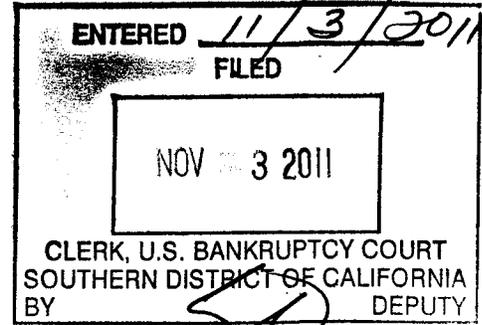


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WRITTEN DECISION - NOT FOR PUBLICATION¹



UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re:) Bankruptcy No.10-00920-LT7
Ryan C. Moeller,) Adversary No. 10-90219-LT
Debtor.)
_____) MEMORANDUM DECISION
Jeffrey S. Marshall,)
Plaintiff,)
v.)
Ryan C. Moeller,)
Defendant.)

Jeffrey Marshall seeks a non-dischargeable judgment against Ryan Moeller pursuant to 11 U.S.C. § 523(a)(2)(A).² Mr. Marshall alleges that Mr. Moeller obtained loans from him through false representations and fraud. More specifically, Mr. Marshall claims that Mr. Moeller, by guaranteeing returns of at least 20% and through false representations, induced him to make two loans in connection with a proposed renovation and sale of real

¹ This opinion is intended only to resolve the dispute between these parties.

² Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 property located at 2765 Las Palmas Cv., Del Mar, CA ("Del Mar Property"). Mr. Marshall
2 asserts that his loans were not paid and that he, thus, suffered damages as a proximate result
3 of the alleged misrepresentations.

4 The Court held a trial in this matter on September 23, 2011. The Court carefully
5 considered all arguments, all evidence properly introduced in the case, and the demeanor of
6 the witnesses. The Court concludes, based on this analysis, that Mr. Marshall is not entitled
7 to a non-dischargeable judgment under section 523(a)(2)(A).³

9 FACTS

10 Jeffrey Marshall and Ryan Moeller met in early 2007 through intramural flag football
11 and other social activities with mutual friends. Unfortunately, the subsequent conversations
12 turned from football to finance. On June 28, 2007, Mr. Moeller sent a mass email soliciting
13 investments for a real estate venture. The email's subject line read: "Investment Opportunity
14 – 20% Guaranteed Return." The body of the email included many representations that
15 indicated Mr. Moeller's confidence in the investment, including that Mr. Moeller's first deal
16 sold in 18 days and paid back investors their loans plus a 20% return.

17 Mr. Marshall was one recipient of this email and he approached Mr. Moeller in
18 response. Mr. Moeller then actively solicited Mr. Marshall's involvement with the Del Mar
19 Property. Mr. Moeller wrote that he needed: "about 20K to cover mortgage payments and
20 pay our laborers to finish up this project." Plaintiff's Ex. 2. Mr. Marshall replied that he
21 could supply \$20,000 by borrowing from his Home Equity Line of Credit (HELOC). *Id.*

22
23
24 ³ The Plaintiff also generally asserted claims under section 523(a)(2)(B), but neither the
25 evidence nor argument at trial support such a theory. In particular, section 523(a)(2)(B) requires a
26 materially false written statement respecting the debtor's or an insider's financial condition. Here,
27 the limited email statements regarding the possibility or probability of financing do not appear to
28 meet the financial statement requirement of 523(a)(2)(B)(ii), and the Plaintiff, in fact, argued that
Debtor actually failed to provide necessary financial information. As a result, the Court's analysis
discusses only section 523(a)(2)(A). But if the emails qualify as written statements for 523(a)(2)(B)
purposes, the Court's analysis as to lack of falsity and lack of fraudulent intent is equally applicable
such that relief under section 523(a)(2)(B) also is not appropriate.

1 Mr. Moeller wrote back, reiterating that he could use the money for the August mortgage
2 payment and stating that this is a "win-win" situation. *Id.*

3 The parties apparently reached an agreement and prepared a promissory note ("First
4 Note") that provided that Mr. Moeller would pay Mr. Marshall \$24,000 (\$20,000 investment
5 + 20% return) plus HELOC interest charges. The payment was due in its entirety: "on or
6 before 10 days after close of escrow of 2765 Las Palmas Cv., Del Mar, CA 92014."

7 Plaintiff's Ex. A.

8 Significantly, the parties stipulated before trial that Mr. Moeller believed the Del Mar
9 Property to be worth at least \$1.8 million at the time of this loan. The evidence supports the
10 reasonableness of this belief, as Mr. Moeller had a 2006 appraisal supporting a greater value
11 for the Del Mar Property once improved, and the renovation of the Del Mar Property was
12 substantially complete.

13 Mr. Moeller faxed the First Note to Mr. Marshall and both parties signed on
14 August 7, 2007. On August 9, 2007, Mr. Marshall advanced the loan proceeds through a
15 \$20,000 check from his HELOC.

16 On September 23, 2007, Mr. Moeller sent Mr. Marshall an email regarding the
17 Del Mar Property that included pictures and more assurances. He stated that the asking
18 price will be between \$1.8-1.9 million and advised that he owed \$1.3475 million. Along
19 with this equity, Mr. Moeller wrote, "[a]s a backup plan, I also have 2 other possible sources
20 of funding." Mr. Moeller also told Mr. Marshall that his money was "very safe." Plaintiff's
21 Ex. 6.

22 On September 27, 2007, Mr. Moeller sent another mass email featuring the same
23 subject line as the first and specifically soliciting funds in connection with the Del Mar
24 Property. The email advised that:

- 25 a. There is \$575,000 of equity in the Del Mar Property;
- 26 b. Mr. Moeller will have 2 more sources of funding in the next couple of
27 months therefore investment would be very safe;

28

1 c. The Del Mar Property has been on the market for five weeks and there
2 has been "extremely good feedback and activity;" and

3 d. Mr. Moeller again guaranteed a 20% return. Defendant's Ex. C.

4 Later that day, Mr. Marshall and Mr. Moeller prepared a second promissory note
5 ("Second Note"). The Second Note provided that Mr. Moeller would pay Mr. Marshall
6 \$33,600 (\$28,000 investment + 20% return) plus HELOC interest charges and that payment
7 was due in its entirety: "on or before 10 days after close of escrow of 2765 Las Palmas Cv.,
8 Del Mar, CA 92014." Plaintiff's Ex. 7. Mr. Moeller faxed the Second Note to Mr. Marshall
9 and both parties signed. On October 1, 2007, Mr. Marshall funded this loan through a check
10 from his HELOC payable to Mr. Moeller.

11 In November of 2007 another email chain between Mr. Moeller and Mr. Marshall
12 commenced. And, yet again, Mr. Moeller told Mr. Marshall that his money was very
13 secure. More specifically, he stated that he had three ways to pay back the Marshall loans:
14 the equity from the Del Mar Property, a potential \$1 million business line of credit, and an
15 overfinance of another property. In one email, Mr. Moeller specifically stated: "The market
16 doesn't have an impact on my ability to pay [investors] back." Plaintiff's Ex. 9.

17 While Mr. Moeller and Mr. Marshall communicated extensively prior to and
18 immediately after the loans were funded, at no time did Mr. Moeller completely disclose his
19 financial obligations. In particular, he owed amounts to other Del Mar Property investors,
20 had credit card debt, was obligated on loans in connection with properties in Arizona, and
21 had student loan obligations. But the record is also clear that Mr. Moeller was actively
22 seeking additional funding through a line of credit or other loan. And, the Court believes
23 Mr. Moeller's testimony that he sincerely believed that he would obtain financing and that
24 he would sell the Del Mar Property quickly and at an amount sufficient to pay his loans,
25 expenses, investors, and a profit to himself. Mr. Moeller pursued other funding and actually
26 received a commitment from a lender at one point, but ultimately failed to obtain a line of
27 credit or other funding.

28

1 But, Mr. Marshall did no real due diligence, and he made no inquiry as to
2 Mr. Moeller's personal finances.

3 On cross examination, Mr. Marshall admitted that this was not his first significant
4 financial transaction. At the time of his loans to Mr. Moeller, Mr. Marshall had a real estate
5 license that he obtained in connection with his employment as a property manager. He also
6 previously purchased a home and took out a personal loan secured by his residence. Finally,
7 Mr. Marshall loaned a friend \$50,000 to open a bar (Gaslamp Tavern) a year or two prior to
8 his loans to Mr. Moeller and made another \$30,000 loan to his friend thereafter.
9 Mr. Moeller claims that Mr. Marshall is a sophisticated investor. While the Court would not
10 label Mr. Marshall as overly sophisticated, he certainly was not a financial or real estate
11 neophyte at the time of the loans.

12 Inevitably, given the real estate melt down, and unfortunately, for both Mr. Moeller
13 and Mr. Marshall, the Del Mar Property did not sell quickly and ultimately sold for less than
14 the amount owed to the secured lender. Thus, Mr. Moeller did not pay back Mr. Marshall's
15 loans in full. At some point Mr. Moeller attempted to follow a payment plan under which
16 he paid back a few thousand dollars. But, almost the entire balance owed on the loans
17 remains outstanding. As Mr. Marshall obtained these funds through a HELOC advance, he
18 is forced to personally pay monthly interest in order to avoid default and foreclosure.

19 Ultimately, Mr. Moeller filed for bankruptcy, and Mr. Marshall initiated this
20 adversary proceeding, seeking to avoid the discharge of the debt owed to him by
21 Mr. Moeller.

22 DISCUSSION

23 Section 523(a)(2)(A) provides that:

24 (a) A discharge under section 727 . . . of this title does not discharge
25 an individual debtor from any debt – . . .

26 (2) for money, property, services, or an extension, renewal, or
27 refinancing of credit, to the extent obtained by –
28

1 (A) false presences, a false representation, or actual
2 fraud, other than a statement respecting the debtor's or an
insider's financial condition; . . .

3
4 In the Ninth Circuit to prove actual fraud, a creditor must establish each
of the following elements:

- 5 (1) That the debtor made the representations;
6
7 (2) That at the time he knew they were false;
8
9 (3) That he made them with the intention and purpose of deceiving
the creditor;
10
11 (4) That the creditor relied on such representations; and
12
13 (5) That the creditor sustained the alleged loss and damage as the
proximate result of the representations having been made.

14 *Britton v. Price (In re Britton)*, 950 F.2d 602, 604 (9th Cir. 1991); *Eugene Parks Law Corp.*
15 *Defined Benefit Pension Plan v. Kirsh (In re Kirsh)*, 973 F.2d 1454, 1457 (9th Cir. 1992). A
16 false pretense involves an implied misrepresentation or conduct which creates and fosters a
17 false impression, while a false representation is an express misrepresentation that induces
18 conduct. *Parker v. Grant (In re Grant)*, 237 B.R. 97, 113 (Bankr. E.D. Va. 1999);
19 *Krenowsky v. Haining (In re Haining)*, 119 B.R. 460, 463-464 (Bankr. D. Del. 1990). But
20 the difference between fraud, false pretense, and false representation is nuanced, and the test
for proving any one of them is essentially the same.

21
22 When analyzing knowledge and intent, the Court must keep in mind that reckless
23 indifference to the truth supports a section 523(a)(2) claim. See *Arm v. A. Lindsay Morrison*
24 *M.D., Inc. (In re Arm)*, 175 B.R. 349, 354 (9th Cir. BAP 1994). Further, a debtor's silence
25 or omission of a material fact can constitute a false representation which is actionable under
26 section 523(a)(2)(A). *Citibank (South Dakota), N.A. v. Eashai (In re Eashai)*, 87 F.3d 1082,
27 1088-1089 (9th Cir. 1996). In order to find liability for fraud based upon omission or
28 silence, however, there must be a duty to disclose. *Id.* But nondisclosure of a material fact

1 in the face of a duty to disclose can establish the requisite reliance and causation for actual
2 fraud under the Code. *Apte v. Romesh Japra, M.D., F.A.C.C. Inc. v. Apte (In re Apte)*,
3 96 F.3d 1319, 1323 (9th Cir. 1996). And in a business transaction such a duty can arise.
4 The *Apte* court, cited section 551 of the Restatement (Second) of Torts (1976) for the
5 proposition that the parties in a business transaction have a:

6 duty to exercise reasonable care to disclose to the other before
7 the transaction is consummated . . . facts basic to the transaction,
8 if [a party] knows that the other is about to enter into it under a
9 mistake as to them, and that the other, because of the
10 relationship between them, the customs of the trade or other
objective circumstances, would reasonably expect a disclosure
of those facts.

11 *Apte*, 96 F.3d at 1324.

12 Finally, the Court notes the often repeated directive that the burden a creditor bears in
13 a non-dischargeability action is high. As a result, Mr. Marshall bears the burden of proving
14 each element of fraud by a preponderance of the evidence. *Grogen v. Garner*, 498 U.S. 279,
15 290 (1991). And, in order to avoid unjustifiably opposing a debtor's fresh start, the
16 Ninth Circuit has held that exceptions to discharge "should be construed strictly against
17 creditors and in favor of debtors." *Klapp v. Landsman (In re Klapp)*, 706 F.2d 998, 999
18 (9th Cir. 1983).

19 As discussed above, for Mr. Marshall to prevail the Court must find that he proved
20 each element of section 523(a)(2)(A) by a preponderance of the evidence.

21 **1. False representations.**

22 **a. Mr. Moeller Did Not Make Fraudulent Misrepresentations In**
23 **Connection With His Solicitation Of The Loans.**

24 Mr. Marshall claims that Mr. Moeller made numerous misrepresentations: that there
25 was \$575,000 in equity in the Del Mar Property; that Mr. Moeller had three separate sources
26 of funding; and that Mr. Marshall's investment was guaranteed to yield a return. The Court
27 determines that none of these statements were materially false when made.
28

1 With regard to the equity in the Del Mar Property, the parties stipulated that
2 Mr. Moeller believed that value of the Del Mar Property exceeded \$1.8 million at the time
3 of the loans. Consistent with this stipulation, Anderson Appraisal Services appraised the
4 Del Mar Property at \$1.925 million, once improved. And in his email dated September 27,
5 2007, Mr. Moeller explained his equity analysis. He sent an email to Mr. Marshall stating:
6 "My second deal I owe 1.375mil and it appraised at 1.925mil which is 575K+ in equity."
7 Plaintiff's Ex. 3. Although the Del Mar Property eventually sold short for \$1.1 million, the
8 representation that there was \$575,000 in equity was not inaccurate at the time of the loans.
9 Indeed, the parties also stipulated that the Del Mar Property unexpectedly decreased in value
10 and that at the time of the loans the market crash in 2007 and 2008 was not reasonably
11 foreseeable.

12 Notwithstanding the stipulated facts, Mr. Marshall challenges the accuracy of
13 Mr. Moeller's calculation of equity arguing that actual profit upon sale would be diminished
14 by future carrying costs, soft costs, and agent commission and that Mr. Moeller's equity
15 analysis failed to so disclose. But Mr. Moeller never disguised the fact that the Del Mar
16 Property was encumbered or denied that typical costs of sale existed. Further, Mr. Moeller's
17 equity analysis was clearly a rough estimate of his belief of the then existing debt to equity
18 ratio, and there is no evidence that he was not then paying the secured creditor and did not
19 intend to pay accruing interest on an ongoing basis.

20 Mr. Marshall further questions the equity analysis based on the fact that Mr. Moeller
21 did not disclose the existence of other investors in the Del Mar Property. But Mr. Moeller
22 never presented his analysis as a precise calculation of profit. While Mr. Marshall was not
23 the only Del Mar Property investor, there was no evidence that any investor was a secured
24 creditor, so these debts were not properly included in a debt to equity analysis. In short,
25 Mr. Moeller's equity assertions were not materially incorrect when made in connection with
26 the solicitation of Mr. Marshall's loans either as to amount or as to the general assertion that
27 equity sufficient to pay all creditors in full existed.

28

1 The three separate sources of funding that Mr. Moeller referred to include the equity
2 from the Del Mar Property, a possible \$1 million business line of credit, and overfinancing
3 of another property. The Court finds that Mr. Moeller did not make any material
4 misrepresentations in this regard. First, as discussed above, there is no evidence suggesting
5 that there was not substantial equity in the Del Mar Property prior to the real estate collapse
6 and at the time of the loans. There is no evidence or even suggestion that the appraisal was
7 fraudulent.

8 With regard to the line of credit and overfinancing, Mr. Moeller wrote on
9 September 23, 2007, that he had "2 other possible sources of funding that [he] could use" to
10 pay back Mr. Marshall's loan. This qualified statement does not rise to the level of a
11 material misrepresentation. The evidence establishes that Mr. Moeller was pursuing other
12 possible sources of funding. In his second solicitation email, sent after the first loan and
13 dated September 27, 2007, Mr. Moeller stated: "I will have 2 more sources of funding in
14 the next couple months." This cannot be construed to mean that he already had secured
15 funding. In fact, Mr. Moeller actually received a Letter of Commitment to Fund from
16 Lunden Investments in November. This letter provided overfinancing for another property
17 in the form of a \$3.5 million loan. While this loan ultimately fell through, Mr. Moeller's
18 assertion that he possibly had this source of funding or believed he would obtain additional
19 funding was not a misrepresentation when made. Mr. Moeller also orally discussed his
20 ability to obtain alternate sources of payment and the fact that the loans were safe prior to
21 the loans. The evidence regarding such statements, however, was general both as to content
22 and timing and there is no evidence of more specific or clearly erroneous statements in the
23 evidence before the Court.

24 Mr. Marshall also contends that the fact that Mr. Moeller was highly leveraged gave
25 him very little chance of receiving the line of credit. In effect, he asks the Court to infer that
26 the statement of probable financing was false to the extent it conveyed a sense of probability
27 or uttered with reckless indifference for the truth. But, Mr. Moeller never represented that
28 he had already received the funds or was guaranteed to receive them and, as discussed

1 below, this assertion by Mr. Marshall is questionable as a matter of fact, unsupported by any
2 expert testimony as to then existing lending standards, and inconsistent with the fact that
3 Mr. Moeller obtained a commitment, albeit from an entity he described as shady after it
4 failed to fund. The evidence as to oral statements in regard to sources of funding, again, is
5 vague, but all written statements refer to possible funding or probable funding. There is no
6 evidence that prior to the loans Mr. Moeller represented that he had secured such funding.

7 Crucially, the evidence indicates that Mr. Moeller only specifically identified these
8 "2 other possible sources of funding" as the business line of credit and overfinancing in
9 emails dated November 9 and November 12, 2007. Thus, the more specific statements
10 occurred well after the loans. These statements were not materially false when made or
11 represented puffery as discussed below.

12 Finally, Mr. Moeller's promise of a "20% guaranteed return" and his assurances as to
13 the safety of the Marshall investment reflected an opinion and his confidence in the future
14 success of the Del Mar Property project. Statements in the form of sales puffery are not
15 actionable unless the speaker does not actually believe what he says or utters them with a
16 reckless indifference for the truth. *Smith v. Meyers (In re Schwartz & Meyers)*, 130 B.R.
17 416, 423 (Bankr. S.D.N.Y. 1991) (citations omitted). Similarly, statements of sincerely held
18 opinion will not support a claim of false statement uttered with intent to defraud. *Id.* at 423-
19 24. The Court finds that Mr. Moeller sincerely believed in his ability to flip the Del Mar
20 Property for a healthy profit sufficient to make good on his guarantee. He recently had sold
21 a local property in 18 days for \$1.375 million cash, a price above appraised value, and
22 thereby repaid investors principal plus a 20% return. The Court finds that he actually
23 believed that the Del Mar Property provided another opportunity for a quick sale and
24 lucrative return on investment. Therefore, the Court finds that Mr. Moeller sincerely
25 believed in the profitability of this venture and did not make the guarantee with a reckless
26 indifference for the truth.

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1 **b. Mr. Moeller Did Not Omit Information Where He Had A Duty To**
2 **Disclose.**

3 Mr. Marshall also contends that he would not have loaned the money if Mr. Moeller
4 had disclosed the amount of debt Mr. Moeller already carried. Mr. Moeller was already
5 burdened with \$23,000 in credit card debt, \$50,000 in student loan debt, and loans of
6 \$290,000 and \$179,000 in relation to other real properties.

7 First, when considering a duty to disclose, one must look to the relationship between
8 the parties as the reasonableness of an expectation of disclosure varies depending on the
9 closeness of the relationship. Thus, a business transaction involving persons in a close
10 relationship gives rise to a higher expectation of disclosure than is found in a similar
11 transaction between two strangers. Here, the parties were acquaintances who had known
12 each other for a handful of months. Such a short-term relationship does not establish a
13 special relationship of trust requiring the highest level of disclosure obligation.

14 But more importantly, and notwithstanding the relationship between the parties, this
15 transaction was a classic case of asset-based financing. Mr. Moeller expected Mr. Marshall
16 to be paid back from the proceeds from the disposition of the Del Mar Property. The deal
17 never directly contemplated personal payment from Mr. Moeller's other assets. Indeed,
18 Mr. Marshall's limited due diligence related solely to the Del Mar Property. Therefore, the
19 nuts and bolts of Mr. Moeller's personal financial situation were not directly at issue.

20 In short, the Court finds that Mr. Moeller did not inappropriately and fraudulently
21 omit this information as he had no reason to assume that these financial facts were material
22 to a decision to invest in his Del Mar Property venture. He anticipated repayment of
23 Mr. Marshall and other Del Mar Property investors from the Del Mar Property. On a worst
24 case basis, he anticipated receiving a loan or line of credit. And there is no evidence that he
25 then believed or reasonably should have believed that his other outstanding debts presented
26 an obstacle to repayment of Mr. Marshall or financing. None involved liens on the Del Mar
27 Property. Further, there is no evidence that any of these obligations were in collection at the
28 time of the loans. And, there was no evidence that Mr. Moeller faced other immediate

1 pressure to pay any of his other debt. Thus, at the time of the loans Mr. Moeller could
2 reasonably assume that he would pay down his credit card and student loan debt over time
3 and that these debts did not impact his ability to repay Mr. Moeller. Finally, as discussed
4 above, Mr. Moeller was confident in his ability to obtain alternate financing. Thus, there
5 was no unsatisfied disclosure duty under the facts of this case.

6 Mr. Marshall contends that Mr. Moeller also should have disclosed that there were
7 other unsecured lenders in the Del Mar Property. The Court, again, finds such non-
8 disclosure immaterial. What is clear is that no such investor held a lien on the Del Mar
9 Property and that Mr. Moeller reasonably assumed abundant equity to pay these obligations.
10 Furthermore, Mr. Moeller's solicitations were in the form of blast emails sent to many
11 people. Mr. Marshall could easily see that Mr. Moeller sought multiple investors for the
12 Del Mar Property venture. Here, there was no offer or illusion of exclusivity. And
13 Mr. Moeller was not compelled to confirm or deny that Mr. Marshall was his only investor
14 where he actively and openly solicited numerous investors.

15 **c. Mr. Moeller Did Not Misuse Loan Proceeds.**

16 Mr. Marshall also argues that Mr. Moeller misappropriated his investment by not
17 using the money solely in connection with the Del Mar Property. While both parties
18 referenced the Del Mar Property in emails, the promissory notes do not condition the loans
19 or their uses. The notes simply provide that Mr. Moeller will pay Mr. Marshall "on or
20 before 10 days after close of escrow of 2765 Las Palmas Cv., Del Mar, CA 92014."
21 Mr. Moeller's email statement that he needs the money "to cover mortgage payments and
22 pay our laborers" is not the functional equivalent of a promise to put the loan proceeds in
23 trust for exclusive use in connection with the Del Mar Property. There was no promise of
24 exclusivity.

25 Further, while it is true that Mr. Moeller comingled Mr. Marshall's money with other
26 funds, there is no evidence that Mr. Moeller did not advance an amount equal to the loans to
27 pay the secured creditor and laborers in connection with the Del Mar Property. Thus, the
28 evidence fails to indicate that the project failed because Mr. Moeller did not pay related

1 expenses. Instead, it failed, as did so many, as a result of the fact that the overall economy
2 went into a downturn. Mr. Moeller supported the Del Mar Property for as long as he could
3 until the market ultimately dealt the death blow and there were no longer enough investors
4 or funds to keep the venture afloat.

5 **2. Mr. Moeller Did Not Make Statements Or Omit Information With The**
6 **Intent and Purpose of Deceiving.**

7 Even if some statements in connection with solicitation of the loans were less than
8 100% accurate, the Court also finds that Mr. Moeller did not act with the purpose of
9 deceiving Mr. Marshall. Mr. Moeller entered into business deals with Mr. Marshall and
10 expected both parties to profit. The Court believes Mr. Moeller's testimony that he would
11 have paid back the loans plus interest had the Del Mar Property sold for its anticipated
12 value. Furthermore, Mr. Marshall effectively concedes this point. When asked if
13 Mr. Moeller would have paid his investors back had there been enough money for all,
14 Mr. Marshall replied, "I don't see why he wouldn't." Thus, at the time of the loans,
15 Mr. Moeller intended to honor his obligations to Mr. Marshall upon sale of the Del Mar
16 Property. Mr. Moeller's statements and silences whether they relate to lack of risk,
17 availability of alternate financing, available Del Mar Property equity, a 20% return, or
18 precise use of funds may reflect excess optimism, but do not establish fraudulent intent.
19 The evidence similarly fails to support a determination that Mr. Moeller made these
20 statements with reckless indifference to the truth. In short, the Court found Mr. Moeller
21 credible as to his lack of fraudulent intent, the record is lacking of sufficient benchmarks of
22 fraud to support a finding of fraudulent intent, and Mr. Marshall, thus, fails to meet his
23 burden on this critical element.

24 **CONCLUSION**

25
26 Having concluded that Mr. Marshall failed to meet his burden of proof in these two
27 areas the Court does not need to discuss proximate cause. The Court also determines that a
28

1 discussion of reliance is unnecessary. Therefore, based on the foregoing, the Court
2 concludes that Mr. Moeller's debt to Mr. Marshall can be discharged. Mr. Moeller must
3 submit a judgment consistent with this ruling within 14 days.
4

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6 DATED: November 3, 2011


LAURA S. TAYLOR, JUDGE
United States Bankruptcy Court

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