SO ORDERED,

Judge Edward Ellington
United States Bankruptcy Judge
Date Signed: July 8, 2016

The Order of the Court is set forth below. The docket reflects the date entered.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:	**CHAPTER 7**
ALONZO SONNY PRYOR, IV	**CASE NO. 1300061EE**

PRIORITYONE BANK

VS. **ADVERSARY NO. 1300069EE**

ALONZO SONNY PRYOR, IV

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Edward Ellington, Judge

MEMORANDUM OPINION ON THE
MOTIONS FOR SUMMARY JUDGMENT

THIS MATTER came before the Court on the *Defendant Alonzo Sonny Pryor, IV's Motion for Summary Judgment* (Adv. Dkt. #97); *PriorityOne Bank's Response to Alonzo Sonny Pryor IV's Motion for Summary Judgment* (Adv. Dkt. #112); *PriorityOne Bank's Motion for Summary Judgment* (Adv. Dkt. #100); and *Defendant Alonzo Sonny Pryor, IV's Response to Plaintiff's Motion for Summary Judgment* (Adv. Dkt. #114). Having considered same and the respective briefs filed by the parties, the Court finds that summary judgment should be granted in favor of Alonzo Sonny Pryor, IV as to 11 U.S.C. §§ 523(a)(2)(A), 727(a)(3), and 727(a)(5); that partial summary judgment should be granted in favor of PriorityOne Bank as to all but one of the elements of 11 U.S.C. § 523(a)(2)(B); that summary judgment should be granted in favor of PriorityOne Bank as to Alonzo Sonny Pryor, IV's counterclaim; and that summary judgment should be denied in all other respects.[1]

FACTS

"On cross-motions for summary judgment, we review each party's motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party." *Ford Motor Co. v. Tex. Dep't. Of Transp.,* 264 F.3d 493, 498 (5th Cir. 2001). Upon consideration of both motions for summary judgment, the Court finds that there are no genuine disputes with respect to the following facts:

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[1]The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052. To the extent any of the following findings of fact are determined to be conclusions of law, they are adopted, and shall be construed and deemed, conclusions of law. To the extent any of the following conclusions of law are determined to be findings of fact, they are adopted, and shall be construed and deemed, as findings of fact.

Prepetition:

1. Over a period of a couple of years (2007 to 2008), Alonzo Sonny Pryor IV (Debtor) and Norman Watson (Watson) entered into a series of loans (ultimately, seven (7) loans) with PriorityOne Bank (PriorityOne) to purchase and to operate a business. The Debtor and Watson co-owned and co-managed the business.

2. The Debtor and Watson signed personal guarantees on all of the business loans from PriorityOne.

3. In connection with the loans, PriorityOne obtained two financial statements and a net worth statement from Merrill Lynch (collectively, Financial Statements). These Financial Statements relate to the Debtor's financial condition.

4. In 2009, PriorityOne commenced litigation in Rankin County, Mississippi, against the Debtor, Watson and their business. The matter was subsequently referred to arbitration.

5. The arbitrator entered a joint and several award in favor of PriorityOne and against the Debtor and Watson in the amount of $532,446.42 (Arbitration Judgment). This amount represents the amount owed to PriorityOne as of June 15, 2012, plus arbitration fees and expenses.

Postpetition:

6. On January 9, 2013, the Debtor filed a petition for relief under Chapter 7 of the United States Bankruptcy Code.

7. PriorityOne commenced the above-styled adversary proceeding on August 30, 2013, with the filing of its *Complaint* (Adv. Dkt. #1) (Complaint). In its Complaint, PriorityOne alleges that

the Arbitration Judgment is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A)[2] and § 523(a)(2)(B), and that the Debtor is not entitled to a discharge pursuant to § 727(a)(3) and § 727(a)(5).

8. The Debtor filed an *Answer, Defenses & Counterclaim of Alonzo Sonny Pryor, IV* (Adv. Dkt. #14) (Answer or Counterclaim) on October 28, 2013. In his Answer, the Debtor denies that PriorityOne is entitled to have the Arbitration Judgment declared nondischargeable. In his Counterclaim, the Debtor alleges that the Complaint is frivolous and that the Debtor should be entitled to damages from PriorityOne. On November 18, 2013, PriorityOne filed *PriorityOne Bank's Answer and Defenses to Counterclaim of Alonzo Sonny Pryor, IV* (Adv. Dkt. #15).

9. On November 20, 2013, the Court entered its *Scheduling Order* (Adv. Dkt. #16). Subsequently, between January 15, 2014, and May 18, 2015, the parties agreed to ten (10) extensions of the scheduling order.

10. The Debtor filed *Defendant Alonzo Sonny Pryor, IV's Motion for Summary Judgment* (Adv. Dkt. #97) (Debtor's Motion) on June 1, 2015. Also on June 1, 2015, *PriorityOne Bank's Motion for Summary Judgment* (Adv. Dkt. #100) (PriorityOne's Motion) was filed. After the Court entered two (2) separate orders granting the parties extensions of time to file responses and briefs, all briefs and responses were filed and the Court took the matter under advisement on July 29, 2015.

CONCLUSIONS OF LAW

I. Jurisdiction

This Court has jurisdiction of the subject matter and of the parties to this proceeding pursuant

[2]Hereinafter, all code sections refer to the Bankruptcy Code found at Title 11 of the United States Code unless specifically noted otherwise.

to 28 U.S.C. § 1334 and 28 U.S.C. § 157. This is a core proceeding as defined in 28 U.S.C. § 157(b)(1), (2)(I) and (2)(J).

II. Summary Judgment Standards

Rule 56 of the Federal Rules of Civil Procedure,[3] as amended effective December 1, 2010,[4] provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When considering a motion for summary judgment, "the court does not weigh the evidence to determine the truth of the matter asserted but simply determines whether a genuine issue for trial exists, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.' *Anderson v. Liberty Lobby, Inc.,* 106 S.Ct. 2505, 2510 (1986)." *Newton v. Bank of Am. (In re Greene),* 2011 WL 864971, at *4 (Bankr. E.D. Tenn. Mar. 11, 2011).

"The moving party bears the burden of showing the . . . court that there is an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)." *Hart v. Hairston,* 343 F. 3d 762, 764 (5th Cir. 2003).

Once a motion for summary judgment is pled and properly supported, the burden shifts to the non-moving party to prove that there are genuine disputes as to material facts by "citing to

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[3]Federal Rule of Civil Procedure 56 is made applicable to bankruptcy proceedings pursuant to Federal Rule of Bankruptcy Procedure 7056.

[4]The Notes of Advisory Committee to the 2010 amendments state that the standard for granting a motion for summary judgment has not changed, that is, there must be no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law. Further, "[t]he amendments will not affect continuing development of the decisional law construing and applying these phrases."

particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations, . . . admissions, interrogatory answers, or other materials."[5] Or the non-moving party may "show[ ] that the materials cited do not establish the absence . . . of a genuine dispute."[6] When proving that there are genuine disputes as to material facts, the non-moving party cannot rely "solely on allegations or denials contained in the pleadings or 'mere scintilla of evidence in support of the nonmoving party will not be sufficient.' *Nye v. CSX Transp., Inc.,* 437 F. 3d 556, 563 (6th Cir. 2006); *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 106 S.Ct. 1348, 1356 (1986)." *Newton,* 2011 WL 864971, at *4. "[T]he nonmovant must submit or identify evidence in the record to show the existence of a genuine issue of material fact as to each element of the cause of action." *Malacara v. Garber,* 353 F. 3d 393, 404 (5th Cir. 2003). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita,* 106 S.Ct at 1356 (citations omitted).

When considering a motion for summary judgment, the court must view the pleadings and evidentiary material, and the reasonable inferences to be drawn therefrom, in the light most favorable to the non-moving party, and the motion should be granted only where there is no genuine issue of material fact. *Thatcher v. Brennan*, 657 F. Supp. 6, 7 (S.D. Miss. 1986), *aff'd*, 816 F.2d 675 (5th Cir. 1987)(citing *Walker v. U-Haul Co. of Miss.*, 734 F.2d 1068, 1070-71 (5th Cir. 1984)); *see also Matshushita*, 106 S.Ct. at 1356-57. The court must decide whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson,* 477 U.S. at 251-52.

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[5]Fed. R. Bankr. P. 7056(c)(1)(A).

[6]Fed. R. Bankr. P. 7056(c)(1)(B).

III. Application to the Case at Bar

A. Judicial Estoppel

The Debtor asserts that the Complaint should be dismissed on the theory of judicial estoppel because PriorityOne only asserted claims of breach of contract to the arbitrator. The Court of Appeals for the Fifth Circuit addressed the theory of judicial estoppel in *Reed v. City of Arlington,* 650 F.3d 571 (5th Cir. 2011). The Fifth Circuit found:

> "The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding." 18 James Wm. Moore et al., Moore's Federal Practice § 134.30 at 63 (3d ed.2011) (hereinafter "Moore's"). It is "an equitable doctrine invoked by a court at its discretion" to "protect the integrity of the judicial process." *New Hampshire v. Maine,* 532 U.S. 742, 749–50, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001) (internal quotation marks and citations omitted). While enumerating several factors that typically inform the decision whether to apply the doctrine in a particular case, the Supreme Court has refused to "establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel," stating instead that different considerations "may inform the doctrine's application in specific factual contexts." *Id.* at 751, 121 S.Ct. 1808; *see also* 18 Moore's § 134.31 at 73 ("Because the doctrine is equitable in nature, it should be applied flexibly, with an intent to achieve substantial justice.... Application of the doctrine of judicial estoppel should be guided by a sense of fairness, with the facts of the particular dispute in mind."); 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4477 at 553 (2d ed. 2002) ("The concern [of judicial estoppel] is to avoid unfair results and unseemliness.").

Reed, 650 F.3d at 573-74.

The party asserting judicial estoppel must prove the following elements: "(1) the party against whom judicial estoppel is sought has asserted a legal position which is plainly inconsistent with a prior position; (2) a court accepted the prior position; and (3) the party did not act inadvertently." *Id.* (citations omitted).

Applying these elements to the case at bar, the Court finds that the Debtor has failed to prove the first element of judicial estoppel. In the arbitration proceedings, PriorityOne was attempting to

have the arbitrator rule that the Debtor was contractually obligated to PriorityOne on the notes. PriorityOne was not litigating any issues related to a discharge of any type in bankruptcy. Consequently, the Court finds that judicial estoppel should not apply because PriorityOne has not "asserted a legal position which is plainly inconsistent with a prior position." *Id.*

B. Issue Preclusion/Collateral Estoppel[7] in Bankruptcy Courts

In the Debtor's Motion, the Debtor asserts that the Arbitration Judgment "defined the nature of the wrongdoing by [the Debtor]. [PriorityOne's] filing of the instant adversary proceeding is an improper attempt to re-characterize the claims it has against [the Debtor] which have already been determined by the Arbitrator."[8] While not specifically using the terms claim preclusion and issue preclusion, the Debtor appears to be invoking this theory. The Debtor asserts that PriorityOne's nondischargeability claim should be dismissed because PriorityOne is prohibited from pursuing a nondischargeability judgment on any grounds other than that determined by the arbitrator.

PriorityOne, in contrast, alleges that the Arbitration Judgment in the amount of $532,446.42 awarded to it in the state court arbitration proceeding is entitled to preclusive effect in establishing the grounds for nondischargeability under § 523(a)(2)(A) & (B) and §§ 727(a)(3) & (a)(5). Before deciding whether the Arbitration Judgment falls within the exceptions to discharge, the Court will

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[7]Issue preclusion is also known by the term collateral estoppel. The *Restatement (Second) of Judgments* replaced the terms *res judicata* and *collateral estoppel* with the clearer terms of *issue preclusion* and *claim preclusion.* Since the adoption of the *Restatement (Second) of Judgments,* the United States Supreme Court has "consistently urged courts to use the terms *claim preclusion* and *issue preclusion*, rather than *res judicata* and *collateral estoppel* as they apply *Restatement (Second)* analysis." *Principles of Preclusion and Estoppel in Bankruptcy Cases,* 79 Am. Bankr. L.J. 839, 843 (Fall 2005) (footnotes omitted). In this Opinion, the Court will use the term issue preclusion rather than collateral estoppel.

[8]*Defendant Alonzo Sonny Pryor, IV's Motion for Summary Judgment,* Adversary No. 1300069EE, Adv. Dkt. #97, p. 2, June 1, 2015.

consider the preclusive effect, if any, of the Arbitration Judgment.

Section 1738 of Title 28 of the United States Code, known as the *Federal Full Faith and Credit Statute*, provides that a federal court must give a state court judgment the same preclusive effect as other courts within the same jurisdiction of the rendering court. When it comes to an arbitration judgment, federal courts are not required to apply the principal of issue preclusion since arbitration is not a *judicial proceeding* as contemplated by 28 U.S.C. § 1738. *McDonald v. City of West Branch, Mich.,* 466 U.S. 284, 288 (1984).

In addressing the preclusive effect of an arbitration proceeding, the Fifth Circuit held that "[a]s a general matter, arbitral proceedings *can* have preclusive effect even in litigation involving federal statutory and constitutional rights, and the decision to apply it is within the discretion of the district court." *Grimes v. BNSF Railway Co.,* 746 F.3d 184, 188 (5th Cir. 2014); *see Universal Am. Barge Corp. v. J-Chem, Inc.,* 946 F.2d 1131, 1137 (5th Cir. 1991) ("when the arbitral pleadings state issues clearly, and the arbitrators set out and explain their factual findings in a detailed written opinion," a district court has broad discretion to decide whether to apply issue preclusion). Consequently, it is within this Court's discretion to decide whether issue preclusion should apply to the case at bar.

"*Issue preclusion* bars relitigation of issues that have been actually litigated. . . .The most frequent application of *issue preclusion* in bankruptcy cases arises in connection with contests over the dischargeability of a particular debt." *Principles of Preclusion and Estoppel in Bankruptcy Cases,* 79 Am. Bankr. L.J. 839, 852-53 (Fall 2005). "Although bankruptcy courts have exclusive jurisdiction to determine the dischargeability of debts under the Bankruptcy Code, it is well established that issue preclusion, also called collateral estoppel, may apply in bankruptcy

dischargeability proceedings. *See generally Grogan v. Garner,* 498 U.S. 279, 284, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991); *Schwager v. Fallas (In re Schwager),* 121 F. 3d 177, 181 (5th Cir. 1997)." *Cornwell v. Loesch,* 2004 WL 614848, at *2 (N.D. Tex. Feb. 27, 2004). "[I]n only limited circumstances may bankruptcy courts defer to the doctrine of collateral estoppel and thereby ignore Congress' mandate to provide plenary review of dischargeability issues." *Dennis v. Dennis (In re Dennis),* 25 F.3d 274, 278 (5th Cir. 1994), *cert. denied,* 513 U.S. 1081, 115 S. Ct. 732, 130 L. Ed. 2d. 636 (1995).

In *Grogan v. Garner,*[9] the United States Supreme Court held that the doctrine of issue preclusion may apply in § 523(a) litigation in the bankruptcy court in order to prevent the relitigation of "those elements of the claim that are identical to the elements required for discharge and which were actually litigated and determined in the prior action. *See* Restatement (Second) of Judgments § 27 (1982)." *Grogan*, 498 U.S. at 284 (footnote omitted). For the purpose of nondischargeability, issue preclusion applies in bankruptcy court only if "the first court has made specific, subordinate, factual findings on the identical dischargeability issue in question—that is, an issue which encompasses the same *prima facie* elements as the bankruptcy issue—and the facts supporting the court's findings are discernible from that court's record." *In re Dennis,* 25 F.3d at 278.

When considering the preclusive effect of a state court judgment, or in this case a state arbitration judgment, a federal court must look to the law of the state where the judgment was entered and give whatever preclusive effect the judgment would have under that state's law. *Shimon v. Sewerage & Water Bd. of New Orleans,* 565 F.3d 195, 199 (5th Cir. 2009); *Chizk v. Ramon (In re Ramon),* 433 B.R. 571, 583 (Bankr. N.D. Tex. 2010) (preclusive effect of a judgment entered in

[9]498 U.S. 279, 112 L. Ed. 2d 755, 111 S. Ct. 654 (1991).

Mississippi).

The Mississippi Supreme Court has stated that collateral estoppel/issue preclusion "precluded parties from relitigating issues authoritatively decided on their merits in prior litigation to which they were parties or in privity." *State ex rel. Moore v. Molpus,* 578 So. 2d 624, 640 (Miss. 1991).

In the case at bar, the only issue litigated before the arbitrator was the issue of whether or not the Debtor breached a contract and thereby owed a debt to PriorityOne. The arbitrator answered this question in the affirmative. Consequently, on the issue of whether the Debtor owes a debt to PriorityOne, the Court will apply the doctrine of issue preclusion. Therefore, the Court finds that the Debtor is liable to PriorityOne in the amount of $532,446.42. The Court must now determine whether the Arbitration Judgment should be given preclusive effect on the question of nondischargeability of the particular debt and/or the entire discharge.

As a procedural matter, the Court finds that it could not give preclusive effect to the Arbitration Judgment on the questions relating to discharge because the Court was not provided with a copy of the Arbitration Judgment or the entire transcript from the arbitration proceeding. Neither PriorityOne nor the Debtor submitted either of these documents to the Court. Consequently, there is no way for the Court to know if the issues surrounding discharge "were actually litigated and determined in the prior action*." Grogan*, 498 U.S. at 284 (footnote omitted)

Further, since bankruptcy courts "have exclusive jurisdiction to determine the dischargeability of debts under the Bankruptcy Code,"[10] PriorityOne was not required to litigate the issue of dischargeability before the arbitrator. "[I]ssue preclusion does not bar a bankruptcy court

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[10]*Cornwell,* 2004 WL 614848, at *2.

from receiving evidence as to facts whereby that court may determine the character, and ultimately, the dischargeability of a debtor. *Matter of Poston,* 735 F.2d 866, 869 (5th Cir. 1984)."[11] Because "the elements required for discharge [were not] actually litigated and determined,"[12] the Arbitration Judgment does not have preclusive effect on the discharge questions.

Contrary to the Debtor's position, issue preclusion does not apply to prevent PriorityOne from requesting the Bankruptcy Court to determine whether the Arbitration Judgment of $532,446.42 is nondischargeable or whether the Debtor's discharge should be denied.

Further, the Court finds that the Debtor's claim that the running of the statute of limitations prevents PriorityOne from raising an objection to the Debtor's discharge/dischargeability of its debt under a fraud or material misrepresentation theory is without merit. The only deadline that would bar PriorityOne from raising a § 523 or § 727 complaint is found in Federal Rule of Bankruptcy Procedure 4004(a). In the case at bar, the deadline was April 9, 2013.[13] Prior to the April 9, 2013, deadline, PriorityOne filed a motion for an extension of time to file its complaint. A second extension was granted, and the deadline to file a complaint was set for August 31, 2013. PriorityOne filed its Complaint on August 30, 2013. Consequently, PriorityOne timely filed its Complaint and is not barred by any deadline and/or statute of limitations. Therefore, the Debtor's Counterclaim to the extent it alleges that the Complaint is frivolous based on judicial estoppel, issue preclusion/collateral estoppel and/or statute of limitations should be denied.

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[11] *Kahkeshani v. Hann (In re Hann),* 544 B.R. 326, 330 (Bankr. S.D. Tex. 2016).

[12] *Grogan*, 498 U.S. at 284 (footnote omitted).

[13] *Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines,* Case No. 1300061EE, Dkt. #7, p. 1, Jan. 11, 2013.

C. § 523 Dischargeability of a Particular Debt

PriorityOne objects to the dischargeability of its debt under § 523(a)(2)(A) and § 523(a)(2)(B). Section 523(a) states in pertinent part:

> 11 U.S.C. § 523. Exceptions to discharge
>
> (a) A discharge under section 727 . . . of this title 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--
> >
> > > (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;

11 U.S.C. § 523.

In the case at bar, PriorityOne bears the ultimate burden of proving by a preponderance of the evidence that the Arbitration Judgment is nondischargeable. In order for PriorityOne's Motion to be granted, PriorityOne must prove that a genuine issue of material fact does not exist as to each essential element under § 523(a)(2)(A), § 523(a)(2)(B), § 727(a)(3) or § 727(a)(5).

1. § 523(a)(2)(A) False Pretenses, False Representation or Actual Fraud

As stated above, § 523(a)(2)(A) excepts from discharge "any debt. . .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;" 11 U.S.C. § 523(a)(2)(A).

As a general matter, the three grounds for non-dischargeability under § 523(a)(2)(A) are similar. Section 523(a)(2)(A)

> "contemplates frauds involving 'moral turpitude or intentional wrong; fraud implied in law which may exist without imputation of bad faith or immorality, is insufficient.'" *Allison v. Roberts (In re Allison),* 960 F.2d 481, 483 (5th Cir.1992) (footnote omitted) (quoting 3 *Collier on Bankruptcy* ¶ 523.08[4], at 523–50 (Lawrence P. King et al. eds., 15th ed. 1989)); *see also First Nat'l Bank v. Martin (In re Martin),* 963 F.2d 809, 813 (5th Cir.1992) ("Debts falling within section 523(a)(2)(A) are debts obtained by frauds involving moral turpitude or intentional wrong, and any misrepresentations must be knowingly and fraudulently made.").

RecoverEdge L.P. v. Pentecost, 44 F.3d 1284, 1291 (5th Cir. 1995).

In the Fifth Circuit, the elements of *false pretenses and false representations* are distinguished from the elements of *actual fraud*. *Id* at 1292. "The distinction recognized by the Fifth Circuit appears to be a chronological one, resting upon whether a debtor's representation is made with reference to a future event, as opposed to a representation regarding a past or existing fact." *Boyington Capital Group, LLC v. Haler (In re Haler*), Case No. 10-42052, Adv. No. 10-4217, 2016 WL 825668, at *13 (Bankr. E.D. Tex. Mar. 2, 2016) (footnotes omitted).

In order for PriorityOne to prevail under § 523(a)(2)(A) for *false pretenses* or *false representations*, PriorityOne "must prove by a preponderance of the evidence that the debtor made representations that were (1) knowing and fraudulent falsehoods, (2) describing past or current facts, (3) that were relied upon by the other party." *Id.*

In order for PriorityOne to prevail under § 523(a)(2)(A) for *actual fraud*, PriorityOne must submit proof that "(1) the debtor made representations; (2) the debtor knew were false at the time they were made; (3) the debtor made the representations with the intention and purpose to deceive the creditor; (4) the creditor relied on the representations; and (5) the creditor sustained losses as a proximate result of the representations. *RecoverEdge L.P. v. Pentecost,* 44 F.3d 1284, 1293 (5th Cir. 1995)" *In re Hann,* 544 B.R. at 331. On May 16, 2016, the United States Supreme Court issued *Husky Int'l Electronics, Inc. v. Ritz,* — U.S. —, 136 S.Ct. 1581 (2016) in which it clarified the standards for *actual fraud.* In *Husky,* the debtor transferred large sums of Chrysalis Manufacturing Corporation's money to other entities he controlled. A creditor of Chrysalis Manufacturing Corporation argued that these inter-company transfers constituted *actual fraud* under § 523(a)(2)(A). The Supreme Court agreed and held that *actual fraud* under § 523(a)(2)(A), "encompasses forms of fraud, like fraudulent conveyance schemes, that can be effected without a false representation." *Husky,* 136 S.Ct. at 1586.

In its Complaint, PriorityOne alleges that "[i]n connection with execution of the Notes, the Debtor represented in his *financial statements* submitted to [PriorityOne] that he owned certain assets which he did not own and/or failed to disclose certain liabilities."[14] PriorityOne then asserts that "the Debtor's debt to [PriorityOne] should be declared non-dischargeable pursuant § 523(a)(2)(A)."[15]

Other than a blanket statement citing the three grounds under § 523(a)(2)(A),[16] PriorityOne

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[14] *Complaint,* Adversary No. 1300069EE, Adv. Dkt. #1, p. 4, August 30, 2013.(emphasis added).

[15] *Id.* at 5.

[16] *Id.*

does not, however, specify under which ground or grounds of § 523(a)(2)(A) it is proceeding. Regardless, PriorityOne's reliance on the Financial Statements as the basis for seeking to have its debt declared nondischargeable under § 523(a)(2)(A) is misplaced.

As explained in *Collier on Bankruptcy:*

> [Section 523(a)(2)(A)] does not, however, deal with deception carried out by means of a statement relating to the debtor's . . . financial condition. False financial statements are dealt with separately in section 523(a)(2)(B) and the exclusion from paragraph (A) makes clear that the false financial statement exception falls within a category separate from the false representation or actual fraud exception and is subject to special conditions to be met before the exception becomes effective. Paragraphs (A) and (B) of section 523(a)(2) are mutually exclusive.

4 Collier on Bankruptcy ¶ 523.08[1] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.)(footnote omitted). Consequently, PriorityOne cannot obtain a judgment declaring the debt nondischargeable under § 523(a)(2)(A) based upon the Financial Statements.

In its *Memorandum in Support of PriorityOne Bank's Motion for Summary Judgment* (Memorandum), PriorityOne raises a different factual basis than asserted in its Complaint as the basis for relief under § 523(a)(2)(A). PriorityOne states in its Memorandum that the Debtor agreed to provide PriorityOne a certificate of deposit as additional security for the loans, however, "[t]he Debtor knew the CD was a joint asset and he would need his mother's consent in order for the Bank to adequately perfect its security interest."[17] PriorityOne contends the failure of the Debtor to provide the certificate of deposit to it should result in the debt being declared nondischargeable under § 523(a)(2)(A).

It appears to the Court that in its Memorandum, PriorityOne is attempting to amend its

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[17] *Memorandum in Support of PriorityOne Bank's Motion for Summary Judgment,* Adversary No. 1300069EE, Adv. Dkt. #102, p. 21-22, June 2, 2015.

Complaint to assert a new factual basis for objecting to the dischargeability of its debt pursuant to § 523(a)(2)(A). "[A] . . . [m]emorandum is not a pleading from which the Court grants relief." *In re Gilmore, Jr.,* 198 B.R. 686, 692 n. 4 (Bankr. E.D. Tex. 1996), *amended in part on reh'g*, 1996 WL 1056889 (Bankr. E.D. Tex. 1996), *aff'd*, *United States v. Gilmore,* 226 B.R. 567 (E.D. Tex. 1998). "[B]ecause a memorandum or brief does not constitute a pleading, a request for relief contained therein cannot constitute a written motion." *In re Allegheny Health, Educ. & Research Foundation,* 233 B.R. 671, 683 (Bankr. W.D. Pa. 1999); *see also Vidalia Dock & Storage Co., Inc. v. Donald Engine Service, Inc.,* 2008 WL 115199, *2 (W.D. La. Jan. 9, 2008) (motion in brief was "deemed deficient"); *Material Products Int'l, Ltd. v. Ortiz (In re Ortiz)*, 441 B.R. 73, 82 (Bankr. W.D. Tex. 2010) ("[T]he Plaintiff's request to amend should be stricken simply because it is improperly made in a responsive pleading. Fed. R. Bankr. P. 9013."). Since a brief "is not a pleading from which the Court grants relief,"[18] PriorityOne's attempt to amend its Complaint by asserting a new factual basis in its Memorandum is deficient and is not properly before the Court. For these reasons, PriorityOne may not assert a new factual basis that was not raised in its Complaint.

As for the basis for declaring the debt nondischargeable contained in its Complaint, namely the Financial Statements, the Court finds that there are no disputes over any material facts as it relates to § 523(a)(2)(A) because there is no factual basis under which the debt could be declared nondischargeable under § 523(a)(2)(A). PriorityOne's request to have the debt declared nondischargeable pursuant to § 523(a)(2)(A) fails as a matter of law. Consequently, PriorityOne's Motion should be denied as to § 523(a)(2)(A) and the Debtor's Motion should be granted as to

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[18] *In re Gilmore,* 198 B.R. at 692 n. 4.

§ 523(a)(2)(A).

Even if the Court allowed PriorityOne to raise the certificate of deposit in its Memorandum as a basis for declaring the debt nondischargeable under § 523(a)(2)(A), the Court finds that PriorityOne has not met its burden to show that the Debtor made a false representation or committed actual fraud.

As proof that the Debtor's representations regarding the certificate of deposits met the standards of § 523(a)(2)(A), PriorityOne cites to excerpts from the Debtor's testimony at his deposition. When questioned about the certificate of deposit at his deposition, the Debtor testified:

> Q: Did you intend to pledge that CD when you signed those loan documents?
>
> A: Well, at the time I signed the loan documents I didn't realize that it said, as collateral, it said CD on there because those were renewals. They were no – money wasn't extended on those loans. So he added that item in there, and I missed it on my reading my documents as I should have, missed it.
>
> Q: But you did read them?
>
> A: I didn't see that, but I signed it, so.
>
> Q: But you did sign it?
>
> A: I did sign it.
>
> . . . .
>
> Q: Did you ever agree to bring that CD in after you had signed the promissory note?
>
> A: I told him I would work on it. He was aware that I had that with my mother. And, in fact, on a couple of different occasions he told me, I don't really need the CD unless you can move the CD to PriorityOne Bank because the only way we can have it as security is if it's housed at this bank.
>
> . . . .
>
> Q: Was the money in that CD yours or your mothers?

> A: My mom's.
>
> Q: Did you know it was your mother's money when you had agreed to pledge it as collateral?
>
> A: Well, I didn't necessarily agree to pledge it as collateral. We talked about moving the CD over there and then I signed the document that I didn't realize said certificate of deposit Regions Bank on it under the security line. Because, again, it was a renewal. We didn't get any money out of the – it was a renewal to extend the loan and bring it up to date is what it was.
>
> . . . .
>
> Q: All right. Did you ever tell Mr. Stubbs that you would not bring that CD in?
>
> A: No.
>
> Q: Okay. At the time that you were discussing pledging this CD with PriorityOne Bank, did you own the CD?
>
> A: Yes. I had an interest in a CD. Yes. It was a joint – it was either/or, I think.[19]

The Court finds that the Debtor's testimony does not meet the standards of § 523(a)(2)(A) to prove that the Debtor made a false representation about the certificate of deposit with the intention and purpose to deceive PriorityOne. The Debtor's testimony shows that he said he would attempt to get the certificate of deposit for collateral. The Debtor also testified that the bank officer knew that he owned the certificate of deposit with his mother. Consequently, the Court finds that even if allowed to amend to include the certificate of deposit, PriorityOne's Motion should be denied as to § 523(a)(2)(A) as a matter of law.

2. § 523(a)(2)(B) False Financial Statement

In *Bandi v. Becnel (In re Bandi),* 683 F.3d 671 (5th Cir. 2012), the Court of Appeals for the

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[19] *PriorityOne Bank's Motion for Summary Judgment,* Exhibit 1 *Deposition of Sonny Alonzo Pryor,* Adversary No. 1300069EE, Adv. Dkt. #100-1, pp. 94-100, June 1, 2015.

Fifth Circuit addressed the differences between § 523(a)(2)(A) and § 523(a)(2)(B):

> Some debts for value obtained by means of a fraudulent statement are dischargeable under § 523(a)(2), and others are not. Debt for property or other value obtained by fraud is broadly rendered nondischargeable by § 523(a)(2)(A), but that subsection carves out certain debt that follows a transfer of value or extension of credit obtained by "a statement" regarding the debtor's "financial condition" and makes that debt dischargeable. However, certain other debt that follows a transfer of value or extension of credit obtained by "a statement" regarding the debtor's "financial condition" is rendered nondischargeable by § 523(a)(2)(B). Under this subsection, if a statement respecting the debtor's or an insider's financial condition is in writing, materially false, reasonably relied upon by the creditor, and the debtor made the statement with intent to deceive, the debt obtained by the fraud is not discharged.
>
> . . . .
>
> The Supreme Court has described these two subsections as "two close statutory companions barring discharge," the first of which pertains to fraud "not going to financial condition" and the second of which pertains to "a materially false and intentionally deceptive written statement of financial condition upon which the creditor reasonably relied."

In re *Bandi*, 683 F.3d at 674–75 (citations and footnotes omitted).

In order to prevail under § 523(a)(2)(B), PriorityOne must show that the Debtor obtained the funds by use of a "materially false and intentionally deceptive written statement of financial condition upon which the creditor reasonable relied."[20] The Fifth Circuit held that the term *financial condition* should be defined by "terms commonly understood in commercial usage rather than a broadly descriptive phrase intended to capture any and all misrepresentations that pertain in some way to specific assets or liabilities of the debtor. . . .It means the general overall financial condition of an. . .individual. . .the overall value of property and income as compared to debt and liabilities." *In re Bandi,* 683 F.3d at 676. PriorityOne bears the burden of proving each of the four elements by a preponderance of the evidence. *Grogan*, 498 U.S. at 287–88; *Gen. Elec. Capital Corp. v. Acosta*

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[20] *Field v. Mans,* 516 U.S. 59, 66, 116 S.Ct. 437, 133 L.Ed. 2d 351 (1995).

(In re Acosta), 406 F.3d 367, 372 (5th Cir.2005).

PriorityOne must prove that the Debtor obtained money from PriorityOne by the use of a statement that is "(1) in writing; (2) that is materially false; (3) respecting the debtor's . . . financial condition; (4) on which the creditor to whom the debtor is liable for money . . . reasonably relied; (5) that the debtor caused to be made or published with intent to deceive."[21]

Upon review of the pleadings, the Court finds that there is no dispute as to the material facts that the Financial Statements were: writings that were materially false statements regarding the Debtor's financial condition on which PriorityOne reasonably relied. As for the final element, whether the Debtor "caused to be made or published with intent to deceive"[22] the Financial Statements, the Court finds that there is a dispute as to the material facts regarding this element.

In his deposition testimony, when questioned about the Financial Statements, the Debtor repeatedly testified that he "didn't fill the document out;"[23] that "I signed it before it was prepared;"[24] denied that it was his signature on the financial statement dated December 5, 2007;[25] and that he had never seen the Merrill Lynch net worth financial statement.[26] Consequently, the Court finds that summary judgment should be granted in part, and denied in part as to whether the

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[21]4 Collier on Bankruptcy ¶ 523.08[2] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.)(footnote omitted).

[22]*Id.*

[23]*PriorityOne Bank's Motion for Summary Judgment,* Exhibit 1 *Deposition of Sonny Alonzo Pryor,* Adversary No. 1300069EE, Adv. Dkt. #101-1, p. 16, June 1, 2015.

[24]*Id.* at 20.

[25]*Id.* at 23.

[26]*Id.* at 46.

debt to PriorityOne should be declared nondischargeable pursuant to § 523(a)(2)(B).[27]

D. § 727(a) Objection to Discharge

Under § 727(a), a court must grant a debtor a discharge unless one of the enumerated exceptions for denying a debtor a discharge under § 727(a) are proven. PriorityOne objects to the discharge of the Debtor under two subsections of Section 727(a). Section 727(a) provides in pertinent part:

> § 727. Discharge.
>
> (a) The court shall grant the debtor a discharge, unless–
>
> . . . .
>
> (3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;
>
> . . . .
>
> (5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

11 U.S.C. § 727(a)(3) and (5).

"The exceptions are construed strictly against the creditor and liberally in favor of the debtor." *The Cadle Co. v. Duncan (In re Duncan),* 562 F.3d 688, 695 (5th Cir. 2009) (citation omitted). The burden of proof is on the objecting party, and the objecting party must show by a preponderance of the evidence it has met the grounds for a denial of a debtor's discharge. *Grogan,*

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[27]Further, the Court will note that the copies of the Financial Statements attached to PriorityOne's pleadings are impossible to read.

498 U.S. at279; *Beaufouef v. Beaubouef (In re Beaubouef),* 966 F.2d 174, 178 (5th Cir. 1992); *East Central Plan'g & Dev. Dist., Inc. v. Clifford (In re Clifford)*, No. 0501472EE, 2008 WL 1988714 (Bankr. S.D. Miss. May 2, 2008); *Comerica Bank v. Rajabali (In re Rajabali),* 365 B.R. 702, 714 (Bankr. S.D. Tex. 2007).

1. § 727(a)(3) Failure to Preserve Financial Information

In *Hughes v. Wells (In re Wells),* 426 B.R. 579 (Bankr. N.D. Tex. 2006), the Honorable Barbara J. Houser, a bankruptcy judge for the Northern District of Texas, provides a clear and thoughtful discussion of § 727(a)(3) and (5).

In addressing § 727(a)(3), Judge Houser found:

> The initial burden is on the [creditors] to prove that [the debtor] failed to keep or preserve his financial records, and that such failure kept the [creditors] from ascertaining [the debtor's] financial condition or business transactions. *Dennis,* 330 F.3d at 703; *Guenther,* 333 B.R. at 765. Once the [creditors] have met their burden of proving that [the debtor] failed to keep or preserve sufficient information from which his financial condition or business transactions could be ascertained, the burden then shifts to [the debtor] to prove that the inadequacy of his records is justified by the totality of the circumstances, including proving what records a reasonable person in similar circumstances would have kept. *Guenther,* 333 B.R. at 765; *see also Dennis,* 330 F.3d at 703. The Court has wide discretion in determining whether [the debtor's] financial records provide sufficient detail and, if not, whether the totality of the circumstances justifies the inadequacy of his financial records. *See Dennis,* 330 F.3d at 703; *see also Goff v. Russell Co. (In re Goff),* 495 F.2d 199, 202 (5th Cir.1974).
>
> Courts understand that debtors often keep poor financial records, and "impeccable system of bookkeeping" is not required; however, "creditors should not be required to speculate about the financial condition of the debtor or hunt for the debtor's financial information." *Guenther*, 333 B.R. at 765. The purpose of imposing the duty on a debtor to preserve financial records is to allow creditors to determine what property has passed through the debtor's hands. *Id.* While the debtor's financial records "need not contain 'full detail,' ... 'there should be written evidence' of the debtor's financial condition." *Dennis,* 330 F.3d at 703 (quoting *Goff,* 495 F.2d at 201); *Guenther,* 333 B.R. at 765. A debtor has a duty to take "reasonable precautions" in preserving his financial records. *Guenther,* 333 B.R. at 765. The financial records a debtor maintains should be appropriate and reasonable for a

> debtor of similar sophistication. *See Dennis,* 330 F.3d at 703; *see also Goff,* 495 F.2d at 201–02 (noting that different standards for bookkeeping should be applied to unsophisticated wage earners and those individuals who are merchants); *J.P. Morgan Chase Bank v, Hobbs (In re Hobbs),* 333 B.R. 751, 758 (Bankr.N.D.Tex.2005) (Hale, J.) (noting that, when addressing justification argument of debtor for failure to keep adequate records, inquiry should include consideration of the debtor's education, experience, and sophistication).
>
> In a personal bankruptcy case, the "quintessential documents" that must be preserved and kept are the debtor's income tax returns. *Dennis,* 330 F.3d at 703 (upholding bankruptcy court's decision not to deny the debtor, an unsophisticated wage earner, a discharge under § 727(a)(3) because the debtor had provided numerous tax returns and bank, payroll, and other records); *see also Chemoil, Inc. v. Pfeifle (In re Pfeifle),* 154 Fed.Appx. 432, 434–35 (5th Cir.2005) (upholding, in unpublished opinion, bankruptcy court's decision not to deny debtor a discharge under § 727(a)(3), where the debtor, a sophisticated wage earner, produced four years of income tax returns and other documentation to creditors); *cf. Womble v. Pher Partners (In re Womble),* 108 Fed.Appx. 993, 995–96 (5th Cir.2004) (finding, in unpublished opinion, that sophisticated, college-educated debtor who ran several businesses for a number of years, who had been in bankruptcy several times, and who employed able attorneys, was rightfully denied a discharge under § 727(a)(3)). However, the mere fact that a debtor has produced his tax returns may not be enough to prevent the denial of a discharge if the debtor's creditors cannot ascertain his financial condition or business transactions without the production of other documentation. *See Cadle Co. v. Terrell (In re Terrell),* 46 Fed.Appx. 731, 731 (5th Cir.2002) (upholding, in unpublished opinion issued per curiam, bankruptcy court's denial of debtor's discharge under § 727(a)(3)). For instance, the debtor's failure to provide bank and credit card statements can also form the basis for denying a discharge under § 727(a)(3), for such documents " 'form the core of what is necessary to ascertain the debtor's financial condition, primarily his use of cash assets.' " *Hobbs,* 333 B.R. at 757 (quoting *Ochs v. Nemes (In re Nemes),* 323 B.R. 316, 324 (Bankr.E.D.N.Y.2005)).

Hughes v. Wells (In re Wells), 426 B.R. 579, 593-95 (Bankr. N.D. Tex. 2006) (footnotes omitted).

In its Complaint, PriorityOne asserts that the Debtor "has concealed, falsified and/or failed to maintain books and records evidencing the transfer or loss of certain assets not listed in his schedules which were previously listed in the financial statements the Debtor provided to [PriorityOne] in connection with the Notes."[28] PriorityOne further states that such actions were "not

[28] *Complaint,* Adversary No. 1300069EE, Adv. Dkt. #1, p. 6, Aug. 30, 2013.

justified under the circumstances."[29]

In its Memorandum, PriorityOne lists the standards it must meet in order to have the Debtor's discharge denied under § 727(a)(3), however, PriorityOne does not show how it has met its burden. PriorityOne does not specify what documents the Debtor has failed to preserve: bank statements, tax returns, credit card statements, etc. The Court finds that PriorityOne has not proven that the Debtor failed to keep and preserve financial records which prevented it from ascertaining the Debtor's financial condition. Consequently, the Court finds that PriorityOne has not met its burden to have the Debtor's discharge denied pursuant to § 727(a)(3).

2. § 727(a)(5) Loss of Assets

PriorityOne also alleges that the Debtor should be denied a discharge because he has failed to explain "the loss of assets or deficiency of assets to meet the defendants' liabilities."[30] In *Wells,* Judge Houser addressed § 727(a)(5) and found:

> The [creditors] next object to [the debtor] receiving a discharge on the grounds that [the debtor] failed to explain satisfactorily the loss of assets of the estate or why there is a deficiency of assets to meet his liabilities. Under § 727(a)(5), a debtor may be denied a discharge where "the debtor has failed to explain satisfactorily, before determination of denial of discharge . . . , any loss of assets or deficiency of assets to meet the debtor's liabilities." 11 U.S.C. § 727(a)(5). A creditor has the initial burden of making known by proper allegation in its complaint the assets the debtor once had but which are no longer available for creditors. *Mozeika v. Townsley (In re Townsley),* 195 B.R. 54, 64 (Bankr. E.D. Tex. 1996); *see also First Tex. Savings Ass'n, Inc. v. Reed (In re Reed),* 700 F.2d 986, 992 (5th Cir. 1983); *First Nat'l Bank of Amarillo v. Holmes (In re Holmes),* 121 B.R. 505, 508 (Bankr. N.D. Tex.1990) (Akard, J.). Upon the creditor's introduction of evidence substantiating the disappearance of substantial assets of the debtor, "the burden shifts to the [d]ebtor to explain satisfactorily the losses or deficiencies." *Townsley,* 195 B.R. at 64; *see also Reed,* 700 F.2d at 992–93. The explanation offered by the debtor of the

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[29] *Id.*

[30] *Id.* at 7.

> disposition of assets need not be meritorious; rather, the explanation need only satisfactorily account for the disposition. *Holmes,* 121 B.R. at 508. Whether a debtor has satisfactorily explained a loss of assets is a factual finding to be made by the bankruptcy court. *Cadle Co. v. Andrews (In re Andrews),* 98 Fed.Appx. 290, 295 (5th Cir. 2004).

In re Wells, 426 B.R. at 606-07.

The Court finds that PriorityOne has failed "by proper allegation in its complaint [to show] the assets the debtor once had but which are no longer available for creditors." *Id.* In its Complaint, PriorityOne fails to allege any specific loss or deficiency of assets. Paragraph 43 of the Complaint simply states that:

> The Debtor has failed to explain satisfactorily the loss of assets or deficiency of assets to meet the debtor's (*sic*) liabilities in that the Debtor has failed to explain the loss or transfer of certain assets not listed in the Debtor's schedules which were previously listed in the financial statements the Debtor provided [PriorityOne] in connection with the notes.[31]

As stated by Judge Houser: "Were the Court to rely on the Complaint alone, there is little doubt that the [PriorityOne] would have failed to meet their burden. *See Krohn v. Cromer (In re Cromer),* 214 B.R. 86, 96 (Bankr. E.D. N.Y.1997) (Duberstein, C.J.) (noting that mere reiteration of language of statute fails to meet burden of establishing prima facie case that specific assets of debtor omitted)." *Wells,* 426 B.R. at 607 n. 46.

In its Memorandum, PriorityOne states more specifically that the Debtor conveyed his interests in real property in March of 2009, to Pryor-Helms Farm, Inc. Then in January of 2010, the Debtor conveyed his stock in Pryor-Helms Farm, Inc. to Pam and Eddie Helms. PriorityOne alleges

[31] *Complaint Objecting to Discharge* at 7.

these actions were "in violation of the terms of the 2006 and 2007 Financial Statements."[32] PriorityOne does not, however, explain how these conveyances in 2009 and 2010 rise to the level of the standards for denying a discharge under § 727(a)(5) nor does PriorityOne offer case law to support its position that the Debtor should be denied a discharge under § 727(a)(5).

In the *Statement of Financial Affairs* filed by the Debtor, Question 10, *Other Transfers,* states: "a. List all other property, other than property transferred in the ordinary course of the business or financial affairs of the debtor, transferred either absolutely or as security within **two years** immediately preceding the commencement of this case."[33] The Debtor filed his bankruptcy petition on January 9, 2013. Since according to PriorityOne ,the last transfer occurred more than two (2) years before the Debtor filed his bankruptcy petition, the Debtor was not required to disclose the transfers. Consequently, PriorityOne has not met its burden to deny the Debtor a discharge under § 727(a)(5).

CONCLUSION

The first step in determining whether a motion for summary judgment should be granted or denied is for the court to determine whether a dispute exists as to "a genuine issue of material fact as to each element of the cause of action."[34] In the case at bar, PriorityOne requests that the Court grant summary judgment in its favor and find that the Debtor's debt to PriorityOne is nondischargeable pursuant to § 523(a)(2)(A) or (a)(2)(B), or deny the Debtor a discharge pursuant

[32] *Memorandum in Support of PriorityOne Bank's Motion for Summary Judgment,* Adversary No. 1300069EE, Adv. Dkt. #102, p. 23, June 2, 2015.

[33] *Statement of Financial Affairs*, Adv. Pro. No. 1200079EE, Adv. Dkt. #3, page 23 of 40, January 09, 2013. (emphasis added).

[34] *Malacara v. Garber,* 353 F.3d 393, 404 (5th Cir. 2003).

to § 727(a)(3) or (a)(5). PriorityOne further requests that the Court grant summary judgment and dismiss the Debtor's Counterclaim. In the Debtor's Motion, the Debtor asks that the Court grant summary judgment in his favor and deny PriorityOne's request to have his debt to the bank declared nondischargeable and deny PriorityOne's objection to his discharge. The Debtor further requests that summary judgment should be granted in favor of the Debtor as to his Counterclaim.

The Fifth Circuit has consistently held that a Chapter 7 debtor should be granted a discharge unless one of the grounds enumerated for the denial of a discharge or for the finding of the nondischargeability of a debt are proven by a preponderance of the evidence. *In re Beaubouef,* 966 F.2d at 178. "The exceptions are construed strictly against the creditor and liberally in favor of the debtor." *In re Duncan,* 562 F.3d at 695. (citation omitted).

In considering the Debtor's Motion and PriorityOne's Motion, the Court finds that summary judgment should be granted in part and denied in part, as follows:

1. <u>Count I: § 523(a)(2)(A)</u>: The Court finds that there are no disputes over any material facts as it relates to § 523(a)(2)(A) because there is no factual basis under which the debt could be declared nondischargeable under § 523(a)(2)(A). PriorityOne's request to have the debt declared nondischargeable pursuant to § 523(a)(2)(A) fails as a matter of law. Consequently, the PriorityOne's Motion should be denied as to § 523(a)(2)(A) and the Debtor's Motion should be granted as to § 523(a)(2)(A) and Count I of the *Complaint* should be dismissed.

2. <u>Count II: § 523(a)(2)(B)</u>: The Court finds that there is no dispute as to the material facts of four of the five elements of § 523(a)(2)(B): that the Financial Statements were: (1) writings that were (2) materially false statements (3) regarding

the Debtor's financial condition on which (4) PriorityOne reasonably relied. As for the fifth element, whether the Debtor "caused to be made or published with intent to deceive"[35] the Financial Statements, the Court finds that there is a dispute as to the material facts regarding this element. Consequently, PriorityOne's Motion should be granted as to all elements of § 523(a)(2)(B) (Count II) except whether the Debtor "caused to be made or published [the financial statements] with intent to deceive."[36] The Court will set subsection (iv) of § 523(a)(2)(B) for trial.

3. Counts III & IV: § 727(a)(3) and § 727(a)(5): The Court finds that PriorityOne has failed to meet its burden to show by a preponderance of the evidence that the Debtor's discharge should be denied pursuant to § 727(a)(3) or § 727(a)(5). Consequently, the Court finds that the Debtor's Motion should be granted as to § 727(a)(3) and § 727(a)(5) and that Count III and Count IV of the *Complaint* should be dismissed.

4. Counterclaim: Since the Court has found that PriorityOne was under no obligation to litigate the issue of dischargeability/discharge before the arbitrator, the Court finds that the Debtor's Counterclaim is not well taken and should be dismissed.

A separate judgment consistent with this Opinion will be entered in accordance with Rule 7054 of the Federal Rules of Bankruptcy Procedure.

##END OF OPINION##

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[35] 4 Collier on Bankruptcy ¶ 523.08[2] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.)(footnote omitted).

[36] *Id.*

SO ORDERED,

Judge Edward Ellington
United States Bankruptcy Judge
Date Signed: July 8, 2016

The Order of the Court is set forth below. The docket reflects the date entered.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE: **CHAPTER 7**
ALONZO SONNY PRYOR, IV **CASE NO. 1300061EE**

PRIORITYONE BANK

VS. **ADVERSARY NO. 1300069EE**

ALONZO SONNY PRYOR, IV

JUDGMENT ON THE
MOTIONS FOR SUMMARY JUDGMENT

Consistent with the Court's Opinion dated contemporaneously herewith,

IT IS THEREFORE ORDERED that *Defendant Alonzo Sonny Pryor, IV's Motion for Summary Judgment* (Adv. Dkt. #97) is well-taken in part and that summary judgment should be granted in favor of Alonzo Sonny Pryor, IV as to 11 U.S.C. §§ 523(a)(2)(A), 727(a)(3), and 727(a)(5) and that Count I, Count III and Count IV of the *Complaint* filed by PriorityOne Bank are hereby dismissed.

IT IS FURTHER ORDERED that *PriorityOne Bank's Motion for Summary Judgment* (Adv. Dkt. #100) is well-taken in part and that summary judgment should be granted in part in favor of PriorityOne Bank as to Count II except as to subsection (iv) of 11 U.S.C. § 523(a)(2)(B).

IT IS FURTHER ORDERED that *PriorityOne Bank's Motion for Summary Judgment* (Adv. Dkt. #100) is well-taken in part and that summary judgment should be granted in favor of PriorityOne Bank as to Alonzo Sonny Pryor, IV's *Counterclaim* and that the *Counterclaim* is hereby dismissed.

IT IS FURTHER ORDERED that summary judgment should be denied in all other respects.

IT IS FURTHER ORDERED that the Court will set subsection (iv) of § 523(a)(2)(B) for trial by separate notice and that the Court will issue a final judgment on all matters following a decision by the Court after the conclusion of the trial.

END OF ORDER