UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Northern Division

In re:	)	Bankr. No. 01-10336
	)	
DAVID L. OCHS	)	Chapter 7
Soc. Sec. No. [redacted]-8757	)	
	)	
and	)	
	)	
ANNETTE L. OCHS	)	
Soc. Sec. No. [redacted]-6819	)	
	)	
Debtors.	)	
	)	
	)	
MICHAEL J. ARNOLDY,	)	Adv. No. 02-1008
SONIA R. ARNOLDY	)	
	)	
Plaintiffs,	)	
	)	DECISION
-vs-	)	
	)	
DAVID L. OCHS	)	
ANNETTE L. OCHS	)	
	)	
Defendants.	)	

The matter before the Court is Plaintiff's nondischargeability complaint. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Decision and accompanying Order shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, the Court concludes that Plaintiffs' prepetition claim against Defendants-Debtors is excepted from discharge under 11 U.S.C. § 523(a)(2)(B).

I.

David L. and Annette L. Ochs filed a Chapter 7 petition on December 6, 2001. On their schedule of debts, they listed Jake

Jundt as an unsecured creditor holding a judgment for $10,985.19. The claim was described as having been assigned to Michael and Sonjia Arnoldy. The Ochs' Statement of Financial Affairs indicated that the Arnoldys had a collection action pending on the petition date.

The Arnoldys timely commenced an adversary proceeding against the Ochs. The Arnoldys alleged that Debtor David Ochs sold them a new home when a mechanic's lien by Jake Jundt existed and that Ochs had failed to disclose this encumbrance before or at the sale closing. The Arnoldys satisfied the $11,555.01 judgment that Jundt obtained subsequent to the sale and they now want their indemnification claim against Debtor David Ochs declared nondischargeable for fraud under 11 U.S.C. § 523(a)(2), (a)(4), or (a)(6). Debtors answered with a general denial.

A trial was held August 15, 2002.[1] Based on the pleadings, the Court directed Plaintiffs' counsel to focus his evidentiary presentation on § 523(a)(2) and § 523(a)(6) since the facts plead did not disclose a fiduciary relationship under § 523(a)(4) or the taking of property of another (embezzlement or larceny) under § 523(a)(4). Plaintiffs' counsel advised the Court that Plaintiffs would seek relief under both §§ 523(a)(2)(A) and (a)(2)(B), as well as § 523(a)(6).

---

[1] Defendants-Debtors' motion for summary judgment was denied.

The mechanic's lien holder, Jacob L. Jundt, a cement contractor for the past 25 years, testified that he worked on a house being built by Ochs for the Arnoldys in the fall of 1998. In the first part of 1999, Ochs and Jundt discussed the bill and Ochs said he would take care of it. Ochs did not pay it. When the sale of the newly constructed home from Ochs to Arnoldy was ready to be closed, Jundt stated the title company did not call him to see if he had been paid in full. Jundt testified this was contrary to the usual procedure he had experienced in similar house sale closings where the title company called him to insure that he had been paid. In early March 1999, Jundt contacted the Arnoldys, who then owned the home, about his bill. Jundt filed his mechanic's lien for $7,602 on March 15, 1999. In the fall of 2000, Jundt commenced foreclosure proceedings. A judgment in his favor for $10,000 was entered June 27, 2001. Eventually, the Arnoldys satisfied the judgment by paying Jundt $11,555.01. Ochs did not reimburse the Arnoldys before he filed bankruptcy.

LaVonne Johnson from the Clark County Title Company ("Title Company") testified that the Title Company handled the closing of the sale of the newly constructed house from Ochs to Arnoldy on December 29, 1998. She stated that before the closing, Ochs' construction lender sent to the Title Company all the lien waivers the lender had from the subcontractors and materialmen who worked

on or provided materials for the Arnoldy house. From these lien waivers, the Title Company completed a "Statement of Owner and Contractor of Lender and Escrowee," which listed all the known subcontractors and materialmen on the project. The Title Company then verified, by calling each subcontractor or materialman on the list, that each had been paid for the goods or services they provided. If a subcontractor or materialman's lien waiver did not come to the Title Company from Ochs' lender, the Title Company would not call that subcontractor. In this situation, the construction lender did not have a lien waiver from Jundt. Consequently, Jundt was not listed on the "Statement of Owner and Contractor of Lender and Escrowee" that the Title Company prepared, and the Title Company did not call Jundt before the closing to verify that he had been paid.

The "Statement of Owner and Contractor of Lender and Escrowee" was one of the documents that Ochs was given to review and sign on the closing date. He did not correct it at that time to include Jundt. At the closing, Ochs also signed two additional affidavits: a seller's affidavit, which the Arnoldys would not see at the closing, and an "Affidavit and Agreement," which was signed by both Ochs and the Arnoldys. Neither affidavit disclosed that Jundt had not yet been paid. Had the Title Company known about Jundt's claim, Johnson testified that the Title Company would have insured

that he received payment through the closing process.

Defendant-Debtor David Ochs testified that he has been in the construction business for many years, starting with his father's construction business in his teens. He stated that he and his wife started their own construction corporation, Ochs Development, Inc., in the spring of 1997. Ochs Development, Inc., built three homes, including the one purchased by the Arnoldys. Ochs used two concrete contractors on the Arnoldy home due to certain time constraints.

Ochs stated that before the sale closing he gave to his construction lender all the unpaid bills that he had. The lender then paid these subcontractors and materialmen and obtained lien waivers from them. The lender then forwarded all the lien waivers from the project to the Title Company. Ochs acknowledged that three subcontractors, including Jundt, were not on the "Statement of Owner and Contractor of Lender and Escrowee" that the Title Company prepared and that he signed at the closing. Ochs said Jundt was not listed on the "Statement of Owner and Contractor of Lender and Escrowee" prepared by the Title Company, which had been based on the lien waivers furnished by the construction lender, because Jundt had not yet submitted a bill. Though at some earlier point in time Ochs knew that Jundt had not yet been paid, Ochs stated that at the closing he was not specifically aware of Jundt's

omission from the "Statement of Owner and Contractor of Lender and Escrowee." Ochs characterized the omission as an oversight arising from the "hurry up" nature of the closing. After the closing on the Arnoldy house, Ochs had available credit with his construction lender. Ochs did not use that credit to pay Jundt.

Ochs recalled that he and Jundt talked about the unpaid bill right before Jundt filed his lien, which was after the closing. Ochs stated he had told Jundt that he would pay him upon receipt of a bill. Ochs could not recall a conversation with the Arnoldys around this same time. By the time of Jundt's foreclosure action, Ochs said he was having financial problems and could not pay Jundt.

Plaintiff Michael Arnoldy testified that he began living in the house in October 1998, before the closing. His family joined him later. He stated that at the closing, he was unaware that Jundt had not been paid: he thought all bills for labor and materials had been paid, though no one specifically told him that. He relied on the accuracy of all the paper work done in connection with the closing and on the realtor and title company who handled the sale. Arnoldy stated he would not have completed the purchase had he known that Jundt had not been paid. Arnoldy acknowledged signing several documents at the closing, but he had no recollection of any specific document or their content. Arnoldy said he first learned of Jundt's unpaid bill when Jundt contacted

him in March 1999. In response, Arnoldy contacted Ochs. Ochs told Arnoldy that he (Arnoldy) should not even know about this problem as it was just between he and Jundt and that he (Ochs) would take care of the matter. Arnoldy agreed Ochs' response was forthright, though he was suspicious about why Ochs had not resolved the problem sooner. Arnoldy testified that he paid Jundt's lien after the title insurance company did not.

II.

As discussed briefly by the Court at the beginning of the trial and as demonstrated by the evidence at trial, the facts in this adversary proceeding do not support a finding of nondischargeability under § 523(a)(4). Debtor David Ochs was not a fiduciary for the Arnoldys and he did not secrete any property that belonged to Arnoldy through either embezzlement or larceny. *See United States v. Walker (In re Walker)*, Bankr. No. 01-31798, Adv. No. 02-7001, slip op. (Aug. 26, 2002); *Sohler v. Barnes (In re Barnes)*, Bankr. No. 01-50397, Adv. No. 01-5014, slip op. (July 30, 2002)(appeal filed). There also was no evidence that Ochs acted with a specific intent to cause the Arnoldys financial harm when he failed to disclose Jundt's outstanding bill prior to or at the closing. Thus, the Arnoldy's claim cannot be found to have arisen from a willful and malicious act by the Ochs as governed by § 523(a)(6). *See Walker*, slip. op. at 8-11. Further, the Arnoldys

did not identify any false representation or actual fraud by the Ochs that was "other than a statement respecting [the Ochs'] financial condition]" that would entitle them to relief under § 523(a)(2)(A). *See First National Bank of Olathe, Kansas v. Pontow*, 111 F.3d 604, 608-09 (8th Cir. 1997)(subdivisions (A) and (B) of § 523(a)(2) are mutually exclusive). Accordingly, those several counts of the Arnoldys' complaint will be dismissed.

In his closing, the Arnoldys' counsel argued that the evidence established nondischargeability under § 523(a)(2)(B). That is where the Court will focus its attention. For a debt to be excepted from discharge under § 523(a)(2)(B), the creditor must show that the debtor obtained money by use of a written statement:

1. that was materially false;

2. regarding the debtor's or an insider's financial condition;

3. on which the creditor *reasonably* relied; and

4. with which the debtor intended to deceive.

Pontow, 111 F.3d at 608. The creditor must prove each element by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279 (1991). If any element is not met, the debt is dischargeable. *Equitable Bank v. Miller (In re Miller)*, 39 F.3d 301, 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 construed for the

debtor, thus effectuating the fresh start policy of the Bankruptcy Code. *Caspers v. Van Horne (In re Van Horne)*, 823 F.2d 1285, 1287 (8th Cir. 1987).

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. *Pollow*, 111 F.3d at 609 (citing *Darclays 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 here. *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).[2]

Reasonable reliance.[3] The reasonableness of a creditor's reliance on a false statement regarding financial condition 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 (cites therein). The Court may consider whether there were any "red flags" that would have alerted a prudent creditor that the written statement was not accurate. *Pontow*, 111 F.3d. at 610. The Court also may consider whether even a minimal investigation would have revealed the

---

[2] The Court notes that in *Alport v. Ritter (In re Alport)*, 144 F.3d. 1163 (8th Cir. 1998), a home purchaser's claim against a debtor-general contractor arising from unpaid subcontractors and materialmen was found nondischargeable under § 523(a)(2)(A) based on the debtor-general contractor's false statements, including some false documentation, that the subcontractors and materialmen had been paid or would be paid. The appellate court did not specifically discuss whether the debtor-general contractor's written statements were "respecting the debtor's or an insider's financial condition." The lower courts' decisions in *Alport* were not reported. Accordingly, the *Alport* decision is not binding authority for whether the relief sought by the Arnoldys arising from Och's written statements about unpaid subcontractors and materialmen is governed by § 523(a)(2)(A) or § 523(a)(2)(B).

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

inaccuracy of the debtor's representations or 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 falcity, 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 Dank 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.

III.

Debtor does not dispute that the unpaid bills that he gave his lender prior to the closing did not contain Jundt's claim and that, consequently, Jundt was not included on the "Statement of Owner and Contractor of Lender and Escrowee." Further, Ochs does not dispute that he failed to disclose Jundt's unpaid bill at the time of the closing. He also does not dispute that information about Jundt's unpaid bill can be characterized as related to his (Ochs') financial condition. Thus, two elements of § 523(a)(2)(B) have been established.

The next element is whether the Arnoldys reasonably relied on Ochs' misinformation in the closing documents, which means the Arnoldys must have actually relied on the documents and that this reliance was reasonable. The Arnoldys directed the Court's attention to three documents related to the real estate sale closing on which they say they relied.[4] Plaintiff Michael Arnoldy

---

[4] One document was the "Affidavit and Agreement" provided by the title insurance company that was signed by Ochs and notarized at the closing. (It was also signed by the Arnoldys, but the purpose of their signatures was unclear.) In this document, Ochs stated that all subcontractors who had furnished work or materials to date had been paid. Through the document, Ochs also agreed to indemnify the title insurance company from any unfiled materialman's lien and that this benefit also inured to the Arnoldys as the party assured under the policy.

The second document was the "Affidavit" and it too was signed by Ochs. Therein, he stated there were no pending legal proceedings, liens, or unrecorded interests that might affect the property. This document was also signed at closing. The Arnoldys

candidly stated that he relied on the veracity of all the closing documents and the people who prepared them, not on any one document in particular. Under these circumstances the Court is satisfied that there was *actual* reliance. The "Statement of Owner and Contractor of Lender and Escrowee" regarding paid and unpaid subcontractors and materialmen that Ochs signed was a key element to the closing documents, and the closing could not have taken place without this information.

The Court also concludes that the Arnoldys' reliance on the closing documents regarding the status of subcontractors and materialmen was *reasonable*. The documents did not contain any red flags indicating obvious omissions, especially since one concrete contractor was included. Indeed, an experienced title company and Ochs' construction lender also found that the information provided by Debtor David Ochs passed muster. That Plaintiff Michael Arnoldy could not recall the specific content of each document is not fatal to his reasonable reliance on them. He had a clear understanding

---

did not see this document.

The third document identified by the Arnoldys as falling under § 523(a)(2)(B) was the "Statement of Owner and Contractor to Lender and Escrowee." This statement was prepared by the Title Company from the lien waivers given to the Title Company by Ochs' construction lender. By signing it, Ochs verified a list, as of December 25, 1998, of all the subcontractors and materialmen who had worked on the house and what they were paid or were to be paid. (Ochs' signature was dated December 28, 1998, but the notary's signature was dated December 29, 1998.)

that the documents did not disclose any problems that would prevent the house sale from closing.

Finally, the Court concludes that a preponderance of circumstantial evidence demonstrates that Debtor David Ochs' omission of Jundt's claim from the closing documents was fraudulent as a product of Ochs' reckless disregard for the truth. The evidence at trial established that: before the closing, Ochs, in haste, only gave his construction lender the unpaid bills that he had in hand; though Ochs did not have a bill from Jundt when he collected the information for his lender, he knew that Jundt had not yet been paid; though the title company prepared the closing documents, they were based chiefly on lien waivers provided by Ochs' lender, who had relied on the bills presented by Ochs; Ochs had the opportunity to review the closing documents before he signed them; and Ochs had available credit with his lender around the time of the closing with which he may have paid Jundt, but he never did so over the next many months while Jundt's materialmen's lien was pending. Most important, Ochs was responsible to insure that the subcontractors and materialmen on the "Statement of Owner and Contractor of Lender and Escrowee" was complete and accurate. No one else was in a position to provide this vital information. For Debtor David Ochs not to have a higher regard for insuring the accuracy of this information in the closing documents constituted

a reckless disregard for the truth. Accordingly, the Arnoldys' claim against Ochs is rendered nondischargeable under § 523(a)(2)(B).

An order will be entered declaring nondischargeable the Arnoldys' pre-petition claim against Debtors.[5]

Dated this 30 day of September, 2002.

BY THE COURT:

Irvin N. Hoyt
Bankruptcy Judge

ATTEST:

Charles L. Nail, Jr., Clerk

By: Deputy Clerk

UNITED STATES BANKRUPTCY COURT SEAL

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

SEP 30 2002

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

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.

SEP 30 2002

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By

[5] Before entry of a judgment, Plaintiffs may want to consider a formal dismissal of Defendant-Debtor Annette L. Ochs from their Complaint as it does not appear that she was involved in the matter at hand.

Curt R. Ewinger
PO Box 96
Aberdeen, SD 57402-0096

Annette L. Ochs
PO Box 946
Aberdeen, SD 57402

David L. Ochs
PO Box 946
Aberdeen, SD 57402

Randall B. Turner
202 South Main Street, #600
Aberdeen, SD 57401