

JUL 11 2014

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. CC-13-1382-PaKuBl
STEVE BARLAAM,) CC-13-1503-PaKuBl
Debtor.) (Cross Appeals)
) CC-13-1500-PaKuBl
) (Related Appeal)

STEVE BARLAAM,) Bankr. No. 11-13387-GM
Appellant/Cross-Appellee,) Adv. Proc. 11-01402-GM

v.) **M E M O R A N D U M**¹

FINANCIAL SERVICES VEHICLE TRUST,)
BY AND THROUGH ITS SERVICER, BMW)
FINANCIAL SERVICES NA, LLC,)
Appellee/Cross-Appellant.)

FINANCIAL SERVICES VEHICLE TRUST,)
BY AND THROUGH ITS SERVICER, BMW)
FINANCIAL SERVICES NA, LLC,)
Appellant,)

v.)
STEVE BARLAAM,)
Appellee,)

Argued and Submitted on June 26, 2014,
at Pasadena, California

Filed - July 11, 2014

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

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 Honorable Geraldine Mund, Bankruptcy Judge, Presiding

2
3 Appearances: Deborah Young of Ayayo Law Offices argued for Steve
4 Barlaam; Rebecca A. Caley of Caley & Associates
argued for Financial Services Vehicle Trust.

5 Before: PAPPAS, KURTZ and BLUMENSTIEL,² Bankruptcy Judges.

6
7 In BAP No. CC-11-1382, chapter 7³ debtor Steve Barlaam
8 ("Barlaam") appeals the judgment ("Judgment") of the bankruptcy
9 court declaring that his debts to Financial Services Vehicle
10 Trust, by and through its servicer, BMW Financial Services NA, LLC
11 ("BMW FS") are excepted from discharge under § 523(a)(2)(B). In
12 BAP No. CC-11-1503, BMW FS cross-appeals that portion of the
13 Judgment denying its request for an award of attorney's fees and
14 costs. In BAP No. 11-1500, BMW FS appeals the order ("Order") of
15 the bankruptcy court denying its Motion to Amend the Judgment to
16 Include Attorney's Fees.

17 We AFFIRM that part of the Judgment declaring that Barlaam's
18 debts to BMW FS are excepted from discharge. However, we REVERSE
19 the bankruptcy court's Judgment and Order denying BMW FS' request
20 for attorney's fees and costs.⁴

21
22
23 ² Hon. Hannah L. Blumenstiel, U.S. Bankruptcy Judge for the
24 Northern District of California, sitting by designation.

25 ³ Unless otherwise indicated, all chapter and section
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532 and
all Rule references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037.

27 ⁴ While there are three appeals, under the circumstances, we
28 have elected to dispose of the issues and appeals in this single
Memorandum.

1 **FACTS**

2 **Background**

3 Barlaam had a penchant for high-priced automobiles. Between
4 2004 and 2010, he leased or purchased nine luxury cars and, with
5 the exception of the two involved in this appeal, paid in full or
6 satisfied the lease payment terms for all of them. As was his
7 practice, Barlaam was assisted in his acquisition of the
8 automobiles involved here by his personal assistant, Dan Ruderman
9 ("Ruderman"). When Barlaam wanted a new vehicle, he instructed
10 Ruderman to research cars and dealerships and, if he found a
11 likely candidate, negotiate a deal for Barlaam. Again, with the
12 exception of the two cars in these appeals, Ruderman took any
13 required credit applications from the dealer to Barlaam, who
14 delivered the completed applications to the dealers.

15 **The 2009 Rolls Royce Phantom Sapphire (the "Rolls Royce")**

16 One of the debts implicated in these appeals arises from
17 Barlaam's lease of a 2009 Rolls Royce Phantom Sapphire (the "Rolls
18 Royce"). Barlaam had previously leased three vehicles from Tim
19 O'Hara ("O'Hara"), general manager of O'Gara Coach Company
20 ("O'Gara"). Acting on Barlaam's instructions, Ruderman requested
21 that O'Hara locate a special edition Rolls Royce for Barlaam.
22 When O'Hara found such a car, Ruderman went to the O'Gara
23 dealership and obtained from O'Hara the "sticker" concerning the
24 Rolls Royce, and the basic figures for a possible lease. After
25 reviewing this information, Barlaam instructed Ruderman to return
26 to O'Gara and negotiate the terms for a lease of the Rolls Royce,
27 which included a trade-in of one of the Ferraris he was leasing.
28 Ruderman returned to O'Gara on December 27, 2008, and negotiated a

1 lease of the Rolls Royce.

2 That same day, a credit application for Barlaam was
3 electronically submitted by O'Gara to BMW FS and entered into the
4 BMW FS "APPRO" software system. One of the key disputes in this
5 appeal is who provided the information that was sent by O'Gara to
6 BMW FS via the APPRO system, and who filled out the information on
7 the written application that was given to O'Gara, which Barlaam
8 had signed. The information submitted to APPRO was, in some
9 respects, incorrect, including a variance on Barlaam's social
10 security number. Even so, the APPRO system identified Barlaam as
11 a prior customer. Three days later, after two credit analysts at
12 BMW FS reviewed the credit application information, BMW FS
13 notified O'Gara that it had approved Barlaam's application to
14 lease the Rolls Royce.

15 Barlaam personally went to the O'Gara dealership and signed
16 the lease and other required documents, including the credit
17 application. It is disputed whether, and to what extent, Barlaam
18 examined the credit application before signing it. The bankruptcy
19 court would later determine that the credit application contained
20 material errors, including an incorrect statement of Barlaam's
21 annual gross income, which the application showed to be \$720,000.

22 The Rolls Royce lease that Barlaam executed required him to
23 make an initial payment of \$15,000, together with forty-eight
24 monthly payments of \$6,193.26. After completing the paperwork,
25 Barlaam took possession of the Rolls Royce; O'Gara then assigned
26 the lease to BMW FS. After making seventeen timely monthly
27 payments, Barlaam defaulted in June 2010. At some point, Barlaam
28 surrendered the Rolls Royce, which was sold by BMW FS at a dealer

1 auction for \$246,000.

2 **The BMW 750i**

3 Barlaam reserved use of the Rolls Royce for "special"
4 occasions. In his view, he needed an "everyday" car, one with
5 good headrest support; Barlaam found that BMW cars were
6 comfortable. Barlaam had no prior contact with BMW dealers, and
7 assigned Ruderman to seek out a dealership, a car, and a deal.

8 Ruderman went to the Steve Thomas BMW dealership to discuss a
9 potential lease of a BMW 750i (the "750i"). Neither Ruderman nor
10 Barlaam had prior dealings with Steve Thomas BMW. The dealership
11 manager provided him with the lease numbers for the 750i.
12 Ruderman phoned Barlaam, who agreed to the deal.

13 Steve Thomas BMW submitted an electronic credit application
14 for the proposed Barlaam lease to BMW FS on April 19, 2010. In
15 it, Barlaam's gross annual income was listed as \$520,000. After
16 analysis via the APPRO software by a credit analyst, BMW FS
17 approved the lease application the same day.

18 Barlaam went to Steve Thomas BMW and signed all of the
19 required documents for the transaction, including the credit
20 application and lease. Again, it is disputed whether and to what
21 extent Barlaam examined the credit application before he signed
22 it. The lease Barlaam signed provided that Barlaam would pay
23 \$2,861.36 at signing, and then make thirty-six monthly payments of
24 \$1,618.00. After completing the paperwork, Barlaam took
25 possession of the 750i. Steve Thomas BMW assigned the lease to
26 BMW FS.

27 After making eleven timely lease payments on the 750i,
28 Barlaam defaulted in March 2011. The 750i was later sold at

1 dealer auction for \$79,500.

2 **The Bankruptcy and Adversary Proceeding**

3 Barlaam filed a petition for relief under chapter 7 on
4 March 18, 2011. The bankruptcy court granted BMW FS's unopposed
5 motion for relief from stay to repossess and sell the Rolls Royce
6 and 750i, which it did.

7 On June 3, 2011, BMW FS filed a complaint against Barlaam
8 seeking an exception to discharge under § 523(a)(2)(B) for the
9 remaining amounts due on Barlaam's leases of the Rolls Royce and
10 750i after application of the sales proceeds. BMW FS alleged that
11 the two credit applications Barlaam signed and submitted to lease
12 the vehicles contained materially false representations as to his
13 financial condition; that he submitted them with the intent not to
14 pay his obligations; and that BMW FS reasonably relied on the
15 false credit applications in extending credit to Barlaam in the
16 leases. In addition to the discharge exception, BMW FS also
17 sought a money judgment against Barlaam equal to the unpaid amount
18 due on the leases, together with an award of attorney's fees and
19 costs.

20 Barlaam, appearing initially pro se in the adversary
21 proceeding, answered the complaint with a general denial. Barlaam
22 filed a motion to dismiss the complaint, arguing that BMW FS's
23 reliance on the credit applications could not have been
24 reasonable, as required by § 523(a)(2)(B)(iii), because he did not
25 personally supply the allegedly false information contained in the
26 credit applications. The bankruptcy court treated this as a
27 motion for summary judgment and BMW FS submitted its own summary
28 judgment motion, arguing that there were no disputed issues of

1 fact as to each of the elements for exception to discharge under
2 § 523(a)(2)(B).

3 The bankruptcy court conducted a hearing on the competing
4 summary judgment motions and then entered a Memorandum of Opinion
5 Regarding Plaintiff and Defendant Motions for Summary Judgment
6 ("SJ Memorandum"). The court concluded that, of the seven
7 required elements for an exception to discharge under
8 § 523(a)(2)(B), BMW FS had established the materiality of the
9 representations in the credit applications, Barlaam's knowledge of
10 their falsity, Barlaam's intent to deceive BMW FS, and that BMW FS
11 had suffered damages proximately caused by Barlaam's
12 misrepresentations. However, the bankruptcy court determined that
13 the undisputed facts did not support the other three required
14 elements for a BMW FS discharge exception, and that a trial would
15 be required to examine whether Barlaam actually made the
16 misrepresentations, whether BMW FS actually and reasonably relied
17 on the misrepresentations, and the amount of damages to BMW FS.

18 A two-day trial followed, at which the court heard testimony
19 from Barlaam, Ruderman, and Kenneth Cioli, a national credit
20 manager for BMW FS. The court entered a Memorandum of Opinion
21 Regarding Judgment for Plaintiff After Trial on July 31, 2013 (the
22 "Trial Memorandum"). The court found that Barlaam and Ruderman
23 were, generally, not credible, and that the testimony of Cioli was
24 credible. In addition to restating its conclusions about the
25 facts established in the SJ Memorandum, the court made several
26 additional critical fact findings and legal conclusions:

27 - "Barlaam was aware of the falsity of his income as filled
28 out on the credit applications he signed before delivery of the

1 cars was made. The Court finds that he reviewed the credit
2 applications and knew of the inaccuracies and accepted these as
3 true statements through the act of signing them." Trial
4 Memorandum at 17.

5 - "BMW FS did rely on the information provided on the credit
6 applications and only authorized the dealership to hand over the
7 keys to the car[s] once Barlaam had signed the required
8 documents." Trial Memorandum at 19.

9 - "This Court has already found that the process by which
10 BMW FS makes its credit decisions is reasonable and that to rely
11 on Defendant's statements without further independent inquiry is
12 also reasonable." Trial Memorandum at 19.

13 - "The damages incurred by Plaintiff through both leases
14 total \$118,470.85." Trial Memorandum at 23.

15 - "The attorney's fees clause [in the leases]. . . is simply
16 not broad enough to cover fraud in the inducement. . . .
17 Plaintiff's request for attorney's fees is denied." Trial
18 Memorandum at 25.

19 Based upon these findings and conclusions, the bankruptcy
20 court entered the Judgment, awarding \$118,924.22 in damages to
21 BMW FS, and determining that the award was excepted from discharge
22 under § 523(a)(2)(B). The Judgment denied BMW FS' request for an
23 award of attorney's fees and costs.

24 Barlaam filed a timely appeal of the Judgment on August 9,
25 2013.

26 BMW FS filed a motion under Rule 9023, which incorporates
27 Civil Rule 59(e), to amend the Judgment on August 13, 2013,
28 arguing that, under the terms of both leases, it was entitled to

1 recover its attorney's fees and costs. Barlaam opposed the
2 motion, asserting that the plain language of the leases did not
3 allow for an award of attorney's fees in what was essentially an
4 action for fraud. In a Memorandum of Opinion Denying Plaintiff's
5 Motion to Amend (the "Reconsideration Memorandum"), the court
6 reaffirmed its conclusion in the Trial Memorandum that the
7 attorney's fee provision in the leases referred only to
8 "collection" of amounts due under contract, not tort claims, and
9 again denied BMW FS's request for attorney's fees. An order
10 denying the BMW FS motion was entered on October 1, 2013 (the
11 "Reconsideration Order").

12 BMW filed a timely appeal of the Reconsideration Order and a
13 timely cross-appeal of the portion of the Judgment denying its
14 request for attorney's fees.

15 JURISDICTION

16 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
17 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C. § 158.

18 ISSUES

19 Whether the bankruptcy court erred in determining that
20 Barlaam's debts to BMW FS were excepted from discharge under
21 § 523(a)(2)(B).

22 Whether the bankruptcy court abused its discretion in denying
23 BMW FS's request for attorney's fees.

24 STANDARDS OF REVIEW

25 In reviewing a bankruptcy court's determination of an
26 exception to discharge, we review its findings of fact for clear
27 error and its conclusions of law de novo. Oney v. Weinberg
28 (In re Weinberg), 410 B.R. 19, 28 (9th Cir. BAP 2009).

1 We review the bankruptcy court's decision to award or deny
2 attorney's fees for abuse of discretion, but any elements of
3 statutory interpretation which figure in the bankruptcy court's
4 decision are reviewable de novo. Evon v. Law Offices of Sidney
5 Mickell, 688 F.3d 1015, 1032 (9th Cir. 2012). Under the abuse of
6 discretion standard, we "affirm unless the [bankruptcy] court
7 applied the wrong legal standard or its findings were illogical,
8 implausible or without support in the record." Gonzalez v. City
9 of Maywood, 729 F.3d 1196, 1201-02 (9th Cir. 2013).

10 The bankruptcy court's interpretation of contract terms is
11 reviewed de novo. United States v. 300 Units of Rentable Hous.,
12 668 F.3d 1119, 1122 (9th Cir. 2012).

13 DISCUSSION

14 I.

15 **The bankruptcy court did not err in deciding that Barlaam's debts**
16 **to BMW FS were excepted from discharge under § 523(a)(2)(B).**

17 A debt resulting from a creditor's reasonable reliance on a
18 debtor's written false representation concerning his or her
19 financial condition may be excepted from discharge under
20 § 523(a)(2)(B), which provides:

21 (a) A discharge under . . . this title does not
22 discharge an individual debtor from any debt . . .
23 (2) for money, property, services, or an extension,
24 renewal, or refinancing of credit, to the extent
25 obtained by . . . (B) use of a statement in writing -
26 (I) that is materially false; (ii) respecting the
27 debtor's or an insider's financial condition; (iii) on
28 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[.]

27 The Ninth Circuit has enumerated the necessary elements for a
28 § 523(a)(2)(B) discharge exception, requiring that there be a

1 writing that contains: "(1) a representation of fact by the
2 debtor, (2) that was material, (3) that the debtor knew at the
3 time to be false, (4) that the debtor made with the intention of
4 deceiving the creditor, (5) upon which the creditor relied,
5 (6) that the creditor's reliance was reasonable, [and] (7) that
6 damage proximately resulted from the representation." Candland v.
7 Ins. Co. of N. Am. (In re Candland), 90 F.3d 1466, 1469 (9th Cir.
8 1996) (quoting Siriani v. Nw. Nat'l Ins. Co. (In re Siriani),
9 967 F.2d 302, 304 (9th Cir. 1992)). The creditor seeking an
10 exception must prove these elements by a preponderance of the
11 evidence. Grogan v. Garner, 498 U.S. 279, 291, 111 S. Ct. 654,
12 112 L. Ed. 2d 755 (1991).

13 The bankruptcy court addressed and made appropriate findings
14 on each of these seven criteria in the SJ Memorandum and Trial
15 Memorandum. As discussed below, we find no error in the court's
16 decision that Barlaam's debt to BMW FS is excepted from discharge
17 under § 523(a)(2)(B).

18 **A. There must be a statement in writing by the Debtor**
19 **containing a false representation of fact.**

20 At the heart of this appeal are two credit applications
21 executed by Barlaam, one in 2008 in seeking lease financing for
22 the Rolls Royce, the other in 2010 to support the lease financing
23 for the 750i. The credit applications each contain information
24 about Barlaam's allegedly then-current annual income. A credit
25 application containing information about an applicant's income
26 constitutes a statement in writing respecting the applicant's
27 financial condition for purposes of § 523(a)(2)(B). Cashco Fin.
28 Servs. v. McGee (In re Cashco), 359 B.R. 764, 768 (9th Cir. BAP

1 2006); Bayer Empl. Credit Union v. Sapp (In re Sapp), 364 B.R.
2 618, 627 (Bankr. N.D. W.Va. 2007) (holding that it is axiomatic
3 that a signed credit application is a writing considered under
4 § 523(a)(2)(B)(ii)).

5 Barlaam testified that he signed the credit application for
6 the Rolls Royce at the O'Gara dealership on December 30, 2008. He
7 acknowledged in that testimony that the line on the application
8 directly above his signature states, in part, "This information in
9 the application is true and correct to the best of my knowledge."
10 Trial Tr. 81:24-25. Barlaam also testified that he signed the
11 credit application for the 750i at Steve Thomas BMW on April 23,
12 2010. The two credit applications are identical in form, and the
13 750i application likewise contained the same assurance by Barlaam
14 that the information in the application was true and correct.

15 On the Rolls Royce application, submitted in 2008, Barlaam's
16 gross annual income was listed at \$720,000. On the 750i
17 application, submitted in 2010, Barlaam's gross annual income was
18 listed at \$520,000. However, the evidence presented to the
19 bankruptcy court in connection with the summary judgment motions
20 and at trial showed that Barlaam's income at those times was much,
21 much lower. For example, Barlaam's federal income tax return for
22 2008 was submitted to the bankruptcy court in connection with the
23 summary judgment motions, and it reported Barlaam had adjusted
24 gross income of just \$8,852 for that year. Barlaam had testified
25 at his § 341(a) meeting of creditors in the bankruptcy case under
26 penalty of perjury that he earned about \$100,000 in 2008. And
27 Barlaam testified at trial, confirming the amounts reported on his
28 2008 tax return and in his comments at the § 341(a) meeting.

1 The disparity between income reported on the 750i credit
2 application, \$520,000, and the documents submitted by BMW FS in
3 the summary judgment proceedings was also striking. Barlaam's
4 income on his 2010 federal return was a negative (\$54,312).
5 Barlaam's Statement of Financial Affairs filed in his bankruptcy
6 case stated his income for 2010 was only \$13,800.

7 At best, then, based upon this evidence, there was a serious
8 question of fact as to the amount of Barlaam's income in 2008 and
9 2010. And based on the evidence in the record, the bankruptcy
10 court was justified in finding that the income information in the
11 credit applications was false. In other words, the two credit
12 applications were writings about Barlaam's financial condition
13 within the meaning of § 523(a)(2)(B) and they contained false
14 information. Barlaam does not dispute this.

15 What has been heatedly contested, however, was the source of
16 the income information contained in the credit applications. Both
17 Barlaam and Ruderman testified that neither of them provided the
18 information used in the credit applications and, instead, that for
19 both the Rolls Royce and 750i credit applications, it was the
20 dealers that provided the information sent to BMW FS.

21 The only testimony heard by the bankruptcy court concerning
22 the source of the information on the credit applications came from
23 Barlaam and Ruderman; there was no testimony or declarations from
24 the dealers. Indeed, Ruderman speculated in his testimony that
25 the Rolls Royce dealer, in the midst of the 2008 recession with
26 few sales, was so desperate to make a sale that O'Hara might have
27 made up information submitted in the credit application to BMW FS.
28 But the bankruptcy court discounted this speculation, concluding

1 instead that the Rolls Royce dealer "had every reason to believe
2 Barlaam would qualify." The record amply supports this finding.
3 Indeed, Barlaam had paid over \$300,000 for the 2005 Rolls Royce
4 purchased through O'Gara and, as far as the dealer knew, Barlaam
5 had an unblemished credit history.

6 In addition, Ruderman's credibility was cast into doubt
7 concerning his comments that the Steve Thomas BMW manager who sold
8 Barlaam the 750i told him that he would submit the credit
9 information electronically from information already existing in
10 the system. The bankruptcy court, however, had testimony from Ken
11 Cioli, national credit manager for BMW FS, attesting that a local
12 BMW dealer would not have access to BMW FS's financial databases
13 and, because there was no prior business relationship between
14 Barlaam and Steve Thomas BMW, there would be no information in
15 their computer files about him. Moreover, Cioli pointed out, in
16 the unlikely event that Steve Thomas BMW somehow got access to the
17 BMW FS databases, it would have found that Barlaam had reported
18 his income in 2008 to be \$720,000, and the dealer would not likely
19 have plucked the \$520,000 income out of thin air.

20 The bankruptcy court also found that Barlaam lacked
21 credibility concerning numerous issues and, in particular, in
22 connection with his repeated assertions that he never read the
23 information on the credit applications before he signed them.
24 Indeed, Barlaam's position is inconsistent with his other
25 testimony:

26 BMW FS COUNSEL: When you came in on both occasions for
27 the [Rolls Royce} Phantom and for the [750i] BMW, you
28 didn't read any of the documents? You just signed them?

. . .

1 BARLAAM: Ask again the question, because you're
2 confusing me.

3 BMW FS COUNSEL: You just signed and didn't read any of
4 the documents. You just signed them.

5 BARLAAM: No, I glanced over to see what I was signing.
6 I didn't review every single word.

7 Trial Tr. 91:13-18, July 8, 2013. Based upon this testimony, the
8 bankruptcy court explained:

9 While Barlaam repetitively asserts that he did not even
10 turn over the credit application, he also stated that he
11 scanned the documents before signing them. Each credit
12 application is only a single page, no small print, and
13 includes just a few numbers. Because he scanned it, he
14 could not possibly have missed the errors.

15 Trial Memorandum at 14.

16 We discuss below the evidence concerning Barlaam's intent to
17 deceive. But for purposes of this element of the § 523(a)(2)(B)
18 exception, we conclude that the bankruptcy court did not clearly
19 err in determining that Barlaam made written [mis]representations
20 of fact concerning his financial condition. In re Candland,
21 90 F.3d at 1466 (instructing that whether there was a
22 misrepresentation is a question of fact for the bankruptcy court
23 reviewed on appeal for clear error.).

24 **B. The misrepresentation must be material.**

25 To constitute a material misrepresentation under
26 § 523(a)(2)(B), the debtor's statement must be substantially
27 inaccurate, and of the type that would affect the creditor's
28 decision making process:

To except a debt from discharge, the creditor must show
not only that the statements are inaccurate, but also
that they contain important and substantial
untruths. . . . Material misrepresentations for this
statutory section are substantial inaccuracies of the

1 type which would generally affect a lender's or
2 guarantor's decision. . . . Significant
3 misrepresentations of financial condition – of the
4 order of several hundred thousand dollars – are of the
5 type which would generally affect a lender's or
6 guarantor's decision.

7 In re Candland, 90 F.3d at 1470 (citing First Interstate Bank of
8 Nev. (In re Greene), 96 B.R. 279, 283 (9th Cir. BAP 1989));
9 Tallant v. Kaufman (In re Tallant), 218 B.R. 58, 71 (9th Cir. BAP
10 1998) ("'Material falsity' in a financial statement can be
11 premised upon the inclusion of false information or upon the
12 omission of information about a debtor's financial condition.").

13 In the bankruptcy court's SJ Memorandum, it found the
14 misrepresentation of Barlaam's income on the two credit
15 applications to be material:

16 The misrepresentations of \$100,000s of Defendant's
17 income are precisely the type of misrepresentations
18 cited by Candland that would affect a lender's decision
19 to lend. They were material both (1) in the sense that
20 income is one of the most (if not the most) important
21 facts in the application and (ii) the amount of the
22 income misstatement.

23 SJ Memorandum at 11.

24 The bankruptcy court's finding on materiality is supported by
25 evidence in the record of the summary judgment proceedings. The
26 team leaders of the two credit analyst groups at BMW FS that
27 approved the Barlaam applications submitted declarations that
28 included the following comments:

Had [BMW FS] known that [Barlaam's] income was either
zero or \$13,800, [BMW FS] would never have approved the
application on behalf of [Barlaam] as there would have
been no income stream to support the lease, much less
support all his other credit obligations and living
expenses.

Declaration of Donald Skeen [Team Leader of the BMW FS credit

1 analyst team that approved the Rolls Royce lease] at 6, July 3,
2 2012.

3 Had [BMW FS] known that [Barlaam's] income was either
4 zero or \$100,000, [BMW FS] would never have approved the
5 application on behalf of [Barlaam] as there would have
6 been no income stream to support the lease, much less
7 support all his other credit obligations and living
8 expenses.

9 Declaration of Jason Bozarth [Team Leader of the analyst team that
10 approved the 705i lease] at 7, July 3, 2012.

11 The bankruptcy court's finding on materiality was further
12 supported at trial by the testimony of Cioli:

13 BMW FS COUNSEL: And had Mr. Barlaam's annual income
14 actually been \$13,800 for the month, would that have
15 been something you would approve the deal on? \$13,800 a
16 year? . . .

17 [CIOLI]: No. That dollar amount per year wouldn't
18 support - it wouldn't support one of the Rolls Royce
19 payments.

20 Trial Tr. 160:3-14, July 9, 2013.

21 Here, the bankruptcy court did not clearly err in finding
22 that the misrepresentations concerning Barlaam's income on the two
23 credit applications were material. In re Nelson, 561 F.2d 1342,
24 1347 (9th Cir. 1977) (materiality is a question of fact reviewed
25 for clear error).

26 **C. The debtor knew the misrepresentation at the time to be
27 false and that the debtor made it with the intention of
28 deceiving the creditor.**

29 Knowledge of the falsity of Barlaam's representations of
30 income on his credit applications can be inferred from the
31 bankruptcy court's analysis of the other discharge exception
32 factors discussed above. Because Barlaam admitted that he
33 "glanced over" the documents before signing them, in the words of

1 the court, the bankruptcy court was entitled to find that he was
2 aware of the errors in the applications concerning his income.
3 Indeed, both credit applications overstated his income by over a
4 half million dollars a year. The court concluded in its
5 SJ Memorandum that Barlaam had to have known that the income
6 statement was untrue. SJ Memorandum at 12. We find no error in
7 this finding.

8 But even if Barlaam had been completely truthful in insisting
9 that he signed the applications without reading them "word for
10 word," considering the significance of these transactions, this
11 practice would still amount to the sort of gross recklessness from
12 which the bankruptcy court could impute Barlaam's knowledge of
13 both the falsity of the statements and his intent to deceive
14 BMW FS. As another trial court, cited in this case by the
15 bankruptcy court, commented:

16 [A d]ebtor cannot simply sign a document that purports
17 to describe his own financial condition without reading
18 or questioning anyone as to its contents and then be
19 held blameless if the statement contains materially
20 false information. A creditor need not establish that
21 the debtor had actual knowledge of the falsity of the
22 representation in order to prevail under section
23 523(a)(2). He may satisfy this element of the required
24 showing by proving that the false statement "was either
25 knowingly made or made with sufficient recklessness as
26 to be fraudulent."

27 Merchants Bank of Cal. v. Oh (In re Oh), 278 B.R. 844, 858 (Bankr.
28 C.D. Cal. 2002) (quoting Alside Supply Ctr. v. Aste (In re Aste),
129 B.R. 1012, 1017 (Bankr. D. Utah 1991)).⁵

Besides serving to impute the knowledge of falsity, a finding

27 ⁵ The Oh and Alside Supply Cr. cases are the progeny of
28 Cent. Nat'l Bank & Trust Co. v. Liming (In re Liming), 797 F.2d
895, 897 (10th Cir. 1986) ("a statement need only be made with
reckless disregard for the truth . . . under § 523(a)(2)(B)").

1 that a debtor acted with gross recklessness satisfies the element
2 of intentional deception in § 523(a)(2)(B)(iv). Knoxville
3 Teachers Credit Union v. Parkey, 790 F.2d 490, 492 (6th Cir.
4 1986); Se. Neb. Coop. Corp. v. Schnuelle (In re Schnuelle),
5 441 B.R. 616, 624 (8th Cir. BAP 2011) ("An intent to deceive can
6 also be established by a debtor's reckless indifference and
7 reckless disregard of accuracy of information on a financial
8 statement."); Gertsch v. Johnson & Johnson Fin. Corp.
9 (In re Gertsch), 237 B.R. 160, 167-68 (9th Cir. BAP 1999) (courts
10 look to the totality of the circumstances, including a reckless
11 disregard for the truth, to determine whether debtors intended to
12 deceive). See also Texas American Bank, Tyler, N.A. v. Barron
13 (In re Barron), 126 B.R. 255, 260 (Bankr. E.D. Tex. 1991) (Proof
14 of intent to deceive does not require the demonstration that the
15 debtor acted with a malignant heart but only that the debtor's
16 actions demonstrate reckless indifference to the actual facts.).
17 Since few debtors admit to a deceitful intent, all facts,
18 including circumstantial evidence, may be relied upon in making
19 the determination as to intent. Devers v. Bank of Sheridan
20 (In re Devers), 759 F.2d 751, 754 (9th Cir. 1985).

21 The bankruptcy court found that Barlaam's intent to
22 misrepresent his income so as to deceive BMW FS can be inferred
23 from the totality of the circumstances, especially the gross
24 recklessness he displayed in signing the credit applications
25 allegedly without reviewing them. The bankruptcy court's finding
26 on this point was not clearly erroneous. Runnion v. Pedrazzini
27 (In re Pedrazzini), 644 F.2d 756, 758 (9th Cir. 1981) (Knowledge
28 of the falsity or deceptiveness of a statement and intent to

1 deceive are questions of fact.).

2 **D. The creditor must reasonably rely on the**
3 **misrepresentation.**

4 There is ample evidence in the record to sustain the
5 bankruptcy court's finding that BMW FS reasonably relied on
6 Barlaam's representations about his income in approving the credit
7 applications. Barlaam disputes this finding, arguing that BMW FS
8 did not rely on his income statements but, instead, on a host of
9 other factors, such as Barlaam's then-impeccable credit record.
10 In support of Barlaam's argument, he provided various training
11 documents used by BMW FS credit analysts, none of which discuss
12 "income" as a factor in making credit decisions.

13 The bankruptcy court acknowledged that, based on the
14 evidence, income was not the only criterion used by BMW FS in
15 approving a credit application. Trial Memorandum at 17.
16 However, Cioli testified at trial that it was the first criterion.
17 According to him, after the credit application information is
18 transmitted from the dealer to BMW FS's APPRO computer system, the
19 APPRO program presents the "Big Picture" as the first screen seen
20 by the credit analyst. The Big Picture takes the income reported
21 and makes several calculations, including total debt to income,
22 and payment to income. If those calculations are not within the
23 acceptable parameters or "rules" for the particular amount of the
24 credit, it is unlikely that the loan will be approved. In
25 particular, Cioli explained that Barlaam's debt to income, and
26 payment to income, calculations for lease transactions of this
27 size were excellent when the annual income figure used was
28 \$720,000 or \$520,000 per year, but that the deals would not be

1 approved if the income reported on his bankruptcy schedules were
2 instead considered by BMW FS. In contrast, all of the evidence
3 submitted by Barlaam dealt with procedures that would take place
4 in analyzing his credit applications only after the Big Picture
5 had measured his income and made its calculations.

6 A related argument posed by Barlaam was that the credit
7 applications were actually approved before he signed them, and
8 thus BMW FS did not actually "rely" on the written applications.
9 However, the bankruptcy court disposed of this argument, again
10 based on Cioli's testimony, because it found that the loan
11 approvals were all "contingent" upon receipt of the written
12 signature of the borrower on the credit applications. Cioli
13 testified that "[w]e have to have an original signature so that we
14 legally know that the customer signed and agreed to the
15 information on the application." Trial Tr. 195:22-25. He also
16 indicated, without contradiction, that dealers are under
17 instructions not to release cars to lessees without a signed
18 credit application.

19 On this record, the bankruptcy court did not clearly err in
20 determining that BMW FS actually relied on the false
21 representations concerning Barlaam's income in the credit
22 applications. But was it reasonable for BMW FS to do so?

23 Reasonable reliance under § 523(a)(2)(B) means reliance that
24 would have been reasonable to a hypothetical average
25 person. Heritage Pac. Fin. LLC v. Machuca (In re Machuca),
26 483 B.R. 726, 736 (9th Cir. BAP 2012). Reasonable reliance is
27 analyzed under a "prudent person" test. Cashco Fin. Servs., Inc.
28 v. McGee (In re McGee), 359 B.R. 764, 774 (9th Cir. BAP 2006);

1 In re Cacciatori, 465 B.R. at 555 (bankruptcy court must
2 objectively assess the circumstances to determine if creditor
3 exercised degree of care expected from a reasonably cautious
4 person in the same business transaction under similar
5 circumstances). Reasonable reliance is judged in light of the
6 totality of the circumstances on a case-by-case basis.
7 In re Machuca, 483 B.R. at 736. A creditor is under no duty to
8 investigate in order for its reliance to be reasonable.
9 In re Gertsch, 237 B.R. at 170 ("[A]lthough a creditor is not
10 entitled to rely upon an obviously false representation of the
11 debtor, this does not require him or her to view each
12 representation with incredulity requiring verification.").
13 Furthermore, a creditor's reliance may be reasonable if it adhered
14 to its normal business practices. Id. at 172.

15 In the bankruptcy court, Barlaam challenged whether it was
16 reasonable for BMW FS to accept his credit applications given the
17 numerous errors in them (e.g., an incorrect social security number
18 and phone number, and his claim to own a home "free and clear"
19 while the application also listed a mortgage payment). However,
20 Barlaam has not continued these challenges on appeal and only
21 challenges the actual reliance, as discussed above. Barlaam's
22 arguments about the reasonableness of BMW FS' reliance on the
23 credit applications are therefore waived. Cervantes v.
24 Countrywide Home Loans, Inc., 656 F.3d 1034, 1035 (9th Cir. 2011)
25 (arguments not raised in opening brief are waived).

26 But even if these arguments were not waived, a creditor's
27 reliance may be reasonable if it has a well-organized set of
28 business practices that it adheres to. In re Gertsch, 237 B.R. at

1 170. In this appeal, there is no dispute that BMW FS's handling
2 of the two credit applications was consistent with its normal
3 business practices.

4 In sum, on this record, the bankruptcy court did not clearly
5 err in determining that BMW FS actually and reasonably relied on
6 the misrepresentations of Barlaam about his income in the credit
7 applications. In re Nelson, 561 F.2d at 1347 (determination of
8 reliance and reasonable reliance are questions of fact reviewed
9 for clear error).

10 **E. The creditor suffered damages proximately resulting from**
11 **the misrepresentation.**

12 On appeal, Barlaam has not challenged the bankruptcy court's
13 computation and determination that BMW FS was damaged in the
14 amount of \$118,470.85 as a result of the misrepresentations of
15 Barlaam.

16 **F. The lease debts were excepted from discharge.**

17 Based upon our review of the record, we conclude that the
18 bankruptcy court did not clearly err in the various fact findings
19 it made to support its decision that Barlaam's debts to BMW FS
20 were excepted from discharge under § 523(a)(2)(B). While the
21 evidence is in some respects disputed, adequate proof was offered
22 by BMW FS to show that Barlaam submitted false information to
23 BMW FS about his annual income in the credit applications to
24 induce BMW FS to give him credit in connection with the Rolls
25 Royce and 750i leases. The bankruptcy court's Judgment so holding
26 is AFFIRMED.

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II.

The bankruptcy court abused its discretion in declining to award attorney's fees to BMW FS.⁶

BMW FS argues that the bankruptcy court should have awarded it the attorney's fees and costs it incurred in successfully prosecuting the § 523(a)(2)(B) action against Barlaam. We agree.

There is no independent right to recover attorney's fees in an adversary proceeding in a bankruptcy case. Heritage Ford v. Baroff (In re Baroff), 105 F.3d 439, 441 (9th Cir. 1997). The prevailing party may be awarded attorney's fees, however, if attorney's fees would have been awarded under substantive state law. Id. (citing In re Johnson, 756 F.2d 738, 741 (9th Cir. 1985)). Here, the applicable "substantive, nonbankruptcy law" is California state law. S. Cal. Permanente Med. Grp. v. Ehrenberg (In re Moses), 215 B.R. 27, 32 (9th Cir. BAP 1997).

California law enforces parties' agreements concerning

⁶ The bankruptcy court's decision to deny BMW FS's request for an award of attorney's fees and costs is the focus of both BAP. No. CC-13-1503, BMW FS's cross-appeal of the bankruptcy court's Judgment, and BAP No. CC-13-1500, BMW FS' appeal of the court's order denying its motion to amend the Judgment. A cross-appeal is proper when a party seeks to enlarge its substantive rights or decrease its monetary liabilities. Lee v. Burlington N. Santa Fe Ry. Co., 245 F.3d 1102, 1107 (9th Cir. 2001). The cross-appeal is a rule of practice, and the appellate court has broad authority to make such dispositions as justice requires. Mahach-Wilson v. Depee, 593 F.3d 1054, 1063 (9th Cir. 2010). On the other hand, an appeal of reconsideration of an order under Civil Rule 59(e) is a disfavored practice, requiring that the appellant show: (1) newly discovered evidence; (2) clear error or manifest injustice; or (3) intervening change in controlling law. Duarte v. Bardales, 526 F.3d 563, 567 (9th Cir. 2008). Below, we reverse the decision of the bankruptcy court in BAP No. CC-13-1503, the cross-appeal. As a result, we need not reach the questions raised in BAP No. CC-13-1500, because the relief BMW FS requests in that appeal is the same as that granted on the cross-appeal, and BMW FS is otherwise not prejudiced.

1 recovery of attorney's fees. Cal. Code Civ. Proc. § 1021
2 provides:

3 Except as attorney's fees are specifically provided for
4 by statute, the measure and mode of compensation of
5 attorneys and counselors at law is left to the
6 agreement, express or implied, of the parties[.]

6 Section 1021 permits recovery of attorney's fees by agreement
7 between the parties in actions sounding in tort as well as
8 contract. Redwood Theaters, Inc. v. Davison (In re Davison),
9 289 B.R. 716, 724 (9th Cir. BAP 2003) ("CCP § 1021 does not limit
10 the recovery of attorney's fees to [contract] claims
11 [A]ttorney's fees may be recoverable under CCP § 1021 even though
12 they are not recoverable under CC § 1717[7] California
13 law permits recovery of attorney's fees by agreement, for tort as
14 well as contract actions.")⁸

15 The decision by a bankruptcy court determining the
16 dischargability of a debt under § 523(a)(2)(B) resolves a tort
17 claim. In re Candland, 90 F.3d at 1470. Moreover, whether a
18 false statement injured a party requires the resolution of a tort
19 claim under California law. Intel. Corp. v. Hamidi, 30 Cal. 4th
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21 ⁷ Cal. Civ. Code § 1717 is limited to actions on a contract,
22 and is not implicated in this appeal.

23 ⁸ Other provisions of California law relevant to the dispute
24 in this appeal are: (1) Cal. Code. Civ. Proc. § 1332(b), which
25 provides that "except as otherwise expressly provided by statute,
26 a prevailing party is entitled as a matter of right to recover
27 costs in any action or proceeding"; and (2) Cal. Civ. Code
28 § 1033.5(a)(10), which provides that attorney fees are "allowable
as costs" when they are authorized by either contract, statute or
law." These statutes evidence the intent of the California
legislature to provide an entitlement to attorney's fees when the
conditions of the statutes are met. Santisas v. Gordon, 17 Cal.
4th 599, 619 (1998).

1 1342, 1347 (2003).

2 Under California case law, if the parties' contract provides
3 for the recovery of attorney's fees and costs, we are instructed
4 to examine the language of the agreement to determine whether an
5 award of attorney's fees is warranted. In re Tobacco Cases I,
6 193 Cal. App. 4th 1591, 1601 (2011). Here, the lease agreements
7 signed by Barlaam for the Rolls Royce and the 750i both provide
8 that:

9 I [Barlaam] will be in default under this Lease if . . .

10 * * *

11 (g) Any information in my credit application or a guarantor's
12 credit application is false or misleading.

13 Lease Agreements at ¶ 26(g). Within the same paragraph 26, the
14 Lease Agreements explain the consequences of a default by the
15 lessee, which includes:

16 If I am in default, you may do any or all of the
17 following:

18 (e) require that I pay all fees and costs of
19 collections, including attorneys' fees, court costs,
interest, and other related expenses for all losses you incur
in connection with my "default" of this Lease."

20 Id. at ¶ 26(e).

21 In reviewing paragraph 26 of the Lease Agreement, we note two
22 salient points: (1) paragraph 26 contains the only provision
23 providing for recovery of attorney's fees and costs by BMW FS, and
24 it is the only provision listing the default conditions;
25 (2) paragraph 26 explicitly labels providing false or misleading
26 information on the credit application, a pre-contract formation
27 act of fraud in the inducement, a default. Thus, Barlaam's
28 misconduct in providing false credit applications at the inception

1 of the lease transactions was an event of default, which in turn
2 authorized BMW FS to recover "all fees and costs of collections,
3 including attorneys' fees [and] court costs . . . BMW FS incur[s]
4 in connection with [Barlaam's] default." ¶ 26(e).

5 The bankruptcy court denied BMW FS's request for an award of
6 attorney's fees and costs, because:

7 The Court is not persuaded that paragraph 26 taken as a
8 whole provides for attorney's fees in a state court
9 action for fraud in the inducement, or for any action in
10 contract. It does not have the broad sweep of the
11 attorney's fees provisions that have been held to cover
12 fees in tort actions. Instead, the provision seems
13 limited to actions in contract. Attorney's fees are
14 included within the general category of cost of
15 "collections," which, under reasonable interpretation,
16 refers to collections of amounts due under the contract.

13 Memorandum of Opinion Denying Plaintiff's Motion to Amend the
14 July 31, 2013 Judgment for Plaintiff's After Trial to Include
15 Attorney's Fees. The bankruptcy court based its analysis of the
16 attorney's fee question on its reading of a recent unpublished BAP
17 decision, Sharma v. Salcido (In re Sharma), 2013 Bankr. LEXIS 2286
18 (9th Cir. BAP May 14, 2013). We determine, however, that Sharma
19 must be distinguished on its facts from the current appeal.

20 The Sharma case involved an award of attorney's fees for
21 fraud in the inducement of a settlement agreement. The fee
22 provision provided:

23 [I]t is agreed by the parties that all attorneys' fees
24 and costs incurred as a result of or in connection to
25 the LAWSUIT, mediation, and settlement shall be borne by
26 the parties who incurred such attorneys' fees and costs.
27 Should suit be brought to enforce or interpret any part
28 of this Agreement, the "prevailing party" shall be
entitled to recover as an element of costs of suit and
not as damages, reasonable attorneys' fees fixed by the
Court. The "prevailing party" shall be the party
entitled to recover his/her/its costs of suit,
regardless of whether such suit proceeds to final

1 judgment.

2 In re Sharma, 2013 Bankr. LEXIS at * 51. On its face, this
3 provision distinguishes between the ordinary costs of suit, to
4 which the Sharma bankruptcy court applied the American Rule
5 requiring parties to bear their own attorney fees, and any further
6 action "to enforce or interpret" the agreement, for which the
7 prevailing party would be entitled to attorney's fees. The Sharma
8 panel determined that the first clause set the baseline and
9 general rule for application of attorney's fees, and that fees
10 would only be recoverable in the restricted case of an action to
11 enforce or interpret the settlement agreement. Id. at *54.

12 There was no reference to fraud in the inducement in the
13 Sharma agreement. Since there was no provision in the Sharma
14 agreement relating to fraud in the inducement, the contractual
15 provision for interpretation and enforcement of the agreement
16 would not apply to "events that occurred before contract
17 formation." Id. The Sharma panel concluded that

18 The attorney's fee provision in the Settlement Agreement
19 is limited to actions to "enforce or interpret any part
20 of this agreement." The plain language of the provision
21 is not broad enough to encompass a claim for fraud in
22 the inducement. See [Exxess Electronixx v. Heger Realty
23 Corp., 68 Cal. App. 4th 376, 380 (1998)]; [Xuereb v.
24 Marcus & Milichap, 3 Cal. App. 4th 1338, 1342 (1992)].
25 Under California law, a tort claim does not "enforce" a
26 contract or operate to declare a party's rights under a
27 contract. Exxess Electronixx, 75 Cal. App. 4th at 1342.

28 Id.

29 However, unlike the Sharma case, the Lease Agreements in the
30 current appeal include a specific "fraud in the inducement"
31 clause. As quoted above, paragraph 26 clearly provides that a
32 fraud in the inducement of the agreement (i.e., the lessee's

1 provision of false or misleading information) was a defined event
2 of default, and the occurrence of a default entitled the
3 prevailing party to recover attorney's fees. Thus, the "plain
4 language" of that provision in the Lease Agreements is not only
5 "broad enough," but in fact explicitly commands, that BMW FS be
6 able to recover its attorney's fees. In our view, the bankruptcy
7 court's reliance on Sharma was therefore misplaced.

8 The bankruptcy court then applied a restrictive
9 interpretation to what constitutes a "collection" action under the
10 Lease Agreements. Instead, we view "collections," as used in the
11 leases, as referring to the phrase "expenses for all losses you
12 incur in connection with my 'default' of this Lease." In other
13 words, if there is a default based on the lessee's provision of
14 false and misleading information in the credit application, the
15 attorney's fees provision would apply.

16 This conclusion is consistent with California state court
17 case law interpreting attorney's fee provisions. "If a
18 contractual attorney fee provision is phrased broadly enough . . .
19 it may support an award of attorney fees to the prevailing party
20 in an action alleging both contract and tort claims." Santisas v.
21 Goodwin, 17 Cal. 4th at 608. In Santisas, the California Supreme
22 Court addressed an attorney's fees provision that provided: "In
23 the event legal action is instituted by the Broker(s), or any
24 party to this agreement, or arising out of the execution of this
25 agreement or the sale, or to collect commissions, the prevailing
26 party shall be entitled to receive from the other party a
27 reasonable attorney fee to be determined by the court in which
28 such action is brought." 17 Cal. 4th at 603. Based upon the

1 plain language of the attorney's fee provision, the California
2 Supreme Court stated this "provision embraces all claims, both
3 tort and breach of contract . . . because all are claims arising
4 out of the execution of the agreement or the sale.'" Id. at 608
5 (emphasis added).

6 Similarly, in Miske v. Bisno, the California Court of Appeals
7 examined an attorney's fees provision found in a limited
8 partnership agreement as it applied to a fraud in the inducement
9 claim. 204 Cal. App. 4th 1249 (2012). The attorney's fees
10 provision there provided: "If any dispute arises between the
11 Partners, whether or not resulting in litigation, the prevailing
12 party shall be entitled to recover from the other party all
13 reasonable costs, including, without limitation, reasonable
14 attorneys' fees." Id. at 1259. The court found that "the above
15 attorney fee provision is broad enough to cover the type of fraud
16 in the inducement claims brought against appellants." Id.
17 (emphasis added); see also Lerner v. Ward, 13 Cal. App. 4th 155,
18 159 (1993) (finding attorney's fees appropriate in a tort action
19 based upon a clause in the contract which provided "in any action
20 or proceeding arising out of this agreement"); but see Redwood
21 Theaters, Inc. v. Davison (In re Davison), 289 B.R. 716, 724 (9th
22 Cir. BAP 2003) (applying California law and denying attorney's
23 fees on a tort cause of action based upon a contract provision
24 that limited recovery of such fees to those "necessary to enforce
25 or to interpret the terms" of the contract); Exxess Electronixx v.
26 Heger Realty Corp., 64 Cal. App. 4th 698, 707-08 (1998) (denying
27 attorney's fees on a tort cause of action under an attorney's fees
28 provision that fees were recoverable that are "incurred to enforce

1 the contract").

2 In this case, we conclude that the plain language of the
3 provisions of the Lease Agreements is broad enough to encompass a
4 claim by BMW FS against Barlaam for fraud in the inducement. In
5 fact, the contracts expressly contemplate such a tort claim as an
6 event of default, which in turn entitles BMW FS to recover its
7 fees and costs of collections for all losses it incurred in
8 connection with the default. Because it erred in its construction
9 of the Lease Agreements, we conclude that the bankruptcy court
10 abused its discretion in limiting recovery of attorney's fees only
11 to those incurred in "collections" of amounts due under the
12 contract. Further, the bankruptcy court abused its discretion by
13 subjecting the terms of the parties' contracts defining the scope
14 of actions in which attorney's fees and costs could be recovered
15 to an overly narrow interpretation. We therefore REVERSE that
16 portion of the bankruptcy court's Judgment denying attorney's fees
17 and costs, and REMAND this action to the bankruptcy court for
18 further proceedings consistent with this decision.

19 **CONCLUSION**

20 We AFFIRM the Judgment of the bankruptcy court determining
21 that Barlaam's debt to BMW FS is excepted from discharge under
22 § 523(a)(2)(B). We REVERSE that part of the Judgment, and the
23 Order, denying an award of attorney's fees and costs to BMW FS and
24 REMAND this action to the bankruptcy court for further proceedings
25 consistent with this decision.

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