SIGNED this 27th day of April, 2022

Shelley D. Rucker
CHIEF UNITED STATES BANKRUPTCY JUDGE

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

In re:	)	
	)	
Teddy Eugene Cox,	)	**No. 2:20-bk-51482-RRM**
	)	**Chapter 7**
Debtor.	)	
	)	
	)	
ABLP REIT, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Adv. No. 2:20-ap-05010-SDR**
	)	
Teddy Eugene Cox,	)	
	)	
Defendant.	)	

MEMORANDUM

ABLP REIT, LLC ("ABLP") filed this adversary proceeding to declare ABLP's judgment against the Debtor, Teddy Eugene Cox, non-dischargable under 11 U.S.C. § 523(a)(2)(A). [Doc. Nos. 27 & 30]. Before the court is ABLP's Motion for Summary Judgment on the issue of non-dischargeablity of the judgment lien obtained against the Debtor. The court

has previously concluded that the Debtor made intentional, material misrepresentations to obtain a loan from ABLP and that it consequently suffered damage. Based on the court's prior ruling, the only issue left for the court to resolve is whether the ABLP justifiably relied on the false statements of the Debtor when advancing the loan. After reviewing supplemental pleadings from the parties and conducting oral argument, the court finds that ABLP has shown that there is no genuine issue of fact regarding whether it justifiably relied on the Debtor's misrepresentations when making the loan. Accordingly, the court grants ABLP's motion for summary judgment and finds the judgment is non-dischargeable under 11 U.S.C. § 523(a)(2)(A).

BACKGROUND

The background of this case has been discussed in the court's Memorandum Opinion. *ABLP Reit, LLC v. Cox* (*In re Cox*), Nos. 2:20-bk-51482-SDR, 2:20-5010-SDR, 2022 Bankr. LEXIS 160 (Bankr. E.D. Tenn. Jan. 21, 2022). In that case, the court reviewed ABLP's Motion for Summary Judgment for non-dischargeability of its judgment lien under 11 U.S.C. § 523(a)(2)(A) and the supporting brief. [Doc. Nos. 28 & 30]. The Debtor did not file a response. The court held that ABLP carried its burden under all applicable elements of 11 U.S.C. § 523(a)(2)(A) to make its judgment lien non-dischargeable, except for the element of justifiable reliance. At that time, the court found that it did not have an adequate factual basis to determine, as a matter of law, whether ABLP's reliance on the Debtor's representations was justified based on the conditions of the property that ABLP knew about at the time it entered into the loan agreement. *See In re Cox*, 2022 Bankr. LEXIS 160 at 24–26. The court's order, entered on January 21, 2022, gave ABLP 21 days to supplement the motion in light of the Debtor's failure to respond. On February 2, 2022, ABLP filed its Amended Motion for Summary Judgment with additional supporting facts. [Doc. No. 36]. The court's order also gave the Debtor 21 days to

respond to any supplement filed by ABLP. [Doc. No. 33]. The Debtor filed a narrative on March 7, 2022, after the deadline to respond. The Debtor's narrative did not address the specific additional facts supporting ABLP's motion. The court held a hearing on the Amended Motion for Summary Judgment on March 22, 2022. At the hearing, the court heard argument from counsel for the plaintiff and the Debtor, who appeared *pro se*.

PROCEDURE

Based on the supplemental facts that it filed, ABLP maintains that it is entitled to judgment as a matter of law. The Debtor did not file a response within the 21 days required by the court's order. The court will treat the facts filed by ABLP in support of its amended motion as undisputed and will consider whether these facts are sufficient to support a judgment. For judicial efficiency, court will also consider whether the debtor's narrative was sufficient to create a genuine issue of fact.

FACTS

The Debtor reached out to ABLP for a loan in 2016. As part of ABLP's due diligence, ABLP looked into the corporate records of the Debtor and the guarantors. Reclaimed Resources, Inc. was registered with the State of Virginia by the Debtor in 2008 and had been in operation at the Property for nearly 8 years without being shut down by any regulatory authorities for environmental violations. (Suppl. Sanada Aff., ¶ 2, Doc. No. 36).

The court has already found that the Debtor was aware of the notices of violation, i.e. the 2014 and 2015 Virginia Department of Environmental Quality (the "DEQ") Notices of Violation (the "2014 and 2015 NOVs") resulting from DEQ staff observing thousands of whole waste tires on the Property and all other Notices of Violation issued by DEQ prior to ABLP funding the

loan.[1] Yet, the Debtor still answered "No" to questions about the existence of any violations. As part of ABLP's due diligence on this loan, ABLP searched online for any indications of environmental or regulatory violations and found nothing. At the time, ABLP thought that meant there were no violations to find. It turns out that the 2014 and 2015 NOVs and any other Notices of Violation that DEQ issued prior to ABLP funding the loan were and are not readily available to the public, according to the President of ABLP, Mr. Jerry Sanada. (Suppl. Sanada Aff., ¶ 3, Doc. No. 36).

In Mr. Sanada's phone meeting with the Debtor on October 21, 2016, one of Mr. Sanada's first questions, after getting some basic background information, was whether there were any environmental violations or issues with the Property. Notwithstanding the fact that the Debtor had received the 2014 and 2015 NOVs and had not done anything to remedy the violations noted therein, the Debtor assured Sanada that the Property "has no issues whatsoever." (Suppl. Sanada Aff., ¶ 4, Doc. No. 36).

ABLP had an inspector examine the Property on November 10, 2016, and as part of that inspection, ABLP had photos taken of the Property. ABLP received the photos and an inspection report on November 14, 2016, and noted what appeared to be two large piles of tires. This concerned ABLP because ABLP could not discern how many tires there were from the photos or why they were being stored on the property. ABLP's Director of Originations, Mr. Bruce Sanders, reached out to the Debtor on November 15, 2016, to inquire about the tires.

The Debtor informed Mr. Sanders that the Debtor's Permit by Rule #605 allowed him to have 2,000 tires on site and that he was currently in possession of that number of tires. The Debtor also sent Mr. Sanders a copy of the section of his permit authorizing him to store 2,000

[1] Descriptions of the contents of the notices are detailed in Exhibit F attached to the complaint. (Doc. 1-6 at 8).

whole tires and 19 tons of tire shred on the Property. ABLP later learned that the Debtor's representation about the number of tires on the property was not true. Although the Debtor's permit did in fact allow him to have 2,000 whole tires on the property, the 2018 DEQ Special Order indicated that the Debtor was in fact storing between 25,000 and 60,000 tires on the Property. At the time, the Debtor told Mr. Sanders that the Property was in compliance.

The Debtor informed Mr. Sanders that DEQ required the Debtor to post a bond that was adequate to pay for the disposal of the tires and any other materials on the Property if the Debtor failed to dispose of the materials himself. ABLP later learned that this was misleading. The Debtor knew that the approximately $16,000 bond he posted was based on the assumption that he would have a maximum of 2,000 tires on site and that the bond would be woefully inadequate to dispose of the tens of thousands of tires he was actually storing on the Property at the time ABLP made the loan. By the time ABLP foreclosed, the Debtor had accumulated hundreds of thousands of tires on the Property, and it cost ABLP hundreds of thousands of dollars to dispose of said tires with nothing but a $16,000 bond to claim for reimbursement. (Sanders Aff., ¶ 2, Doc. No. 36).

The Debtor provided ABLP with a letter from the DEQ dated November 17, 2016 (just two days after Sanders' conversation with the Debtor) with the subject "Re: Comprehensive Evaluation Inspection Report for Reclaimed Resources, Inc. 191 Williams Street, Bristol, Virginia…" (the "DEQ Compliance Letter"). The Debtor presented the DEQ Compliance Letter to ABLP as proof that the Property was in compliance with DEQ regulations. (Suppl. Sanada Aff., ¶ 5, Doc. No. 36). However, long after the loan closing and shortly after the subsequent foreclosure, ABLP learned that the Debtor's offer of the DEQ Compliance Letter as proof of compliance was misleading. Far from being a comprehensive evaluation inspection report of all

conditions on the property, the DEQ Compliance Letter merely addressed the Debtor's corrective actions regarding some specific water compliance issues on the Property. The DEQ Compliance Letter was completely unrelated to, and did not resolve the issues raised in, the 2014 and 2015 NOVs, which cited an unpermitted "sanitary landfill or other facility for the disposal, treatment, or storage of nonhazardous solid waste," and an unpermitted "solid waste management facility storing tires." Mr. Sanada states that had ABLP known about the 2014 NOV and the 2015 NOV, it would not have approved and funded the Loan. (Suppl. Sanada Aff., ¶ 6, Doc. No. 36).

At the hearing, the Debtor appeared and made statements on his own behalf. While these statements were not made while the debtor was under oath, the court construes the Debtor's statements made on his own behalf as a *pro se* litigant as a proffer to facts he would testify if put under oath. The Debtor's narrative did not dispute ABLP's additional facts with respect to ABLP's due diligence regarding compliance with environmental laws and regulations and his responses. It does dispute the final number of tires removed after default but does not dispute that he had been notified that the number of tires on the property exceeded 2,000. He did not dispute that the violation existed at the time he received the loan proceeds. His justification for his failure to disclose the violations was that he intended to buy a machine that would remedy the violations after closing. The Debtor stated that in 2014 he hired an environmental company "to draw up the plan and make all the process that was necessary for us to be in compliance" with environmental standards. (Hr'g Digit. Audio, March 22, 2022, at 3:10:00–3:11:15). This confirmed for the court that the Debtor knew he was not in compliance with environmental laws. He argues that his intention to remedy the violation shows that he had no intent to deceive ABLP in obtaining a loan. (Hr'g Digit. Audio, March 22, 2022, at 3:18:41–3:19:09). The Debtor offered no evidence that he acted on those "intentions" after receiving the loan proceeds. The Debtor did

not disclose his conversations with the DEQ regarding environmental problems on the Property to ABLP in obtaining the loan proceeds because he "did not feel like there was anything for [him] to have to disclose." (Hr'g Digit. Audio, March 22, 2022, at 3:18:41–3:19:09). ABLP did not challenge any of the statements that the Debtor made under this proffer.

The court concludes that the Debtor presented no evidence that he provided any basis for ABLP to question the representations that he made in the loan application and environmental questionnaire. He offered no evidence that he disclosed the violations cited in 2014 and 2015 in any conversations with ABLP. His hope to remediate those problems after closing does not change the undisputed fact that he knew of the violations, knew they needed to be remedied, and made a conscious decision not to disclose them during ABLP's due diligence.

ANALYSIS

The issue before the court is the plaintiff's motion for summary judgment under Fed. R. Bankr. P. 7056 on the issue of non-dischargability of ABLP's judgment lien under 11 U.S.C. § 523(a)(2)(A). The court shall grant the movant a judgment if the movant has shown that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law under F.R.C.P. 56(a), which is made applicable to adversary proceedings by Fed. R. Bankr. P. 7056.

Under 11 U.S.C. § 523(a)(2)(A), a discharge in a Chapter 7 case will not extend to any debt "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by[] false pretenses, a false representation, or actual fraud, other than a statement respecting the Debtor's or an insider's financial condition." For an exception to discharge based on a misrepresentation, the Sixth Circuit Court of Appeals in *Rembert v. AT&T Universal Card Servs.* (*In re Rembert*), requires:

> (1) the Debtor obtained money through a material misrepresentation that, at the time, the Debtor knew was false or made with gross recklessness as to its truth; (2) the Debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss. In order to except a debt from discharge, a creditor must prove each of these elements by a preponderance of the evidence. Further, exceptions to discharge are to be strictly construed against the creditor.

141 F.3d 277, 280–81 (6th Cir. 1998) (citations omitted).

As noted in this court's prior opinion, the undisputed facts supported all of the elements for denying dischargeablity of a debt under § 523(a)(2)(A) except for justifiable reliance. Accordingly, the court will address justifiable reliance in light of the additional facts provided by the parties.

The language of "reasonably relied" from § 523(a)(2)(A)(iii) has been interpreted by courts as justifiable reliance. The Supreme Court explains in *Field v. Mans*, that the appropriate standard for assessing justifiable reliance for actual fraud comes from the Restatement (Second) of Torts (1976). *See* 516 U.S. 59, 70, 116 S. Ct. 437, 133 L. Ed. 2d. 351 (1995).

> Justifiable reliance is more than actual reliance. [*Redmond v. Finch* (*In re Finch*), 289 B.R. 638, 644 (Bankr. S.D. Ohio 2003)]. Yet, it is much less stringent than reasonable reliance. *Miller v. Bauer* (*In re Bauer*), 290 B.R. 568, 579 (Bankr. S.D. Ohio 2003). It is a subjective standard that looks to the factual circumstances between the parties instead of a community standard. *Id.* It imposes no duty to investigate, even if an investigation would have revealed the fraud. *Lawson v. Conley* (*In re Conley*), 482 B.R. 191, 208-09 (Bankr. S.D. Ohio 2012). However, the creditor is 'required to use his senses, and cannot recover if he blindly relies upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation.' *Field v. Mans*, 516 U.S. [at 71].

Mazak Corp. v. King (*In re King*), No. 11-1202, 2013 Bankr. LEXIS 4756* at 48–49 (Bankr. S.D. Ohio 2013).

The Debtor's withholding of the DEQ NOVs from 2014 and 2015 created justifiable reliance for ABLP because ABLP could not otherwise discover this information through any public record. When the Debtor reached out to ABLP for a loan in 2016, ABLP confirmed that the Debtor had operated Reclaimed Resources, Inc. in the state of Virginia since 2008 without being shut down for environmental reasons. However, ABLP reports that it could not have discovered the DEQ NOVs from 2014 and 2015 through ordinary means of research, such as internet search engines. The Debtor even admitted that he did not disclose these NOVs because he did not think it was something he had to disclose, and he was planning on remedying the violations after the loan closing.

Through the supplemental facts, ABLP has shown that it did more than a cursory examination and did not blindly rely on the initial loan application. It has shown that the Debtor continued to misrepresent the status of the Property. According to the chronology established by Mr. Sanada, the Debtor reached out to ABLP for a loan in 2016. On October 21, 2016, the Debtor and Mr. Sanada had a conversation about whether the Debtor's property complied with environmental regulations. The Debtor represented to him that the Property had "no issues whatsoever," despite the Debtor knowing about the 2014 and 2015 NOVs. On November 2, 2016, the Debtor executed a Commercial Loan Application answering "no" to questions about violations but conceding that the property contained tires. Based on the Debtor's answers, ABLP had the property inspected on November 10, 2016, and photographed the piles of tires. Photographs of the tires on the property from that investigation caused ABLP concern about whether the Property violated environmental regulations. Mr. Sanders called the Debtor on November 15, 2016, to ask what permission the Debtor had to store the tires that the investigation reported. Just two days later, on November 17, 2016, the Debtor furnished Mr.

Sanada with the DEQ Compliance Letter in order to represent that the entire property was in compliance as of October 27, 2016. However, the letter had nothing to do with tires and addressed an entirely separate issue. On December 15, 2016, the Debtor completed an Environmental Questionnaire, further representing that there were no environmental violations or hazards on the property. Only then did ABLP make the loan of $1,200,000 on December 29, 2016, in reliance on the representations made by the Debtor.

CONCLUSION

For the above stated reasons and based on the undisputed facts, the court finds, as a matter of law, that ABLP relied on the representations made by the Debtor when entering into the loan agreement. ABLP has satisfied the element of justifiable reliance. The Debtor's narrative and argument do not raise a genuine issue as to the facts on which ABLP relied to meet the element of justifiable reliance. Thus, ABLP's Motion for Summary Judgment is GRANTED. As a result, the court finds that ABLP's judgment is non-dischargable under 11 U.S.C. § 523(a)(2)(A). A separate order will enter.

###