UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Fredrick E. Clement
Bankruptcy Judge

2500 Tulare Street
Department A, Courtroom 11
Fresno, California

WEDNESDAY

JUNE 17, 2015

10:00 A.M. CHAPTER 7 ADVERSARY PROCEEDINGS

PRE-HEARING DISPOSITIONS

GENERAL DESIGNATIONS

Each pre-hearing disposition is prefaced by the words "Final Ruling," "Tentative Ruling" or "No Tentative Ruling." Except as indicated below, matters designated "Final Ruling" will not be called and counsel need not appear at the hearing on such matters. Matters designated "Tentative Ruling" or "No Tentative Ruling" will be called.

MATTERS RESOLVED BEFORE HEARING

If the court has issued a final ruling on a matter and the parties directly affected by a matter have resolved the matter by stipulation or withdrawal of the motion before the hearing, then the moving party shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter to be dropped from calendar notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860.

ERRORS IN FINAL RULINGS

If a party believes that a final ruling contains an error that would, if reflected in the order or judgment, warrant a motion under Federal Rule of Civil Procedure 52(b), 59(e) or 60, as incorporated by Federal Rules of Bankruptcy Procedure, 7052, 9023 and 9024, then the party affected by such error shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter either to be called or dropped from calendar, as appropriate, notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860. Absent such a timely request, a matter designated "Final Ruling" will not be called.

1. 14-12200-A-7 ALVIN SOUZA, JR. AND ROBYN SOUZA
14-1082
MILLER HAY AND TRUCKING, INC.
V. SOUZA, JR. ET AL
KEVIN LITTLE/Atty. for pl.

CONTINUED PRE-TRIAL CONFERENCE
RE: AMENDED COMPLAINT
10-5-14 [26]

No tentative ruling.

2. 14-12200-A-7 ALVIN SOUZA, JR. AND ROBYN SOUZA MLF-3
14-1082
MILLER HAY AND TRUCKING, INC.
V. SOUZA, JR. ET AL
MICHAEL FARLEY/Atty. for mv.
RESPONSIVE PLEADING

MOTION FOR SUMMARY JUDGMENT
5-14-15 [53]

Tentative Ruling

Motion: Summary Judgment
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Denied
Order: Civil minute order

Debtor-Defendants Alvin Souza, Jr. and Robyn Souza move for summary judgment as to the first cause of action in Creditor-Plaintiff Miller Hay & Trucking, Inc.'s First Amended Complaint. First Am. Compl., filed Oct. 5, 2014, ECF #26. The first cause of action asserts two theories of fraud under 11 U.S.C. § 523(a)(2)(A): fraud arising from (1) an agreement entered in August or September 2011, for the delivery of hay to the debtor's dairy, First Amended Compl. at ¶¶ 7-16, and from representations made in the course of performance of that agreement; and (2) the parties' settlement of a state court action relating to Plaintiff's delivery of hay and the contract regarding such delivery. Defendants advance three arguments: (1) oral representations respecting the Defendants' financial condition will not support an action under 11 U.S.C. §523(a)(2)(A); (2) there is no evidence that the representations were false at the time made; and (3) Plaintiff could not justifiably rely on any such representation made. Plaintiff opposes the motion. Plaintiff has the better side of the argument.

LEGAL STANDARDS

Summary Judgment

Federal Rule of Civil Procedure 56 requires the court to grant summary judgment on a claim or defense "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), *incorporated by* Fed. R. Civ. P. 56. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). "A fact is 'material' when, under the governing substantive law, it could affect the outcome of the case." *Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 322 F.3d

1039, 1046 (9th Cir. 2003) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

A party may move for summary judgment on an issue for which the other party bears the burden of proof at trial, e.g., a defendant who moves for summary judgment contending the plaintiff cannot establish one or more elements of the plaintiff's prima facie case. In such cases, the moving party bears the burden of production and persuasion that no genuine issue of fact exists.

"A moving party without the ultimate burden of persuasion at trial—usually but not always the defendant—has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F3d 1099, 1102 (9th Cir. 2000). "The moving party may carry its burden of production on summary judgment either by: [1] *negating* (disproving) an essential element of the opposing party's claim or defense; [or] [2] 'showing' the opposing party *does not have enough evidence* of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial." Tashima & Wagstaffe, *California Practice Guide: Federal Civil Procedure Before Trial* § 14:128 (Rutter Group 2015) (citing *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000)).

In this procedural posture, "[t]he moving party may support its summary judgment motion by submitting affirmative evidence that *disproves* an essential element of the opposing party's claim or defense." *Id.* at § 14:129. "Alternatively, the moving party may carry its initial burden on summary judgment by 'showing' the opposing party *lacks sufficient evidence* to carry its ultimate burden of persuasion at trial; i.e., it does not have evidence from which a jury could find an essential element of the opposing party's claim or defense. [FRCP 56(c)(1)(B); *Celotex Corp. v. Catrett* (1986) 477 US 317, 325, 106 S.Ct. 2548, 2554; *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, supra, 210 F.3d at 1102; *Turner v. City of Taylor* (6th Cir. 2005) 412 F3d 629, 637]." *Id.* at § 14:130.

11 U.S.C. § 523(a)(2)(A) Fraud

The elements of a § 523(a)(2)(A) action are well known to this court. The plaintiff creditor must prove "(1) the debtor made a representation; (2) the debtor knew the representation was false at the time he or she made it; (3) the debtor made the representation with the intent to deceive; (4) the creditor justifiably relied on the representation; and (5) the creditor sustained damage as a proximate result of the misrepresentation having been made." *In re Mbunda*, 484 B.R. 344, 350 (9th Cir. BAP 2012), *aff'd*, No. 13-60002, 2015 WL 161469 (9th Cir. Apr. 13, 2015).

Plaintiff Miller Hay would bear the burden of proof at trial, *Grogan v. Garner,* 498 U.S. 279, 289 (1991). Defendants bear the burden of proof on their motion for summary judgment. Tashima & Wagstaffe, *California Practice Guide*: *Federal Civil Procedure Before Trial* at § 14:128; *see also Nissan Fire & Marine Ins. Co. Ltd.*, 210 F.3d at 1102.

DISCUSSION

Evidentiary Issues

Each party has interposed evidentiary objections. But given the court's ruling in favor of Plaintiff, the court need only address the admissibility of Exhibits 3 and 4 to rule on this motion. Neither Exhibit 3 nor Exhibit 4 were authenticated, Fed. R. Evid. 901, 902, and as a consequence, neither exhibit was considered. No other evidentiary rulings are made.

First Theory: August/September 2011 Agreement Regarding Hay

Oral Statements Regarding Financial Condition and Section 523(a)(2)(A)

Defendants argue that as a matter of law each of the alleged representations articulated in the First Amended Complaint at paragraphs 12-16 is an oral representation as to Defendants' financial condition and, therefore, will not support an exception to discharge proceeding brought under 11 U.S.C. § 523(a)(2)(A).

Defendants correctly point out that oral representations regarding financial condition, even if false, will not support an action under 11 U.S.C. § 523(a)(2)(A). *In re Belice*, 461 B.R. 564, 573 (9th Cir. BAP 2011).

But the analysis does not end there. Plaintiff alleged in its complaint that, prior to the parties' entering the hay delivery agreement, that Defendants told Miller Hay that they were not going to file bankruptcy and were capable of paying for feed delivered. First Amended Compl. ¶¶ 12.

Defendants' argument cannot be accepted. First, their alleged statements do not fit within the financial-condition exception to 11 U.S.C. § 523(a)(2)(A). The best reading of Ninth Circuit authority on the issue is that "financial condition" is narrowly defined. *In re Belice,* 461 B.R. 564, 573 (B.A.P. 9th Cir. 2011). It includes "only statements providing information as to a debtor's net worth, overall financial health, or an equation of assets and liabilities." March, Ahart & Shapiro, *California Practice Guide: Bankruptcy* § 22:452.4 (Rutter Group 2014) (citing *In re Belice,* 461 B.R. 564, 574 (B.A.P. 9th Cir. 2011)). To fall within the financial-condition exception, the debtor-defendant must have made a "meaningful" and "comprehensive" representation of net worth, financial health or assets and liabilities. *Id.*

Discussing *In re Belice*, a commentator provides examples of statements that did *not* qualify as "statements respecting the debtor's financial condition" for nondischargeability purposes: a "Chapter 7 Debtor's alleged misrepresentations concerning Debtor's (i) $30,000 monthly salary as an attorney; (ii) $100,000 profit from the sale of his residence; (iii) $7,000 monthly rent payment; (iv) status as a professional football team's season ticket holder; (v) purchase of a $28,000 diamond engagement ring; and (vi) security provided for creditor's loan. *While several of the statements related to Debtor's historical income and expenses, they were not akin to any sort of complete or comprehensive statement of income and expenses*; and statements relating to *some* of Debtor's assets *did not reveal anything meaningful or comprehensive about Debtor's overall net worth*, because they indicated nothing about Debtor's liabilities or any liens against

any of his property. [*In re Belice*, supra, 461 BR at 579]." March, Ahart & Shapiro, *supra*, § 22:452.5 (emphases added).

Defendants argue that their representations fall within the exception for statements of financial condition, specifically a representation regarding overall financial health. But this court disagrees. The representations are not complete, comprehensive or meaningful representations of net worth, financial health, or assets and liabilities, as contemplated by *Belice*. As a consequence, the statements do not fall within the financial-condition exception to § 523(a)(2)(A). Additionally, as pled, the complaint outlines a class of related factual representations, i.e., representations that Defendants were not filing bankruptcy and were capable of paying for the hay. First Am. Compl. ¶¶ 12. Thus, even if some of Defendants' statements were in fact statements of financial condition, a claim under § 523(a)(2)(A) may still be viable based other grounds and statements made by the Defendants. For example, a representation of no present intention of filing bankruptcy, if false when made, may form a basis for actual fraud independent of a representation of ability to pay, and both may independently except debts resulting therefrom from discharge. In some factual scenarios, a representation that no bankruptcy is contemplated can constitute a representation that will support an action under § 523(a)(2)(A). *See Zarate v. Baldwin (In re Baldwin)*, 578 F.2d 293 (10th Cir. 1978) (covenant against bankruptcy together with other deceptive conduct constituted basis for finding of nondischargeability); *Johnson v. Kriger (In re Kriger)*, 2 B.R. 19 (Bankr. D. Or. 1979); *Stoner v. Walsh*, 24 Cal. App. 3d 938 (1972). Admittedly, each of these authorities were decided under the Bankruptcy Act. But Defendants have cited no binding or persuasive to depart from this precedent.

Promises of Future Performance

Defendants argue that there is no evidence that their alleged promise to pay and to refrain from filing bankruptcy were false when made. Mem. P. & A. at III(C)(1), filed May 14, 2015, ECF #55.

Plaintiff has pled, "Debtors requested and accepted hay shipments from plaintiff, all the while indicating . . . ability and willingness to pay therefore. However, Debtors intentionally misrepresented their ability to pay, and their future intention to file bankruptcy." First Am. Compl. ¶ 12.

As to the representation that Defendants did not intend to file bankruptcy, the undisputed evidence is that Defendants formed the intention to file bankruptcy well after the contract with Miller Hay was executed. The agreement between Plaintiff and Defendants was entered into in August or September 2011. And Defendants did not decide to file bankruptcy until the April 2012. Exh. B, p. 6 of 91, lines 12-21; Exh. C, 12 of 91, lines 9-17; Exh A, p. 2 of 91, lines 6-18. But showing this undisputed fact does not negate all factual bases for the Plaintiff's claim, such as, for example, the factual ground that Defendants had falsely represented that they had an intention to pay the debt or the factual ground that Defendants continued to represent during the course of performance that they would pay for Plaintiff's deliveries without having a present intent to perform such promises.

As to the factual ground relating to Defendants' promise to pay the debt and their fraudulent intent in making such promises (i.e., a positive intent not to perform, a lack of intent to perform, or

knowledge of inability to perform), Defendants have not carried their burden of proof. Defendants have not (1) offered evidence disproving that they lacked an intention to pay the debt when they represented that they would pay, or (2) identified the portions of the record that reveal an absence of evidence on their fraudulent intent, or (3) stated the reasons why the Plaintiff cannot prove their fraudulent intent.

Defendants mischaracterize Plaintiff's allegation of the representation made, characterizing it only as a promise to pay cash on delivery, if they filed bankruptcy. *See* First Am. Compl. ¶ 14. While the complaint does allege such a representation, the complaint also alleges a more far-reaching representation: "Debtors requested and accepted hay shipments from plaintiff, *all the while indicating that* [they] *had the ability and willingness to pay* therefore. . ." *See id.* at ¶ 12 (emphasis added). More importantly, Defendants have not met their summary-judgment burden to show that Plaintiff has no evidence of their inability to pay as of the date (or dates) of their promises to pay. Separate Statement of Undisputed Material Facts #1-27, filed May 14, 2015, ECF #56. Defendants attempted to offer Exhibits 3 and 4 to the Deposition of Shirley Miller. But those were not authenticated. But even if they had been, they purport to show only partial payment. From partial payment of the debt the court could draw two inferences, one in favor of granting the motion and the other against granting it. The first inference is their intent to pay the debt and the second is their intent to pay only part of it. These conflicting inferences are themselves sufficient grounds to deny the motion as they present a genuine issue of material fact as to one of the factual grounds for Defendant's fraudulent representation. As a result, even if Exhibits 3 and 4 had been authenticated the court would deny the motion.

Justifiable Reliance

"A creditor claiming nondischargeability under § 523(a)(2)(A) must also show it was justified in relying on the debtor's fraudulent conduct in obtaining the money, property or services. [*Field v. Mans* (1995) 516 US 59, 73-76, 116 S.Ct. 437, 444-446—reliance need not reach level of "reasonableness" to establish nondischargeability under § 523(a)(2)(A) but must still be justifiable; *In re Eashai* (9th Cir. 1996) 87 F3d 1082, 1090; *In re Ortenzo Hayes* (BC CD CA 2004) 315 BR 579, 588—creditors could not justifiably rely on oral misrepresentation made in context of sale negotiation, where provision was not incorporated into purchase agreement] Justifiable reliance is an intermediate standard between actual reliance and reasonable reliance. [*In re Schnuelle* (8th Cir. BAP 2011) 441 BR 616, 622]." March, Ahart & Shapiro, *California Practice Guide: Bankruptcy*, § 22:480 (Rutter Group 2014).

Defendants argue that Plaintiff did not justifiably rely on their representations because Plaintiff was aware of their financial difficulties and Defendants immediately fell behind in the payment of their hay delivery bills but Plaintiff continued to make deliveries thereafter.

The court finds conflicting inferences to be drawn from the evidence, and the court does not weigh the evidence at summary judgment. When Defendants made the decision to enter into the contract with Plaintiff, before their delayed payments on Plaintiff's bills, the evidence was that there were rumors of Defendants' financial difficulties. From this evidence, the court could find that

Plaintiff's reliance was not justified. The court could also find that the rumors coupled with Plaintiff's representations of ability to pay did constitute justifiable reliance. Further, Plaintiff's making continued deliveries in light of Defendant's tardiness in paying for them does not change the result.

Second Theory: January 2014 Agreement Regarding Settlement

Defendants argue that a promise made as part of a settlement agreement cannot form the basis of a fraud action under § 523(a)(2)(A). The court rejects this argument for several reasons. Under § 523(a)(2)(A), contractual promises can sometimes constitute a false representations or actual fraud. *In re Barrack*, 217 B.R. 598, 606 (B.A.P. 9th Cir. 1998). "In addition, 'where the promisor knew or should have known of his prospective inability to perform,' the promise can be found to be fraudulent." *Id.* (quoting *In re Firestone*, 26 B.R. 706, 715 (Bankr. S.D. Fla.1982)). In sum, the promises contained in a settlement agreement, like any other contract, form the basis for a fraudulent representation when (1) the promisor intends positively not to perform or lacks present intent to perform the promise, or (2) the promisor knew or should have known of his or her prospective inability to perform the promise.

Furthermore, even a promise to pay money to the other party to a settlement agreement can constitute such a fraudulent representation when there is no intent to perform. *See Bednarsz v. Brzakala (In re Brzakala)*, 305 B.R. 705, 711-12 (Bankr. N.D. Ill. 2004). In *Brzakala*, the debtor-defendant moved to dismiss a complaint alleging claims under § 523(a)(2)(A) and (B). One of the two claims brought under § 523(a)(2)(A) was based on a settlement agreement. *Id.* at 711. The court found that allegations of the claim based on the debtor's promise to pay money and issue a mortgage to the creditors—and his failure to comply with such obligations—satisfied § 523(a)(2)(A). *Id.* Such a promise in a settlement agreement made without a present intent to perform can be the sort of false representation or actual fraud described in § 523(a)(2)(A). *Id.* The court also reasoned that the debtor had obtained an extension of credit, *see* § 523(a)(2), when he promised to pay money and issue a mortgage to settle the creditors' action against him. *Id.* In exchange for the debtor's promises, the creditors had forborne collection efforts, reduced the claim from $243,000 to $77,000, and postponed payment. *Id.* Thus, a debtor's promise to pay money as part of a settlement of a claim can constitute a promise that obtains an extension of credit—a modification of the creditor's claim or the substitution of a new obligation for the existing one, with different terms governed by the settlement.

Relying on the Supreme Court's decision in *Cohen v. de la Cruz*, 523 U.S. 213 (1998), the Ninth Circuit has eliminated "the receipt of a benefit" from the elements of § 523(a)(2)(A) fraud. "[W]e find that in light of *Cohen*, the receipt of a benefit is no longer an element of fraud under § 523(a)(2)(A)." *Muegler v. Bening*, 413 F.3d 980, 984 (9th Cir. 2005). Therefore, a party who promises to pay to another party a settlement amount can be held liable under § 523(a)(2)(A) despite not receiving actual funds so long as the other elements of that subsection are satisfied.

In this case, the fact that Defendants did not receive money under the settlement does not remove their settlement promises from the scope of § 523(a)(2)(A). Defendants' promises may well have been made to obtain an extension of credit, but even so, the receipt of a benefit is not required in this circuit to satisfy § 523(a)(2)(A). The breach of a

settlement agreement's promises, moreover, can give rise to a debt for damages to the extent that such promises constitute an enforceable contractual obligation. The promises in a settlement agreement, if fraudulently made, can give rise to a debt, if breached, that fall squarely within the meaning of "debt" for purposes of § 523(a)(2)(A). *See Cohen v. de la Cruz*, 523 U.S. 213, 218 (1998).

The question of fraud in the inducement to enter the settlement agreement was fairly raised by the pleadings. First Am. Compl. ¶¶ 25-28. Defendants have offered no specific reasons or evidence showing an absence of evidence on this point or showing specific evidence disproving such fraud. Separate Statement of Undisputed Materials Facts #1-27, filed May 14, 2015, ECF #56. Having not carried their summary-judgment burden, the court will deny summary judgment on this ground.

CONCLUSION

The court will deny the Defendants' motion. Defendants have not carried their burden of showing the absence of a genuine issue of material fact on any essential element of the Plaintiff's claim. From the motion, the court does not have a basis to conclude that no evidence supports each independent factual ground on which an essential element of Plaintiff's claim is based.

PARTIAL FINDINGS

"If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact--including an item of damages or other relief--that is not genuinely in dispute and treating the fact as established in the case." Fed. R. Civ. P. 56, incorporated by Fed. R. Bankr. P. 7056. The court exercises it discretion to decline partial findings in this case.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

Defendants Alvin Souza, Jr. and Robyn Souza's motion for summary judgment has been presented to the court, and Plaintiff has presented its opposition in response. Having considered the motion, the opposition, and replies, and having reviewed the evidence and heard oral argument, if any,

IT IS ORDERED that the motion is denied. The court makes no partial findings pursuant to Federal Rule of Civil Procedure 56(g), incorporated by Federal Rule of Bankruptcy Procedure 7056.

3. 12-12304-A-7 MARTHA FAIR
15-1053
FAIR V. BANK OF AMERICA, N.A.
ET AL
THOMAS ARMSTRONG/Atty. for pl.
CONTINUED TO 8/19/15, ECF
NO. 22

STATUS CONFERENCE RE: COMPLAINT
4-22-15 [1]

Final Ruling

This matter is continued to August 19, 2015, at 10:00 a.m.

4. 11-62509-A-7 SHAVER LAKEWOODS
14-1076 DEVELOPMENT INC.
PARKER V. GAINES
LISA HOLDER/Atty. for pl.
RESPONSIVE PLEADING

RESCHEDULED STATUS CONFERENCE
RE: COMPLAINT
7-28-14 [1]

Final Ruling

This matter is continued to July 22, 2015, at 10:00 a.m.

5. 13-18043-A-7 TARSEM PABLA
14-1075
MANFREDO V. PABLA ET AL
TRUDI MANFREDO/Atty. for pl.
RESPONSIVE PLEADING

CONTINUED PRETRIAL CONFERENCE
RE: COMPLAINT
7-28-14 [1]

No tentative ruling.

6. 11-17165-A-7 OAKHURST LODGE, INC., A
15-1017 CALIFORNIA CORPORATION
OAKHURST LODGE, INC. V.
FIRST-CITIZENS BANK & TRUST
DONNA STANDARD/Atty. for pl.
STIPULATION

CONTINUED STATUS CONFERENCE RE:
COMPLAINT
2-11-15 [1]

No tentative ruling.

7. 14-14479-A-7 FABIO GALVEZ
14-1153
GALVEZ ET AL V. THE UNITED STATES OF AMERICA, THE
CONTINUED TO 8/19/15, ECF NO. 46

CONTINUED STATUS CONFERENCE RE: COMPLAINT
12-19-14 [1]

Final Ruling

This matter is continued to August 19, 2015, at 10:00 a.m.