UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE	)	**CHAPTER 7**
	)	
Mohamedaly A. Panjwany,	)	**CASE NO. 03-71555**
	)	
Debtor.	)	
	)	
BellSouth Telecommunications, Inc.	)	**ADVERSARY PROCEEDING**
	)	**No. 03-09348**
Plaintiff,	)	
v.	)	
	)	
Mohamedaly A. Panjwany	)	
	)	
Defendant.	)	

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFF'S MOTION TO AMEND THE COMPLAINT

This adversary proceeding is before the court on the parties' cross motions for summary judgment and on Plaintiff's motion to amend the complaint. Plaintiff seeks a determination that its claims against Defendant are nondischargeable pursuant to 11 U.S.C. §523(a)(4).

A threshold matter is Plaintiff's motion to amend the complaint. The original complaint contained three counts: the first alleges Plaintiff's claim is nondischargeable pursuant to §523(a)(2). The third and fourth counts seek relief to permit Plaintiff to collect from its surety bond, and have been resolved by an order granting Plaintiff relief from the automatic stay and are moot. The second count, paragraph 14, which is the subject of Plaintiff's motion to amend, states, in pertinent part, "Pursuant to 11 U.S.C. §727(a)(4), the court shall not grant the debtor a discharge, if the debtor fraudulently received money." In the prayer, Plaintiff seeks a

determination of nondischargeability pursuant to "11 U.S.C. §52(a)(2) and (4)" (sic) and seeks a denial of Defendant's discharge pursuant to §727(a)(4). Plaintiff's motion to amend the complaint seeks to amend paragraph 14 of the complaint by substituting §523(a)(4) for §727(a)(4), asserting the insertion of §727(a)(4) was a scrivener's error. Plaintiff's motion for summary judgment argues only §523(a)(4), not §523(a)(2) or §727(a)(4).

Defendant opposes the motion to amend on the grounds the complaint states no facts in support of a claim under §523(a)(4) and on the grounds of Plaintiff's delay in mentioning the scrivener's error. Additionally, Defendant asserts that the amendment seeks to add a new claim for relief after the expiration of the bar date under §523(c).

Rule 15(c) of the Federal Rules of Civil Procedure provides:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading....

Rule 15(c) and Bankruptcy Rules 4004 and 4007 interact to allow an amendment asserting new grounds objecting to discharge to relate back to the date the original complaint was filed if the new grounds arose out of the conduct, transaction or occurrence set forth in the original complaint. *Maes v. Herrera,* 36 Bankr. 693 (Bankr. D. Col. 1984). However, totally new grounds unrelated to the conduct, transaction or occurrence set forth in the original complaint may not be added by amendment after the deadline for filing such complaints has passed. *In re Ksensowski,* 56 Bankr. 819, 829 (Bankr. E.D.N.Y. 1985); *McCullough v. Anderson*, 30 Bankr. 229,233 (Bankr. S.D. Fla. 1983).

> Relation back is to be liberally applied if the original pleading gave the defendant fair notice of the claims that are added in the amendment. Thus, relation back is permissible if a plaintiff seeks to correct a technical mistake or omission, state a new legal theory of relief, or amplify the facts alleged in the prior complaint.

Grella v. Zimmerman (In re Art & Co., Inc.), 179 B.R. 757 (Bankr. D. Mass. 1995).

In the instant case, Plaintiff's amendment relates to the same conduct, transactions and occurrences set forth in the original complaint. Therefore, the amendment relates back to the date the complaint was initially filed and is, therefore, timely. Additionally, as Plaintiff's second count incorporates the facts initially alleged in the complaint and as those facts do support a claim under §523(a)(4), Plaintiff's amendment does not lack factual support. Finally, Defendant appears to suggest surprise but alleges no prejudice resulting from the amendment. Plaintiff's motion for summary judgment presents all the facts it relies upon in support of its claim under §523(a)(4) and Defendant has adequately responded. Therefore, Plaintiff's amendment to the complaint will be allowed.

The material facts relating to the parties' cross motions for summary judgment are undisputed. Plaintiff and Defendant entered into a Payment Agent Agreement that provided for Defendant, through his sole proprietorship Big J Foods, to collect from individuals payments and deposits on their telephone bills and deposit those payments into specific bank accounts established by Plaintiff. In consideration of those services, Defendant received $.30 per collection. Defendant delegated his duties under the Payment Agent Agreement to employees.

In August 2001, Plaintiff discovered a shortfall in the daily deposits over a period from August 6 to August 15. The amount missing totaled $217,445.27. When questioned about the missing funds, Defendant stated they had been stolen by one of the employees to whom he had delegated the tasks required by the Payment Agent Agreement. Defendant filed a police report about the stolen funds October 15, 2001. Plaintiff contends the loss of funds constitutes defalcation while acting in a fiduciary capacity, rendering Plaintiff's claim nondischargeable.

Section 523(a)(4) of the Bankruptcy Code excepts from discharge any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." Fraud for purposes

of this exception has generally been interpreted as involving intentional deceit, rather than implied or constructive fraud. *In re Tripp*, 189 B.R. 29 (Bankr. N.D.N.Y. 1995); *In re McDaniel*, 181 B.R. 883 (Bankr. S.D. Tex. 1994). Defalcation refers to a failure to produce funds entrusted to a fiduciary and applies to conduct that does not necessarily reach the level of fraud, embezzlement, or misappropriation. *Quaif v. Johnson*, 4 F.3d 950 (11th Cir. 1993). See also *In re Loevener*, 167 B.R. 824 (Bankr. E.D. Va. 1994). Wrongful intent is not necessary to show defalcation. *Carey Lumber Co. v. Bell,* 615 F. 2d 370 (5th Cir. 1980).[1] Mere failure to perform, if a fiduciary duty to perform existed, is sufficient to establish nondischargeability under §523(a)(4). *See*, *In re Musgrove,* 187 B.R. 808 (Bankr. N.D. Ga. 1995)(J. Drake)("one who qualifies as an ERISA 'fiduciary' also should fall within the type of 'fiduciary' contemplated by §523(a)(4)...").

As debts arising from breaches of ordinary care are normally dischargeable in bankruptcy, and exceptions to discharge are strictly construed in favor of the debtor, a minimum level of culpability is required to make a debt nondischargeable as a defalcation under section 523(a)(4). *In re Martin*, 161 B.R. 672 (B.A.P. 9th Cir. 1994); *Central Hanover Bank & Trust Co. v. Herbst*, 93 F.2d 510 (2d Cir. 1937). When a debtor has been acting as a trustee or other fiduciary, however, the debtor is responsible for knowledge of the fiduciary responsibilities and may not cite mere ignorance as a defense to an objection to dischargeability asserted under 523(a)(4). *In re Richardson*, 178 B.R. 19 (Bankr. D.D.C. 1995).

Although Defendant claims he cannot be held liable for the actions of his employees, courts have found that fraud committed by an agent render a debt nondischargeable as to a debtor-principal. *Love v. Smith*, 98 B.R. 423 (B.C.D. Ill. 1998). Defalcation as used in

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[1] *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981), renders decisions of the Fifth Circuit issued prior to September 30, 1981, binding precedent for the Eleventh Circuit.

11 U.S.C. § 523(a)(4) may result from a mere deficit resulting from misconduct. *In re Janikowski*, 60 Bankr. 784, 789 (Bankr. N.D. Ill. 1986). That a debtor derived no personal gain is no defense and defalcation may result through the debtor's negligence rather than his misconduct. *In re Cowley*, 35 Bankr. 526, 529 (Bankr. D. Kan. 1983). Defalcation has been defined as broadly as the failure by a trustee to properly account for funds entrusted to him. *Carey Lumber Co. v. Bell*, 615 F.2d 370, 376 (5th Cir. 1980); *In re Borbidge*, 90 Bankr. 728, 736 (Bankr. E.D. Pa. 1988).

The facts in the instant case are similar to those in *Georgia Lottery Corp. v. Daniel*, 225 B.R. 249 (Bankr. N.D. Ga 1998). In that case, the debtor had a contract with the Georgia Lottery Corporation to sell lottery tickets. The contract required Daniel to preserve and account for the proceeds of the lottery sales and to maintain a separate bank account in which the proceeds were to be deposited. Before the filing of her bankruptcy petition, Daniel failed to remit the lottery money she had collected. Daniel claimed that any shortfall between the sales and deposits were due to stolen tickets or employee theft. The court granted the Georgia Lottery's motion for summary judgment and held that the debt Daniel owed was nondischargeable under 11 U.S.C. §523(a)(4).

Defendant attempts to distinguish this case from *Daniel* by asserting that the debtor in *Daniel* offered no evidence or affidavits in support of her explanation for the missing funds, unlike in the instant case. The procurement of affidavits and evidence of employee theft, however, does not distinguish this case from *Daniel*. As in *Daniel*, Defendant was subject to an express trust and a fiduciary relationship existed between Plaintiff and Defendant. In both cases, the debtor claimed that the loss of funds was due to employee theft and that the debtor was ignorant of the thefts until after they had occurred. Defendant's police report concerning the alleged theft contains nothing more than statements claiming an alleged theft occurred. The

report was filed over two months after Plaintiff knew or should have known the funds were missing. As a fiduciary, Defendant's duty included the responsibility to monitor his employees performance under the Payment Agent Agreement and to investigate the missing funds immediately. Defendant's conduct constitutes defalcation while acting as a fiduciary. Accordingly, it is hereby

ORDERED that Plaintiff's motion to amend its complaint is *granted* and the amendment is *allowed.* It is further

ORDERED that Plaintiff's motion for summary judgment is *granted.* Defendant's motion for summary judgment is *denied.*

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Plaintiff's Counsel, and Defendant's Counsel.

IT IS SO ORDERED this 8th day of February, 2005.

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE