

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In Re:

**VICTOR M. CASCIO,
DEBTOR.**

**BLUE RIDGE BANK AND TRUST,
PLAINTIFF,**

v.

**VICTOR MICHAEL CASCIO,
DEFENDANT.**

**CASE NO. 01-20231
CHAPTER 7**

ADV. NO. 01-6035

**ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT¹**

Plaintiff Blue Ridge Bank and Trust seeks summary judgment on its claim that a judgment rendered in its favor against the defendant, Victor M. Cascio, in state court² is not dischargeable pursuant to Title 11 U.S.C. § 523(a)(2)(B). After reviewing the materials submitted and the applicable law, the court concludes that Blue Ridge's entire motion must be denied.

On October 31, 1997, the Johnson County, Kansas, trial court entered judgment ordering that Blue Ridge recover on a series of notes evidencing loans extended to Mr. Cascio. Blue Ridge claims that in extending the loans represented by the notes, it actually and reasonably relied on a materially false written financial statement Mr. Cascio signed and delivered to Blue Ridge on two different occasions with the intent to deceive Blue Ridge into providing the loans. To support its claims, Blue

¹ The plaintiff appears by counsel Michelle M. Suter of Commercial Law Group, P.A., of Leawood, Kansas. The defendant, Victor M. Cascio, appears Pro Se.

² Johnson County, Kansas, District Court Case No. 97 C 425.

Ridge has furnished affidavits, with supporting documents, that it contends provide uncontroverted facts establishing that Mr. Cascio made materially false representations in his financial statement regarding the actual value of his holdings in a corporation named “Cadast” and regarding the existence of a note receivable from “ARA.”

Although the court will not consider Mr. Cascio’s untimely filed response to Blue Ridge’s Motion for Summary Judgment,³ an analysis of the claim demonstrates that Blue Ridge has failed to identify facts entitling it to summary judgement. Blue Ridge has not met its initial burden demonstrating that no material issues of fact remain for trial and that it is entitled to judgment as a matter of law.

I. FACTUAL BACKGROUND

For purposes of this opinion, only the following facts and allegations are relevant.

On September 24, 1994, Mr. Cascio signed and delivered a financial statement to Blue Ridge indicating \$2,574,200.00 in assets and a net worth of \$2,081,200.00. He appears to have signed the financial statement again on April 7, 1995. In his financial statement, Mr. Cascio represented that he had a \$1,100,000.00 asset in “VICCO/Cadast” and a \$480,000.00 note receivable from “*ARA.” Blue Ridge contends that it subsequently relied on the financial statement and the assets it described when considering whether to loan money or otherwise extend credit to Mr. Cascio. Blue Ridge asserts that, relying on his financial statement, it extended and renewed a series of loans to and for Mr. Cascio and that Mr. Cascio subsequently defaulted on those loans. Blue Ridge then sought and

³ Blue Ridge’s Motion for Summary Judgment was filed on February 12, 2003. Mr. Cascio’s Motion To Extend Time To File Answer to Motion for Summary Judgment, which was not properly noticed, was received on March 10, 2003. Thereafter, on March 10, 2003, an Order to Correct Defective Pleading was issued to Mr. Cascio directing that the appropriate notice be issued within ten (10) days of the date thereof. The Order to Correct Defective Pleading has not been complied with to date. Therefore, Mr. Cascio’s reply to Blue Ridge’s Motion for Summary Judgment, which was filed on March 17, 2003, was filed untimely and will not be considered by this court. *See* L.R. 6.1 (e)(2) (“A party shall have 20 days to respond to a motion to dismiss or for summary judgment.”). As a result, for the limited purpose of this order, Blue Ridge’s statement of uncontroverted facts, where substantiated by the record, will be accepted as true.

received a money judgment on the personal notes evidencing the defaults.⁴

Regarding Mr. Cascio's assertion of an asset in "VICCO/Cadast" (hereinafter "Cadast"), Blue Ridge contends that at the time he signed his financial statement, Mr. Cascio knew the listing of \$1,100,000.00 did not represent his individual interest in Cadast, which was a corporation in which Mr. Cascio was a shareholder. To support its contention, Blue Ridge provides both the sworn affidavit of Ms. Marie Cascio and the deposition of Mr. Cascio taken in connection with the Johnson County, Kansas, trial proceeding.⁵ Marie Cascio's sworn affidavit states simply: "Victor Cascio's individual interest in Cadast was not equal to the \$1,100,000 listed on [the financial statement] as of either [of] the dates the statement was signed."⁶ Although Ms. Marie Cascio's affidavit was accompanied by supporting documentation describing Cadast's financial status and the number of shares Mr. Cascio held in Cadast through a revocable trust in his name,⁷ none of the documentation identified the mechanism(s) utilized to determine Cadast's asset valuation (e.g., market value, book value, whether "good will" was considered, etc.), or what compensation Mr. Cascio would receive as a shareholder should Cadast's assets have been liquidated on the open market. In Mr. Cascio's deposition, he states only that he used the "value of the real estate" owned by Cadast to arrive at the \$1,100,000.00 value, "because that's what [they] would sell [the real estate] for."⁸ Mr. Cascio does

⁴ The Johnson County trial court awarded Blue Ridge a combined sum of \$776,923.13, plus varying rates of interest thereon, on numerous note defaults and an account overdraft. Based on the aforementioned judgment, Blue Ridge claims Mr. Cascio still owed \$658,605.94 as of the date of his bankruptcy petition.

⁵ The court notes that Blue Ridge also provided an unfiled bankruptcy petition, with schedules and a statement of financial affairs, apparently prepared by Victor Cascio. However, the court does not find persuasive value in the bankruptcy documents absent Mr. Cascio's signature.

⁶ See Exhibit 2, ¶ 5, Plaintiff's Motion for Summary Judgment, Doc. # 82, filed on February 12, 2003.

⁷ The court recognizes that Mr. Cascio's interest in Cadast was represented by stock with a face value of \$2,718.00 issued to a revocable trust in his name. However, without knowing what powers Mr. Cascio had over the trust's assets, whether the trust had a valid spendthrift provision, or what Mr. Cascio would be entitled to should Cadast have liquidated, the significance of stock, whether issued to Mr. Cascio or a trust in his name, is immaterial for the purposes of this order.

⁸ See Exhibit 4(A), p. 65:25 and 66:1-9, Plaintiff's Motion for Summary Judgment, Doc. # 82, filed on February 12, 2003.

not otherwise assert or suggest that he is not entitled to the entire \$1,100,000.00 value of the Cadast asset.

Regarding Mr. Cascio's representation in his financial statement that he possessed a \$480,000.00 note receivable described as "*ARA" (hereinafter "ARA"), Blue Ridge contends that although Mr. Cascio represented that the ARA note receivable referenced on the financial statement was due in connection with a sale of one of his businesses to a corporation known as Ara Services, Inc., or "ARA," an ARA note receivable never existed. Blue Ridge supports its contention with the affidavit of Anthony C. Basilio, the Vice President, Finance, of a corporation affiliated with Aramark Services, Inc., f/k/a Ara Services, Inc., or "ARA." Mr. Basilio asserts that ARA never executed a promissory note of any amount or of any type for or in favor of Victor Cascio and that ARA has never been advised that any promissory note it has executed in favor of any person or entity was endorsed as payable to Victor Cascio. In addition, Mr. Basilio also points out that although ARA employed Mr. Cascio for a short period beginning January 29, 1993, as evidenced by a letter agreement attached to his affidavit, Mr. Cascio's employment with ARA had been terminated by April 1994 and that under no calculation would any earnings by Victor Cascio from his work with ARA approach \$480,000.00.

II. SUMMARY JUDGMENT STANDARDS

Rule 56 of the Federal Rules of Civil Procedure governs summary judgment and is made applicable to adversary proceedings by Rule 7056 of the Federal Rules of Bankruptcy Procedure. In articulating the standard of review for summary judgment motions, Rule 56 provides that judgment shall be rendered if all pleadings, depositions, answers to interrogatories, and admissions and affidavits on file show that there are no genuine issues of any material fact and the moving party

is entitled to judgment as a matter of law.⁹ In determining whether any genuine issues of material fact exist, the court must construe the record liberally in favor of the party opposing the summary judgment.¹⁰ An issue is “genuine” if sufficient evidence exists on each side “so that a rational trier of fact could resolve the issue either way” and “[a]n issue is ‘material’ if under the substantive law it is essential to the proper disposition of the claim.”¹¹

The burden on the nonmovant to respond arises only if the summary judgment motion is properly “supported” as required by Rule 56(c).¹² Accordingly, summary judgment is “appropriate” under Rule 56(e) only when the moving party has met its initial burden of production under Rule 56(c).¹³ If the evidence produced in support of the summary judgment motion does not meet this burden, “summary judgment must be denied even if no opposing evidentiary matter is presented.”¹⁴ If the nonmoving party fails to respond, the [bankruptcy court] may not grant the motion without first examining the moving party’s submission to determine if it has met its initial burden of demonstrating that no material issues of fact remain for trial and the moving party is entitled to judgment as a matter of law.¹⁵ If it has not, summary judgment is not appropriate, for “[n]o defense to an insufficient showing is required.”¹⁶

⁹ Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056.

¹⁰ *McKibben v. Chubb*, 840 F.2d 1525, 1528 (10th Cir. 1988) (citation omitted).

¹¹ *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 2002).

¹² *Murray v. City of Tahlequah, Okl.*, 312 F.3d 1196, 1200 (10th Cir. 2002) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160-61 (1970)).

¹³ *Id.*

¹⁴ *Id.* (citing *Adickes*, 398 U.S. at 160).

¹⁵ *Id.*

¹⁶ *Id.* (citing *Adickes*, 398 U.S. at 161).

III. DISCUSSION

A. Collateral Estoppel

Blue Ridge asserts that collateral estoppel should preclude Mr. Cascio from relitigating both the existence of the debt and the underlying facts establishing the debt as determined by the Johnson County, Kansas, trial court. To support its collateral estoppel claim, Blue Ridge provides only an authenticated amended judgment entered by the trial court in response to a motion to alter or amend judgment. When the doctrine of collateral estoppel is invoked, the court is required to refrain from relitigating factual matters already decided in a previous state court proceeding.¹⁷ “Collateral estoppel is binding on the bankruptcy court and precludes relitigation of factual issues if: (1) the issue to be precluded is the same as that involved in the prior action; (2) the issue was actually litigated by the parties in the prior action; and (3) the prior court’s determination of the issue was necessary to the resulting final and valid judgment.”¹⁸ “When collateral estoppel is asserted, the plaintiff has the burden of introducing a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action.”¹⁹ Therefore, “[a] bankruptcy court must scrutinize the entire record of the state court proceedings in order to determine whether collateral estoppel exists.”²⁰ Although Blue Ridge provided an authenticated amended judgment issued by the Johnson County, Kansas, trial court, the six-page judgment does not provide information necessary for this court to determine the controlling facts and pinpoint the exact issues actually litigated in the trial

¹⁷ *Miles v. Rutledge (In re Rutledge)*, 245 B.R. 678, 681 (Bankr. D. Kan. 1999) (citing *In re Wallace*, 840 F.2d 762, 765 (10th Cir. 1988)).

¹⁸ *Id.* (citing *In re Reid*, 149 B.R. 669, 671 (Bank. D. Kan. 1992) (citations omitted)).

¹⁹ *Id.* (citing *Rupert v. Krautheimer (In re Krautheimer)*, 210 B.R. 37, 53 (Bankr. S.D.N.Y. 1997)).

²⁰ *Id.* (citing *Krautheimer*, 210 B.R. at 52).

court. Without the opportunity to scrutinize a more complete record of the Johnson County trial court proceedings, this court is unable to determine whether collateral estoppel exists.

However, this court may take judicial notice, *sua sponte*, of its own records, preceding court records if called to the court's attention by the parties, and proceedings in other courts, both within and without the federal judicial system, if those proceedings had direct relation to the matters at issue.²¹ The court takes judicial notice of the amended judgment issued by the Johnson County trial court, wherein the trial court ordered that Blue Ridge recover judgment against Mr. Cascio on debt represented by a series of notes.²² In addition, this court accepts Blue Ridge's contention as true, for the purposes of its motion for summary judgment only, that the loans it approved in reliance on Mr. Cascio's financial statement were the subject of the Johnson County trial proceedings. Therefore, the entire recovery ordered by the Johnson County trial court is subject to this court's § 523(a)(2)(B) dischargeability determination by summary judgment disposition.

B. Title 11 U.S.C. § 523(a)(2)(B) Exception to Discharge

Blue Ridge contends that Mr. Cascio's judgment debt should be excepted from discharge pursuant to § 523(a)(2)(B). Exceptions to discharge must be "narrowly construed" with doubt to be resolved in the debtor's favor.²³ A creditor seeking to except a debt from discharge must prove each element of § 523(a)(2)(B) by a preponderance of the evidence.²⁴ Title 11 U.S.C. § 523(a)(2)(B)

²¹ *St. Louis Baptist Temple v. Federal Deposit Insurance*, 605 F.2d 1169, 1172 (10th Cir. 1979) (citations omitted).

²² The court notes, however, that the Johnson County trial court made no reference to fraud or facts establishing the elements of fraud in its order.

²³ *See Belco First Fed. Credit Union v. Kaspar (In re Kaspar)*, 125 F.3d 1358, 1361 (10th Cir. 1997).

²⁴ *See Grogan v. Garner*, 498 U.S. 279, 286-87 (1991).

states that:

- (a) A discharge... does not discharge an individual debtor from any debt--
...
 - (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--
 - (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.

Therefore, in order to find a debt nondischargeable under this section, a bankruptcy court must find, by a preponderance of the evidence, that “the debt was incurred: (1) using a written statement; (2) that is materially false; (3) respecting the debtor’s or an insider’s financial condition; (4) on which the creditor reasonably relied; and (5) that the debtor caused to be made or published with the intent to deceive.”²⁵

Mr. Cascio does not deny providing Blue Ridge with a financial statement reflecting a net worth of over \$2,000,000.00.²⁶ Therefore, in order to grant Blue Ridge’s Motion for Summary Judgment, no genuine issue of material fact must exist regarding whether the financial statement was materially false, whether Blue Ridge’s reliance on the financial statement was reasonable, and whether Mr. Cascio provided the financial statement to Blue Ridge with the intent to deceive.

For a financial statement to be materially false, the information need only be provided with

²⁵ *Skull Valley Band of Goshute Indians v. Chivers (In re Chivers)*, 275 B.R. 606, 6134-14 (Bankr. D. Utah 2002).

²⁶ Defendant’s Answer to Complaint to Determine Dischargeability of Debt, ¶ 4, Doc. # 6, filed on June 8, 2001.

a reckless disregard for the truth to make the underlying debt nondischargeable under §523(a)(2)(B).²⁷ A materially false statement contains an omission, concealment or understatement as to any of the debtor's material liabilities and must paint an untruthful picture of the debtor's financial condition in such a light that would normally affect a creditor's decision to grant credit.²⁸ Reliance on a false statement is reasonable if there exists some basis for relying upon the debtor's representations.²⁹ However, "a showing of the debtor's dishonesty is simply not sufficient to prevent discharge under § 523(a)(2)."³⁰ Therefore, Blue Ridge must show that it reasonably relied on Mr. Cascio's financial statement in agreeing to extend the loan and not just, after the fact, argue that his financial statement induced making the loan itself. Finally, requisite intent to deceive may be inferred from sufficiently reckless disregard of the accuracy of the facts.³¹

The § 523(a)(2)(B) exception to discharge is narrow. Construing the record liberally in favor of Mr. Cascio, the court believes genuine issues of material fact remain for trial. Blue Ridge has not met its burden of satisfying each element of § 523(a)(2)(B) by a preponderance of the evidence. Questions of fact remain regarding the actual value of Mr. Cascio's interest in Cadast. Without knowing how Cadast's assets were valued (e.g., market value, book value, whether good will was considered, etc.), genuine issues of material fact remain regarding whether Mr. Cascio's financial

²⁷ *Cent. Nat'l Bank and Trust Co. v. Liming (In re Liming)*, 797 F.2d 895, 897 (10th Cir.1986) (citation omitted) (quoting 3 COLLIER ON BANKRUPTCY ¶ 523.09[5][b], at 523-62 (Lawrence P. King ed. 1981)).

²⁸ See *Red Oak Branch of Farmers State Bank v. White (In re White)*, 167 B.R. 977, 979 (Bankr. E.D. Okla. 1994) (quoting *In re Harmer*, 61 B.R. 1, 5 (Bankr. D. Utah 1984)).

²⁹ *Leadership Bank v. Watson (In re Watson)*, 958 F.2d 977, 978 (10th Cir. 1992) (quoting *First Bank v. Mullet (In re Mullet)*, 817 F.2d 677, 679 (10th Cir. 1987), *abrogated in part on other grounds, Field v. Mans*, 516 U.S. 59, 63 n. 4 (1995)).

³⁰ *Mullet*, 817 F.2d at 682.

³¹ See *Driggs v. Black, (In re Black)*, 787 F.2d 503, 505-06 (10th Cir. 1986), *abrogated on other grounds, Grogan v. Garner*, 498 U.S. 279 (1991); see also *Carini v. Matera*, 592 F.2d 378, 380 (7th Cir. 1979) (*per curiam*) ("Indeed, where, as here, a person knowingly or recklessly makes a false representation which the person knows or should know, will induce another to make a loan, intent to deceive may logically be inferred.").

statement was materially false.

Further, even if the court were to hold a reasonable trier of fact would determine Mr. Cascio's ARA note receivable representation, standing alone, rendered his financial statement materially false, a genuine issue of material fact exists regarding whether Blue Ridge's reliance on Mr. Cascio's financial statement was reasonable. With today's proliferation of inexpensive information-sharing technology and document delivery services, the court believes a reasonable trier of fact may find that Blue Ridge was unreasonable in failing to request and obtain actual copies of either the alleged ARA note receivable or of Cadast's financial documentation. This is especially true considering the relative cost of the U.S. Postal Service, facsimile transmissions, or even e-mail, when compared to two assets totaling over \$1,580,000.00 of \$2,574,200.00 in assets and three-quarters of the net worth alleged in Mr. Cascio's financial statement.

Finally, in light of the genuine issues of material fact already outlined, among others, the court holds a genuine issue of material fact also remains regarding whether Mr. Cascio's financial statement representations were made with an intent to deceive Blue Ridge. The court believes that allegations of fraud contain questions of veracity and judgments about intent that, in the absence of specific evidence to the contrary, are best left for trial.³² Accordingly, Blue Ridge's failure to meet its burden of proving each element of § 523(a)(2)(B) by a preponderance of the evidence must result in a denial of its motion for summary judgment.

IT IS THEREFORE ORDERED that Blue Ridge's motion for summary judgment seeking exception to discharge for a judgment debt under Title 11 U.S.C. § 523(a)(2)(B) is denied.

Dated at Kansas City, Kansas, this ____ day of _____, 2003.

³² See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (“[A]t the summary judgment stage the judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial”); *Romero v. Union Pac. R.R.*, 615 F.2d 1303, 1309 (10th Cir. 1980) (questions of motive and intent are “particularly inappropriate for summary judgment disposition”).

ROBERT D. BERGER
U.S. BANKRUPTCY JUDGE