UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW JERSEY

Order Filed on June 4, 2021
by Clerk
U.S. Bankruptcy Court
District of New Jersey

In Re: **MANUEL M. BELLO,** Debtor.	Case No.: 19-13788 Hearing Dates: March 3, 2021 and March 10, 2021 Judge: John K. Sherwood
HAP LIFT, LLC, Plaintiff, vs. **MANUEL M. BELLO,** Defendant.	Adv. Pro. No.: 19-01982

DECISION AND ORDER RE: DISCHARGEABILITY OF HAP LIFT, LLC'S GUARANTY CLAIM

The relief set forth on the following pages, numbered two (2) through eighteen (18), is hereby **ORDERED**.

DATED: June 4, 2021

Honorable John K. Sherwood
United States Bankruptcy Court

FACTS AND PROCEDURAL HISTORY

Defendant Manuel M. Bello ("Mr. Bello") filed for Chapter 11 relief on February 25, 2019. His case was converted to Chapter 7 on October 9, 2019. Plaintiff HAP Lift, LLC ("HAP") commenced this adversary proceeding on June 1, 2019. HAP seeks a determination that its claim against Mr. Bello arising from a personal guaranty dated March 1, 2016 (PTE-5, the "Guaranty") is nondischargeable pursuant to § 523(a)(2) of the Bankruptcy Code because it is a claim based on a fraudulent financial statement by Mr. Bello. (Doc. 1).[1] A trial was held by Zoom on March 3, 2021 and March 10, 2021. (Docs. 33, 34).

In 2015, Mr. Bello sought to purchase a luxury townhouse at 215 Sullivan Street, Unit TH-A, New York, New York (the "Sullivan Property") for $17,500,000. Mr. Bello formed 215 Sullivan St., LLC ("Sullivan") to facilitate the purchase of the Sullivan Property. (Doc. 27, ¶ 8). Sullivan received two loans on March 1, 2016 to finance the purchase of the Sullivan Property. New Wave Loans Residential, LLC ("New Wave") loaned Sullivan $11,750,000 (the "New Wave Loan") and received a first mortgage on the Sullivan Property. Mr. Bello personally guaranteed the New Wave Loan. (PTE-9). HAP loaned Sullivan and 50 South Pointe Drive #3402 LLC ("South Pointe") $4,500,000 (the "HAP Loan") and received a second mortgage on the Sullivan Property. (PTE-1; Doc. 27, ¶¶ 10-12). HAP also received a second mortgage on 50 South Pointe Drive, Unit 3402, Miami, Florida (the "South Pointe Property"). (*Id.*). Under the Guaranty, Mr. Bello personally guaranteed all amounts due under the HAP Loan.

[1] HAP's Complaint also sought to have its claim deemed nondischargable because it was the result of willful and malicious injury by Mr. Bello under §523(a)(6) but HAP did not pursue this claim at trial. (Doc. 38, n.4). HAP also did not pursue the relief sought in the First Count of the Complaint (general fraud and misrepresentation).

In Article 3.4 of the Guaranty, Mr. Bello represented:

> As of the date hereof, and after giving effect to this Guaranty and the contingent obligation evidenced thereby, [Mr. Bello] is and will be solvent, and had and will have assets which, fairly valued, exceed its obligations, liabilities (including contingent liabilities) and debts, and has and will have property and assets sufficient to satisfy and repay its obligations and liabilities.

(PTE-5, Article 3.4). This statement by Mr. Bello, that he was solvent as of March 1, 2016 is the main issue of fact in this case.[2] To prevail, HAP must prove that Mr. Bello was insolvent when the statement was made, that HAP reasonably relied on the statement, and that Mr. Bello intended to deceive HAP.

In March 2017, just one year after closing on the Sullivan Property, Sullivan defaulted on the New Wave Loan and Sullivan and South Pointe defaulted on the HAP Loan. (Doc. 24, ¶¶ 37-38; PTE-6; PTE-10). South Pointe sold the South Pointe Property on June 21, 2017, for $6,350,000. (Doc. 24, ¶ 43). The first mortgagee's loan was satisfied, and HAP received $2,500,000. (*Id.,* PTE-24). On April 30, 2018, Sullivan filed a petition for Chapter 11 relief in the United States Bankruptcy Court for the Southern District of New York. In that case, the Sullivan Property was sold at auction to New Wave for its credit bid of $14,625,000. (PTE-11). HAP did not receive any proceeds from the sale of the Sullivan Property. (Doc. 27, ¶ 24; Doc. 24, ¶¶ 41-42; PTE-10; PTE-11). On July 27, 2017, HAP commenced an action against Mr. Bello in the United States District Court for the Southern District of New York seeking to recover all amounts

[2] As to Mr. Bello's statement that he would remain solvent, the Court does not see this as a basis for a nondischargeability claim. "A bare promise to be fulfilled in the future, which is not carried out, does not render a consequent debt nondischargeable under § 523(a)(2)(A) … An unfulfilled promise to perform in the future is actionable only in contract." *Cochran v. Reath* (*In re Reath*), 368 B.R. 415, 425 (Bankr. D.N.J. 2006) (internal citations omitted). Thus, the focus of the parties at trial was properly on the state of Mr. Bello's finances as of March 1, 2016.

due under the Guaranty. (Doc. 24, ¶ 39). The District Court entered judgment against Mr. Bello for $3,142,951.73 on January 30, 2019. (PTE-7).

1. Mr. Bello's Solvency Representation.

During trial on March 3 and March 10, 2021, both parties presented evidence with respect to Mr. Bello's solvency at the time he executed the Guaranty on March 1, 2016. To prove that he was solvent (and that he believed he was), Mr. Bello testified that in the process of obtaining the New Wave Loan to finance the purchase of the Sullivan Property, New Wave conducted standard underwriting. (March 3, 2021 Tr. – 77-81; Doc. 27, ¶ 19). New Wave worked with Mr. Bello's chief operating officer, accountant, and lawyer to obtain bank records and cash flow statements for Mr. Bello's businesses and ultimately provided financing for the Sullivan property. (*Id.*).

Mr. Bello also proffered two loan applications to prove that he was, or believed that he was, solvent as of March 1, 2016. Mr. Bello had applied for a loan from Federal Savings Bank ("FSB") on October 28, 2015. (PTE-18). FSB approved the application and made a loan in the amount of $3,000,000 secured by a first mortgage on the South Pointe Property. FSB conducted due diligence and relied on documentation submitted by Mr. Bello's accountant and staff. (March 3, 2021 Tr. – 23:22 - 24:1). The application included a list of assets and liabilities and reflected that Mr. Bello had a net worth of $12,824,128.77. (PTE-18; PTE-48). Though this was Mr. Bello's personal loan application, included in the list of assets were properties that Mr. Bello did not personally own, such as houses in Kinnelon and Seaside Heights, New Jersey. Mr. Bello acknowledged that he did not hold title to all the assets listed and that some of the assets were held in trust and by LLCs. (PTE-3; PTE-14; PTE-41; March 3, 2021 Tr. – 24:12-22; 25:10-20). He also suggested, without corroboration, that FSB was aware of this. (March 3, 2021 Tr. – 25:1-2).

In November 2016, Mr. Bello applied for a loan from Seacoast National Bank. Mr. Bello testified that his accountants prepared a joint financial statement for him and his wife, Deborah Bello ("Mrs. Bello"). (DTE-1, March 3, 2021 Tr. – 190:24-192:16). The joint financial statement reflected that Mr. Bello's and Mrs. Bello's total assets were $54,088,474.31 and total liabilities were $598,116. (DTE-1; Doc. 27, ¶ 21). This joint financial statement did not indicate which assets were owned by Mr. Bello, Mrs. Bello, or entities which were either owned or controlled by Mr. Bello or Mrs. Bello. (Doc. 27, ¶ 20). Mr. Bello claims that he became insolvent because of market movements, unsuccessful private equity investments, co-partners of Maven Partners LLC absconding with his money, and a significant downward shift in real estate values in 2016. (March 10, 2021 Tr. – 45:2-11; 46:12-14; Doc. 27, ¶ 26).

Mr. Bello's evidence and testimony concerning his solvency on March 1, 2016 was not very credible. The financial information provided to FSB and Seacoast National Bank was both incomplete and inconsistent. It was clear, however, that Mr. Bello routinely held valuable assets in trusts and LLCs but considered these assets to be his own when applying for credit. (DTE–1; PTE-18; Doc 24, ¶ 20). The bottom line is that Mr. Bello did not prove that he was solvent on March 1, 2016, but the burden of proof at trial as to the solvency issue was on HAP.

HAP presented expert testimony to prove that Mr. Bello was insolvent as of March 1, 2016. HAP's expert, Howard Fielstein ("Mr. Fielstein"), presented a report (PTE-33, the "Report") which was prepared after he analyzed Mr. Bello's financial documents. As illustrated in the chart below, Mr. Fielstein concluded that as of March 1, 2016, Mr. Bello had total assets of $9,620,064

and total liabilities of $19,458,677 and was thus insolvent. (PTE-33, ¶ 20).

FIGURE 1 – MR. BELLO SCHEDULE OF ASSETS AND LIABILITIES AT FAIR VALUE AS OF MARCH 1, 2016

ASSETS		**LIABILITIES**	
Bank Account (a)		**Federal Savings Bank (d)**	$ 3,000,000
Bank of America Checking Acct x-9645	$ 126,647		
Bank of America MM Svg Acct x-6619	11,430	**Personal Guarantee (e)**	
Metropolitan Account x-1200	5,000	New Wave Loans Residential, LLC	11,750,000
Signature Checking Acct x-5805	79,537	Hap Lift, LLC	4,500,000
Signature Checking MMA x-5805	3,910		
		Other Liabilities (f)	
Real Estate (b)		Amex x-7293	77,041
210 Boonton Avenue	464,438	VW Credit Inc.	23,231
50 South Pointe Drive #3402	2,088,504	US Bank	21,450
		BMW	86,955
Other Assets (c)			
49% membership interest in InstaFundz, LLC	376,774		
Due from Maven Partners LLC	5,589,368		
Jewelry	874,456		
TOTAL ASSETS	**$ 9,620,064**	**TOTAL LIABILITIES**	**$ 19,458,677**
ASSET DEFICIENCY (i.e. INSOLVENCY)	**$ (9,838,613)**		

(PTE-33, Figure 1).

Mr. Fielstein acknowledged at trial that his analysis shortchanged Mr. Bello's net worth regarding the South Pointe Property and the related $3,000,000 mortgage debt to FSB. (March 3, 2021 Tr. – 149-155). On the asset side, he only gave Mr. Bello credit for 50% of the net equity in the South Pointe Property - $2,088,504 using a valuation of $6,200,000. Actually, Mr. Bello's 50% interest in the South Pointe Property should have been $3,100,000 which would result in an upward adjustment of just over $1,000,000 on the asset side of the ledger. Also, though Mr. Bello was liable for the entire $3,000,000 due to FSB, this claim was secured by a first mortgage against the South Pointe Property (valued at $6,200,000). Mr. Fielstein did not discount the $3,000,000 liability based on the high probability that it would be satisfied by the proceeds of the South Pointe

Property. (March 3, 2021 Tr. – 165:11-15). Ultimately, Mr. Bello had no exposure to FSB on this claim.

The Report included the full value of the guarantees of the New Wave Loan and HAP Loan, even though these two liabilities were contingent. (PTE-33, Figure 1). The full $4,500,000 of exposure to HAP was counted as a liability even though HAP had second mortgages on the Sullivan Property and the South Pointe Property. As stated, this full exposure did not come to pass because HAP received $2,500,000 from the South Pointe Property sale. The New Wave exposure was fully counted at $11,750,000 even though New Wave had a first mortgage on the Sullivan Property which, by all accounts, was worth more than New Wave's debt. If the Report did not include the full amount of the guaranteed liabilities because they were contingent, then Mr. Fielstein's analysis might indicate that Mr. Bello was solvent. Mr. Fielstein testified that, to determine the amount of Mr. Bello's liabilities as of March 1, 2016, one needed to discount ("to the best that we could") for the likelihood that the contingent liabilities arising from the guaranties would not occur, but he did not do so in the Report. (March 3, 2021 Tr. – 165-166).

Though most of the evidence at trial related to Mr. Bello's balance sheet insolvency, there was no credible explanation by Mr. Bello as to how he was going to pay his debts as they became due after the Sullivan Property was purchased. In March 2016, Mr. Bello took on $16,250,000 of new debt (New Wave and HAP) to acquire the Sullivan Property. There is no evidence in the record that shows that Mr. Bello had the means to service this debt on a current basis and the record reflects that Mr. Bello defaulted on those loans within one year of closing. (PTE-6; Doc. 24, ¶ 37). Mr. Bello's 2016 tax return also suggests that he and his wife did not have enough income to

service such massive debt. (PTE-30). The tax return showed combined compensation for Mr. and Mrs. Bello of $495,225 and total income after accounting for losses of $156,409. (*Id.*).

2. Reasonable Reliance By HAP.

HAP's principal, Harsh Padia ("Mr. Padia"), contends that he relied on Mr. Bello's representation in the Guaranty that he was solvent as of March 1, 2016. He also contends that he would not have loaned the $4,500,000 to Sullivan and South Pointe without this representation. (Doc. 24, ¶ 60 - 61). However, at trial, Mr. Padia was asked to identify what he relied on to provide the HAP Loan, and he indicated that he relied on the collateral for the loan and his perception of Mr. Bello's wealth. (March 3, 2021 Tr. – 105:24-107:2). Due to Mr. Padia's relationship with Mr. Bello, he did not believe he needed to review any records to confirm Mr. Bello's wealth. (March 3, 2021 Tr. – 106:22 - 107:2). Further, Mr. Padia could not recall any details of discussions with Mr. Bello about the Guaranty. (March 3, 2021 Tr. – 111:15-20). In sum, Mr. Padia's testimony suggested that his decision to make the HAP Loan was based more on the mortgages and previous dealings with Mr. Bello, and less on the solvency representation in the Guaranty. (March 3, 2021 Tr. – 139:11-18).

Mr. Bello's case did not focus much on whether there was reliance by HAP. Rather, the emphasis was the reasonableness of HAP's reliance. Mr. Bello suggested that a borrower's statement that he is "solvent," without more, is too general to qualify as a statement regarding a debtor's financial condition that a creditor would reasonably rely on. (Doc. 39, ¶ 35).

Along those lines, Mr. Bello's counsel established that HAP did not seek or review any detailed financial statements setting forth Mr. Bello's assets and liabilities. Examples of such statements are in the FSB loan application (PTE-18) and the Seacoast National Bank loan

application. (DTE-1). Mr. Padia's testimony was that he believed that Mr. Bello was wealthy and successful based on their past business dealings and general observations. Mr. Padia described Mr. Bello's "narrative" as that of a very wealthy person whose wealth was manifested by his expenditures and assets. (Doc. 24, ¶¶ 12-18). Mr. Padia was aware of Mr. Bello's high-end residential real estate, multiple high-priced automobiles (Ferraris), country club memberships, jewelry, and private jet usage – to name a few things. (Doc. 24, ¶¶ 22-31). There is no doubt that Mr. Bello gave the outward appearance that he was a man of significant wealth which led Mr. Padia to forgo a deep analysis of his personal financial statements and be satisfied with the general solvency representation. In hindsight, Mr. Padia acknowledged that this was "naive" of him. (March 3, 2021 Tr. – 106:13-22).

A logical question was that, if Mr. Bello had so much personal wealth, why did he need to borrow $4,500,000 from HAP to purchase the Sullivan Property? Mr. Bello's response, apparently believed by Mr. Padia, was that his liquidity was tied up in other successful business ventures. (March 3, 2021 Tr. – 106:1-5; 107:3-15). Again, Mr. Padia did not do anything specific to investigate Mr. Bello's liquidity or his other businesses.

Mr. Padia's opinion on the value of the Sullivan Property was between $15-25 million. (March 3, 2021 Tr. – 103: 5-9). The first mortgage held by New Wave was for $11,750,000. Thus, using the middle of Mr. Padia's range as to the value of the Sullivan Property, it was conceivable that the HAP Loan would be protected by the Sullivan Property alone. Beyond that, HAP had a second mortgage on the South Pointe Property. As noted above, this mortgage generated $2,500,000 for HAP when the South Pointe Property was sold in June 2017. The Guaranty provided HAP with a third source of recovery.

3. Mr. Bello's Intent To Deceive HAP.

Mr. Bello contends that he was solvent when he signed the Guaranty. So, there is no direct evidence that he intended to deceive HAP. Mr. Bello adds that because of the value of HAP's mortgages against the Sullivan Property and the South Pointe Property, there was little risk that he would ever incur liability under the Guaranty. Also, he considered his personal exposure to the first mortgage lenders on the Sullivan Property and South Pointe Property (New Wave and FSB) to be hypothetical at best because they were fully secured by their collateral. (*See* Doc. 39, pp. 9-14). Based on this, Mr. Bello submits that he reasonably believed he was solvent on March 1, 2016.

HAP presented evidence that as a general practice, Mr. Bello included assets that he did not personally own when describing his net worth to creditors. Examples included his homes in Kinnelon and Seaside Heights, New Jersey which were included in his personal financial statements submitted to lenders but ultimately owned by Mrs. Bello. (PTE-18; DTE-1). HAP also revealed at trial that Mr. Bello's answer to the interrogatory concerning his assets as of March 1, 2016 was inaccurate and incomplete in many respects. (PTE-12; March 3, 2021 Tr. – 51-52). In sum, HAP was convincing during trial in establishing that – "While [Mr.] Bello intentionally presented to his lenders an artificially, and materially false, inflated net worth, he also attempted to remove the very assets on which he relied from the reach of his lenders and other creditors through his transfer of those assets to various entities that he did not own or to irrevocable trusts that he created…." (Doc. 37, ¶ 40).

But there is no dispute that these detailed financial statements that included assets that Mr. Bello did not own were not shared with HAP or relied on by HAP. The only thing HAP asked for was the general statement from Mr. Bello that he was "solvent" without underlying detail.

LEGAL ANALYSIS

To prove a case under § 523(a)(2)(B), HAP must prove that it extended credit based on a false financial statement in writing, it reasonably relied on that statement, and that Mr. Bello proffered the statement with an intent to deceive HAP.[3] It is undisputed that the statement that Mr. Bello was solvent on March 1, 2016 was a statement regarding his financial condition. (Doc. 39, ¶ 26). The legal issues are whether the solvency statement was false; whether HAP reasonably relied on the statement; and whether Mr. Bello made the statement with intent to deceive. On each of the issues, HAP has the burden of proof.[4]

1. HAP Did Not Prove That Mr. Bello Was Insolvent.

The Court considers New York law and the language in the Guaranty in determining whether the Mr. Bello's representation was false. In the Guaranty, Mr. Bello represented to HAP that he was "solvent" as of March 1, 2016. Specifically, he stated that he, "is and will be solvent, and had and will have assets which, fairly valued exceed its obligations, liabilities (including contingent liabilities) and debts, and has and will have property and assets sufficient to satisfy and

[3] Under Section 523(a)(2)(B), a debt is nondischargeable to the extent obtained by use of a statement in writing:

(i) that is materially false;
(ii) respecting the debtor's or an insider's financial condition;
(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
(iv) that the debtor caused to be made or published with the intent to deceive.

11 U.S.C. § 523(a)(2)(B).

[4] *Insurance Co. of N.Am. v. Cohn*, 54 F.3d 1108, 1114 (3d Cir. 1995).

repay [his] obligations and liabilities." (PTE-5, Article 3.4). Pursuant to New York Debtor and Creditor Law, "[a] person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured." [5] Both the Guaranty and New York law suggest that the question of solvency should be addressed by comparing Mr. Bello's assets to his liabilities – a balance sheet test. Although HAP presented evidence at trial that it was unlikely that Mr. Bello would be able to pay both the HAP Loan and New Wave Loan on a current basis based on his 2016 income, this fact is not relevant under a balance sheet insolvency test.

A personal guarantee of a loan has been viewed by courts as "a probable liability which must be considered in determining a person's solvency."[6] It is recognized under New York law that there must be evidence that a contingent liability, including one arising from a guaranty, must be "probable" in order to be accounted for in evaluating solvency.[7] Accordingly, if a certain contingent liability is deemed "probable," then it "must be included in the computation of total indebtedness."[8] However, to determine the amount and probability of a contingent liability, "the court must assess the liability from the debtor's perspective and multiply the total debt guaranteed by the probability that the debtor will be required to make good on the guarantee."[9] Thus, there is

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[5] N.Y. D.C.L. § 271.

[6] *Continental Bank N.A. v. Modansky*, 159 B.R. 129, 133 (Bankr. S.D.N.Y 1993) (citing *Marine Midland Bank v. Stein*, 105 Misc. 2d 768, 433 N.Y.S.2d 325 (Sup. Ct. 1980)).

[7] *Matter of Gronich & Co., Inc. v Simon Prop. Group, Inc.*, 180 AD.3d 541, 543 119 N.Y.S.3d 456 (2d Dept. 2020) (citing *Staten Island Sav. Bank v. Reddington*, 260 A.D.2d 365, 687 N.Y.S.2d 707 (App. Div. 2nd Dept. 1999)).

[8] *Davis v. Suderov*, 148 B.R. 165, 176 (Bankr. E.D.N.Y. 1992) (holding that the entire amount of guaranty should be included when the debtor was almost certain to be called upon immediately to satisfy guaranty).

[9] *Suderov,* 148 B.R. at 176 (citing *Covey v. Commercial Nat'l Bank*, 960 F.2d 675 (7th Cir. 1992)); *see also Staten Island Sav. Bank* at 366 (2d Dept. 1999) (mere existence of personal guaranty is insufficient to establish that liability is probable within meaning of Debtor and Creditor Law §271(1)).

ample authority under New York law that suggests that an adjustment may be necessary when computing contingent liabilities for the purposes of a solvency analysis.

HAP suggests that debts need not be absolute or matured to be considered in evaluating solvency and that "probable liability" should include contingent liabilities such as guarantees. In support of this position, HAP cites to *Allen Morris Commercial Real Estate Servs. Co. v. Numismatic Collectors Guild, Inc*.[10] This case involved a claim by a landlord (Allen Morris) against a new corporation (Numismatic) that had purchased the assets of its original tenant (Old Numismatic) and assumed its liabilities. The landlord also sought relief against shareholders of Old Numismatic who received substantial distributions from the proceeds of sale. The landlord, a creditor of Old Numismatic, argued that these distributions were fraudulent conveyances because they left Old Numismatic insolvent and were made without fair consideration. The District Court considered the question of Old Numismatic's insolvency under §271 of the New York Debtor – Creditor law and concluded that Old Numismatic was left with no assets to pay the rent claim of Allen Morris. The Court reached this conclusion even though Old Numismatic had a contract claim against Numismatic (its buyer) who had assumed all of its liabilities. The Court described this contract claim as "so uncertain and contingent in nature that it lacks present fair salable value within the meaning of the Debtor and Creditor Law."[11] Thus, even though Old Numismatic had a contract claim against its buyer that might be used to satisfy the landlord's claim, the Court still deemed the landlord's claim against Old Numismatic to be "probable." But, it is noteworthy that the Court conducted an analysis of the quality of the contract claim and found it to be "uncertain

[10] 1993 U.S. Dist. LEXIS 7052 at 23-24 (S.D.N.Y. May 26, 1993).
[11] *Id.* at 28 n.12.

and contingent."[12] Here, Mr. Bello's most substantial liabilities were secured by first and second mortgages against valuable real estate – collateral that is more certain and less contingent than a contract claim.

The use of the term "probable liability" in §271 of the New York Debtor Creditor Law suggests that some assessment must be done before a contingent personal liability is counted at full face value in an insolvency analysis. Otherwise, it would be best to replace the term with something like "any possible liability." According to HAP and Mr. Fielstein's Report, all of Mr. Bello's mortgage debt was considered probable even though it was likely that the mortgaged real estate would be the primary source of recovery. Applying New York law, Mr. Bello's liabilities should have been discounted to reflect the likelihood that Mr. Bello would not be called upon to satisfy all his mortgaged-backed debt. Since HAP's solvency analysis overstated Mr. Bello's liabilities by treating all his mortgage-backed debt as probable, HAP did not prove that Mr. Bello was insolvent on March 1, 2016.

2. **HAP's Reliance Was Not Reasonable.**

In *Insurance Co. of N. Am. v. Cohn*, the Third Circuit held that the "reasonableness of a creditor's reliance under § 523(a)(2)(B) is judged by an objective standard, *i.e.*, that degree of care which would be exercised by a reasonably cautious person in the same business transaction under similar circumstances."[13] The court noted three factors for consideration:

> (1) the creditor's standard business practices in evaluating cred-worthiness (absent other factors, there is reasonable reliance where the creditor follows its normal business practices);

[12] *Id.*
[13] *Insurance Co. of N. Am. v. Cohn*, 54 F.3d 1108, 1117 (3d Cir. 1995).

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

Id.

Determining reasonable reliance is a fact specific inquiry.[14] There was no evidence at trial that HAP had standard business practices for evaluating creditworthiness. This was because HAP was not in the business of lending on a regular basis. (March 3, 2021 Tr. – 132:11-19). The limited evidence on HAP's business affairs (as presented by Mr. Padia) suggested that he was an investor in real estate and other business ventures. (March 3, 2021 Tr. – 109:2-8; 112:7-24). Likewise, as to the standards or customs in HAP's industry for evaluating creditworthiness, there was little to consider because HAP was not a regular participant in the lending industry. (March 3, 2021 Tr. – 132:11-19). But the record does contain examples of detailed financial statements requested from Mr. Bello by other lenders. (DTE-1; PTE-48). These financial statements are far more detailed than the general solvency statement that was given by Mr. Bello to HAP. Thus, it does not appear that factors (1) or (2) above would support a finding of reasonable reliance by HAP.

With respect to the "surrounding circumstances" under factor (3), Mr. Padia testified that based on his past business dealings with Mr. Bello and his outward appearance of significant

[14] *Id.* at 1118.

wealth, he was "shocked" to learn that Mr. Bello held so few assets in his own name. (Doc. 24, ¶ 45-53). Essentially, Mr. Padia was lulled into a false sense of security by Mr. Bello's extravagant lifestyle and did not think it was necessary to dig deeply into his personal balance sheet. As to Mr. Bello's financial condition, HAP was satisfied with the general statement that he was solvent. It does not seem that a lender that truly cared about the creditworthiness of a guarantor would rely on such a general statement. An individual whose assets exceed liabilities by just $100 can be technically solvent yet still be a terrible credit risk. The more prudent approach is to have a borrower list the assets and liabilities that support his solvency assertion and quantify the income and assets at his disposal if called upon to pay the debt.

Applying an objective standard and looking at the degree of care that would be exercised by a reasonably cautious person in the same business transaction under similar circumstances, the Court does not believe that a reasonably cautious lender with concerns about a guarantor's financial condition would rely on a solvency statement without some analysis of the basis for the statement. Thus, HAP has not proven reasonable reliance.[15]

3. HAP Did Not Prove That Mr. Bello's Solvency Statement Was Made With An Intent To Deceive.

For the HAP Loan to be nondischargeable, Mr. Bello must have also intended to deceive HAP with his statements.[16] Intent is rarely proven by direct evidence and courts may infer intent

[15] As to actual reliance by HAP on the solvency statement, Mr. Padia's declaration suggested that he did rely on the statement in making the HAP Loan. (Doc. 24, ¶ 8). However, as set forth above, Mr. Padia's testimony on cross examination suggested that he relied less on the solvency statement and more on the mortgages and Mr. Bello's rich man narrative. (March 3, 2021 Tr. – 105:22 -107:2). Though actual reliance by HAP was a close call, it is not necessary to decide the issue of actual reliance since the Court has found that HAP's reliance was not reasonable from an objective standpoint.

[16] 11 U.S.C. § 523(a)(2)(B)(iii).

from the totality of the circumstances.[17] Moreover, it is sufficient that the debtor exhibited mere "reckless indifference to, or reckless disregard of, the accuracy of the information in the financial statement of the debtor when the totality of the circumstances supports such an inference."[18] "Because a debtor will rarely, if ever, admit that deception was his purpose, the intent to deceive is an extremely difficult element to prove. To assist the creditor, while maintaining the notions of fair play and justice, [the Court has] allowed the intent to deceive to be presumed upon the proof of a prima facie case."[19] Thus, had the Court found that Mr. Bello was insolvent when he signed the Guaranty, it would be presumed that he intended to deceive HAP. Since HAP did not prove that Mr. Bello was insolvent when the Guaranty was signed, HAP does not get the benefit of this presumption.

HAP's claim that Mr. Bello engaged in deceptive practices with other creditors by submitting inaccurate financial statements that included assets he did not own was supported by credible evidence. While this evidence may be relevant to whether Mr. Bello intended to deceive other creditors, it is not relevant to the question of whether he intended to deceive HAP with the statement that he was solvent. Since the Court agrees with Mr. Bello's argument that his contingent exposure to New Wave and HAP (and possibly FSB) was unlikely because of the mortgages, there was a reasonable basis for Mr. Bello to believe he was solvent as of March 1, 2016. Thus, the Court cannot conclude based on the evidence and legal analysis that Mr. Bello's statement that he was solvent was made with the intent to deceive.

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[17] *Cohn*, 54 F.3d at 1118-19; *see also In re Drewett*, 13 B.R. 877 (Bankr. E.D. Pa.1981).
[18] *Cohn*, 54 F. 3d at 1119.
[19] *Drewett*, 13 B.R. 877 at 880 (citing *In re Tomeo*, 1 B.R. 673 (Bankr. E.D. Pa. 1979)).

THEREFORE, IT IS ORDERED:

1. HAP's request for a judgment that its claim against Mr. Bello is nondischargeable under § 523(a)(2)(B) of the Bankruptcy Code is denied; and

2. The adversary proceeding is dismissed.

Form order − ntcorder

UNITED STATES BANKRUPTCY COURT

District of New Jersey
MLK Jr Federal Building
50 Walnut Street
Newark, NJ 07102

In Re: Manuel M. Bello and Deborah Bello
Debtor

Case No.: 19−13788−JKS
Chapter 7

HAP LIFT, LLC
Plaintiff

v.

Manuel M. Bello
Defendant

Adv. Proc. No. 19−01982−JKS

Judge: John K. Sherwood

NOTICE OF JUDGMENT OR ORDER
Pursuant to Fed. R. Bankr. P. 9022

Please be advised that on June 4, 2021, the court entered the following judgment or order on the court's docket in the above−captioned case:

Document Number: 42 − 1
Decision and Order re: Dischargeability of HAP LIFT, LLC's Guaranty Claim. (related document:1 Complaint filed by Plaintiff HAP LIFT, LLC).. Service of notice of the entry of this order pursuant to Rule 9022 was made on the appropriate parties. See BNC Certificate of Notice. Signed on 6/4/2021 (rah)

Parties may review the order by accessing it through PACER or the court's electronic case filing system (CM/ECF). Public terminals for viewing are also available at the courthouse in each vicinage.

Dated: June 4, 2021
JAN: rah

Jeanne Naughton
Clerk