IT IS ORDERED as set forth below:

Date: January 21, 2015

Wendy L. Hagenau

Wendy L. Hagenau
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CASE NO. 12-71914-WLH
	)	
STEPHEN LEE KIRKLAND,	)	CHAPTER 7
	)	
Debtor.	)	JUDGE WENDY L. HAGENAU
	)	
ROBIN KLAMFOTH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ADV. PROC. NO. 12-5625
	)	
STEPHEN LEE KIRKLAND,	)	
	)	
Defendant.	)	

ORDER AND JUDGMENT

This matter came before the Court for trial on January 13, 2015 on Plaintiff Robin Klamfoth's ("Plaintiff" or "Klamfoth") Complaint to Determine Dischargeability of Debt under 11 U.S.C. §§ 523(a)(2)(A), 523(a)(2)(B) and 523(a)(6). Both Ms. Klamfoth and the Debtor Steven Kirkland ("Debtor") represented themselves individually. This Court has jurisdiction to hear this matter and to enter a final judgment pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157

and this is a core proceeding under 28 U.S.C. § 157(b)(2)(I). At the conclusion of the trial, the Court made findings of fact and conclusions of law as to certain issues which are incorporated herein.

FACTS

On April 20, 2008, Ms. Klamfoth and the Debtor met for the first time in a meeting that lasted approximately an hour. Ms. Klamfoth had been in a variety of businesses and entrepreneurial ventures over the prior several years, having been a real estate agent, a real estate developer, a seller of media ads and sponsorships, and a seller of products from France. Ms. Klamfoth's business partner, Sam Sikes, knew the Debtor and was investing in a transaction the Debtor was putting together between Renaissance Capital and Extensor Capital ("Extensor/Renaissance Transaction"). The Debtor expected fees and commissions of approximately $2 million from this transaction. The Debtor had told Mr. Sikes, however, that the Debtor needed money for personal expenses to bridge the gap until the Extensor/Renaissance Transaction closed and he began earning fees. Mr. Sikes suggested to the Debtor that Ms. Klamfoth may be interested in the opportunity to loan him funds. The Debtor was approximately $18,000 in arrears on his mortgage and was a defendant in a lawsuit pending in Gwinnett County at the time. It is unclear from the testimony whether Mr. Sikes was told of this specific financial information. It is clear, however, that Ms. Klamfoth was not told by the Debtor or anyone else of the Debtor's financial condition. It is equally clear that Ms. Klamfoth never asked the Debtor about his financial condition or whether any lawsuits were pending.

Mr. Sikes then arranged the meeting between Ms. Klamfoth and the Debtor held on April 20, 2008. Ms. Klamfoth did not go to the meeting expecting to be asked for a personal loan, but to hear about potential investment opportunities. The Debtor described the Extensor/Renaissance Transaction as well as other deals he had "in the works". He presented a

draft of a private placement memorandum with respect to a deal known as Wavetech. During this presentation, the Debtor also offered Ms. Klamfoth the "opportunity" to make him a personal loan of $50,000 to be repaid in 60 days with a $50,000 return. In other words, the Debtor offered to borrow $50,000 from Ms. Klamfoth and to repay her $100,000 in 60 days. The Debtor did not tell Ms. Klamfoth how the funds would be used. Ms. Klamfoth knew she was making a personal loan to the Debtor but presumed the funds would be invested by the Debtor in a transaction. She never asked about the use of the funds, though. She also acknowledged that if she had known the funds were to be used to pay the Debtor's debts she may still have made the loan.

The next day, April 21, 2008, the parties signed a Loan Agreement and Promissory Note ("Agreement"). The Agreement defined the Debtor individually as the borrower and RSK Legacy, Ltd./Robin Klamfoth as the lender. The Agreement also contained the following declaration which the Debtor inserted before the Plaintiff signed the Agreement.

> I, Steven L. Kirkland, promise to pay RSK Legacy, Ltd./Robin Klamfoth the total sum of $100,000 that includes the repayment of principal and all accrued interest with the time frame of 60 days. This repayment obligation is predicated on the ongoing private placement transaction as presently contemplated between my company TKO Inc. and Extensor capital (*sic*).

The Debtor testified his understanding of the phrase "predicated on the ongoing private placement transaction" meant that he did not have an obligation to pay Ms. Klamfoth the principal or interest unless the Extensor/Renaissance Transaction closed successfully. Ms. Klamfoth testified she did not think too much about the insertion of this caveat in the Agreement and assumed it was identifying how the Debtor would be using the funds that she was loaning to him.

Ms. Klamfoth then borrowed $50,000 on her personal home equity line of credit and wired the funds to the Debtor's personal account. The Debtor did not repay the funds in 60 days.

Ms. Klamfoth extended the due date for another 30 days but still the Debtor made no payment. Over the next three years or so, the Debtor made periodic payments to Ms. Klamfoth totaling $21,500.

In the meantime, the Debtor had raised over $2 million for the Extensor/Renaissance Transaction, but the transaction fell apart in the first two weeks of May. The monies raised were then transferred to an Extensor fund which managed the funds over the next year. The Debtor received approximately $3,000 in commissions as a result of this transaction in December 2009.

Ms. Klamfoth contends she is owed $100,000 under the Agreement, less the amounts paid by the Debtor, for a total of $78,500, plus attorney's fees. She contends this claim is non-dischargeable because it was the result of fraud, false pretenses or false representations, and was willfully and maliciously incurred. In particular, Ms. Klamfoth argues the Debtor should have told her about the pending lawsuit and his personal financial condition, and his proposed use of the loaned funds. She argues he overstated his qualifications and successes. The Debtor contends he had no obligation to tell Ms. Klamfoth about the pending lawsuit or his financial condition since she did not ask. He argues he made no misrepresentations because she never asked about his planned use of the money or his financial condition. He also alleges that he told her of projects in the works and gave her documents marked as drafts, but never misrepresented the status of the transactions. Rather, Ms. Klamfoth apparently did not understand the distinction between planned transactions and those actually occurring.

CONCLUSIONS OF LAW

Claim

The first question presented is whether Ms. Klamfoth holds a claim against the Debtor. The Debtor contends he had no obligation to repay Ms. Klamfoth because of the condition in the

Agreement stating that the repayment obligation was "predicated on" a transaction between his company and Extensor.

The Court concludes the "predicated on" language contained in the Agreement is ambiguous. The Court heard testimony from both parties as to their understanding of the meaning of the Agreement, and it is clear the parties did not understand the proviso the same way. Moreover, the language in the Agreement is unclear. It simply states "this repayment obligation is predicated on the ongoing private placement transactions as presently contemplated between my company TKO Inc. and Extensor capital." It does not say it is predicated on the successful closing of the transaction, or even what that might mean. The Debtor states his understanding that the repayment obligation would only occur if the Extensor/Renaissance Transaction was successful. Renaissance Capital is not mentioned anywhere in the Agreement, however. Further, because the transaction on which the repayment obligation is predicated is defined as one between the Debtor's company and Extensor Capital, it could conceivably include the transactions that were subsequently concluded between Mr. Kirkland's company and Extensor Capital whereby the over $2 million raised in anticipation of the Extensor/Renaissance Transaction was then provided to Extensor for management. The proviso language is simply too vague for the Court to enforce, and the Court concludes the Debtor had an obligation to repay Ms. Klamfoth.

The Court also concludes Ms. Klamfoth is the holder of the claim. Not only does the Agreement contemplate that she and her company are lenders, but the undisputed testimony is the funds provided to the Debtor were Ms. Klamfoth's personal funds obtained by taking out a loan on her home equity line of credit.

Although Ms. Klamfoth has a claim and the Debtor's obligation to repay is enforceable, the Agreement is usurious. A loan that is for more than $3,000 and less than $250,000 is

usurious where the interest rate is in excess of 5% per month. O.C.G.A. §§ 7-4-2 and 7-4-18; Norris v. Sigler Daisy Corp., 260 Ga. 271, 272 (1990). The penalty for a usurious loan is a forfeiture of the interest, but the lender may still collect the principal. O.C.G.A. § 7-4-10; Norris, 260 Ga. at 272. Here, the interest contained in the Agreement was 100% payable over 60 days, or 50% per month. This interest rate is clearly usurious and not enforceable by Ms. Klamfoth. The maximum she could collect under the Agreement is $50,000, less the amount already repaid to her by the Debtor for a balance of $28,500.

Finally, Ms. Klamfoth asked at the trial that she be awarded attorney's fees. Plaintiff did not seek attorney's fees in her Complaint, and the Agreement does not provide for a recovery of attorney's fees. Therefore, the request at trial is denied. Ms. Klamfoth holds a claim in the amount of $28,500. The next question, though, is whether the claim is dischargeable.

Dischargeability

Section 523(a)(2)(A) excludes from discharge any debt "obtained by . . . false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." Exceptions to discharge are narrowly construed and the burden is on the creditor to prove non-dischargeability by a preponderance of the evidence. Duncan v. Bucciarelli (In re Bucciarelli), 429 B.R. 372, 375 (Bankr. N.D. Ga. 2010). To state a claim under Section 523(a)(2)(A), the creditor must prove the following four elements:

> (1) the debtor made a false representation, other than an oral statement respecting the debtor's financial condition, with intent to deceive the creditor;
> (2) the creditor actually relied on the misrepresentation;
> (3) the creditor's reliance was justifiable; and
> (4) the misrepresentation caused a loss to the creditor.

Id.

The representation at issue must relate to existing or past facts, as opposed to mere speculations or declarations about future events. New Austin Roosevelt Currency Exch., Inc. v. Sanchez (In re Sanchez), 277 B.R. 904, 908 (Bankr. N.D. Ill. 2002) (citations omitted). A

debtor's representations related to future actions are not false representations under Section 523(a)(2)(A), absent a showing the debtor never intended to perform the future act at the time the statement was made. See e.g., In re Bucciarelli, 429 B.R. at 375. Here, the Debtor's statements about the hoped-for success of future business deals, the success of which would enable him to pay the loan, were not representations of existing facts, and therefore cannot constitute material misrepresentations. The evidence shows the Debtor discussed planned and possible transactions and presented Ms. Klamfoth with draft documents, but the evidence does not support the allegation the Debtor misrepresented that the transactions had occurred or were definite.

Ms. Klamfoth points particularly to the Debtor's failure to disclose a pending lawsuit and his financial condition as well as the proposed use of funds as a basis for non-dischargeability. It is undisputed Ms. Klamfoth did not ask about these topics and the debtor did not affirmatively make any misrepresentation. Generally, unless the debtor has an independent duty to disclose the facts under a fiduciary or similar relationship, misrepresentations may not consist of silence. E.g., Tallant v. Kaufman (In re Tallant), 218 B.R. 58, 65 (B.A.P. 9th Cir. 1998) (holding that "attorney's failure to disclose information that is required to be disclosed under the professional rules of responsibility may constitute a false representation of nondisclosure"). Silence may, however, constitute a misrepresentation where prior statements or partial disclosures would leave a false impression absent additional disclosure. E.g., Santa Ana Unified School District v. Montgomery (In re Montgomery), 489 B.R. 609, 625 (Bankr. N.D. Ga. 2013). The evidence does not support a conclusion that the Debtor held any fiduciary-type relationship with Ms. Klamfoth obligating him to make voluntary disclosures of his financial condition. There is no evidence the Debtor made partial disclosure of his financial condition necessitating further disclosure.

Moreover, Section 523(a)(2)(A) specifically excludes oral statements related to a debtor's financial condition as a basis for non-dischargeability. Misrepresentations relating to a debtor's financial condition must be in writing to cause a claim to be non-dischargeable. 11 U.S.C. § 523(a)(2)(B). Thus, even if Debtor had affirmatively lied about his current assets and liabilities, such oral statements would directly relate to his financial condition, and therefore

would not constitute material misrepresentations for purposes of Section 523(a)(2)(A). See Lamar, Archer & Cofrin, LLP v. Appling (In re Appling), 500 B.R. 246, 251 (Bankr. M.D. Ga. 2013).

Plaintiff argues the Debtor should have disclosed the purpose for the loan and the proposed use of the funds. Plaintiff made no inquiry as to the purpose of the loan. She only presumed it was for investment since the Debtor's business was discussed. There is no evidence the Debtor ever represented the funds would be used for anything other than personal purposes. The loan was always structured as a loan, not an investment and Plaintiff knew the loan was a personal one to the Debtor. Ms. Klamfoth may have thought the loan was for investment, but she has not established that the Debtor ever represented that to her. There is therefore no representation on which to base non-dischargeability.

Even if misrepresentations were made, the creditor must rely on the misrepresentation and that reliance must be justifiable. Justifiable reliance is a subjective test, and is less stringent than the "reasonable person" standard. In re Bucciarelli, 429 B.R. at 376. "In conducting this analysis, the court examines the particular qualities and characteristics of the plaintiff and circumstances of the particular case." Id. (quotations and citations omitted). A creditor is under no obligation to engage in further investigation and is free to rely on the debtor's statements. In re Appling, 500 B.R. at 253. A creditor may not, however, be willfully blind where a perfunctory investigation would have revealed the misrepresentations or where the "surrounding circumstances raise red flags." Rice, Heitman & Davis, S.C. v. Sasse (In re Sasse), 438 B.R. 631, 650 (Bankr. W.D. Wis. 2010).

In the current case, the Plaintiff had business experience even though she had never made a loan except small ones to close friends or family. She also testified she had never met, nor spoken with Debtor, prior to the one-hour meeting. She reviewed the Agreement prior to signing the document, including the clause that appeared to condition repayment of the loan on the occurrence of some future event. Although justifiable reliance is a "lower bar" than reasonable reliance, it is difficult to see how Plaintiff's reliance was justifiable where the representations

were at a single meeting, Plaintiff sought no further assurances or did any due diligence before making the loan, and the loan document on its face appeared to limit her right to repayment.

Next, Ms. Klamfoth argues her claim is non-dischargeable under 11 U.S.C. § 523(a)(2)(B). This section requires that the claim arise by use of a statement in writing, that is materially false, respecting the debtor's financial condition, that the debtor caused to be made or published with intent to deceive and on which the creditor reasonably relied. Ms. Klamfoth argues the Agreement itself is the statement which satisfies the requirements of Section 523(a)(2)(B). That is not the case, however. The Agreement makes no representation regarding the Debtor's financial condition. Plaintiff's claim under Section 523(a)(2)(B), therefore, fails.

Finally, Ms. Klamfoth argues her claim is non-dischargeable under 11 U.S.C. § 523(a)(6) which provides that a debt is not dischargeable if it was for willful and malicious injury by the debtor to another entity or to the property of another entity. The term "willful" means intentional and deliberate; "malicious" means "wrongful and without just cause or excessive even in the absence of personal hatred, spite or ill will." Lee v. Ikner (In re Ikner), 883 F.2d 986, 991 (11th Cir. 1989); Chrysler Credit Corp. v. Rebhan, 842 F.2d 1257, 1263 (11th Cir. 1998) abrogated on other grounds by Grogan v. Garner, 498 U.S. 279 (1991); Sunco Sales, Inc. v. Latch (In re Latch), 820 F.2d 1163, 1166 n.4 (11th Cir. 1987). The debtor, through his acts, must have actually intended the injury, not just taken intentional acts which resulted in an injury. Kawaauhau v. Geiger, 523 U.S. 57, 62 (1998). Because the term "willful" means intentional and deliberate, it cannot be established merely by applying a recklessness standard. In re Ickner, 883 F.2d at 991. A finding of reckless disregard may be sufficient to establish maliciousness, as it can be implied or constructive. Chrysler Credit Corp., 842 F.2d at 1262-63.

Ms. Klamfoth has failed to carry her burden of proving that her claim of $28,500 is a result of willful or malicious injury. She has not provided evidence that the Debtor intended to

injure Ms. Klamfoth. The evidence showed the Extensor/Renaissance Transaction was a transaction in active discussion at the time the Agreement was signed. The evidence included extensive e-mails between the Debtor and Extensor as well as other third-party investors regarding the transaction. Although the transaction appears to have failed within several weeks of the Agreement, that is not sufficient to carry Plaintiff's burden of showing that the Debtor actually intended to injure Ms. Klamfoth. Moreover, the Court notes the Debtor did make payments of over $21,000 to Ms. Klamfoth, although not immediately. Finally, the Court notes the inclusion by the Debtor in the Agreement of the declaration that the repayment obligation was "predicated on" a transaction between his company and Extensor reflects that the Debtor was not intending to deceive Ms. Klamfoth. The proviso regarding repayment is not artfully drawn and has ultimately been found to be unenforceable by the Court, but it is evidence the Debtor was trying to tell Ms. Klamfoth that his repayment obligation (at least in his mind) was contingent on something. As such, the language negates any implication of a willful and malicious intent to deceive.

CONCLUSION

Based on the foregoing, the Court concludes that Ms. Klamfoth's claim of $28,500 is dischargeable and judgment will be entered for the Debtor.

END OF ORDER

DISTRIBUTION LIST

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