

ENTERED ON
SEP 26 2005

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DOCKET

IN RE:)
)
MICHAEL J. DAVIS, JR.)
)
Debtor)
)

CHAPTER 7
CASE NO. 04-97253-MHM

KENNESAW DRYWALL & SUPPLY,)
INC.)
)
Plaintiff)
v.)
)
MICHAEL J. DAVIS, JR.)
)
Defendant)

**ADVERSARY PROCEEDING
NO. 04-9209**

ORDER REGARDING PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT

By order entered June 15, 2005, Plaintiff's motion for default judgment was scheduled for hearing to permit Plaintiff to present proof of damages and to present *prima facie* evidence of a claim for relief under §523(a)(4). Hearing was held August 1, 2005, at which Plaintiff attorney and Defendant *pro se* were present.

Plaintiff argues that its claim against Defendant is nondischargeable under §523(a)(4) either as defalcation by a fiduciary or as embezzlement. Defendant is an attorney who was employed by Plaintiff to "pursue a number of outstanding accounts." Plaintiff alleges that Defendant performed services negligently. Also, Plaintiff alleges Defendant failed to remit \$3,000 that he did collect.

In support of the contention that the claim against Defendant is nondischargeable as defalcation by one acting in a fiduciary capacity, Plaintiff cites *Brawer v. Gelman*, 47 B.R. 735 (Bankr. S.D. Fla 1985)(J. Weaver). In *Gelman*, the plaintiff had employed the defendant attorney to pursue a personal injury claim. Thereafter, the defendant was suspended from the practice of law but failed to inform the plaintiff. By the time the plaintiff learned of the defendant's suspension, the statute of limitations on her claim had expired. The plaintiff obtained a judgment against the defendant for malpractice and sought to have that judgment declared nondischargeable under §523(a)(4) for defalcation. With little discussion, the bankruptcy court concluded that as her attorney, the defendant was a fiduciary of the plaintiff's causes of action, that allowing the Statute of Limitations to expire was a breach of his fiduciary duties, and that the defendant's conduct constituted defalcation while acting in a fiduciary capacity.

The holding in *Gelman*, however, does not appear to be the majority position with regard to dischargeability under §523(a)(4) of attorney malpractice claims. In the case of *SunTrust Bank v. Roberson*, 231 B.R. 136 (Bankr. S.D. Ga. 1999)(J. Walker), the plaintiff-lender sought a determination of nondischargeability of a claim arising from the debtor-attorney's negligent failure, as closing agent on the refinancing of a parcel of real property, to ensure that a senior mortgage was paid. The debtor-attorney also falsely represented to the lender that the senior mortgage had been paid. The bankruptcy court explained, "A review of the case law shows a consensus among the courts that defalcation requires, at the least, entrustment of the plaintiff's money or property to the debtor." In other words, in order for defalcation to occur, a trust *res* must exist. The *Roberson* court concluded that the debtor-attorney had never been entrusted with any funds of the plaintiff and, thus, could not be guilty of defalcation while acting in a fiduciary capacity.

Similarly, in the case of *Tillman v. Mason*, 191 B.R. 50 (Bankr. S.D. N.Y.), in which the defendant-attorney had negligently failed to file the plaintiff-client's complaint, the court concluded that, because no trust *res* existed, no claim of defalcation could arise. *See also Braud v. Stokes*, 142 B.R. 908 (Bankr. N.D. Cal. 1992); *Andy Warhol Foundation for Visual Arts, Inc. v. Hayes*, 183 F. 3d 162 (2d Cir. 1999); *Stephens v. Bigelow*, 271 B.R. 178 (9th Cir. BAP 2001). In the case of *Banks v. Gill Distribution Centers, Inc.*, 263 F. 3d 863 (9th Cir. 2001), the court concluded that the placement by the defendant-attorney of settlement funds into the attorney's trust account created a trust *res* and the attorney became a fiduciary within the meaning of §523(a)(4). The failure to distribute the settlement funds thus created a nondischargeable debt.

In light of the contrary cases cited above, this court finds the holding in *Gelman* unpersuasive. In this adversary proceeding, only \$3,000 of Plaintiff's total claim of \$298,810 represents funds that Plaintiff contends Defendant failed to properly remit to Plaintiff. The balance of Plaintiff's claim arises from services Defendant failed to perform. Therefore, only the \$3,000 amount is subject to a determination of nondischargeability. Plaintiff, however, failed to present sufficient evidence to establish Defendant's liability as to that \$3,000. Plaintiff presented a copy of a judgment against Don Durieux for \$3,000 and Plaintiff presented a copy of a check from Mr. Durieux's attorney for \$2,000 but Plaintiff presented no evidence that the check was negotiated by Defendant and no evidence of payment of the other \$1,000. Defendant asserted that he was entitled to all or a portion of the \$3,000 as his fee for services and expenses.

Accordingly, it is hereby

ORDERED that Plaintiff's motion for default judgment in this adversary proceeding is denied except as to the \$3,000 described above. It is further

ORDERED that, within 30 days of the date of entry of this order, Plaintiff and Defendant shall confer to determine the extent to which Plaintiff is entitled to that \$3,000, and shall file a joint statement regarding the conference, which statement shall also set forth whether the parties have been able to settle their dispute or a further hearing of Plaintiff's motion for default judgment should be scheduled. If a further hearing is required, both parties should be prepared to present evidence regarding their contentions concerning the disputed \$3,000.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Plaintiff's attorney, Defendant's attorney, and the Chapter 7 Trustee.

IT IS SO ORDERED, this the 22nd day of September, 2005.



MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE