Not For Publication

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

IN RE:	CASE NO.	05-32195(LMW)
ROBERT A. GILSON, JR. AND ROBERTA M. GILSON,	CHAPTER	7
DEBTORS.		
CONNECTICUT COMMUNITY INVESTMENT CORP.,	ADV. PRO. NO.	05-3137(LMW)
PLAINTIFF	DOC. I.D. NO.	11
vs.		
ROBERT A. GILSON, JR. AND ROBERTA M. GILSON,		
DEFENDANTS.		

APPEARANCES

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MEMORANDUM OF PARTIAL DECISION AND ORDER

Lorraine Murphy Weil, United States Bankruptcy Judge

The matter before the court is the above-referenced plaintiff's (the "Plaintiff") motion (Adv. Pro. Doc. I.D. No. 11, the "Motion")[1] seeking an entry of default judgment against the above-captioned debtors (the "Debtors") to the effect that a debt (the "Debt") in the amount of $28,000 plus interest was not discharged in this chapter 7 case pursuant to 11 U.S.C. §§ 523(a)(2)(A), 523(a)(2)(B) and/or 523(a)(6). This matter is a core proceeding within the purview of 28 U.S.C. § 157(b). The court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334 and that certain order dated September 21, 1984 of the District Court (Daly, C.J.).[2]

I. PROCEDURAL BACKGROUND

A. The Chapter 7 Case

The Debtors commenced this chapter 7 case by voluntary petition filed on April 29, 2005. (Case Doc. I.D. No. 2, the "Petition.") The Petition was filed in conjunction with a complete set of schedules and a statement of financial affairs. (Case Doc. I.D. No. 2, collectively, the "Schedules.") Schedule B totaled the value of the Debtors' personal property at $36,545.00, including four automobiles (two of which were impounded by the City of West Haven) and various personal items. Schedule D totaled the Debtors' secured claims at $44,344.00. Schedule E totaled the Debtors' unsecured priority claims at $33,500.00. Schedule F totaled the Debtors' unsecured nonpriority claims at $69,478.18, including the Debt allegedly owed to the Plaintiff in the amount of $28,000.

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[1] Citations herein to the docket of the above-captioned chapter 7 case appear in the following form: "Case Doc. I.D. No. ___." Citations herein to the docket of this adversary proceeding appear in the following form: "Adv. Pro. Doc. I.D. No. ___."

[2] That order referred to the "Bankruptcy Judges for this District" *inter alia* "all proceedings arising under Title 11, U.S.C. . . . ."

Schedule I stated the Debtors' current monthly income at $2,829.00 and Schedule J stated the Debtors' current monthly expenses at $4,347.34.

August 8, 2005 was set as the last date upon which objections to discharge and complaints within the purview of Section 523(a) could be timely filed. (Case Doc I.D. No. 1.) On July 22, 2005, the Plaintiff moved to extend the time to file a Section 727 or Section 523 complaint (Case Doc. I.D. No. 7) which was granted by the court on August 5, 2005 (Case Doc. I.D. No. 13). The extended last date to oppose discharge or dischargeability was set for October 11, 2005. (*Id*.) The chapter 7 trustee filed a report of no distribution on July 29, 2005 (Case Doc. I.D. No. 12) and the court issued the Debtors' discharge order on October 12, 2005 (Case Doc. I.D. No. 16).

B. <u>The Adversary Proceeding</u>

On October 3, 2005, the Plaintiff initiated this adversary proceeding by timely filing a complaint (Adv. Pro. Doc. I.D. No. 1, the "Complaint") against the Debtors seeking a judgment from the court declaring that the Debt is nondischargeable pursuant to 11 U.S.C. §§ 523(a)(2)(A), 523(a)(2)(B) and/or 523(a)(6). The Complaint also seeks attorney's fees and costs in its prayer for relief. (*See id*. at 4-5.) On November 15, 2005 the Plaintiff filed a motion for default (Adv. Pro. Doc. I.D. No. 7) which was granted on November 30, 2005 (Adv. Pro. Doc. I.D. No. 8). Thereafter, the Plaintiff moved for default judgment pursuant to Rule 7055 of the Federal Rules of Bankruptcy Procedure. (*See* Adv. Pro. Doc. I.D. No. 11.) A hearing was scheduled for December 28, 2005 (Adv. Pro. Doc. I.D. No. 12) but was continued twice. The hearing was ultimately held on January 25, 2006 (the "Hearing"),[3] during which the Plaintiff argued that the Complaint, affidavits and other

[3] References herein to the audio record of the Hearing appear in the following form: "Audio Record at __:__:__."

materials[4] submitted to the court in support of the Motion established a prima facie case of nondischargeability. (*See* Audio Record at 1:47:00 - 1:47:35.) At the conclusion of the Hearing, the court took the matter under advisement. After due consideration, the court is ready to issue its decision.

For the reasons set forth below, the court concludes that the Debt is excepted from discharge pursuant to Section 523(a)(6) only with respect to Mr. Robert A. Gilson and only to the extent that the Plaintiff can prove the value of its interest in the relevant collateral at the time of conversion. The court further concludes that the Plaintiff has failed to establish a prima facie case under both Sections 523(a)(2)(A) and 523(a)(2)(B). A further hearing will be scheduled in order to address the remaining issues not resolved by this decision.

II. FACTS

The Debtors are a married couple residing in West Haven, Connecticut. One of the Debtors, Mr. Robert A. Gilson, was a member of R & B Services, LLC ("R&B") which operated a landscaping business. On February 17, 2004, Mr. Gilson, on behalf of R&B, executed a certain Note and Security Agreement (the "Agreement") with the Plaintiff in consideration for a $28,000.00 commercial loan. (*See* Complaint, Exhibit A.) Pursuant to the Agreement, R&B agreed to make monthly payments of principal and interest to the Plaintiff and granted the Plaintiff a first priority security interest in all of R&B's assets (the "Collateral"). (*See id*.) In connection with the

[4] The Plaintiff filed an affidavit of debt and affidavit of attorney's fees along with the Motion. (*See* Adv. Pro. Doc. I.D. No. 11.) Thereafter, the Plaintiff submitted two additional affidavits: the affidavit of John Torello, Loan Officer of the Plaintiff (*see* Adv. Pro. Doc. I.D. No. 14, Attachment No. 2, the "Torello Affidavit"), and the affidavit of Mark Cousineau, Executive Director of the Plaintiff (*see* Adv. Pro. Doc. I.D. No. 14, Attachment No. 3). The Plaintiff also filed a certified copy of the transcript from the Debtors' meeting of creditors held on June 9, 2005 (the "Meeting") and continued on June 23, 2005. (*See* Adv. Pro. Doc. I.D. No. 14, the "Transcript.")

Agreement, Mr. Gilson (in his capacity as member of R&B) executed a certain Borrower's Affidavit on the same day, wherein he made numerous representations regarding the ability of R&B to perform fully under the Agreement. (*See* Complaint, Exhibit C.) Additionally, the Debtors (both Mr. and Mrs. Gilson) executed a certain Guaranty (*see* Complaint, Exhibit B, the "Guaranty") and a certain Guarantors' Affidavit (*see* Complaint, Exhibit D, the "Guarantors' Affidavit") wherein they undertook personal liability for the Debt and made representations regarding their own ability to guarantee the repayment of the Debt.

Neither R&B nor the Debtors made a single payment on the Debt. The Schedules show that R&B went out of business in March of 2004, less than one month after it executed the Agreement. In August of 2004, Mr. Torello, loan officer for the Plaintiff, contacted Mr. Gilson to inquire about the Debt and lack of payment. Mr. Gilson informed Mr. Torello that he had sold the Collateral and used the proceeds from the sale for personal use "because he and his wife needed money because his wife was ill."[5] (Torello Affidavit at 2.) As noted above, on April 29, 2005 the Debtors filed a joint petition under chapter 7 of the Bankruptcy Code.

III. THE COMPLAINT

On October 3, 2005, the Plaintiff filed the Complaint alleging four counts: two counts of fraudulent misrepresentation under Section 523(a)(2)(A), one count of causing willful and malicious injury under Section 523(a)(6), and one count of fraudulent misrepresentation through the use of a statement of financial condition under Section 523(a)(2)(B). The Plaintiff seeks a determination by this court that the Debt was not discharged in this case and that the Debtors pay reasonable

[5] In addition to the Torello's testimony, Mr. Gilson admitted at the Meeting to selling essentially all of the Collateral and using the proceeds for personal expenses. (*See* Transcript 9:12-9:17, 22:3-22:20.)

attorney's fees and legal costs. The court deals below with each of the four counts and the claim for attorney's fees and costs.

IV. ANALYSIS

A. Default Judgment Standard

Entry of judgment by default is governed by Rule 55 of the Federal Rules of Civil Procedure made applicable here by Rule 7055 of the Federal Rules of Bankruptcy Procedure. In respect of their discharge, debtors are always deemed to have appeared in the adversary proceeding for purposes of Rule 55(b)(2) of the Federal Rules of Civil Procedure. *Batstone v. Emmerling (In re Emmerling)*, 223 B.R. 860, 867 (B.A.P. 2d Cir. 1997). *See also* 10A Charles A. Wright, et al., *Federal Practice and Procedure* § 2686, at 45 (3d ed. 1998) (hereafter, "Wright, et al") ("[I]n order to ensure defendant an opportunity to defend against plaintiff's application, a court usually will try to find that there has been an appearance by defendant, which has the effect of requiring that notice of the application for a default be given.").

Although the Debtors have failed to plead, a motion for judgment by default is not granted as a matter of right. Rather, the court in its discretion may conduct a hearing "requir[ing] some proof [from the plaintiff] of the facts that must be established in order to determine [the debtors'] liability." Wright, et al § 2688, 60-61. *See also Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 96 (2d Cir. 1993) ("as a general rule a . . . court should grant a default judgment sparingly . . . when the defaulting party is appearing *pro se.*"). At the court's discretion, such proof may be made by affidavit. *See* Fed. R. Civ. P. 43(e) (made applicable here by Fed. R. Bankr. P. 9017). Further, "where the allegation is one of fraud, it is appropriate that the court [evaluate] the evidence to insure that the drastic remedy of a determination of non-dischargeability is not entered without the

presentation of a prima facie case." *United Counties Trust Co. v. Knapp (In re Knapp)*, 137 B.R. 582, 585 (Bankr. D. N.J. 1992). *See also General Electric Capital Corp. v. Bui (In re Bui)*, 188 B.R. 274, 276 (Bankr. N.D. Cal. 1995) ("A plaintiff must demonstrate a *prima facie* case by competent evidence in order to obtain a [d]efault [j]udgment."). A prima facie showing is made only when, from the evidence presented, "a factfinder could reasonably find every element that the plaintiff must ultimately prove to prevail in the action." *Fisher v. Vassar College*, 114 F.3d 1332, 1336 (2d Cir. 1997) (*en banc*), *cert. denied*, 522 U.S. 1075 (Jan. 20, 1998), *reh'g denied*, 523 U.S. 1041 (Mar. 23, 1998), *abrogated on other grounds by Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

B. Nondischargeability under Bankruptcy Code § 523(a)(6)

In count two of the Complaint, the Plaintiff asserts that Mr. Gilson unlawfully converted the Collateral. A reasonable finder of fact could find that Mr. Gilson committed the tort of conversion when he sold the Collateral and put the proceeds to personal use. *Cf. Case Credit Corp. v. Portales Nat'l Bank*, 126 N.M. 89, 91 (1998) ("Case law from other jurisdictions amply supports the proposition that, when a debtor makes an unauthorized sale of collateral, and when that transfer constitutes a default under the terms of the security agreement, the secured party obtains an immediate right to the collateral, permitting him to maintain an action for conversion.") (internal quotations and citations omitted). Accordingly, the legal analysis under Section 523(a)(6) appropriately focuses on Mr. Gilson's conversion of the Collateral.

1. Legal Standard

Bankruptcy Code § 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." 11 U.S.C.A. § 523(a)(6) (West 2006). To except a debt from discharge under this section, the Plaintiff bears the burden of proving two distinct elements: (1) that the injury was willful and (2) that the injury was inflicted with malice. *See Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 463 (6th Cir. 1999)*; Mitsubishi Motors Credit of Am., Inc. v. Longley (In re Longley)*, 235 B.R. 651, 655 (B.A.P. 10th Cir. 1999).

a. Willful

The "willful" element of Section 523(a)(6) requires that the debtor must have intended the consequences of his actions, not just the action itself. *Kawaauhau v. Geiger*, 523 U.S. 57, 61-62 (1998). While the Second Circuit has yet to apply *Geiger* to a case involving an unlawful conversion of collateral, the majority of circuits appear to adopt a subjective standard (which this court hereby adopts) in determining the motive of the debtor at the point of conversion. *See*, *e.g.*, *Carrillo v. Su (In re Su)*, 290 F.3d 1140, 1142-43 (9th Cir. 2002); *In re Markowitz*, 190 F.3d at 464; *Miller v. J.D. Abrams Inc. (In re Miller)*, 156 F.3d 598, 603 (5th Cir. 1998); *In re Longley*, 235 B.R. at 657. That standard requires the plaintiff to prove that the debtor had the subjective knowledge or intent to deprive the creditor of collateral or that the debtor knew with substantial certainty that the creditor would be harmed by the conversion. *See*, *e.g.*, *In re Markowitz*, 190 F.3d at 464; *Thiara v. Spycher Bros. (In re Thiara)*, 285 B.R. 420, 432 (B.A.P. 9th Cir. 2002). A willful injury can be found through circumstantial or indirect evidence of both the debtor's knowledge of the creditor's

security interest and the debtor's knowledge that the conversion would cause a particularized injury. *In re Longley*, 235 B.R. at 657.

b. Malicious

In order to except the Debt from discharge under Section 523(a)(6), the Plaintiff must also prove that the injury was malicious. "This requirement is separate and distinct from the issue of willfulness." *Calumet v. Whiters (In re Whiters)*, 2006 WL 257320, *20 (Bankr. N.D. Ind. Feb. 3, 2006). Although the Supreme Court in *Geiger* did not address the malicious requirement under Section 523(a)(6), the Second Circuit has interpreted it to mean "wrongful and without just cause or excuse, even in the absence of personal hatred, spite, or ill-will." *Navistar Fin. Corp. v. Stelluti (In re Stelluti)*, 94 F.3d 84, 87 (2d Cir. 1996). *See also Sanger v. Busch (In re Busch)*, 311 B.R. 657, 666 (Bankr. N.D.N.Y. 2004). Moreover, actual malice may be implied by the circumstances surrounding the debtor's conduct. *See In re Busch*, 311 B.R. at 666.

2. Application of Law to Fact

A claim for unlawful conversion of collateral can give rise to a claim for nondischargeability under Section 523(a)(6). *See In re Longley*, 235 B.R. at 657. In that context, the injury is not that the creditor's debt goes unpaid. Rather, the specific injury is that the creditor's collateral was improperly disposed of without authority and the proceeds were used for purposes other than for payment of the obligations that the property secured. *In re Whiters*, 2006 WL 257320, * 19. However, not every act of conversion falls within the purview Section 523(a)(6). As Justice Cardozo stated in *Davis v. Aetna Acceptance Co.*, 293 U.S. 328 (1934), "a willful and malicious injury does not follow as of course from every act of conversion, without reference to the circumstances. There may be a conversion which is innocent or technical." *Id.* at 332.

> The problem with conversion cases . . . is that rarely are the debtors acting out of a desire to injure the creditors, even though the injury to the creditor, although not desired, is almost always substantially certain to result from a debtor's actions. Thus, the key in conversion cases is to analyze each set of circumstances on a case-by-case basis to determine whether the conversion is in the nature of an intentional tort or whether the conversion is a result of a negligent or reckless tort - but not willful or malicious.

New Buffalo Savings Bank v. McClung (In re McClung), 335 B.R. 466, 474 (Bankr. M.D. Fla. 2005) (quoting from *Auco Fin. Servs. of Billings v. Kidd (In re Kidd)*, 219 B.R 278, 284 (Bankr. D. Mont. 1998)).

In this case, the Plaintiff has submitted sufficient evidence demonstrating that Mr. Gilson had actual knowledge of the Plaintiff's security interest in the Collateral, yet converted it and used the proceeds for personal purposes. The Agreement signed by Mr. Gilson (on behalf of R&B) in February of 2004 evinces Mr. Gilson's actual knowledge of the Plaintiff's security interest in the Collateral. The Torello Affidavit and the Transcript are evidence that Mr. Gilson intentionally converted the Collateral by selling essentially all of it and using the proceeds to pay personal expenses. (*See* Torello Affidavit at 2; Transcript 9:12-9:17, 22:3-22:20.) Moreover, from the evidence a reasonable finder of fact could conclude that Mr. Gilson knew that the Collateral most likely represented the Plaintiff's sole chance at repayment. Therefore, a reasonable finder of fact could find that Mr. Gilson's destruction of the Plaintiff's property interest in the Collateral was "willful." The Plaintiff has also satisfied the malice requirement of Section 523(a)(6): Mr. Gilson's conversion of the Collateral was in violation of the Plaintiff's security interest and was without just cause or excuse.[6] Accordingly, the Plaintiff in this case has submitted sufficient evidence to

[6] The Debtors' need to pay medical bills does not constitute "just cause or excuse" for Mr. Gilson to sell the Collateral which was R&B's property and not his own.

establish a prima facie case of nondischargeability with respect to Mr. Gilson's conversion of the Collateral under Section 523(a)(6). However, because there is no evidence that Mrs. Gilson had any part in the conversion, her discharge remains unimpaired as to that claim.

3. Damages

The appropriate measure of damages for a willful and malicious conversion under Section 523(a)(6) is the value of the converted property at the date of conversion. *See Plikus v. Plikus*, 26 Conn. App. 174, 178 (1991); *Epstein v. Automatic Enter.*, 6 Conn. App. 484, 489 (1986). *Cf. Heritage Bank of Central Illinois v. Vogel (In re Vogel)*, 2005 WL 3506443, *9 (Bankr. C.D. Ill. Dec. 12, 2005). The Plaintiff in this case has failed to submit any evidence as to the value of its interest in the Collateral at the time of conversion. Consequently, the court cannot determine how much of the Debt is excepted from discharge under Section 523(a)(6). Therefore, the court will schedule a further hearing so that the Plaintiff (if it chooses) may submit additional evidence to prove the value of its interest in the Collateral at the time of conversion. The Debt may be excepted from Mr. Gilson's discharge only to the extent of such provable value.

C. Nondischargeability under Section 523(a)(2)(A)

In counts one and four of the Complaint, the Plaintiff also seeks an order declaring the Debt nondischargeable pursuant to Bankruptcy Code § 523(a)(2)(A) because the Debtors (both Mr. and Mrs. Gilson) made false representations regarding their and/or R&B's ability to repay the Debt.

1. Legal Standard

Bankruptcy Code § 523(a)(2)(A) excepts from discharge "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 . . . ." 11 U.S.C.A. § 523(a)(2)(A) (West 2006).

To establish a prima facie case of nondischargeability under Bankruptcy Code § 523(a)(2)(A), the Plaintiff must make adequate proof of the following: (1) the Debtors made representations; (2) knowing them to be false; (3) with the intent and purpose of deceiving the Plaintiff; (4) upon which representations the Plaintiff actually and justifiably relied; and (5) which proximately caused the alleged loss or damage sustained by the Plaintiff. *See*, *e.g.*, *Rosenblit v. Kron (In re Kron)*, 240 B.R. 164, 165 (Bankr. D. Conn. 1999) (Krechevsky, J.).

2. Application of Law to Fact

In this case, the alleged misrepresentations by the Debtors can be divided into two categories: (1) Mr. Gilson's representations on behalf of R&B in the Agreement and Borrower's Affidavit (*see* Complaint, Exhibits B & D), and (2) the Debtors' personal representations in the Guaranty and Guarantors' Affidavit (*see* Complaint, Exhibits A & C).

a. The Agreement and the Borrower's Affidavit

Mr. Gilson, on behalf of R&B, made representations regarding R&B's intent and/or ability to repay the Debt by executing the Agreement and Borrower's Affidavit. Accordingly, the first element of Section 523(a)(2)(A), that the debtor made representations, is satisfied.[7] The second and third elements of Section 523(a)(2)(A) require that the Plaintiff prove that the Debtors knew that the representations were false at the time they were made and were made with the intent and purpose of deceiving the Plaintiff. Because knowledge and intent to defraud are rarely proven by direct

[7] While every contract (including the Agreement and Guaranty) constitutes a representation of the parties *intent* to perform thereunder, *see Anastas v. American Savings Bank (In re Anastas)*, 94 F.3d 1280, 1285 (9th Cir. 1996) (quoting from the Restatement (Second) of Torts, § 530(l) cmt c (1979)), execution of the Agreement and the Guaranty did not constitute a representation of R&B's and/or the Debtors' *ability to pay* the Debt as a matter of law. *See id.*; *Citibank (South Dakota), N.A. v. Olwan (In re Olwan)*, 312 B.R. 476, 483-84 (Bankr. E.D.N.Y. 2004).

evidence, this court adopts a "totality of the circumstances" approach to determine if there is sufficient circumstantial evidence for the court to infer knowledge and intent. *Citibank USA, N.A. v. Spring (In re Spring)* 2005 WL 588776, *4 (Bankr. D. Conn. March 7, 2005). In this case, the facts that R&B never made a payment on the loan and R&B went out of business only about one month after the Agreement was executed would permit a reasonable finder of fact to find that Mr. Gilson knew that his representations regarding R&B's intent and/or ability to repay the Debt were false when made and were made with the intent to induce and deceive the Plaintiff.

However, the fourth element of Section 523(a)(2)(A) requires the Plaintiff to demonstrate that it actually and justifiably relied on those misrepresentations. *See American Express Centurion Bank v. Truong (In re Truong)*, 271 B.R. 738, 747 (Bankr. D. Conn. 2002) (citing *AT&T Universal Card Servs. v. Mercer (In re Mercer)*, 246 F.3d 391, 411 (5th Cir. 2001)). While the justifiable reliance standard is less exacting than the reasonable reliance standard, the Plaintiff still is required to submit evidence regarding its credit screening process and relationship with R&B. *See, e.g., In re Mercer*, 324 B.R. at 423. As the Supreme Court stated in *Field v. Mans*, 516 U.S. 59, 71 (1995), a creditor "is required to use his senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to it if he had utilized his opportunity to make a cursory examination." The Plaintiff in this case has failed to submit any evidence regarding its credit screening process or relationship with R&B. In particular, the Plaintiff has failed to produce the financial statements referred to in the Borrower's Affidavit. Consequently a reasonable finder of fact could not, without more, find that the Plaintiff's reliance on Mr. Gilson's representations in

the Borrower's Affidavit was justifiable. The Plaintiff, therefore, has failed to establish a prima facie case under Section 523(a)(2)(A) with respect to Mr. Gilson.[8]

b. The Guaranty and the Guarantors' Affidavit

The record as it now stands is insufficient to permit a reasonable finder of fact to conclude that the Debtors' representations of their intent and/or personal ability to repay the Debt pursuant to the Guaranty were false when made and that the Debtors knew that such representations were false.[9] That is because the record supports only that the Debtors were in financial distress in August of 2004. However, the Guaranty and the Guarantors' Affidavit were executed in February of 2004 and any extrapolation of the Debtors' financial condition in August of 2004 back six months to February of 2004 would, without more, be pure speculation. Moreover, as with the Agreement and Borrower's Affidavit, the Plaintiff has submitted no proof of "justifiable" reliance.

D. Nondischargeability under Section 523(a)(2)(B)

In count three of the Complaint (the "Third Count"), the Plaintiff further seeks an order declaring the Debt to be nondischargeable pursuant to Bankruptcy Code § 523(a)(2)(B) because both Mr. Gilson, on behalf of R&B, and the Debtors personally made representations regarding their ability to repay the indebtedness allegedly using a statement of financial condition.

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[8] Because the Plaintiff has failed to satisfy the fourth element, it is unnecessary to analyze the fifth and last element of Section 523(a)(2)(A). *See In re Kron*, 240 B.R. at 166 ("The inability of the plaintiff to prove every element of § 523(a)(2)(A) by a preponderance of the evidence, and the narrow construction applied to exceptions to dischargeability, prescribe a ruling in favor of the debtor."). However, it is a reasonable conclusion that, if there was the requisite degree of reliance by the Plaintiff, that damage resulted therefrom.

[9] If the Debtors knew they would be unable to perform when they executed the Guaranty, that is tantamount to a lack of intent to perform. *See, e.g., In re Mercer*, 246 F.3d at 409.

1. Legal Standard

Bankruptcy Code Section 523(a)(2)(B) 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 . . . respecting . . . financial condition." 11 U.S.C.A. § 523(a)(2)(B) (West 2006). In order to establish a prima facie case of nondischargeability under Section 523(a)(2)(B), the Plaintiff must prove five elements: (1) that the Debtors used a statement in writing, (2) that was materially false, (3) regarding the Debtors' financial condition, (4) that the Plaintiff reasonably relied upon and (5) that the Debtors caused to be made or published with an intent to deceive the Plaintiff. *See id.*; *Voyatzoglou v. Hambley (In re Hambley)*, 329 B.R. 382, 398-400 (Bankr. E.D.N.Y. 2005). All Section 523(a) exceptions to discharge are to be strictly construed against the creditor and liberally construed in favor of the debtor. *See Bellco First Fed. Credit Union v. Kaspar (In re Kaspar)*, 125 F.3d 1358, 1361 (10th Cir. 1997).

2. Application of Law to Fact

The first and third element of Section 523(a)(2)(B) require the use of a written statement regarding the financial condition of the Debtors or of R&B. While the phrase "statement in writing . . . respecting . . . financial condition" is not defined in the Bankruptcy Code, it has been generally construed as meaning a statement related to the overall financial health or net worth of the debtor in the nature of balance sheets, income statements, statements of changes in financial position, or income and debt statements. *See, e.g., Weiss v. Alicea (In re Alicea)*, 230 B.R. 492, 501-03 (Bankr. S.D.N.Y. 1999) (collecting cases). Even under a broad interpretation, a financial statement must at the very least concern the condition or quality of an asset or liability that would impact the Debtors' or R&B's financial picture. *See Citik Ka Wah Bank Ltd. v. Wong (In re Wong)*, 291 B.R. 266, 277

(Bankr. S.D.N.Y. 2003). Therefore, as a threshold inquiry the court must determine if the Debtors provided a statement of financial condition that in some way indicated their or R&B's net worth.

The Plaintiff first alleges that Mr. Gilson's representations on behalf of R&B in the Borrower's Affidavit constitutes a statement of financial condition that falls within the purview of Section 523(a)(2)(B). The court, however, is unpersuaded by that argument because the Borrower's Affidavit merely reiterates R&B's ability to perform under the Agreement; it does not provide the Plaintiff with any financial information regarding assets, liabilities or overall net worth. Consequently, the Borrower's Affidavit is not a statement of financial condition under Section 523(a)(2)(B).

The Plaintiff next alleges that the Guaranty and Guarantors' Affidavit executed by the Debtors are statements of financial condition under Section 523(a)(2)(B). As with the Borrower's Affidavit, the court is not persuaded by the Plaintiff's allegation. The Guarantors' Affidavit does not contain sufficient financial information to qualify as a Section 523(a)(2)(B) "statement." Moreover, "[a] guarantee is not a financial statement because it lacks financial data. Rather, a guarantee is like any other promise to perform in the future." *In re Alicea*, 230 B.R. at 504. Thus, because the Guaranty and Guarantors' Affidavit do not provide the requisite financial information regarding the net worth of the Debtors or R&B, neither constitutes a statement of financial condition within the purview of Section 523(a)(2)(B). Accordingly, as a matter of law the Third Count must be dismissed.

E. Attorney's Fees and Costs

In addition to seeking an order from this court excepting the Debt from discharge, the Plaintiff has requested reasonable attorney's fees and costs in its prayer for relief. While there is no

general right to attorney's fees in bankruptcy actions, if the underlying issue is governed by state law "such fees may be awarded in accordance with state law." *BankBoston, N.A. v. Sokolowski (In re Sokolowski)*, 2054 F.3d 532, 535 (2d Cir. 2000). However, if (as here) the issue is not governed by state law, but rather is peculiar to federal bankruptcy law, "attorney's fees will not be awarded absent bad faith or harassment by the losing party." *Citibank USA, N.A. v. Spring (In re Spring)*, 2005 WL 588776, *6 (Bankr. D. Conn. March 7, 2005).[10]

In the present action, the Plaintiff has not yet prevailed (it may prevail in part if it can sufficiently prove the value of its interest in the Collateral as mentioned above). Accordingly, a decision as to fees and costs is premature at this time. Moreover, the court is not persuaded that the Debtors acted in bad faith or otherwise harassed the Plaintiff in this adversary proceeding. Additionally the Plaintiff has not properly pled its claim for attorney's fees. "A general demand for attorney's fees in the prayer for relief does not state a proper claim for attorney's fees, as required by [Rule 7008(b) of the Federal Rules of Bankruptcy Procedure]." *Spring,* 2005 WL 588776, *6. *See also Hartford Police F.C.U. v. DeMaio (In re DeMaio)*, 158 B.R. 890, 892 (Bankr. D. Conn. 1993) (Krechevsky, J.) ("Statements made in a *prayer* are insufficient to satisfy the requirement that attorney's fees be stated as a *claim*.") (emphasis in original). Accordingly, the Plaintiff's claim for attorney's fees is denied. Any claim for statutory costs is premature.

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[10] Under Rule 7054(b) of the Federal Rules of Bankruptcy Procedure, the court may award costs to the prevailing party. *See* Fed. R. Bankr. P. 7054(b) ("The court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides."). "Costs" are defined in 28 U.S.C. § 1920. *See D&B Countryside, L.L.C. v. Newell (In re D&B Countryside, L.L.C.)*, 217 B.R. 72, 75-76 (Bankr. E.D. Va. 1998). "Costs" may be paid only pursuant to a filed bill of costs. *See* 28 U.S.C.A. § 1920 (West 2006).

IV. CONCLUSION

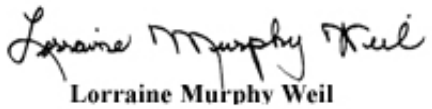
For the reasons stated above, the court concludes that the Plaintiff has established a prima facie case under Section 523(a)(6) but the Debt can be excepted from discharge only with respect to Mr. Gilson and only to the extent that the Plaintiff can prove the value of its interest in the converted Collateral at the time of the conversion. The remainder of the motion is denied and the Third Count is dismissed. The court will issue a notice of further hearing to allow the Plaintiff to submit, if it chooses, any further evidence which it believes proves the amount of its nondischargeable debt under Section 523(a)(6).

Additionally, the court denies the Plaintiff's claim for reasonable legal fees, as the Plaintiff was unable to prove bad faith or harassment on the part of the Debtors and failed to properly plead that claim. Any claim for statutory costs is premature as the Plaintiff has not yet prevailed.

It is **SO ORDERED**.

Dated: April 24, 2006

BY THE COURT



Lorraine Murphy Weil
United States Bankruptcy Judge