Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
July 01, 2016

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

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In re: MARK J. ESCOTO, Debtor.	Case No.: 13-10096-MKN Chapter 7
ROBERT G. HILLSMAN, Plaintiff, v. MARK J. ESCOTO, Defendant.	Adversary No.: 13-01058-MKN Date: July 22, 2015 Time: 9:30 a.m.

SUPPLEMENTAL MEMORANDUM DECISION AFTER TRIAL[1]

On July 22, 2015, the court heard the Motion for Entry of Findings, Conclusions and Judgment on the Record, or, in the Alternative, to Reopen Discovery and Set New Trial Date, brought by the plaintiff. The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

[1] In this Supplemental Memorandum Decision, all references to "ECF No." are to the numbers assigned to the documents filed in the above-captioned bankruptcy case as they appear on the docket maintained by the clerk of the court. All references to "AECF No." are to the documents filed in the above-captioned adversary proceeding. All references to "Section" are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All citations (and textual references) to "NRS" are to provisions of the Nevada Revised Statutes pursuant to NRS 220.170(4)(a). All references to "FRBP" are to the Federal Rules of Bankruptcy Procedure. All references to "FRCP" are to the Federal Rules of Civil Procedure.

BACKGROUND

On January 4, 2013, Mark J. Escoto ("Debtor") filed a voluntary Chapter 7 petition. On his Schedule "F," Debtor listed Robert Hillsman ("Hillsman") as having an unsecured claim in the amount of $200,000 based on a personal loan. (ECF No. 1).

On April 8, 2013, Hillsman commenced the above-captioned adversary proceeding. The adversary complaint sought to determine the dischargeability of the personal loan pursuant to Section 523(a)(2)(A) and Section 523(a)(2)(B). (AECF No. 1). On May 15, 2013, Debtor filed an answer. (AECF No. 7).

On August 16, 2013, an order was entered scheduling a pretrial conference and a trial. (AECF No. 10).

On January 30, 2014, Debtor filed a motion for summary judgment ("SJ Motion"). (AECF No. 13). On March 19, 2014, Hillsman filed his opposition to the SJ Motion that included a Countermotion for Summary Judgment ("SJ Countermotion"). (AECF No. 25). On April 16, 2014, an order was entered denying both the SJ Motion and the SJ Countermotion. (AECF No. 29). Accordingly, the matter proceeded to trial.

On May 12, 2014, the parties filed a joint pre-trial memorandum ("Joint Memorandum"). (AECF No. 34). In that Joint Memorandum, Hillsman indicated that he would seek a determination of nondischargeability only under Section 523(a)(2)(A).

On June 2, 2014, trial was conducted before the court. After close of evidence, final arguments were presented and the matter was taken under submission.

On July 3, 2014, the court entered a Memorandum Decision After Trial ("Trial Decision") setting forth the court's findings of fact and conclusions of law. (AECF No. 46). A separate judgment was entered in favor of the Debtor ("Judgment"). (AECF No. 47).

On July 15, 2014, Hillsman timely filed a notice of appeal. (AECF No. 52).

On May 15, 2015, the Bankruptcy Appellate Panel of the Ninth Circuit ("BAP") entered a memorandum decision vacating the Judgment and remanding the matter ("BAP Remand Memorandum") for this court to enter additional or amended findings in determining whether Hillsman had met his burden of demonstrating proximate cause for any damages incurred by the

Debtor's failure to disclose certain settlements reached earlier in their dispute. (AECF No. 70).

On June 18, 2015, Hillsman filed the instant Motion for Entry of Findings, Conclusions and Judgment on the Record, or, in the Alternative, to Reopen Discovery and Set New Trial Date ("Motion") (AECF No. 71) by which he requests the court to enter the additional or amended findings required by the BAP Remand Memorandum. Because the BAP vacated the prior Judgment, Hillsman also requests entry of a new judgment. On July 9, 2015, Debtor filed a response ("Response"). (AECF No. 76). On July 16, 2015, Hillsman filed a reply ("Reply"). (AECF No. 78).

On July 22, 2015, a hearing was conducted and arguments were presented by counsel. Thereafter, the matter was taken under submission.[2]

APPLICABLE ELEMENTS UNDER SECTION 523(a)(2).

As previously discussed, Hillsman seeks a determination that the funds he loaned to the Debtor should be excepted from discharge under Section 523(a)(2)(A). Exceptions to discharge are narrowly construed. See Snoke v. Riso (In re Riso), 978 F.2d 1151, 1154 (9th Cir. 1992). Hillsman, as the plantiff, bears the burden of proving all of the elements required under Section 523(a)(2)(A) by a preponderance of the evidence. See Sachan v. Huh (In re Huh), 506 B.R. 257, 262 (B.A.P. 9th Cir. 2014).

A debtor may not receive a discharge under Section 727(b) of any debt "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial conditions." 11 U.S.C. § 523(a)(2)(A).

In order to establish a claim under Section 523(a)(2)(A), a creditor must prove: "(1) misrepresentation, fraudulent omission or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and (5) damage to the creditor

[2] On July 22, 2015, Hillsman's counsel filed a declaration (AECF No. 80) regarding additional attorney's fees he incurred since the close of trial and on July 28, 2015, his counsel filed an additional declaration. (AECF No. 82).

proximately caused by its reliance on the debtor's statement or conduct." Turtle Rock Meadows, etc. v. Slyman (In re Slyman), 234 F.3d 1081, 1085 (9th Cir. 2000). The "intent to defraud is a question of fact," and the "intent to deceive can be inferred from the surrounding circumstances." Cowen v. Kennedy (In re Kennedy), 108 F.3d 1015, 1018 (9th Cir. 1997).

It is well-established that nondisclosure of a material fact constitutes a fraudulent representation under Section 523(a)(2)(A) where the debtor has a duty to disclose. See Apte v. Japra (In re Apte), 96 F.3d 1319, 1323-24 (9th Cir. 1996). In a business transaction, parties owe each other a duty to disclose if because of the relationship between them, the customs of the trade, or other objective circumstances, a reasonable expectation of disclosure is created. Id. at 1324.

Where a creditor's claim under Section 523(a)(2)(B) is based on a forbearance, the creditor bears the burden of proving that at the time of the forbearance "it had valuable collection remedies." See Stevens v. Nw. Nat'l Ins. Co. (In re Siriani), 967 F.2d 302, 305 (9th Cir. 1992). In addition to having valuable collection remedies at the time of the forbearance, the creditor must prove that "those remedies became worthless." Id. In other words, the creditor must show some damage proximately caused by the forbearance other than the unpaid debt.

Where the creditor's claim under Section 523(a)(2)(A) also is based on a forbearance, the same evidentiary burden applies. See Cho-Hung Bank v. Kim (In re Kim), 163 B.R. 157, 161 (B.A.P. 9th Cir. 1994), aff'd and adopted, 62 F.3d 1511 (9th Cir. 1995). Thus, a plaintiff who seeks to deny discharge of a debt based on a fraudulently obtained extension or forbearance must prove by a preponderance of the evidence that he or she actually had valuable collection remedies and that those remedies became lost value as a result of the extension or forbearance. See, e.g., Shah v. Chowdaury (In re Chowdaury), 2014 WL 2938274, at *4 (9th Cir. June 30, 2014)(creditor must present evidence that he had valuable collection remedies and that the remedies lost value as a result of forbearance); Antioch Community Federal Credit Union v. Pagnini (In re Pagnini), 2012 WL 5489031, at *5-6 (B.A.P. 9th Cir. Oct. 18, 2012)(existence of valuable collection remedy and its loss of value must be established by credible evidence); Milner v. Locke (In re Locke), 205 B.R. 592, 598 (B.A.P. 9th Cir. 1996)(existence of valuable

collection remedy must be established by creditor); Diversified Funding Group, LLC v. Herndon (In re Herndon), 2014 WL 3966386, at *8 (Bankr.D.Ariz. Aug. 13, 2014)(creditor must produce evidence that "it had valuable collection remedies at the time of the extensions which lost value during the extension period."); California Bank & Trust v. Kahn (In re Kahn), 2013 WL 5881618, at *14 (Bankr. S.D. Cal. Sep. 30, 2013)(creditor failed to present any evidence that its available collection remedies lost value during the extension periods); Hussain v. Chopra (In re Chopra), 2013 WL 1681773, at *8 (Bankr. N.D. Cal. Apr. 17, 2013)(creditor must present evidence establishing what valuable collection remedies were lost as a result of a settlement); First American Title Insurance Company v. Cunningham (In re Cunningham), 2012 WL 6042863, at *6 (Bankr. D. Ariz. Dec. 5, 2012)(creditor must show that valuable collection remedies existed and that those remedies lost value during the renewal period, not that the creditor would have exercised those rights in a sufficiently timely fashion); Banner Bank v. Bell (In re Bell), 2010 WL 4809123, at *4-5 (Bankr. W.D. Wash. July 21, 2010)(creditor must present evidence that had it exercised its collection rights at the time of the loan extension it would have avoided the loss now claimed).

THE TRIAL DECISION

The Trial Decision listed the exhibits admitted into evidence at trial and sets forth the testimony of the three witnesses called at trial.[3] The court discussed its factual findings based on the evidence presented as well as its legal conclusions concerning Hillsman's claim under Section 523(a)(2)(A).

Because the court found that Hillsman had failed to meet his burden of proving that a certain amendment dated March 10, 2011, extending the maturity date of his promissory note from the Debtor,[4] was the proximate cause of any damages under Section 523(a)(2)(A), the

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[3] In this Supplemental Memorandum Decision, the court will use the same exhibit and witness references used in the Trial Decision.

[4] An Amending Agreement dated March 10, 2011, was admitted into evidence at trial. (Ex. 4). The amendment extending the maturity date of the promissory note is referred to as an extension agreement in the BAP Remand Memorandum and is referred to as the "Amending Agreement" by this court in the Trial Decision. In this Supplemental Memorandum Decision,

separate Judgment was entered contemporaneously in favor of the Debtor. The Trial Decision constituted the court's findings of fact and conclusions of law pursuant to FRCP 52, incorporated by reference under FRBP 7052.

THE BAP REMAND MEMORANDUM

On appeal, the BAP concluded that this court applied the correct legal standard for determining proximate cause under Section 523(a)(2)(A) and that the court correctly determined that Hillsman failed to establish proximate cause with respect to the Extension Agreement. The BAP also concluded, however, that the bankruptcy court should have examined proximate cause with respect to the settlements in 2008 and 2009 of certain construction defect litigation that had been commenced by the Debtor[5] and which settlements had not been disclosed by the Debtor to Hillsman.[6] The BAP, therefore, vacated the Judgment, but not the Trial Decision. It remanded the adversary proceeding to this court for additional or amended findings as to whether Hillsman demonstrated at trial that he held valuable collection remedies at the time of the settlements and that those collection remedies lost value.[7]

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the court will also refer to it as the Extension Agreement.

[5] For purposes of this Supplemental Memorandum Decision, the construction defect litigation will be referred to as the "Christopher Homes Litigation" and these separate settlements of that litigation will be referred to as the "2008 Settlement" and the "2009 Settlement."

[6] This court applied the proximate cause standard required by the Ninth Circuit in Siriani and Kim. That legal standard, however, was never cited by Hillsman or the Debtor in the Joint Memorandum nor in their summary judgment briefs. Because the parties did not appreciate the correct legal standard, they did not present their proof at trial with the goal of satisfying that standard. As noted by the BAP, Hillsman did not pursue a claim for conversion of the settlement proceeds but focused on the Debtor's concealment in relation to the Extension Agreement. See BAP Remand Memorandum at 14:12-28. Although the BAP agreed that Hillsman failed his burden of proof with respect to the written Extension Agreement, it adopted the First Circuit's viewpoint in Field v. Mans, 157 F.3d 35 (1998), and held that the Debtor's failure to disclose the settlements should be treated as extensions of credit. See BAP Remand Memorandum at 17:10-27. It therefore vacated the Judgment and remanded for this court to apply the same legal standard to the Debtor's earlier failures to disclose the settlements.

[7] Inasmuch as Hillsman had every opportunity to present his evidence at trial, the record is closed and has not been reopened. The findings of fact and conclusions of law set forth in this Supplemental Memorandum Decision are in addition to those already set forth in the Trial

THE EVIDENTIARY RECORD REGARDING SETTLEMENT PERIODS ADDRESSED ON REMAND

Thirty-two exhibits were admitted at trial. Only one exhibit addresses the Debtor's income, expenses, and assets prior to the commencement of his bankruptcy proceeding. Debtor filed a Financial Disclosure Form (Ex. 10) in his marital dissolution proceeding on December 27, 2012, i.e., only eight days before the Debtor filed his bankruptcy petition. That Financial Disclosure Form was signed under penalty of perjury on the date it was filed and purports to reflect the Debtor's financial condition as of that date. None of the other exhibits admitted at trial could establish the income, expenses and liabilities of the Debtor and Shirley Escoto, his ex-wife, in 2008 or 2009.[8]

Three witnesses testified at trial. Only the Debtor and Shirley Escoto provided any testimony concerning their income, expenses, and assets in existence before, during or after the commencement of the Debtor's bankruptcy proceeding. Hillsman testified as to the circumstances of his claim against the Debtor, but offered no testimony establishing the income, expenses, and assets of the Debtor and Shirley Escoto.[9]

DISCUSSION

As directed by the BAP, on remand this court will first focus on whether Hillsman met his burden of establishing that he had valuable collection remedies at the time the two settlements were reached. If Hillsman establishes that valuable collection remedies did exist at

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Decision. Unless specified in this Supplemental Memorandum Decision, none of the findings and conclusions in the Trial Decision are altered or amended. To the extent required, those findings and conclusions are incorporated into this Supplemental Memorandum Decision by reference as if fully stated herein.

[8] No personal financial statements of the Debtor or Shirley Escoto, no financial records of the Debtor's business entities, no tax returns of the Debtor or his business entities, no records of any asset searches, no reports of any accountants or forensic accountants, and no other documents of any kind were offered or admitted at trial to establish these facts.

[9] No percipient witnesses testified or were offered to testify at trial concerning the income, expenses, or assets of the Debtor or Shirley Escoto, nor of the income, expenses, or assets of the Debtor's business entities. No expert witnesses testified or were offered to testify to establish any of these facts.

the time of those settlements, this court will then determine whether Hillsman also established that such remedies were made less valuable as a result of the Debtor's failure to disclose the settlements. Because Hillsman does not allege that the personal loan was obtained by fraud or misconduct by the Debtor,[10] any determination of Hillsman's rights to collect the personal loan must begin with the promissory note.

1. Hillsman's Demand Promissory Note.

Hillsman rejected the draft Promissory Note prepared by the Debtor. (Ex. 1). Instead, he prepared the Demand Promissory Note using his own familiar software. (Ex. 2). That was the agreement that was signed by both the Debtor and Shirley Escoto on March 10, 2008. The Demand Promissory Note is in the amount of $200,000, and states, in pertinent part as follows:

> FOR VALUE RECEIVED, the undersigned, Mark J. Escoto and Shirley A. Escoto attaching by ownership of the Pledged Building and all attachmnets (sic) owned by the Nevada-listed LLC known as JAEMSS, LLC (a Nevada Limited-Liability Company (the "Borrower"), hereby acknowledges itself indebted to Robert G. Hillsman as a single man (the "Lender") and promises to pay ON DEMAND to or to the order of the Lender **at the end of a three year period from the date of signatures affixed** (otherwise known as a BALLOON PAYMENT for the SUM IN TOTAL of $200,00.00 **or upon settlement of the lawsuit filed by and between the above-listed Borrowers, the "Escoto's" joint and severably- and the entity known as CHRISTOPHER HOMES et al.**

The Demand Promissory Note also goes on to state as follows:

> Parties do hereby further agree that Mark Escoto states as Owner and Manager of JAEMSS, LLC-Nevada, Escoto states and by this note **pledges all equity in the LLC including his Dental Practice and the Building housing same**, located @ 2471 Professional Court, Las Vegas, Nevada 89128, as part of the Smoke Ranch Business Park and the Las Vegas Technology Center **as collateral and security for this note**, and furthermore that **he will produce documents indicating that said assets are attached only by his lending institution as the first holder of lien and that at no time shall Escoto et al place any indivual or entity ahead of Hillsman who by this note assumes second position towards the listed assets**.

The Demand Promissory Note further provides:

> Escoto et al further **pledge** any and all personal possessions holdings and items of value as security and collateral for payment of this note and by this note **grant Lender-Hillsman the right to remove any and all possessions of Escoto et al**

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[10] Hillsman does not assert nor did he present any evidence that the personal loan memorialized by the Demand Promissory Note was the product of misrepresentation or fraud by the Debtor or Shirley Escoto. See BAP Remand Memorandum at 14:16-19. See also Trial Decision at 14:8 to 15:12.

> **to be sold as necessary to recover debt in full and to effect garnishment of any paycheck, settlement monies, or other assets without the need of a court order regarding the same.**

(Emphasis added).

There is no dispute that if the Demand Promissory Note became due upon its three-year maturity date, or, upon the settlement of the Christopher Homes Litigation, Hillsman's remedy would be to sue on the note.

2. Deficiencies of the Demand Promissory Note.

Even a charitable reading of the Demand Promissory Note prepared by Hillsman reveals multiple and significant ambiguities, beyond its many typographical errors, that were not addressed by the evidence presented at trial. First, the Demand Promissory Note provides that repayment is due either at the end of three years from being signed, i.e., March 10, 2011, or, "upon settlement of the lawsuit . . . between . . . the "Escoto's". . . and the entity known as CHRISTOPHER HOMES et al." Because Hillsman never argued at trial that the Debtor procured a forbearance by concealing the settlements, neither Hillsman nor the Debtor testified as to whether the phrase "settlement of the lawsuit" referred to settling with only Christopher Homes or with all parties in the lawsuit. Obviously, this is important because there were two different settlements reached at different times concerning the same lawsuit.[11]

Second, the initial pledge offered by the Debtor refers to "all equity in the LLC including his Dental Practice and the Building housing same" as "collateral and security" for the Demand Promissory Note, but the priority language states that "at no time shall Escoto et al place any indivual (sic) or entity ahead of Hillsman who by the note assumes second position towards the listed assets." (Emphasis added). Obviously, this, too, is important because (1) Hillsman never argued at trial that he could pursue remedies against the collateral referenced in the Demand Promissory Note, and, (2) neither Hillsman nor the Debtor testified as to the identity or existence of any creditors in senior position who might prevent Hillsman from executing against "the listed

[11] On remand, Hillsman maintains that the 2008 Settlement is the only date that should be used to evaluate his collection remedies. See Motion at 7:17-18. This view, of course, ignores the ambiguous language in the document he drafted.

assets" related to the Debtor's business.

Third, the subsequent pledge of "any and all personal possessions holdings and items of value" appears to encompass tangible items, rather than intangible interests such as legal claims and proceeds thereof. This, too, is important because neither Hillsman nor the Debtor testified as to whether the parties intended that the attempted pledge included a right to any proceeds from the settlement of the lawsuit.

Fourth, granting a "right to remove any and all possessions" of the Debtor as necessary to recover the debt is consistent with a pledge of tangible assets, but neither Hillsman nor the Debtor testified as to whether that "right to remove" encompassed any other interests of the Debtor. The stated purpose of allowing removal of any and all possessions "to effect garnishment of any paycheck, settlement monies, or other assets without the need of a court order regarding the same" is consistent with a self-help remedy with respect to tangible assets, but inconsistent with a garnishment remedy against interests held by third parties that is available under Nevada law if a court orders the issuance of a writ of attachment. See NRS 31.240. Because Hillsman never argued at trial that he had self-help remedies against any collateral referenced in the Demand Promissory Note, neither Hillsman nor the Debtor testified as to the meaning of this language.

As Hillsman rejected the Promissory Note prepared by the Debtor and insisted on preparing the Demand Promissory Note on which he would bring suit, any ambiguities are resolved against him.[12] See generally Dickenson v. State, Dept. of Wildlife, 110 Nev. 934, 937, 877 P.2d 1059, 1061 (Nev. 1994). See, e.g., Brewington v. State Farm Mut. Auto. Ins. Co., 45 F.Supp.3d 1215, 1220-21 (D. Nev. 2014)(ambiguous language of insurance policy construed against insurer).[13] Thus, it appears the Demand Promissory Note did not become due until the

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[12] Hillsman apparently used the same Demand Promissory Note form to make personal loans to another individual and modified the form extensively to meet the situation. (Exs. F and G).

[13] Unlike a typical promissory note that is signed by the borrower, the Demand Promissory Note drafted by Hillsman also is signed by Hillsman. Thus, it appears to have been more of a pure contract between the Debtor and Hillsman, further suggesting that the ordinary

litigation with CHRISTOPHER HOMES et al was settled on November 24, 2009, i.e., when the state court granted Executive Plumbing's good faith settlement motion. (Ex. 24).[14] Additionally, it appears the pledge of any business-related assets by the Debtor in favor of Hillsman was never better than a second lien position behind any other secured creditors. There is no basis on which to determine what legal remedies Hillsman had against the Debtor under the pledge, however, because there was no evidence presented of the secured or unsecured status of the claims of other creditors.

The ambiguities in the Demand Promissory Note also support the conclusion that the settlement proceeds were not pledged to Hillsman because the chosen language of the instrument refers to tangible assets and the physical removal thereof as a source of payment in the event of default. This conclusion is buttressed by the self-help language used in the Demand Promissory Note on which no third party in possession of assets belonging to the Debtor could reasonably rely.

These obvious ambiguities in the Demand Promissory Note are not addressed by Hillsman on remand. No evidence that would resolve these ambiguities in his favor was adduced at trial. On this basis alone, the court concludes that Hillsman has failed to meet his threshold burden of proving that he had valuable collection remedies at the time of the settlements that lost value as a result of the extensions or forbearance.

Even if the ambiguities in the Demand Promissory Note are not construed against him, however, it was still Hillsman's burden at trial to prove that he had valuable collection remedies that were made less valuable by the Debtor's failure to disclose the settlements. Because Hillsman did not pursue the correct legal standard for his claim under Section 523(a)(2)(A), however, he did not offer specific proof of the remedies that he could pursue if the Debtor breached his obligation to repay the Demand Promissory Note upon settlement of the litigation.

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rules of contract interpretation should apply in determining the remedies that would have been available to enforce its terms.

[14] After the 2009 Settlement with Executive Plumbing, the litigation was finally dismissed on or about February 11, 2010. (Ex. 26).

Thus, as discussed below, even if the Demand Promissory Note became due when the 2008 Settlement with defendant Christopher Homes was approved by the state court on August 20, 2008 (Ex. 17), the type and value of the collection remedies available at that time were never proven at trial.[15] Likewise, the collection remedies available when the 2009 Settlement with Executive Plumbing was approved on November 24, 2009, were never proven at trial.

3. The Collection Remedies Alleged by Hillsman on Remand.

On remand, Hillsman maintains that if he had known of the 2008 Settlement with Christopher Homes on August 20, 2008, he would have demanded immediate repayment of the personal loan. If the Debtor, however, had refused Hillsman's payment demand on August 20, 2008, Hillsman now alleges: (1) that he could have enforced the pledge of the settlement proceeds, see Motion at 8:23 to 9:4; (2) that he could have obtained a constructive trust or equitable lien on the proceeds of the settlements under Nevada case law, see id. at 9:5-18[16] and Reply at 8:23 to 9:13; (3) that he could have obtained a prejudgment writ of attachment under NRS 31.010 based on a breach of the Demand Promissory Note, see Motion at 9:19 to 10:4; (4) that he could have obtained the settlement proceeds on a claim and delivery theory under NRS 31.840 through issuance of a writ of possession, see id. at 10:5-18; and (5) that in lieu of a writ of possession, he could have obtained a temporary restraining order under NRS 31.859 preventing the Debtor from transferring personal property, see id. at 10:19-24. Hillsman maintains that any one of these remedies could have prevented or reduced that damage that he sustained.

The inquiry required in this circuit is not to ask merely what collection remedies were theoretically possible. Any time a debtor fails to meet a legal obligation to pay a debt, the creditor to whom the debt is owed has collection remedies available, both informal and formal.

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[15] Because neither Hillsman nor the Debtor were aware of the applicable proximate cause standard, this court independently considered the remedies that might have been available at the time the parties entered into the Extension Agreement on March 10, 2011. See Trial Decision at 18:10 to 21:5.

[16] Hillsman maintains that a constructive trust or equitable lien may be imposed in Nevada based on the Nevada Supreme Court's decisions in Danning v. Lum's, Inc., 86 Nev. 868, 478 P.2d 166 (1970), Locken v. Locken, 98 Nev. 369, 650 P.2d 803 (1982), and Maki v. Chong, 119 Nev. 390, 75 P.3d 376 (2003).

Those collection remedies have no value to the creditor, however, unless they result in at least some resources to satisfy the obligation. For example, informal collection attempts through personal visits, telephone calls, and demand letters to an individual who does not have any means to pay, have zero value to the creditor. The adage "you can't get blood out of a turnip" comes to mind. Likewise, a formal collection action against the same individual, seeking both pre-judgment and post-judgment remedies for the entire debt, also has zero value to the creditor. The phrase "one hundred percent of nothing is still nothing" also comes to mind. Thus, the mere existence of possible collection remedies cannot satisfy a creditor's burden of establishing that damage was proximately caused by an extension or forbearance improperly obtained under Section 523(a)(2).

Rather, the inquiry required in this circuit is whether any valuable collection remedies existed at the time of the misrepresentation that were made less valuable during the period in which the ill-gotten extension or forbearance was in effect. In the present case, there is no question that if the Debtor settled the Christopher Homes Litigation, the Demand Promissory Note became due. There is no question that if the Demand Promissory Note was due and the Debtor refused to pay, Hillsman could have sued the Debtor. There is no question that after suing the Debtor to collect the Demand Promissory Note, Hillsman might have obtained a judgment for the full amount owed. There is no question that if Hillsman established that his legal remedies were inadequate, he could have asked the court for equitable relief in the form of a constructive trust or equitable lien if he prevailed on his collection suit. Likewise, there seems to be no question that Hillsman at least could have asked for the various prejudgment remedies he now suggests on remand, such as a writ of possession for personal property through claim and delivery under NRS 31.840, a temporary restraining order in lieu of a writ of possession under NRS 31.859, or, a prejudgment writ of attachment under NRS 31.010. That Hillsman could have requested such remedies, however, does not establish their value, nor the amount by which those remedies lost value during the period of nondisclosure.

4. The Existence of Valuable Collection Remedies.

Because these remedies are now asserted as an afterthought, Hillsman never actually

offered evidence at trial intended to establish the existence of any particular collection remedies at the time of the settlements, nor that such remedies lost value.

Other than perhaps the settlement proceeds themselves, the evidentiary record does not establish the existence of any specific, non-exempt assets that would have been available to satisfy a money judgment if Hillsman had commenced a collection suit after the 2008 Settlement or the 2009 Settlement was reached. The importance of this evidentiary obligation was emphasized by the BAP as follows: "In addition to identifying the existence of remedies, Siriani requires a creditor to show a reduction in the value of such remedies during a specific period of time. Assuming Escoto possessed funds or available assets at the requisite point in time, Hillsman did not present any evidence that these funds or assets dissipated during the extension period." BAP Remand Memorandum at 12:19-25.

On remand, Hillsman refers to remedies possibly taken with respect to specific cash in the Debtor's bank account, i.e., $370,000 withdrawn, see Motion at 9:27 to 10:1, but as the BAP observed, Shirley Escoto "testified that [Debtor] withdrew $370,000 from the couple's joint bank account **on an unidentified date**." BAP Remand Memorandum at 12:12-14 (emphasis added). The BAP concluded that "Even if the Panel assumed her testimony is true, Hillsman provided no evidence that [Debtor] possessed these funds at any time relevant to the extension agreement." Id. at 12:14-16.[17] The same is true on remand with respect to the 2008 Settlement and the 2009 Settlement: even if Hillsman had obtained a judgment immediately after the 2008 Settlement or the 2009 Settlement was reached, he has not proven that the Debtor and his ex-wife had $370,000 in their joint account or any amount on which to execute. Likewise, Hillsman has not established the existence of any other non-exempt assets[18] that would have been available to

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[17] Debtor and his ex-wife, Shirley Escoto, testified as to various asset transfers occurring in connection with their bizarre, two-part marital dissolution proceeding, see Trial Decision at 9:13-20, 12:8-17, and 13:12-15 & n.7, but neither the precise dates on which the assets were acquired nor the precise dates the subsequent transfers were made was ever established at trial.

[18] Hillsman apparently argued before the BAP that the Debtor had claimed $160,000 of income in 2011, monthly earnings of $19,623.57 in 2012, and other business earnings, see BAP Remand Memorandum at 11:27 to 12:1, perhaps suggesting that some form of wage garnishment, or prejudgment remedy would have been available. See Reply at 10:9. While this

satisfy a judgment. Hillsman fares no better with respect to the proceeds of either settlement.

Debtor testified that the 2008 Settlement produced a net of $118,000 that was used to pay for expert witnesses to complete the Christopher Homes Litigation against Executive Plumbing, as well as to pay for reconstruction of the Debtor's residence.[19] As previously discussed, however, Hillsman did not establish that the Demand Promissory Note actually became due upon the 2008 Settlement because there were still claims outstanding in the Christopher Homes Litigation. Hillsman did not testify as to the meaning of the key phrase in his Demand Promissory Note: "upon settlement of the lawsuit filed by and between [the borrowers] . . . and the entity known as CHRISTOPHER HOMES et al." Nor did Hillsman elicit testimony from the Debtor as to his understanding of this language. As a result, Hillsman's possible testimony could not be corroborated by the Debtor, nor could the court weigh the credibility of the witnesses in the event of competing testimony. Thus, Hillsman has failed to establish that he had a valuable collection remedy available in connection with the 2008 Settlement.

Debtor also testified that the 2009 Settlement produced a net of $142,000 after payment of legal fees and expenses. On remand, Debtor does not dispute that the Demand Promissory Note became due no later than the 2009 Settlement that completed the Christopher Homes Litigation. See Response at 3:8-11, 4:6-9, and 5:23-24. Hillsman maintains that he would have immediately demanded repayment of the Demand Promissory Note if he had known of either settlement, thereby suggesting that he would have commenced a collection lawsuit at that time if the Debtor refused or otherwise failed to repay. Assuming that the Demand Promissory Note became due no later than the 2009 Settlement, Hillsman still has the threshold burden, of course,

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argument was never raised at trial because Hillsman never sought to establish the existence or value of the available collection remedies at trial, Debtor testified that the income amounts in his financial disclosures for himself as well as his business operations were not accurate. See Trial Decision at 12:8 to 13:2. Under these circumstances, reliable evidence of the Debtor's actual personal and business income simply was not adduced at trial to establish the value of a garnishment or prejudgment remedy.

[19] Although the Debtor's testimony generally lacked credibility, Hillsman did not adduce any evidence independently establishing the net amount of funds that would have been available from the 2008 Settlement to satisfy the Demand Promissory Note.

of proving the existence of valuable collection remedies at that time.

As previously discussed, Hillsman did not present evidence establishing the existence of any non-exempt assets that he could pursue. He did not establish when the Debtor and Shirley Escoto obtained funds in their joint bank account nor when the Debtor withdrew $370,000 from the joint account. Hillsman also did not establish that the Debtor sold a Land Rover at a time that would have been available to satisfy his claim. See BAP Remand Memorandum at 12:25 to 13:3. As previously mentioned, the only documentary evidence admitted at trial consisted of the Debtor's Financial Disclosure Form dated December 27, 2012, that sheds no light on the income, expenses, and assets of the Debtor and Shirley Escoto at the time of the settlements in 2008 and 2009. Moreover, even the Debtor testified that the Financial Disclosure Form was inaccurate. Similarly, the Debtor and Shirley Escoto were the only witnesses competent to testify as to their income, expenses, and assets, but neither of them testified as to their income, expenses, and assets at any specific point in time, including when the settlements were reached in 2008 and 2009.

Also as previously mentioned, Hillsman asserts on remand that he had, *inter alia*, certain prejudgment remedies available that could have prevented the Debtor and Shirley Escoto from dissipating their assets, presumably including the settlement proceeds. See Reply at 9:24 to 10:1. Other than asserting that those remedies were available, however, he does not analyze whether those remedies could have been granted.[20] Obviously, Hillsman was required to actually demonstrate the viability of his purported remedies in order to meet his burden of proving that he had valuable collection remedies.

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[20] Hillsman is not required to demonstrate that he would have timely pursued any particular remedies had he known that the Demand Promissory Note became due. See BAP Remand Memorandum at 10:22-28, citing Siriani, 967 F.2d at 306. See also Trial Decision at 19 n.11. Hillsman is, however, required to prove that the remedies he now claims he would have pursued were both available and valuable at the time. Id. at 305. See also Kim, 163 B.R. at 161. He then is required to prove that whatever valuable remedies he establishes lost value during the period in which he was unaware that this Demand Promissory Note was due. Id. Hillsman's difficulty, of course, is that he never presented the evidence in his case at trial with the correct legal standard in mind. Instead, he now wants to argue on remand the existence and value of alleged collection remedies after the evidentiary record already has closed.

The prejudgment remedies of claim and delivery, temporary restraining order, and attachment suffer from some of the same evidentiary defects that plague the enforcement of a final judgment: Hillsman failed to establish the facts necessary to determine that such might have been imposed. For example, to obtain a writ of possession for personal property by claim and delivery under Nevada law, the plaintiff must establish that he is the owner of property in the defendant's possession or that the plaintiff is lawfully entitled to possession. See NRS 31.850(1). Hillsman does not even allege that he is the owner of any personal property in the Debtor's possession as of the 2008 Settlement nor the 2009 Settlement. As previously discussed, Hillsman also has offered no evidence establishing that he is entitled to the Debtor's equity, if any, in JAEMSS, LLC "including his Dental Practice and Building housing same" for which Hillsman was pledged only a second lien position under the Demand Promissory Note that he drafted. Also as previously discussed, Hillsman offered no evidence establishing that the intangible interest in the settlement proceeds actually had been pledged to him under the Demand Promissory Note that he drafted. In other words, he never established that he had a right under the Demand Promissory Note to possession of the proceeds of the 2008 Settlement nor the proceeds of the 2009 Settlement. Likewise, a temporary restraining order in lieu of a writ of possession under NRS 31.859 still requires the plaintiff to demonstrate that he is entitled to possession of the subject personal property. See NRS 31.859; NRS 31.853; and NRS 31.850. Because Hillsman did not own the proceeds of the 2009 Settlement, and was not entitled to possession of the proceeds, he has not established that he could have prevented the Debtor from using those funds to reconstruct his residence or even to pay his many other creditors.[21] Thus, Hillsman has not demonstrated that the mechanisms provided by the Nevada claim and delivery statute would have been applicable to any of the settlement proceeds, or any other personal property of the Debtor.

Similarly, Hillsman has not proven that a prejudgment writ of attachment would have

[21] In his bankruptcy schedules, Debtor listed secured claims of $1,221,207.01 and $1,044,638, see Trial Decision at 19:14-19, as well as unsecured claims exceeding $1,751,867, see id. at 20 n.12, as of the petition date.

been available to prevent disposition of the settlement proceeds. A prejudgment writ of attachment certainly allows for property of a defendant to be attached as security for payment of an eventual judgment. See NRS 31.010. Additionally, property that may be attached certainly includes debts owed to the defendant. See NRS 31.050. Under Nevada law, a prejudgment writ of attachment may be issued after notice and hearing under NRS 31.013, or without notice and hearing under NRS 31.017. The Nevada statute on which Hillsman relies, however, expressly states that a writ of attachment after notice is not available for breach of a contract that is secured by a pledge of real or personal property. See NRS 31.013(1)(a). Additionally, the Nevada statute also specifies that a writ of attachment without prior notice is available only upon sufficient evidence that the defendant is disposing of or concealing assets and that the defendant's remaining assets are insufficient to satisfy the plaintiff's claim. See NRS 31.017(5).[22]

Inasmuch as Hillsman maintains that his Demand Promissory Note includes enforceable, albeit unperfected pledges, of the Debtor's real and personal property assets, see Motion at 8:23 to 9:4, he has failed to demonstrate that he can even seek a prejudgment writ of attachment after giving notice under Nevada law. Likewise, Hillsman has failed to demonstrate any point in time during which the Debtor did not have sufficient assets to satisfy his claim[23] so as to obtain a prejudgment writ of attachment without giving prior notice under Nevada law. Thus, Hillsman has provided no persuasive factual or legal argument on which to find that he had a prejudgment attachment remedy under Nevada law that he could have pursued against the proceeds of the 2008 Settlement or the 2009 Settlement, or any other property of the Debtor, at any time the Demand Promissory Note came due.

In addition to his prejudgment collection remedies, Hillsman also maintains that under Nevada law he could have obtained a constructive trust or an equitable lien on the settlement

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[22] NRS 31.017 lists nine different instances in which a writ of attachment may be issued without notice to the defendant. Absent any substantive analysis by Hillsman of the requirements for issuance of a writ of attachment without notice in his favor, the court has concluded that only NRS 31.017(5) might apply to his claim.

[23] Apparently, Hillsman argued before the BAP that the Debtor had substantial income that would have been available to satisfy a judgment. See Response at 10:2-8.

proceeds. Unfortunately, none of the cases on which Hillsman relies, see note 16, supra, support this conclusion.[24] Danning v. Lum's, Inc. involved the actual dismissal of a complaint seeking a constructive trust remedy where the plaintiff failed to identify the res on which a trust could be imposed. 478 P.2d at 168. Locken v. Locken involved a court's imposition of a constructive trust where a son agreed to convey specific real property to his father upon the father's performance of certain significant conditions and the son's subsequent refusal to convey the property after performance. 650 P.3d at 804. Maki v. Chong involved a sister's theft of her brother's disability benefit check, and subsequent purchase of a residence, where the court rejected the sister's claim of a homestead on the ground that the brother was entitled to a constructive trust or equitable lien against the proceeds of the check that were traceable to the residence. 75 P.3d at 378-79.

All three cases cited by Hillsman would require an identifiable res that belonged to or was intended to belong to the plaintiff. The two cases where constructive trust or equitable lien concepts provided relief to the plaintiff involved family relationships where there was no adequate remedy at law. For reasons previously discussed, Hillsman has failed to establish that the settlement proceeds belonged to him or were intended to belong to him. Moreover, he was a patient of the Debtor and a social acquaintance, but the personal loan was a business transaction. Hillsman has failed to establish that the Demand Promissory Note came due while the Debtor and Shirley Escoto were in possession of the 2008 Settlement proceeds. He has failed to meet his burden of proving that he was entitled to the 2009 Settlement proceeds. Hillsman has failed to demonstrate that his remedies at law were inadequate to support equitable relief at the time the settlements were reached. Thus, he has not established that a constructive trust or an equitable lien were available to him as collection remedies.

Under these circumstances, Hillsman has failed to meet his burden of demonstrating that he had valuable postjudgment collection remedies, valuable postjudgment equitable remedies, or

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[24] In the vacuum of Hillsman's failure to even address possible collection remedies at trial, the court raised and rejected the availability of equitable remedies such as a constructive trust or an equitable lien in connection with the Extension Agreement. See Trial Decision at 20:13 to 21:1, citing, e.g., Locken v. Locken as well as Maki v. Chong.

valuable prejudgment remedies available at the time of the 2008 Settlement and 2009 Settlement.

5. The Loss in Value of Collection Remedies.

On remand, Hillsman requests damages in the amount of $327,089.24, plus post-trial interest and attorneys' fees. See Motion at 14:5-8; Reply at 11:5-10. Remarkably, that was the identical amount that Hillsman sought at trial. That figure included the principal amount of the Demand Promissory Note, interest, default interest, late charges, and attorney's fees through the date of trial.

Seeking the same amount on remand is clearly inappropriate because it is based entirely on the amount of the unpaid debt rather than the damage caused by the extension. In this circuit, Hillsman was required to establish what his remedies were at the time of the 2008 Settlement and the 2009 Settlement. After establishing the existence of those remedies, he was further required to establish the amount by which those remedies lost value as a result of the wrongfully obtained forbearance. That amount, not the balance of the Demand Promissory Note, would constitute the correct amount of his damages caused by the misconduct under Section 523(a)(2)(A).

Instead of pointing to evidence admitted at trial that would establish the amount of damage caused by the extension, Hillsman simply refers to the amount he originally sought under the Demand Promissory Note. That was the erroneous approach taken at trial. Having been apprised of the correct analysis by the BAP and in the Trial Decision, however, Hillsman merely repeats the same error on remand.

Thus, even if Hillsman had met his threshold burden of establishing the existence of valuable collection remedies at the time of the undisclosed settlements, he has failed to meet his further burden of establishing the amount by which those remedies lost value.

CONCLUSION

Based on the foregoing, the court again concludes that Hillsman has failed to meet his burden of proof under Section 523(a)(2)(A). His claim therefore will not be excepted from the discharge provided to the Debtor by Section 727(b). A separate judgment in favor of the Debtor has been entered concurrently with this Supplemental Memorandum Decision. Each party shall bear their own attorney's fees and costs.

This Supplemental Memorandum Decision, in addition to the Trial Decision, constitutes the court's additional findings of fact and conclusions of law on remand, entered pursuant to FRBP 7052 and FRCP 52.

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