UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

IN RE:	)	
	)	
WALTER R. COLES	)	**Case No. 02-52908**
	)	
	)	
_____	)	
	)	
	)	
LEXINGTON STATE BANK,	)	
	)	
Plaintiff,	)	
v.	)	**Adversary No. 03-6007**
	)	
WALTER R. COLES,	)	
	)	
Defendant.	)	
	)	
_____	)	

ORDER DENYING CROSS MOTIONS FOR SUMMARY JUDGMENT UNDER § 523(a)(2)

THIS MATTER came on for hearing before the undersigned bankruptcy judge upon the motion for summary judgment filed by the Defendant Walter R. Coles ("Defendant" or "Debtor") and the cross motion for summary judgment filed by the Plaintiff Lexington State Bank ("Plaintiff" or "LSB") in response to the Plaintiff's Complaint to Determine Dischargeability and to Deny Discharge. Appearing before the court was Joshua Levy, counsel for the Defendant and Julie A. Pape, counsel for the Plaintiff. Both parties submitted briefs in support of their Motions for Summary Judgment. The Plaintiff alleges that grounds for nondischargeability exist under 11 U.S.C. § 523 (a)(2)(A) (section which excepts from discharge those debts incurred by fraud) and that grounds exist to deny the Debtor a discharge under 11

U.S.C. § 727(a)(5) (section which denies a discharge of all debts if the Debtor fails to satisfactorily explain the loss of any assets).[1]

Undisputed Facts

On October 25, 2002, the Debtor filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code.

From September 1999 through July 2002, the Plaintiff and the Defendant had an ongoing business relationship. During this period, Coles obtained four loans from LSB either in his name, jointly with his wife, Jacqueline M. Coles, or as a personal guarantor on a loan to a limited liability company under the name of CHW, LLC.

The First Loan is dated September 1999 and was granted in the amount of $200,000. This loan was made to the Debtor. This loan was subsequently renewed on October 20, 2000 and December 28, 2001. The Debtor provided a personal financial statement in conjunction with this loan dated September 13, 1999.

The Second Loan is dated April 2000 and was granted in the amount of $150,000. This loan was made to the Debtor and his spouse. This loan was subsequently renewed on November 20, 2000 and December 28, 2001. This loan has been paid in part during the bankruptcy proceeding.

The Third Loan is dated October 23, 2000 and was granted in the amount of $150,000. This loan was made to the Debtor. This loan was renewed on December 1, 2000 and December 28, 2001. The Debtor provided updated personal financial statements on October 19, 2000,

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[1] LSB has filed a motion to dismiss this claim, so the motions for summary judgment on this claim will not be discussed.

October 22, 2001 and July 1, 2002.

In November 2000, the Debtor transferred various assets to his spouse. On or about October 2001, the Debtor supplied LSB with a financial statement. In July 2002, LSB filed a lawsuit against the Debtor and his spouse. LSB requests a judgment against the Debtor in the amount of $462,766.31.

Exceptions to Discharge of a Debt

Pursuant to §523(a)(2)(B) the Debtor's debt to LSB is not dischargeable to the extent the debt was for money, property, services, or an extension, renewal, or refinancing of credit obtained by the "use of a statement in writing (i) that is materially false; (ii) representing 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). In the matter before the court all parties agree that there are only three issues to be addressed and those are: (i) was the financial statement materially false; (ii) was it given with the intent to deceive and (iii) did LSB reasonably rely on the financial statements.

Standard for Summary Judgment

The standard for summary judgment is set forth in Fed. R. Civ P. 56, which is made applicable to this proceeding by Bankruptcy Rule 7056, and provides that the movant will prevail on a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). See also Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265

(1986). The movant has the initial burden of establishing that there is an absence of any genuine issue of material fact, and all reasonable inferences must be drawn in favor of the nonmoving party. Id.

Discussion

For the Debtor to prevail on his Motion, the court must find, considering all the facts in a light most favorable to LSB, that the financial statement was not materially false, that the Debtor had no intent to deceive LSB and that LSB did not reasonably rely on the financial statement. Conversely, for LSB to prevail on its cross motion, the court must find, considering all the facts in a light most favorable to the Debtor, that the Debtor gave LSB a written financial statement that was materially false, the Debtor gave the statement with the intent to deceive LSB and that LSB reasonably relied on the financial statement.

LSB contends that (1) the Debtor transferred assets to his wife and that he failed to disclose the transfers on financial statements submitted to the bank; (2) the Debtor gave LSB financial statements that were materially false because he failed to disclose that creditors had taken legal action against him for the non payment of debt; (3) the Debtor presented these materially false financial statements with the intent to deceive LSB and to induce LSB into renewing the loans; and (4) LSB relied to its detriment on these materially false financial statements.

The Debtor admits that the personal financial statement submitted did not contain all of the information requested, but argues that none of the information supplied was false and that the omissions were not material and were "unintentionally left blank." Brief page 14. As to the intent to deceive, the Debtor argues that in as much as a bank representative testified that the Debtor

has been "as forthcoming as anyone would be," LSB cannot satisfy the intent to deceive as a matter of law. Lastly, the Debtor argues that, as a matter of law, LSB cannot prevail on reasonable reliance as the Bank has a duty to obtain correct financial information if it wished to use the financial statement as a basis for nondischargeability. The Debtor contends that LSB did not follow established procedures in renewing the loan and approved the loan renewal due to an established banking relationship with the Debtor.

Issues relating to intent to deceive and reasonable reliance are issues of fact that are not appropriately determined by a summary judgment proceeding. The "fact" that "at no time did Coles intentionally mislead LSB," as alleged by the Debtor, cannot be held as fact for the purposes of a summary judgment hearing.

Issues of intent and reliance are factual determinations and as one court stated, "[i]t is highly unlikely that a situation would ever arise under which summary judgment would be appropriate in [an] adversary proceeding brought under section 523(a)(2)." United States v. Earhart (In re Earhart), 68 B.R. 14, 17 (Bankr. N.D. Iowa 1986). See also In re Jones, 298 B.R. 451, 462 (Bankr. D. Kan. 2003) ("Questions about a person's intent or other state of mind require consideration of intangible factors such as witness credibility and can rarely be resolved by summary judgment"); and Munch v. Sanders (In re Sanders), 1993 WL 13004583 (S.D. Ga. 1993) (denying summary judgment on issue of whether plaintiff reasonably relied on written statement because it was a question of fact). The motion for summary judgment and the cross motion are premised on factual assumptions by both parties that have not been proven nor adjudged to be true by the fact finder. Intent and reasonable reliance are questions of fact and summary judgment is inappropriate in this case.

Therefore, based on the foregoing it is ORDERED ADJUDGED AND DECREED that the Debtor's Motion for Summary Judgment and LSB's Cross Motion for Summary Judgment under 11 U.S.C. §523(a)(2) are both DENIED.

This the 14th day of October, 2003.

Catharine R. Carruthers

Catharine R. Carruthers
United States Bankruptcy Judge