IT IS ORDERED as set forth below:

Date: February 2, 2015

Mary Grace Diehl

Mary Grace Diehl
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In re:	:	BANKRUPTCY CASE NO:
CATHERINE M. ZAHOS,	:	**13-67503-MGD**
Debtor.	:	CHAPTER 7
BEACH COMMUNITY BANK,	:	
Plaintiff,	:	
v.	:	ADVERSARY PROCEEDING NO:
CATHERINE M. ZAHOS,	:	**14-05023**
Defendant.	:	

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This is a non-dischargeability action arising from Debtor-Defendant Catherine Zahos's entry into two loan transactions with Beach Community Bank for the stated purpose of real estate investment. Ms. Zahos immediately defaulted and Beach brought suit against Ms. Zahos

and others in the Circuit Court of Walton County, Florida to foreclose the real property and obtain a money judgment. Beach obtained a prepetition money judgment against Ms. Zahos and now seeks to except the resulting indebtedness from discharge under 11 U.S.C. § 523(a)(2)(A) and (B).

Beach filed the instant Motion for Summary Judgment on September 26, 2014 (Pl's. Mot. Summ. J., Doc. 22 ("Motion")). With it, Beach filed its Statement of Undisputed Material Facts pursuant to Bankruptcy Local Rule 7056-1 (Pl's. Statement Material Facts, Doc. 23 ("Statement")). Ms. Zahos did not file a response to Beach's Motion or Statement, and as a result the material facts contained in the Statement are deemed admitted under that rule. BLR 7056-1(a)(2), N.D. Ga. Nonetheless, because Ms. Zahos is acting *pro se*, the Court held a hearing December 16, 2014 on Beach's motion to ascertain whether Ms. Zahos opposed the Motion, and if so whether she was prepared to identify facts in the record which created a genuine and material dispute. Kevin A. Stine appeared for Beach and Ms. Zahos appeared on her own behalf. At the hearing, the Court ordered further briefing on certain issues related to Beach's section 523(a)(2)(B) claim. Plaintiff filed a Supplemental Brief on January 9, 2015. (Doc. 27).

For the reasons set forth below, Beach has met its burden of showing that no material facts are in genuine dispute and that it is entitled to judgment as a matter of law that the judgment debt is non-dischargeable under 11 U.S.C. § 523(a)(2)(B). The Court therefore does not reach the issue of whether the debt is non-dischargeable under section 523(a)(2)(A). This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(I), jurisdiction over this action is set forth in 28 U.S.C. §§ 157(b) and 1334(b), and venue is proper.

I. Facts[1]

In 2010, prior to the filing of Ms. Zahos's Chapter 7 case, Beach extended two loans to Ms. Zahos: (a) a $375,000 loan for purchasing residential real estate for investment, and (b) a $40,000 loan for furnishing the real estate. (Statement ¶ 1, Doc. 23; Aff. Pritchard ¶ 4, Doc. 24 ("Aff.")). Ms. Zahos provided a number of financial records to Beach in connection with the loan. (Statement ¶ 5). These documents included (a) a Personal Financial Statement (Aff ¶ 5; Confidential Financial Statement, Pl's. Ex. 10, Doc. 6 at 1 ("PFS")) and (b) a Certification of Financial Condition (Aff ¶ 5; Certification of Financial Condition to Beach Community Bank, Pl's. Ex. 11, Doc. 6 at 3 ("Certification")). Beach was also provided with unsigned copies of Ms. Zahos's purported federal income tax returns for 2007 to 2009 (Aff ¶ 5; Pl's. Ex. 12, Doc. 6 at 4–23).

Kathy Pritchard, Beach's Senior Vice President, was a Senior Loan Officer at the time of the transaction, and supervised underwriting Ms. Zahos' loans. (Aff. ¶¶ 1–2). According to Ms. Pritchard's uncontroverted statement, Beach relied upon information contained in the PFS and Certification in making its decision to advance the funds to Ms. Zahos. (Aff. ¶¶ 9–10). Ms. Pritchard further stated that under Beach's lending guidelines at the time, Beach would not have approved and funded either loan had it known any of the information in those records was false, as this is the type of information Beach typically relies upon to review and approve real estate-related loan applications. (Aff. ¶¶ 12–14, 16).

Much of the information contained in those documents was false.[2] For example, on her PFS, Ms. Zahos reports owning $550,000 in non-marketable securities, $175,000 in real estate,

[1] As Beach's Statement was not disputed, all material allegations of fact contained within it are deemed admitted. BLR 7056-1(a)(2), N.D. Ga.

and over $300,000 in notes and receivables, among other assets. (PFS at 1). All of these figures were false. (Zahos Rule 2004 Exam. at 67:8–11, Doc. 25 ("Exam")). On her Certification, Ms. Zahos hand wrote her annual income as "$750,000." (Exam at 63:13–25). She later admitted that she had not been employed full time since 2003 or 2004 and did not earn any income in 2007 to 2009. (*Id.* at 41:4-42:1, 78:5–15). Ms. Zahos has also admitted that she did not review the PFS or the loan documents before signing them. (*Id.* at 68:8–9, 101:15–22).

Ms. Zahos has maintained that at the time she was an unwitting participant in a broader scheme perpetrated by a man named Paul Hill. (Nov. 11, 2013 Letter from Zahos to Stone, Exam Ex. 29 at 2, Doc. 25-4 at 36 ("Letter")). Ms. Zahos has asserted that Mr. Hill filled out the fictitious information on the PFS. (Exam 67:24–68:12). However, as noted above, the Certification was written in her handwriting. (*Id.* at 63:13–25).

Ms. Zahos immediately defaulted on both loans. (Statement ¶¶ 17–18). Beach filed suit in the Circuit Court of Walton County, Florida to judicially foreclose the property in 2011, and obtained a final judgment against Ms. Zahos in 2012 (*Id.* ¶. 20–21). Beach domesticated the money judgment against Ms. Zahos in Georgia in 2012. (*Id.* ¶¶ 22–23). Ms. Zahos filed a voluntary Chapter 7 petition on August 9, 2013, and Beach brought the instant action on January 23, 2014.

[2] The Court notes that while the tax returns for Ms. Zahos received by Beach in connection with the loan also contained false information, there appears to be a factual dispute about whether Ms. Zahos actually provided the unsigned returns to Beach. Because there is no genuine dispute that the PFS and Certification were provided by Ms. Zahos, the Court finds this factual dispute to be immaterial.

II. Summary Judgment Standard

In accordance with Rule 56 of the Federal Rules of Civil Procedure, applicable to this Court pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is appropriate only if "the pleadings, the discovery and disclosure materials on file, and any affidavits 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). Material facts are those which might affect the outcome of a proceeding under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505 (1986). Further, a dispute of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The moving party has the burden of establishing the right to summary judgment. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991); *Clark v. Union Mut. Life Ins. Co.*, 692 F.2d 1370, 1372 (11th Cir. 1982). Once this burden is met, the nonmoving party cannot rely merely on allegations or denials in its own pleadings. Fed. R. Civ. P. 56(e). Rather, the nonmoving party must present specific facts that demonstrate there is a genuine dispute over material facts. *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 918 (11th Cir. 1993). The "[o]ne who resists summary judgment must meet the movant's affidavits with opposing affidavits setting forth specific facts to show why there is an issue for trial." *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1217 (11th Cir. 2000); Fed R. Civ. P. 56(e).

In determining whether a genuine issue of material fact exists, the Court must view the evidence in the light most favorable to the nonmoving party. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598 (1970); *Rosen v. Biscayne Yacht & Country Club, Inc.*, 766 F.2d 482, 484 (11th Cir. 1985). It remains the burden of the moving party to establish the absence of

a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548 (1986).

III. Discussion

Beach has met its burden of demonstrating that no material facts are in genuine dispute. Ms. Zahos did not offer any evidence in response to the Motion or attempt to refute any of the factual allegations in Beach's Statement. Even viewing the record in the light most favorable to Ms. Zahos, the Court concludes that the judgment debt is non-dischargeable under 11 U.S.C. § 523(a)(2)(B). The Court therefore does not reach the issue of whether the debt is also non-dischargeable under section 523(a)(2)(A).

> Section 523(a)(2)(B) excepts from discharge debts—
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> (B) 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). Thus, to prevail on a section 523(a)(2)(B) claim, a creditor must demonstrate that: (1) the debtor owes the plaintiff a debt for money, property, or the extension of credit that was obtained by the debtor through the use of a written statement; (2) the written statement was materially false; (3) the written statement concerns the debtor's financial condition; (4) the plaintiff reasonably relied on the statement; and (5) the debtor published the writing with the intent to deceive the plaintiff. *In re McDowell*, 497 B.R. 363, 368 (Bankr. N.D. Ga. 2013) (Drake, J.) (citing *Transp. Alliance Bank v. Owens (In re Owens),* Adv. No. 05-1020, 2006 WL 6592058, at *2 (Bankr. N.D. Ga. May 22, 2006)). The burden of proof, preponderance of the evidence, is on the creditor seeking to except the debt from discharge. *Grogan v. Garner*,

498 U.S. 279, 291 (1991). "Because of the very nature and philosophy of the Bankruptcy law the exceptions to dischargeability are to be construed strictly . . . ." *In re Hunter*, 780 F.2d 1577, 1579 (11th Cir. 1986) *abrogated on other grounds by Grogan*, 498 U.S. at 279.

Ms. Zahos is deemed to have admitted owing the full amount of the $561,213.36 pre-petition judgment debt. (Statement ¶ 24; *see also* Petition Schedule D, Bankr. Doc. 18-1 at 19 (admitting $375,000 of the debt.)). Further, the parties do not dispute the following issues of fact: that the Ms. Zahos obtained money through the PFS and Certification, (Statement ¶¶ 5–6) that she provided those documents to Beach, (*Id.*) and that the documents contained false information concerning Ms. Zahos's financial condition. (*Id.* ¶ 32). Accordingly, the following issues of law remain to be determined on summary judgment: (A) whether the falsity of the statements was material, (B) whether Beach's reliance on the statements was reasonable, and (C) whether Ms. Zahos published the statements to Beach with intent to deceive Beach.

A. The PFS and Certificate were materially false.

The undisputed record shows that the statements contained in the PFS and Certificate were false. (Exam at 67:8–11, Doc. 25). The first question before the Court is whether the falsehood was material. "A falsehood is material if it is 'significant in both amount and effect on the creditor receiving the financial statement.' . . . 'The information must have actual usefulness to the creditor and must have been an influence on the extension of credit.'" *Citizens Bank of Washington County v. Wright (In re Wright)*, 299 B.R. 648, 659 (Bankr. M.D. Ga. 2003) (quoting *Enter. Nat'l Bank of Atlanta v. Jones (In re Jones)*, 197 B.R. 949, 955 (Bankr. M.D. Ga. 1996)). The false information on the PFS and the Certificate dealt with Ms. Zahos's assets and income. (Exam at 63:13–25, Doc. 25; PFS at 1, Doc 6 at 1). Ms. Pritchard's uncontroverted sworn statement shows that this information is essential to Beach's underwriting process. (Aff. ¶

16, Doc. 24). Further, the amount by which Ms. Zahos's assets and income were overstated was substantial—both were completely fabricated. (Exam at 67:8–11). Thus, the fabrications in the PFS and the Certificate were material. The court next turns to whether Beach relied on those fabrications.

B. Beach reasonably relied upon the PFS and the Certificate.

Having concluded that the falsified information in the PFS and the Certificate is of the sort normally relied upon in extending credit, the next step is to determine whether Beach actually relied upon the information in this case, and if so, whether such reliance was reasonable under the circumstances.

It is uncontested that Beach actually relied on the information contained in the PFS and the Certificate. (Statement ¶¶ 8–9). When determining whether reliance is reasonable, courts normally consider (1) the length of the business relationship, (2) the presence or absence of red flags that would alert an ordinary lender, and (3) whether minimal investigation would have turned up inaccuracies. *City Bank & Trust Co. v. Vann (In re Vann)*, 67 F.3d 277, 280–81 (11th Cir. 1995). In the Eleventh Circuit, the lender is held to the standard of "an ordinary and average person." *Id.*

While Ms. Zahos and Beach did not have a prior business relationship, Beach was reasonable to rely on the information contained in the PFS and the Certificate primarily for two reasons. First, the record contains no evidence of any "red flags" — the documents themselves were internally consistent and based on Ms. Zahos's stated occupation were not facially unreasonable. (Statement ¶¶ 9–11). Further, Beach attempted to externally verify the contents by seeking tax returns. (Aff. ¶ 11). While there is some dispute as to who provided the falsified the tax returns to Beach (Exam 76:2–23), this dispute is not material to the question of whether

Beach's reliance on them was reasonable. Regardless of who provided the tax returns to Beach, there is nothing in the record that would indicate that further investigation was necessary in light of the information in the tax returns corroborating the information in the PFS and the Certificate. In the absence of any evidence that the falsified information should have alerted Beach to further investigate the information's veracity, summary judgment on this element is appropriate.

C. Beach has demonstrated intent to deceive on the part of Ms. Zahos.

The final inquiry before the court is whether Ms. Zahos provided the falsified information in the PFS and the Certificate to Beach with intent to deceive it. "A bankruptcy court may look to the totality of the circumstances, including the recklessness of a debtor's behavior, to infer whether a debtor submitted a statement with intent to deceive." *Equitable Bank v. Miller (In re Miller),* 39 F.3d 301, 305 (11th Cir. 1994). While indifference to the truth of a statement alone may not always suffice, "[r]eckless disregard for the truth or falsity of a statement combined with the sheer magnitude of the resultant misrepresentation may combine to produce the inferrence [sic] of intent [to deceive]." *Id.* (quoting *Foote & Davies v. Albanese (In re Albanese),* 96 B.R. 376, 380 (Bankr. M.D. Fla. 1989)) (internal quotations omitted).

Beach does not contend that Ms. Zahos willfully provided it false information for the purpose of defrauding it. Rather, Beach contends Ms. Zahos's conduct of signing the loan documents and the PFS without knowledge of their contents demonstrated such reckless indifference for the truth that it rose to the level of intent to deceive. (Statement ¶ 33; Exam at 68:8–9 (PFS), 101:15–22 (loan documents)).

Courts have held that failing to read a document before signing it is a reckless act that can rise to the level of intent to deceive. *The CIT Group/Sales Financing, Inc. v. Kim (In re Kim),* No. 04-6521-MHM, 2005 WL 6488240, at *3 (Bankr. N.D. Ga. Sept. 29, 2005) ("Even if

Defendant failed to read the document, he is charged with knowledge of its contents."). Whether failing to read a statement constitutes recklessness that rises to the level of intent to deceive is ordinarily a fact intensive question that can easily vary from case to case. *Compare American Investment Bank, N.A. v. Hosking (In re Hosking)*, 89 B.R. 971, 975 (Bankr. S.D. Fla. 1988) ("[Debtor] signed the fraudulent Financial Statement without reading it and, therefore, he is not entitled to discharge of the . . . debt."), *and Commonwealth Land Title Ins. Co. v. Homer (In re Homer)*, 168 B.R. 790, 800 (Bankr. N.D. Ga. 1994) (Massey, J.) ("[O]ne who signs a written document without reading it, unless prevented from doing so by some fraud or artifice, is chargeable with knowledge of its contents." (internal quotations omitted)), *with Enter. Nat'l Bank of Atl. v. Jones (In re Jones)*, 197 B.R. 949, 963–64 (M.D. Ga. 1996) ("[M]ere neglect will not trigger nondischargeability.").

The undisputed record shows that Ms. Zahos signed the PFS and the loan documents without reviewing them. (Statement ¶ 33; Exam at 68:8–9, 101:15–22). However, this case contains further evidence of Ms. Zahos's intent to deceive Beach beyond mere recklessness: a misrepresentation of her income penned in her own hand on the Certificate. (Certificate, Doc. 6-1 at 3; Exam at 41:4–42:1, 78:5–15). Ms. Zahos's avowed failure to review the documents she signed coupled with her handwritten, misrepresented income on her Certificate together demonstrate an intent to deceive. Consequently, this element is satisfied by the undisputed record and judgment as a matter of law is appropriate.

D. Attorney's Fees

Beach cites two Eleventh Circuit cases that held that a Bankruptcy Court, when liquidating a debt alongside a judgment of non-dischargeability, may include reasonable attorney's fees if the contract creating the debt provided for it in a manner enforceable under

applicable law. *TranSouth Fin. Corp. of Florida v. Johnson*, 931 F.2d 1505, 1509 (11th Cir. 1991); *Cadle Co. v. Martinez (In re Martinez)*, 416 F.3d 1286, 1290 (11th Cir. 2005). To the extent the pre-petition judgment included an award of attorney's fees, this authority would support the Court holding the awarded fees non-dischargeable alongside the judgment debt. However, Beach has not produced any evidence of its entitlement to attorney's fees over and above the amount already included in the $561,213 prepetition judgment deemed admitted by Ms. Zahos. (Summary Final Judgment, Beach Community Bank v. Zahos et al., No. 2011 CA 000016, slip op. at 3 (Fla. Cir. Ct. Feb. 6, 2012) (Doc. 1-9); Statement ¶ 24). Beach may seek a determination of entitlement to attorney's fees for bringing this non-dischargeability action by separate motion, setting forth any supporting evidence and the applicable law under which the contractual provision would be enforceable post-judgment.

IV. Conclusion

The uncontested record shows no material factual disputes as to Beach's claim under Section 523(a)(2)(B), and Beach has met its burden of demonstrating entitlement to summary judgment under that section. Accordingly, it is

ORDERED that Plaintiff's Motion for Summary Judgment is **GRANTED**.

It is **FURTHER ORDERED** that Defendant's judgment debt to Plaintiff of $561,213.36 is hereby deemed **NON-DISCHARGEABLE**.

A separate judgment in favor of Beach Community Bank will be entered contemporaneously with this order.

The Clerk shall serve a copy of this Order upon Plaintiff, Defendant, and counsel for Defendant.

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