UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

ANGELO AMODIO CASE NO. 92-63411

Debtor

ADIRONDACK BANK, A FEDERAL
SAVINGS BANK,

Plaintiff

vs. ADV. PRO. NO. 93-70157

ANGELO AMODIO,

Defendant

APPEARANCES:

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STEPHEN D. GERLING, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter is before the Court on the adversary complaint of Adirondack Bank ("Bank") against Angelo Amodio ("Debtor") filed August 30, 1993. In this proceeding, the Bank seeks to have its claims against the Debtor declared nondischargeable pursuant to §523(a) of the Bankruptcy Code (11

U.S.C. §§101-1330) ("Code").[1] The Debtor filed his Answer on September 23, 1993. A trial was held on February 2, 1994, in Utica, New York, and the parties were given the opportunity to file post-trial memoranda of law. The matter was submitted for decision on March 7, 1994.[2]

JURISDICTIONAL STATEMENT

The Court has core jurisdiction of this adversary proceeding pursuant to 28 U.S.C. §§1334(b), 157(a), (b)(1) and (b)(2)(I).

FACTS

At the time of the trial, the Debtor testified that he

[1] With respect to two loans made to the Debtor, the Bank alleges a cause of action based on Code §523(a)(2)(B). With respect to the overdrafts or so-called "check kiting" on two checking accounts, the Bank alleges several causes of action based on Code §523(a)(2)(A), (a)(4) and (a)(6).

[2] On June 15, 1994, the Court was advised by letter from the Bank's attorneys that due to Debtor's agreement to confess judgment as to the "check kiting" scheme referred to herein and make restitution, all as part of a disposition of pending criminal charges against the Debtor, the Bank was withdrawing that portion of its complaint dealing with the "check kiting", but sought a decision as to the balance of the complaint. On June 23,1994 and again on August 8, 1994, the Court contacted both the Bank's and Debtor's attorneys by letter requesting a stipulation partially discontinuing that portion of the Bank's complaint dealing with "check kiting", pursuant to Federal Rule of Bankruptcy Procedure 7041. In the interim, the Court withheld issuance of the decision. Having received no response from either party to its prior correspondence, the Court issues the within Memorandum-Decision, Findings of Fact, Conclusions of Law and Order.

was self-employed as a real estate broker. He also indicated that he had at one time also been in the insurance business. The business certificate signed by the Debtor on July 9, 1985, lists the Debtor's business as "Amodio Real Estate and Insurance." See Bank's Exhibit 60. The Debtor asserts, however, that there are actually two separate businesses, Angelo F. Amodio Insurance and Amodio Real Estate.

On or about November 1, 1991, the Debtor entered into a contract with Gates-Cole Associates, Inc. ("Gates-Cole") for the sale of that portion of the Debtor's insurance business handling casualty insurance. See Bank's Exhibit 1. The contract includes the sale of the Debtor's client list and certain office equipment, as well as an agreement to provide consultant services for a period of three years and an agreement not to compete within a fifty mile radius of Utica, New York, for five years in the casualty insurance business. The Debtor was still free to continue in the business of life, accident and health insurance.

On or about November 11, 1991, the Debtor submitted an application to the Bank for a loan of $30,000 for working capital for Amodio Real Estate and Insurance. See Bank's Exhibit 11. In support of the application, the Debtor provided the Bank with tax returns for the years 1988-1990 (see Bank's Exhibits 6-8), as well as a personal financial statement ("Financial Statement"). See Bank's Exhibit 5. The Financial Statement listed the value of Amodio Real Estate and Insurance as $600,000.

The Debtor sought a second loan from the Bank in March or April 1992 for $25,000 to be used to purchase restaurant equipment

in conjunction with a business to be operated by the Debtor's son. See Bank's Exhibit 12. The loan was originally to be paid back in full on June 6, 1992 (see Bank's Exhibit 70,) but was later renewed for an additional three months (see Bank's Exhibit 16). The loan application, signed by the Debtor in an individual capacity on or about April 3, 1992, included projections of earnings from the proposed business, as well as a list of equipment that the Debtor's son intended to purchase using the proceeds from the loan.

In both instances, the Debtor signed commitment letters agreeing that there were to be no material changes in assets, management, financial condition or nature of the business for which the loan was being made. See Bank's Exhibits 3 and 4. The first letter, dated December 24, 1991, set forth the terms and conditions for the $30,000 loan and was signed by the Debtor twice, once as owner of Amodio Insurance and Real Estate and once personally. The second letter, dated March 23, 1992, set forth the terms and conditions for $25,000 loan and was signed by Debtor individually without any reference to Amodio Insurance and Real Estate. With respect to the first letter, Debtor testified that he never informed the Bank that he had sold a portion of the insurance business.

The Court heard testimony from David Durgee ("Durgee"), Executive Vice President and Director of Lending for the Bank, to the effect that in reviewing the loan application, including tax returns and personal financial statement, the Bank specifically looked at the net worth, liquidity, debts and value of the Debtor's business. The Bank considered the cash flow and profitability of

the business as well. In this case, the Debtor's tax returns indicated an increase in receipts from 1988-1990. Although there had been a drop in profits, the returns also indicated that profit had come back in the third year, which was attributed by Durgee to the corrective action taken by the Debtor to reduce expenses. The drop in profits was also indirectly reflected in the credit reports on the Debtor and his real estate business. See Bank's Exhibit 9 and 10. The reports indicated certain credit card delinquencies in 1989. The credit reports also established that the Debtor had a history of paying his mortgages and other bank debt.

The Debtor had also furnished the Bank with a list of accounts receivable totalling $98,572.48. See Bank's Exhibit 11. The Bank was given a security interest in the accounts receivable, and it was Durgee's testimony that the loans were self-liquidating. In making a determination concerning the loans, he stated that he had not relied on the Debtor's income stream. Nor had he considered the value of the Debtor's real estate as it would not have been a primary source of repayment on the loans.

Durgee testified that he had not learned of the sale of a portion of the Debtor's insurance business until approximately one year after the first loan was made. He could not state definitively whether or not the Bank would have denied the loans had it known of the sale. He did indicate that if the Debtor had advised the Bank of the sale, the Bank would have asked that the Debtor provide it with information concerning the portion of the Debtor's income which was attributable to the issuance of casualty insurance and also would have requested information concerning the

monies received from the sale of the business.

As of the date of the trial, both loans were in default. Durgee testified that the balance on the first loan was approximately $28,200 in principal and $4,000 in interest. With respect to the second loan, he indicated that approximately $25,000 in principal was due and owing and $3,500 in interest.[3]

In addition to the two loans discussed above, the Debtor also had two checking accounts with the Bank (hereinafter the "Insurance Account" and the "Real Estate Account"). The Bank presented evidence that checks had been drawn on the two accounts from July 15, 1992 - July 23, 1992, which resulted in overdrafts totalling $210,301.87 as of February 2, 1994. The checking account statements provided by the Bank show a pattern of deposits and withdrawals on a daily basis for substantially equal amounts and are summarized as follows:

Insurance Account

Date	Deposit Transactions	Checks drawn on the Bank and Paid by the Bank
7/15/92	$33,500(Exhibit("E")-19)	$33,000, Ck.1090(E-53)
7/16/92	28,175 (E-19)	29,500, Ck.1091(E-54)
7/17/92	29,500 (E-20-23)*	29,500, Ck.1093(E-55)
	3,500 (E-20,22)*	
7/20/92	32,000 (E-24,26)*	32,500, CK.1094(E-52)
7/21/92	33,500 (E-27,29)*	
7/22/92	36,500 (E-30,32)*	
7/23/92	35,000 (E-33,35)*	

[3] According to the post-trial memorandum of law submitted on behalf of the Bank, as of February 2, 1994, the total amount due and owing to the Bank was $60,927.12.

Real Estate Account

Date	Deposit Transactions	Checks drawn on the Bank and Paid by the Bank
7/16/92	$29,500 (E-37,39)*	$29,500, Ck.1391(E-36)
7/17/92	32,500 (E-40,42)*	32,000, Ck.1392(E-56)
7/21/92	32,000 (E-43,45)*	32,000, Ck.1395(E-57)
7/22/92	35,000 (E-46,48)*	33,500, Ck.1400(E-58)
7/23/92	33,000 (E-49,51)*	

*Deposits which resulted in Notice of Insufficient Funds received from Savings Bank of Utica ("SBU") (E-21, 25, 28, 31, 34, 38, 41, 44, 47, 50).

On November 3, 1992, the Bank initiated an involuntary Chapter 7 proceeding against the Debtor. An Order for relief was granted by this Court on April 23, 1993. The adversary proceeding herein was commenced by the Bank on or about August 30, 1993. At the trial held on February 2, 1994, the Debtor called no witnesses and declined to provide the Bank with requested books and records. The Debtor also invoked his Fifth Amendment rights against self-incrimination concerning all questions involving alleged insufficient funds and checks drawn on his accounts with the Bank. He indicated to the Court that charges were pending against him in both state and federal courts concerning an alleged check kiting scheme. Accordingly, the Court ruled that it would not compel testimony from the Debtor regarding the identification of Bank's Exhibits 20-35, 38-58 and 61-68, which included deposit slips, returned checks and notices of insufficient funds.

ARGUMENTS

With respect to the two loans made to the Debtor, the

Bank asserts that its claim should be declared nondischargeable pursuant to Code §532(a)(2)(B). As to its claim of $210,301.87 for the overdrafts paid on the Debtor's two checking accounts, the Bank contends that it should also be declared nondischargeable pursuant to any one of three provisions of the Code, namely §523(a)(2)(A), (a)(4) or (a)(6).

In his Answer the Debtor simply denied the allegations made regarding the loans made by the Bank. The Debtor declined to either admit or deny the allegations regarding the check kiting scheme, asserting his Fifth Amendment privilege. The Debtor offered nothing in the way of a defense either in his Answer or at trial, apparently relying on the fact that the Bank has the burden of proving its allegations.

DISCUSSION

The standard of proof to be applied in considering exceptions to discharge is the preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). In order to succeed under Code §523(a)(2)(B), the Bank must establish five elements, namely, (1) that there was a written statement made by the Debtor; (2) that the statement concerned the Debtor's financial condition; (3) that the statement was materially false; (4) that the Bank reasonably relied on the statement; and (5) that the Debtor caused the writing to be made with the intent to deceive the Bank. See In re Boice, 149 B.R. 40, 44-45 (Bankr. S.D.N.Y. 1992).

The Court will first direct its discussion to the Debtor's application for a loan of $30,000 for working capital in the Debtor's business to cover accounts receivable and commissions. See Bank's Exhibit 11. As to the first element that there be a written statement by the Debtor, the Court was presented with several statements signed and submitted by the Debtor for the purpose of obtaining the line of credit. These included a commercial loan application (see Bank's Exhibit 11), the Financial Statement (see Bank's Exhibit 5) and federal tax returns for the years 1988-1990 (see Bank's Exhibits 6-8). Attached to the loan application was a signed list of accounts receivables as of December 1, 1991, in the amount of $98,572.48.

It is sufficient that the Debtor signed the documents to find that they were written by him. Id. at 45. Furthermore, Code §523(a)(2)(B) applies not only to statements labeled as "financial statements" but also to any statements made in written loan applications. In re Lefeve, 131 B.R. 588, 593 (Bankr. S.D.Miss. 1991) (citations omitted). Therefore, both the loan application and the Financial Statement constitute written statements by the Debtor.[4]

With respect to the second element, that the statement concern the Debtor's financial condition, "[a] statement concerning the ownership of assets clearly qualifies as a statement regarding a debtor's financial condition." Boice, supra, 149 B.R. at 46. In

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[4] The tax returns, while signed by the Debtor and furnished in conjunction with the loan application, were not compiled for the specific purpose of obtaining the loan and, accordingly, are not considered by this Court in its discussion of Code §523(a)(2)(B).

this instance, Section 3 of the Financial Statement required that the Debtor list his assets. So too, attached to the loan application was a list of the accounts receivables of Amodio Real Estate and Insurance. Clearly, both of these documents should be considered statements regarding the Debtor's financial condition.

The third factor to be considered is whether either statement was "materially false." "A materially false statement is one that 'paints a substantially untruthful picture of a financial condition by representing information of the type which would normally affect the decision to grant credit." Lefeve, supra, 131 B.R. at 594 (quoting In re Jordan, 927 F.2d 221, 224 (5th Cir. 1991)). There was no evidence that there were any materially false statements made in the loan application itself. There were, however, questions raised concerning the valuation of the Debtor's business as listed in the Financial Statement. The Financial Statement completed by the Debtor shows a value of $600,000 as of November, 1991. As the Debtor declined to provide the Bank with his books and records, it was impossible for the Bank to provide the Court with any information to verify the figure. According to the personal financial statement completed by the Debtor on or about March 15, 1991, and apparently also prepared for Key Bank, the same asset was previously valued at $1,350,000. See Bank's Exhibit 2.[5] It may well have been that the difference actually represented a downward valuation based on the sale of the casualty portion of the Debtor's insurance business approximately ten days

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[5] A second financial statement apparently prepared for Key Bank on June 4, 1992, indicated a value of $1,400,000. See Bank's Exhibit 2A.

before the Financial Statement was signed, but there was no testimony offered to support such an hypothesis. When questioned regarding the discrepancy, the Debtor indicated that he could not account for it. The fact remains that the Debtor, an experienced businessman, failed to apprise the Bank of the recent sale even though he knew that the tax returns provided to the Bank, when combined with the Financial Statement and loan application, were intended to provide an accurate financial picture of the business at the time he was applying for the loan. A misrepresentation concerning the ownership of assets is a material falsity pursuant to Code §523(a)(2)(B). Boice, supra, 149 B.R. at 45. "[T]he concealment of a material fact may be the equivalent of a false representation." Matter of Milbank, 1 B.R. 150, 154 (Bankr. S.D.N.Y. 1979); see also In re Kroh, 87 B.R. 1004, 1008 (Bankr.W.D. Mo. 1988) (Finding of material falsity in a financial statement can be based on omission of information about a debtor's financial condition.). The fact that the information provided may have been technically true does not relieve the Debtor from correcting any statement he may have made that he has reason to believe the Bank will rely on in making its decision. See generally First Nat'l Bank of Elgin v. Nilles, 35 B.R. 409, 411 (N.D.Ill. 1983). In Elgin the debtor submitted an application for a loan in which he indicated that the information being provided was "as of January 5, 1981." The debtor signed the form and presented it to the bank on February 13, 1991, without apprising it of a loan of $25,000 incurred on January 26, 1981. The district court reversed the bankruptcy court's decision, finding that the debtor's concealment

was a material misrepresentation.

A similar conclusion is reached by this Court in respect to the Debtor's application for a $30,000 line of credit. The Debtor had an obligation to provide the Bank with a complete and accurate picture of his financial status, including that of his business.

That the statement constituted a material misrepresentation of the Debtor's financial status does not end the Court's analysis. The fourth element that the Bank must establish is that it reasonably relied on the Financial Statement in making the loan to the Debtor. Reasonable reliance can be shown if the Financial Statement was a contributory cause of the extension of credit. Kroh, supra, 87 B.R. at 1008. Durgee testified that the Bank had obtained two credit reports on the Debtor which were used to check the accuracy of the Financial Statement. See Exhibit 9 and 10. While Durgee could not give a definitive answer one way or the other as to whether he would have approved the loan had he known of the sale of a portion of the Debtor's business, he did testify that in granting the loan he took into account the Debtor's net worth, liquidity, debts and the value of the business. With respect to the latter, he indicated that he had considered the cash flow and profitability of the business in making his determination.

It is the view of the Court that the Bank reasonably relied on the information provided to it, particularly in light of its independent verification of its accuracy using the credit reports. The credit reports, however, would not have alerted to the Bank to the sale of the Debtor's business only ten days before

the Debtor submitted his loan application. The Bank had to rely on the Debtor for that information, and the Debtor failed to provide same.

With respect to the fifth element, "[i]ntent to deceive can be established by the reckless indifference and reckless disregard of the accuracy of the information in the financial statement." Id. (citation omitted). As noted above, the Debtor herein is an experienced businessman. In providing the Bank with the Financial Statement, as well as his tax returns for his business, the Debtor demonstrated a reckless disregard for the accuracy of the financial picture of his business, given that it did not reflect the fact that a portion of the Debtor's business had recently been sold.

The Court concludes that the business loan of $30,000 was obtained as a result of materially false representations, intentionally made by the Debtor in the Financial Statement presented to the Bank and accordingly, the debt is not dischargeable in bankruptcy pursuant to Code §523(a)(2)(B).

Applying a similar analysis to the loan made to the Debtor in March or April, 1992, for $25,000, the Court notes the following: The application was for a commercial loan for the purchase of restaurant equipment. See Bank's Exhibit 12. The loan application was signed by the Debtor without reference to "Amodio Real Estate and Insurance." The tax returns attached to the application are those of "Milt's Classic Sandwiches." The income and expense statement made a part of the application were also for Milt's Classic Sandwiches. Neither the loan application (Bank's

Exhibit 12), commitment letter of March 23, 1992 (Bank's Exhibit 4), nor the promissory note issued on the loan (Bank's Exhibit 70) make any reference to the Debtor's insurance business. Both were signed by the Debtor in his individual capacity. The Bank has presented no evidence that the information in any of these documents, while signed by the Debtor were in any way false. Durgee did testify that it was not necessary to obtain additional credit reports concerning the Debtor since those obtained in conjunction with the previous request for a $30,000 line of credit were less than 90 days old. However, the credit reports are not statements made by the Debtor and are not to be considered by the Court in its analysis pursuant to Code §523(a)(2)(B). Therefore, the Court concludes that the Bank has failed to establish by a preponderance of the evidence that a basis exists pursuant to Code §523(a)(2)(B) which would preclude the Debtor from obtaining a discharge of the debt owed to the Bank for the $25,000 loan.

The Court next examines the transactions labelled by the Bank as a "check kiting scheme."[6] The Bank contends that on the basis of the alleged check kiting scheme, the Debtor should be denied a discharge pursuant to Code §§523(a)(2)(A), (a)(4) or (a)(6). Initially, the Court will examine the facts as they pertain to an analysis under Code §523(a)(2)(A).

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[6] "Check kiting 'occurs when accounts are maintained in different banks and checks are drawn on one account and deposited in the other when neither account has any substantial funds in it to pay the checks drawn on it. Since it takes several days to collect a check, each of the accounts will show substantial credits of uncollected checks, and those credits will continue so long as checks continue to be drawn every day in each bank and deposited in the other bank.'" United States v. Pick, 724 F.2d 297, 298 n.1 (2d Cir. 1983).

Code §523(a)(2)(A) provides that a debt is nondischargeable if incurred as the result of false pretenses, false representations, or actual fraud. The Bank must establish by a preponderance of the evidence that (1) the Debtor made false representations; (2) at the time made, the Debtor knew the representations were false; (3) the representations were made with the intention and purpose of deceiving the Bank; (4) the Bank relied on the representations; and (5) the Bank sustained the alleged injury as a proximate result of the representations made by the Debtor. In re Verdon, 95 B.R. 877, 884 (Bankr. N.D.N.Y. 1989) (citations omitted).

The courts appear split on whether the "mere giving of a check without more proof, is an actionable representation under Code §523(a)(2)(A)." In re Miller, 112 B.R. 937, 940, n.1 (Bankr. N.D.Ind. 1989) (citations omitted). Some courts have held that an issued check carries with it an implied representation by the issuer that there are sufficient funds available to cover it. See id.; In re Newell, 164 B.R. 992, 995 (Bankr. E.D.Mo. 1994); In re Lewsadder, 84 B.R. 711, 714-715 (Bankr. D.Or. 1988)(citing In re Kurdoghlian, 30 B.R. 500, 502 (9th Cir. BAP 1983)); contra In re Mahinske, 155 B.R. 547 (Bankr. N.D.Ala. 1992). In large measure, the split is the result of the courts' application of an analysis made by the Supreme Court. See Williams v. United States, 458 U.S. 279, 102 S.Ct. 3088, 73 L.Ed.2d 767 (1982). In Williams the Supreme Court had focused on an element of a criminal statute requiring that there be a knowingly false statement. Justice

Blackmun, writing for the majority[7] and relying on the definition found in the Uniform Commercial Code ("UCC"), concluded that "a check is not a factual assertion at all, and therefore cannot be characterized as 'true' or 'false'." Id. at 284, 102 S.Ct. at 3091. Justice Blackmun acknowledged that there were other plausible interpretations of what a check represents. Id. at 290, 102 S.Ct. at 3095. However, the court elected to narrowly interpret the statute "consistent with our usual approach to the construction of criminal statutes." Id., 102 C.Ct. at 3094. The statute under consideration in Williams (18 U.S.C. §1104) made no reference to fraudulent intent, and the court was reluctant to impose criminal liability simply on the writing of a check, knowingly supported by insufficient funds, and depositing it in a federally insured bank. Justice White, in his dissent, indicated that the fact that the UCC defines a check in a particular manner does not mean that a check cannot carry with it other representations. Id. at 291, 102 S.Ct. at 3095. As Justice White noted, "It defies common sense and everyday practice to maintain, as the majority does, that a check carries with it no representation as to the drawer's account balance." Id. In the matter herein, the Court is not concerned with criminal liability. The focus of the Court's analysis, for purposes of dischargeability of the debt, is simply on whether there was a false representation made by the Debtor. This Court concurs with those courts which have held that for purposes of Code §523(a)(2)(A), the issuance of

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[7] Justices White, Brennan, Marshall and Chief Justice Burger dissented.

a check constitutes an implied representation that there are funds available in the account. The mere issuance of a check against an account with insufficient funds to cover the check, standing alone, does not provide a basis for holding the resultant debt nondischargeable. See In re Fitzgerald, 109 B.R. 893, 901 (Bankr. N.D.Id. 1989); Newell, supra, 164 B.R. at 995. However, circumstances surrounding the transaction(s) may support a finding that the debt is nondischargeable should they establish that the representations were fraudulent. See generally id.

In Newell the debtor had issued a check on December 11, 1991, in the amount of $6,000 while the account on which the check was drawn had a balance of approximately $1,727.14. The debtor then proceeded to write checks against the account with the plaintiff's bank totalling approximately $9,600.00, and dated December 11, 1991 and December 12, 1991. On December 12, 1991, she then made a deposit of $9,200 into her account with the plaintiff's bank using a check which was drawn on an account with a balance of $5,052.62. The court in Newell concluded that "[t]he proximity in time of these two deposits, in the circumstances that have been presented here, compels the conclusion that the debtor falsely represented that she possessed sufficient funds to cover the checks." Newell, supra, 164 B.R. at 996.

This Court, in reviewing the evidence herein, reaches a similar conclusion. According to the testimony and the evidence presented by the Bank in the form of checking account statements (see Bank's Exhibit 19 and 36), deposit slips (see Bank's Exhibits 20, 24, 27, 30, 33, 37, 40, 43, 46 and 49), checks written on the

Debtor's accounts with SBU (see Bank's Exhibits 22, 23, 26, 29, 32, 35, 39, 42, 45, 48 and 51) and notices of insufficient funds (see Bank's Exhibits 21, 25, 28, 31, 34, 38, 41, 44, 47, 50) for the period from July 15, 1992 - July 23, 1992, it is clear to this Court that the Debtor falsely represented to the Bank that there were available funds to support each of the checks deposited in the two accounts with the Bank when, in fact, that was not the case.

As to the second element that the Debtor knew that the representations were false, the Debtor is an experienced businessman. He presented no evidence to the effect that his records or accounts were in any sort of disarray and that he was unaware of the lack of funds. The very nature of the transactions whereby monies were deposited and then withdrawn within the period of one week between SBU and the Bank supports the Bank's position that the Debtor knew that the funds were not available to cover the checks he wrote and deposited in his accounts with the Bank from July 15, 1992 - July 23, 1992.

The third element requires proof that the representations were made with the intent to deceive the creditor. As this Court noted in In re Bossard, 74 B.R. 730, 737 (Bankr. N.D.N.Y. 1987),

> Direct proof of fraudulent intent is rarely available. Therefore, intent to deceive may be inferred when the totality of the circumstances presents a picture of deceptive conduct by the debtor, which indicates that he did intend to deceive and cheat the lender. The representation coupled with his conduct is sufficient to permit the court to infer requisite intent. (quoting In re Schlickman, 6 B.R. 281, 282 (Bankr. D.Mass. 1980).

A court is also able to draw an adverse inference from a debtor's refusal in a civil matter to "testify in response to probative

evidence against it." Federal Sav. & Loan Ins. Corp. v. Sutherlin, 109 B.R. 700, 706 (E.D.La. 1989) (citation omitted); see also In re Horridge, 127 B.R. 798, 799 (S.D.Tex. 1991). In the matter before this Court, the Debtor refused to provide books or records or to testify concerning the alleged check kiting scheme, choosing to invoke his Fifth Amendment privilege. Given the number of deposits and withdrawals within a short period of a week and the fact that there were insufficient funds to support the transfers, combined with the Debtor's refusal to provide any evidence whatsoever in defense of his actions, the Court concludes that the Debtor possessed the intent to deceive.

The fourth element requires that the Court examine whether the Bank relied on the representations made by the Debtor. A review of the customer statement for the Insurance Account shows a pattern of daily deposits and withdrawals in varying amounts in May and June of 1992. See Bank's Exhibit 19. This pattern of activity continued until Monday, July 20, 1992, when a check that had been deposited and credited to the Insurance Account was returned for insufficient funds by SBU. A similar pattern of activity was documented in the customer statement for the Real Estate Account. See Bank's Exhibit 36. During the period from July 15, 1992 - July 23, 1992, the Bank continued to honor the checks written by the Debtor. Upon receipt of the notices of insufficient funds, Durgee testified that he had been notified of the activity in both accounts. Durgee also testified that on or about Friday, July 24, 1992, he spoke with the Debtor and was given assurances that the overdrafts at that time totalling approximately

$80,000 would be resolved by Monday, July 27, 1992. The Court concludes that the Bank relied on the deposits made into the Debtor's accounts, as well as the Debtor's assurances, in electing to pay checks written against the accounts upon their presentment.

As to the fifth element requiring that the Bank demonstrate that it sustained injury as a result of the representations made by the Debtor, the Bank presented evidence that in reliance on the deposits to the Debtor's accounts, it permitted the Debtor to withdraw funds from both the Real Estate Account and the Insurance Account totalling $210,301.87. See Bank's Exhibits 52-58.

The Bank has met its burden by a preponderance of the evidence as to all five elements required to support a cause of action based on Code §523(a)(2)(A). Accordingly, the Court concludes that the debt arising from overdrafts totalling $210,301.87 in both the Real Estate Account and the Insurance Account of the Debtor is nondischargeable. Therefore, it is unnecessary for the Court to address the Bank's arguments made pursuant to Code §§523(a)(4) and (a)(6).

For the foregoing reasons, it is

ORDERED that the relief sought in the Bank's complaint with respect to a determination of nondischargeability, pursuant to Code §523(a)(2)(B), of the debt owing on the loan of $30,000 made to the Debtor for working capital for Amodio Real Estate and Insurance is granted; it is further

ORDERED that the relief sought in the Bank's complaint with respect to a determination of nondischargeability, pursuant to

Code §523(a)(2)(B), of the debt owing on the second loan of $25,000 to be used by the Debtor's son to purchase restaurant equipment is denied; and it is further

ORDERED that the relief sought in the Bank's complaint with respect to a determination of nondischargeability, pursuant to Code §523(a)(2)(A), of the debt owing as a result of overdrafts on the Real Estate Account and the Insurance Account in the amount of $210,301.87 is granted.

Dated at Utica, New York

this   day of   1994

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge