:

> whether there had been previous business dealings with the debtor that gave rise to a relationship of trust; whether there were any "red flags" that would have alerted an ordinarily prudent lender to the possibility that the representations relied upon were not accurate; and whether even minimal investigation would have revealed the inaccuracy of the debtor's representations.[18]

While, as the Bank points out, the Debtor was a long-time customer of the Bank, that factor regarding previous business dealings is only one of many factors that a bankruptcy court may consider in making its determination. An additional factor

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[16] The Bank argues that this Court should also determine that the Financial Statement was materially false in more than one respect. The bankruptcy court concluded that the mischaracterization of the ARA contract as a note receivable was sufficient to find the Financial Statement materially false, and it was unnecessary to address the remaining claims of material falsity. We find no error in this conclusion.

[17] *Watson*, 958 F.2d at 978 (quoting *Mullet*, 817 F.2d at 679).

[18] *Coston v. Bank of Malvern (In re Coston)*, 991 F.2d 257, 261 (5th Cir. 1993) (en banc) (per curiam) (citing *Mullet*, 817 F.2d at 679); *see also Sinclair Oil Corp. v. Jones (In re Jones)*, 31 F.3d 659, 662 (8th Cir. 1994) (applying *Coston* factors).

is whether even minimal investigation would have revealed the inaccuracy of the Debtor's representation that he had a $480,000 note from ARA. The bankruptcy court applied that factor, finding that the Bank could have easily asked to see a copy of the note, which would have revealed the inaccuracy.[19] We cannot conclude that this finding is without factual support in the record, and we are not left with a definite and firm conviction that a mistake has been made.

B. Intent to Deceive

In order to exempt a debt from a debtor's discharge under § 523(a)(2)(B), a creditor must prove that the debtor made the written statement with the intent to deceive the creditor. The bankruptcy court found that the Debtor was careless in preparing the Financial Statement, but his carelessness did not rise to the level of reckless disregard for the truth or intent to deceive.[20] The bankruptcy court premised its conclusion on the Debtor's "credible testimony that the Bank knew the details of his financial affairs that extended beyond the Financial Statement."[21] As the bankruptcy court noted, the Bank's President could not deny that the Debtor had provided him with information relevant to the true nature of the ARA contract.[22]

We conclude that the bankruptcy court's finding of fact is supported by the record. The bankruptcy court found the Debtor's testimony credible, and we must

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[19] Memorandum Opinion and Order at 10-11, *in* Appellant's Appendix at 512A-13.

[20] Memorandum Opinion and Order at 12, *in* Appellant's Appendix at 513A; *see Driggs v. Black (In re Black)*, 787 F.2d 503, 505-506 (10th Cir.1986) ("[T]he requisite intent may be inferred from a sufficiently reckless disregard of the accuracy of the facts."), *abrogated in part on other grounds*, *Grogan v. Garner*, 498 U.S. 279 (1991).

[21] Memorandum Opinion and Order at 12, *in* Appellant's Appendix at 513A.

[22] *Id.* at 13, *in* Appellant's Appendix at 514.

defer to that court's opportunity to judge the credibility of the witnesses.[23] The Bank points to evidence that could support a conclusion that the Debtor intended to deceive. But, "although the evidence here might support the bankruptcy court's decision had it inferred an intent to deceive from the circumstantial evidence admitted in this case, it does not compel such a finding and does not require us to reverse the court's holding."[24] We are not left with a definite and firm conviction that a mistake has been made.

CONCLUSION

For the reasons stated above, the bankruptcy court's judgment is AFFIRMED.

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[23] Fed. R. Bankr. P. 8013; *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). The Bank argues that the six-month delay between the date of the trial and the date of the bankruptcy court's Memorandum Opinion and Order and Judgment should reduce this Court's regard for the bankruptcy court's opportunity to determine credibility. But, this Court is in no better position to determine credibility than the bankruptcy court. The Bank also draws our attention to an error in the bankruptcy court's opinion that states the date the ARA contract terminated as April 7, 1995, rather than 1994. However, the bankruptcy court was aware of when the ARA contract terminated because the opinion also indicates that the contract had been terminated *prior to* April 7, 1995. The bankruptcy court also relied upon the Debtor's testimony that he did not remove the asset from his financial statement because pending lawsuits over the interpretation of the ARA contract existed and that the Bank did not deny that the Debtor had provided it with this information. We therefore find no error in this alleged inconsistency.

[24] *Palmacci v. Umpierrez*, 121 F.3d 781, 790 (1st Cir.1997) (further quotation omitted). *See also Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").