UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE:

FELIX KRUPCZYNSKI and
ANNE KRUPCZYNSKI,

Case No.: 3:09-bk-5698-JAF
Chapter 7

Debtors.
_____/

SEV HRYWNAK,

Plaintiff,

v.

Adversary No.: 3:09-ap-624-JAF

FELIX KRUPCZYNSKI,

Defendant.

_____/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Adversary Proceeding is before the Court upon the Complaint (Doc. 1), filed by Sev Hrywnak ("Plaintiff") against the Debtor, Felix Krupczynski ("Defendant"), seeking an exception to the discharge of Defendant pursuant to 11 U.S.C. § 523(a)(2)(A). On June 8, 2011, the Court conducted a trial. Defendant appeared at trial and testified on his behalf. Plaintiff, however, did not appear at the trial.[1]

In lieu of oral argument, the Court directed the parties to submit memoranda in support of their respective positions. Upon the evidence presented at trial and the memoranda of the parties (Docs. 35, 36), the Court makes the following Findings of Fact and Conclusions of Law pursuant to

[1] Having previously been granted trial continuances on two separate occasions (Docs. 16, 24), Plaintiff moved for a third continuance two days prior to trial (Doc. 28). The Court denied the motion and proceeded with trial (Doc. 30). Plaintiff's counsel was present at the trial and presented testimonial and documentary evidence. Subsequent to the trial, the Court provided Plaintiff an opportunity to present his testimony (*see* Doc. 32). Plaintiff, however, declined.

Bankruptcy Rule 7052. The transcript of the underlying trial proceedings (Doc. 34) will hereinafter be referred to as "Tr." followed by the appropriate page number.

FINDINGS OF FACTS

In or around February 2006, the Debtors, Felix and Anne Krupczynski, formed the Jacksonville Jam, LLC (the "Company") (Tr. 17-21). The purpose of the Company was to own and operate a minor-league, professional men's basketball team, the Jacksonville Jam (Tr. 16-17). Originally, the Jacksonville Jam was a member of the American Basketball Association (the "ABA") (Tr. 17). The Jacksonville Jam's home games were played at the University of North Florida ("UNF") Arena. As a member of the ABA, the Jacksonville Jam was not profitable during the 2006-2007 season, and incurred a net loss (Tr. 76-77).

Plaintiff, Sev Hrywnak, is the Chairman of the Board of the Premier Basketball League (the "PBL"). Plaintiff began discussions with Defendant in an effort to affiliate the Jacksonville Jam with the newly formed PBL (Tr. 21-25). Plaintiff advised Defendant that the PBL had realistic hopes of garnering various corporate sponsorships and investments, both for the league and for individual teams (Tr. 25). As part of these discussions, on August 6, 2007, Defendant prepared and emailed to Plaintiff and the CEO of the PBL, Mr. Tom Doyle, a *pro forma* (the "*Pro Forma*") (Tr. 26; Def. Ex. 4).[2] Defendant testified that the *Pro Forma* was submitted to the PBL in relation to a proposed investment into the team (Tr. 31, 35).

The *Pro Forma* provided Defendant's estimation of revenue and expenses associated with fielding the Jacksonville Jam for the upcoming season (Tr. 26, 29). In the email communication,

[2] Merriam-Webster Dictionary defines a *pro forma*, in relevant part, as a business-related document based on assumptions and informal projections, often excluding extraordinary charges or expenses "in order to present a more attractive financial report." MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/pro%20forma (last visited Dec. 7, 2011). It should be noted that the judiciary does not exercise responsibility over the content or current viability of the URL provided.

Defendant informed Plaintiff and Mr. Tom Doyle that the Jacksonville Jam would require approximately $600,000 in order to be adequately capitalized for the approaching 2007-2008 season, and that if he could not obtain such funds, he would be more inclined to simply sell the team as a whole (Tr. 35; Def. Ex. 4). The *Pro Forma* included estimated corporate sponsorships in the amount of $200,000 and an overall net loss of $371,666 (Def. Ex. 4).[3] The *Pro Forma* did not include estimated amounts related to Company debt service (Tr. 34-35).

Defendant testified that, after reviewing the *Pro Forma*, Plaintiff and Mr. Tom Doyle informed him that they were not interested in investing in the Jacksonville Jam (Tr. 35). As an inducement to join the PBL, however, Plaintiff offered to loan Defendant $100,000 to assist in the startup of the Jacksonville Jam as a member of the newly formed PBL (*see* Tr. 37; *see also* Def. Exs. 1, 2). Defendant testified that Plaintiff stated: "I'll lend you some money to get this thing started, you know, and then we can get all of the sponsorships that we're working on from a league perspective and investors." (Tr. 35). Defendant maintains that Plaintiff volunteered to loan him the subject funds and that he did not solicit a loan from Plaintiff (Tr. 43-44).

On October 4, 2007, Plaintiff prepared and sent to Defendant, by facsimile transmission, a promissory note in the principal amount of $100,000 (Pl. Ex. 1). On December 30, 2007, Defendant executed a second promissory note in the principal amount of $28,000 (Pl. Ex. 2) (collectively, the "Notes"). The Notes provided for repayment in six monthly installments, commencing May 1, 2008 and December 20, 2008 respectively (Pl. Exs. 1, 2). Both Notes contained the following provision in paragraph 12(E):

[3] Defendant testified that his estimated $200,000 in corporate sponsorships did not include potential sponsorship or investment money from the PBL (Tr. 26-29). Additionally, Defendant testified that he based the $200,000 sponsorship estimation on the fact that during the previous 2006-2007 season he was able to garner sponsorship money, and that he believed he had technologically "distinct platforms to sell to companies" (Tr. 27-28).

> The purpose of this Loan is to facilitate Borrower's [Defendant] desire to have Borrower's professional basketball team [the Jacksonville Jam] become a member team in the new Premier Basketball League operated by Premier Basketball League, Inc., an Illinois corporation.

(Pl. Exs. 1, 2).

At the time Defendant accepted the subject loans from Plaintiff, his only employment was with the Company (Tr. 23). In addition, on the date Defendant first received loan proceeds from Plaintiff, both the Company's bank account and his personal bank account had recently been overdrawn by several hundred dollars (Tr. 38-43). Defendant testified, however, that he owned two real estate properties which, at the time, had over $2,000,000 in equity (Tr. 23, 38). One of these properties was Defendant's primary, river-front residence and the other was a piece of river-front rental property in St. Augustine, Florida, that was being leased (Tr. 45-46). In addition, Defendant's wife, Anne, testified that she has a bachelor of science degree in information systems, a bachelor of science degree in computer design, and a masters degree in business administration ("MBA") (Tr. 69, 92). She further testified that she and her husband would have ultimately sought employment if they became unable to pay their personal expenses as they came due (Tr. 69, 92)

During the 2007-2008 season, Defendant fielded the Jacksonville Jam as a member of the PBL (Tr. 43). The head coach was an individual named Mike Gillespie and home games continued to be played at the UNF Arena.

Leading up to the 2007-2008 season, Defendant and his wife endeavored to solicit corporate sponsorships for the team; however, such attempts were unsuccessful (Tr. 26-29). In addition to the loans provided by Plaintiff, *supra*, in order to continue fielding the Jacksonville Jam, Defendant and his wife borrowed funds from friends and family (Tr. 74-79). One such loan totaled $92,878.66 (Tr. 74). Defendant and his wife also obtained cash advances from their personal credit cards in the

approximate amount of $74,000 (Tr. 65) and used their personal savings and retirement funds (Tr. 68). From 2006-2008, Defendant and his wife invested a total of $327,326.84 into the Jacksonville Jam (Tr. 73).

Anne maintained detailed records of the business finances (*see* Pl. Ex 3; Tr. 65). On advice of her accountant, she designated monies contributed to the Company by Defendant and herself as "loan[s] from owner," and any payments from the Company to Defendant and herself as "loan payment[s]" (Tr. 72). This method of designation was done in order to avoid incurring unwarranted tax obligations if she were to designate such monies as employee salaries (Tr. 105).

Expenditures to field and operate the team included, *inter alia*: (1) payroll for team members, coaches, and trainers; (2) liability and medical insurance; (3) travel costs for the team; (4) the leasing of office space; (5) venue leasing; (6) advertising; (7) medical supplies for the team; (8) game-day entertainment expenses; (9) vehicle expenses; (10) equipment storage costs; (11) miscellaneous fees, *etc*. (*see* Def. Ex. 2). The testimony reveals that, of the proceeds from Plaintiff's loans, *supra*, Defendant used approximately $58,000 to pay the aforementioned expenditures, $13,700 to make monthly payments on the personal credit card cash advances that were contributed to the Jacksonville Jam, and $51,000 for repayment of the aforementioned "loan[s] from owner" (Tr. 87-88, 92-94, 102-05). Defendant and his wife, Anne, did not pay themselves a salary for work provided to the Company; rather, they used "loan repayment" funds to pay for their personal expenses as they became due (Tr. 97-99).

As a member of the PBL, the Jacksonville Jam played nine games in the 2007-2008 season (which amounts to approximately half of the season) (Tr. 50). During the week of January 28, 2008, Defendant told Plaintiff that additional funds would be needed to pay the rent at the UNF Arena in order to complete the season (*see* Tr. 51). On the afternoon of January 30, 2008, a conference call

was conducted between Plaintiff, Defendant, Mr. Tom Doyle, and Ms. Becky Purser, the Director of Facilities at UNF, regarding the renegotiation of the lease and payment of rent (Tr. 51). During the conference call, Plaintiff advised that he would pay the UNF rent for the upcoming game on February 1, 2008 as well as for the remainder of the season (Tr. 44, 51). Three days later, however, on February 4, 2008 (approximately three months prior to the first note becoming due), Plaintiff and Mr. Tom Doyle advised Defendant that the Jacksonville Jam was no longer a member of the PBL (Tr. 51-52).

At trial, Plaintiff's counsel asked Defendant's wife, Anne: "Do you know if Dr. Hrywnak [Plaintiff] offered to take the Jam operations over in exchange for forgiveness of the loan, any or all of it?" (Tr. 107-08). To which, Anne responded in the negative, stating: "He [Plaintiff] threatened to throw us out of the league [PBL] if we didn't give him our company." (Tr. 107-08).

Unable to compete in the PBL, the Jacksonville Jam ceased operations. Subsequently, Defendant defaulted under the terms of the Notes. Plaintiff then filed a complaint against Defendant in the Circuit Court of Cook County, Illinois, to collect under the Notes. On April 24, 2009, a default judgment was entered against Defendant in the amount of $174,940.04, which included attorney fees as provided in the Notes (Tr. 46, 48). Defendant testified that the judgment entered against him was a default judgment because he was unable to afford to defend the action (Tr. 56). On July 13, 2009, Defendant and his wife, Anne, filed the instant case under Chapter 7 of the Bankruptcy Code (Case No. 3:09-bk-5698-JAF).

CONCLUSIONS OF LAW

By way of the instant Adversary Complaint (Doc. 1), Plaintiff seeks to have the aforementioned judgment in the amount of $174,940.04 excepted from discharge pursuant to 11

U.S.C. § 523(a)(2)(A), which provides that a discharge pursuant to § 727 of the Bankruptcy Code does not discharge an individual from any debt:

> for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

11 U.S.C. § 523(a)(2)(A).

Plaintiff contends that Defendant fraudulently induced him into providing the subject loans by misrepresenting the intended use of the funds (Doc. 36 at 4-5). Plaintiff maintains the subject loan proceeds were not used for the stated purpose of facilitating Defendant's desire to field the Jacksonville Jam in the PBL (Doc. 36 at 8-12). In addition, Plaintiff asserts that, in making the loans, Plaintiff relied on the "scant and misrepresented disclosures" contained in the *Pro Forma* (Doc. 36 at 4-5). For the reasons that follow, the Court is not persuaded.

In order to except a debt from discharge under 11 U.S.C. § 523(a)(2)(A), a plaintiff must establish: (1) the defendant made a false representation with the purpose and intent of deceiving the plaintiff; (2) the plaintiff relied upon the representation; (3) the plaintiff's reliance on the representation was justifiably founded; and (4) the plaintiff sustained a loss as a result of the representation. *See Fuller v. Johannessen (In re Johannessen)*, 76 F.3d 347, 350 (11th Cir. 1996). Further, the plaintiff must prove each element, *supra*, by a preponderance of the evidence. *See Grogan v. Garner*, 498 U.S. 279, 291 (1991).

Intent is a subjective matter, requiring the court to examine the totality of the circumstances in order to determine whether the defendant possessed the requisite intent to deceive the plaintiff. *Lyons v. Wiggins (In re Wiggins)*, 250 B.R. 131, 134 (Bankr. M.D. Fla. 2000). The party objecting to discharge must then establish that it relied on the false representation. *Id.*; *City Bank & Trust Co.*

v. Vann (In re Vann), 67 F.3d 277, 280 (11th Cir. 1995). A creditor-plaintiff cannot establish non-dischargeability pursuant to § 523(a)(2)(A) without proof of reliance. *Avis Rent A Car Systems, Inc. v. Maxwell (In re Maxwell)*, 334 B.R. 736, 742 (Bankr. M.D. Fla. 2005).

In this instance, Plaintiff has not established the requisite elements necessary for excepting the subject debt from discharge. As an initial matter, Plaintiff has failed to prove by a preponderance of the evidence that Defendant intended to deceive him by way of a false representation. Plaintiff argues that, by not listing the Company's estimated debt service in the *Pro Forma*, Plaintiff intended to deceive him and induce him into providing the subject loans (Doc. 36 at 5-11). The uncontroverted testimony at the hearing, however, is that the *Pro Forma* was submitted in relation to investment discussions that were ultimately declined by the PBL (Tr. 43-44). Defendant testified that the *Pro Forma* was not provided to Plaintiff in an effort to solicit a loan. This testimony is uncontroverted. Indeed, the email communication accompanying the *Pro Forma* tends to support Defendant's assertion in this regard. Specifically, Defendant stated that if he could not "raise adequate capitalization" in the amount of $600,000 he would be "more apt to selling the team as a whole" (Def. Ex. 4). Moreover, the *Pro Forma* included an overall net loss of $371,666 (Def. Ex. 4).

Plaintiff states "*[t]he Pro Forma went beyond hopeful fiscal projections* and was solely drafted for the intention of inducing investments into and [sic] failed business so that Defendant could fund an extravagant lifestyle" (Doc. 36 at 11) (*emphasis added*). As noted above, a *pro forma* is a document based on assumptions and informal projections, which often excludes extraordinary charges or expenses in order to present a more attractive financial report. Here, the *Pro Forma* clearly specifies that, even with hopeful corporate sponsorships, the Jacksonville Jam would have incurred a significant overall net loss during its first season as a member of the PBL (Def. Ex. 4).

Plaintiff is a sophisticated business man, and the Court is unable to discern from the evidence presented at trial that the *Pro Forma* was drafted solely for the purpose of procuring a fraudulent loan from Plaintiff. The stated purpose of the loan was to facilitate Defendant's desire to field the Jacksonville Jam in the PBL, which Defendant did until he was terminated from the league prior to the Notes becoming due.

Plaintiff makes much of the fact that Defendant had negative bank account balances just prior to receiving the loan proceeds from the first note (Doc. 36 at 7-10). Plaintiff asserts that "Defendant may not incur substantial debt under speculative possibilities of repayment without such incurrence amounting to reckless disregard for the truth" (Doc. 36 at 9). The Eleventh Circuit Court of Appeals has stated that reckless disregard for the truth can constitute a false representation. *Birmingham Trust Nat'l Bank v. Case*, 755 F.2d 1474, 1476 (11th Cir. 1985).

In support of his argument in this regard, Plaintiff cites *AT&T Universal Card Servs. Corp. v. Reynolds (In re Reynolds)*, 221 B.R. 828 (Bankr. N.D. Ala. 1998). In that case, however, the debtor-defendant, who had been receiving monthly Social Security disability income of $840 per month for over five years, exceeded his credit limit of $5,000 (approximately half his annual income) within fourteen days of his first use of his credit card. *Id*. at 830–31. Such charges resulted in the first minimum monthly payment being due in the amount of $327.04. *Id*. at 839. The debtor-defendant testified at trial that he intended to make the payment from both rent he had expected to receive and reimbursement from his girlfriend of charges that she had made on the account. *Id*. The court found the debtor's "reliance upon such speculative financial arrangements appears to be a reckless disregard of the truth of his ability to make the minimum monthly payments"; thus, satisfying the fraud element of 11 U.S.C. § 523(a)(2)(A). *Id.*

Here, Defendant testified to having over $2,000,000 in equity in river-front real estate holdings (his primary residence and a rental property) at the time he accepted the subject loans (Tr. 45-46). In addition, Anne testified that she has a bachelor of science degree in information systems, a bachelor of science degree in computer design, and an MBA, and that she and her husband would have sought employment if they ultimately became unable to pay their personal expenses (Tr. 69, 92). Based on this evidence, the Court is unable to conclude that Defendant's acceptance of a $128,000 loan from Plaintiff was attributable to a reckless disregard of his financial situation. *See Compass Bank v. Meyer (In re Meyer)*, 296 B.R. 849, 860-61 (Bankr. N.D. Ala. 2003) (distinguishing the facts in *In re Reynolds*, *supra*, and finding an unemployed debtor's expectation that she would again be employed and earning similar income to her previous salary was not in reckless disregard to her financial situation, even when she incurred credit card debt while unemployed that amounted to nearly ten percent of her previous income level).

Further, the Jacksonville Jam was terminated as a member of the PBL approximately three months prior to the first note becoming due (and close to ten months before the second note became due) (Tr. 51-52; *see* Pl. Exs. 1, 2). Defendant fielded the team and it was not until the Jacksonville Jam was terminated from the PBL that it ceased operations.

Based on the totality of the circumstances, the Court finds Plaintiff has not shown by a preponderance of the evidence that Defendant acted with the requisite intent, or reckless disregard of his financial situation, to constitute a false representation pursuant to 11 U.S.C. § 523(a)(2)(A).

Even assuming *arguendo* that Plaintiff established the requisite level of intent on the part of Defendant to fraudulently induce him into loaning the subject funds, Plaintiff has nevertheless failed to establish the second and third elements of 11 U.S.C. § 523(a)(2)(A) (*i.e.*, that Plaintiff relied upon the representation(s) of Defendant and that such reliance was justified).

Exceptions to the discharge provisions of the Bankruptcy Code are to be narrowly construed in favor of the debtor. *Agribank, FCB v. Gordon (In re Gordon)*, 277 B.R. 805, 809 (Bankr. M.D. Ga. 2001). In addition, the creditor objecting to the discharge of a debt has the burden of proving that the debtor is not entitled to have the debt discharged. *Murphy & Robinson Inv. Co. v. Cross (In re Cross)*, 666 F.2d 873, 880 (5th Cir. 1982). Although Plaintiff states in his papers (by way of counsel) that he justifiably relied on Defendant's representations in making the subject loans, he presented no evidence establishing the same. *See In re Maxwell*, 334 B.R. at 743 (finding the creditor-plaintiff's failure to present evidence establishing reliance was fatal to its claim under 11 U.S.C. § 523(a)(2)(A)). "A creditor cannot establish non-dischargeability pursuant to § 523(a)(2)(A) without *proof* of reliance." *Id*. at 742 (*emphasis added*). Without showing reliance, Plaintiff cannot show damages.

CONCLUSION

Based on the foregoing, the Court finds Plaintiff has failed to prove by a preponderance of the evidence any of the elements required under § 523(a)(2)(A) to except Defendant's debt from discharge.

In the Answer to the Complaint, Defendant requested an award of attorney's fees and costs associated with this proceeding (Doc. 4 at 2). Pursuant to Florida Statutes Section 57.105(7) and the terms of the Notes (Pl. Exs. 1, 2), Defendant is entitled to such an award. "[Florida Statutes] Section 57.105(7) is applicable in dischargeability actions and 'safeguards a debtor's fresh start."' *Kaplus v. Lorenzo (In re Lorenzo)*, 434 B.R. 695, 711 (Bankr. M.D. Fla. 2010) (*quoting Flagship Bank & Trust Co. v. Woollacott (In re Woollacott)*, 211 B.R. 83, 87 (Bankr. M.D. Fla. 1997)).

The Court will enter a separate Judgment consistent with these Findings of Fact and Conclusions of Law.

DATED this 13th day of December, 2011 in Jacksonville, Florida.

/s/ Jerry A. Funk
JERRY A. FUNK
United States Bankruptcy Judge

Copies to:

Robert A. Heekin, Jr., Attorney for Plaintiff
Nina M. LaFleur, Attorney for Defendant