

MAR 30 2007

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

| | | | |
|------------------|---|-----------|-----------------|
| In re: |) | BAP Nos. | CC-06-1085-DKMo |
| |) | | CC-06-1086-DKMo |
| PATEEL BOYAJIAN, |) | | |
| |) | Bk. Nos. | SV 04-11929-KT |
| Debtor. |) | | SV 04-11930-KT |
| _____ |) | | |
| |) | Adv. Nos. | SV 04-01317-KT |
| In re: |) | | SV 04-01318-KT |

SALPY BOYAJIAN,
Debtor.

NEW FALLS CORPORATION,
Appellant,

v.

PATEEL BOYAJIAN,
Appellee.

NEW FALLS CORPORATION,
Appellant,

v.

SALPY BOYAJIAN,
Appellee.

O P I N I O N

Argued and Submitted on February 22, 2007
at Pasadena, California

Filed - March 30, 2007

Appeal from the United States Bankruptcy Court
for the Central District of California

Hon. Kathleen Thompson, Bankruptcy Judge, Presiding

Before: DUNN, KLEIN, and MONTALI, Bankruptcy Judges.

1 DUNN, Bankruptcy Judge:
2

3 The bankruptcy court determined as a matter of law that in
4 order for an assignee creditor to prevail in an exception to
5 discharge adversary proceeding brought pursuant to
6 § 523(a)(2)(B),¹ the assignee creditor must have reasonably
7 relied on the materially false financial statement provided by
8 the debtor. We REVERSE.

9
10 **I. FACTS**

11 On July 13, 1999, Blue Diamond Straw & Toothpick Company,
12 Inc. ("Blue Diamond") entered into a lease agreement ("Epic
13 Lease") with Epic Funding Corporation ("Epic"). Pateel Boyajian
14 ("Pateel") and Salpy Boyajian ("Salpy"), sisters (collectively
15 "Sisters"), were Blue Diamond's President and Vice President,
16 respectively. Pateel and Salpy each signed a Continuing Guaranty
17 of Indebtedness, guaranteeing Blue Diamond's obligations under
18 the Epic Lease ("Guarantees"). In conjunction with signing the
19 Epic Lease and the Guarantees, Pateel and Salpy each provided
20 Epic a personal financial statement dated June 30, 1999,
21 reflecting a personal net worth of \$680,162 and \$719,382,
22 respectively ("Personal Financial Statements").

23 By letter dated February 15, 2000, Blue Diamond advised Epic
24 of cash flow problems that were responsible for delayed payments

25
26 ¹ Unless otherwise indicated, all chapter, section and rule
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
28 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
enacted and promulgated prior to the effective date of most of
the provisions of the Bankruptcy Abuse Prevention and Consumer
Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 ("BAPCPA"),
because the cases from which these appeals arise were filed
before the BAPCPA effective date (generally October 17, 2005).

1 to Epic. Epic sold all of its rights, title and interest in the
2 Epic Lease to Cupertino National Bank dba The Matsco Companies
3 ("Cupertino National Bank") on March 28, 2002.² Ultimately, in
4 May 2002, Blue Diamond defaulted on its obligations under the
5 Epic Lease, and Pateel and Salpy defaulted on the Guarantees. On
6 October 24, 2002, Cupertino National Bank commenced an action in
7 Contra Costa County Superior Court, and a default judgment was
8 entered on January 22, 2003, against Blue Diamond, Pateel and
9 Salpy, jointly and severally, in the amount of \$193,132.69,
10 representing amounts due under the Epic Lease and the Guarantees
11 ("Judgment").

12 Cupertino National Bank then assigned all of its rights,
13 title and interest in the Judgment to Stornawaye Capital, LLC
14 ("Stornawaye") on May 8, 2003. Stornawaye conducted judgment
15 debtor examinations of Pateel and Salpy on November 12, 2003.
16 Subsequently, Stornawaye assigned all of its rights, title and
17 interest in the Judgment to New Falls Corporation ("New Falls")
18 on February 19, 2004.

19 Pateel and Salpy each filed a voluntary chapter 7 petition
20 on March 16, 2004. New Falls brought adversary proceedings
21 against Pateel and Salpy in their respective bankruptcy cases,
22 seeking a declaration that the Judgment was nondischargeable
23 pursuant to § 523(a)(2)(B), based on the Personal Financial
24 Statements, which New Falls alleged were fraudulent. On cross-
25 motions for summary judgment, the bankruptcy court ruled that
26

27
28 ² References to the sequence of assignments are found in
the Adversary Proceeding Complaint, pp. 4-5.

1 because New Falls itself had not relied on the Personal Financial
2 Statements, as a matter of law, it was not entitled to prevail on
3 a cause of action under § 523(a)(2)(B). The bankruptcy court
4 denied New Falls' motions for summary judgment, granted Pateel
5 and Salpy's motions for summary judgment, and entered summary
6 judgments in favor of Pateel and Salpy.³ New Falls appealed.

7 8 **II. JURISDICTION**

9 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
10 §§ 1334 and 157(b)(2)(I). We have jurisdiction over this appeal
11 pursuant to 28 U.S.C. § 158.

12 13 **III. ISSUE**

14 Whether the "reasonable reliance" required by
15 § 523(a)(2)(B)(iii) for a nondischargeable debt incurred with the
16 use of a false financial statement in writing requires reasonable
17 reliance not only by the lender who extended the original credit
18 to a debtor, but also by an assignee.

19
20
21 ³ New Falls' complaints against Pateel and Salpy also
22 included a cause of action under § 523(a)(2)(A), alleging
23 essentially that Blue Diamond was owned and operated by Rostom
24 Boyajian, Pateel and Salpy's father, and that Pateel and Salpy
25 misrepresented themselves as President and Vice President of Blue
26 Diamond because their father, having twice previously filed
27 bankruptcy, was not creditworthy. The bankruptcy court also
28 granted Pateel and Salpy's motions for summary judgment on this
cause of action, stating: "The problem that you have with the
[§]523(a)(2)([A]) is that it is clear that the credit decision
was made knowing that the father was involved with the business.
It's right there in the paperwork." New Falls has not appealed
this decision of the bankruptcy court.

1 **IV. STANDARDS OF REVIEW**

2 Construction of a statute presents a question of law that we
3 review de novo. Duffy v. Dwyer (In re Dwyer), 303 B.R. 437, 439
4 (9th Cir. BAP 2003). We review a bankruptcy court's conclusions
5 of law de novo. Fireman's Fund Ins. Co. v. Grover (In re Woodson
6 Co.), 813 F.2d 266, 270 (9th Cir. 1986). We review summary
7 judgment orders de novo. Tobin v. San Souci Ltd. P'ship (In re
8 Tobin), 258 B.R. 199, 202 (9th Cir. BAP 2001). Viewing the
9 evidence in the light most favorable to the non-moving party, we
10 must determine "whether there are any genuine issues of material
11 fact and whether the trial court correctly applied relevant
12 substantive law." Id.

13
14 **V. DISCUSSION**

15 A. Section 523(a)(2)(B) and its Reliance Element

16 This case turns on the meaning of a provision of the
17 Bankruptcy Code. Accordingly, the place to begin our analysis is
18 with the language of the subject and related statutory
19 provisions.

20 Exceptions to discharge of debts in bankruptcy are specified
21 in § 523(a). The subsection at issue in this appeal is
22 § 523(a)(2)(B), which provides:

23 A discharge under section 727 . . . of this title does not
24 discharge an individual debtor from any debt-

25 . . .
(2) for money, property, services, or an extension, renewal,
or refinancing of credit, to the extent obtained, by-

26 . . .
(B) use of a statement in writing-

27 (i) that is materially false;

28 (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

1 credit reasonably relied; and
2 (iv) that the debtor caused to be made or
published with intent to deceive. . . .

3 The specific question is whether New Falls, an assignee of
4 Epic, is the "creditor to whom the debtor is liable" for purposes
5 of § 523(a)(2)(B)(iii) "reasonable" reliance or, instead, whether
6 Epic is the only creditor whose reliance matters. In other
7 words, must the assignee prove, as required by the bankruptcy
8 court, that it independently "reasonably relied" on a materially
9 false written financial statement?

10 At oral argument, the Sisters conceded that three of the
11 four essential elements prescribed by § 523(a)(2)(B) make sense
12 only in connection with the extension of credit by the original
13 creditor. Specifically, they concede that subparagraph (i)
14 requiring that the statement be materially false, subparagraph
15 (ii) requiring that the statement address financial condition,
16 and subparagraph (iv) requiring intent to deceive all relate to
17 the original creditor at the time of the original transaction and
18 not to that creditor's assignee at some later time.

19 Thus, the question boils down to whether subparagraph (iii)
20 requiring reasonable reliance on the statement "by the creditor
21 to whom the debtor is liable" must, as the bankruptcy court held,
22 be reevaluated each time the claim is assigned.

23 The Sisters assert that a "plain meaning" interpretation of
24 the phrase "by the creditor to whom the debtor is liable"
25 requires each subsequent assignee to demonstrate its own
26 "reasonable reliance" on the debtor's original materially false
27 statement concerning financial condition that was made or
28 published with intent to deceive. They ask that we focus solely

1 on the language of § 523(a)(2)(B)(iii), specifying reasonable
2 reliance by "the creditor to whom the debtor is liable for such
3 money, property, services, or credit," and on the definition of
4 "creditor"⁴ under the Bankruptcy Code. The Sisters assert that
5 § 523(a)(2)(B)(iii) does not specify reasonable reliance by the
6 "original creditor" or the "initial creditor," just the
7 "creditor." Accordingly, based on the "plain meaning" of
8 § 523(a)(2)(B)(iii), viewed separately from the balance of
9 § 523(a)(2)(B), if the "creditor," New Falls, cannot show its own
10 reasonable reliance on the Personal Financial Statements, which
11 apparently it cannot, it is the Sisters' position that New Falls
12 cannot prove a required element of a § 523(a)(2)(B) cause of
13 action, and the bankruptcy court's summary judgment rulings were
14 correct.

15 However, it is not appropriate to consider the language of
16 § 523(a)(2)(B)(iii) in isolation for a number of reasons. First,
17 it is not consistent with the general provision of § 523(a)(2)
18 that a debt is excepted from discharge "to the extent obtained
19 by" the circumstances described in subparagraph (B), which
20 inherently implies a unity of time.

21 Further, if Congress intended that the limited exceptions to
22 discharge under § 523(a) would be further limited in the event of
23 assignment of claims, it knew how to make such provisions
24 explicit, and it did so with respect to obligations for alimony
25 and support in § 523(a)(5)(A):

26
27 ⁴ Section 101(10)(A) defines a "creditor" as an "entity
28 that has a claim against the debtor that arose at the time of or
before the order for relief [filing of the bankruptcy petition]
concerning the debtor."

1 A discharge under section 727, 1141, 1228(a), 1228(b),
2 or 1328(b) of this title does not discharge an
individual from any debt-

3 (5) to a spouse, former spouse, or child of the debtor
4 for alimony to, maintenance for, or support of such
spouse or child . . . , but not to the extent that-

5 (A) such debt is assigned to another entity,
6 voluntarily, by operation of law, or otherwise
7 (other than debts assigned pursuant to section
8 408(a)(3) of the Social Security Act, or any such
debt which has been assigned to the Federal
Government or to a State or any political
subdivision of such State). . . . (emphasis
added).⁵

9 In addition, the Sisters' emphasis on the use of the
10 unmodified term "creditor" in § 523(a)(2)(B)(iii) gives it a
11 significance that Congress never intended and is inconsistent
12 with the other provisions of § 523(a)(2)(B). Indeed, this Panel
13 has held that an assignee can pursue a cause of action under
14 § 523(a)(2)(B) even if the debtor's intent to deceive, for
15 purposes of § 523(a)(2)(B)(iv), was directed at the assigning
16 party. See Tustin Thrift & Loan Ass'n v. Maldonado (In re
17 Maldonado), 228 B.R. 735, 738-740 (9th Cir. BAP 1999).⁶

18 At oral argument, the Sisters' counsel argued from the
19 general principle that exceptions to discharge are narrowly
20 interpreted in favor of debtors (see, e.g., Quarre v. Saylor (In
21 re Saylor), 108 F.3d 219, 221 (9th Cir. 1997)) and pointed to the

23 ⁵ This specific assignment exception is underlined by
24 § 522(f)(1)(A)(ii)(I), which provides that a judicial lien for
25 alimony, maintenance or support of a spouse or child cannot be
26 avoided except to the extent that the debt secured by such
judicial lien has been "assigned to another entity, voluntarily,
by operation of law, or otherwise."

27 ⁶ The issue before us was not raised before the Panel in
28 Maldonado, as reasonable reliance by the assignee creditor was
conceded. Id. at 737.

1 reasonable reliance element under § 523(a)(2)(B)(iii), missing
2 from § 523(a)(2)(A), dealing with other frauds, as having a
3 “moderating” impact in light of the realities of trafficking in
4 financial obligations in our economy, citing Field v. Mans, 516
5 U.S. 59 (1995). However, the “moderating” concerns discussed in
6 Field v. Mans and the underlying legislative history clearly
7 relate to the practices of certain original lenders and have
8 nothing to do with assignment law or the rights of assignees.⁷

9 The House Report on the Act suggests that Congress
10 wanted to moderate the burden on individuals who
11 submitted false financial statements, not because lies
12 about financial condition are less blameworthy than
13 others, but because the relative equities might be
14 affected by practices of consumer finance companies,
15 which sometimes have encouraged such falsity by their
16 borrowers for the very purpose of insulating their own
17 claims from discharge.

18 Id. at 76-77.⁸

19 ⁷ Likewise, neither Field v. Mans nor the subject
20 legislative history address issues with respect to nonconsumer
21 transactions, such as the Epic Lease and Guarantees concerned in
22 these appeals.

23 ⁸ The relevant legislative history states:

24 It is a frequent practice for consumer finance
25 companies to take a list from each loan applicant of
26 other loans or debts that the applicant has
27 outstanding. While the consumer finance companies use
28 these statements in evaluating the credit risk, very
often the statements are used as a basis for a false
financial statement exception to discharge. The forms
that the applicant fills out often have too little
space for a complete list of debts. Frequently, a loan
applicant is instructed by a loan officer to list only
a few or only the most important of his debts. Then,
at the bottom of the form, the phrase “I have no other
debts” is either printed on the form, or the applicant
is instructed to write the phrase in his own
handwriting.

(continued...)

1 B. The Bankruptcy Court's Decision

2 In reaching its decision, the bankruptcy court relied upon
3 the language of § 523(a)(2)(B)(iii) and General Electric Capital
4 v. Bui (In re Bui), 188 B.R. 274 (Bankr. N.D. Ca. 1995). We
5 disapprove Bui for the following reasons.

6 In Bui, General Electric Capital Corporation ("GECC"), as
7 successor-in-interest to Levitz Furniture ("Levitz"), sought to
8 have its debt assigned from Levitz excepted from Bui's discharge
9 pursuant to § 523(a)(2)(B) on the basis that the Levitz Revolving
10 Charge Application completed by Bui allegedly misstated Bui's
11 income. Using the following analogy, the Bui court held that
12 both Levitz and GECC must have relied on the written
13 misstatement:

14 In a situation such as this, involving a "middleman",
15 reliance should be shown by each link in the chain of
16 parties involved. Assume that A sells a ring to B
17 representing in writing that it is a diamond whereas in
18 fact it is a cubic zirconia. B sells it to C. C sells
19 it to D and D sells it to E who discovers the truth.
20 If A filed bankruptcy, does E have a valid cause of
21 action against A under § 523(a)(2)? For bankruptcy
22 purposes, should a debt be non-dischargeable vis a vis
23 a person or entity to whom no misrepresentation was
24 made? It seems clear that, at a minimum, in the
25 absence of an applicable legal presumption, E would
26 have to show that B, C, D and E all reasonably relied
27 on A's original misrepresentation to B. . . . GECC has
28 not demonstrated . . . that, first, Levitz relied on
Bui's allegedly false statement, and second, that GECC
also relied. . . .

23 Id. at 279.⁹

25 ⁸(...continued)

26 H.R. Rep. No. 95-595, at 130 (1978), reprinted in 1978
27 U.S.C.C.A.N. 5787, 6091.

28 ⁹ The analogy is neither apt nor relevant, as it appears to
relate to the sale of a cubic zirconia as a diamond by "false
pretenses, a false representation or actual fraud," actionable
(continued...)

1 No citation to any authority is provided by the Bui court
2 for this proposition. Instead, the Bui court appears to have
3 concluded that the only cases allowing exceptions to discharge
4 based on third-party reliance on false financial statements were
5 limited to situations where a debtor had provided a false
6 financial statement to a credit reporting agency, which provided
7 the service of republishing the financial statement for use by
8 others. Id. at 279-80, citing Rogers v. Gardner, 226 F.2d 864
9 (9th Cir. 1955).

10 Two courts have followed Bui. In Tompkins & McMaster v.
11 Whitenack (In re Whitenack), 235 B.R. 819 (Bankr. D.S.C. 1998), a
12 law firm which represented the buyer of debtor's property failed
13 to identify an outstanding lien in its title examination and
14 failed to take that lien into consideration in the preparation of
15 the closing documents. After the sale closed, the law firm
16 discovered the unpaid lien.

17 When the debtor refused to pay the lien, the law firm did
18 so, and took an assignment both of the lien claim and of any
19 rights the buyer had against the debtor. When the debtor filed
20 bankruptcy, the law firm sought to have its debt held
21 nondischargeable pursuant to § 523(a)(2)(B), asserting that in
22 signing the sale documents, which promised to convey marketable
23 title free of encumbrances, the debtor had provided a false
24 statement in writing with respect to his financial condition.
25 Citing Bui, the Whitenack court stated:

26 _____
27 ⁹(...continued)
28 pursuant to § 523(a)(2)(A), and has nothing to do with obtaining
money or credit through the use of a materially false financial
statement, actionable pursuant to § 523(a)(2)(B).

1 A creditor to whom a Debtor's obligation is assigned,
2 must demonstrate that not only did the assignor
3 reasonably rely on the Debtor's false representation,
but that it also relied on the false representations in
deciding to receive the assignment.

4 Id. at 826. Stating that the law firm could not "divorce itself"
5 from its active participation in the sale transaction, the
6 Whitenack court found either that there was no actual reliance on
7 the written statements, or that the reliance by the buyer and/or
8 the law firm was not reasonable.

9 In Criimi Mae Svcs. Ltd. P'ship. v. Hurley (In re Hurley),
10 285 B.R. 871 (Bankr. D.N.J. 2002), a § 523(a)(2)(A) case, the
11 court denied debtor's motion for summary judgment, to allow the
12 plaintiff to conduct discovery on the reliance element of its
13 cause of action. Plaintiff sought to determine if each
14 successor-in-interest to the original lender relied on the
15 alleged misrepresentations debtor had made with respect to
16 environmental contamination of property secured by the loan at
17 issue.

18 Other bankruptcy courts have held that where the
19 creditor is a successor in interest to an original
20 creditor, the creditor may establish a finding of
21 "justifiable reliance" by showing that each successor
22 to the original creditor relied on the
misrepresentation. Although this issue has not been
addressed by the courts within the Third Circuit, this
court finds the reasoning of the Bui and Whitenack
courts persuasive, and will follow it here.

23 Id. at 876 (citations omitted).

24
25 C. An Assignee Steps into the Shoes of His Assignor

26 The difficulty with the analysis of Bui and the courts that
27 reason similarly is that no account is taken of the legal
28 implications of an assignment. See generally RESTATEMENT (SECOND)

1 OF CONTRACTS §§ 316-43 (1981) (Ch. 15 Assignment and Delegation).

2 "Stated as a basic principle, an assignee merely steps into
3 the shoes of his assignor [citation omitted]. The question of
4 what rights and remedies pass with a given assignment depends on
5 the interest of the parties." State Bar v. Tooks (In re Tooks),
6 76 B.R. 162, 164 (Bankr. S.D. Ca. 1987), citing P. Coast Agric.
7 Exp. Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196, 1208 (9th
8 Cir. 1975). See also 29 WILLISTON ON CONTRACTS § 74:47 (4th ed.
9 2003) ("It has been held repeatedly that the assignee 'stands in
10 the shoes' of the assignor. . . ."); RESTATEMENT (SECOND) OF CONTRACTS
11 § 336(1) ("By an assignment the assignee acquires a right against
12 the obligor only to the extent that the obligor is under a duty
13 to the assignor; and if the right of the assignor would be
14 voidable by the obligor or unenforceable against him if no
15 assignment had been made, the right of the assignee is subject to
16 the infirmity.")

17 In Tooks, the debtor, an attorney, converted \$62,000
18 belonging to an insurance company to his own use. A subsequent
19 criminal restitution order obligated the debtor to reimburse the
20 insurance company. The State Bar's Client Security Fund ("State
21 Bar") made partial reimbursement to the insurance company in the
22 amount of \$24,200, receiving an assignment of the insurance
23 company's rights to the extent of the payment. The debtor did
24 not seek to discharge his obligation to the insurance company,
25 but he did seek to discharge the State Bar's assigned claim.

26 The debtor filed a motion for summary judgment against the
27 State Bar, which the bankruptcy court denied. The assignment at
28 issue transferred "all" rights of the assignor to the State Bar,

1 and the issue was whether, as a matter of law, the
2 nondischargeable character of the assignee's claim was excepted
3 from transfer. The bankruptcy court held that it was not.

4 Although the Tooks case involved causes of action under
5 §§ 523(a)(4) and (a)(6), the analysis is equally applicable to a
6 § 523(a)(2) cause of action. In fact, as stated by the
7 bankruptcy court in In re Geriatrics Nursing Home, Inc., 195 B.R.
8 34, 38 (Bankr. D.N.J. 1996):

9 [I]t is not sensible to argue that a purchaser of [a]
10 claim who takes an assignment of the claim does not
11 step into the shoes of the assignor. Neither the
12 Bankruptcy Code nor the Bankruptcy Rules restrict the
13 ability of an assignee to assert all the rights of a
14 creditor. In the absence of inequitable conduct, the
15 court cannot discern any basis for limiting the rights
16 of an assignee of a claim.

14 This Panel has recognized the right of an assignee creditor
15 to pursue an outright denial of discharge to a debtor under
16 § 727(a). See Ota v. Samsung Elec. Co., Ltd. (In re Ota), 192
17 B.R. 545 (9th Cir. BAP 1996). In Ota, the debtor owed money to a
18 supplier to his business, and the supplier, in turn, owed money
19 to Samsung. When the supplier experienced financial
20 difficulties, it partially satisfied its obligation to Samsung by
21 assigning to Samsung its claim against the debtor, prepetition.
22 When the debtor filed for bankruptcy protection in chapter 7,
23 Samsung filed an adversary proceeding against the debtor, seeking
24 to deny him a discharge pursuant to §§ 727(a)(3) and (a)(5). The
25 debtor argued that Samsung, as an assignee creditor, had no
26 standing to object to his discharge. Our Panel disagreed,
27 holding that "absent an improper purpose or motive, an assignee
28 or purchaser of claims has standing to object to a debtor's

1 discharge." Id. at 549. See Luke v. Clegg (In re Clegg), 352
2 B.R. 912, 920-21 (Bankr. M.D. Ga. 2006) (Whether an assignee
3 acquires a creditor's claim pre- or postpetition, unless the
4 assignee had an improper purpose in acquiring the claim, the
5 assignee steps into the shoes of the assignor creditor and can
6 assert all of the assignor creditor's rights.).

7 In other decisions of this Panel, the rights of assignees to
8 bring exception to discharge actions under § 523(a)(2)(B) have
9 been recognized implicitly. See, e.g., Smith v. Lachter (In re
10 Smith), 242 B.R. 694 (9th Cir. BAP 1999) (plaintiffs asserted
11 judgment creditor rights of a dissolved corporation based on an
12 assignment; no discussion of the fact or implications of the
13 assignment on the § 523(a)(2)(B) cause of action and its
14 elements); Berr v. FDIC (In re Berr), 172 B.R. 299 (9th Cir. BAP
15 1994) (FDIC as successor-in-interest to a state bank; no
16 discussion of the fact or implications of the successor interest
17 on the § 523(a)(2)(B) cause of action and its elements).¹⁰

18 19 D. New Falls as Assignee

20 As alleged in the complaint, Epic sold all of its rights,
21 title and interest in the Epic Lease to Cupertino National Bank
22 on March 28, 2002. Cupertino National Bank then obtained the
23 Judgment against Blue Diamond, Pateel, and Salpy, and on May 8,
24 2003, assigned all of its rights, title and interest in the
25

26 ¹⁰ While instructive, Smith and Berr are not binding
27 precedents in this instance, because the issue before us was not
28 raised in either case. See Ball v. Payco-Gen. Am. Credits (In re
Ball), 185 B.R. 595 (9th Cir. BAP 1995).

1 Judgment to Stornawaye. Ultimately, Stornawaye assigned all of
2 its rights, title and interest in the Judgment to New Falls.¹¹

3 Imposing a requirement that New Falls prove its own
4 reliance, independent of Epic's, not only imposes a barrier to
5 enforcement of its assignment rights, it makes no sense when
6 applying the remedy made available under § 523(a)(2)(B). A
7 similar theory was posited by the debtor in FDIC v. Meyer (In re
8 Meyer), 120 F.3d 66 (7th Cir. 1997), but rejected by the court.
9 In Meyer, the debtor, who had guaranteed a loan Commercial
10 Finance made to the company of which he was an officer and
11 director, asserted that subsequent assignments of the Commercial
12 Finance debt precluded a nondischargeability action against him.
13 The Meyer court articulated the flaws in this position.

14 [Meyer's theory] is that Commercial Finance's
15 assignment of the loan payments to its parent (then
16 Federal Bank, now the FDIC) somehow bars the parent
17 from pursuing Meyer for non-discharge. The theory goes
18 like this. Meyer never misled Federal Bank; Meyer had
19 no written or oral agreements with Federal Bank; thus,
20 Federal Bank has no claim against Meyer. This argument
21 betrays a fundamental misunderstanding of contract law.
22 The fallacy in Meyer's reasoning is best laid out in
23 this example. Creditor lends money to Debtor, based on
24 Debtor's representations. Creditor assigns the loan to
25 Assignee. Later, Debtor is revealed to have lied to
26 Creditor. (The only wrinkle in this case is that Meyer
27 is the guarantor for a defaulting Debtor.) Meyer is
28 saying that Assignee has no legal recourse against
Debtor. That cannot be true: the very reason that the

23 ¹¹ The record does not contain a complete copy of any of
24 the assignments. In their briefs Pateel and Salpy assert that
25 New Falls' failure to provide a copy of the each assignment
26 compels us to affirm the bankruptcy court. The absence of the
27 assignments for review is not significant, however, because we
28 are faced only with the general legal issue as to whether
reliance by the assignee must be demonstrated, as a matter of
law, in order for New Falls to defeat the Sisters' motions for
summary judgment and proceed to trial on its § 523(a)(2)(B)
causes of action.

1 institution of assignment exists is to enable Creditor
2 to transfer its rights against Debtor (Meyer) to
Assignee (Federal Bank).

3 Id. at 70.

4 Pateel and Salpy make the same argument rejected by the
5 Meyer court, albeit with a slight twist. They assert New Falls
6 cannot demonstrate reliance on the Personal Financial Statements,
7 either because they did not provide New Falls with the Personal
8 Financial Statements, or because it was not reasonable for New
9 Falls to rely on the Personal Financial Statements, which were
10 nearly 5 years old at the time New Falls took its assignment of
11 the Judgment. The former argument is squarely addressed by
12 Meyer. The latter argument raises the issue of timing of fraud.
13 However, the age of the Personal Financial Statements at the time
14 of the assignment, any assignment, is a red herring.

15 For purposes of [§] 523(a)(2), however, the timing of
16 the fraud and the elements to prove fraud focus on the
17 time when the lender . . . made the extension of credit
18 to the Debtor. In other words, [the] assignee of the
19 Agreement . . . steps into the shoes of its
20 assignor . . . , and the inquiry of whether a creditor
21 justifiably relied on Debtor's alleged
22 misrepresentations is focused on the moment in time
23 when that creditor extended the funds to Debtor. See
McClellan v. Cantrell, 217 F.3d 890, 896 (7th Cir.
2000) (Ripple, Circuit Judge, concurring) (noting
21 Congress' use of "obtained by" in § 523(a)(2) "clearly
22 indicates that fraudulent conduct occurred at the
23 inception of the debt, i.e. the debtor committed a
fraudulent act to induce the creditor to part with his
money or property.").

24 Bombardier Capital, Inc. v. Dobek (In re Dobek), 278 B.R. 496,
25 508 (Bankr. N.D. Ill. 2002).

26 While Dobek and McClellan are both cases decided under
27 § 523(a)(2)(A), because the "obtained by" language also is part
28 of the text of § 523(a)(2)(B), the same analysis is applicable in

1 nondischargeability cases under § 523(a)(2)(B). Considered as a
2 whole, § 523(a)(2)(B) links in time:

- 3 1) money or credit,
- 4 2) obtained by the debtor,
- 5 3) by use of a materially false financial statement,
- 6 4) that was reasonably relied upon by the creditor when the
7 original transaction was consummated.

8 For purposes of § 523(a)(2)(B)(iii), the term “creditor to whom
9 the debtor is liable” necessarily is a temporal concept, relating
10 to the creditor who extended credit to the debtor when the loan
11 was made. It would be absurd to interpret it otherwise.

12 13 E. Policy Considerations

14 The basic policy supporting discharges in bankruptcy is to
15 give the honest but unfortunate debtor a fresh start. Marrama v.
16 Citizens Bank of Mass., __ U.S. __, 127 S.Ct. 1105, 1107 (2007);
17 Brown v. Felsen, 442 U.S. 127, 128 (1979).

18 The Tooks court discussed the policy considerations
19 implicated by failure to make the exception to discharge
20 provisions of the Code available to assignees:

21 In the future, a dishonest debtor will know that he
22 will be protected from the financial consequence of his
23 wrongdoing in situations where a surety agrees to pay
24 the victim. The debt will be paid by the surety to the
25 victim/creditor and, since the surety would not have
26 assignment rights, the debtor will be effectively
27 discharged from the consequences of his own willful and
28 malicious conduct.

26 Tooks, 76 B.R. at 164. The bankruptcy court below expressed the
27 same concerns in the § 523(a)(2)(B) context: “Because really
28 what you’re saying to me it’s okay to lie . . . in order to get

1 the credit because if you're really lucky somebody else will come
2 along and purchase this debt. . . ." Transcript of December 8,
3 2005 Hearing, pp. 35-36.

4 There is no policy expressed in the Bankruptcy Code to
5 reward such dishonesty by debtors, and no such policy should be
6 implemented in the absence of clear direction from Congress. The
7 bare use of the term "creditor" in § 523(a)(2)(B)(iii) does not
8 provide such clear guidance.

9
10 **VI. CONCLUSION**

11 The principles of assignment, case law allowing assignees to
12 prosecute § 727 denial of discharge and § 523(a)(2)(B) exception
13 to discharge causes of action without imposing a requirement that
14 the assignee establish a chain of reliance, the nature of fraud
15 and when it occurs, and the policy considerations regarding the
16 discharge of debts in bankruptcy all lead us to conclude that the
17 bankruptcy court erred when it required, as a matter of law, that
18 New Falls establish its own reliance, independent of Epic's, on
19 the Personal Financial Statements as a condition to prevailing on
20 a cause of action under § 523(a)(2)(B). The bankruptcy court
21 erred as a matter of law in granting Pateel and Salpy's motions
22 for summary judgment against New Falls on the § 523(a)(2)(B)
23 causes of action. We REVERSE and REMAND.