

This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.

Dated: June 25, 2024



Guy R. Humphrey
Guy R. Humphrey
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

<i>In re:</i>	:	
ERIC L. MILLER,	:	Case No. 22-30047
	:	Chapter 13
<i>Debtor.</i>	:	Judge Humphrey
<hr/>		
Matthew Lucas,	:	
	:	
Plaintiff,	:	Adv. No. 22-3009
	:	
v.	:	
	:	
Eric L. Miller,	:	
	:	
Defendant.	:	

DECISION (1) DENYING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT AND (2) GRANTING DEFENDANT DEBTOR’S AMENDED MOTION FOR SUMMARY JUDGMENT (DOCS. 28 & 49)

I. Introduction

This decision concerns cross motions for summary judgment filed by Plaintiff Matthew Lucas and Defendant Debtor Eric L. Miller on whether an unliquidated contribution claim owed by Defendant Debtor is non-dischargeable under 11 U.S.C. § 523(a)(2)(A). Specifically, the issue before the court is whether the signature of Defendant Debtor to a settlement agreement

constitutes a sufficient representation upon which Plaintiff could justifiably rely. Upon review of the evidence presented through the summary judgment filings, and for the reasons set forth below, the court finds that the debt owed by Defendant Debtor is not excepted from discharge under 11 U.S.C. § 523(a)(2)(A) as a matter of law. Accordingly, summary judgment is granted to Defendant Debtor and denied to Plaintiff.

II. Jurisdiction

This court has jurisdiction pursuant to 28 U.S.C. § 1334(b) and the Standing Order of Reference (Amended General Order No. 05-02) of the District Court for the Southern District of Ohio in accordance with 28 U.S.C. § 157(a). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B), and this court has constitutional authority to enter a final judgment. *Stern v. Marshall*, 564 U.S. 462, 499 (2011).

III. Summary Judgment Standard

A court “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a) (made applicable in this adversary proceeding by Federal Rule of Bankruptcy Procedure 7056). “A ‘genuine’ dispute exists only where ‘evidence is such that a reasonable [finder of fact] could return a [judgment] for the nonmoving party.’” *Papa v. Bolera (In re Bolera)*, 564 B.R. 569, 577 (Bankr. S.D. Ohio 2016) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Gallagher v. C.H. Robinson Worldwide, Inc.*, 567 F.3d 263, 270 (6th Cir. 2009)). A fact is material if it might affect the outcome of the suit under substantive law. *Niecko v. Emro Mktg. Co.*, 973 F.2d 1296, 1304 (6th Cir. 1992) (citing *Anderson*, 477 U.S. at 248).

“To prevail, the moving party, if bearing the burden of persuasion at trial, must establish all elements of its claim.” *Bolera*, 564 B.R. at 577 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986)). “[T]he nonmoving party must come forward with ‘specific facts showing that there

is a genuine issue for trial.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted). When reviewing a motion for summary judgment, a court views all evidence and draws all inferences in the light most favorable to the nonmoving party. *Id.*

IV. Factual and Procedural Background

The alleged debt arises from the settlement of a cognovit judgment against Plaintiff Matthew Lucas (“Lucas”) and Defendant Debtor Eric Miller (“Miller”). In 2002, Lucas and Miller entered into business together to sell scooters and electric bikes, forming Collegiate E-Bike, Inc. (“Collegiate”). Doc. 25-1, *Transcript of Matthew Lucas Deposition* (“Lucas Dep.”) 7:22-7:25, 10:2-10:6; Doc. 28 at 13-15, *Affidavit of Matthew Lucas* (“Lucas Aff.”) ¶ 4. Collegiate concluded its operations in 2007 or 2008. Lucas Dep. 10:2-10:6. Around the same time, Lucas also owned a business known as Innovative Designs, Inc. (“Innovative”).¹ Lucas Aff. ¶ 4. Innovative specialized in promotional products and corporate gifts. Lucas Dep. 20:4-20:6.

Collegiate struggled from its inception, with attempts at rapid expansion to blame. *Id.* at 10:17-10:22. Collegiate operated at a loss from about 2002 to 2004. *Id.* at 11:11-11:14. However, in 2005 or 2006, Collegiate d/b/a Across the Field shifted its focus and opened a brick-and-mortar store near the Ohio State University campus in Columbus, Ohio. *Id.* at 11:15-12:3. In addition to continuing to sell bikes, Across the Field sold Ohio State University merchandise. *Id.* at 12:3-12:9. Although Across the Field generated some success, the operations were only marginally profitable. *Id.* at 12:10-12:24. A second storefront located in the Easton Mall in

¹ In his motion for summary judgment (Doc. 28), Lucas claims that both he and Miller founded Innovative together; however, the evidence presented through Lucas’ affidavit (Lucas Aff. ¶ 4) and deposition testimony (Lucas Dep. 18:21-18:25) provides that Lucas was the sole owner of Innovative and that Miller was not involved with Innovative.

Columbus, Ohio contributed to the economic troubles, due to that store's increased and fluctuating rental obligations. *Id.* at 15:1-15:10.

Initially, Collegiate purchased scooters from Indiana. *Id.* at 14:18-14:21. However, eventually, Collegiate decided to purchase wholesale and import scooters from China in order to increase its profit margin. *Id.* at 13:7-13:19, 14:18-14:21. Due to the lack of profits, the decision to purchase wholesale required Collegiate to obtain a loan. *Id.* at 14:8-14:14. On February 28, 2007, Innovative and Collegiate executed and delivered to Fifth Third Bank a promissory note (the "Note") in the amount of \$99,525.57. Lucas Aff. ¶ 5 and Ex. A. Both Lucas and Miller guaranteed payment on the Note. Lucas Aff. ¶¶ 6-7 and Exs. B-C. Collegiate used the proceeds from the Note to purchase product; however, overstaffing and the additional expenses from the Easton Mall storefront continued to impede profitability. Lucas Dep. 18:8-18:20. As a result, Lucas and Miller decided to sell Collegiate in 2007 at a loss. *Id.* at 20:24-21:12. While Lucas and Miller were able to recoup the cost of the inventory, the Note remained unpaid. *Id.* at 21:7-21:12. Lucas, Miller, Innovative, and Collegiate defaulted on the Note. Lucas Aff. ¶ 9. At that time, Lucas and Miller did not discuss the repayment of the Note. Lucas Dep. 21:13-21:17.

Once collection attempts on the Note began, Lucas and Miller discussed the statute of limitations for actions related to the default of the Note. *Id.* at 22:2-22:13. Eventually, the Note was sold to TBF Financial, LLC ("TBF") on October 29, 2015. *Id.* at 23:19-23:22; Lucas Aff. ¶ 8 and Ex. D. On September 20, 2016, TBF sued Lucas and Miller for collection of the Note in Franklin County, Ohio Court of Common Pleas, Case No. 16CV008996. Lucas Aff. ¶ 10 and Ex. E. Upon confession of judgment on the cognovit note, TBF recorded its judgment against Lucas and Miller. Doc. 26-1, *Transcript of Jeremiah Heck Deposition* ("Heck Dep.") 5:6-5:12.

Lucas and Miller jointly retained attorney Jeremiah Heck (“Heck”) as counsel. Lucas Dep. 23:22-23:23, 24:7-24:11. Upon retention, Lucas and Miller waived any conflict of interest arising from Heck’s joint representation of the parties. Heck Dep. 5:6:6-6:14. As counsel for Lucas and Miller, Heck attempted to vacate the judgment obtained by TBF. *Id.* at 5:13-5:15. Heck further advised Lucas and Miller that “they were both jointly and severally liable, meaning that they were both liable for potentially 100 percent of the debt.” *Id.* at 6:20-6:23.

Ultimately, Lucas and Miller opted to settle the outstanding debt. In order to resolve the pending litigation, Lucas and Miller agreed to pay TBF \$80,000 (the “Settlement”). Lucas Aff. Ex. F. Both Lucas and Miller signed the Settlement Agreement and Release in April, 2021 (the “Settlement Agreement” or “Settlement”). *Id.* Pursuant to the Settlement Agreement, an initial payment of \$35,000 was due to TBF on or before April 15, 2021. *Id.* Thereafter, Lucas and Miller were to make 22 monthly payments in the amount of \$2,000, followed by one final payment in the amount of \$1,000. *Id.* Lucas and Miller had minimal contact following the Settlement. Lucas Dep. at 30:1-30:3. While Lucas paid TBF pursuant to the terms of the Settlement, Miller did not. Lucas Aff. ¶¶ 15, 16.

Lucas argues that Miller never suggested to Lucas that he would not contribute towards the Settlement. Lucas Dep. 34:21-34:22, 36:9-36:10, 37:11-37:17. However, Miller claims that he informed Heck of his inability to pay. Doc. 30, *Transcript of Meeting of Creditor* (“341 Tr.”) 17:18-17:21 (“I was very clear when I spoke to all the lawyers about this that I do not have the money or means to be able to pay that.”). Miller also suggests that he informed Lucas of his inability to pay. *Id.* at 18:7-18:9 (“I made everyone well aware of there’s no way in the world I can pay that back.”). Heck testified that, “everybody knew that Eric [Miller] was not going to be able to contribute to the settlement at the time.” Heck Dep. 9:1-9:3. According to Heck, Miller

“was fairly steadfast in that he would do everything he could to help other than financially contribute because he didn’t have the funds to do so.” *Id.* at 11:3-11:6. Miller never made any representations to Heck that he would be contributing to the Settlement. *Id.* at 12:15-12:16. Instead, Miller informed Heck that he could not contribute to the Settlement at that time. *Id.* at 12:16-12:18.

Before Lucas signed the Settlement Agreement, Heck emailed him to inform him that Miller had provided authority to settle the dispute on March 1, 2021. Lucas Dep. 34:4-34:16; Heck Dep. Ex. A. In that same email, Heck cautioned Lucas that “[t]his doesn’t mean [Miller] is pitching in on the settlement and that’s something you’ll have to deal with later, but he did agree to give [Lucas] authority.” Heck Dep. Ex. A. Based on his conversations with Miller, Heck understood that Miller did not have the funds to contribute to the Settlement and, through his email to Lucas, relayed Miller’s inability to pay. Heck Dep. 9:25-10:5. Heck also explained that Lucas approached him on multiple occasions to discuss options in which Lucas could recover against Miller. *Id.* at 10:6-10:9, 10:23 and Ex. B. Heck declined to engage in such discussions due to the potential conflict of interest between his clients. *Id.* at 10:9-10:12 and Ex. B.

Lucas, on the other hand, contends that he did not interpret Heck’s email to suggest that Miller had an inability to pay or contribute to the Settlement. Lucas Dep. 34:19-34:23 (“Eric [Miller] never mentioned that he was not going to pay.”). According to Lucas, he and Miller engaged in approximately 20 to 25 discussions related to settlement negotiations in the year preceding Heck’s email to Lucas. *Id.* at 40:4. However, at no point did Lucas and Miller discuss how Miller would be contributing. *Id.* at 40:15-40:19. Likewise, Heck never informed Lucas that Miller would be contributing to the Settlement. *Id.* at 42:15-42:17. Lucas admits that Miller never promised that he would pay towards the Settlement. *Id.* at 60:9-90:10. Though Lucas

claims that neither Miller nor Heck informed him that Miller intended to file for bankruptcy, Lucas admits that Miller repeatedly suggested filing bankruptcy as a means to address the Note.² *Id.* at 42:15-42:20, 44:8-44:13. Lucas also testified that Miller suggested filing for bankruptcy approximately two or three times in the year preceding the Settlement. *Id.* at 50:9-50:11, 58:12-58:13. Miller confirmed that while he specifically mentioned filing bankruptcy to Heck, he did not have any discussions with Lucas in which he would have indicated his intent to file bankruptcy in the future. 341 Tr. 19:20-20:2.

Lucas acknowledges that he and Miller were jointly liable on the Settlement. Lucas Dep. 51:19-51:22. Lucas believed that both he and Miller were responsible for making payments toward the Settlement. *Id.* at 52:5-52:7 (“[B]oth of us should have paid half of it.”). Although Miller made no oral representation to Lucas, Lucas assumed that Miller would contribute towards repaying the Settlement. *Id.* at 55:12-55:13. Despite having no guarantee that Miller would contribute towards the Settlement, Lucas entered into the Settlement in order to avoid increased costs. *Id.* at 63:5-63:21 (“We were forced to settle.”). Specifically, signing the Settlement was to the financial advantage of both Lucas and Miller. *Id.* at 42:7-42:14. Because of the joint nature of Heck’s representation, Lucas would have needed Miller’s authority to enter into the Settlement. Heck Dep. 11:11-11:13; Lucas Dep. 31:9-31:12.

On October 22, 2021, Lucas commenced a civil action for contribution against Miller in the Preble County, Ohio, Court of Common Pleas, Case No. 21CV032348. Doc. 28, Ex. G. On January 17, 2022, Miller filed his voluntary Chapter 13 petition. Estate Doc. 1. In the schedules attached to his petition, Miller lists a debt in the amount of \$90,000 owed to Lucas and refers to a

² During his deposition, Lucas initially testified that Miller would frequently suggest filing bankruptcy as early as 2005. Lucas Dep. 43:2-43:4. According to Lucas, Miller would “always” suggest that he and Lucas file bankruptcy in 2016. *Id.* at 44:2-44:8. Later, however, Lucas testified that Miller only suggested filing bankruptcy “several” times following 2016. *Id.* at 44:12-44:25.

“Judgment / 21CV032348.” *Id.* at 27. Although Lucas testified to having obtained a judgment against Miller in the state court proceeding (Lucas Dep. 66:25-67:8), the court takes judicial notice that the proceeding was stayed prior to the entry of a judgment as a result of Miller’s bankruptcy filing. *Lucas v. Miller*, Preble C.P. 21CV032348, Entry, Mar. 11, 2022. However, the parties have since stipulated that if Miller is liable for contribution, the appropriate amount of contribution would be \$40,000. Doc. 53.

Lucas commenced this adversary proceeding with a complaint to determine the dischargeability of the debt pursuant to 11 U.S.C. § 523(a)(2). Doc. 1. Miller filed an answer to the complaint, both denying the allegations and asserting several affirmative defenses. Doc. 3. On October 26, 2023, Lucas filed a motion for leave to amend his complaint (Doc. 23) and a proposed amended complaint (Doc. 24). Lucas sought to amend his complaint to narrow the determination of nondischargeability under § 523(a)(2)(A) and to include an additional and related state law claim for promissory fraud.³

On October 27, 2023, Miller and Lucas filed cross motions for summary judgment (Docs. 27, 28) on Lucas’ initial complaint. Both parties filed timely responses in opposition. Docs. 36, 37. The court subsequently granted Lucas’ request for leave to amend his complaint on November 29, 2023. Doc. 38. Shortly thereafter, Miller filed an answer to the amended complaint, maintaining his denial of its allegations. Doc. 40.

The court permitted the parties to either amend their dispositive motions or advise the court of their intent to proceed on their original motions. Doc. 45. Miller filed an amended motion for summary judgment on April 9, 2024 (Doc. 49), to which Lucas replied on April 10, 2024 (Doc. 50). Lucas declined to file an amended motion, proceeding instead on his original

³ Lucas filed his initial complaint (Doc. 1) under the broad umbrella of § 523(a)(2), without specifying the subsection. Through his motion to amend (Doc. 23) and the amended complaint (Doc. 24), Lucas narrows his request to determine the debt as nondischargeable pursuant to § 523(a)(2)(A).

motion. Upon request by Miller (Doc. 31) and pursuant to a prior court order (Docs. 32, 45), the parties presented oral arguments at a hearing conducted on May 15, 2024. Following the hearing, the court permitted the parties to file supplemental briefs upon the agreement of counsel. Doc. 52. Supplemental filings (Docs. 53, 54) were made on June 3, 2024. The matter is now ripe for determination.

V. Positions of the Parties

Lucas seeks a determination that he is owed a debt by Miller and that it is nondischargeable under § 523(a)(2)(A) because the debt was incurred as a result of Miller's fraudulent misrepresentations. Essentially, Lucas claims that the Settlement was an "extension, renewal, or refinancing of credit" pursuant to § 523(a)(2) and that Miller fraudulently misrepresented his intent to contribute or pay any portion of the Settlement by virtue of his signature on the Settlement Agreement. Lucas argues that Miller intended to file bankruptcy before entering into the Settlement, and that Lucas justifiably relied, to his detriment, upon Miller's signature on the Settlement Agreement.

In support of his argument, Lucas relies on various state law claims of fraud, including fraudulent inducement and promissory fraud, suggesting that the court can declare the debt nondischargeable under § 523(a)(2)(A) based on Miller's liability under a state law claim for fraud. Although Lucas asserts various other state law claims, Lucas directs the court's attention to his state law claim for contribution. Doc. 53. However, Lucas specifically argues that the alleged fraud committed by Miller extends only to the Settlement. *Id.*

Conversely, Miller asks this court to find the debt owed to Lucas dischargeable as a matter of law. Miller asserts that he is entitled to judgment in his favor as the record lacks any evidence that Miller made any representation to Lucas and, therefore, Lucas could not have justifiably relied on any such representation. Instead, Miller argues that Lucas was aware of

Miller's inability to financially contribute to the Settlement and willingly entered into the Settlement, as doing so was in Lucas' best interest.

VI. Legal Analysis

A. Entitlement to a Judgment

Ordinarily, a debtor is discharged from a debt, even those debts which may be nondischargeable under § 523(a)(2)(A), “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” 11 U.S.C. § 523(c). Section 523(a) of the Bankruptcy Code provides for several exceptions to discharge, including any debt obtained by false pretenses, a false representation, or actual fraud. See 11 U.S.C. § 523(a)(2)(A). “To succeed on a claim made under a subsection of § 523(a), a plaintiff must prove by a preponderance of the evidence each requisite element to support the determination that a specific debt is non-dischargeable under those subsections.” *Feldman v. Pearl (In re Pearl)*, 577 B.R. 513, 523 (Bankr. E.D. Ky. 2017) (citing *Merritt v. Layne (In re Layne)*, 517 B.R. 778, 781 (Bankr. E.D. Ky. 2014)). See also *Grogan v. Garner*, 498 U.S. 279, 291 (1991) (determining preponderance of the evidence as the appropriate burden of proof standard for the dischargeability exceptions of § 523(a)).

As an initial matter, the court must determine the existence of a debt before a creditor can show that a debt is nondischargeable under one of the § 523(a) exceptions. *Conley v. Conley (In re Conley)*, 482 B.R. 191, 207 (Bankr. S.D. Ohio 2012) (citing *Steed v. Shapiro (In re Shapiro)*, 180 B.R. 37, 38 (Bankr. E.D.N.Y. 1995)). “Whether a debt is nondischargeable under 11 U.S.C. § 523(a) is a matter separate from the merits of the debt itself.” *Long v. Piercy (In re Piercy)*, 21 F.4th 909, 918 (6th Cir. 2021) (citing *Sill v. Sweeney (In re Sweeney)*, 276 B.R. 186, 195-96 (B.A.P. 6th Cir. 2002)). “A ‘debt’ is defined in the Code as ‘liability on a claim,’ a ‘claim’ is defined in turn as a ‘right to payment,’ and a ‘right to payment,’ we have said, ‘is nothing more

nor less than an enforceable obligation.” *Pearl*, 577 B.R. at 523 (quoting *Cohen v. de la Cruz*, 523 U.S. 213, 218 (1998)). A “claim” may exist whether such right is “reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured[.]” See 11 U.S.C. § 101(5)(A), (B). “There must be a prepetition debt owed by a debtor because the exceptions to discharge do not provide a creditor with a cause of action that simultaneously creates a debt and renders it nondischargeable.” *Rable v. Childers (In re Childers)*, 651 B.R. 699, 715 (Bankr. N.D. Ohio 2023) (citing *Kyle-Wolf v. McClure (In re McClure)*, 625 B.R. 733, 738 (Bankr. C.D. Ill. 2021)).

Section 523(a)(2)(A) does not define the scope of a debtor’s liability for fraud. *Bartenwerfer v. Buckley*, 598 U.S. 69, 81-82 (2023). Instead, “[t]he validity of a creditor’s claim is determined by rules of state law.” *Grogan*, 498 U.S. at 283. Generally, a creditor may establish the existence of a prepetition debt through evidence of a prepetition judgment. *McClure*, 625 B.R. at 738. Absent a prepetition judgment evidencing the debt, the bankruptcy court will normally determine the existence of and liquidate any such debt under the applicable state law. *Conley*, 482 B.R. at 207; see also *Hart v. S. Heritage Bank (In re Hart)*, 564 F. App’x. 773, 776 (6th. Cir. 2014) (Bankruptcy Court has statutory and constitutional authority to liquidate debts based upon state law in determining the dischargeability of a debt.).⁴ “If the plaintiff fails to establish the existence of a valid debt under non-bankruptcy law, the analysis ends without consideration of § 523(a) and the defendant is entitled to judgment.” *McClure*, 625 B.R. at 738.

Here, Lucas does not hold a prepetition judgment against Miller. Although Lucas has filed suit against Miller in state court for contribution, the litigation was stayed due to Miller’s

⁴ There can be instances in which the total debt, whatever amount it may be, is determined to be nondischargeable and the bankruptcy court leaves the amount to be determined by another court, such as a domestic relations court which may be the more appropriate forum in which to liquidate the debt. See *Cowan v. Ladosenky (In re Ladosenky)*, 617 B.R. 275, 278 (Bankr. E.D. Mich. 2020).

bankruptcy case filing. As a result, any alleged debt has not been liquidated, and the court must first determine whether Miller owes a debt to Lucas.

In his amended complaint, Lucas alleges several causes of action against Miller as the basis of his debt, including state law claims for fraudulent inducement, promissory fraud, contribution, unjust enrichment, breach of contract, and breach of duty of good faith and fair dealing in contract. The *McClure* court provides guidance when a creditor brings a claim under § 523(a)(2)(A) alleging a cause of action under state law:

As pointed out by the Supreme Court in *Grogan v. Garner*, where a creditor brings a complaint under § 523(a)(2)(A) alleging a cause of action for fraud under state law, it should be considered whether the debtor is liable to the creditor on other grounds, apart from the fraud claim. Section 523(a)(2)(A) applies not only to a state law fraud claim but may also apply to a contract or other transactional liability, as long as it is a debt “for money, property, services, ... to the extent obtained by false pretenses, a false representation or actual fraud.” The distinction between claims is especially important where the fraud cause of action under state law imposes upon the creditor a “clear and convincing” burden of proof. Even if such a creditor is unable to establish a debt for fraud under state law, she may yet hold a claim for a separate debt, provable by a preponderance of the evidence and arising out of the same transaction, that is itself actionable under §523(a)(2)(A).

McClure, 625 B.R. at 738-39 (citing *Grogan*, 498 U.S. at 284-85 and n.12). This court now applies the controlling state law to determine the existence of a debt.

Based upon the representations of counsel at the hearing and the parties’ joint stipulation (Doc. 53), the court begins its discussion of the existence of a debt with Lucas’ claim for contribution under § 2307.25 of the Ohio Revised Code. Section 2307.25(A) provides, in part:

[I]f one or more persons are jointly and severally liable in tort for the same injury or loss to person or property or for the same wrongful death, there may be a right of contribution even though judgment has not been recovered against all or any of them. The right of contribution exists only in favor of a tortfeasor who has paid more than that tortfeasor’s proportionate share of the common liability, and that tortfeasor’s total recovery is limited to the amount paid by that tortfeasor in excess of that tortfeasor’s proportionate share. No tortfeasor may be compelled to

make contribution beyond that tortfeasor's own proportionate share of the common liability.

Ohio Rev. Code § 2307.25(A).

Before the court can determine what, if any, right to contribution exists, the court must first determine whether Lucas and Miller are jointly and severally liable under the terms of the Settlement. In Ohio, “joint and several liability generally attaches when multiple parties default on their collective promise to pay a single sum of money, unless the contract sets forth their individual obligations.” *In re All Kelley & Ferraro Asbestos Cases*, 821 N.E.2d 159, 165 (Ohio 2004) (citing *Stage v. Olds*, 12 Ohio 158, 167 (1843); *Wallace v. Jewell*, 21 Ohio St. 163, 171-172 (1871)). Lucas argues that the Settlement imposed joint and several liability on Lucas and Miller. Miller does not contest the joint and several nature of the Settlement. In fact, Miller concedes that the underlying debt owed to TBF was joint and several. Doc. 49.

The Supreme Court of Ohio has held that “[c]ontribution, when it exists, is the right of a person who has been compelled to pay what another should have paid in part to require partial (usually proportionate) reimbursement and arises from principles of equity and natural justice.” *Travelers Indemn. Co. v. Trowbridge*, 321 N.E.2d 787, 789 (Ohio 1975), paragraph two of the syllabus, *overruled on other grounds*, in *Motorists Mut. Ins. Co. v. Huron Rd. Hosp.*, 653 N.E.2d 235 (Ohio 1995). As an equitable remedy, contribution is not based in contract, nor does it require a written agreement. *Schwetschenau v. Whitfield*, 894 N.E.2d 96, 99 (Ohio Ct. App. 2008) (citation omitted). “Instead, the obligation to contribute arises from the nature of the relationship between the parties.” *Id.* (citation omitted).

“[A] contribution action concerns the obligation to pay a proportionate share of a joint obligation owed to an injured party.” *Ohio Cas. Ins. Co. v. Allied Technical Servs.*, No. 13CA010376, 2014 WL 840023, at *3, 2014 Ohio App. LEXIS 731, at *6 (Ohio Ct. App. Mar.

3, 2014) (citing *Natl. Mut. Ins. Co v. Whitmer*, 435 N.E.2d 1121, 1123 (Ohio 1982)). In *Whitmer*, the Supreme Court of Ohio held:

[T]he right to contribution is inchoate from the time of the creation of the relationship giving rise to the common burden until the payment by a co-obligor of more than his proportional share, and that the right becomes complete and enforceable only upon a payment by the claimant extinguishing the whole of the common obligation. That is, even though the equity for contribution arises at the time of the creation of the relationship between the parties, the right to sue thereon accrues when a party has paid more than his share of the joint obligation.

435 N.E.2d at 1123.

Although the record is not clear as to when Lucas' contribution claim accrued, the potential right of contribution arose at the time of the Settlement. The Settlement Agreement was signed by both Lucas and Miller. Lucas Aff. Ex. F. Therefore, Lucas and Miller were jointly and severally liable on the amount owed to TBF in the Settlement. The undisputed evidence in the record provides that Lucas made payments to TBF pursuant to the terms of the Settlement, whereas Miller did not. Lucas Aff. ¶¶ 15, 16. In other words, Lucas held a valid, yet unliquidated, prepetition claim for contribution against Miller. Furthermore, Miller does not dispute the existence of a debt owed to Lucas, as evidenced by the schedules attached to his petition in which he lists a \$90,000 debt owed to Lucas and refers to Lucas' claim for contribution in the stayed state court litigation. Estate Doc. 1, 27. The parties have since stipulated that the appropriate amount of Lucas' claim is \$40,000. Doc. 53. Under these circumstances, the court finds the existence of a debt actionable under § 523(a)(2)(A). As such, the court need not consider the other state law claims alleged within Lucas' complaint relating to the issue of whether a debt exists for purposes of § 523(a)(2)(A), and the court proceeds directly to its analysis of dischargeability under that section. See *McClure*, 625 B.R. at 740.

B. Nondischargeability Under § 523(a)(2)(A)

Under § 1328 of the Code, a Chapter 13 debtor can obtain a court order discharging a debt upon the completion of all payments in a confirmed plan. 11 U.S.C. § 1328(a). Alternatively, the court may grant a discharge to a Chapter 13 debtor, even if the debtor has failed to complete the plan payments, if the debtor meets the hardship discharge standard. 11 U.S.C. § 1328(b). However, § 523(a)(2)(A), through § 1328(a)(2), precludes a debtor from receiving a discharge for 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[.]” 11 U.S.C. § 523(a)(2)(A). Discharge exceptions under § 523(a)(2)(A) are narrowly construed in favor of the debtor. *Sanderson Farms, Inc. v. Gasbarro*, 299 F. App’x 499, 504 (6th Cir. 2008) (citing *Meyers v. I.R.S. (In re Meyers)*, 196 F.3d 622, 624 (6th Cir. 1999)). Lucas does not allege that Miller engaged in actual fraud. See *Husky Int’l Elecs., Inc. v. Ritz*, 578 U.S. 355, 366 (2016) (holding that actual fraud under § 523(a)(2)(A) does not require a false misrepresentation). Instead, Lucas’ argument rests on two alleged misrepresentations or fraudulent omissions arising out of Miller’s signature to the Settlement Agreement: (1) that Miller never informed Lucas that he would not repay his share of the Settlement; and (2) that at the time he signed the Settlement Agreement, he intended to file bankruptcy. Therefore, the court will focus its discussion on the elements of false representations and false pretenses below.

1. False Representation

To successfully establish an exception to discharge under § 523(a)(2)(A) based on false representation or false pretenses, the creditor must prove by a preponderance of the evidence that:

(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.

Rembert v. AT&T Universal Card Servs., Inc. (In re Rembert), 141 F.3d 277, 280-81 (6th Cir. 1998) (citing *Longo v. McLaren (In re McLaren)*, 3 F.3d 958, 961 (6th Cir. 1993)).

A false representation is “an expressed misrepresentation.” *Fuller v. Givens (In re Givens)*, 634 B.R. 755, 762 (Bankr. E.D. Tenn. 2021) (citing *Jennings v. Bodrick (In re Bodrick)*, 509 B.R. 843, 855 (Bankr. S.D. Ohio 2014)). “[A] representation must be one of existing fact and not merely an expression of opinion, expectation, or declaration of intention.” *Conley*, 482 B.R. at 209 (citations omitted). “A court can find a false representation if the plaintiff presents proof that the defendant (1) made a false or misleading statement; (2) with the intent to deceive; and (3) in order for the plaintiff to turn over money or property to the defendant.” *Givens*, 634 B.R. at 762 (quoting *Varble v. Chase (In re Chase)*, 372 B.R. 133, 137 (Bankr. S.D.N.Y. 2007)). “[A] broken promise to repay a debt, without more, will not sustain a cause of action under § 523(a)(2)(A).” *GCAP Holdings, L.L.C. v. Bodley*, No. 21-10337, 2022 WL 565585, at *3, 2022 U.S. Dist. LEXIS 33097, at *7 (E.D. Mich. Feb. 24, 2022) (quoting *EDM Mach. Sales, Inc. v. Harrison (In re Harrison)*, 301 B.R. 849, 854 (Bankr. N.D. Ohio 2003)).

Additionally, the false or misleading statement must be a “material misrepresentation,” which is defined as “substantial inaccuracies of the type which would generally affect a [creditor’s] decision.” *Givens*, 634 B.R. at 761 (quoting *Haney v. Copeland (In re Copeland)*, 291 B.R. 740, 761 (Bankr. E.D. Tenn. 2003)). A debtor’s silence or omission of a material fact may constitute a false representation under § 523(a)(2)(A). *Id.* (citing *Fee v. Eccles (In re Eccles)*, 407 B.R. 338, 342 (B.A.P. 8th Cir. 2009)). A false or misleading statement “is not material if the creditor knows it is false or possesses information sufficient to call the

representation into question.” *Id.* at 762 (quoting *Copeland*, 291 B.R. at 791). “[T]he test for materiality is not whether the [creditor] *actually* relied on the false statement, but whether the statement was *capable of influencing*, or had a natural tendency to influence, the [creditor’s] decision.” *Id.* (quoting *United States v. Keefer*, 799 F.2d 1115, 1127 (6th Cir. 1986)) (emphasis in original).

Section 523(a)(2)(A) does not apply to material misrepresentations regarding a debtor’s financial condition.⁵ “The ‘financial condition’ exception exempts certain debts from the non-dischargeability provisions of 11 U.S.C. § 523(a)(2)(A).” *Livingston v. Transnation Title Ins. Co (In re Livingston)*, 372 F. App’x 613, 616 (6th Cir. 2010). “A debt based upon an oral misrepresentation of financial condition is not actionable and will be dischargeable.” *Kapitus Servicing, Inc. v. Friedlander (In re Friedlander)*, Nos. 19-12300, 19-1070, 2020 WL 4809896, at *4, 2020 Bankr. LEXIS 1681, at *12 (Bankr. N.D. Ohio June 25, 2020) (citing *Prim Capital Corp. v. May (In re May)*, 368 B.R. 85, 2007 WL 2052185, at *5 (B.A.P. 6th Cir. 2007)). The exclusion of statements regarding a debtor’s ability or inability to pay its liabilities applies to omissions of the same. *Woodbourne Invs., LLC v. Boyd (In re Boyd)*, Nos. 17-50593 MPP, 17-5015 MPP, 2019 WL 948347, at *6-7, 2019 Bankr. LEXIS 574, at *20-21 (Bankr. E.D. Tenn. Feb. 22, 2019) (citing *Metz v. Bentley (In re Bentley)*, 531 B.R. 671, 690 (Bankr. S.D. Tex. 2015)). “To hold otherwise would defy logic, as it would produce the untenable conclusion that an oral representation regarding one’s financial condition is not actionable, but silence regarding one’s financial condition would be.” *Boyd*, 2019 WL 948347, at *6, 2019 Bankr. LEXIS 574, at *21.

⁵ An alleged misrepresentation concerning the debtor’s financial condition is only nondischargeable under § 523(a)(2)(B), which requires the use of a statement in writing that is materially false concerning the debtor’s or an insider’s financial condition. See 11 U.S.C. § 523(a)(2)(B). Lucas has not made such an allegation in this proceeding.

A creditor must also prove intent on the part of the debtor. “[F]ailure to perform does not by itself establish fraudulent intent[,]” as a finding of fraud under § 523(a)(2)(A) “requires that it be shown that at the time the debt was incurred, there existed no intent on the part of the debtor to repay the obligation.” *GCAP Holdings*, 2022 WL 565585, at *3, 2022 U.S. Dist. LEXIS 33097, at *7-8 (citing *Harrison*, 301 B.R. at 854). In the Sixth Circuit, a debtor’s intent is determined by a subjective standard at the time the representation was made. *Givens*, 634 B.R. at 767 (citing *Rembert*, 141 F.3d at 281).

Lastly, a creditor must prove justifiable reliance upon a debtor’s false or misleading statement. “Under the justifiable reliance standard, a party 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.’” *Conley*, 482 B.R. at 208 (quoting *Field v. Mans*, 516 U.S. 59, 71 (1995)). Like intent, the standard for determining whether a creditor’s reliance upon a debtor’s false representation is subjective, “based on the facts and circumstances surrounding each individual case.” *Givens*, 634 B.R. at 769 (quoting *Copeland*, 291 B.R. at 766-67). “To constitute justifiable reliance, the plaintiff’s conduct must not be so utterly unreasonable, in the light of the information apparent to him, that the law may properly say that his loss is his own responsibility.” *Stewart Title Guar. Co. v. Roberts-Dude*, 497 B.R. 143, 151 (S.D. Fla. 2013)). “However, a party generally is under no duty to do an investigation for justifiable reliance to be found even if such an investigation might have revealed the fraud.” *Conley*, 482 B.R. at 208-09 (citing *Willens v. Bones (In re Bones)*, 395 B.R. 407, 432 (Bankr. E.D. Mich. 2008); *Copeland*, 291 B.R. at 767). “In considering justifiable reliance, the court may consider the sophistication of the creditor and the parties’ past relationship.” *Id.* at 209 (citing *Liberty Savings Bank, FSB v. McClintic (In re*

McClintic), 383 B.R. 689, 694 (Bankr. S.D. Ohio 2008); *Wilhelm v. Finnegan (In re Finnegan)*, 428 B.R. 449, 456 (Bankr. N.D. Ohio 2010) (similar) (citing *Eugene Parks Law Corp. Defined Benefit Plan v. Kirsh (In re Kirsh)*, 973 F.2d 1454, 1459 (9th Cir. 1992))).

In the absence of a false misrepresentation when determining whether the debt owed by Miller to Lucas is dischargeable, the court finds in favor of Miller. Lucas' claim hinges on the assertion that Miller misrepresented his intention to repay the Settlement due to his signature on the Settlement Agreement; however, the undisputed evidence before the court paints a different picture. It is clear from the record that Lucas willingly entered into the Settlement with full knowledge of Miller's precarious financial state and the possibility that Miller might not be able to fulfill the repayment terms, without any affirmative representation from Miller regarding his potential contribution to the Settlement. Aside from his signature to the Settlement establishing joint and several liability between Lucas and Miller, there is a distinct lack of evidence to suggest that Miller ever made an express commitment to Lucas to repay any portion of the Settlement amount. To the contrary, the evidence reflects that at the time the Settlement was entered into, Miller unequivocally stated multiple times that he could not contribute to the Settlement payments.

The gist of Lucas' argument, as his counsel confirmed during the oral argument on the cross motions for summary judgment, is that by signing the Settlement Agreement Miller implicitly represented that he would contribute one-half of the Settlement payments. However, the evidence undisputedly establishes that at the time the Settlement was entered into, Miller made it abundantly clear that he could not and would not be making payments on the Settlement. Lucas proceeded to make all of the payments due under the Settlement without any participation by Miller. Thus, at that time of the Settlement, Lucas' very best argument is that Miller

implicitly promised to reimburse Lucas in the future for Miller's share of the Settlement paid by Lucas. And Heck, their joint counsel, informed Lucas that he would have to deal with Miller on that issue in the future. There is no evidence even that Miller expressly promised to pay Lucas for his share of the Settlement in the future. However, even if there was such an express promise, a promise to do something in the future is not actionable under § 523(a)(2)(A). See *Conley*, 482 B.R. at 209. Thus, if not even an express promise to do something in the future, such as pay a debt as in this case, does not result in a nondischargeable debt under § 523(a)(2)(A), then certainly an implicit promise to pay a debt in the future does not result in a nondischargeable debt under § 523(a)(2)(A). Such a promise, express or implicit, is not an expression of fact.

In addition, *Rembert* emphasized that the focus on § 523(a)(2)(A) must be on the debtor's subjective fraudulent intent. *Rembert*, 141 F.3d at 281. There is no evidence that Miller ever intended to defraud Lucas. The evidence shows that Miller always intended to discharge all of the liability to Fifth Third Bank and TBF by filing a bankruptcy and suggested that course of action to Lucas multiple times. But Lucas did not want to file a bankruptcy. The evidence further showed through Heck's testimony that Miller merely gave his authority to proceed with the Settlement with TBF to settle a larger debt which Miller and Lucas already jointly owed to TBF as the successor to Fifth Third Bank, while making it clear to Heck and Lucas that he could not contribute to the Settlement. Miller did not engage in any misrepresentation, deceit, or other fraudulent conduct or omission in consenting to the Settlement. Further, Miller received nothing of value from entering into the Settlement. While Lucas implicitly argues that Miller received the benefit of his paying Miller's \$40,000 share of the Settlement obligation to TBF, Miller always openly advocated that he intended to discharge any such liability in a bankruptcy. In other words, Miller did not "con" or mislead Lucas into entering into the Settlement so that Lucas would pay

his share of the Settlement. The evidence reflects that Miller acquiesced to the Settlement to appease Lucas who, for his own reasons, did not desire to file bankruptcy and discharge the underlying indebtedness. These undisputed facts show no subjective fraudulent intent on Miller's part. If this court were to find that Miller's acquiescence to the Settlement created a nondischargeable obligation to Lucas, it could be argued that the contrary would be true – that Lucas conned Miller into being liable for a debt to TBF which Miller always openly intended to discharge.

Moreover, the doctrine of materiality provides that the misrepresentation must relate to a fact that influenced Lucas' decision to enter into the Settlement. The record is devoid of any such evidence. Even if that were not so, statements or omissions regarding Miller's financial condition are excluded. In this context, Miller's alleged nondisclosure of his contemplation of bankruptcy does not rise to the level of actionable misrepresentation. Furthermore, the record reflects that Miller had multiple conversations with both Heck and Lucas prior to entering the Settlement regarding the potential of resorting to bankruptcy, thereby negating any claim of deceit through omission.

Lastly, even if Lucas could establish a misrepresentation by Miller, the evidence does not support any form of justifiable reliance by Lucas on Miller's part in the Settlement. At no point does Lucas even suggest that he would not have entered into the Settlement unless Miller first agreed to pay his contributory share of the Settlement. There was no discussion between Lucas and Miller about Miller's contribution, and therefore, no basis for Lucas to expect repayment from Miller, particularly in light of Lucas' understanding of the joint and several nature of the Settlement. Lucas' own admission that the Settlement was financially advantageous to both parties underscores the lack of reliance on any representation by Miller. In consideration of these

factors, the court finds no false misrepresentation and deems the debt owed by Miller to Lucas dischargeable as a matter of law.

2. False Pretenses

To the extent Lucas's arguments suggest that Miller engaged in false pretenses, Lucas' motion for summary judgment must be denied. A false pretense is an "implied misrepresentation or conduct intended to create and foster a false impression, as distinguished from a 'false representation' which is an express misrepresentation." *Copeland*, 291 B.R. at 760 (quoting *Ozburn v. Moore (In re Moore)*, 277 B.R. 141, 148 (Bankr. M.D. Ga. 2002)); see also *Conley*, 482 B.R. at 210 (citing *James v. McCoy (In re McCoy)*, 114 B.R. 489, 498 (Bankr. S.D. Ohio 1990)) ("For dischargeability purposes, false pretenses is differentiated from false misrepresentation only in that it is not expressed, but implied based on conduct designed to give a false impression."). A false pretense includes:

any intentional fraud or deceit practiced by whatever method in whatever manner[, which] may be implied from conduct or may consist of concealment or non-disclosure where there is a duty to speak, and may consist of any acts, work, symbol, or token calculated and intended to deceive. . . . It is a series of events, activities or communications which, when considered collectively, create a false and misleading set of circumstances, or a false and misleading understanding of a transaction, by which a creditor is wrongfully included by a debtor to transfer property or extend credit to the debtor. . . . Silence or concealment as to a material fact can constitute false pretenses.

Givens, 634 B.R. at 761-62 (citations omitted). "A false pretense has been defined to include a 'mute charade,' where the debtor's conduct is designed to convey an impression without oral representation." *Lansden v. Jones (In re Jones)*, 585 B.R. 465, 505 (Bankr. E.D. Tenn. 2018) (citing *Schafer v. Rapp (In re Rapp)*, 375 B.R. 421, 433 (Bankr. S.D. Ohio 2007)) (internal citations omitted). False pretense has also been described as "usually, but not always, the product of multiple events, acts or representations undertaken by a debtor which purposely create a contrived and misleading understanding of a transaction . . ." *Id.* (citing *Evans v. Dunston (In re*

Dunston), 117 B.R. 632, 641 (Bankr. D. Colo. 1990), *aff'd in part and rev'd in part on other grounds*, 146 B.R. 269 (D. Colo. 1992). “The failure to disclose a material fact can form the basis of either a material misrepresentation or false pretense.” *Id.* (internal citations omitted).

The crux of Lucas’ argument – that Miller engaged in false pretenses by signing the Settlement Agreement, thereby implying his ability to repay the debt – is unsupported by the evidence. The record lacks any indication that Miller conveyed, through act or assurance, his capability or intent to contribute to the repayment of the Settlement. Furthermore, Miller’s silence with respect to filing bankruptcy does not rise to the level of false pretenses, as Miller frequently discussed bankruptcy as an option, demonstrating a lack any deceitful conduct on his part.

As previously discussed, the court notes that Lucas was not only aware of Miller’s financial troubles prior to entering into the Settlement, but also proceeded with full knowledge of the joint and several liability imposed by the Settlement. Despite Lucas suggesting that he believed Miller would repay him for his portion of the Settlement based on how they were raised and where they were from, Lucas’ claim of being misled into believing that Miller would fulfill his financial obligation under the Settlement lacks credibility, especially in light of Lucas’ understanding of Miller’s financial limitations at the time of the Settlement.

Lucas’ argument of justifiable reliance is equally untenable. Lucas cannot claim that he was misled into the Settlement when the evidence clearly indicates that Lucas had prior knowledge of Miller’s financial distress. As mentioned above, Lucas acknowledged the mutually beneficial nature to the Settlement, which undermines any suggestion that Lucas entered into the Settlement to his detriment. Accordingly, the court finds the debt to be dischargeable, as there is no basis to conclude that Miller engaged in false pretenses.

VII. Conclusion

The court finds that there is no genuine issue for trial and Miller is entitled to judgment as a matter of law. Lucas's motion for summary judgment is denied and Miller's motion for summary judgment is granted. The court will contemporaneously enter an order consistent with this decision.

Copies to:

Counsel for the Plaintiff

Counsel for the Defendant