UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Western Division

In re:	)	Bankr. No. 02-50259
	)	
DELBERT BRINK	)	Chapter 7
d/b/a Deadwood Pawn	)	
f/d/b/a B.S. Enterprises	)	
Soc. Sec. No. 503 76 2107	)	
and	)	
PAMELA M. LAURENTI-BRINK	)	
f/d/b/a Gold Mountain Floral	)	
And Gifts	)	
f/k/a Pamela M. Harp	)	
f/k/a Pamela M. Laurenti	)	
Soc. Sec. No. 503-76-5270	)	
Debtors.	)	
	)	
FIRST WESTERN BANK, DEADWOOD	)	Adv. No. 02-5014
Plaintiff,	)	
-vs-	)	DECISION RE: COMPLAINT
	)	FOR DETERMINATION
DELBERT BRINK and	)	OF THE DISCHARGEABILITY
PAMELA BRINK	)	OF PLAINTIFF'S CLAIM
Defendants.	)	
	)	

The matter before the Court, on stipulated facts and briefs in lieu of trial, is Plaintiff First Western Bank's complaint for a determination that its claim against Defendants-Debtors Delbert and Pamela Brink is nondischargeable. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Decision and accompanying Judgment shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, the Court concludes that the subject debt is not excepted from discharge under either 11 U.S.C. § 523(a)(2)(B) or 11 U.S.C. § 523(a)(6).

I.

On September 6, 1995, Delbert Brink completed a personal financial statement for First Western Bank ("Bank") as part of a loan application process. Under Schedule 4 of the financial statement, which was entitled "RECEIVABLES DUE TO ME ON MORTGAGES AND CONTRACTS I OWN," Delbert listed Marlin Brink, his brother. He described the associated property with this debt as "Family Ranch." Under a balance due column, Delbert listed $48,000.00.

On May 22, 2000, Delbert and Pamela Brink completed a home mortgage application at the Bank. Under "Other Asset," the Brinks listed a one-quarter interest in the Brink family ranch and valued it at $62,500. Similarly, on April 13, 2001, Delbert Brink signed a personal financial statement as part of a loan refinancing with the Bank. Under "REAL ESTATE OWNED," Debtors listed "Share of Family ranch" and he valued it at $62,500.

On September 17, 2001, Delbert and Pamela Brinks borrowed $12,353.21 from the Bank for business purposes. This loan refinanced an earlier business loan. As security for the September 17, 2001, note, the Brinks pledged the following property, as described in the Security Agreement:

> **A. Equipment.** All equipment including, but not limited to, all machinery, vehicles, furniture,

> fixtures, manufacturing equipment, farm machinery and equipment, shop equipment, office and recordkeeping equipment, and parts and tools. All equipment described in a list or schedule which I give to you, will also be included in the Property, but such a list is not necessary for a valid security interest in my equipment.
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> **B. Specific Property.** 1966 INTERNATIONAL BULLDOZER SN#WTC-340-AB[,] 1978 EAGLE ULTRA LIGHT/ZENONA 235CC MOTOR[.]

The Bank filed a UCC1 form with the South Dakota Secretary of State on September 25, 2001. Listed on the UCC1 were a 1978 Eagle Ultra Light/Zenona 235cc motor ("the ultralight") and a 1966 International bulldozer ("the bulldozer"). Also included were Accounts and Other Rights to Payment, Inventory, Equipment, and General Intangibles, as those terms are defined on the UCC1.[1] Debtors also executed for the Bank a State of South Dakota Financing Statement that covered the ultralight and the bulldozer.

On May 7, 2002, Delbert and Pamela Brink ("Debtors") filed a Chapter 7 petition. Debtors scheduled the Bank as an unsecured claimant for $11,910.87 regarding the September 17, 2001, business loan. After the petition was filed, the Bank learned that Debtors were still in possession of the ultralight.

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[1] The collateral described on the document itself was slightly different than what the parties stated in their stipulated facts.

The parties jointly estimated that it has a value to collectors of $5,000 and Debtors are willing to turn it over to the Bank. As to the bulldozer, Debtors advised the Bank post-petition that Debtor Delbert Brink had sold it in the latter part of 2001 for $2,000. Debtors did not advise the Bank of this sale beforehand and Debtor Delbert Brink stated that he forgot the bulldozer, which is not a titled vehicle, had been pledged as collateral to the Bank.

Following post-petition discovery, the parties further stipulated that Debtors do not, in fact, have any interest in the Brink family ranch. Debtor Delbert Brink, in deposition testimony, stated that his father died in 1991 and left the ranch to his wife, Delbert's mother. Based on conversations with family members, Delbert understood some time thereafter that his two older brothers, and in particular his brother Marlin, were buying the ranch from their mother and that Delbert and his two other younger siblings would equally divide $120,000 of the sale proceeds with interest.[2] Thus, in the mid-1990s, Delbert valued his interest in the ranch at around $50,000, with

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[2] Debtor Delbert Brink stated that the ranch is comprised of 8,900 acres. He stated that he thought his mother had received some sort of cash up front and that the $120,000 balance, in which he was to receive a share, would be paid with interest.

the inclusion of interest. Shortly before Debtors filed bankruptcy, while Delbert was still trying to devise a means of avoiding bankruptcy, he talked to his mother about the ranch sale proceeds. At that time he learned that his mother had been receiving the sale proceeds in $10,000 annual installments for the past several years which she was using for her living expenses, that some sort of trust arrangement existed, and that Delbert and his two other siblings would only receive equal shares of any unpaid balance of the $120,000, if any, at the time of their mother's death. Debtor Delbert Brink stated at the deposition that he does not have any documentation regarding his brothers' purchase of the ranch, he does not know the total purchase price, he does not know if his brothers currently hold title to the land, and he has not seen any documentation regarding the trust or any residual interest he may have in the sale proceeds when his mother passes away.

The Bank timely commenced an adversary proceeding seeking a denial of Debtors' discharge under 11 U.S.C. § 727 or a determination that its claim against Debtor arising from the September 17, 2001, note was nondischargeable under either 11 U.S.C. § 523(a)(2) or § 523(a)(6). The parties agreed to

submit the matter on stipulated facts and briefs.[3] Because the Bank's brief did not specifically address § 727, at the Court's request the Bank's counsel confirmed by letter that the Bank now was seeking relief only under § 523(a)(2)(B) and § 523(a)(6).

II.
APPLICABLE LAW UNDER § 523(a)(2)(B).

For a debt to be excepted from discharge under § 523(a)(2)(B), the creditor must show that the debtor obtained credit:

1. by use of a written statement:
2. that was materially false;
3. regarding the debtor's or an insider's financial condition;
4. on which the creditor *reasonably* relied; and
5. with which the debtor intended to deceive.

First National Bank of Olathe, Kansas v. Pontow, 111 F.3d 604, 608 (8th Cir. 1997). The creditor must prove each element by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279 (1991); *Valley National Bank v. Bush (In re Bush)*, 696 F.2d 640, 644 n.4 (8th Cir. 1983). If any element is not met, the debt is

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[3] The Stipulated facts incorporated Debtor Delbert Brink's deposition, which included deposition exhibits, and "all other documents of record."

dischargeable. *Equitable Bank v. Miller (In re Miller)*, 39 F.3d 310, 304 (11th Cir. 1994). Any evidence presented must be viewed consistent with the congressional intent that exceptions to discharge be narrowly construed against the creditor and liberally for the debtor, thus effectuating the fresh start policy of the Code. *Caspers v. Van Horne (In re Van Horne)*, 823

Written statement. The statement at issue must be in writing. To satisfy this requirement, the statement must be one of the following: (1) written by the debtor, (2) signed by the debtor, or (3) adopted and used by the debtor. *Management Jets International, Inc. v. Mutschler (In re Mutschler)*, 45 B.R. 482, (Bankr. D.N.D. 1984)(quoting therein *In re Goff*, 17 B.R. 564, 567 (Bankr. W.D. Ky. 1982); *In re LaRocca*, 12 B.R. 56, 59 (Bankr. W.D. La. 1981)).

Materially false. A materially false statement is one that is substantially inaccurate, *Kunzler v. Bundy (In re Bundy)*, 95 B.R. 1004, 1008 (Bankr. W.D. Mo. 1989)(cites therein), or one that "paints a substantially untruthful picture." *The Heritage Bank v. Bohr (In re Bohr)*, 271 B.R. 162, 167 (Bankr. W.D. Mo. 2001). An omission of information may be considered materially false. *Bundy*, 95 B.R. at 1008.

Regarding financial condition. Though some courts have

narrowly construed the phrase "respecting the debtor's or an insider's financial condition" to encompass only balance sheets of net worth, the phrase has been more broadly interpreted in this Circuit. *Pontow*, 111 F.3d at 609 (citing *Barclays American/Business Credit, Inc. v. Long (In re Long)*, 774 F.2d 875, 877 (8th Cir. 1985)(nondischargeability of debt arising from alleged misrepresentation regarding inventory is governed by § 523(a)(2)(B)); *compare Skull Valley Band of Goshute Indians v. Chivers (In re Chivers)*, 275 B.R. 606, 614-15 (Bankr. D. Utah 2002)(narrow interpretation adopted). The broader interpretation reflects the language of the statute and will be applied in this District. *See Armbrustmacher v. Redburn (In re Redburn)*, 202 B.R. 917, 927-29 (Bankr. W.D. Mich. 1996)(statement that property is owned free and clear of liens is a statement respecting financial condition; stockholder report is a statement respecting financial condition).

Reasonable reliance. "Reasonable reliance" under § 523(a)(2)(B) has two components: the creditor must have *actually* relied on the debtor's written statement and that reliance must have been *reasonable*. *Ramsey National Bank & Trust Co. v. Dammen (In re Dammen)*, 167 B.R. 545, 552 (Bankr. D.N.D. 1994); *see Telmark, L.L.C. v. Booher (In re Booher)*, 284

B.R. 191, 200-01 (Bankr. W.D. Pa. 2002)(cites therein). For actual reliance to have occurred, the written statement must have played a substantial part in influencing the creditor's decision to deal with the debtor. *AT&T Universal Card Services v. Mercer (In re Mercer)*, 246 F.3d 391, 413 (5th Cir. 2001); *Abrams v. Sea Palms Assocs. (In re Abrams)*, 229 B.R. 784, 789 (B.A.P. 9th Cir. 1999). The written statement, however, need not be the only thing upon which the creditor relied. *Abrams*, 229 B.R. at 789; *Dammen*, 167 B.R. at 552.

The reasonableness[4] of a creditor's reliance on a false financial statement must be judged in light of the "totality of the circumstances." *Sinclair Oil Corp. v. Jones (In re Jones)*, 31 F.3d. 659, 662 (8th Cir. 1994) (quoting *Coston v. Bank of Malvern (In re Coston)*, 991 F.2d 257, 261 (5th Cir. 1993); *Pontow*, 111 F.3d at 610. The Court may consider whether there were any "red flags" that would have alerted a prudent lender that the statement was not accurate. *Id.* The Court also may consider whether even a minimal investigation should have revealed the inaccuracy of the debtor's representations or

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[4] The reasonable reliance standard under § 523(a)(2)(B) is different than under § 523(a)(2)(A), where the creditor's reliance must be justifiable. *See Field v. Mans*, 116 S.Ct. 437 (1995).

whether the statement was stale. *Id.*

Intent to deceive. Because direct proof of intent is nearly impossible to obtain, a creditor may present evidence of the surrounding circumstances from which intent may be inferred. *Van Horne*, 823 F.2d at 1287 (cites therein). The knowledge and experience of the debtor are two circumstances to consider. *Merchants National Bank v. Moen (In re Moen)*, 238 B.R. 785, 791 (B.A.P. 8th Cir. 1999). A reckless disregard for the truth of a statement "combined with the sheer magnitude of the resultant misrepresentation" may produce an inference of an intent to deceive. *Miller*, 39 F.3d. at 305 (quoting *In re Albanese*, 96 B.R. 376, 380 (Bankr. M.D. Fla. 1989)). If a debtor makes a misrepresentation under circumstances where he should have known its falsity, a reckless disregard for the truth may be found. *Moen*, 238 B.R. at 791 (quoting therein *In re Duggan*, 169 B.R. 318, 324 (Bankr. E.D.N.Y. 1994)). However, a showing of carelessness or presumptuousness, *Enterprise National Bank v. Jones (In re Jones)*, 197 B.R. 949, 963 (Bankr. M.D. Ga. 1996)(quoting therein *Miller*, 39 F.3d at 305)), or negligence is not sufficient. *Id.* at 964. If the creditor produces circumstantial evidence of fraudulent intent, the debtor cannot overcome that evidence with an unsupported assertion of honest

intent. *Bohr*, 271 B.R. at 169.

DISCUSSION.

The Court agrees with the Bank that the personal financial statement that Debtor Delbert Brink prepared for the Bank on September 6, 1995 (and that was updated or supplanted by a similar one thereafter) was a statement by Debtor, in writing, regarding the Debtors' financial condition, that was materially false. The Court will even assume, for purposes of this decision, that the Bank actually relied on the statement and that the Bank's reliance was reasonable.[5] Where the Bank's case fails is on the element of Debtors' intent. Fraudulent intent has not been shown.

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[5] At the final pre-trial conference on November 21, 2002, the parties only contemplated filing stipulated facts and briefs. There was no understanding between them on the record that each party could also file affidavits. Without the affidavits of the Bank's officers the record would be devoid of evidence regarding the Bank's actual and reasonable reliance on the subject financial statements. Since the Bank's case fails on the element of intent, however, the Court does not herein rule on whether the Bank's affidavits, even if received, would be sufficient evidence of the requisite reliance. If that had been the only issue, the Court most likely would have required a trial so that the evidence on the reliance element of § 523(a)(2)(B) could have been developed more fully, Debtors' counsel could have cross-examined the Bank's witnesses, and the Court could have judged these witnesses' credibility.

The Bank argues that Debtors[6] acted with the requisite reckless disregard for the truth when Debtor Delbert Brink stated that he had a substantial interest in the Brink family ranch. Debtor Delbert Brink's deposition testimony, however, essentially reflected what he set forth on the financial statements he gave the Bank. He thought he held an interest in the Brink family ranch or at least an interest in the sale proceeds when he completed the financial statements. While his description of that interest in the financial statements may not have been legally precise or appropriate for the category under which he listed it, the financial statements did reflect what Debtor Delbert Brink then thought his interest was. There is not sufficient evidence, direct or circumstantial, on which the Court can conclude anything more than that Delbert's statements about his interest in the ranch were presumptuous, which is not actionable under § 523(a)(2)(B).[7]

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[6] Debtor Pamela Brink completed and signed the mortgage applications by not the personal financial statements.

[7] The issue of intent does not readily lend itself to resolution by stipulated facts and briefs. *See United States v. One 1989 Jeep Wagoneer*, 976 F.2d 1172, 1176 (8th Cir. 1992)(summary judgment must be used with caution when intent is at issue). Had this matter been presented on a summary judgment motion, the motion likely would have been denied so that the Court could have heard the testimony of Debtor Delbert Brink and better judged his credibility. Since the parties agreed prior

III.
APPLICABLE LAW UNDER § 523(a)(6).

A debt for a willful and malicious injury to another person or to the property of another person is excepted from discharge under 11 U.S.C. § 523(a)(6). The question of what constitutes a "willful" injury has been answered by the Supreme Court:

> The word "willful" in [§ 523](a)(6) modifies the word "injury," indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury. Had Congress meant to exempt debts resulting from unintentionally inflicted injuries, it might have described instead "willful acts that cause injury." Or, Congress might have selected an additional word or words, *i.e.*, "reckless" or "negligent," to modify "injury." Moreover, as the Eighth Circuit observed, the [§ 523](a)(6) formulation triggers in the lawyer's mind the category "intentional torts," as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend "the *consequences* of an act," not simply "the act itself." Restatement (Second) of Torts § 8A, Comment *a*, p. 15 (1964) (emphasis added).

Kawaauhau v. Geiger, 523 U.S. 57, 61-62 (1998).

"Malicious" conduct is something more than a reckless disregard for the creditor's economic interests and expectancies. *Barclays American/Business Credit, Inc, v. Long (In re Long)*, 774 F.2d 875, 881 (8th Cir. 1985). Absent some

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to the final pre-trial conference to waive the right to trial and to submit the matter to the Court on stipulated facts and briefs, the Court will abide by that agreement.

additional aggravated circumstances, establishing that a debtor knowingly violated the creditor's legal rights is insufficient to establish malice. *Id.* Instead, the expected harm to the creditor must be certain or substantially certain to occur. *Id.* The conduct must necessarily be known by the debtor to cause injury. *Id.* In sum, "malicious" conduct is conduct targeted at the creditor that is certain or almost certain to cause harm, *Waugh v. Elderidge (In re Waugh)*, 95 F.3d 706, 711 (8th Cir. 1996), and that is committed without just cause or excuse. *Dennis v. Novotny (In re Novotny)*, 226 B.R. 211, 218 (Bankr. D.N.D. 1998)(quoting therein *Tinker v. Colwell*, 193 U.S. 473, 486 (1904)).

Intent is a fact question. *Waugh*, 95 F.3d at 710; *Johnson v. Fors (In re Fors)*, 259 B.R. 131, 135-36 (B.A.P. 8th Cir. 2001). Evidence of the surrounding circumstances may be presented from which intent may be inferred. *Caspers v. Van Horne (In re Van Horne)*, 823 F.2d 1285, 1287 (8th Cir. 1987)(cites therein). The debtor may be required to overcome the circumstantial evidence with more than unsupported assertions of honest intent. *Id.* at 1287-88 (cites therein).

As noted above, to prevail on a nondischargeability complaint, the creditor must establish by a preponderance of the

evidence all the elements required. *Grogan*, 498 U.S. at 286-87; *Shahrokhi)*, 266 B.R. at 707. The exceptions to discharge are construed narrowly in order to effect the fresh start policy of the Bankruptcy Code. *Miller*, 276 F.3d at 429.

DISCUSSION.

Debtor Delbert Brink[8] admitted that he sold the bulldozer without receiving permission from the Bank, without remitting the proceeds to the Bank, and for a price lower than what was listed on the financial statements given to the Bank. The record also shows that Debtor sold the bulldozer only a short time after rewriting a business loan with the Bank and after giving the Bank a security interest in the bulldozer. There is no other evidence, however, from which the Court can deduce what Debtor Delbert Brink's intent was. He testified as his deposition that he had forgotten about the Bank's security interest when he sold the bulldozer. There is nothing in the record to refute or cast doubt on that statement or to show that Brink sold the bulldozer with the targeted intent of causing financial harm to the Bank. In this Circuit, "malicious" conduct under § 523(a)(6) is something more than a debtor's

[8] There is no evidence that Debtor Pamela Brink played any role in the sale of the bulldozer.

reckless disregard for the creditor's economic interests and expectancies. *Long*, 774 F.2d at 881. Since no more than Debtor Delbert Brink's recklessness for the Bank's interest in the bulldozer has been shown and since exceptions to discharge must construed in Debtors' favor, the Court concludes that the Bank has not established that its claim is excepted from discharge under § 523(a)(6).

A judgment will be entered for Defendants-Debtors that declares that the subject debt is not excepted from discharge under either § 523(a)(2)(B) or § 523(a)(6).

Dated this 7 day of February, 2003.

BY THE COURT:

Irvin N. Hoyt
Bankruptcy Judge

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered
FEB 07 2003
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

ATTEST:
Charles L. Nail, Jr., Clerk
By _____ Deputy Clerk

(SEAL)

I hereby certify that a copy of this document was electronically transmitted, mailed, hand delivered or faxed this date to the parties on the attached service list.

FEB 07 2003

Charles L. Nail, Jr., Clerk
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