THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 02-22250
	)	
DENNIS W. MEANS,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	
MARIAN O'BRIEN,	)	Adversary Proceeding No. 03-1040
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
DENNIS W. MEANS,	)	**MEMORANDUM OF OPINION**
	)	
Defendant.	)	

The plaintiff Marian O'Brien loaned money to the debtor-defendant Dennis Means and his company, CaCorp, Inc., for use in operating the business. O'Brien filed this complaint to obtain a determination that the debts are not dischargeable under 11 U.S.C. §§ 523(a)(2)(A) and (B) because they were obtained by fraud or through the use of a materially false financial statement. Means denies the allegations. For the reasons stated below, the plaintiff did not meet her burden of proof and the debts are discharged.

JURISDICTION

Jurisdiction exist under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

FACTS

A.

The plaintiff presented her case through her testimony and the cross-examination of the defendant and accountant John Forbes. The defendant presented his case through his testimony and that of John Forbes, together with the cross-examination of the plaintiff. Both parties offered exhibits which were accepted into evidence.

These findings of fact reflect the court's weighing of the evidence, including determining the credibility of the witnesses. In doing so, the court considered the witnesses' demeanor, the substance of the testimony, and the context in which the statements were made, recognizing that a transcript does not convey tone, attitude, body language or nuance of expression. *See* FED. R. BANKR. P. 7052 (incorporating FED. R. CIV. P. 52). When the court finds that a witness's explanation was satisfactory or unsatisfactory–believable or not believable–, it is using this definition:

> The word satisfactory 'may mean reasonable, or it may mean that the Court, after having heard the excuse, the explanation, has that mental attitude which finds contentment in saying that he believes the explanation–he believes what the [witness] says with reference to the [issue at hand]. He is satisfied. He no longer wonders. He is contented.'

United States v. Trogden (In re Trogden), 111 B.R. 655, 659 (Bankr. N.D. Ohio 1990) (discussing the issue in context of bankruptcy code § 727) (quoting *First Texas Savings Assoc., Inc. v. Reed*, 700 F.2d 986, 993 (5th Cir. 1983)).

B.

This dispute arises out of business loans made by Marian O'Brien to Dennis Means and his company, CaCorp, Inc. dba Correct-Air Corporation. Correct-Air Corporation had been in business under other ownership since 1959, manufacturing industrial air conditioning units for heavy duty applications such as cooling control rooms next to steel operations. In August 1999, Means bought the assets of Correct-Air Corporation and formed CaCorp to operate the business. Means developed a business plan for CaCorp that included retaining the original customer base, moving into international markets, and expanding to provide air conditioning systems to pharmaceutical companies and similar businesses that need "clean rooms" to process their products in a dust free, bacteria free environment.

O'Brien and Means were introduced by their mutual accountant, John Forbes, who was responding to O'Brien's interest in investing some money. Forbes suggested that she talk with Means, who needed capital for his business. O'Brien and Means met in late 1999 or early 2000 at the CaCorp offices. Means showed O'Brien around and gave her written information about his background and the company. Over time, O'Brien loaned money to CaCorp and Means in four separate documented transactions. Means used the funds for legitimate business purposes, including purchasing equipment and materials and paying labor. These are the four loans at issue:

(1) By note dated March 15, 2000, O'Brien loaned CaCorp and Means $15,000.00. (First Loan). This loan was repaid according to the terms of the note. (Pl. Exh. 1).

(2) By note dated December 22, 2000, O'Brien loaned CaCorp and Means $25,000.00. (Second Loan). The note was due and payable on June 22, 2001. (Def. Exh. A). CaCorp paid

some interest on this note, but no principal.

(3) By note dated December 28, 2000, O'Brien loaned CaCorp and Means $125,000.00. (Third Loan). The note was due and payable on June 28, 2001. (Pl. Exh. 4). The circumstances surrounding this loan are discussed further below. This note was not repaid.

(4) By note dated October 31, 2001, O'Brien loaned CaCorp and Means $5,000.00. (Fourth Loan). The note was due and payable on January 31, 2002. (Pl. Exh. 12). This note was not repaid.

Things did not work out as Means had planned. The steel companies, experiencing their own financial difficulties, became slow pays and dragged out their orders. And then, according to Means, the attacks of September 11, 2001 "pretty much stopped everything." CaCorp went out of business when the landlord locked the doors for non-payment of rent. If not for that, Means feels that the company could have survived and grown by focusing on the clean room opportunities. Means filed his chapter 7 case on October 28, 2002.

Additional facts are set forth below.

THE POSITIONS OF THE PARTIES

An individual chapter 7 debtor is entitled to a discharge of all debts, with the exceptions stated in bankruptcy code § 523. O'Brien relies on the exceptions set forth in §§ 523(a)(2)(A) and (B). Under these sections, a debtor is not discharged from a debt (1) where money was obtained by false pretenses, a false representation, or actual fraud, other than a statement concerning the debtor's financial condition; or (2) where the debtor obtained money by using a materially false written financial statement which the lender reasonably relied on and which the debtor provided with intent to deceive. O'Brien argues that Means initially gave her background

information that was not accurate and that he later gave her a financial statement that falsely represented that her Third Loan would be fully secured by a mortgage on the house owned by Means's wife (the house). O'Brien would not have entered into either the Third or Fourth Loan without security. Means denies any liability under the statute and argues that this debt arises out of a garden variety business deal which had an unhappy result without the fault of either party.

DISCUSSION

The creditor has the burden of proving her case by a preponderance of the evidence. *See Grogan v. Garner,* 498 U.S. 279, 286 (1991).

A. Claim under § 523(a)(2)(B): The Third and Fourth Loans

This claim relates to the Third and Fourth Loans. Section 523(a)(2)(B) makes nondischargeable any debt where the debtor obtained money by using a written statement that is (1) materially false; (2) respecting the debtor's financial condition; (3) on which the creditor reasonably relied; and (4) that the debtor provided with intent to deceive. *See* 11 U.S.C. § 523(a)(2)(B). Means obtained at least the Third Loan based on his financial statement. The disputed issues here are whether the financial statement was materially false, whether Means provided it with an intent to deceive, and whether O'Brien's reliance on it was reasonable. O'Brien must show "not only that the financial statement was in fact false, but that it was materially false . . . [and] materially false [in this context] means the statement must contain not only incorrect or erroneous information but must be substantially inaccurate." *Marx v. Reeds (In re Reeds),* 145 B.R. 703, 706 (Bankr. N.D. Okla. 1992). Intent to deceive can be shown by proving that Means had a subjective intent to deceive or that he recklessly submitted the financial statement knowing it was not true. *Investors Credit Corp. v. Batie (In re Batie),* 995 F.3d 85, 90

(6th Cir. 1993). Whether O'Brien's reliance was reasonable is determined by the totality of the circumstances surrounding the loan. This requirement is directed at creditors acting in bad faith. *See Bank One, Lexington N.A. v. Woolum (In re Woolum)*, 979 F.2d 71, 76 (6th Cir. 1992).

These additional facts are relevant to this claim: In late December 2000, Means approached O'Brien about loaning an additional $150,000.00. He explained that CaCorp had quite a few orders coming in, but did not have the money to fill them. O'Brien was willing to consider loaning $125,000.00, but wanted security for the loan because it was so large. She asked for a note secured by a mortgage on the house and a "net worth statement." Means agreed to provide both. Additionally, although neither party had retained an attorney for the First or Second Loans, O'Brien decided to consult an attorney so that she would be sure to have security for the Third Loan. Means had no objection to this, although he continued to represent himself.

On December 27, 2000, Means faxed these documents to James Lyons, O'Brien's attorney:

(1) a financial statement dated November 30, 2000; and

(2) a cover letter stating that Lyons could contact accountant John Forbes if he needed any additional information about CaCorp, adding that Means needed the funds by December 28, 2000 to complete year end transactions.

(Pl. Exh. 3). Lyons gave the documents to O'Brien.

The deal closed on December 28, 2000. In connection with the closing, Means signed a note, a mortgage on the house,[1] a security agreement giving O'Brien a security interest in CaCorp's equipment inventory, and an affidavit (notarized by Lyons) that the statements in the

[1] His wife Heidi Means also signed the mortgage.

financial statement were true and O'Brien was relying on them in making the loan. (Pl. Exhs. 3, 4, 5, and 6).

The financial statement was a preprinted form. This is the relevant part of the statement, with Means's handwritten additions marked in bold:

Assets	In Dollars	Liabilities	In Dollars
Cash on hand and in banks	**6,726.00**	Notes payable to banks:	
U.S. Government and marketable securities	0	Secured **(SBA)** Unsecured	**297,153.00** 0
Non-marketable securities **(ESOP)**	**133,000.00**	Due to brokers	0
Securities held by broker and/or in margin account	0	Accounts payable: Secured Unsecured **(VISA, AMEX)**	0 **4,048.00**
Restricted or control stocks	0	Unpaid income taxes	0
Partial interests in real estate equities	0	Other unpaid taxes and interest	0
Real estate owned **by Heidi**	**400,000.00**	Debt on real estate equities	0
Loan receivable	**60,000.00**	Real estate mortgages	**179,000.00**
Automobiles and other personal property	**40,000.00**	Other debts **(personal debts)**	**153,547.00**
Cash value of life insurance	**8,000.00**	**Nat. City Bank (LOC)**	**24,680.00**
Other assets **(IRA)**	**25,000.00**		
Total	**$672,726.00**	Total Liabilities Net Worth	**658,428.00** **14,298.00**
		Total	0

Means attached to the financial statement a list of business notes and loans and personal debts. Under "Business Notes," among other things he listed: "Firstar (C-A purchase/SBA) Original amount $350,000.00 Status $297,153.00 Paid $52,847.00." He also noted that C-A was Correct-Air Corporation. Under "Personal Debts," among other things he listed: "Mortgage (NCB Mortgage Co.) Value of residence $400,000.00 Original mortgage $290,000.00 Amount Due $179,000.00."

O'Brien assumed based on these documents that the Firstar loan was secured only by the company's assets and not by any personal asset of Means. She further assumed that her Third Loan would be fully secured by the mortgage given to her by Means and his wife on the house. She arrived at this conclusion by starting with a house value of $400,000.00 and subtracting the NCB $179,000.00 mortgage balance, leaving equity of $221,000.00.

What Means was trying to communicate through this statement was significantly different. By listing Firstar (SBA) as "secured" he intended to convey that Firstar and SBA had secured rights against him arising out of his purchase of CaCorp. Means financed that purchase through the former owner and Firstar. Firstar loaned Means $350,000.00 which was secured in part by a mortgage on the house.[2] SBA apparently guaranteed that loan. (Pl. Exh. 11, last page). Means's understanding of this transaction was that if CaCorp defaulted on the loan, the SBA would first liquidate the company's assets (which were substantial) and would only proceed against the house if a balance remained. He considered this to be a lien, not a mortgage. The financial

[2] The documentation in evidence is limited to the mortgage given to Firstar by Heidi Means. (Pl. Exh. 11). The details of the transaction are, therefore, sketchy.

statement did not have a category for liens, so he listed it as secured under "notes payable to banks."

Neither O'Brien nor her attorney asked Means or Forbes for any additional information about the financial statement in general or clarification about the security for the Firstar/SBA loan in particular. Neither of them did a lien search. At some point, O'Brien learned that Firstar held a mortgage on the house that was superior to hers.[3] The amount of the Firstar loan secured by a mortgage left no equity in the house for O'Brien's loan.

The determining issues are whether the financial statement is materially false and, if so, whether Means intended to defraud O'Brien by providing it. The court finds the answer to both questions is no. While the financial statement is somewhat ambiguous, it is not substantially inaccurate. O'Brien concedes that the Firstar/SBA creditor, loan balance, and nature of the loan (i.e. secured) are correctly listed under the Notes category. She argues, though, that to give a complete picture the transaction should have been listed a second time under mortgages. If Means had done so, however, it would have inaccurately inflated his liabilities by $297,153.00, the outstanding amount of the Firstar loan. O'Brien contends that Means could have counteracted this problem by adding an explanatory footnote. The fact that there are alternative, or even better ways, to describe an obligation, however, does not make this description substantially inaccurate.

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[3] There was no evidence as to when O'Brien made this discovery. In summer 2001, Means and his wife refinanced the house through Colony Mortgage and put the money they received back into CaCorp. The transaction, which included documents signed by O'Brien, affected her mortgage but was not the basis for either claim under § 523. No further discussion is, therefore, necessary on this point.

Alternatively, even if the financial statement is considered materially false, O'Brien did not prove that Means intended to deceive her. O'Brien argues that Means recklessly submitted the financial statement to her knowing that it was not true. She contends that O'Brien, who earned a Masters of Business Administration in 1983 and had extensive business experience, must have known that the information was not true. The only reason to give it to her, therefore, would be to deceive.

This case illustrates that holding a degree is not a guarantee that the individual absorbed any particular body of knowledge. Means testified that his MBA focus was on marketing and he did not take any financial classes in connection with that degree or otherwise. His previous employment did not require any particular financial background because the companies had other employees who attended to those matters. His understanding of basic financing issues is minimal. He did not consult with an attorney or accountant before preparing the financial statement. Certainly, the financial statement is not a model of clarity; the court, however, believed Means's statements as to why he provided the information that he did in the format that he did. His understanding of the Firstar/SBA obligation was flawed, but genuinely held. These other factors also militate against a finding of fraudulent intent: Means cooperated with O'Brien's attorney; Means offered to have his accountant provide any additional information requested; Means asked for a quick closing, but he did not turn down any request to extend it; Means accurately disclosed that his net worth was only slightly more than $14,000.00; and Means later put more of his own money from the house refinancing into the business. The court concludes based on these findings that Means intended to obtain a loan from O'Brien, but did not

intend to deceive her in doing so. O'Brien did not, therefore, prove her case under § 523(a)(2)(B).

In light of this conclusion, it is not necessary to resolve the question of whether O'Brien's reliance on the financial statement was reasonable. Similarly, it is not necessary to decide whether O'Brien continued to rely on the financial statement in making the Fourth Loan and, if so, whether that can sustain a cause of action without evidence that Means resubmitted the financial statement to her at that time.

B. Claim under § 523(a)(2)(A): The Second Loan

O'Brien asserts that the Second Loan is nondischargeable under 11 U.S.C. § 523(a)(2)(A). That section provides that a discharge under 11 U.S.C. § 727 does not discharge a debtor from a debt:

> (2) 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 . . . financial condition[.]

11 U.S.C. § 523(a)(2)(A). To have the loan declared nondischargeable under this section, O'Brien must prove that (1) the debtor obtained property through a material misrepresentation known to the debtor to be false when made or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the misrepresentation; and (4) the reliance was the proximate cause of the loss. *See Rembert v. AT&T Universal Card Servs. Inc. (In re Rembert),* 141 F.3d 277, 280-81 (6th Cir. 1998); *Providian Bancorp v. Shartz (In re Shartz),* 221 B.R. 397, 399 (B.A.P. 6th Cir. 1998).

O'Brien bases this claim on the information Means gave her during their initial meeting, consisting of Means's resume, an article he wrote for Agency Sales Magazine titled "A Marketing Audit Checklist" dealing with marketing plans, articles about him that appeared in the same magazine titled "Koreans Learn About Reps" and "Dennis Means Launches Consulting Company," a brochure about CaCorp's air conditioning systems, and two sheets marked "Business Growth" that have bullet points for revenue, savings, and additional company information. (Pl. Exhs. 14, 15). There was no evidence that these materials contained misrepresentations and counsel did not identify any such statements when asked to do so during closing argument. Instead, O'Brien again points to the fact that Means received an MBA degree as stated on his resume. She contrasts this with his testimony that he did not know the difference between a mortgage and a lien. The educational statements, however, are true. What O'Brien seems to be arguing is that Means must have learned more during his MBA program than he admitted, thus casting doubt on other parts of his testimony. This argument simply does not state a claim under § 523(a)(2)(A).

O'Brien also points to statements in the resume detailing Means's employment history. There, Means described his achievements at named companies, such as stating that while at Stride Inc. he "[l]ed successful turnaround of manufacturing and distribution company within 18-month period through due diligence process, acquisition and general management resulting in a $14.5 million in revenue generation." (Pl. Exh. 14). The description goes on to say that Means managed a number of areas, including bank relationships. There was no evidence that Means did not actually work at any of these companies in the positions described. Nor was there any evidence that he did not accomplish what he said he accomplished. There was no elaboration

about what the banking relationship reference meant. The argument to discredit these statements is that if Means had really done what he said he did at other companies, he should have been able to do a better job at CaCorp; therefore, since he did not do a good job at CaCorp, he must not have had the experience that he claimed. First, there was no evidence that Means mismanaged CaCorp; the only evidence was that the company failed due to outside economic conditions. And second, the court finds that this argument is an insufficient basis to discard otherwise uncontradicted testimony that Means did have the experience he stated in the resume. O'Brien did not, therefore, prove her claim under § 523(a)(2)(A).

CONCLUSION

For the reasons stated, judgment will be entered on the complaint in favor of the debtor-defendant Dennis Means. A separate order will be entered in accordance with this memorandum of opinion.

Date: 19 April 2007

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center on:

Brenda Bodnar, Esq.
Glenn Forbes, Esq.

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MARIAN O'BRIEN,	)	Adversary Proceeding No. 03-1040
	)	
Plaintiff,	)	
	)	
v.	)	**JUDGMENT**
	)	
DENNIS W. MEANS,	)	
	)	
Defendant.	)	

For the reasons stated in the memorandum of opinion filed this same date, judgment is entered on the complaint in favor of the defendant-debtor.

IT IS SO ORDERED.

Date: 19 April 2004

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center on:

Brenda Bodnar, Esq.
Glenn Forbes, Esq.