

FILED & ENTERED

AUG 31 2015

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY bakchell DEPUTY CLERK

ORDER NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re:

GARRY MICHAEL KANN,

Debtor.

Case No. 2:13-bk-23722 RK

Chapter 7

Adv. No. 2:13-ap-01840 RK

GARRETT KELLY KRAUSE,

Plaintiff,

vs.

GARRY MICHAEL KANN,

Defendant.

**ORDER ON DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT, DENYING
SUMMARY JUDGMENT, GRANTING
RELIEF IN PART BY TREATING
CERTAIN FACTS AS ESTABLISHED
PURSUANT TO FEDERAL RULE OF
CIVIL PROCEDURE 56(g), VACATING
STATUS CONFERENCE AND SETTING
PRETRIAL CONFERENCE**

Hearing

Date: September 2, 2015

Time: 1:30 p.m.

Place: Courtroom 1675
255 East Temple Street
Los Angeles, CA 90012

Pending before the court in the above-captioned adversary proceeding is the Motion of Defendant Garry Michael Kann for Summary Judgment ("Motion"). ECF 81. The Motion is currently set for hearing on September 2, 2015 at 1:30 p.m. A status conference in the adversary proceeding is also set for the same time.

1 Having considered the moving, opposing and reply papers, the court determines
2 that oral argument is unnecessary, dispenses with it, takes the Motion under submission,
3 vacates the hearing and status conference, and makes the following rulings.

4 The Motion argues that Defendant is entitled to summary judgment for four
5 reasons: (1) Plaintiff's claim under 11 U.S.C. § 523(a)(2)(A) based on fraudulent
6 misrepresentation is time-barred by the applicable three-year statute of limitations for
7 fraud or intentional misrepresentation under California Code of Civil Procedure § 338(d);
8 (2) Defendant's alleged misrepresentation that he was the lead principal banker on the
9 "tombstones" for his prior company fails as a matter of law for lack of proof of justifiable
10 reliance and as nonactionable "puffery"; (3) Defendant's alleged misrepresentation that
11 the Airborne and Aerospace transactions would be closing in order to induce Plaintiff to
12 make short term loan advances to Defendant fails as a matter of law for lack of proof of
13 proximate cause of Plaintiff's injury; and (4) Defendant's alleged misrepresentation that
14 he had the intent and ability to repay the advances owed under the Settlement
15 Agreement executed with Plaintiff in February 2009 fail as a matter of law due to lack of
16 proof of his intent and as a nonactionable oral statement regarding his financial condition.
17 Motion at 16-27.

18 Having read the moving, opposing, and reply papers, and the evidence relating
19 thereto, the court determines that there are genuine issues of material fact related to
20 each of Defendant's claimed bases for granting summary judgment and that the record
21 on the Motion is not clear that Defendant is entitled to judgment as a matter of law. That
22 is, based on Plaintiff's declaration, ECF 85-1, the court determines that there are
23 genuine disputes of material fact for trial whether Plaintiff was aware or should have been
24 aware of Defendant's alleged fraud at least three years before Plaintiff filed suit, whether
25 Plaintiff's reliance on Defendant's tombstone representations was or was not justifiable or
26 that such representations were nonactionable puffery, whether Defendant's alleged
27 misrepresentations regarding the closing of the Airborne and Aerospace transactions did
28 or did not proximately cause Plaintiff's injury and whether Defendant's alleged

1 misrepresentations of his intent and ability to repay the advances under the Settlement
2 Agreement fail for lack of proof of intent or are nonactionable oral statements of financial
3 condition.

4 Although the court is denying the Motion for the reasons stated above, the court
5 will deem certain facts established pursuant to Federal Rule of Civil Procedure 56(g).
6 The court notes that as indicated by Plaintiff's Separate Statement of Genuine Issues,
7 ECF 86, Plaintiff has admitted Facts Nos. 9, 10, 25, 26, 28, 31, 37, 41, 42, 45, 46 and 49
8 of Defendant's Statement of Uncontroverted Facts and Conclusions of Law, ECF 81-1.
9 Also, as indicated by Defendant's Response to Plaintiff's Additional Material Facts, ECF
10 91-1, Defendant admitted Additional Facts Nos. 1 (except not implicitly admitting that
11 "lead investment banker" is a phrase used in the investment banking industry), 8, 13, 14,
12 15, 17, 19, 22 (except only admitting "some" steps, not "many") and 23 set forth in
13 Plaintiff's Separate Statement of Genuine Issues, ECF 86. The court will exercise its
14 discretion pursuant to Federal Rules of Civil Procedure 56(g), made applicable here by
15 Federal Rules of Bankruptcy Procedure 7056, and will treat as established Facts 9, 10,
16 25, 26, 28, 31, 37, 41, 42, 45, 46 and 49 of Defendant's Statement of Uncontroverted
17 Facts and Conclusions of Law and Additional Facts 1 (except not implicitly admitting that
18 "lead investment banker" is a phrase used in the investment banking industry), 8, 13, 14,
19 15, 17, 19, 22 (except only admitting "some" steps, not "many") and 23 of Plaintiff's
20 Separate Statement of Genuine Issues because these facts are admitted by the parties
21 and are thus not genuinely in dispute pursuant to Federal Rule of Civil Procedure 56(g).

22 As to the remaining facts in Defendant's and Plaintiff's statements of
23 uncontroverted facts, the court will not deem those facts established. It appears to the
24 court that some of the facts in Defendant's Statement of Uncontroverted Facts may have
25 been implicitly admitted by Plaintiff since they were objected to only because they were
26 unsupported by admissible evidence because the Declaration of Gary Kann in Support of
27 the Motion for Summary Judgment ("Kann Declaration") was originally filed unsigned.
28 The court will not deem these facts admitted because Defendant only later filed a signed

1 copy of the Kann Declaration, after Plaintiff filed his opposition, and Plaintiff did not have
2 an opportunity to address those facts that were unsupported by admissible evidence at
3 the time the Motion and the Opposition were filed. In any event, because the court is
4 denying the Motion, the parties will have an opportunity to determine what facts are truly
5 undisputed when they prepare and file their joint pre-trial stipulation.

6 Based on the foregoing, it is hereby ordered as follows:

- 7 1. Facts 9, 10, 25, 26, 28, 31, 37, 41, 42, 45, 46 and 49 of Defendant's
8 Statement of Uncontroverted Facts and Additional Facts 1 (except not
9 implicitly admitting that "lead investment banker" is a phrase used in the
10 investment banking industry), 8, 13, 14, 15, 17, 19, 22 (except only
11 admitting "some" steps, not "many") and 23 of Plaintiff's Separate
12 Statement of Genuine Issues are hereby treated as established because
13 such facts are not genuinely in dispute in this adversary proceeding
14 pursuant to Federal Rule of Civil Procedure 56(g) and Federal Rule of
15 Bankruptcy Procedure 7056.
- 16 2. The Motion is hereby denied as to Defendant's request for entry of
17 summary judgment.
- 18 3. The hearing on the Motion and the status conference set for September 2,
19 2015 at 1:30 p.m. are vacated and taken off calendar.
- 20 4. A pre-trial conference is set for November 10, 2015 at 2:00 p.m.

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1 5. The parties are ordered to file a joint pretrial stipulation on or before
2 November 3, 2015 and otherwise comply with Local Bankruptcy Rule 7016-
3 1 in preparing for the pretrial conference.

4 IT IS SO ORDERED.

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24 Date: August 31, 2015



Robert Kwan
United States Bankruptcy Judge