

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF KENTUCKY  
LEXINGTON DIVISION

IN RE:

THADD TAYLOR

CASE NO. 10-50039

DEBTOR

PEOPLES EXCHANGE BANK

PLAINTIFF

v.

ADV. NO. 10-5036

THADD TAYLOR

DEFENDANT

**ORDER**

This matter having come before the Court on the Defendant's Motion for Summary Judgment (DOC. 16), and the matter having been heard on November 3, 2010, and the matter having been taken under submission, the Court hereby issues this Order.

The issue in this adversary proceeding is whether a debt owed by the Defendant to Peoples Exchange Bank ("Plaintiff") may be deemed nondischargeable under 11 U.S.C. §§ 523(a)(4)(A) and (a)(6) based on the Defendant's alleged misrepresentations to the Plaintiff in connection with obtaining financing, and his alleged willful and malicious injury to the Plaintiff.

On February 14, 2008, the Defendant executed and delivered a note to the Plaintiff for a principal sum of \$174,939.00 (the "Cattle Note"). To secure payment of the Cattle Note, the Defendant also executed and delivered to the Plaintiff a security agreement which provided a lien on, but was not limited to, 155 head of mixed breed cows and calves. Subsequently, on January 15, 2009, the Defendant executed and delivered another note to the Plaintiff for the sum of \$24,361.05, which was secured by a perfected first and prior lien against all tobacco owned by the Defendant (the "Tobacco Note"). The Tobacco Note provided for one payment due in full on July 15, 2009. The Plaintiff, however, did not raise a claim concerning the Tobacco Note in its complaint. It is only raised in the Plaintiff's response to the Defendant's motion for summary judgment. Because a claim

based on the Tobacco Note has not been properly pled in the Plaintiff's complaint, the Court will only determine whether the debt owed pursuant to the Cattle Note is dischargeable in this adversary proceeding.

To except a debt from discharge under section 523(a)(2)(A), a creditor must prove:

- (1) the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth;
- (2) the debtor intended to deceive the creditor;
- (3) the creditor justifiably relied on the false representation; and
- (4) its reliance was the proximate cause of loss.

*Rembert v. AT&T Universal Card Svcs., Inc. (In re Rembert)*, 141 F.3d 277, 280-81 (6th Cir. 1998).

The Defendant argues in his motion for summary judgment that the statements the Defendant allegedly made to the Plaintiff concerned his financial condition, and thus are not properly alleged under section 523(a)(2)(A). Some of the statements at issue are set forth in the Plaintiff's answers to the Defendant's interrogatories:

- a) I have 155 head of cows and calves worth at least \$205,000; and
- b) That I am holding on to the cattle because it is not a good time to sell; and
- c) That I have cattle worth well in excess of the principal loan balance of \$174,639; and
- d) That I will pay off the note when the cattle are sold.

Answers of People's Exchange Bank to Defendant's First Set of Interrogatories, Interrogatory No. 2, P.2. The Defendant claims these statements refer to his financial condition because they concern the number of cattle owned by the Defendant, the value of said cattle, and the Defendant's ability to use the cattle to repay the loan balance.

Section 523(a)(2)(A) provides that a debt may be excepted from discharge that was obtained by "false pretenses, a false representation, or actual fraud, *other than a statement respecting the debtor's or an insider's financial condition.*" 11 U.S.C. § 523(a)(2)(A) (emphasis added). Statements respecting the debtor's financial condition are to be pled under section 523(a)(2)(B)(ii). The term "financial condition" is not defined by the Code, and courts are divided on its proper scope. *See* 4 Collier on Bankruptcy ¶ 523.08[2][c] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.).

Some courts hold that the term "financial condition" refers only to the debtor's overall financial condition, such as the debtor's solvency or net worth. This narrow

construction of the term serves to expand the universe of alleged oral misrepresentations that may be subject to the nondischargeability exception as it permits alleged oral misrepresentations regarding facts such as the ownership of specific property or the ability to obtain refinancing to fall within section 523(a)(2)(A), thereby avoiding the statutory requirement of section 523(a)(2)(B) that the misrepresentation be in writing. Other courts, relying on the statutory text, i.e., the use of the broader term “financial condition,” rather than “financial statement,” and drawing the conclusion that factual representations regarding ownership of an asset or the existence or non-existence of an encumbrance on an asset “go to the very heart of a [debtor’s or insider’s] financial condition” have held that the term “financial condition” has a broader scope.

*Id.* (citations omitted). Accordingly, whether a statement by a debtor concerns his “financial condition” depends upon how broad of a scope the court grants the term under section 523(a)(2)(B). If it is granted a more narrow scope under section 523(a)(2)(B), then it takes on a broader scope under section 523(a)(2)(A).

The more narrow construction under section 523(a)(2)(B) seems ideal based upon the parties’ history. This approach would “expand the universe of alleged oral misrepresentations that may be subject to the nondischargeability exception as it permits alleged oral misrepresentations regarding facts such as the ownership of specific property or the ability to obtain refinancing to fall within section 523(a)(2)(A) . . . .” *Id.* The parties had been involved in financial agreements since 2002, and the 2007 note at issue was merely a renewal of note that had been executed five years earlier. Based upon the history of the parties and their business relationship, the statements should not be deemed to concern his “financial condition” such that they must be in writing under section 523(a)(2)(B). The Defendant represented to various loan officers that he had collateral, the value of which would be sufficient to eventually pay off the loan. The Defendant is not alleged to have made any statements as to his income, expenses, or other operations of his business which would normally be a basis for his “financial condition.” Therefore, the allegation is properly plead under section 523(a)(2)(A).

Furthermore, there remain genuine issues of material fact including a determination of the alleged fraud and whether the Defendant willfully and maliciously injured the Plaintiff which preclude a granting of summary judgment.

For the foregoing reasons, the Defendant’s Motion for Summary Judgment (DOC. 16) is hereby OVERRULED.

COPIES TO:

Matthew S. Goeing, Esq.  
David A. Franklin, Esq.  
Jason C. Rapp, Esq.

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***The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.***



**Signed By:**  
**Joseph M. Scott, Jr.**  
**Bankruptcy Judge**  
**Dated: Wednesday, November 03, 2010**  
**(jms)**