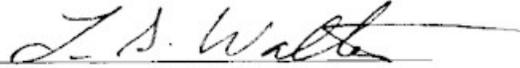


This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.

Dated: September 29, 2006


Lawrence S. Walter
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

In re: :
 :
 SUHAS S. KAKDE, : Case No. 05-33193
 : Chapter 7
 : Judge L. S. Walter
 Debtor. :
 :
 :
 Buckeye Retirement Co., LLC, Ltd., :
 :
 :
 Plaintiff. :
 : Adv. Pro. No. 05-3296
 v. :
 :
 :
 Suhas S. Kakde, :
 :
 :
 Defendant. :

**DECISION DENYING PLAINTIFF’S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

The court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(a) and 1334, and the standing General Order of Reference in this District. This matter is before the court on the motion for partial summary judgment filed by Plaintiff Buckeye Retirement Co., LLC, Ltd.

(“Buckeye”) [Adv. Doc. 33]; the responsive memorandum filed in opposition by Defendant Suhas S. Kakde (“Mr. Kakde”) [Adv. Doc. 38]; and Buckeye’s reply memorandum [Adv. Doc. 40].

Buckeye requests summary judgment on Count I of its complaint seeking to deny discharge of the debt owed by Mr. Kakde to Buckeye as assignee of Provident Bank (“Provident”). The cause of action is based on 11 U.S.C. § 523(a)(2)(B) and essentially alleges that Mr. Kakde facilitated loan advances to his corporation, U.S. Aeroteam, Inc. (“USAT”), by means of intentional or reckless submission to Provident of certain false and misleading financial statements. Because material facts remain to be determined, the court denies the motion.

FACT SUMMARY

Mr. Kakde was the President, Chief Executive Officer, and majority shareholder of USAT. On or about November 2, 2000 (and extended in May and August of 2003), USAT and Provident entered into an asset-based secured revolving loan transaction (“Loan”) with a credit limit of the lesser of \$2,500,000 or a borrowing base amount derived from a formula of percentages of defined eligible inventory, eligible accounts receivable, and cash (“Borrowing Base”). Mr. Kakde executed a guarantee of USAT’s obligations under the Loan.

In accordance with the Loan requirements, USAT periodically presented financial statements to Provident containing daily, weekly, and monthly collateral reports (“Borrowing Base Certificates”). These Borrowing Base Certificates were usually signed by John Busch (“Mr. Busch”), the Chief Financial Officer for USAT, or by his assistant. On occasion, Mr. Kakde signed the Borrowing Base Certificates. Provident made periodic advances to USAT under the Loan, with maximum amounts adjusted in accordance with the Borrowing Base.

Beginning in 2002, USAT began having financial difficulties and by early 2003 became delinquent on the Loan. It filed for chapter 11 bankruptcy relief on December 24, 2003. On December 30, 2003, Provident obtained judgment against Mr. Kakde on his guaranty in the principal sum of \$2,030,632.87 plus interest. Provident assigned its interest in the USAT Loan and the judgment against Mr. Kakde to Buckeye on December 16, 2004.

Between August 1, 2003 and December 22, 2003, USAT submitted to Provident Borrowing Base Certificates that inaccurately overstated the Borrowing Base. The inaccuracies fall into three categories: (1) some reported accounts receivable from Delphi were subject to setoff and therefore not “eligible” and some reported payables to Delphi were understated (“Delphi Setoffs”); (2) beginning in August of 2003, USAT diverted some eligible receivables into and out of an undisclosed account at Bank One, but continued to report the receivables to Provident as uncollected and unpaid (“Receivables Diversion”); (3) USAT diverted its 2002 tax refund in the amount of \$43,499 into the undisclosed Bank One account (“Tax Refund Diversion”).

SUMMARY JUDGMENT STANDARD

The appropriate standard to address the motion for summary judgment filed in this adversary proceeding is contained in Fed. R. Civ. P. 56(c) and incorporated in bankruptcy adversary proceedings by reference in Fed. R. Bankr. P. 7056. Rule 56(c) states in part that a court must grant summary judgment to the moving party if:

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). In order to prevail, the moving party, if bearing the burden of persuasion at trial, must establish all elements of its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986). If the burden is on the nonmoving party at trial, the movant must: 1) submit affirmative evidence that negates an essential element of the nonmoving party's claim; or 2) demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. *Id.* at 331-32. Thereafter, the opposing party "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (citations omitted); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-251 (1986). All inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. *Matsushita*, 475 U.S. at 586-88.

LEGAL ANALYSIS

To determine a debt to be nondischargeable under § 523(a)(2)(B), Buckeye must prove that Mr. Kakde obtained a loan or extension of credit from Buckeye by:

(B) use of a statement in writing—

- (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[.]

11 U.S.C. § 523(a)(2)(B). The creditor carries the burden of proving each of the elements by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991); *National City Bank v. Plechaty (In re Plechaty)*, 213 B.R. 119, 123 (6th Cir. B.A.P. 1997).

Because the elements essential to establishing a case under 11 U.S.C. § 523(a)(2)(B) are highly fact-sensitive, it is a difficult subject for summary judgment. *See Kand Medical, Inc. v. Freund Medical Products, Inc.*, 963 F.2d 125, 127 (6th Cir.1992) (generally summary judgment is inappropriate where the issue of intent is involved); *In re Jones*, 298 B.R. 451, 463 (Bankr. D. Kan. 2003). As discussed below, some key elements necessarily require an analysis based on the “totality of the circumstances.” In the context of this motion for summary judgment, the court does not have before it the “totality of the circumstances,” but rather a discreet set of undisputed facts. The court’s analysis of such elements as “reasonable reliance” and “intent to deceive” is necessarily handicapped by the absence of a complete record.

It is unnecessary here to exhaustively analyze all of the elements that Buckeye must prove under § 523(a)(2)(B) because it is clear that material facts remain in dispute as to two of those elements: (1) the reasonable reliance of Buckeye; and (2) Mr. Kakde’s intent to deceive.

The statute does not define “reasonable reliance” but courts have required proof that the creditor actually relied on the false statement in extending the loan and that the reliance was objectively reasonable. *Plechaty*, 213 B.R. at 125; *John Deere Co. v. Myers (In re Myers)*, 124 B.R. 735, 742 (Bankr. S.D. Ohio 1991); *I. H. Mississippi Valley Credit Union v. O’Connor (In re O’Connor)*, 149 B.R. 802, 809 (Bankr. E.D. Va. 1993). As with the other factors, Buckeye carries the burden of proof as to its actual and reasonable reliance on the allegedly false statements.

Consequently, to prove actual reliance, a subjective standard, the creditor must prove that the false financial statement was a “substantial factor” in the creditor’s decision to extend credit. *O’Connor*, 149 B.R. at 810 (noting that a creditor does not meet the subjective reliance test by merely having glanced at the financial statement at issue). Even if the creditor can show actual

reliance on the false financial statement, the reasonableness of that reliance remains at issue. Generally, courts have held that “reasonable reliance” is a question of fact to be determined in light of the totality of the circumstances. *In re Ledford*, 970 F.2d 1556, 1560 (6th Cir.1992), *cert. denied*, 507 U.S. 916, 113 S.Ct. 1272, 122 L.Ed.2d 667 (1993); *In re Woolum*, 979 F.2d 71, 75-76 (6th Cir.1992), *cert. denied*, 507 U.S. 1005, 113 S.Ct. 1645, 123 L.Ed.2d 267 (1993); *Matter of Coston*, 991 F.2d 257, 261 (5th Cir.1993).

In his affidavit, Mr. Burk asserts in conclusory fashion that Provident made advances to USAT “in reliance upon the certification of USAT and Mr. Kakde of the accuracy and completeness” of the information contained within the Borrowing Base Certificates. However, Mr. Kakde argues, with some support from the affidavit of Mr. Busch, that Provident was well aware of USAT’s financial problems, that accounting practices employed by USAT with respect to the Delphi Setoffs were contemporaneously disclosed to agents of Provident, and that Provident regularly received financial information from USAT and conducted periodic audits. Depending upon the specific information available to Provident, blind reliance on the Borrowing Base Certificates may have been unreasonable. The facts surrounding what supporting information was available to Provident and when it was available is either in dispute or is not before the court. This evidence is material and prevents this court from determining the reasonableness of Provident’s reliance. Buckeye makes a stronger case with respect to the Tax Refund Diversion and the Receivables Diversion, but those matters largely turn on Mr. Kakde’s intent.

In order for Mr. Kakde’s debt to be determined nondischargeable, Buckeye must prove that the financial statements were “caused to be made or published with intent to deceive.” 11 U.S.C. § 523(a)(2)(B)(iv). To meet this element, Buckeye must demonstrate that Mr. Kakde

intended to deceive Buckeye with the allegedly false information contained in the Borrowing Base Certificates. *See American General Finance, Inc. v. Steinbrunner (In re Steinbrunner)*, 149 B.R. 484, 488-89 (Bankr. N.D. Ohio 1992). The standard for determining intent includes actual intent to deceive as well as recklessness, indifference and disregard for accuracy. *Steinbrunner*, 149 B.R. at 489; *AmSouth Financial Corp. v. Warner (In re Warner)*, 169 B.R. 155, 162 (Bankr. W.D. Tenn. 1994). A determination of intent to deceive focuses on circumstantial evidence and is generally “inferred if the totality of the circumstances presents a picture of deceptive conduct by the debtor which indicates an intent to deceive or cheat the creditor.” *Myers*, 124 B.R. at 741; *In re Cohn*, 54 F.3d 1108 (3rd Cir. 1995).

The initial hurdle for Buckeye is to hold Mr. Kakde responsible for Borrowing Base Certificates prepared, signed, and submitted by others. It is undisputed that Mr. Busch had primary responsibility for generating and signing the Borrowing Base Certificates and that Mr. Kakde rarely signed them. Buckeye argues that because Mr. Kakde was a sophisticated business man and the CEO to whom Mr. Busch and others reported, he must therefore be held responsible for the intentional or reckless submission of the false information submitted to Buckeye. Mr. Kakde, on the other hand, asserts that he was not aware of the inaccuracies in the Borrowing Base Certificates, that he justifiably relied completely on Mr. Busch, and that he insisted upon appropriate professional behavior by Mr. Busch and other staff members. In short, there remains a dispute as to the degree of Mr. Kakde’s knowledge and control of the information submitted to Buckeye.

Even assuming that Mr. Kakde could be held responsible for the Borrowing Base Certificates prepared by others, there remain disputed facts that preclude summary judgment. Focusing first on the inaccuracies in the Borrowing Base Certificates stemming from the Delphi

Setoffs, it is unclear whether Provident was already aware of the accounting for these setoffs at the time the Borrowing Base Certificates were submitted. As mentioned above, Mr. Kakde and Mr. Busch indicate that Provident had other financial information available to it and that these matters were contemporaneously disclosed to various agents of Provident during routine audits. If Mr. Kakde believed Provident was already aware of the accounting, he could not have had an intent to deceive, nor would his submission of the Borrowing Base Certificates to Provident have been reckless.

Similarly, the requisite recklessness or intent to deceive may be lacking to the extent inaccuracies in the Borrowing Base Certificates were due to the complicated reciprocal supply arrangements between USAT and Delphi, Delphi's assumption of USAT debts to suppliers, and/or the anomalous setoffs that resulted from settlement of two partial contract cancellations by Delphi. In other words, if the allegedly false information was actually the result of an accounting method used by USAT to address unorthodox circumstances, a method that simply did not coincide with Provident's expectations, then the intent of Mr. Kakde or USAT may not have been to deceive and their actions may not have been reckless.

As for the Tax Refund Diversion and Receivables Diversion, a significant dispute remains as to whether USAT's counsel, Mr. Noland, advised his client to divert these funds. While Buckeye acknowledges the existence of an email message from Mr. Noland in which he admits to giving such advice, Buckeye nevertheless questions the extent of that advice. If Mr. Noland indeed advised USAT with respect to the Bank One Diversion, the court's determination might be impacted by the exact nature of that advice and the degree to which that advice was followed. The facts pertaining to this aspect of the case remain disputed and unclear and the parties have not fully addressed the legal significance of this issue.

CONCLUSION

For the foregoing reasons, Buckeye's Motion for Partial Summary Judgment is hereby

DENIED.

IT IS SO ORDERED.

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