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

IN RE: ANTHONY C. BYRD & MARY P. BYRD — **CASE NO. 9200529JC**

BANK OF MISSISSIPPI — **PLAINTIFF**

VS. — **ADVERSARY NO. 9200156**

ANTHONY C. BYRD — **DEFENDANT**

J. Patrick Caldwell
Elias Lake Tolbert
P.O. Box 1836
Tupelo, MS 38802 — Attorney for Plaintiff

R. Charles Robb
P.O. Box 1044
Vicksburg, MS 39181 — Attorney for Defendant

Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION

This adversary proceeding is before the Court on the Objection to Dischargeability of Debt and Complaint for Entry of Judgment filed by the Bank of Mississippi. The Bank of Mississippi seeks an adjudication, pursuant to 11 U.S.C. § 523(a)(2)(B)[1], that its claim arising out of a promissory note executed by Anthony Byrd is nondischargeable. The bank further seeks entry of a judgment against Byrd for the sum of $ 19,305.68 plus interest, costs and attorney fees.

---

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

After the trial of this adversary proceeding, the parties submitted to the Court written closing arguments along with citations in support of their respective positions. Having considered the evidence presented at trial and the arguments of counsel, and being otherwise fully advised in the premises, the Court holds that the Bank of Mississippi's complaint is well taken and should be granted. In so holding, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The Debtor, Anthony C. Byrd, is a dentist who presently is teaching courses at a local community college. Due to the loss of his right thumb, Dr. Byrd is no longer able to practice dentistry. In addition to his experience practicing dentistry and teaching, Dr. Byrd has a fairly extensive business background . At trial Dr. Byrd testified that since graduation from dental school approximately 15 years ago, he has owned a roofing business for a short time, was involved in a venture operating a fishing tackle store, was a major stockholder in a corporation named Mississippi Marine Specialties, owned a city block in Mount Olive, Mississippi which he used as rental property, and owned half of the office building in which his dental practice was located.

In January of 1990, Dr. Byrd first approached the Bank of Mississippi to obtain an unsecured loan in the amount of $ 20,000. Prior to this time, the Bank of Mississippi had no relationship with Dr. Byrd in his individual capacity. In the process of considering whether to extend the loan, the bank requested and

received from Dr. Byrd a 1988 individual income tax return for Dr. and Mrs. Byrd along with a statement of financial condition as of June 30, 1989 prepared by Dr. Byrd's accountant. In addition to the information supplied by Dr. Byrd, the bank also obtained a credit report on Dr. Byrd. After considering the information in its possession, the Bank of Mississippi granted Dr. Byrd the loan for $ 20,000.

The promissory note was first renewed in July of 1990. At this time the Bank of Mississippi requested a current financial statement from Dr. Byrd. In accordance with the bank's request, Dr. Byrd provided a statement of financial condition as of December 31, 1989. The financial statement again was prepared by Dr. Byrd's accountant. No further documentation was requested of Dr. Byrd to renew the note.

In January 1991, the promissory note was again renewed. Again pursuant to the bank's request, Dr. Byrd provided a financial statement as of August 31, 1990. This statement was not signed by an accountant, but instead appears to have been partially prepared by Dr. Byrd, and incorporates portions of his previous financial statement.

On July 19, 1991, Dr. Byrd executed a third renewal note in favor of the Bank of Mississippi in the amount of $ 17,748.17. To obtain the loan renewal, Dr. Byrd provided a financial statement as of December 31, 1990. The statement was prepared and signed by Dr. Byrd's accountant. In addition to Dr. Byrd's financial

statement, the Bank of Mississippi also obtained a credit report prior to renewing the loan.

On February 7, 1992 Dr. Byrd and his wife filed a joint petition for relief under Chapter 7 of the Bankruptcy Code. The Bank of Mississippi subsequently commenced this adversary proceeding alleging that the financial statements provided to the bank by Dr. Byrd were false, and therefore his debt to the bank arising out of the July 19, 1991 promissory note should be adjudicated nondischargeable pursuant to Bankruptcy Code § 523(a)(2)(B).

The first financial statement provided to the bank by Dr. Byrd is dated June 30, 1989 and was provided in conjunction with the initial loan made in January of 1990. It showed Dr. Byrd as having a net worth of approximately $ 649,000. Appearing on the financial statement is an asset consisting of 60 acres of real property in Smith County, Mississippi with a value of $ 30,000. At trial Dr. Byrd admitted that he did not, in fact, own the property. Dr. Byrd explained that at the time the financial statement was prepared, he believed the land had been devised to him upon his father-in-law's death. Dr. Byrd admitted that he has never paid taxes on the property nor has he ever seen a tax bill for taxes due on the property. According to Dr. Byrd's testimony, his brother-in-law farms the property, and he just assumed that his brother-in-law was paying the taxes.

In addition to the acreage in Smith County, Dr. Byrd's June 30, 1989 financial statement lists as an asset a residence in

Covington County, Mississippi with an appraised value of $ 49,800. Dr. Byrd testified that at the time he executed the January, 1990 note in favor of the Bank of Mississippi, he had sold the property to his brother on a conditional sales contract with a purchase price of $ 39,000. Dr. Byrd further testified that the property was encumbered with a deed of trust securing a note for $ 39,000 to the Bank of Simpson County. Dr. Byrd's financial statement mentions neither the conditional sales contract nor the note and deed of trust to the Bank of Simpson County. Dr. Byrd explained that his failure to list these items on his financial statement was an oversight.

Also appearing as an asset on the financial statement is a note receivable for approximately $ 183,000 from Southern Outdoors, Inc. The statement reflects that 92% of the stock in Southern Outdoors is owned by Dr. Byrd.

At the time of the original loan, the Bank of Mississippi obtained a credit report on Dr. Byrd. Dr. Byrd's debt to the Bank of Simpson County did not appear on the credit report. At trial, the loan officer testified that in reading the credit report nothing appeared to suggest that Dr. Byrd's financial statement was not correct.

The second financial statement, dated December 31, 1989, was provided to the bank in conjunction with the July, 1990 renewal, and shows Dr. Byrd as having a net worth of approximately $ 629,000. It also lists as assets the 60 acres in Smith County, Mississippi with a value of $ 30,000, the residence in Covington

County, Mississippi with an appraised value of $ 49,800, and the note receivable for approximately $ 184,000 from Southern Outdoors, Inc. Again, Dr. Byrd's financial statement mentions neither the conditional sales contract on the Covington County property nor the note and deed of trust to the Bank of Simpson County. The bank did not obtain a credit report at the time of the first renewal.

The third financial statement, dated August 31, 1990, was provided to the bank in conjunction with the January, 1991 renewal, and shows Dr. Byrd as having a net worth of approximately $ 820,000. The financial statement again lists as assets the 60 acres in Smith County, Mississippi, the residence in Covington County, Mississippi and the note receivable from Southern Outdoors. Again, Dr. Byrd's financial statement mentions neither the conditional sales contract on the Covington County property nor the note and deed of trust to the Bank of Simpson County. The bank did not obtain a credit report at the time of the second renewal.

The final financial statement, dated December 31, 1990, was provided to the bank in conjunction with the last renewal of the note in July, 1991. It shows Dr. Byrd as having a net worth of approximately $ 488,000. In the space of four months, Dr. Byrd's claimed net worth decreased by $ 332,000. As in the previous three statements, Dr. Byrd fails to list the conditional sales contract on the Covington County property and the note and deed of trust to the Bank of Simpson County. This financial statement simply lists as assets both the 60 acres in Smith County, Mississippi and the residence in Covington County, Mississippi. The note receivable

from Southern Outdoors no longer appears on the financial statement. Dr. Byrd testified that his accountant advised him it would be preferable to change the status of the $ 184,000 from a note receivable due from Southern Outdoors to an additional capital contribution to Southern Outdoors. At the time of the final renewal the bank did obtain a credit report. This credit report did reflect Dr. Byrd's debt to the Bank of Simpson County.

CONCLUSIONS OF LAW

In an action pursuant to § 523 of the Bankruptcy Code, the Plaintiff must establish its case by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). The issue of whether a particular debt is nondischargeable under the Bankruptcy Code is a matter of federal law. Id.; Allison v. Roberts (Matter of Allison), 960 F.2d 481, 483 (5th Cir. 1992).

The Bank of Mississippi seeks a judgment declaring its claim against Dr. Byrd nondischargeable pursuant to Bankruptcy Code § 523(a)(2)(B), which provides in pertinent part as follows:

> **11 USC § 523**
>
> **§ 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-
>
> . . .

> (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 . . . .

To prevail on its complaint, the Bank of Mississippi must prove each of the following elements by a preponderance of the evidence:

1. the existence of a statement in writing;
2. the writing must be materially false;
3. the writing must concern the debtor's financial condition;
4. the creditor must have reasonably relied on the statement; and
5. the statement must be made or published with the intent to deceive.

Comco Ins. Co. v. Brinkley (In re Brinkley), No. 890272JC, slip op. at 5-6 (Bankr. S.D. Miss. 1991, Ellington, Judge); First Interstate Bank of Nevada v. Green (In re Green), 96 B.R. 279, 282 (Bankr. 9th Cir. 1989).

Obviously each of the financial statements provided to the bank by Dr. Byrd constitutes a writing concerning Dr. Byrd's financial condition. Therefore, the first and third elements listed above are easily met.

While Dr. Byrd admits that each of the financial statements did not accurately reflect his financial condition as of

the date of each statement[2], he denies that the statements were materially false. Dr. Byrd also contends that the bank did not reasonably rely on the financial statements, and that the statements were not made with intent to deceive the bank. Therefore, the Court must determine whether the financial statements were materially false, whether the bank reasonably relied upon them, and whether the statements were made with an intent to deceive.

MATERIALLY FALSE FINANCIAL STATEMENTS

Dr. Byrd attempts to use a mathematical analysis to show that the financial statements were not materially false. In support of his position, he introduced evidence at trial regarding part of the bank's criteria for granting unsecured loans. Dr. Byrd argues that even if the inaccuracies in his financial statements were corrected, he still would have come within the bank's net worth and income parameters, and therefore, would have been granted the loan.

Regarding the issue of whether a financial statement is materially false, the Fifth Circuit Court of Appeals has stated:

> A materially false statement is one that `paints a substantially untruthful picture of a financial condition by misrepresenting information of the type which would normally affect the decision to grant credit.' In re Nance, 70 B.R. 318, 321 (Bankr. N.D. Tex. 1987), citing In re Denenberg, 37 B.R. 267 (Bankr. D. Mass. 1983). Further, in

---

[2] See Exhibit P-1, Defendant's Answers To Bank of Mississippi's First Request For Admissions.

> determining whether a false statement is material, a relevant although not dispositive inquiry is `whether the lender would have made the loan had he known the debtor's true situation.' In re Bogstad, 779 F.2d 370, 375 (7th Cir. 1985). Finally, it is well-established that writings with pertinent omissions may qualify as `materially false' for purposes of § 523(a)(2)(B). In re Biedenharn, 30 B.R. 342 (Bankr. W.D. La. 1983).

Jordan v. Southeast National Bank (Matter of Jordan), 927 F.2d 221, 224 (5th Cir. 1991), *overruled in part by*, Coston v. Bank of Malvern (Matter of Coston), 991 F.2d 257 (5th Cir. 1993)[3].

This Court's opinion is that Dr. Byrd did not prove the bank would have made the loan even if it had known his true financial situation. However, even if he had proved the bank would have loaned him the money, regardless of the errors in his financial statement, the Fifth Circuit has clearly held while such proof is relevant, it is not dispositive of the issue of whether the statement is materially false.

This Court finds that the inclusion as an asset on his financial statement of 60 acres of real property valued at $ 30,000, which Dr. Byrd has never owned, is a material misstatement.

Furthermore, this Court finds that Dr. Byrd's representation that he owned free and clear a $ 49,000 residence in Covington County, Mississippi constitutes a material omission. In

---

[3] In Coston v. Bank of Malvern (Matter of Coston), 991 F.2d 257 (5th Cir. 1993) the Fifth Circuit overruled it opinion in Matter of Jordan "to the extent it held that reasonableness of reliance is a conclusion of law." Id. at 259.

fact, the Covington County property was subject to a deed of trust securing a note in the principal amount of $ 39,000 and a conditional sales contract for $ 39,000.

This Court holds that the listing of a substantial asset that in reality Dr. Byrd never owned, and the omission of both a substantial liability to the Bank of Simpson County and the conditional sales contract on the Covington County property renders each of the financial statements materially false.

REASONABLE RELIANCE

In total, four financial statements were provided to the Bank of Mississippi, beginning with the original loan in January of 1990 and ending with the third renewal of the note in July of 1991. Dr. Byrd asserts that the Court should only consider whether the bank reasonably relied on the last financial statement provided to the bank. He argues that by the time of the final renewal in July of 1991, the bank was aware of certain "red flags," i.e., the appearance on the July 1991 credit report of the note to the Bank of Simpson County and the removal of the $ 184,000 note receivable from Southern Outdoors from his financial statement. Therefore, Dr. Byrd asserts that the banks reliance on the final financial statement was not reasonable.

Assuming *arguendo* that Dr. Byrd's final financial statement did contain "red flags" that should have alerted the lender to possible inaccuracies in the financial statement, it is this Court's opinion that, in the present case, where no additional

money was obtained with each renewal, it is the first and not the last financial statement provided to the bank that is relevant in determining the reasonableness of the bank's reliance.

The issue of "whether a bank waives its fraud claim when it renews notes after it becomes aware of inaccuracies on previous financial statements" is unresolved in the Fifth Circuit. First National Bank of LaGrange v. Martin (Matter of Martin), 963 F.2d 809, 815 (5th Cir. 1992). After identifying the two lines of decisions addressing the issue, the Fifth Circuit specifically declined to answer the question in Matter of Martin.

The Tenth Circuit Court of Appeals has specifically addressed the issue, holding that where the renewal of a note does not represent new debt incurred, renewal after the bank has knowledge of the false statement does not waive the bank's nondischargeability rights. Central National Bank and Trust Co. Of Enid, Oklahoma v. Liming (In re Liming), 797 F.2d 895 (10th Cir. 1986). In so holding, the court stated:

> Liming asserts that, even if Central National relied on the financial statement when it issued the loan, it did not rely on the statement when it issued the renewal note-when it knew Liming's correct finances. He also argues that, because Central National passed up its opportunity to call the loan, it is now either estopped or has waived its right to object to the false statement.
>
> We reject these arguments as well. The renewal only maintained Liming's initial debt, which was incurred in reliance on Liming's initial false statement. It did not represent a new debt incurred without regard to the initial false statement. Neither estoppel nor waiver applies because there was no reason to think that the renewal note represented either a statement that Central National would not

> have nondischargeability rights if bankruptcy arose or that Central National had promised not to assert such rights. If anything, the issuance of the renewal note showed Central National's great concern over Liming's false financial statement. It represents its attempt to make the best of a bad situation. We will not hold that the bank should have called the loan when it discovered the falsity of the financial statement in order to maintain its right to rely on the falsehood. Central National should not be penalized for accepting part payment and extending the date by which the loan must be repaid in an apparent effort to keep Liming afloat. A different ruling would frustrate the purposes of the bankruptcy law.

Id. at 898 (citations omitted). See also Northern Trust Co. v. Garman (Matter of Garman), 643 F.2d 1252 (7th Cir. 1980), *cert. denied*, 450 U.S. 910, 101 S.Ct. 1347, 67 L.Ed.2d. 333 (1981); Merrill Lynch Business Financial Services, Inc. v. Kim (In re Kim), 125 B.R. 594 (Bankr. C.D. Cal. 1991); Sovran Bank N.A. v. Allen (In re Allen), 65 B.R. 752 (E.D. Va. 1986). But see Camden National Bank v. Archangeli (In re Archangeli), 6 B.R. 50 (Bankr. D. Maine 1980).

In view of the foregoing authority, this Court holds that since the note renewals did not represent new debt incurred, the Court must consider only whether the bank reasonably relied on the financial statement provided to the bank in connection with the original note executed by Dr. Byrd in January, 1990.

In holding that the reasonableness of a lender's reliance is a factual determination, the Fifth Circuit has stated:

> Ultimately, our conclusion that the section 523(a)(2)(B) reasonableness of reliance determination is a factual one rests on the nature of the determination. The

> reasonableness of a creditor's reliance, in our view, should be judged in light of the totality of the circumstances. The bankruptcy court may consider, among other things: whether there had been previous business dealings with the debtor that gave rise to a relationship of trust; whether there were any "red flags" that would have alerted an ordinarily prudent lender to the possibility that the representations relied upon were not accurate; and whether even minimal investigation would have revealed the inaccuracy of the debtor's representations.

Coston v. Bank of Malvern (Matter of Coston), 991 F.2d 257, 261 (5th Cir. 1993)(citations omitted). See also Young v. National Union Fire Insurance Co. of Pittsburgh, PA. (Matter of Young), 995 F.2d 547 (5th Cir. 1993); Jordan v. Southeast National Bank (Matter of Jordan), 927 F.2d 221 (5th Cir. 1991).

When Dr. Byrd originally approached the Bank of Mississippi regarding a $ 20,000 loan, he had no individual past loan or deposit relationship with the bank. However, he supplied to the bank a professionally prepared financial statement and his last income tax return. In addition, the bank obtained a credit report on Dr. Byrd prior to extending the loan. The loan officer for the bank testified that neither the income tax return nor the credit report contained information that would appear to contradict Dr. Byrd's financial statement.

Dr. Byrd argues that a title report on his real property would have revealed that he did not own the 60 acres in Smith County and that the Covington County residence was encumbered with a deed of trust. However, the loan officer testified that the bank does not obtain title reports when considering an unsecured loan.

Dr. Byrd also argues that the existence of the $ 183,000 note receivable from a corporation in which he owns 92% of the outstanding stock is inherently suspicious and should be considered a "red flag."

This Court is unwilling to hold that a lender must obtain a title report on all real property listed on a financial statement before that lender's reliance thereon will be considered reasonable. Therefore, the fact that the bank did not obtain a title report on the real property listed on Dr. Byrd's financial statement does not render the bank's reliance unreasonable. Likewise, aside from Dr. Byrd's assertion that the $ 183,000 note receivable is inherently suspicious, no proof has been offered to show that the bank was unreasonable in relying on Dr. Byrd's professionally prepared financial statement as to the amount due him from a corporation in which he owns almost all of the stock.

In light of the evidence presented at trial, this Court holds that the Bank of Mississippi's reliance upon the financial statement provided by Dr. Byrd in connection with the original loan was reasonable.

INTENT TO DECEIVE

Finally, this Court must determine whether Dr. Byrd had the requisite intent to deceive the Bank of Mississippi. Dr. Byrd denies that he intended to deceive the bank. At trial Dr. Byrd explained that he listed the 60 acres in Smith County as an asset because he thought he owned the property as a result of a

conversation with his brother-in-law shortly after his father-in-law's death. However, Dr. Byrd admitted being aware that he has never paid any taxes or received a tax bill on the property. Dr. Byrd's explanation for omitting the conditional sales contract and the deed of trust on the Covington County property was that these items were somehow mistakenly omitted from the first financial statement. Since updated financial statements were prepared by reference to the previous statement, these items were never listed on any of the financial statements.

In Highland Village Bank v. Bardwell (Matter of Bardwell), 610 f.2d 228, 229 (5th Cir. 1980), the Fifth Circuit Court of Appeals held that "[o]btaining credit by a materially false financial statement will prevent bankruptcy discharge if the bankrupt either had actual knowledge of the falsity of the statement or demonstrated reckless indifference to the accuracy of the facts stated therein." (citations omitted). Intent to deceive may be inferred from the totality of the circumstances surrounding Dr. Byrd's transaction with the Bank of Mississippi. Jordan v. Southeast National Bank (Matter of Jordan), 927 F.2d 221 (5th Cir. 1991); FDIC v. Lefeve (In re Lefeve), 131 B.R. 588 (Bankr. S.D. Miss. 1991). In Young v. National Union Fire Insurance Co. of Pittsburgh, PA. (Matter of Young), 995 F.2d 547 (5th Cir. 1993) the Fifth Circuit went so far as to state: "Having determined that [the debtor] submitted false financial information, his `intent to deceive may be inferred from use of a false financial statement to obtain credit.'" Id. at 549 (citing In re Pryor, 93 B.R. 517, 518

(Bankr. S.D. Tex. 1988)). Furthermore, "debtors with business acumen . . . are to be held to a higher standard." Jordan v. Southeast National Bank (Matter of Jordan), 927 F.2d 221, 226 (5th Cir. 1991)(citations omitted).

Dr. Byrd is a highly educated man with an extensive background in business matters. Since graduation from dental school, he has been involved in several business ventures and has owned a substantial amount of real property. The Court has no doubt that Dr. Byrd possessed an understanding of both the incidents of real property ownership and the significance of encumbrances on real property. Therefore, in accordance with the standards set forth above, it is this Court's opinion that Dr. Byrd should be held to a higher standard than an individual possessing little education or business experience.

This Court holds that Dr. Byrd exhibited a reckless indifference to the accuracy of his June 30, 1989 financial statement which he provided to the Bank of Mississippi to obtain the original $ 20,000 unsecured loan in January of 1990. A finding of reckless indifference is sufficient to constitute an intent to deceive, and therefore, the Bank of Mississippi has proved the final element necessary for a judgment of nondischargeability pursuant to Bankruptcy Code § 523(a)(2)(B).

CONCLUSION

In summary, the Bank of Mississippi has shown by a preponderance of evidence that the financial statement provided to

the bank by Dr. Byrd in connection with the original promissory note was a materially false statement, in writing, concerning Dr. Byrd's financial condition, upon which the bank reasonably relied, and that Dr. Byrd's financial statement was made with intent to deceive. Therefore, a nondischargeable judgment against Dr. Byrd will be entered in favor of the Bank of Mississippi for the amount of the bank's claim against Dr. Byrd, together with attorney fees and costs of court, with interest accruing at the contract rate from the date of entry of the judgment.

A separate judgment consistent with this opinion will be entered in accordance with Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

DATED this the 30th day of March, 1994.

UNITED STATES BANKRUPTCY JUDGE

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

IN RE:
ANTHONY C. BYRD
MARY P. BYRD

CASE NO. 9200529JC

BANK OF MISSISSIPPI

VS.

ADVERSARY NO. 920156

ANTHONY C. BYRD

FINAL JUDGMENT

Consistent with this Court's opinion dated March 30, 1994, it is hereby ordered and adjudged that:

1. Judgment is entered against Anthony C. Byrd in favor of the Bank of Mississippi in the amount of $22,597.37 together with attorney fees in the amount of $7,500, with interest accruing at the contract rate of 10.5% per annum from the date of entry of judgment, and for all costs of court.

2. The aforementioned debt of Anthony C. Byrd to the Bank of Mississippi is excepted from discharge under the provisions of 11 U.S.C. § 523(a)(2)(B).

3. This is a final judgment for the purposes of Federal Rules of Bankruptcy Procedure 7054 and 9021.

SO ORDERED this the 29th day of April, 1994.

UNITED STATES BANKRUPTCY JUDGE