

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT**

BAP NO. EP 12-015

**Bankruptcy Case No. 11-20198-JBH
Adversary Proceeding No. 11-02034-JBH**

**DAVID O'DONNELL,
Debtor.**

**THOMAS A. TOYE, III,
Plaintiff-Appellee,**

v.

**DAVID O'DONNELL,
Defendant-Appellant.**

**Appeal from the United States Bankruptcy Court
for the District of Maine
(Hon. James B. Haines, Jr., U.S. Bankruptcy Judge)**

**Before
Lamoutte, Feeney, and Cabán,
United States Bankruptcy Appellate Panel Judges.**

**James F. Molleur, Esq., on brief for Appellant.
Kelly W. McDonald, Esq., on brief for Appellee.**

December 5, 2012

Per Curiam.

David O'Donnell ("O'Donnell") appeals from a bankruptcy court judgment in favor of Thomas A. Toye III ("Toye") determining that O'Donnell's obligation to Toye was nondischargeable pursuant to § 523(a)(2)(B)¹ because the extension of credit was obtained by use of a false financial statement. On appeal, O'Donnell argues that the bankruptcy court clearly erred in finding that he caused his personal financial statement "to be made or published with intent to deceive" Toye, as required by § 523(a)(2)(B)(iv). For the reasons set forth below, we **AFFIRM.**

BACKGROUND

In 2007, O'Donnell and Rudy Ferrante ("Ferrante") established Alder Street Properties, LLC for the purpose of acquiring and holding certain apartment buildings on Alder Street and Cumberland Avenue in Portland, Maine (the "Alder Street transaction"). Under the purchase agreement for the properties, O'Donnell and Ferrante were required to provide a \$350,000.00 down payment at closing, and they asked Kevin Smith, a commercial loan broker, to help arrange the financing for a bridge loan (the "Loan"). Smith, who had assisted O'Donnell and Ferrante in several prior transactions, approached Toye to see if he would be interested in financing the Loan. Smith and Toye had also worked together on several prior transactions. In connection with the Loan, Smith prepared personal financial statements for O'Donnell and Ferrante and sent them to Toye. The document purporting to be O'Donnell's personal financial statement (the "Financial Statement") was dated December 3, 2007, and was signed with

¹ Unless expressly stated otherwise, all references to "Bankruptcy Code" or to specific statutory sections shall be to the Bankruptcy Reform Act of 1978, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, 119 Stat. 23, 11 U.S.C. §§ 101, et seq.

O'Donnell's name, although O'Donnell maintains that he did not sign it himself, and the evidence did not show otherwise. It indicated that O'Donnell had a net worth of \$2,570,733.00, that his ownership in real estate (owned either individually or through LLCs) was valued at approximately \$1,620,000.00, and that he had monthly income of \$38,265.00. It is undisputed that the Financial Statement was a materially false statement of his financial condition as it overstated property ownership and net rental income, and did not include encumbrances on various properties.

After receiving the Financial Statement, Toye agreed to extend the Loan. In connection therewith, Alder Street Properties LLC executed a promissory note in the amount of \$350,000.00, and both O'Donnell and Ferrante provided personal guaranties of the note. As additional security, O'Donnell executed a mortgage and security agreement with respect to certain real property in Augusta, Maine. The goal was to refinance within a few months and pay off the Loan. The refinancing never occurred, however, and Toye was never repaid.

Toye sued O'Donnell in the Kennebec County Superior Court for the debt due under his personal guaranty, and on August 27, 2009, the state court entered judgment against O'Donnell in the amount of \$417,974.00.

In July 2009, Ferrante filed a chapter 7 petition, and Toye brought an adversary action against Ferrante seeking a determination that the debt owed to him on account of his personal guaranty was nondischargeable pursuant to § 523(a)(2)(B). After a trial, the bankruptcy court determined that Ferrante had provided Toye with a false financial statement within the meaning of § 523(a)(2)(B) on which Toye reasonably relied and, as a result, declared Ferrante's debt to Toye to be excepted from discharge.

O'Donnell filed a chapter 7 petition in February 2011. Thereafter, Toye filed a two-count adversary complaint alleging: (1) that O'Donnell's debt to him was nondischargeable pursuant to § 523(a)(2)(B) because the debt was obtained by use of a false financial statement; and (2) that Ferrante's fraud on Toye (as determined by the bankruptcy court in Ferrante's bankruptcy case) should be imputed to his partner, O'Donnell, for purposes of determining the dischargeability of O'Donnell's debt under § 523(a)(2)(B).

In a Joint Pre-Trial Memorandum, the parties indicated that there was no dispute that the Financial Statement was materially false, that it purported to relay O'Donnell's financial condition, or that Toye relied on it in extending the Loan. Rather, the primary factual dispute centered on the fourth prong under § 523(a)(2)(B) – whether O'Donnell caused the Financial Statement to be made or published with the intent to deceive Toye. O'Donnell also challenged whether Toye's reliance on the Financial Statement was justified, and whether Smith was Toye's agent in connection with the Loan. As to the imputation of fraud claim, the parties indicated that the primary factual dispute was whether O'Donnell and Ferrante were partners.

On March 8, 2012, the bankruptcy court held a trial at which Toye, Smith, and O'Donnell testified and numerous exhibits were introduced into evidence. O'Donnell testified that Smith had handled the financing for numerous prior transactions for O'Donnell and Ferrante, and that in connection with those transactions, Smith had prepared personal financial statements for O'Donnell and submitted them to the lenders on his behalf. With respect to the Alder Street transaction, O'Donnell testified that he knew Smith needed specific financial information from him, and he provided Smith with certain bank statements, tax returns, his social security number,

and records regarding his stock portfolio and retirement accounts. He insisted, however, that he did not provide any false information to Smith, and did not know the details of any financial statement that Smith was preparing to give to Toye with respect to the Alder Street transaction. According to O'Donnell, Smith never met with him to review the Financial Statement, and the first time he saw the Financial Statement was at a state court hearing after Toye obtained judgment against him. O'Donnell also asserted that although the Financial Statement was signed with his name, he did not sign the Financial Statement himself, and he did not know who signed it. Specifically, O'Donnell testified as follows:

Q: And what was your understanding as to the extent to which you would have to give information to Kevin Smith that he could forward to Mr. Toye about your personal financial circumstances?

A. Kevin – Kevin Smith told me that to, you know, to give Tom some – a sense of security and, you know, because Tom had never met me. I don't know if he'd ever met Rudy but he never met me. He needed some documents like my PrimeVest account, my retirement accounts, my stock, you know, stock – stock accounts and my Social Security Number and some tax returns.

...

Q: All right. So Kevin asked you for tax returns, he asked you for financial records.

A. Yes.

Q: And your Social Security Number so he could check out your credit.

A. Yes.

...

Q: Did you understand that Kevin was creating a personal financial statement that would include all the real estate that you owned and monthly income and expenses for your buildings?

A. Jim, I honestly didn't know what kind of financial statement he was putting together. I didn't know what it – he just told me what I needed to bring to get to them so I got that information that he required to him.

Q: And you had – you had actually sat down with Kevin Smith and prepared a personal financial statement back in June of 2007, about six months before.

A. Yes. Yup.

Smith testified about his business relationship with O'Donnell and Ferrante, and how he had assisted them with several prior transactions by preparing financial statements and other documentation. With respect to the Alder Street transaction, Smith testified about how the Loan was structured and what information he relied upon when preparing the Financial Statement. According to Smith, he gathered certain information from O'Donnell's tax returns, bank account statements, and investment account statements. He obtained income information from rent rolls or tax returns. Real estate ownership, valuations, and mortgages came from various sources, such as credit reports, city assessment records, Rudy Ferrante, or Chris Smith (a property manager assisting Ferrante and O'Donnell). Although Smith insisted that he had documentation for all the information contained in the Financial Statement, he could not definitely state who provided him with each individual piece of documentation. Smith agreed that although it was standard practice for him to talk to people about any financial statements he was preparing for them, he did not review the Financial Statement with or provide the Financial Statement to O'Donnell, nor did he see O'Donnell sign the Financial Statement.

After the close of evidence, the bankruptcy court concluded that Toye had met his burden of proof on most elements of his claim under § 523(a)(2)(B), but took under advisement the issue of whether O'Donnell had “caused [the Financial Statement] to be made or published with intent to deceive.” See 11 U.S.C. § 523(a)(2)(B)(iv).

On March 20, 2012, the bankruptcy court entered its Final Judgment in favor of Toye, excepting O'Donnell's obligation to Toye from discharge under § 523(a)(2)(B). In its oral

findings and conclusions, the bankruptcy court found that although O'Donnell tried to portray Smith as Toye's agent, Smith was actually O'Donnell's agent in the Alder Street transaction.

The bankruptcy court stated:

Mr. Smith said he could help find the bridge financing that Mr. O'Donnell wanted. Mr. O'Donnell gave him some figures relating to accounts and the like. Mr. Smith, through his familiarity and past work with Mr. O'Donnell whereby he had helped find financing, put together a financial statement on Mr. O'Donnell's behalf and submitted it to Mr. Toye.

Although the bankruptcy court acknowledged that O'Donnell did not actually review or sign the Financial Statement, it stated that nondischargeability under § 523(a)(2)(B) can be based on whether the debtor "turned a blind eye to it in reckless disregard of the truth or falsity of the propositions asserted in the [F]inancial [S]tatement." In this regard, the bankruptcy court stated:

In this case, Mr. O'Donnell said to Smith, go ahead and give him what . . . Mr. Toye needs to extend the credit. Those papers prepared by Mr. Smith with the authority of Mr. O'Donnell and submitted in order to get 400-and-some-thousand dollars worth of financing approved by virtue of Mr. O'Donnell's personal guarant[y], were done on the authority and at the instruction of Mr. O'Donnell and no one else. For Mr. O'Donnell is too clever and too nice for Mr. O'Donnell to disclaim that he has responsibility for the financial statement was materially false that he set in motion and that he turned a – willfully turned a blind eye to the content of that. . . . [H]e did it intending whatever it was to be sufficient in Mr. Toye's eye . . . and he did that happily not caring what the exact content was. That's damning under Section 523(a)(2)(B), it's willful disregard of the truth of what was represented and submitted in order to obtain the financing that he desired and ultimately received.

As to the alternative theory under which Toye asserted that Ferrante's fraud could be imputed to O'Donnell, the bankruptcy court found that the evidence did not establish that existence of a partnership or joint venture sufficient to impute Ferrante's fraud on O'Donnell.

This appeal followed.

JURISDICTION

Before addressing the merits of an appeal, we must determine that we have jurisdiction, even if the issue is not raised by the litigants. See Boylan v. George E. Bumpus, Jr. Constr. Co. (In re George E. Bumpus, Jr. Constr. Co.), 226 B.R. 724 (B.A.P. 1st Cir. 1998). We have jurisdiction to hear appeals from: (1) final judgments, orders, and decrees; or (2) with leave of court, from certain interlocutory orders. 28 U.S.C. § 158(a); Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). A decision is considered final if it “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment,” id. at 646 (citations and internal quotations omitted), whereas an interlocutory order ““only decides some intervening matter pertaining to the cause, and . . . requires further steps to be taken in order to enable the court to adjudicate the cause on the merits.”” Id. (quoting In re American Colonial Broad. Corp., 758 F.2d 794, 801 (1st Cir. 1985)). Generally, a bankruptcy court’s determination regarding the dischargeability of a debtor’s obligations under § 523(a)(2) is a final appealable order. See Blacksmith Invs., Inc. v. Woodford (In re Woodford), 418 B.R. 644, 649 (B.A.P. 1st Cir. 2009); Aoki v. Atto Corp. (In re Aoki), 323 B.R. 803, 811 (B.A.P. 1st Cir. 2005); Cambio v. Mattera (In re Cambio), 353 B.R. 30, 31 n.1 (B.A.P. 1st Cir. 2004). Werthen v. Werthen (In re Werthen), 282 B.R. 553, 555-56 (B.A.P. 1st Cir. 2002), aff’d, 329 F.3d 269 (1st Cir. 2003). Accordingly, we have jurisdiction to hear this appeal.

STANDARD OF REVIEW

Appellate courts apply the clearly erroneous standard to findings of fact and *de novo* review to conclusions of law. See Lessard v. Wilton-Lyndeborough Coop. School Dist., 592

F.3d 267, 269 (1st Cir. 2010). A bankruptcy court’s determination of whether a requisite element of a nondischargeability claim under § 523(a)(2)(B) is present is a factual determination which is reviewed for clear error. Douglas v. Kosinski (In re Kosinski), 424 B.R. 599, 607 (B.A.P. 1st Cir. 2010) (citing Lentz v. Spadoni (In re Spadoni), 316 F.3d 56, 58 (1st Cir. 2003); Palmacci v. Umpierrez, 121 F.3d 781, 785 (1st Cir. 1997); Century 21 Balfour Real Estate v. Menna (In re Menna), 16 F.3d 7, 11 (1st Cir. 1994)); see also Morrison v. Western Builders of Amarillo, Inc. (In re Morrison), 555 F.3d 473, 482 (5th Cir. 2009) (“The bankruptcy court’s determination of intent to deceive is a finding of fact subject to the clearly erroneous standard of review.”); Northland Nat’l Bank v. Lindsey (In re Lindsey), 443 B.R. 808, 812-13 (B.A.P. 8th Cir. 2011) (“Whether a requisite element of a claim of nondischargeability under § 523(a)(2)(B) has been satisfied is a factual determination that is reviewed for clear error.”).

A finding is clearly erroneous when, although there is evidence to support it, the reviewing court “is left with the definite and firm conviction that a mistake has been committed. Hannigan v. White (In re Hannigan), 409 F.3d 480, 482 (1st Cir. 2005) (quoting Anderson v. Bessemer City, N.C., 470 U.S. 564, 573 (1985)); Chase v. Harris (In re Harris), 385 B.R. 802, 804 (B.A.P. 1st Cir. 2008). If the trial court’s account of the evidence is plausible in light of the record viewed in its entirety, a reviewing court may not reverse, even if convinced that if it had been sitting as a trier of fact, it would have weighed the evidence differently. In re Harris, 385 B.R. at 804 (citations omitted). When reviewing the evidentiary record, great deference is accorded to the bankruptcy court’s factual determinations when they are based on the credibility and the demeanor of the witnesses. See Palmacci v. Umpierrez, 121 F.3d at 785; Rodriguez-Morales v. Veterans Admin., 931 F.2d 980, 982 (1st Cir. 1991).

DISCUSSION

I. Section 523(a)(2)(B) Exception to Discharge

Section 523(a)(2)(B) makes nondischargeable any debt:

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

(B) use of a statement in writing –

(i) that is materially false;

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

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive[.]

11 U.S.C. § 523(a)(2)(B). A creditor seeking to except a debt from discharge bears the burden of proving each of these elements by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 291 (1991).

O'Donnell concedes the existence of the first three elements. He challenges, however, the bankruptcy court's findings with respect to the fourth prong of § 523(a)(2)(B). Thus, the only issue before us is whether, upon the record before it, the bankruptcy court clearly erred when it found that Toyé had met his burden of proving that: (1) O'Donnell caused the Financial Statement to be made or published; and (2) that he did so with the intent to deceive Toyé.

II. Whether the bankruptcy court clearly erred in finding that O'Donnell caused the Financial Statement to be made or published.

The bankruptcy court found that O'Donnell, through his agent Smith, caused the false Financial Statement to be made. O'Donnell argues that § 523(a)(2)(B)(iv) was not satisfied because he did not prepare or sign the Financial Statement, nor had he ever reviewed, adopted, or otherwise authenticated or ratified it. He also argues that bankruptcy court erred in finding that Smith was his agent in connection with the Loan.

It is well established that a debtor need not personally prepare or sign the written statement to satisfy the requirements of § 523(a)(2)(B). See Am. Gen. Fin. Servs., Inc. v. Johnson (In re Johnson), 436 B.R. 116, 119 (Bankr. E.D. Mo. 2010) (“To satisfy the materially false writing requirement of [§] 523(a)(2)(B), the written statements need not be physically prepared by a debtor.”). Thus, a debtor cannot escape liability under § 523(a)(2)(B) just because a financial statement was completed by someone else. See Insouth Bank v. Michael (In re Michael), 265 B.R. 593, 598 (Bankr. W.D. Tenn. 2001). Rather, the requirements of § 523(a)(2)(B) are met as long as the financial statement was either written by the debtor, signed by the debtor, written by someone else but adopted or used by the debtor, or if the debtor caused the statement to be prepared. See Mitsubishi Motor Sales of Caribbean, Inc. v. Seda Ortiz, 418 B.R. 11, 22 (D.P.R. 2009) (stating that to prove elements of § 523(a)(2)(B), the statement “must have been either written by the debtor, signed by the debtor, or written by someone else but adopted and used by the debtor.”); Tower Credit, Inc. v. Williams (In re Williams), 431 B.R. 150, 157 n.16 (Bankr. M.D. La. 2010) (“As long as the written statement is written, signed, adopted or used by the debtor, the basic precondition concerning the writing requirement to the non-dischargeability complaint under [§] 523(a)(2)(B) is met”); Regions Bank v. Whisnant (In re Whisnant), 411 B.R. 559, 564-65 (Bankr. E.D. Tenn. 2009) (holding that statement does not have to be prepared by debtor to satisfy the written statement requirement; however, debtor “must have either created it, had it created, or allowed it to be ‘published’ by making it public or circulating it.”); Chevy Chase Fed. Sav. Bank v. Graham (In re Graham), 122 B.R. 447, 451 (Bankr. M.D. Fla. 1990) (“A written statement does not have to be physically prepared by a

defendant. The requirements of § 523(a)(2)(B) are met if the existence of a written statement was caused to be prepared by the defendant.”).

O’Donnell maintains that he did nothing to adopt or authenticate the Financial Statement. According to O’Donnell, in order to adopt a financial statement for purposes of § 523(a)(2)(B), a debtor must take some affirmative and intentional action to approve the content of that statement. O’Donnell claims he never took any such affirmative action; he never reviewed the Financial Statement before it was submitted to Toye, did not sign it himself, and, in fact, did not even know of its existence until after Toye obtained a judgment against him in state court. Thus, he argues, he cannot be deemed to have adopted the content of the false Financial Statement. Toye argues, however, that since O’Donnell caused the Financial Statement to be made by enlisting Smith to complete and submit the paperwork for the Loan, he is responsible for its contents. We agree.

The bankruptcy court found that Smith was O’Donnell’s agent with respect to the Alder Street transaction, and that Smith prepared the paperwork “on the authority and at the instruction of O’Donnell and no one else.” There is ample support in the record for the bankruptcy court’s finding that Smith was acting as O’Donnell’s agent in connection with the Loan. Both Smith and O’Donnell testified that Smith had assisted Ferrante and O’Donnell on several prior business transactions, including two transactions (the NCCS Transaction and the Katahdin Transaction) within six months prior to the Alder Street transaction. O’Donnell testified that he relied on Smith, who had greater expertise in commercial lending, to address all necessary paperwork for those prior transactions. He did not tell Smith which forms to fill out or give him a list of forms; instead, O’Donnell trusted Smith to generate all necessary documents. In both instances, Smith

received certain financial information from O'Donnell, obtained some information from other sources, filled out a personal financial statement for O'Donnell, and submitted it to the respective lenders.

With respect to the Loan, the record shows that although Ferrante primarily handled the Alder Street transaction, and asked Smith to arrange the financing, O'Donnell knew about this request and acquiesced in Smith's involvement. Moreover, O'Donnell admitted that he provided Smith with certain financial information relating to his accounts, which Smith then used to prepare a financial statement on O'Donnell's behalf. Based on the prior history between the parties, the bankruptcy court could infer that O'Donnell knew or should have known that asking Smith to complete paperwork for the Loan, and providing him with certain personal financial information, would necessarily mean that Smith would prepare and deliver any necessary personal financial statements, just as he had in the two prior instances. See Coughlin v. First Nat'l Bank of Boston (In re Coughlin), 27 B.R. 632, 636 (B.A.P. 1st Cir. 1983) ("Courts may assume that debtors intend the natural consequences of their acts."). Based on this evidence, the bankruptcy court did not clearly err in finding that Smith was acting as O'Donnell's agent in connection with the Loan, and that by requesting his agent to complete and submit the paperwork for the Loan, he caused the Financial Statement to be made or published for purposes of § 523(a)(2)(B). The next question is whether the bankruptcy court erred in finding that O'Donnell had the requisite intent to deceive.

III. Whether the bankruptcy court erred in finding that O'Donnell had the requisite intent to deceive Toye.

O'Donnell argues that there is no evidence that he intended to deceive Toye, and challenges the bankruptcy court's finding that he acted with reckless disregard as to the truth of the Financial Statement.

A creditor can prove intent to deceive through direct or circumstantial evidence. In re Sheridan, 57 F.3d 627, 633 (7th Cir. 1995). A debtor, however, will rarely admit that he intended to deceive a creditor. Courts have thus held that intent to deceive under § 523(a)(2)(B) may be inferred from the totality of the circumstances surrounding the debtor's acts, including the debtor's reckless indifference to, or reckless disregard of, the accuracy of the financial information submitted to the creditor. See, e.g., Insurance Co. of N. Am. v. Cohn (In re Cohn), 54 F.3d 1108, 1119 (3d Cir. 1995) (“[A] creditor can establish intent to deceive by proving reckless indifference to, or reckless disregard of, the accuracy of the information in the financial statement of the debtor when the totality of the circumstances supports such an inference.”); Southeast Neb. Coop. Corp. v. Schnuelle (In re Schnuelle), 441 B.R. 616, 624 (B.A.P. 8th Cir. 2011) (citations omitted); Helena Chem. Co. v. Richmond (In re Richmond), 429 B.R. 263, 298 (Bankr. E.D. Ark. 2010); First State Bank of Munich v. Braathen (In re Braathen), 364 B.R. 688, 702 (Bankr. D.N.D. 2006); see also In re Coughlin, 27 B.R. at 636. “A bankruptcy court’s determination that a debtor did not act with the intent to deceive is a finding of fact” and subject to the clearly erroneous standard of review. Hudgens v. New Equip. Leasing Inc. (In re Hudgens), 149 Fed. App’x 480, 486 (7th Cir. 2005) (citation omitted). “Ultimately . . . , where a debtor testifies as to her subjective intent, the bankruptcy court must make a credibility determination, considering the debtor’s testimony, along with other objective circumstantial

evidence of the debtor's subjective intent." AT&T Universal Card Servs. v. Mercer (In re Mercer), 246 F.3d 391, 409 (5th Cir. 2001) (citing In re Sheridan, 57 F.3d at 633-34).

As one court stated:

A determination of intent under this section is much like a determination of reasonable reliance; an objective standard to be determined by the fact finder. Intent to deceive may either be demonstrated by proof that the debtor acted intentionally or knowingly or in the alternative that debtor's conduct exhibited reckless indifference to the existing facts. Necessarily, debtor's intent cannot be divined in a vacuum but must be viewed in light of the circumstances of the case. Therefore, a debtor's credibility is an important factor in determining whether the debtor's intent to deceive was present. . . .

Tex. Am. Bank, Tyler, N.A. v. Barron (In re Barron), 126 B.R. 255, 260 (Bankr. E.D. Tex. 1991) (internal citations and quotations omitted).

The bankruptcy court found that O'Donnell, through his agent Smith, had caused the false Financial Statement to be made, and that in doing so, O'Donnell "willfully turned a blind eye to the content" of the Financial Statement and, therefore, acted with "willful disregard of the truth of what was represented and submitted in order to obtain the financing that he desired and ultimately received." O'Donnell argues that the bankruptcy court's conclusions are inconsistent with the evidence. According to O'Donnell, although he admits that he provided certain financial information to Smith, that information was completely accurate and he cannot be held responsible for false information provided to Toye in a financial statement which he did not review or approve. Thus, O'Donnell claims, there was no evidence that he intended to deceive Toye.

A bankruptcy court can, however, find evidence of intent to deceive despite a debtor's claim of ignorance. See, e.g., FDIC v. Reisman (In re Reisman), 149 B.R. 31, 38 (Bankr. S.D.N.Y. 1993).

A debtor cannot escape liability under section 523(a)(2)(B) by firmly putting his head in the sand and later claiming not to have known of the falsity of representations that were made on his behalf while his head was covered. Such conduct is sufficiently reckless to give rise to nondischargeable liability under section 523(a)(2)(B).

Merchants Bank of Cal. v. Oh (In re Oh), 278 B.R. 844, 860 (Bankr. C.D. Cal. 2002). Thus, a debtor's ignorance can be sufficiently reckless to satisfy the intent requirement. Citizens Bank of Washington Co. v. Wright (In re Wright), 299 B.R. 648, 660-61 (Bankr. M.D. Ga. 2003).

For example, in In re Reisman, the bankruptcy court found that the debtor caused false financial statements to be submitted with the intent to deceive the bank even though the statements in issue were prepared and furnished to the bank by the debtor's accountant. In that case, the debtor claimed ignorance of the fact that his accountant prepared and delivered false financial statements in order to induce the bank to extend credit to the debtor. 149 B.R. at 33. The bankruptcy court found that the debtor caused the false financial statement to be submitted to the bank with intent to deceive because the debtor knew his personal financial statement was required as a condition of the loan, he was aware that his accountant submitted the statements to the bank, he recklessly disregarded their accuracy and, in any case, the debtor accepted the benefits of his accountant's misdeeds and thus was liable on agency principals. Id. at 38.

This case presents a similar situation. As noted above, O'Donnell was an experienced real estate developer, and in many prior instances where he provided personal guaranties, he was required to submit personal financial statements prepared either by Smith or by someone else.

With respect to the Alder Street transaction, he knew that he needed to provide a personal guaranty, and that Toye would require additional assurances as he had no prior dealings with O'Donnell. O'Donnell personally submitted certain financial information to Smith, and O'Donnell knew that Smith would use his financial information to prepare some kind of personal financial statement to give to Toye. Thus, O'Donnell had a responsibility to inquire about what kind of documentation Smith was preparing and to follow up with Smith in order to review the accuracy of the Financial Statement before it was submitted to Toye. At trial, O'Donnell testified that he did not know what kind of financial statement Smith was preparing to give to Toye, but the bankruptcy court apparently did not find that assertion to be credible or plausible. Although the bankruptcy judge did not expressly make a credibility finding, he was clearly in the best position to evaluate the testimony of the witnesses, and implicit in his finding that O'Donnell had "turned a blind eye" is a rejection of O'Donnell's claims of innocence. As noted above, where intent is at issue, we must give the bankruptcy judge's assessment of O'Donnell's credibility great deference. In re Bonnanzio, 91 F.3d at 302 (citations omitted). The bankruptcy judge considered the totality of the circumstances, including O'Donnell's actions and his testimony, and found that O'Donnell acted with reckless disregard for the truth or accuracy of the Financial Statement. Although the bankruptcy judge's findings regarding O'Donnell's intent to deceive could have been more amply supported in his bench ruling, we are not "left with the definite and firm conviction that a mistake has been committed." In re Hannigan, 409 F.3d at 482. (citation and internal quotations omitted).

Moreover, even if we were to accept O'Donnell's argument that he was unaware that the Financial Statement was submitted to Toye, he is nevertheless responsible for the acts of his

agent, Smith. “When agents act within the scope of their actual or apparent authority, the principal is liable for their acts of fraud.” In re Reisman, 149 B.R. at 38 (citations omitted). Smith acted within the scope of his ostensible authority when he submitted the Financial Statement to Toye on O’Donnell’s behalf, and O’Donnell accepted the benefits of Smith’s submission of the false Financial Statement (i.e., the Loan from Toye). O’Donnell cannot escape the consequences of his agent’s bad acts.

Thus, we conclude that the record, taken as a whole, supports the bankruptcy court’s finding that O’Donnell acted with the requisite intent to deceive, and that the bankruptcy court’s finding is not clearly erroneous.

CONCLUSION

We conclude that the bankruptcy court did not err in finding that Toye had met his burden of proving that O’Donnell caused the Financial Statement to be made or published with the intent to deceive Toye. Accordingly, we **AFFIRM** the bankruptcy court’s determination that Toye’s claim is excepted from discharge under § 523(a)(2)(B).