IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 7
	)	
CHRISTOPHER J. TIGANI,	)	Case No. 10-11855(PJW)
	)	
Debtor.	)	
_____	)	
	)	
COMMUNITY BANK DELAWARE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adv. Proc. No. 11-52325(PJW)
	)	
CHRISTOPHER J. TIGANI,	)	
	)	
Defendant.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stephen W. Spence
Stephen A. Spence
PHILLIPS, GOLDMAN &
SPENCE, P.A.
1200 North Broom Street
Wilmington, DE 19806

Counsel to Community
Bank Delaware

Christopher J. Tigani 06786-015
MDC Brooklyn
P.O. Box 329002
Brooklyn, NY 11232

Pro Se

Dated: December 5, 2012

WALSH, J.

Procedural Background

1. The debtor, Christopher J. Tigani (Defendant), filed the above captioned bankruptcy on June 8, 2010. The case was originally filed under Chapter 11, but it was converted to Chapter 7 on November 29, 2010.

2. The plaintiff, Community Bank Delaware (Plaintiff), filed this adversary proceeding on June 13, 2011, objecting to the discharge of a certain $350,000 debt.

3. On April 2, 2012, a one day trial was held.

4. Plaintiff, represented by counsel, presented three witnesses in its case in chief. Plaintiff first called Ronda Myers, Plaintiff's Chief Operations Officer ("Myers"). It then called Lynda Messick, Plaintiff's President ("Messick"). It also called Defendant. Defendant, appearing pro se, cross-examined both Myers and Messick. In addition, he testified on his own behalf in his defense. Defendant did not present any other witnesses.

The Debt and the Objection to Discharge

5. It is undisputed that Defendant owes Plaintiff a valid debt. Defendant did not offer any testimony contesting the validity of the debt. Plaintiff loaned Defendant $350,000 on December 12, 2008 with a term of one year and monthly interest payments (the "Loan"). (Ex. 12 at 6 (Promissory Note)); (Tr. 23 (Myers), 93-94 (Messick)) In December 2009, Defendant sought an

extension of the loan, which was granted on January 8, 2010, extending the maturity date to September 17, 2010 and requiring monthly interest payments (the "Extension"). (Ex. 12 at 9); (Tr. 24 (Myers), 95 (Messick)) Defendant defaulted on the extended loan's monthly interest payments, and Plaintiff instituted a confessed judgment proceeding on April 30, 2010. (Tr. 94 (Messick))

6. An objection to discharge is governed by § 523(a)(2)(B) of Title 11. Section 523(a)(2)(B) states:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) 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.

Plaintiff has the burden to prove each element by a preponderance of the evidence.

7. "In order for a statement made by the debtor to render a debt nondischargeable under § 523(a)(2)(B), the statement, to be in writing, must have been either signed by the debtor, written or produced by the debtor, or have been adopted and used by the debtor." Vangelisti v. Kerbaugh (In re Kerbaugh), 159 B.R. 862, 871 (Bankr. D. N.D. 1993).

> Written statements need not be prepared nor signed by the debtor himself; rather, the writing requirement is satisfied if the debtor "adopted and used, or caused [the document] to be prepared." McCleary, 284 B.R. at 885; see Ripley Co. State Bank v. Shelton, 42 B.R. 547, 548 (Bankr. E.D. Mo. 1984)(stating that nothing requires a debtor to sign a financial statement, only that "the debtor caused[d] (the financial statement) to be made or published").

In re Richmond, 429 B.R. 263, 295 (Bankr. E.D. Ark. 2010). Tax returns are among the many types of documents that satisfy this standard. See In re Whisnant, 411 B.R. 559, 564-66 (Bankr. E.D. Tenn. 2009)(finding that federal tax returns submitted to the plaintiff by the debtor "fall squarely within the scope of statements in writing respecting a debtor's financial condition contemplated by § 523(a)(2)(B).").

8. Defendant submitted written statements to Plaintiff. Defendant submitted a financial statement and three years of tax returns to Plaintiff in support of his loan request. (Exs. 1-4) While those documents do not bear Defendant's signature, they were adopted and used by Defendant in seeking the Loan. (Tr. 11-15, 55 (Myers), 134-35 (Defendant)) Similarly, Defendant submitted another financial statement in connection with the Extension. (Ex. 6) Once again, while that financial statement does not bear Defendant's signature, it was adopted and used by Defendant in seeking the Extension. (Tr. 25-27, 57 (Myers))

9. Defendant's written statements were materially false. "Material falsity has been defined as 'an important or substantial

untruth.' A recurring guidepost used by courts has been to examine whether the lender would have made the loan had he known of the debtor's true financial condition." In re Cohn, 54 F.3d 1108, 1114 (3rd Cir. 1995)(quoting In re Bogstad, 779 F.2d 370, 375 (7th Cir. 1985)). The Cohn Court enumerated two factors that determine materiality: whether (1) the lender would have made the loan had he known of the debtor's true financial condition; and (2) whether the false representation influenced the lender's decision to extend credit. Id.

10. The Court finds that Defendant's written statements were materially false regarding his ownership of N.K.S. Distributors, Inc. (the "Company"). All of the written statements submitted by Defendant represented that Defendant is a substantial owner of the stock of the Company. The 2008 financial statement, in a section entitled "Business Interests," lists the Company as an interest worth $49,633,210 and states "Owner: Christopher Tigani." (Ex. 1 at 6) That document also contains a balance sheet that "shows the value of [Defendant's] assets and liabilities, and [Defendant's] net worth," and it includes the following entry, "NKS Distributors, Inc....$49,663.210." (Ex. 1 at 9) Similarly, the 2009 financial statement includes a balance sheet that "shows the value of [Defendant's] assets and liabilities and [Defendant's] net worth," and it includes the following entry "NKS Distributors, Inc. (42.40% of $39,663,210)...$17,451,812." (Ex. 6 at 7) As for the Company's

tax returns, all three state in Schedule E that "Christopher Tigani" is an owner of 44% of the Company's common stock. (Exs. 2-4)

11. Defendant's ownership interest in the Company, however, was held in trust. The trust document, entitled "Irrevocable Trust for the Benefit of Christopher J. Tigani" was admitted into evidence. (Ex. 10) The trust became effective on December 31, 1999, with Robert F. Tigani, Sr. as the trustor and Defendant as the trustee. The trust provides that 52 shares of the Company are to be held "for the benefit of [Robert F. Tigani, Sr.'s] son, CHRISTOPHER J. TIGANI," with the net income distributed to Defendant. (Ex. 10, Art. II.B) The trust includes a provision that prohibits the assignment of any interest in income or principal and provides that no beneficiary's creditors can attach or reach such an interest. (Ex. 10, Art. 11) The trust document makes it clear that the Company's shares are owned by the trust and not Defendant individually. (Ex. 10)

12. Defendant's failure to disclose in his written statements, in particular his financial statements, that his ownership interest in the Company was held in trust constitutes a false representation. Defendant admitted at the hearing that the written statements were "incorrect" about that point. (Tr. 126, 128-29)

13. Furthermore, Defendant's false representations were material. Plaintiff's witnesses credibly testified that, had they known that Defendant's interest in the Company was held in trust, they would have restructured or denied the Loan and Extension. (Tr. 67-71 (Myers), 85-88, 96-97, 107, 113, 117 (Messick)) This was so because Defendant's ownership in the Company was the largest asset on his balance sheet, and Plaintiff was willing to structure the Loan and Extension as unsecured with the belief that it could look to the liquidation of Defendant's interest in the Company in the event of a default. Defendant's interest in the Company was and is beyond Plaintiff's reach. (Tr. 86)

14. *Defendant's false representations related to his financial condition.*

> Under Code § 523(a)(2)(B), a lender has the burden of proving that a debtor made a false written representation "respecting the debtor's . . . financial condition." The term "financial condition" is undefined in the Code. Some Courts have narrowly defined statements of "financial condition" as those contained in balance sheets, profit and loss statements, and statements of net worth. However, the majority of the reported decisions on the issue articulate a broader definition of "financial condition" -- one which encompasses statements concerning the condition or quality of a single asset or liability impacting on the debtor's financial picture.

In re Priestley, 201 B.R. 875, 882 (citations omitted).

This Court has sided with the majority rule, adopting the broader definition of "financial condition." Id.

15. The Court finds that Defendant's false representations "related to his financial condition." As stated above, Defendant

falsely represented his ownership interest in the Company by failing to disclose that said interest was held in trust. That false representation related to Defendant's financial condition. The false representation meets the broad definition used by a majority of courts including this Court because the representation concerns the condition and value of a single asset that impacts Defendant's financial situation. Indeed, Defendant's interest in the Company is presented as the largest asset on his balance sheet. (Exs. 1 at 6, 6 at 7)

16. The Bank reasonably relied upon Defendant's false representations. "The reasonableness of a creditor's reliance under § 523(a)(2)(B) is judged by an objective standard, i.e., that degree of care which would be exercised by a reasonably cautious person in the same business transaction under similar circumstances." In re Cohn, 54 F.3d at 1117. There are three factors to consider:

> (1) the creditor's standard practices in evaluating credit-worthiness (absent other factors, there is reasonable reliance where the creditor follows its normal business practices); (2) the standards or customs of the creditor's industry in evaluating credit-worthiness (what is considered a commercially reasonable investigation of the information supplied by debtor); and (3) the surrounding circumstances existing at the time of the debtor's application for credit (whether there existed a "red flag" that would have alerted an ordinarily prudent lender to the possibility that the information is inaccurate, whether there existed previous business dealings that gave rise to a relationship of trust, or whether even minimal investigation would have revealed the inaccuracy of the debtor's representations).

Id.

17. Plaintiff reasonably relied on Defendant's representations about his ownership interest in the Company. Plaintiff proved that it in fact relied upon Defendant's false representations. Myers, the loan officer, testified that she relied on Defendant's representations about his ownership interest in the Company when she was structuring the Loan and Extension and deciding upon her recommendations. (Tr. 18, 20-22, Ex. 5 (Loan Worksheet); Tr. 28-31, 35, Ex. 7 (Extension Worksheet)) While Myers testified that she was not sure how the loan application process would have proceeded if she had known the truth, she testified twice that it was likely that she would not have approved the Loan. On cross-examination by Defendant, Myers testified as follows:

> Q Okay. Would you have recommended the bank make the loan if it said Christopher J. Tigani, trustee?
>
> A I can't answer that now. I don't know. I would say no, we would not have, I would not have, but I don't know at this point.

(Tr. 38:9-13)

* * *

> A I believe that we would have either A, not done the loan, or B, you know, again, structured it differently....

(Tr. 71:19-20) Similarly, Messick testified that she relied upon Defendant's representation about his ownership interest in the Company when she approved the Loan. (Tr. 80-82) And Messick

further testified that Plaintiff's loan committee, of which she is a member, relied upon that same representation when it approved the Extension. (Tr. 82-83) Indeed, Messick testified at the hearing, upon questioning by Defendant: "We thought you owned this stock." (Tr. 111:21) Messick stated her belief that the Loan would not have been approved as structured. On cross-examination by Defendant, Messick testified as follows:

> Q In connection with this original application process, had it been disclosed in Mr. Tigani's financial statement or on the tax returns that he didn't own the stock of N.K.S. Distributors, and that it was in fact owned entirely by a trust, what would have been different in terms of the loan application process at the bank?
>
> A Well, any time -- if we had known it was in the name of a trust, that was -- it usually calls for review, but we really don't like to do that then because it adds another layer of protection for the client and exposure to risk for the bank.
>
> There have been times where we have loaned money to trusts. We've had the individual guarantees of the individuals, we've also had the trust guarantees. So it would have been a whole new ball game had we known that.

(Tr. 85:21-86:9)

* * *

> Q And had he, Mr. Tigani disclosed to the bank in connection with his original application that oh, by the way, my single largest asset on my balance sheet isn't actually owned by me, it's owned by a trust, from a policy standpoint in 2008, what would the bank have expected at that point in terms of promises to pay and protection?
>
> A Oh, it would have been a different ball game. It would have been a different ball game. And we would have looked to collateral.

(Tr. 97:2-10)

* * *

Q Okay. So if the stock was held in trust, it wouldn't have made a difference, would it?

A You know, and I think Ronda tried to say, you know, I don't know what we would do. I wouldn't take the stock as collateral, but if we had an opportunity to review the trust documents and see that you know, it was a stock that might be marketable, you know, maybe. But again, we'd have to look at it.

I would say no. My flat answer would, if you're asking me to draw on my years of experience, if I had learned that the trust controlled the stock, it probably would have stopped this loan as it was structured for me completely.

(Tr. 106:20-107:6)

* * *

This was going to be a short term loan. You were going to liquidate some real estate. You were trying to sell a condo here or a town home there, it was going to be very short term.

It is extremely expensive for both the borrower and the bank to do a short term real estate secured loan. Given the fact that you had an enormous net worth of which most of it was N.K.S., at that time the lender determined that the fastest, most expedient and probably the cheapest way for both you the borrower and us the bank to do this was to do a short term, which it was, unsecured term note.

You're asking what ifs. You're saying that if I had seen that this, if I had known that you had N.K.S. stock or that the stock was in a trust. She might have gone back and looked at this. But you're asking me to kind of re-engineer something that was already done.

This is not a menu, it's not a Chinese menu where you pick one from column A and one from column B. The lender put together the best deal for you and the best deal for the bank at the time. Had we known that that

> stock was all owned by the trust, you know, what would Ronda have come back and recommended? I don't know. This might have been plan B.

Tr. 109:22-110:18)

* * *

> Q Okay. And what makes you believe that I had any knowledge that if you saw that I owned the stock personally, or if it said $49 million in trust there would be any difference?
>
> A Because if that stock were under the name of the trust, we would not have made that loan that way.

(Tr. 113:13-18)

18. Plaintiff's reliance upon Defendant's false representation was reasonable. The Court first takes note of Plaintiff's witnesses' experience in the banking industry. At the time of the hearing, Myers, the loan officer, had 14 years of experience in commercial lending, and Messick, Plaintiff's president, had been a banker for 38 years. (Tr. 9, 84) Plaintiff's testimony and documentary evidence demonstrated that Plaintiff conducted a reasonable investigation of Defendant's credit-worthiness. Myers drew on her experience and requested and relied upon Defendant's professionally prepared financial statements and tax returns. (Tr. 10-11, 15, 25, 37) Further, Myers testified that she was in frequent contact with Defendant about his request, and that she went over the financial statements with Defendant. (Tr. 13, 55) Messick testified that she reviewed the credit memorandum produced by Myers when deciding upon the Loan, and that the loan

committee relied on another credit memorandum produced by Myers to decide upon the Extension. (Tr. 81-84, 102-03; Exs. 5, 7)

19. There was no evidence of any red-flags that should have alerted Plaintiff to the falsity of Defendant's representations. Both Myers and Messick testified that they had no reason to believe that Defendant's interest in the Company was held in trust. (Tr. 20, 23 (Myers), 82 (Messick))

20. Defendant's representations were made with intent to deceive. "[T]he intent to deceive can be inferred from the totality of the circumstances, including the debtor's reckless disregard for the truth." In re Cohn, 54 F.3d 1108, 1118-19. Plaintiffs may use circumstantial evidence to prove this prong because "a debtor will rarely, if ever, admit that deception was his purpose." Id. at 1118. Under this approach, "a creditor can establish intent to deceive by proving reckless indifference to, or reckless disregard of, the accuracy of the information in the financial statement of the debtor when the totality of the circumstances supports such an inference." Id. at 1119.

21. From a business and financial prospective, the Defendant cannot be viewed as unsophisticated. Defendant holds a four-year undergraduate degree in management and marketing. (Tr. 132) For a number of years prior to filing bankruptcy, Defendant was running the Company, a business that he claimed had a value in excess of

$49,000,000. (Ex. 1 at 6) His degree of sophistication is confirmed by his own testimony. For example, he testified as follows:

> Q Did you become familiar with, either from education or from experience working at the firm, with the presentation of the financial statements of N.K.S. Distributors?
>
> A Yes.
>
> Q Do you understand what a balance sheet is?
>
> A Yes, absolutely.
>
> Q You understand what net worth is?
>
> A Yes.
>
> Q You understand the concept of gross and operating income and net income?
>
> A Yes.

(Tr. 133:10-20)

He further testified as follows:

> Q Well, in connection with banking, had you been involved in banking relationships with other banks prior to 2008?
>
> A Yes.
>
> Q And isn't it true that you'd been asked by various banks that you borrowed money from to provide either something prepared by you or by others, a financial statement showing your net worth at the time of the application?
>
> A Yes.
>
> Q And so you were not unfamiliar with the concept of having to submit a personal financial statement in order to get a loan?
>
> A No.

(Tr. 135:5-16)

22. The Court finds that, under the totality of the circumstances, Defendant acted with intent to deceive Plaintiff because he acted with reckless disregard for the truth regarding his ownership interest in the Company. Defendant knew the trust existed and that it held the shares of the Company. (Tr. 120-22, Ex. 10) He acknowledged that he signed the trust document (Tr. 120), which was prepared by his family's trust attorney who also drafted his will. (Tr. 123-24) Yet, despite Defendant's knowledge of the trust, he did not disclose its existence to Plaintiff. (Tr. 136, 143) The Court concludes that Defendant did not disclose the trust in order to induce Plaintiff to provide the Loan and approve the Extension on favorable terms. Messick testified that she believed that Defendant intended to deceive Plaintiff in order to get the Loan and Extension. (Tr. 112-15)

23. There are numerous facts in the record that lead the Court to find Defendant's claim of ignorance as not credible. As noted above, Defendant is a sophisticated business and consumer, who should know the basic effect of the trust. He had prepared his own financial statements and he had interacted with banks on many occasions, including submitting financial statements showing his net worth for the purpose of borrowing money. (Tr. 133-35) He started working for the Company right out of college, and he became the executive vice-president and manager of the Company in 2000.

(Tr. 132-33) From that point forward, he was responsible for the financial matters of the Company (which, during that time, was a successful liquor distributor worth many millions of dollars), and he testified that he is familiar with financial statements, balance sheets, net worth, etc. (Tr. 133) Defendant's personal ownership of the Company was represented as making up most of his net worth, and the ins and outs of the Company had consumed most of Defendant's adult life leading up to the time he submitted the subject documents to Plaintiff. This is not a case of a misunderstanding about the ownership of a minor, obscure asset. Defendant testified that "at the time that the financial statement was prepared, to me there was no difference between me owning it and the trust owning it." (Tr. 123) I find this testimony to be not credible. The relevant facts lead the Court to conclude that Defendant acted with reckless disregard for the truth regarding his ownership in the Company.

Defendant's Counter Arguments are Without Merit

24. Defendant advanced two primary arguments in opposition to Plaintiff's evidence, besides his claim of ignorance. First, Defendant makes the point that Plaintiff did not take his interest in the Company as collateral. Thus, according to Defendant, his interest in the Company was irrelevant or immaterial to Plaintiff's decisions. (See Tr. 148) Defendant repeatedly questioned Plaintiff's witnesses on this issue, asking why they did not take

Defendant's Company stock as collateral. (Tr. 39, 44, 56-57, 62-64, 106, 109-12) Messick explained that Plaintiff, a small community bank, will rarely take stock as collateral, especially if it is non-traded privately held stock, because Plaintiff has to assign it a value for regulators. (Tr. 106) More importantly, however, is the point that Plaintiff, in its credit analysis, may properly rely upon the availability of Defendant's stock without having to take it as collateral. As Messick explained, Plaintiff viewed Defendant's interest in the Company as a key source of liquidity in the event Defendant defaulted:

> Q ...when you see a person with high net worth like this as to the risk the bank is taking of collection when and if the borrower defaults, if they are listing the fact that they own a significant percentage of the stock of a company, is that one of the factors that allows you to still consider making an unsecured loan versus demanding real estate collateral?
>
> A Yes. There's -- lending's changed over the last 15 years, but the one thing that has remained constant is the ability for high net worth individuals who may not have strong cash flow to get loans. And the reasoning behind that is, unlike you and I that may live paycheck to paycheck and depend on our cash flow for the sole repayment of the loan, a high net worth individual has a significant amount of assets that can be liquidated to pay off that credit. That's the biggest difference.
>
> I know they say cash is king, and it is, until you're dealing with high net worth individuals, and then it's really a balancing of the income that's required to satisfy the debt and their ability to liquidate to pay that off.

(Tr. 96:7-25-97:1; see id. 117) Similarly, Defendant pointed to Plaintiff's decision to take an assignment of life insurance policy

as collateral and not his stock. Plaintiff's witnesses made it clear that the sole purpose of the life insurance assignment was to protect Plaintiff in the event Defendant died. (Tr. 43, 86)

25. Second, Defendant argues that Alex Pires, Plaintiff's Chairman of the Board of Directors and a member of the loan committee, knew or should have known that Defendant's interest in the Company was held in trust. (See Tr. 146-49) It appears that Pires referred Defendant to Plaintiff regarding the Loan, and further that Pires knew about Defendant's struggle with his father over the control of the Company. Pires, however, was not shown any documents that may have disclosed information about Defendant's trust ownership in the Company, or otherwise made aware of anything relevant to that issue, until *after* the Extension. (Tr. 149-54)

26. In sum, both of Defendant's counter arguments are without merit.

Conclusion

Based upon the foregoing findings of fact and conclusions of law, the Court will enter an order holding that Defendant's debt to Plaintiff is non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(B).

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Plaintiff,	)	
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v.	)	Adv. Proc. No. 11-52325(PJW)
	)	
CHRISTOPHER J. TIGANI,	)	
	)	
Defendant.	)	

ORDER

For the reasons set forth in the December 5, 2012 Findings of Fact and Conclusions of Law, Debtor's debt owed to Community Bank Delaware is not discharged.

Peter J. Walsh
United States Bankruptcy Judge

Dated: December 5, 2012