

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 03-30956

HERMAN J. MARTI

Debtor

ROBERT S. PAGE

Plaintiff

v.

Adv. Proc. No. 03-3129

HERMAN J. MARTI

Defendant

NOTICE OF APPEAL FILED: July 9, 2004

DISPOSITION: Withdrawal of Appeal with Notice filed August 19, 2004.

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HERMAN J. MARTI

Defendant

MEMORANDUM

APPEARANCES: WADE M. BOSWELL, ESQ.
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Knoxville, Tennessee 37901
Attorney for Plaintiff

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3715 Powers Street
Knoxville, Tennessee 37917
Attorney for Defendant/Debtor

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding is before the court upon the Complaint filed by the Plaintiff, Robert S. Page, on July 30, 2003, seeking a judgment against the Defendant/Debtor (Debtor) for damages pursuant to an employment contract and a determination of nondischargeability of any judgment under 11 U.S.C.A. § 523(a)(2)(A) (West 1993 & Supp. 2004). On April 5, 2004, the Plaintiff filed a Motion to Amend Complaint requesting permission to amend the Complaint to include § 523(a)(2)(B) (West 1993) as a basis for his cause of action against the Debtor, which was granted by the court in an Order entered on April 8, 2004.

The trial of this adversary proceeding was held on June 23, 2004. The record before the court consists of the testimony of Susan Bowman, Denise Macmillan, the Plaintiff, and the Debtor, together with eleven exhibits introduced into evidence.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(I) (West 1993).

I

In September 2001, the Plaintiff, a licensed medical doctor residing in Winchester, Virginia, was contacted by a recruiter concerning a primary care physician position with East Tennessee Healthcare Management Corporation (ETHMC) in Knoxville, Tennessee. Subsequently, he met on five occasions with the Debtor, who was the President and Chief Executive Officer of ETHMC, as well as a majority stockholder. The Debtor, a licensed nurse practitioner, operated the clinic as allowed by Tennessee law, but he required the direct supervision of a licensed physician who had to sign off on a percentage of patients' charts, primarily those for which the Debtor prescribed narcotics. During these meetings, the Debtor

advised the Plaintiff that ETHMC's two locations, Asheville Highway and Corryton, were "doing well," and ETHMC needed a physician to provide primary health care services. In particular, the Plaintiff testified that the Debtor represented that the Corryton location was growing extremely fast, and even though ETHMC hired a full-time physician, Dr. Sullivan, in November 2001, for its Asheville Highway location, ETHMC still wanted to hire the Plaintiff because the practice could support two full-time physicians, one at each location.

In January 2002, the Plaintiff agreed to provide his services to ETHMC at its Corryton location, beginning in March 2002. Pursuant thereto, on January 11, 2002, the Plaintiff entered into an Employment Agreement with ETHMC, which was executed by the Plaintiff and the Debtor, in his capacity as ETHMC's Chief Executive Officer. See TRIAL EX. 6. The Employment Agreement provides that the Plaintiff would receive the following compensation:

3. COMPENSATION OF EMPLOYEE. As compensation for the services provided by Dr. Page under this Agreement, ETHMC will pay Dr. Page an annual salary of \$120,000.00 payable on Thursday of every other week. ETHMC will pay Dr. Page a one time signing bonus of \$5000.00, half payable upon signing this Agreement and half payable after 90 days of employment. ETHMC will pay Dr. Page an annual performance bonus, consisting of 5% of fees generated by Dr. Page, payable within 30 days of the end of each fiscal year. ETHMC will pay Dr. Page a quarterly performance bonus, consisting of 10% of new patient fees generated by Dr. Page, payable within 30 days of the end of each fiscal quarter. ETHMC will pay Dr. Page a bonus of \$2000.00, for being board certified, upon signing this agreement and at the completion of each year of employment as long as Dr. Page maintains board certification. Upon termination of this Agreement, payments under this paragraph shall cease; provided, however, that Dr. Page shall be entitled to payments for periods or partial periods that occurred prior to the date of termination and for which Dr. Page has not yet been paid, and for any bonus earned in accordance with ETHMC's customary procedures, if applicable. Accrued vacation will be paid in accordance with state law and ETHMC's customary procedures. This

section of the Agreement is included only for accounting and payroll purposes and should not be construed as establishing a minimum or definite term of employment.

TRIAL Ex. 6. The Employment Agreement also provides that the Plaintiff would be reimbursed for all “out-of-pocket” expenses, including CEU expenses up to \$3,000.00 per year, medical license fees, DEA fees, and moving expenses up to \$2,500.00. TRIAL Ex. 6. Additionally, under the Employment Agreement, the Plaintiff would have the opportunity to be a stockholder, as follows:

16. STOCK AND STOCK OPTIONS. Dr. Page shall be entitled to the following stock and stock options:

- 5% of corporate stock, half issued upon signing and half after 90 days of employment
- option to purchase 10% of corporate stock, at the per share price of \$151.00, within one year of signing this Agreement
- option to purchase 10% of corporate stock during second year of this Agreement (price to be set one year from the date this Agreement is signed)
- Dr. Page may return to ETHMC all stock purchased by him at anytime in exchange for the value established herein
- upon termination of this Agreement pursuant to the 90 days written notice as provided in Paragraph 17 hereof or upon the death or disability of Dr. Page, Dr. Page or his estate will return to ETHMC all stock issued to him in exchange for the value established herein
- value of shares will be determined by corporate income from the previous year, or year-to-date (whichever is higher) divided by total number of shares issued.

TRIAL Ex. 6. The Employment Agreement also addresses the term of employment and termination as follows:

17. TERM/TERMINATION. Dr. Page's employment under this Agreement shall be for one year, beginning on March 1, 2002. This Agreement shall automatically renew for subsequent periods of one year unless terminated by ETHMC upon 90 days written notice, or by Dr. Page upon 90 days written notice. If Dr. Page is in violation of this Agreement, ETHMC may terminate employment without notice and with compensation to Dr. Page only to the date of such termination. If Dr. Page is in violation of this Agreement and employment is terminated, Dr. Page will return all stock issued to him and repay all signing bonuses. If Dr. Page is in violation of this Agreement and employment is terminated, additional stock purchased by Dr. Page will be surrendered and Dr. Page will be compensated for the value of stock. If Dr. Page or ETHMC terminate this Agreement, after the one year period with 90 days notice, Dr. Page will surrender all stock and will be compensated for the value of all stock owned by Dr. Page. The compensation paid under this Agreement shall be Dr. Page's exclusive remedy.

TRIAL Ex. 6.

The Plaintiff began working for ETHMC on March 4, 2002.¹ He testified that approximately six weeks later, on April 22, 2002, the Debtor advised him that ETHMC was having financial difficulties, due primarily to billing problems, and that the Plaintiff would have to take a pay cut until things were worked out. The Plaintiff testified that from that point forward, his salary was cut by almost 50%. On July 19, 2002, the Plaintiff was fired by the Debtor. The Plaintiff testified that he was summarily fired without cause, and that he is entitled to lost income, bonuses, and other benefits for the remaining term of the Employment Agreement. The Debtor disputes this allegation, testifying that the Plaintiff was fired for cause, namely, his inability to work with the remaining staff in combination with an incident involving ETHMC's receptionist, Ms. Macmillan.

¹ The Plaintiff testified that March 1, 2002, fell on a Friday, so he and the Debtor agreed that he would physically begin working in the Corryton office on the following Monday, March 4, 2002.

Thereafter, on August 26, 2002, ETHMC closed its Asheville Highway and Corryton offices and opened an office located in Whittle Springs, into which it combined the patients and staffs of the two closed offices. ETHMC filed the Voluntary Petition commencing its Chapter 7 bankruptcy case on January 21, 2003, and the Plaintiff was listed in its bankruptcy schedules as a nonpriority unsecured creditor, having a disputed claim. See TRIAL EX. 12. On February 25, 2003, the Debtor filed the Voluntary Petition commencing his bankruptcy case under Chapter 7 of the Bankruptcy Code. The Plaintiff timely filed his Complaint to determine nondischargeability in July 2003.

The Plaintiff alleges that the Debtor made false statements to fraudulently induce the Plaintiff into accepting employment with ETHMC. At a minimum, the Plaintiff argues that the Debtor's statements regarding the viability of ETHMC's business were made with reckless disregard. Additionally, the Plaintiff avers that he was supplied with graphs, pie-charts, and profit/loss statements by the Debtor showing the financial status of ETHMC, which did not include unpaid but incurred expenses, and which showed that the company was profitable when it was not. As a result of the Debtor's misrepresentations, the Plaintiff argues that he has incurred out-of-pocket losses of \$27,000.00 and loss of future earnings in the amount of \$55,000.00, for which he seeks a judgment and a determination of nondischargeability.

The Debtor argues that the Plaintiff entered into his Employment Agreement with ETHMC, a Tennessee corporation, and not the Debtor individually. He also argues that the negotiations leading to the Plaintiff's employment by ETHMC were not fraudulent nor were the documents that he furnished false. Furthermore, the Debtor avers that the Plaintiff was

fired for willful misconduct, including the physical assault of one employee and verbal assaults upon other employees of ETHMC, and thus, he is not entitled to lost future earnings under the Employment Agreement.

II

The Plaintiff seeks a judgment against the Debtor in the amount of \$77,597.00 and a determination that the judgment is nondischargeable. The nondischargeability of debts is governed by 11 U.S.C.A. § 523, which provides, in material part:

(a) A discharge under section 727^[2] . . . of this title does not discharge an individual debtor from any 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 or an insider's financial condition [or]

(B) use of a statement in writing—

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

² Chapter 7 debtors receive a discharge of pre-petition debts, “[e]xcept as provided in section 523 of this title[.]” 11 U.S.C.A. § 727(b) (West 1993). This accomplishes the goals of Chapter 7 to relieve “honest but unfortunate” debtors of their debts and allow them a “fresh start” through this discharge. *In re Krohn*, 886 F.2d 123, 125 (6th Cir. 1989) (citing *Local Loan Co. v. Hunt*, 54 S. Ct. 695, 699 (1934)). The Debtor received a discharge on August 11, 2003.

(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 intent to deceive[.]

....

(c) (1) Except as provided . . . the debtor shall be discharged from a debt of a kind specified in paragraph (2) . . . of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2) . . . as the case may be, of subsection (a) of this section.

11 U.S.C.A. § 523 (West 1993 & Supp. 2004). The Plaintiff, as the party seeking a determination of nondischargeability, bears the burden of proving all of the above elements by a preponderance of the evidence, while the court construes § 523(a) strictly against the Plaintiff and liberally in favor of the Debtor. *Grogan v. Garner*, 111 S. Ct. 654, 661 (1991); *Rembert v. AT&T Universal Card Servs., Inc. (In re Rembert)*, 141 F.3d 277, 281 (6th Cir. 1998); *Haney v. Copeland (In re Copeland)*, 291 B.R. 740, 759 (Bankr. E.D. Tenn. 2003). Additionally, the bankruptcy court possesses both the jurisdiction and the authority to adjudicate the Plaintiff's claims and award any necessary damages. *See Copeland*, 291 B.R. at 792 (citing *Longo v. McLaren (In re McLaren)*, 3 F.3d 958, 965 (6th Cir. 1993)).

Since subsection (B) deals exclusively with documents concerning the financial condition of the Debtor or an insider, and subsection (A) expressly excludes financial documents, they are mutually exclusive. *Copeland*, 291 B.R. at 759 (quoting *First Nat'l Bank v. Pontow*, 111 F.3d 604, 608 (8th Cir. 1997)). Nevertheless, if the court finds that a debtor

committed fraud under either subsection of § 523(a)(2), “‘any debt’ arising from that fraudulent conduct is excepted from discharge.” *Copeland*, 291 B.R. at 759 (quoting *Alworth v. Levy (In re Levy)*, 250 B.R. 638, 642 (Bankr. W.D. Tenn. 2000)).

A

A determination of nondischargeability under § 523(a)(2)(A) requires proof that the Debtor’s conduct was somewhat “blameworthy,” and his fraudulent intent may be “inferred as a matter of fact” based on the totality of the circumstances. *Copeland*, 291 B.R. at 759 (citing *Commercial Bank & Trust Co. v. McCoy (In re McCoy)*, 269 B.R. 193, 198 (Bankr. W.D. Tenn. 2001)). Both material misrepresentations and actual fraud fall within the scope of § 523(a)(2)(A). *Copeland*, 291 B.R. at 759.

“[F]alse pretense” involves implied misrepresentation or conduct intended to create and foster a false impression, as distinguished from a “false representation” which is an express misrepresentation[, while a]ctual fraud “consists of any deceit, artifice, trick, or design involving direct and active operation of the mind, used to circumvent and cheat another - something said, done or omitted with the design of perpetrating what is known to be a cheat or deception.”

Copeland, 291 B.R. at 760 (quoting *Ozburn v. Moore (In re Moore)*, 277 B.R. 141, 148 (Bankr. M.D. Ga. 2002) and *First Centennial Title Co. v. Bailey (In re Bailey)*, 216 B.R. 619, 621 (Bankr. S.D. Ohio 1997)).

To satisfy § 523(a)(2)(A), the Plaintiff must prove that the Debtor obtained value through material misrepresentations that he knew were false or that he made with gross recklessness, that the Debtor intended to deceive the Plaintiff, that the Plaintiff justifiably

relied on the Debtor's false representations, and that the Plaintiff's reliance was the proximate cause of his losses. See *Copeland*, 291 B.R. at 760 (citing *Rembert*, 141 F.3d at 280). Additionally, the Debtor may be held liable for any tortuous acts that he committed, including fraud and/or misrepresentation, even if they were committed at a time when he was acting as an agent of ETHMC, a corporation. *AlliedSound, Inc. v. Neely*, 909 S.W.2d 815, 821 (Tenn. Ct. App. 1995).

The Plaintiff has not met his burden of proof under § 523(a)(2)(A). There is no dispute that the Debtor, an officer and stockholder in ETHMC, negotiated with and subsequently hired the Plaintiff to work for ETHMC. However, the proof does not evidence that the Debtor made any false misrepresentations "other than a statement representing the debtor's or an insider's financial condition" upon which the Plaintiff justifiably relied. 11 U.S.C.A. § 523(a)(2)(A). The Plaintiff testified that the Debtor repeatedly told him that the business was doing so well that it needed two full-time physicians. These types of statements, in and of themselves, do not rise to the level of fraudulent misrepresentations necessary for nondischargeability under subsection (a)(2)(A). Instead, the court believes such statements to be more akin to "puffery." The Debtor acknowledged that he told the Plaintiff that the business was growing, a statement which the Debtor obviously believed because he still hired the Plaintiff after hiring Dr. Sullivan in order to have a full-time physician in both the Asheville Highway office and the Corryton office. Based upon the evidence, the court does not find any basis for nondischargeability under § 523(a)(2)(A).

B

In the alternative, the Plaintiff seeks a determination of nondischargeability under § 523(a)(2)(B), which requires proof that the Plaintiff reasonably relied upon false financial documents concerning the Debtor or an insider, provided to him by the Debtor, while possessing an intent to deceive the Plaintiff. *Copeland*, 291 B.R. at 780 (quoting 4 COLLIER ON BANKRUPTCY ¶ 523.08[2] (Lawrence P. King ed., 15th ed. rev. 2002)). All of the criteria set forth in the statute must be satisfied for a finding of nondischargeability. See 11 U.S.C.A. § 523(a)(2)(B). And once again, as with subsection (a)(2)(A), the Debtor is liable for any fraud or misrepresentation committed while acting on behalf of ETHMC as its agent. *Allied Sound*, 909 S.W.2d at 821.

Any document used by the Debtor, whether he prepared it or not, satisfies the writing requirement. *Copeland*, 291 B.R. at 782. In this case, the documents at issue are pie-charts and graphs concerning the financial condition of ETHMC. However, under the Bankruptcy Code, ETHMC, as a “corporation [in] which the debtor is a director, officer, or person in control,” is an insider of the Debtor, and any documents concerning its financial condition are included within the scope of § 523(a)(2)(B). 11 U.S.C.A. § 101(31) (West 1993); see also 11 U.S.C.A. § 523(a)(2)(B)(ii); *Copeland*, 291 B.R. at 783-84.

Additionally, the documents at issue must contain materially false statements offering “a substantially untruthful picture” of ETHMC’s financial condition that significantly affected the Plaintiff’s decision to enter into the Employment Agreement. *Copeland*, 291 B.R. at 782;

Insouth Bank v. Michael (In re Michael), 265 B.R. 593, 598 (Bankr. W.D. Tenn. 2001). Along those lines, the Plaintiff must prove that he reasonably relied on the documents furnished by the Debtor. In making this determination, the court should consider “whether there had been previous business dealings with the debtor that gave rise to a relationship of trust; whether there were any "red flags" that would have alerted an ordinarily prudent lender to the possibility that the representations relied upon were not accurate; and whether even minimal investigation would have revealed the inaccuracy of the debtor's representations.” *Copeland*, 291 B.R. at 785 (quoting *Coston v. Bank of Malvern (In re Coston)*, 991 F.2d 257, 261 (5th Cir. 1993)). “While . . . the concept of reasonable reliance does not generally require creditors to conduct an investigation prior to entering into agreements with prospective debtors, such a precaution could be the ordinarily prudent choice[.]” *Shaw Steel, Inc. v. Morris (In re Morris)*, 223 F.3d 548, 554 (7th Cir. 2000).

As with subsection (A), intent is also an issue under subsection (B). Intent can be proved by the Debtor's actions, as well as his having a reckless disregard for the truth of the financial documents furnished to the Plaintiff. *Copeland*, 291 B.R. at 786. Intent is established if the Debtor submitted financial documents that he knew were untrue, even without a subjective intent to deceive. *Copeland*, 291 B.R. at 786 (citing *Investors Credit Corp. v. Batie (In re Batie)*, 995 F.2d 85, 90 (6th Cir. 1993)). Similarly, “[r]eckless disregard for the truth or falsity of a statement combined with the sheer magnitude of the resultant misrepresentation may combine to produce the inference of intent [to deceive].” *Copeland*,

291 B.R. at 786 (quoting *Norris v. First Nat'l Bank (In re Norris)*, 70 F.3d 27, 30 n.12 (5th Cir. 1995)).

In support of his argument, the Plaintiff submitted into evidence five documents presented to him, at his request, in late November or early December 2001, during his employment negotiations with the Debtor on behalf of ETHMC. It is undisputed that these documents were printed off of his computer by the Debtor, who used an accounting software package to maintain ETHMC's accounting records.

The first document is entitled Income and Expense by Month, July 2000 through June 2001. TRIAL EX. 1. The document first shows a graph breaking down expenses compared with income for each month in the date range. It also shows an Expense Summary pie chart and table, evidencing the various expenses of ETHMC and the percentages of each in relation to the total expenses of \$250,800.05. This document evidences the following break-down of expenses from July 2000 through June 2001:

Salaries	36.72%
Supplies	14.49%
Taxes	11.03%
Repairs	5.24%
Rent	4.88%
Benefits	4.47%
Equipment Purchase	3.47%
Interest Expense	2.07%
Laboratory Fees	2.05%
Telephone	2.03%
Other	<u>13.55%</u>
	\$250,800.05

TRIAL EX. 1.

The second document is an Income by Customer Summary dated July 2000 through June 2001, which lists ETHMC's customers in alphabetical order, with the amounts paid by each during that time period. TRIAL EX. 2. This document evidences a total income for this one-year period of \$261,535.55. TRIAL EX. 2.

The third document is entitled Income and Expense by Month July 1 through November 19, 2001. TRIAL EX. 3. Like Exhibit 1, it shows a graph comparing income with expenses, along with an Expense Summary pie chart, evidencing total expenses for July through November 2001 of \$162,778.52, broken down by percentages as follows:

Salaries	35.96%
Taxes	13.41%
Supplies	9.56%
Rent	5.91%
Contract Labor	5.79%
Equipment Lease	4.48%
Equipment Purchase	4.12%
Benefits	3.70%
Repairs	3.54%
Telephone	2.85%
Other	<u>10.67%</u>
	\$162,778.52

TRIAL EX. 3.

The fourth document, like Trial Exhibit 2, is an Income by Customer Summary and is dated July 1 through November 19, 2001, evidencing a total income for ETHMC of \$186,726.15. TRIAL EX. 4.

The fifth document is a Profit & Loss statement dated July 1 through November 20, 2001. TRIAL EX. 5. It shows a total income of \$185,493.80, less total expenses of \$162,778.52, for a net ordinary income of \$22,715.28, plus interest income of \$30.01, resulting in a final Net Income of \$22,745.29 for that 143-day period. TRIAL EX. 5.

The Plaintiff testified that he did not rely upon any additional documents, nor did he request any further documentation from the Debtor concerning the business viability of ETHMC. Additionally, the Plaintiff appeared to accept the validity of the documents, as they exist. His primary argument concerning their falsity centers around the fact that the expenses shown on the Income and Expense Reports reflect only those expenses that ETHMC actually paid during those respective time periods, but they did not reflect outstanding expenses owed by the company but not paid.

Based upon the evidence before the court, the Plaintiff cannot meet his burden of proof under § 523(a)(2)(B). The Plaintiff testified very earnestly that he had other employment opportunities that he declined in order to take the position with ETHMC, and the court is convinced that the Plaintiff actually relied upon these five documents in making his decision to accept employment with ETHMC. Nonetheless, there is no evidence that the documents are materially false, that the Debtor intended to deceive the Plaintiff by using these documents, that the Debtor was grossly reckless in presenting these documents to the Plaintiff, or that the Plaintiff's reliance upon the documents, while actual, was nevertheless reasonable.

The documents, which were printed off of the Debtor's computer, purport to show the income and expense breakdowns for their respective time periods. A careful review of these documents, however, indicates that only those expenses actually paid are included in a pie chart summary of expenses for these given months. Likewise, the Profit & Loss statement reflects only the income and expenses actually paid from July 1 through November 20, 2001. See TRIAL EX. 5. None of these documents contain categories concerning prospective income, accounts receivable billed but not received, and/or outstanding expenses. As such, there is nothing inherently false about these documents, as they report the information that their titles would indicate. The documents simply provide a breakdown of income actually received, along with summaries of expenses paid during those given months.

The Debtor acknowledges that he printed these documents for the Plaintiff during his recruitment for employment, at the Plaintiff's request, but that he did not tell the Plaintiff that ETHMC had outstanding debts not reflected in these documents. The fact that the Debtor failed to inform the Plaintiff that ETHMC had outstanding accounts payable does not, however, give rise to a finding of the necessary intent to deceive or gross recklessness required for nondischargeability of a debt. The Debtor was recruiting the Plaintiff to become an employee of ETHMC. Although the Employment Agreement subsequently entered into between the parties provided that the Plaintiff would be entitled to stock and stock options, up to a maximum of 25%, at the time the Plaintiff received the documents, he was being sought as an employee. Moreover, the Plaintiff was not being hired to perform managerial or bookkeeping services but to provide medical services to patients and to provide

supervision, as required by Tennessee law, over the Debtor's nurse practitioner practice. During the Plaintiff's recruitment and negotiations for employment with ETHMC, the Debtor was under no obligation or duty to disclose accounting information to the Plaintiff beyond what he requested. Furthermore, the Plaintiff stated that he did not specifically ask the Debtor about expenses not reflected in these documents. While the Plaintiff was not required to ask the Debtor about such information, he must bear the burden of his failure to do so. And, as previously stated, there is no evidence that the information contained in those documents was false or untrue. The fact that the Plaintiff understood the documents to reflect something other than what they actually did reflect cannot be held against the Debtor.

Finally, the court is not convinced that the Plaintiff's reliance on these documents as evidence of the company's future viability was reasonable. As previously stated, these documents simply report the actual monthly income and expenditures for ETHMC from July 2000 through November 2001. And, even though the Plaintiff inquired as to who prepared the financial documents and was advised that the Debtor and an accountant prepared this information, the Plaintiff did not request to meet with the accountant, nor did he request copies of ETHMC's tax returns or any additional documents that might provide financial information regarding ETHMC's current and prospective viability. Once again, the Plaintiff was not required to make additional inquiries, but his failure to do so cannot be construed as a fraudulent intent to deceive or gross recklessness by the Debtor.

Because the Plaintiff has not met his burden of proof under either § 523(a)(2)(A) or (B), he is not entitled to a nondischargeable judgment against the Debtor. Accordingly, the

court will not address the issue of whether the Debtor terminated the Plaintiff for cause or in breach of the Employment Agreement since any possible judgment for damages has been discharged pursuant to the discharge granted the Debtor on August 11, 2003.

A judgment consistent with this Memorandum will be entered.

FILED: June 30, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

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Case No. 03-30956

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HERMAN J. MARTI

Defendant

J U D G M E N T

For the reasons stated in the Memorandum filed this date containing findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding by Rule 7052 of the Federal Rules of Bankruptcy Procedure, it is ORDERED, ADJUDGED, and DECREED that the Complaint filed by the Plaintiff on July 30, 2003, is DISMISSED.

ENTER: June 30, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE