UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 7
JONGHAN KIM	)	CASE NO. 04-94695-MHM
Debtor	)	
THE CIT GROUP/SALES FINANCING, INC.	)	
Plaintiff	)	**ADVERSARY PROCEEDING**
v.	)	**NO. 04-6521**
JONGHAN KIM	)	
Defendant	)	

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on Plaintiff's Motion for Summary Judgment under §§523(a)(2)(A), 523(a)(2)(B), and 523(a)(6). Defendant submitted a Response Brief in Opposition to the Motion. For the reasons set forth below, Plaintiff's Motion for Summary Judgment will be granted.

FACTS

Defendant is a Korean-born American citizen who has lived in the United States for approximately thirty-eight years. Defendant is able to read and write English and has been self-employed as a martial arts instructor for approximately ten years. Given the nature of his business, Defendant routinely entered into contractual obligations with students and financial companies.

On December 30, 1998, Defendant financed the sale of a 1998 Kountrya 3761 Motorhome (the "Motorhome") through Coach & Campers of Atlanta ("Coach") and Plaintiff in the amount of $89,268.00. Coach is an RV rental and sales business operated by Marion and Theresa Webb. Defendant entered into a contract promising to pay Coach or its assignee 180 consecutive monthly installments of $853.09 with payments to begin January 30, 1999 (the "Sales Contract"). As part of the financing, Defendant executed a Security Agreement providing that he would use the Motorhome only for personal, family or household purposes, avoid other liens from attaching to the Motorhome, not use the Motorhome as rental property, and not sell the Motorhome without Plaintiff's prior approval. The Security Agreement also stated that Defendant would be trading in a 1992 Mercedes valued at $41,600.00 and contribute a $1,000.00 cash downpayment toward the purchase of the Motorhome. Even though conceding that his signature is on the Sales Contract and Security Agreement, Defendant contends that when he signed these documents they were incomplete and information was later filled in without his knowledge or approval. According to Defendant, the information later filled in on the Security Agreement included the affirmations as to the Mercedes trade-in and the cash downpayment. Debtor did not own the Mercedes and did not provide it as a trade-in or provide any cash as a down payment.

Vivian Walker (hereinafter "Walker"), a Litigation Specialist for Plaintiff, testified in her affidavit that Plaintiff anticipates that when a customer enters into a sales contract like the one signed by Defendant the customer will maintain the collateral for personal, family, and household purposes. Additionally, she states that Plaintiff relied on Defendant's affirmations in a credit application and Security Agreement when it financed Defendant's purchase of the Motorhome.

Further, she attests that if Plaintiff had been aware that Defendant intended to use the Motorhome in a rental fleet, it would not have approved the loan under the terms offered to Defendant.

Defendant contends that he was approached by Marion Webb (hereinafter "Webb"), a family friend, with a business idea whereby Defendant would purchase the Motorhome and place it in Webb's rental fleet. The parties agreed to use the Motorhome as rental property for a few years and then sell it for profit to be divided between them. Webb was to provide Defendant with the funds to cover the monthly payments to Plaintiff allegedly from any rental income. Defendant testified in his deposition that he trusted Webb and viewed this plan as a "great moneymaking opportunity." Defendant also stated that he was aware at all times that he would be liable for the payments if Webb failed to provide him with sufficient funds to cover the payments. The arrangement between Defendant and Webb provided that Webb would select the Motorhome, obtain the tags and title, maintain possession of the Motorhome in his rental fleet, provide Defendant with funds to cover monthly payments, and then the parties would sell the Motorhome and divide the profit. In his bankruptcy petition, Defendant referred to his agreement with Webb as a "leaseback" arrangement. Additionally, Defendant purchased a second RV through Webb with similar financing arrangements but a different lender in September of 1999.

The arrangement between Defendant and Webb continued until August or September of 2002 when Webb stopped providing Defendant with the funds to make the monthly installment payments to Plaintiff. Thereafter, Defendant continued to make payments to Plaintiff until March of 2003, even though Defendant was no longer receiving money from Webb; however, when Defendant learned that Webb had sold the Motorhome to a third party, he ceased making the monthly payments to Plaintiff. As a result of Defendant's default, Plaintiff obtained a default

judgment against him, which was entered December 11, 2003, in the amount of $87,993.29: $76,259.52 in principal, $3,629.87 in interest, and $8,103.90 for attorney fees, court costs and other interest.

In addition to the default judgment, Plaintiff sought to recover the Motorhome. Plaintiff could not recover it, however, because Plaintiff failed to secure its interest in the Motorhome under Georgia law. Plaintiff sent Defendant a letter in March of 2002 requesting information to assist Plaintiff in securing title to the Motorhome. Apparently Coach had never turned over to Plaintiff the original certificate of title. Defendant never possessed the certificate of title to the Motorhome, either. While no proof was offered, the undisputed facts, including the arrangement between Debtor and Webb, lead to the logical inference that Webb held the title certificate, which enabled his transfer of the Motorhome to a third party.

DISCUSSION

Summary judgment is authorized when all the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show that no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). In assessing whether a "genuine issue" for trial exists, the court must consider all the evidence and factual inferences reasonably drawn from the evidence in a light most favorable to the nonmoving party. *Stewart v. Booker T. Washington Ins.*, 232 F.3d 844, 850 (11th Cir. 2000). More specifically, if under the substantive law the moving party bears the burden of proof at trial, it must demonstrate that for each essential element of its *prima facie* case no reasonable jury could find for the nonmoving party. *United States v. Four Parcels of Real*

Property, 941 F.2d 1428, 1437 (11th Cir. 1991). Due to the policy of providing the debtor with a fresh start in bankruptcy, exceptions to discharge under section 523 should be construed strictly against the creditor. *Schweig v. Hunter*, 780 F.2d 1577, 1579 (11th Cir. 1986). A creditor seeking a determination of nondischargeability pursuant to section 523(a) has the burden of proving its *prima facie* case by a preponderance of the evidence. *Grogan v. Garner,* 498 U.S. 279, 291 (1991).

I. *Plaintiff Is Entitled to Summary Judgment under Section 523(a)(2)(A)*

Plaintiff alleges it is entitled to judgment under section 523(a)(2)(A) because Defendant obtained credit by making false representations in the Security Agreement. Plaintiff argues that Defendant misrepresented his intentions to pay for the Motorhome, that the Motorhome would remain in his possession, and that the Motorhome was purchased for his personal use.

Section 523(a)(2)(A) provides that a 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, other than a statement respecting the debtor's or an insider's financial condition" is precluded from discharge. 11 U.S.C. § 523(a)(2)(A) (2005). Thus, to establish a *prima facie* case against Defendant, Plaintiff must show the following by a preponderance of the evidence: (i) Defendant made a false representation with the purpose and intention of deceiving Plaintiff; (ii) Plaintiff relied on the representation; (iii) Plaintiff's reliance was justifiable; and (iv) Plaintiff sustained a loss as a result of the representation. *Hunter,* 780 F.2d at 1579; *see also In re Vann,* 67 F.3d 277, 283 (11th Cir. 1995) (holding justifiable reliance is required under section 523(a)(2)(A)).

Plaintiff has shown that Defendant falsely represented his intentions for purchasing the Motorhome because Defendant admits he signed the Security Agreement expressly stating he purchased the Motorhome for "personal, family, or household purposes" and would not "rent it out" while simultaneously planning to place the Motorhome into a rental fleet as a "money making opportunity." Additionally, Defendant's intent to deceive Plaintiff is evidenced by his reckless indifference in signing the Security Agreement. Even if Defendant failed to read the document, he is charged with knowledge of its contents. *Rick v. U.S.,* 434 F. Supp. 1262 (S.D. Ga. 1976). Intent under section 523(a)(2)(A) can be inferred when a debtor acts with such reckless disregard for the truth as to constitute willfulness. *Bombardier Capital, Inc. v. Dobek,* 278 B.R. 496 (N.D. Ill. 2002). Defendant is a business man familiar with both contractual obligations and financing agreements. Thus, Defendant's testimony that he failed to read the Security Agreement and executed an incomplete contract supports Plaintiff's argument that Defendant recklessly disregarded the truth of any affirmations made in the Security Agreement. Such a reckless disregard for the truth is sufficient to show an intent to deceive by Defendant.

Plaintiff has also shown that it justifiably relied upon Defendant's false representations. Justifiable reliance is the applicable standard under §523(a)(2)(A). *City Bank & Trust Co. v. Vann*, 67 F. 3d 277 (11th Cir. 1995). Justifiable reliance is a subjective standard measured by the individual creditor's own capacity, knowledge, and information which may be fairly charged against it from facts within its observation. *Id.* Justifiable reliance is a less stringent standard than reasonable reliance. *Id.*

> To constitute justifiable reliance, "[t]he plaintiff's conduct must not be so utterly unreasonable, in the light of the information apparent to him, that the law may properly say that his loss is his own responsibility."

Id., at 283, *citing* W. Page Keeton, PROSSER & KEETON ON TORTS §108, at 749 (5th Ed. 1984). Justifiable reliance on the representations by Defendant is shown by the statement in Walker's affidavit that Plaintiff relied on the affirmations in Defendant's credit application and Security Agreement. Walker also stated that Plaintiff would not have loaned the money if Defendant had disclosed the actual terms and intent of the transaction. The facts and circumstances surrounding the transaction also support the conclusion that Plaintiff's reliance was justifiable. Therefore, Plaintiff is entitled to summary judgment under §523(a)(2)(A). Although consideration of the other grounds asserted by Plaintiff is unnecessary, in the interest of thoroughness, they are considered below.

II. *Plaintiff Not Entitled to Summary Judgment under Section 523(a)(2)(B)*

Plaintiff's second contention is that it is entitled to summary judgment under section 523(a)(2)(B) because Defendant executed loan documents containing false information as to his financial position while never intending to repay the loan with his own funds. Section 523(a)(2)(B) provides that a claim "for money, property, services, or an extension, renewal, or refinancing of credit," will not be discharged if it was "obtained by the use of a statement in writing that is materially false; respecting the debtor's or an insider's financial condition; on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and that the debtor caused to be made or published with intent to deceive." 11 U.S.C. § 523(a)(2)(B) (2005). To establish a *prima facie* case under section 523(a)(2)(B), Plaintiff must show that (i) its debt was for obtaining money or credit; (ii) Defendant used a written statement; (iii) the statement was materially false; (iv) the statement by Defendant regards

his financial condition; (v) Plaintiff reasonably relied on the statement; and (vi) Defendant published the statement with an intent to deceive. *In re Archer,* 55 B.R. 174, 178 (Bankr. M.D. Ga. 1985).

For a *prima facie* case under section 523(a)(2)(B), Plaintiff's evidence is lacking in at least two respects. First, Plaintiff has not shown by a preponderance of the evidence that the Security Agreement constitutes a statement regarding Defendant's financial condition. The Security Agreement indicates only that Defendant has full ownership interest in the Motorhome used as collateral for the loan at a time when Defendant now admits he did not own the Motorhome – when he executed the agreement. A misrepresentation as to one's ownership interest in a single asset does not constitute a statement regarding his or her financial condition. *See generally In re Dixon,* 1986 U.S. App. LEXIS 21286, 6-7 (11th Cir. 1986); *Jokay Co. v. Mercado*, 144 B.R. 879 (Bankr. C.D. Cal. 1992); *Weiss v. Alicea,* 230 B.R. 492 (Bankr. S.D. N.Y. 1999). While the false statements regarding a trade-in and cash downpayment may provide grounds to determine nondischargeability under §523(a)(2)(A), those statements do not constitute a statement "respecting the debtor's . . . financial condition." Thus, §523(a)(2)(B) does not provide grounds for excepting Plaintiff's claim from discharge.

III. *Plaintiff Not Entitled to Summary Judgment under Section 523(a)(6)*

Plaintiff's last contention is that it is entitled to summary judgment under section 523(a)(6) because Defendant exercised reckless indifference when making representations on the Security Agreement which ultimately caused Plaintiff injury. Section 523(a)(6) provides that a claim arising from a "willful and malicious injury by the debtor to another entity or to the property of another entity" is not dischargeable. 11 U.S.C. § 523(a)(6) (2005). To satisfy the

requirements under section 523(a)(6), Plaintiff must show that Defendant intended to cause the injury or harm. *Kawaauhau v. Geiger*, 523 U.S. 57, 64 (1998). Mere intention to complete or act that results in an unintended injury to Plaintiff is not sufficient.

Defendant testified that when obtaining the loan from Plaintiff he intended to receive the funds to pay off the loan from Coach. In fact, Defendant consistently made payments on the loan with monies he received from Webb. Thus, even if Defendant never intended to make the monthly payments from his personal funds, no evidence suggests Defendant intended that Plaintiff would not receive payments on the loan. Additionally, Plaintiff's failure to obtain a security interest in the Motorhome is not so much a consequence of Defendant's conduct than of Plaintiff's inaction at purchase and Webb's intervening misconduct. Therefore, Plaintiff's claim under §523(a)(6) is without merit.

Accordingly, it is hereby

ORDERED that Plaintiff's motion for summary judgment under §523(a)(2)(A) is granted.

IT IS SO ORDERED this 28th day of September, 2005.

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE