IT IS ORDERED as set forth below:

Date: September 24, 2013

Barbara Ellis-Monro
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	
JONATHAN ROSS ST. HILAIRE and KRISTIN MARIE ST. HILAIRE,	CASE NO. 12-71061-BEM
Debtors.	CHAPTER 7
JTWO, LLC,	
Plaintiff,	ADVERSARY PROCEEDING NO. 12-05612-BEM
v.	
JONATHAN ROSS ST. HILAIRE,	
Defendant.	

O R D E R

A trial was held in this adversary proceeding on July 29, 2013 (the "Trial"). Plaintiff, JTWO, LLC ("Plaintiff") seeks a determination that certain amounts it loaned to an entity owned by Defendant, Jonathan Ross St. Hilaire ('Defendant") are non-

dischargeable in Defendant's chapter 7 case pursuant to 11 U.S.C. §§523(a)(2)(A) and (a)(2)(B). [Doc. No. 1]. The matters raised in Plaintiff's complaint are within this Court's jurisdiction and subject to entry of a final judgment as core matters that involve "a substantive right created by the Bankruptcy Code…" *In re Toledo*, 170 F.3d 1340, 1344 (11th Cir. 1999); 28 U.S.C. § 157(b)(2)(I). After carefully considering the pleadings, the evidence presented and the applicable authorities, the Court enters the following findings of fact and conclusions of law in accordance with Fed. R. of Bankr. P. 7052.

I. FINDINGS OF FACT

Plaintiff is owned by James Laber ("Laber") and his wife. At the time relevant to this proceeding, Defendant was employed as an executive pastry chef involved with food production and menus for 10 restaurants. Defendant and Laber had known each other for a number of years prior to the events at issue in this proceeding having became acquainted through their respective employment.

At some point in 2008, Defendant approached Laber about investing in a new venture, called Boulange St. Hilaire, LLC ("BSH"), which was envisioned as a wholesale and retail bakery and pastry shop that was to begin operations in the first quarter of 2008. [Plaintiff's Exhibit #1]. In conjunction with Defendant's solicitation of a loan from Laber, Defendant provided Laber with a business plan for BSH (the "Business Plan"). [Plaintiff's Exhibit #1]. The Business Plan contains six sections: (i) Executive Summary, (ii) Products and Service, (iii) Market Analysis Summary, (iv) Strategy and Marketing, (v) Management Summary, and (vi) Financial Plan. The Financial Plan portion of the business plan includes sales forecast, break-even analysis, projected profit and loss,

projected cash flow, projected balance sheet, and sensitivity analysis. The Executive Summary portion of the document, states in part:

> To achieve the Company's objectives Boulange St. Hilaire is seeking $100,000 in total funding through bank or Small business Administration (SBA) backed lending. The Company has already received $250,000 in outside investment to cover build out and equipment costs. The bank or SBA-backed loan will be paid back from the cash flow of the business within seven years, collateralized by the assets of the Company, and backed by the personal integrity, experience, and a contractual guarantee from the owner.

[Plaintiff's Exhibit #1, page 2]. Defendant gave the Business Plan to Laber for the purpose of interesting Plaintiff in investing in BSH.

Defendant entered into a ten year lease agreement with Inman Park Properties of East Atlanta, LLC on June 29, 2007, for the lease of the premises located at 567 Flat Shoals Avenue (the "Lease"). These premises were intended to be used for BSH's bakery and pastry business. The Lease included special stipulations for landlord funding of certain improvements to the premises up to a maximum amount of $250,000, "which shall be for kitchen equipment and a grease trap, if required." [Defendant's Exhibit #1]. The improvements, including equipment, were to remain property of the landlord until Tenant, which was Defendant rather than BSH, repaid the landlord $250,000. The tenant improvement loan was to be repaid at the rate of $50,000 per year beginning in the second year of the Lease and to continue for four years. [Defendant's Exhibit #1]. The landlord did not fulfill its commitment and the space was never completed which caused BSH to be unable to begin operations.

At the time Defendant solicited a loan from Plaintiff, the Lease had been executed, but no funds had been provided by the landlord. Defendant testified that he was not sure what he told Laber about funding for additional equipment needed for BSH or about other capital, but he thought he told him that the investment was for build out from the landlord. Laber had one of "his financial guys," who had worked in the banking industry for several years, review the Business Plan. Plaintiff either would not have invested in the venture if the "financial guy" had not approved the transaction or would have sought a larger ownership interest in BSH. Laber believed, based upon the Business Plan and several conversations with Defendant, that the $250,000 was in place and that the additional $100,000 was needed to purchase equipment. Laber and Defendant had several detailed discussions about the concept for the business and the anticipated build out of the space, but Laber did not receive a copy of the Lease.

Approximately 5-6 months before the build out of the BSH space was to be completed, Defendant used $70,000 of the funds received from Plaintiff to purchase equipment and $30,000 for a security deposit and legal fees. After BSH failed to begin operations, Defendant used this equipment, without objection from Plaintiff, in another venture Defendant began with different investor(s). At some point after BSH failed to begin operations, Defendant agreed to repay the loan to Plaintiff. Defendant failed to make the agreed upon payments and in July, 2011, a judgment was entered prior to trial in the state court with Defendant's consent. Defendant made payments to Plaintiff totaling $44,300.00. The current balance owed is $73,797.63. [Plaintiff's Exhibit #12].

In seeking to except the debt owed to Plaintiff from discharge Plaintiff relies upon the fact that Laber and Defendant discussed the build out to be funded with the $250,000 investment. Plaintiff further asserts that because Defendant made a "brazenly false statement" regarding the $250,000 investment that there is no room to infer an honest intent and that Defendant "conveyed this to Plaintiff to induce Plaintiff to lend him money for his business" such that the amount owed on account of the loan to BSH should be excepted from discharge pursuant to 11 U.S.C. §523(a)(2). *See* Plaintiff's Proposed Findings of Fact.

Defendant admitted that he provided the Business Plan which included the statement about the $250,000 investment to Plaintiff to induce Plaintiff into making a loan to BSH, but denied that the representation was false or constituted a misrepresentation. Defendant further denies that Plaintiff reasonably relied on a false representation or that Defendant intended to deceive Plaintiff. *See* Answer ¶ 9.

II. CONCLUSIONS OF LAW

Section 523(a)(2) of the Bankruptcy Code provides that a debt is excepted from discharge if it is:

(2) for money, property, services, or an extension, renewal, or refinancing of credit to the extent obtained, by --

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(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; or

In order to prevail under §523(a)(2)(A), Plaintiff must establish that:

(1) The debtor made a false representation, other than an oral statement respecting the debtor's or an insider's financial condition, with intent to deceive the creditor;

(2) The creditor actually relief on the misrepresentation;

(3) The reliance was justifiable; and

(4) The misrepresentation caused a loss to the creditor.

See Advance Financial Corp. v. Gross (In re Gross), 2011 Bankr. LEXIS 3273 (Bankr. N.D. Ga. 2011)(*citing In re Bucciarelli,* 429 B.R. 372, 375 (Bankr. N.D. Ga. 2010)(citing In re Bilzerian, 100 F.3d 886, 892 (11th Cir. 1996))).

The primary purpose of our bankruptcy system is a "fresh start" for the honest but unfortunate debtor. *Local Loan Co. v. Hunt*, 292 U.S. 234, 54 S.Ct. 695, 78 L.Ed. 1230 (1934); *Perez v. Campbell*, 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971). Because of this clearly stated policy, exceptions to discharge are generally construed narrowly against a creditor and liberally in favor of the debtor. Thus, the creditor has the burden to prove each element necessary under § 523(a)(2). *See Grogan v. Garner*, 498 U.S. 654, 112 L.Ed.2d 755 (1991).

1. A Statement Respecting a Debtor's or an Insider's Financial Condition

In order to establish the first element of Plaintiff's claim under § 523(a)(2)(A), Plaintiff must prove that Defendant made a false representation with the intent to deceive Plaintiff and that the representation was not one respecting BSH's financial condition. Thus, the Court will first consider whether the Business Plan [Plaintiff's Exhibit #1] is a statement concerning the debtor's or an insider's financial condition.

The terms contained in the phrase "statement respecting the debtor's or an insider's financial condition" are not defined in the Bankruptcy Code, but courts have generally held, that because § 523(a)(2)(B) specifically covers statements *in writing* respecting a debtor's financial condition, § 523(a)(2)(A)'s exclusion of representations "*other than* a statement respecting the debtor's or an insider's financial condition" renders oral statements inactionable. *See Rose v. Lauer (In re Lauer),* 371 F.3d 406, 413 (8th Cir. 2004) ("Subsections 523(a)(2)(A) and (B) are mutually exclusive."); *But see WFI Georgia Inc. f/k/a Suntech Systems, Inc. v. Phillips*, 2007 Bankr. LEXIS 2193, 2007 WL 7141216 (Bankr. N.D. Ga. 2007)(stating that arguably the narrow view would allow for a claim under 523(a)(2)(A) with respect to an aspect of financial condition).

This lack of definition has led to a split in opinion regarding whether the phrase "statement respecting a debtor's or an insider's financial condition" should be interpreted broadly to include any statement that has a bearing on the financial position of the debtor or an insider or narrowly to include statements respecting debtor's overall net worth, financial health or equation of assets and liabilities. *See Douglas v. Kosinski,* 424 B.R. 599, 610 (B.A.P. 1st 2010)(compiling cases).

In *Douglas*, the Court considered whether information consisting of projections of profit, loss, expenses and net profit for a one year period was a statement respecting a debtor's or an insider's financial condition within the meaning of § 523(a)(2). The Court noted the split between the Courts regarding the broad or narrow view of the terms "statement concerning financial position" but declined to adopt one or the other approach noting the "all courts agree that in determining whether a statement relates to a debtor's financial condition, the term is not limited to formal financing statements." *Id.* at 609. Thus, the Court held that the statement, in whatever form, "must, in some way, describe the financial condition of the debtor" which the Court reasoned "necessarily means that there must be some historical perspective to the figures contained within the statement, and it follows that a statement that provides unsubstantiated projections of future performance does not constitute a statement of financial condition for purposes of § 523(a)(2)." *Id.* at 610. The projections provided in *Douglas* were based on information obtained from an individual who had previously operated a nightclub in the space to be used by the debtor's insider and did not present any information related to the debtor's insider's existing or historical financial condition even though the insider had been operating for at least part of the prior twelve months. Because the information provided to plaintiff projected *possible* expenses and sales and "mere projections for future business operations" the Court concluded that the information was not a statement of financial condition within the meaning of § 523(a)(2)(B). *Id.*

Similarly, the Business Plan contains projections of future operating income, expenses and profits for BSH and bases its analysis of these items on an anticipated event

– receipt of a $100,000 loan. Thus, until such time as Plaintiff loaned BSH $100,000 the information contained in the Business Plan was completely hypothetical and could not constitute a statement regarding BSH's overall net worth or income flow. Nor could the Business Plan constitute a statement as to any aspect of BSH's financial condition because the projections were purely hypothetical. The Business Plan is merely a projection of possible results since it was based upon an analysis of a start up venture prior to receiving the very investment the projections assumed. Projections are by their very nature uncertain. *See, e.g.,* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, 11th Ed. 2003 (defining projection as: "an estimate of future possibilities based on a current trend"). Because of this inherent uncertainty, it would be illogical to conclude that a projection contains the type of information that could be considered a statement respecting a debtor's or an insider's financial condition and Plaintiff's claim under § 523(a)(2)(B) cannot be sustained.

Even if the Business Plan could be considered a statement concerning BSH's financial condition under the broad view as a statement concerning the anticipated loan of $100,000, Plaintiff's claim under § 523(a)(2)(B) would fail because Plaintiff did not reasonably rely on the information contained in the Business Plan. In considering whether reliance on a financial statement is reasonable, the Courts consider the totality of the circumstances and in doing so have identified several factors that indicate reasonableness: (i) whether there had been previous business dealings with the debtor that gave rise to a relationship of trust; (ii) whether the debt was incurred for personal or commercial reasons; (iii) 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 (iv) whether even minimal investigation would have revealed the inaccuracy of the debtor's representations. *See, Coston v. Bank of Malvern (In re Coston)*, 991 F.2d 257, 261 (5th Cir. 1993); *See also*, *Collier on Bankruptcy* ¶ 523.08[2][d] (Alan N. Resnick & Henry J. Sommers eds., 16th ed.), *In re Gordon*, 277 B.R. 796, 802 (Bankr. M.D. Ga. 2001), *In re Granger*, 06-52502 RFH, 2008 WL 3852732 (Bankr. M.D. Ga. July 30, 2008).

Here, the evidence showed that the parties knew each other for some years through work, but there was no evidence that theirs' was a close personal relationship. Rather, Laber testified that he knew Defendant as a talented chef, that he believed there was a need in the market for this type of venture and that he was excited to go into business with Defendant. Further, rather than relying on personal trust, Laber had "his financial guy" review the Business Plan and had the financial advisor not approved the Business Plan, Plaintiff either would not have made the loan or would have asked for a larger ownership percentage in the business. In addition, and more importantly, there were several red flags in the Business Plan that should have caused Plaintiff to investigate. First, none of the tables or charts in the Business Plan included the $250,000 landlord commitment. In fact, in the Start-Up Summary contained in the Business Plan, the "Total Planned Investment" is set forth as $0 for Owner and $0 for Investor and a bar graph on the bottom of the Start-Up Summary page includes a $100,000 loan and no investment. The Start-Up Summary also contains errors in calculating the total cash available. The summary sets forth a beginning cash balance of $64,400 after reducing the $100,000 loan

by anticipated start up liabilities of $55,600 rather than the remaining cash balance of $44,400. In addition, even minimal due diligence, such as requesting bank statements, would have shown that BSH did not have $250,000 in cash. Thus, even if the Business Plan were considered a statement concerning debtor's or an insider's financial condition, Plaintiff did not reasonably rely and cannot except the debt from discharge pursuant to § 523(a)(2)(B).

2. False Pretense, False Representation or Actual Fraud

In addition to establishing that the Business Plan was not a financial statement within the meaning of § 523(a)(2)(A), to prevail on its § 523(a)(2)(A) claim Plaintiff must establish that Defendant (i) made a false representation with the intent to deceive Plaintiff; (ii) that Plaintiff relied on the representation; (iii) the reliance was justified; and, (iv) Plaintiff sustained a loss as a result of the misrepresentation. *See SEC v. Bilzerian (In re Bilzerian),* 153 F.3d 1278, 1281 (11th Cir. 1988); *TI Inv. Mgmt. Co. v. Miele (In re Miele),* 2007 Bankr. LEXIS 3059 (Bankr. N.D. Ga. 2007). "The false representation may come in the form of an express misrepresentation, an implied misrepresentation, or "conduct intended to create and foster a false impression."" *Id.* at *9 (*citing, In re Callaway*, 2006 Bankr LEXIS 3575, *61 (Bankr. N.D. Ga. 2006)). The debtor need not have received the money directly in order for a debt to be nondischargeable under § 523(a)(2)(A), rather the debtor need only have benefited from money obtained through false pretenses, a false representation, or actual fraud. *Id.* Courts may infer the required intent to deceive from the facts and circumstances of the case, but "if there is room for an inference of honest intent, the question of nondischargeability

must be resolved in the debtor's favor." *See Advance Financial Corp. v. Gross (In re Gross),* 2011 Bankr. LEXIS 3273 (Bankr. N.D. Ga. 2011)(*citing, In re Callaway,* 2006 Bankr. LEXIS (quoting *In re Collier,* 231 B.R. 618 (Bankr. N.D. Ohio 1999))).

Plaintiff points to the statement regarding $250,000 investment in the Business Plan, the failure to include a repayment obligation for the tenant improvement funds, visiting the proposed site, discussions regarding the build out of the proposed premises and BSH's anticipated operations and Defendant's failure to execute a guaranty as proof of Defendant's intent to deceive. Laber also testified that he had numerous discussions with Defendant about the venture and when they were visiting the proposed premises they specifically discussed the location of the retail and wholesale areas, the location of the wholesale loading dock and even the type of fuel that would be used in the delivery trucks. Laber testified further that he did not recall being told that the landlord was providing tenant improvement funds, but that he remembered something about Savannah, Georgia, that "either the guy [the other investor] was from there or living there." Further, Laber stated that he may have seen the Lease, but did not have a copy and did not recognize the document. Laber also testified that once Plaintiff had made the loan, Defendant stopped returning his calls and he felt like Defendant was avoiding him.

Although Defendant did not have $250,000 in cash from another investor, at the time he solicited Plaintiff's investment, Defendant did have a signed commitment from a third party to fund up to $250,000 in tenant improvements and equipment costs. Was the language in the Business Plan phrased in such a way that it could be read as cash in the bank rather than tenant improvement funds? Certainly, however, this turn of phrase

without more is not sufficient to establish that Defendant intended to deceive Plaintiff. Further, the site visit Plaintiff relies upon to allege a scheme to defraud was in fact the leased space. Having observed the demeanor of the witnesses, the Court found Laber to be a credible witness while the Defendant was less so. Notwithstanding, the Court finds that the facts in this case are more indicative of a legitimate but failed business venture than a scheme to defraud Plaintiff. *Cf. TI Inv. Mgmt. Co. v. Miele*, 2007 Bankr. LEXIS 3059 (scheme to defraud included among other things, fake IPO, site visits to 8 stores, false financials for 8 stores evidencing a scheme to defraud rather than a legitimate failed venture). Because there is clearly room to infer honest intent, Plaintiff has failed to establish the intent to deceive necessary to establish a claim under § 523(a)(2)(A) and the debt owed to Plaintiff is dischargeable.

Pursuant to Fed. R. Bankr. 7058 a separate judgment will be entered contemporaneously herewith.

END OF ORDER

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