ORDERED.

Dated: January 20, 2022

Caryl E. Delano
Chief United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
www.flmb.uscourts.gov

In re:

Louis Alan Maier,

Debtor.
_____/

Case No. 2:19-bk-05580-FMD
Chapter 7

David Christa and
Christa Construction, LLC,

Plaintiffs,

v.

Louis Alan Maier,

Defendant.
_____/

Adv. Pro. No. 2:20-ap-318-FMD

ORDER (1) GRANTING DEBTOR'S MOTION FOR SUMMARY JUDGMENT AND (2) DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

David Christa and Christa Construction, LLC (together, "Plaintiffs") initiated this proceeding by filing a *Complaint to Determine Debtor's Discharge and*

Dischargeability of a Debt (the "Complaint").[1] In the Complaint, Plaintiffs allege that (1) Louis Maier ("Debtor") owes them $1.5 million under an indemnity agreement, (2) the debt is nondischargeable under 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(2)(B)[2] because Debtor fraudulently induced them to enter the indemnity agreement, and (3) Debtor's discharge should be denied under § 727(a)(2) because Debtor fraudulently transferred cash and real property before and after filing his bankruptcy case.

The parties have filed motions for summary judgment ("Debtor's SJ Motion"[3] and "Plaintiffs' SJ Motion"[4]). The Court has carefully considered the motions, the record, and the arguments of counsel and concludes:

First, although Plaintiffs hold an unliquidated fraudulent inducement claim against Debtor, they failed to meet their burden of proof on summary judgment to establish the claims under §§ 523(a)(2)(A) or 523(a)(2)(B).

Second, Debtor met his burden on summary judgment to show an absence of evidence to support Plaintiffs' claims under §§ 523(a)(2)(A) and 523(a)(2)(B), the burden then shifted to Plaintiffs, and Plaintiffs did not meet their burden to show an

[1] Doc. No. 1.
[2] Unless otherwise stated, statutory citations are to the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.*
[3] Doc. No. 28.
[4] Doc. No. 31.

issue of fact. Therefore, Plaintiffs do not hold a claim against Debtor for fraudulent inducement under either §§ 523(a)(2)(A) or 523(a)(2)(B).

Third, Debtor met his burden on summary judgment to show an absence of evidence to support Plaintiffs' objections to Debtor's discharge under § 727 because Plaintiffs do not hold an allowable claim against Debtor for breach of a contract for indemnity or for contribution, the burden then shifted to Plaintiffs, and Plaintiffs did not meet their burden to show an issue of fact.

Accordingly, the Court will deny Plaintiffs' SJ Motion and grant Debtor's SJ Motion.

I. FACTS

Prior to filing his bankruptcy petition, Debtor, a licensed Master Electrician,[5] lived in Rochester, New York, and worked there as an electrical contractor through his solely owned limited liability company, EastCoast Electric, LLC ("EastCoast"). EastCoast was formed in 1999.[6]

In September 2016, Debtor and EastCoast entered a *General Agreement for Indemnity* with QBE Insurance Corporation ("QBE") under which Debtor and EastCoast agreed to reimburse QBE for losses related to any surety bonds issued by QBE on EastCoast's behalf.[7] Generally, governmental entities require construction

[5] Doc. No. 31, ¶ 10; Doc. No. 32, ¶ 11.
[6] Doc. No. 32, ¶¶ 7-9.
[7] Main Case, Doc. No. 10-1; Doc. No. 28-4.

contractors to provide a surety bond to guarantee the contractors' performance of the construction contracts and the contractors' payment of all subcontractors on the projects.[8] Frequently, and particularly with smaller contractors, surety companies (such as QBE) require the contractors' principals to agree to indemnify the surety company in the event the surety company is required to complete the project or pay the property owner on the bond.

In 2017, EastCoast entered a contract with the Rochester Joint Schools Construction Board to provide electrical services for School 16 (the "School 16 Project"). At that time, QBE was concerned about EastCoast's financial condition, and required EastCoast and Debtor to obtain an additional indemnitor prior to issuing a surety bond for the School 16 Project.[9]

Debtor asked Plaintiff David Christa ("Christa"), his longtime friend, to join as a co-indemnitor on the bond for the School 16 Project, and in early September 2017, gave Christa his personal financial statement dated May 6, 2016 (the "2016 Financial Statement").[10]

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[8] For example, the "Miller Act requires all prime contractors in federal construction contracts to post a performance bond, which ensures the completion of the contract, and a payment bond, which protects subcontractors and individuals furnishing labor and material for the contract. 40 U.S.C. § 270a(a)(1) and (2)." *Westchester Fire Ins. Co. v. U.S.*, 52 Fed. Cl. 567, 570 n.3 (Court of Federal Claims 2002).

[9] Doc. No. 28, ¶¶ 2-3.

[10] Doc. No. 31-1; Doc. No. 32, ¶ 18.

The 2016 Financial Statement refers to "Key" and appears to be a form used by Key Bank to obtain information regarding an individual's income, assets, and liabilities prior to extending credit or opening an account. Debtor's information is handwritten on the form. Debtor stated that his salary was $114,000 and that his rental income was $49,000. Debtor also listed assets with a total value of $4,286,000, including marketable securities with a value of $1,041,000, Debtor's interest in EastCoast with a value of $1,200,000, and four parcels of real estate with a total value of $1,995,000. The 2016 Financial Statement does not list any mortgages on the real estate.

On September 11, 2017, Christa wrote Debtor a letter (a) congratulating him on the School 16 Project; (b) stating, "I want to get you our agreement to issue payment/performance bonds;" (c) setting out a schedule for payment of a $100,000 fee to Christa in four installments between September 30, 2017, and March 15, 2018; and (d) stating, "In addition, I will need you to indemnify myself as well as Christa Construction LLC" (the "Letter Agreement).[11]

Christa signed the Letter Agreement as president of Christa Construction, LLC ("Christa LLC"); Debtor signed the Letter Agreement individually and as president

[11] Doc. No. 31-2.

of EastCoast. Plaintiffs acknowledge that Debtor paid Christa the $100,000 provided for in the Letter Agreement.[12]

Two days after the date of the Letter Agreement, on September 13, 2017, Debtor, EastCoast, Christa, and Christa LLC, as "Indemnitors" executed a *General Agreement for Indemnity (Bond Specific)* (the "QBE Indemnity Agreement"),[13] in which they agreed to indemnify QBE against any loss that QBE incurred on its surety bond for the School 16 Project.

In paragraph 6 of the QBE Indemnity Agreement, the Indemnitors agreed:

> [I]f any of the Indemnitors shall become obligated to make payment to Surety [QBE] under this Agreement, then the breaching parties shall indemnify, defend, and hold the other party harmless from any and all damages, expenses, or claims arising in connection with such obligation.

And in paragraph 18 of the QBE Indemnity Agreement, the parties agreed that it was governed by New York law.

On October 12, 2017, a month after Debtor and Plaintiffs executed the QBE Indemnity Agreement, Debtor signed a second personal financial statement, again on a form used by "Key" (the "2017 Financial Statement").[14] In the 2017 Financial Statement, Debtor listed his salary as $104,000 and his rental income as $19,200. He also listed assets with a total value of $3,700,000, including marketable securities with

[12] Doc. No. 32, ¶ 23 ("The oral terms and conditions affirmed in the September 11, 2017 Letter were consummated by [Debtor] and EastCoast timely making the four $25,000 installments.").
[13] Doc. No. 31-3.
[14] Doc. No. 31-4.

a value of $965,000, his interest in EastCoast with a value of $300,000, and seven parcels of real estate with a total value of $2,075,000, including properties referred to herein as the "Grenell Property," the "Rutgers Property," and the "Cape Coral Property." In the "liabilities" section of the 2017 Financial Statement, Debtor made the notation "RLI ? [sic] Mortgages," but he stated neither the amounts of the mortgages nor the properties they encumbered.

In March 2018—six months after execution of the QBE Indemnity Agreement—QBE notified Christa that Debtor and EastCoast had "fallen behind on their obligations on the School 16 Project."[15]

Between August 2, 2018, and May 21, 2019, Debtor entered into a number of transactions involving his real property:

a. Debtor paid $144,000 to his son, allegedly as the prepayment in full of a 12-year lease of the Rutgers Property.[16] (Previously, in 2016, Debtor had transferred the Rutgers Property to his son, who then leased the property back to Debtor);[17]

b. Debtor transferred the Cape Coral Property to his daughter,[18] who, three months later, deeded the property back to Debtor.[19] A month after his daughter

[15] Doc. No. 32, ¶ 26.
[16] Doc. No. 1, pp. 36-37.
[17] Debtor purchased the Rutgers Property in August 2015 and transferred it to 71 Rutgers Street, LLC, in September 2015. In June 2016, 71 Rutgers Street, LLC, transferred the Rutgers Property to Debtor's son who immediately leased the Rutgers Property to Debtor for a 12-year term beginning on June 1, 2016, and ending on June 1, 2028, with rent due "in full 12 yrs $144,000." (Doc. No. 31-5.)
[18] Doc. No. 31-6.
[19] Doc. No. 31-8.

transferred the Cape Coral Property back to him, Debtor signed a promissory note for $120,000 to his daughter and secured the note with a mortgage on the Cape Coral Property;[20] and

c. Debtor sold the Grenell Property to a third party for $400,000, from which Debtor received net proceeds of $395,058.74 (the "Grenell Proceeds").[21] The day after the sale closed, Debtor wire transferred the Grenell Proceeds to his Morgan Stanley annuity account (the "Morgan Stanley Account").[22]

On January 23, 2019, QBE sent Debtor a letter demanding payment of $1.5 million "representing the combined total of the claims asserted to date" on all of the bonds issued by QBE on EastCoast's projects.[23] And on May 31, 2019, QBE sued Debtor, EastCoast, Debtor's daughter, and Debtor's son in state court in New York for breach of contract, indemnification, specific performance, and his alleged fraudulent transfers of the Cape Coral Property, the Rutgers Property, and the Grenell Property.[24]

On June 12, 2019, Debtor filed a Chapter 7 bankruptcy petition in the Middle District of Florida. In his bankruptcy schedules, Debtor claimed the Cape Coral

[20] Doc. No. 31-9.
[21] Doc. No. 1, ¶ 78; Doc. No. 5, ¶ 78; Doc. No. 31-10.
[22] Doc. No. 31-14, pp. 157-159; Doc. No. 33, p. 44.
[23] Doc. No. 28-4.
[24] Main Case, Doc. No. 10, Ex. B.

Property as his exempt homestead property and the Morgan Stanley Account, valued at $487,817.27, as an exempt annuity.[25]

Two months after he filed his bankruptcy case, Debtor executed and recorded a warranty deed transferring the Cape Coral Property to "Louis Alan Maier Trust U/A dated December 21, 2017, Louis Alan Maier, Trustee."[26]

Plaintiffs filed a proof of claim in Debtor's bankruptcy case in which they assert that QBE is holding them liable for $1,495,164 under the School 16 Project bond, less credits for payment of $350,000 and "an additional $125,000.00 in services and good will on other non-bonded projects."[27] There is no evidence that Plaintiffs have made any additional payments to QBE.

II. THE ADVERSARY PROCEEDING

In the Complaint, Plaintiffs allege that QBE has demanded $1.5 million under the QBE Indemnity Agreement from each of them as indemnitors.

In Counts I and II of the Complaint, Plaintiffs allege that Debtor made fraudulent representations, both orally and in the 2016 Financial Statement, to induce them to enter the QBE Indemnity Agreement, and that they have been injured by Debtor's fraudulent representations in the amount of QBE's demand. Therefore,

[25] Main Case, Doc. No. 15, pp. 12-13.
[26] Doc. No. 31-11.
[27] Main Case, Claim No. 4-1, p. 4.

Plaintiffs assert that their indemnity claim against Debtor is nondischargeable under both § 523(a)(2)(A) and § 523(a)(2)(B).

In Counts III and IV of the Complaint, Plaintiffs allege that Debtor made prepetition and postpetition fraudulent transfers to his son, daughter, and the Morgan Stanley Account such that his discharge should be denied under §§ 727(a)(2)(A) and 727(a)(2)(B).

Debtor denied the material allegations of the Complaint.[28] In Debtor's SJ Motion, Debtor seeks a determination that Plaintiffs are not his creditors and therefore have no standing to file the Complaint, and that the Complaint fails to state claims under §§ 523(a)(2)(A) and 523(a)(2)(B). In Plaintiffs' SJ Motion, they seek judgment in their favor on all four counts of the Complaint. The parties filed responses and replies,[29] and the Court conducted a hearing to consider Debtor's SJ Motion and Plaintiffs' SJ Motion.[30]

III. SUMMARY JUDGMENT STANDARD

Under Federal Rule of Civil Procedure 56(a), a party "may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought." Summary judgment is appropriate when

[28] Doc. No. 5.
[29] Doc. Nos. 36, 39, 41, 42.
[30] Doc. No. 43.

the moving party shows that there is no genuine dispute as to any material fact and that it is entitled to judgment as a matter of law.[31]

For issues on which the movant bears the burden of proof, the movant must come forward with credible evidence that, if not controverted at trial, would entitle the movant to a directed verdict. But for issues on which the nonmovant bears the burden at trial, the moving party may either show that there is an absence of evidence to support the non-moving party's claim or may come forward with affirmative evidence showing that the non-moving party will be unable to prove its claim or defense at trial. If the moving party carries its initial burden, the responsibility shifts to the non-moving party to show the existence of a genuine issue of material fact.[32]

Here, Plaintiffs bear the burden of proof to establish their standing to assert the claims under § 523 and § 727,[33] and also bear the burden of proof as to each required element of the claims.[34]

[31] Fed. R. Civ. P. 56(a), made applicable to this proceeding by Fed. R. Bankr. P. 7056.
[32] *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115-16 (11th Cir. 1993); *In re Fields*, 2018 WL 1616840, at *2 (Bankr. M.D. Fla. Mar. 30, 2018).
[33] *In re Bilfield*, 493 B.R. 748, 751-53 (Bankr. N.D. Ohio 2013).
[34] *In re Daniel*, 613 B.R. 374, 379 (Bankr. M.D. Fla. 2020).

IV. ANALYSIS

The parties agree that their relative rights under the QBE Indemnity Agreement are governed by New York law.[35] In addition, because all the events giving rise to Plaintiffs' claims arose in New York, New York law controls.[36]

A. Plaintiffs' Nondischargeability Claims Under § 523(a)(2)

1. Plaintiffs have standing to prosecute claims under § 523.

Plaintiffs allege in their Complaint that "[a]s a result of the Debtor's misrepresentations to Plaintiffs, Plaintiffs have been forced to pay QBE in excess of $475,000.00 in cash and services."[37] In Debtor's SJ Motion, Debtor primarily asserts that Plaintiffs lack standing to file the Complaint because "Plaintiffs are not creditors of [Debtor] under the Bankruptcy Code, or under contract law, or the common law of the State of New York."[38] Debtor contends that, under New York law, "as between two jointly obligated co-indemnitors, absent one paying the obligation in full, the co-indemnitor is not entitled [to] recover from his co-indemnitor."[39] In other words,

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[35] Doc. No. 31-3, § 18.
[36] Bankruptcy courts borrow from the law applicable in diversity cases to hold that the forum state's choice of law rules apply where the underlying rights are defined by state law. *In re Richert*, 632 B.R. 877, n. 116 (Bankr. M.D. Fla. 2021). Florida has adopted the "significant relationships test" set forth in the Restatement (Second) of Conflict of Laws. *In re Bill Hionas*, 361 B.R. 269, n. 4 (Bankr. S.D. Fla. 2006) (citing *Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999 (Fla. 1980)).
[37] Doc. No. 1, ¶ 33.
[38] Doc. No. 28, p. 5.
[39] Doc. No. 28, p. 14.

Debtor characterizes Plaintiffs' claims solely as claims for subrogation or contribution.

But in their nondischargeability claims under § 523(a)(2), Plaintiffs allege that Debtor fraudulently induced them to enter the QBE Indemnity Agreement. Under New York law, a party who has been fraudulently induced to enter a contract may seek as damages its actual pecuniary loss, which may include out-of-pocket loss and consequential damages. Under the "out-of-pocket" measure of damages, the claimant may recover "that which is necessary to restore a party to the position it occupied before commission of the fraud."[40]

The definition of a "claim" in the Bankruptcy Code is broad, and means "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."[41] Although no judgment has been entered on Plaintiffs' fraud claims against Debtor and they remain unliquidated in Debtor's Chapter 7 case, "courts have recognized that 'a bankruptcy court has the authority to liquidate a state law claim and enter a monetary judgment against a debtor when

[40] *In re Signature Apparel Group LLC*, 577 B.R. 54, 93 (Bankr. S.D.N.Y. 2017) (citations omitted). *See also In re Basic Food Group, LLC*, 2018 WL 5805943, at *15 (Bankr. S.D.N.Y. Oct. 31, 2018).
[41] § 101(5)(A).

deciding if that claim/judgment is non-dischargeable in a debtor's bankruptcy case.'"[42]

Here, Plaintiffs' claims under § 523(a)(2) are based on Debtor's alleged fraud, they have alleged out-of-pocket losses arising from the alleged fraud, and this Court has the authority to liquidate the claims in connection with Plaintiffs' nondischargeability claims under § 523(a)(2). The Court concludes that Plaintiffs hold unliquidated fraudulent inducement claims against Debtor and, therefore, they have standing to pursue their claims under § 523(a)(2).

2. Plaintiffs' § 523(a)(2)(A) Claim

Under § 523(a)(2)(A), a debt is nondischargeable if it is obtained by "false pretenses, a false representation, or actual fraud, *other than a statement respecting the debtor's or an insider's financial condition*."[43] Section 523(a)(2)(A) covers three types of conduct: (a) false pretenses, which is an implied misrepresentation intended to create or foster a false impression; (b) a false representation, which is an express misrepresentation; and (c) actual fraud, which is a false or misleading representation made with the intent to induce reliance, and upon which the plaintiff detrimentally

[42] *In re Richert*, 632 B.R. at 892 (quoting *In re Carroll*, 464 B.R. 293, 312 (Bankr. N.D. Tex. 2011), *aff'd sub nom Carroll v. Farooqi*, 486 B.R. 718 (N.D. Tex. 2013).
[43] 11 U.S.C. § 523(a)(2)(A) (emphasis added).

relied.[44] The three concepts generally are interpreted in accordance with common law.[45]

Under New York law, to establish a fraudulent inducement claim, a plaintiff must show (a) a material misrepresentation or omission of fact that was collateral to the contract it induced, (b) the defendant's knowledge of its falsity, (c) the defendant's intent to defraud, (d) the plaintiff's reasonable reliance on the misrepresentation, and (e) damage to the plaintiff.[46] However, for a fraudulent inducement claim to be nondischargeable under § 523(a)(2)(A), the creditor's reliance need only be justifiable, which involves a subjective measurement of the creditor's individual capacity and knowledge.[47]

Here, Plaintiffs allege in the Complaint that Debtor fraudulently represented (a) that he "had the knowledge, skill, wherewithal and ability to complete the School 16 Project;" (b) that he would not cause any claims to be asserted against the bond issued by QBE for the School 16 Project; and (c) that he would indemnify Plaintiffs for any losses incurred by Plaintiffs on the School 16 Project.[48]

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[44] *In re Polasky*, 2021 WL 614032, at *5 (Bankr. M.D. Fla. Feb. 17, 2021) (citing *In re Osborne*, 604 B.R. 582, 597 (Bankr. M.D. Ga. 2019)).
[45] *In re Kovacs*, 2021 WL 1603600, at *9 (Bankr. E.D.N.Y. Apr. 23, 2021) (quoting *Husky Intern. Electronics, Inc. v. Ritz*, 578 U.S. 356, 360, 136 S. Ct. 1581, 1586, 194 L. Ed. 2d 655 (2016) (quoting *Field v. Mans*, 516 U.S. 59, 69, 116 S. Ct. 437, 133 L. Ed. 2d 351 (1995)).
[46] *In re Greene Avenue Restoration II Corp.*, 597 B.R. 202, 211 (Bankr. E.D.N.Y. 2019).
[47] *In re Kovacs*, 2021 WL 1603600, at *9; *In re Polasky*, 2021 WL 614032, at *5 (citations omitted).
[48] Doc. No. 1, ¶¶ 22, 23.

For the following reasons, the Court finds that (a) Plaintiffs did not meet their burden to prove that the debt allegedly owed to them was obtained by Debtor's fraudulent inducement under § 523(a)(2)(A); (b) Debtor has met his burden on summary judgment to show the absence of evidence to support a claim under § 523(a)(2)(A), and the burden then shifted to Plaintiffs; and (c) Plaintiffs did not meet their burden to show a genuine issue of material fact.

First, Plaintiffs acknowledge that Debtor was, and is, a licensed Master Electrician in the City of Rochester, New York,[49] and do not allege that he lacked the skill to complete the School 16 Project.

Second, to the extent that Plaintiffs contend that Debtor misrepresented his financial ability to complete the School 16 Project and to reimburse them for any losses, those representations are statements respecting Debtor's financial condition and are outside the scope of § 523(a)(2)(A).

Third, Debtor's alleged statements other than his statements "respecting the debtor's or an insider's financial condition" were not fraudulent under § 523(a)(2)(A) because a "false representation under § 523(a)(2)(A) must relate to a present or past fact."[50] If an alleged representation relates to a debtor's intent to perform an act in

[49] Doc. No. 31, ¶ 10.
[50] *In re Cascio*, 568 B.R. 851, 856 (Bankr. M.D. Fla. 2017) (quoting *In re Casali*, 517 B.R. 835, 843 (Bankr. N.D. Ill. 2014)).

the future, it is not actionable under § 523(a)(2)(A) unless the debtor lacked the subjective intent to perform the act at the time that the statement was made.[51]

For example, "New York law distinguishes between a promissory statement of what will be done in the future that gives rise only to a breach of contract cause of action and a misrepresentation of a present fact that gives rise to a separate cause of action for fraudulent inducement,"[52] although a promise made with no present intent to perform constitutes a misrepresentation of existing fact upon which an action for fraudulent inducement may be based.[53]

A lack of subjective intent to perform in the future is difficult to prove, because "a debtor's 'mere failure to perform is not sufficient evidence of scienter nor is subsequent conduct contrary to the original representation necessarily indicative of fraudulent intent.'"[54] If a debtor honestly intends to keep a promise at the time he makes it, "but later changes his mind or fails or refuses to carry his expressed

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[51] *In re Cascio*, 568 B.R. at 856 (citing *In re Vega*, 503 B.R. 144, 148 (Bankr. M.D. Fla. 2013)).
[52] *Fierro v. Gallucci*, 2008 WL 2039545, at *4 (E.D.N.Y. May 12, 2008) (quoted in *In re Greene Avenue Restoration II Corp.*, 597 B.R. at 210-11).
[53] *Sabo v. Delman*, 143 N.E. 2d 906, 908 (N.Y. 1957) (quoted in *In re Greene Avenue Restoration II Corp.*, 597 B.R. at 211).
[54] *In re Chaney*, 596 B.R. 385, 397 (Bankr. N.D. Ala. 2018) (quoting *In re Smith*, 572 B.R. 1, 16 (1st Cir. B.A.P. 2017)).

intention into effect, there has been no misrepresentation. This is true even if there is no excuse for the subsequent breach."[55]

Here, Plaintiffs contend that Debtor falsely represented that EastCoast and Debtor would perform electrical work on the School 16 Project in the future and would reimburse Plaintiffs for any future losses, but Plaintiffs failed to show that, *at the time he made the alleged statements*, Debtor did not intend to perform the work or reimburse Plaintiffs. For example, Plaintiffs produced no evidence that Debtor and EastCoast never commenced work on the School 16 Project or that they never paid any subcontractors or laborers in connection with the project.

At his examination under Federal Rule of Bankruptcy Procedure 2004, Debtor testified regarding the problems that occurred with the School 16 Project:

> Q And tell me what happened with the School 16 project.
>
> A The project -- first of all, the – I'm a Local 86 electrical contractor. The union could not provide manpower for us to complete the work on time. There was an abundance of work out there, and the union could not find people. So I had a lack of manpower.
>
> Unfortunately, it got behind schedule, and then everything went downhill from there. We had to work overtime and double time, triple time, and the costs just accelerated.[56]

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[55] *In re Smith*, 572 B.R. at 16 (quoting *Palmacci v. Umpierrez*, 121 F.3d 781, 787 (1st Cir. 1997)). *See also In re Velasco*, 617 B.R. 718, 735 (Bankr. M.D. Fla. 2020), in which the court found that the plaintiff's evidence was consistent with the debtor's lack of intent to perform his promise, but was "equally consistent (if not more so) with a phenomenon this Court often refers to as 'terminal euphoria,'" whereby business debtors always believe they can improve their financial condition. "'Terminal euphoria,' though irrational, does not give rise to fraudulent intent not to perform in the future."

[56] Doc. No. 31-14, p. 42, ll. 10-21.

In addition, the evidence is that (a) Debtor performed under the Letter Agreement by paying Plaintiff Christa the agreed-upon $100,000 fee,[57] (b) EastCoast commenced performance of the School 16 Project, and (c) QBE did not notify Christa that Debtor and EastCoast had "fallen behind" on their obligations until six months *after* Plaintiffs signed the QBE Indemnity Agreement.[58]

This evidence does not prove that Debtor lacked the subjective intent—*at the time Plaintiffs signed the QBE Indemnity Agreement*—to complete the School 16 Project or to reimburse Plaintiffs for any future loss. Rather, the uncontroverted evidence establishes that in September 2017, Debtor intended to complete the School 16 Project and EastCoast commenced performance of the project, but that subsequent events such as labor shortages and increasing costs ultimately led to EastCoast's inability to complete the work.

Fourth, Plaintiffs did not establish that their reliance on Debtor's alleged representations was justifiable because Plaintiffs knew that QBE required EastCoast and Debtor to obtain an additional indemnitor on the School 16 Project bond based on QBE's concerns regarding Debtor's and EastCoast's ability to complete the project. For example, Plaintiffs allege in the Complaint that "QBE was not comfortable with

[57] Doc. No. 32, ¶ 23.
[58] Doc. No. 32, ¶ 26. In Plaintiffs' SJ Motion, Plaintiffs assert without evidence that "by early 2018" Debtor knew that EastCoast did not have the ability to meet its current obligations, was delinquent on its union dues, and therefore could not obtain labor from the union to complete the School 16 Project. (Doc. No. 31, ¶ 99).

issuing a bond to EastCoast without additional security, as EastCoast had not previously been involved in such a large project."[59] Indeed, QBE's concern was the reason that Debtor asked Christa to join as a co-indemnitor on the QBE Indemnity Agreement.

Measured subjectively—based on what these particular Plaintiffs knew at the time of the QBE Indemnity Agreement[60]—Plaintiffs' reliance on Debtor's statements regarding his ability to perform the School 16 Project was not justifiable.

3. Plaintiffs' § 523(a)(2)(B) Claim

Under § 523(a)(2)(B), a debt is nondischargeable if it is obtained by the use of a statement in writing (a) that is materially false; (b) respecting the debtor's or an insider's financial condition; (c) on which the creditor reasonably relied; and (d) that the debtor caused to be made with the intent to deceive.[61] Section 523(a)(2)(B) applies to a debtor's written statements that present a substantially untruthful picture of the debtor's financial condition by misrepresenting the type of information that would normally affect the decision to grant credit.[62]

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[59] Doc. No. 1, ¶¶ 14-15. Christa affirmed the allegation in his affidavit in support of Plaintiffs' SJ Motion (Doc. No. 32, ¶ 15).
[60] *In re Scialdone*, 533 B.R. 53, 61 (Bankr. S.D.N.Y. 2015).
[61] 11 U.S.C. § 523(a)(2)(B).
[62] *In re Polasky*, 2021 WL 614032, at *5 (citing *In re Chadha*, 598 B.R. 710, 718 (Bankr. E.D.N.Y. 2019)).

For a debt to be nondischargeable under § 523(a)(2)(B), the creditor's reliance on the debtor's statement must be reasonable.[63] Generally, the standard for reliance under § 523(a)(2)(B) is higher than the standard for reliance under § 523(a)(2)(A) because the "reasonable" requirement of § 523(a)(2)(B) places some level of responsibility on the creditor to verify the basis for the statement, which is more demanding that the "justifiable" requirement of § 523(a)(2)(A).[64]

Here, Plaintiffs allege that Debtor gave them written statements concerning Debtor's and EastCoast's financial condition: (a) Debtor's 2016 Financial Statement, and (b) EastCoast's balance sheet and profit and loss statement as of August 15, 2017 (the "EastCoast Statement").[65]

Plaintiffs have not alleged that the EastCoast Statement contains misrepresentations. However, they assert that Debtor's 2016 Financial Statement is materially false because (a) Debtor did not disclose that four of his properties were subject to mortgages held by RLI Insurance Company ("RLI"); (b) Debtor valued his interest in EastCoast at $1.2 million, which was $900,000 more than he valued the interest one year later on his 2017 Financial Statement; (c) Debtor did not disclose his interest in any vehicles or boats, even though he listed three vehicles and two boats

[63] *In re Kovacs*, 2021 WL 1603600, at *12 ("An essential element of a claim under § 523(a)(2)(B) is that the creditor must have reasonably relied on the written statement.").
[64] *In re May*, 579 B.R. 568, 583 (Bankr. D. Utah 2017).
[65] Doc. No. 1, ¶¶ 42-45.

in his 2017 Financial Statement; (d) Debtor listed rental income in the amount of $49,000, even though he actually incurred a net loss on his rental property after accounting for expenses; and (e) Debtor claimed that he was insolvent when he filed his bankruptcy case in June 2019.[66]

For the following reasons, the Court finds that (a) Plaintiffs did not meet their burden to prove that the debt allegedly owed to them was obtained by Debtor's fraudulent inducement under § 523(a)(2)(B); (b) Debtor met his burden on summary judgment to show the absence of evidence to support a § 523(a)(2)(B) claim, and the burden then shifted to Plaintiffs; and (c) Plaintiffs did not meet their burden to show a genuine issue of material fact.

First, the evidence does not show that the 2016 Financial Statement was materially false or that Debtor delivered the 2016 Financial Statement to Plaintiffs with the intent to deceive them:

(a) Plaintiffs assert that Debtor granted mortgages on four of his properties to RLI in "late 2016,"[67] evidenced by copies of the RLI mortgages dated November and December 2016.[68] But the 2016 Financial Statement is dated "as of May 16, 2016," and was signed on May 16, 2016. In other words, the evidence is that Debtor granted

[66] Doc. No. 1, ¶¶ 47-49; Doc. No. 31, ¶ 28.
[67] Doc. No. 31, ¶ 30.
[68] Main Case, Doc. No. 41.

the RLI mortgages on his properties six months *after* the date of the 2016 Financial Statement.

(b) In the 2017 Financial Statement, Debtor reduced the value of his interest in EastCoast from $1.2 million, as stated in the 2016 Financial Statement, to $300,000. But Plaintiffs presented no evidence to support their contention that the $1.2 million valuation in the 2016 Financial Statement was not accurate as of its date.

(c) Debtor listed vehicles and boats in the 2017 Financial Statement that were not listed in the 2016 Financial Statement. But the value of the vehicles and boats in the 2017 Financial Statement actually *increased* Debtor's net worth, so that Debtor's omission of the assets in the 2016 Financial Statement is not the type of misrepresentation that would have affected Plaintiffs' decision to extend credit.

(d) In the 2016 Financial Statement, Debtor listed $49,000 as his rental income, but the form itself does not specify whether the amount of "rental income" was a gross or net amount.

(e) Finally, Debtor signed the 2016 Financial Statement in May 2016 and filed his Chapter 7 petition in June 2019. The 2016 Financial Statement is too remote in time to evidence the falsity of Debtor's disclosures three years before the bankruptcy.

Second, Plaintiffs cannot show that they *reasonably* relied on the 2016 Financial Statement. "A creditor cannot be said to have reasonably relied, pursuant to

§ 523(a)(2)(B), on a financial statement with indicators or 'red flags' that would prompt a reasonable person to further inquire into the accuracy of the information."[69] Here, although the 2016 Financial Statement contained some financial information, it was not a full and complete statement of Debtor's financial condition in May 2016; much of the hand-written information (including the description of Debtor's real estate) is barely legible, and Debtor did not list any cash on hand or household goods, or complete the section of the form related to the acquisition of his real estate. And when Debtor delivered the 2016 Financial Statement to Plaintiffs in September 2017, the information was already a year old.

Although Plaintiffs assert that Debtor "assured" them that the year-old information on the 2016 Financial Statement was accurate when Debtor delivered it to them,[70] "[m]ost courts in the Eleventh Circuit find that a creditor has not reasonably relied on a financial statement when it is three months or older because the information is considered stale."[71] Plaintiffs did not show that they took any steps to investigate the veracity of the 2016 Financial Statement.

[69] *In re Strength*, 562 B.R. 799, 808 (Bankr. M.D. Ala. 2016) (citations omitted).
[70] Doc. No. 31, ¶ 111.
[71] *In re Strength*, 562 B.R. at 810 (citing *In re Jones*, 197 B.R. 949, 962 (Bankr. M.D. Ga. 1996)).

B. Plaintiffs' Objections to Debtor's Discharge Under § 727

Under § 727(c)(1), the trustee, a creditor, or the United States trustee may object to a debtor's discharge.[72] Therefore, Plaintiffs only have statutory standing to object to Debtor's discharge if they qualify as creditors.[73]

Generally, "a creditor possessing a claim (even a disputed claim or a claim that has been objected to) has standing to bring an adversary proceeding objecting to discharge, *until such time as the claim is disallowed*."[74] For example, in *In re Howie-Cox*,[75] the plaintiff filed a complaint against the debtor to determine the dischargeability of a debt under § 523(a)(2) and to deny the debtor's discharge under § 727(a). In its analysis of the § 523(a)(2) claims, the court found that the debtor did not owe any debt to the plaintiff and, because plaintiff was not a creditor in the debtor's bankruptcy case, she did not have standing to object to the debtor's discharge under § 727(a). As the court explained, "[o]nly those creditors who have claims that will be affected by the discharge can file objections" to the discharge.[76]

Here, the Court has found that Plaintiffs cannot establish their claims for fraudulent inducement. Thus, to have standing to prosecute their claims under § 727, Plaintiffs must establish that they possess a claim against Debtor that is independent

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[72] 11 U.S.C. § 727(c)(1).
[73] *In re Harman*, 628 B.R. 359, 365 (Bankr. N.D. Ga. 2021).
[74] *In re Maier*, 498 B.R. 340, 344 (Bankr. M.D. Fla. 2013) (citing *Cadleway Properties, Inc. v. Andrews*, 239 F.3d 708, 710 (5th Cir. 2001) (emphasis added).
[75] 515 B.R. 533 (Bankr. E.D. Mich. 2014).
[76] *In re Howie-Cox*, 515 B.R. at 549 (citations omitted).

of the fraudulent inducement claim. Plaintiffs' potential, remaining claims are (1) a claim for breach of contract for indemnity under the Letter Agreement, and (2) a claim for contribution.

1. Plaintiffs do not hold a breach of contract for indemnity claim.

In the Letter Agreement—drafted by Christa—Christa stated, "I want to get you our agreement to issue payment/performance bonds," and set out a schedule for Debtor's payment of a $100,000 fee to Christa. Christa also stated "*I will need you* to indemnify myself as well as" Christa LLC.[77]

Christa testified at his deposition that the Letter Agreement reflected the terms of his agreement to serve as co-indemnitor under the QBE Indemnity Agreement and that, other than the QBE Indemnity Agreement, there was no other document "between [Debtor] and myself."[78] Christa also testified:

> Q Okay. It says you want to get -- "I want to get you our agreement to issue payment." If you want to get him something, that would be something that would occur in the future. So it's obvious that you must have had some idea that you were going to have him sign an additional document?
>
> A *It would have been done for the Surety through QBE.*
>
> Q But this doesn't talk about QBE, this talks about you're doing something. Were you to get him an additional document?
>
> A No.

[77] Doc. No. 31-2 (emphasis supplied).
[78] Doc. No. 28-1, pp. 14-15.

Q *What were the terms and conditions of your Indemnity Agreement?*

A *Same as QBE Agreement.*

Q *Well, that would be the QBE Indemnity Agreement?*

A *We would supercede. We're joint parties, Maier and myself.*

Q Yes.

A *And I think -- and that spells out what the indemnity is.*

. . .

Q It says you want to get him -- you want to get Mr. Maier your agreement. "I want to get you our agreement to issue payment." *So, what agreement were you going to get him*?

A *The QBE General Indemnity Agreement.*

Q That's the one you were going to get him?

A Correct.

Q And to get him that, you wanted to be paid $100,000.

A Correct.[79]

Under New York law, "where parties involved in negotiations have reached preliminary agreements contemplating future negotiations, subsequent approvals or a further contract, binding obligations are not typically created."[80] There is a "strong

[79] Doc. No. 28-1, pp. 15-17 (emphasis added). In his affidavit dated October 5, 2021, Christa stated that the word "want" in the sentence "I want to get you our agreement" was mistyped and should have been typed "wanted" because Christa and Debtor had already orally reached an agreement (Doc. No. 32, ¶ 22).

[80] *In re 50 Pine Co., LLC*, 317 B.R. 276, 281 (Bankr. S.D.N.Y. 2004) (citations omitted).

presumption against finding binding obligation in agreements which include open terms, call for future approvals and expressly anticipate future preparation and execution of contract documents."[81] Therefore, absent language expressly stating the parties' intent to be bound, an interim agreement generally does not create binding obligations.

Here, from the content of the Letter Agreement and Christa's own testimony, the Court finds that (a) the Letter Agreement was a nonbinding preliminary agreement, (b) the only agreement between Debtor and Christa is documented in the QBE Indemnity Agreement, (c) the QBE Indemnity Agreement "superseded" the Letter Agreement as the only agreement between Debtor and Christa, (d) Debtor and Christa agreed to serve as co-indemnitors under the QBE Indemnity Agreement, and (e) the Letter Agreement does not constitute a separate agreement for Debtor to indemnify Christa independent of the QBE Indemnity Agreement.

The Court concludes that Plaintiffs do not hold a claim against Debtor for breach of a contract for indemnity.

2. Plaintiffs do not hold an allowable claim for contribution.

Plaintiffs acknowledge that a claimant "is not entitled to contribution unless he has paid more than his portion of the debt of a joint obligation."[82] And Plaintiffs

[81] *In re Lyondell Chemical Company*, 491 B.R. 41, 56 (Bankr. S.D.N.Y. 2013) (quoting *Teachers Ins. and Annuity Ass'n of America v. Tribune Co.*, 670 F. Supp. 491, 499 (S.D.N.Y. 1987)).
[82] Doc. No. 39, ¶¶ 24, 26.

acknowledge that they have paid only $475,000 of QBE's asserted claim of $1,495,164 under the QBE Indemnity Agreement.

In *In re Schuler*,[83] the debtor was the sole owner of a construction corporation in New York. The debtor and his wife both agreed to indemnify an insurance company that had provided a payment bond for the corporation, and the wife paid the insurance company in full. When the debtor filed an individual bankruptcy petition, his wife filed a claim for the full amount of her payment.[84]

The *Schuler* court explained the distinct concepts of contribution and subrogation under New York law:

> New York Jurisprudence 2nd accurately states that "in subrogation, a third party discharges an obligor's obligation to the obligee and then seeks the right to stand in the obligee's position, so as to be able to assert the obligee's former rights against the obligor." In the present instance, [the debtor's corporation] is the obligor against whom [wife] may assert subrogation. *Under the indemnity agreement with [the insurance company], however, [the debtor and wife] share the status of joint obligors. "Where one of several joint debtors pays the debt, his remedy against the others is confined to a claim for contribution." Accordingly, as against the bankruptcy estate of her husband, [wife] holds only a right to contribution*.
>
> *As a general rule, "all co-obligors must contribute equally in discharging their common obligation."* . . . As between themselves, [the debtor and wife] agreed to assume an equal responsibility to indemnify [the insurance company].[85]

[83] 354 B.R. 37 (Bankr. W.D.N.Y. 2006).
[84] *In re Schuler*, 354 B.R. at 40.
[85] *Id*. at 40-41 (citations omitted) (emphasis added).

Consequently, the *Schuler* court allowed the wife's claim for contribution against the debtor's bankruptcy estate for one-half of the amount that she had paid to the insurance company, representing "one-half of the sum that [wife] paid to satisfy the joint duty to indemnify the surety."[86]

And as stated by a New York state court in *Slutsky v. Leftt*:[87]

> The obligation of one of two sureties is to pay the whole debt. His right is, if he pays the whole debt, to recover one-half from his co-surety, or the whole from the principal. *If [one co-surety] pays less than the whole debt, he cannot recover from his co-surety, though he may from the principal, more than the amount which he has paid in excess of the moiety which, as between him and his co-surety, it was his duty to pay*.[88]

In other words, as against the principal obligor on the debt, a co-indemnitor may recover the full amount that he has paid on the debt. But as against another co-indemnitor, a co-indemnitor may only recover the amount that he had paid in excess of his equal share of the total debt.

Here, EastCoast is the named Principal on the QBE bond; QBE is the Surety; and EastCoast, Debtor, Christa, and Christa LLC are the four co-indemnitors under the QBE Indemnity Agreement.[89] Therefore, under New York law, Plaintiffs' remedy against Debtor, a co-indemnitor, "is confined to a claim for contribution" to the extent

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[86] *Id*. at 41.
[87] 1994 WL 88862 (Civil Court, City of New York Dec. 31, 1993).
[88] *Id*. at ***1 (quoting *Morgan v. Smith*, 70 N.Y. 537, 541-42 (1877)) (emphasis added).
[89] Doc. No. 31-3, §§ 1.6, 2. The term "principal" is defined as any entity "whose obligation the Surety is requested to guarantee by issuing or procuring a Bond." (Doc. No. 31-3, § 1.6.)

that Plaintiffs paid "in excess of the moiety," or more than their equal share of the total debt owed to QBE.[90]

Applying the rule of contribution to Plaintiffs' claims in this adversary proceeding, the Court concludes from the record that Plaintiffs have not paid more than their share of the debt owed to QBE which, together, is one-half of the $1,495,164 claimed by QBE or $747,582.

Plaintiffs assert that because QBE continues to hold them liable for the full amount of $1,495,164, they are entitled to a claim in that amount. But Plaintiffs acknowledge that "any debt that *would be* owed to Plaintiffs by the Debtor for *indemnity, contribution or subrogation is still unliquidated, contingent and unmatured*."[91] And under § 502(e)(1)(B), Plaintiffs' claim—which is solely a claim for contribution—must be disallowed because it is contingent as of the date of this Order.[92]

Under § 502(e)(1)(B), a claim is disallowed if (a) the party asserting the claim is liable with the debtor on the claim of a third party, (b) the claim is contingent, meaning that the co-debtor has not paid the creditor, at the time of its allowance or disallowance, and (c) the claim is for reimbursement or contribution.[93]

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[90] *In re Schuler*, 354 B.R. at 40 (quoting *Booth v. Farmers' and Mechanics' National Bank*, 74 N.Y. 228, 232 (1879)).
[91] Doc. No. 39, ¶ 27 (emphasis added).
[92] 11 U.S.C. § 502(e)(1)(B).
[93] *In re Motors Liquidation Company*, 598 B.R. 744, 760 (Bankr. S.D.N.Y. 2019).

Here, two and one-half years after Debtor filed his bankruptcy petition, one and one-half years after Plaintiffs filed their Complaint objecting to Debtor's discharge, and after the parties filed dispositive motions on Plaintiffs' Complaint under the Court's Scheduling Order,[94] Plaintiffs cannot establish that they paid QBE more than the $475,000 they claim in their Complaint and SJ Motion.[95]

The Court concludes that, under § 502(e)(1)(B), Plaintiffs do not hold an allowable claim.

3. Plaintiffs lack standing to prosecute the § 727 claims.

As set forth above, the Court has determined that Plaintiffs do not hold an allowable claim for fraudulent inducement under § 523(a)(2), for breach of contract for indemnity under the Letter Agreement, or for contribution under New York law and § 502(e)(1)(B).

The facts in this case are readily distinguished from those in *In re Insley*.[96] In *Insley*, the debtor's business partner held a contribution claim against the debtor that, because the partner had not yet paid the partnership's debts, was contingent as of the petition date and as of the deadline for filing objections to discharge (the "727 Deadline"). The partner timely filed a complaint to bar debtor's discharge under

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[94] Debtor filed his bankruptcy case on June 12, 2019; Plaintiffs obtained extensions of the deadline to file a § 523 and a § 727 complaint to May 22, 2020 (Main Case, Doc. No. 116), and they filed the Complaint on May 18, 2020. The record does not reflect that Plaintiffs have paid any sums other than as alleged in their Complaint.

[95] Doc. No. 1, ¶ 59; Doc. No. 31, ¶ 37.

[96] 313 B.R. 667 (Bankr. W.D. Penn. 2004).

§ 727, and thereafter the partner paid the partnership debts for which he and the debtor were both liable.

On the debtor's motion to dismiss for lack of standing (which the bankruptcy court treated as a motion for summary judgment), the court ruled that the partner had standing to object to the debtor's discharge under § 727(a). The court reasoned that (a) the contribution claim had not been disallowed as of the 727 Deadline, (b) the contribution claim had become fixed by virtue of the partner's payment of the joint debts, and (c) therefore, under § 502(e)(2), the claim related back to the date the bankruptcy case was filed and could not be disallowed in the future.[97]

But unlike the partner in *Insley*, as of the date of this Order, Plaintiffs' admittedly contingent contribution claim has not become fixed. Therefore, the Court concludes that Plaintiffs are not creditors of Debtor as required by § 727(c)(1) and they lack standing to object to Debtor's discharge under § 727(a). The Court finds that (a) Debtor has met his burden on summary judgment; (b) the burden shifted to Plaintiffs; and (c) Plaintiffs have not met their burden to show a genuine issue of material fact.

[97] *In re Insley*, 313 B.R. at 670.

V. CONCLUSION

Accordingly, for the foregoing reasons, it is

ORDERED:

1. Plaintiffs' Motion for Summary Judgment (Doc. No. 31) is **DENIED.**

2. Debtor's Motion for Summary Judgment (Doc. No. 28) is **GRANTED.**

3. The Court will enter a separate final judgment in Debtor's favor.

Clerk's office to serve on interested parties via CM/ECF.