UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 7
	)	
RICHARD L. EVILSIZER,	)	CASE NO. 08-60740-MHM
	)	
Debtor.	)	
	)	
	)	
TULSA DYNASPAN, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ADVERSARY PROCEEDING
	)	NO. 08-6298
RICHARD L. EVILSIZER,	)	
	)	
Defendant.	)	

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This adversary proceeding is before the court on Plaintiff's motion for partial summary judgment. Plaintiff ("TDI") seeks a determination that the factual findings of a state court in Oklahoma preclude relitigation of those facts in this court. TDI also contends that the facts, as determined by the Oklahoma court, support a determination as a matter of law that TDI's claims against Defendant are nondischargeable under §523(a)(2)(A), (4) or (6). Defendant does not dispute that certain facts were established by the Oklahoma court and cannot be relitigated, but Defendant contends those facts are insufficient to support a determination of nondischargeability.

In 2004, Debtor and others filed a lawsuit against TDI in state court in Tulsa, Oklahoma. TDI filed counterclaims against Debtor and the other plaintiffs. On May 30, 2007, the District Court of Tulsa County, Oklahoma (the "Oklahoma Court"), entered an order granting summary judgment to TDI against Debtor and the other individual plaintiffs, David G. Markle ("Mr. Markle"), David M. Bobbitt ("Mr. Bobbitt"), and Deborah C. Martin ("Ms. Martin"). In its order, the Oklahoma Court referred to Debtor, Mr. Markle, Mr. Bobbitt and Ms. Martin collectively as "the Individual Plaintiffs" and refers to other relevant entities as follows: Monarch Cement Company as "Monarch"; General Building Systems, LLC, as "GBS"; and ENCO Concrete, LLC, as "ENCO." The findings of fact by the Oklahoma Court relevant to this proceeding[1] were:

1. On June 6, 1986, Monarch purchased a majority interest (51%) in TDI from Mr. Markle.

2. After June 6, 1986, Mr. Markle continued as President of TDI.

3. [Debtor] served as Vice President of TDI until January 11, 2005.

4. Mr. Bobbitt served as Vice President of TDI until May 14, 2004.

5. Ms. Martin served as Secretary-Treasure of TDI until January 11, 2005.

6. The Individual Plaintiffs owed fiduciary duties to TDI.

7. While at TDI, the Individual Plaintiffs were the four highest ranking employees and made the day-to-day decisions of TDI.

8. GBS was registered as a limited liability company on October 13, 2003, in the State of Oklahoma.

[1] The Oklahoma Court made certain findings of fact regarding Mr. Markle and his employment agreement with TDI that are not relevant to this proceeding.

9. Since its inception and continuing to the present day, Mr. Markle owns a 31.67% interest in GBS, [Debtor] owns a 31.67% interest in GBS, Mr. Bobbitt owns a 31.66% interest in GBS, and Ms. Martin owns a 5% interest in GBS.

10. The Individual Plaintiffs never disclosed their involvement with GBS, a company that sold materials to TDI, or disclosed that they sought to profit personally from TDI jobs.

11. All of GBS' office business was performed at the TDI offices and its records were kept at TDI's offices. GBS did not have its own office space.

12. The Individual Plaintiffs used TDI's resources for the benefit of GBS. They copied TDI's purchase order form and used it as GBS' own. The Individual Plaintiffs used TDI's telephones, computers, network and internet accounts, as well as proprietary and confidential information to carry on the business of GBS.

13. GBS never sold nor rented any products nor provided any services to anyone other than TDI.

14. Under the Individual Plaintiffs' supervision, either or both TDI and GBS sent purchase orders to the suppliers, namely Hamilton Forms, Unigus, Atlantic Metrocast, and Enterprise Concrete Products ("Suppliers"), for materials needed on TDI's jobs.

15. In TDI's offices and using TDI's computers, forms, and printers, the Individual Plaintiffs prepared purchase orders from TDI and directed to GBS for the exact same materials ordered above.

16. In TDI's offices and using TDI's computers, forms and printers, the Individual Plaintiffs prepared invoices made on behalf of GBS and directed to TDI.

17. Acting on behalf of TDI, the Individual Plaintiffs verified GBS' invoices and approved them for payment by TDI.

18. Ms. Martin supervised TDI's payments to GBS.

19. The Individual Plaintiffs, namely Ms. Martin and Mr. Markle, signed TDI checks made payable to GBS.

20. In each case, TDI paid GBS before GBS paid the Suppliers.

21. When invoices from the Suppliers arrived at TDI's offices, the Individual Plaintiffs intercepted the invoices and had GBS pay them.

22. GBS' 2004 Partnership Tax Return reflects a Gross Profit of $385,983.00. GBS' 2003 Partnership Tax Return reflects a Gross Profit of $85,725.00, with a Cost of Goods Sold of $0.

23. In 2003, GBS distributed $10,000 to the Individual Plaintiffs. In 2004, GBS distributed $527,786.00 to the Individual Plaintiffs.

24. ENCO was registered as a limited liability company on December 24, 2003, in the State of Oklahoma.

25. Since its inception and continuing to the present day, Mr. Markle owns a 51% interest in ENCO, [Debtor] owns a 24.5% interest in ENCO, and Mr. Bobbitt owns a 24.5% interest in GBS.

26. The Individual Plaintiffs never disclosed their involvement with ENCO, a company that sold materials to TDI or disclosed that they sought to profit personally from TDI jobs.

27. ENCO never sold nor rented any products nor provided any services to anyone other than TDI.

28. All of ENCO's office business was performed at the TDI offices. ENCO did not have its own office space.

29. The Individual Plaintiffs used TDI's resources for the benefit of ENCO. They used TDI's telephones, computers, network and internet accounts, as well as proprietary and confidential information to carry on the business of ENCO.

30. Under the Individual Plaintiffs' supervision, either or both TDI and ENCO sent purchase orders to the Suppliers for materials needed on TDI's jobs.

31. In TDI's offices and using TDI's computers, forms, and printers, the Individual Plaintiffs prepared purchase orders from TDI and directed to ENCO for the exact same materials ordered above.

32. In TDI's offices and using TDI's computers, forms and printers, the Individual Plaintiffs prepared invoices made on behalf of ENCO and directed to TDI.

33. Acting on behalf of TDI, the Individual Plaintiffs verified ENCO's invoices and approved them for payment by TDI.

34. Ms. Martin supervised TDI's payments to ENCO.

35. Ms. Martin and Mr. Markle signed TDI checks made payable to ENCO.

36. In each case, TDI paid ENCO before ENCO paid the Suppliers.

37. TDI could have bought the Forms that ENCO purchased from the Suppliers.

38. When invoices from the Suppliers arrived at TDI's offices, the Individual Plaintiffs intercepted the invoices and had ENCO pay them.

39. ENCO's 2004 Partnership Tax Return reflects a gross profit of $2,581,173.00 and a Cost of Goods Sold of $560,504.

40. In 2004, ENCO distributed $2,578,770.00 to Mr. Markle, [Debtor], and Mr. Bobbitt.

The Oklahoma Court granted summary judgment in favor of TDI on TDI's counterclaims for breach of fiduciary duty and unjust enrichment.

CONCLUSIONS OF LAW

Pursuant to FRCP 56(c), incorporated in Bankruptcy Rule 7056, a party moving for summary judgment is entitled to prevail if no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. The burden of proof is on the

moving party to establish that a genuine issue of material fact is absent. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Clark v. Coats & Clark, Inc.*, 929 F. 2d 604 (11th Cir. 1991). Evidence is to be construed in the light most favorable to the nonmoving party. *Id.; Rollins v. TechSouth, Inc.*, 833 F. 2d 1525 (11th Cir. 1987). Unless the moving party satisfies its burden to show an absence of a genuine issue of material fact, no burden of going forward arises for the opposing party to show that a genuine issue of material fact exists. *Adickes,* 398 U.S. at 157; *Clark,* 929 F. 2d at 607. This is so regardless of which party has the burden of proof at trial. *Id.*

In the instant case, Debtor does not dispute the preclusive effect of the factual findings of the Oklahoma Court. Debtor does contend that those facts, as to Debtor, are insufficient to support any judgment against Debtor because Debtor is mentioned by name only four times. In the first paragraph of the order, however, the Oklahoma Court designates Mr. Markle, Debtor, Mr. Bobbitt and Ms. Martin, collectively, as the Individual Plaintiffs. Therefore, each time the Oklahoma Court made a finding of fact as to the Individual Plaintiffs, that finding was made as to Debtor. The Oklahoma Court made 19 findings of fact as to the conduct of the Individual Plaintiffs, including Debtor. One finding limited the term "Individual Plaintiffs" to Ms. Martin and Mr. Markle. Four findings named Debtor. The Oklahoma Court's findings of fact are clearly stated, complete and material to this adversary proceeding. Consequently, TDI has shown that the material facts are undisputed.

The U.S. Supreme Court has held that, in dischargeability proceedings in bankruptcy courts, principles of *res judicata* are inapplicable to prior state court judgments. *Brown v. Felsen,* 442 U.S. 127, 131 (1979). Principles of collateral estoppel, however, are applicable

in dischargeability proceedings. *Grogan v. Garner,* 498 U. S. 279 (U.S. 1991). As stated above, Debtor does not dispute that the findings of fact by the Oklahoma Court cannot be relitigated, but he asserts that they are insufficient to support a determination of nondischargeability and that additional facts exist that would show Debtor is entitled to discharge his obligations to TDI, specifically, Debtor asserts that he was just following orders. Debtor does not contend that he was unaware of the nature and extent of his fellow officers' conduct, nor does Debtor allege he refused to share in the proceeds of that conduct. Therefore, the "just-following-orders" defense does not negate the intent element in either §523(a)(2)(A) or (a)(6).

Section 523(a)(2)(A)

A debt is nondischargeable pursuant to 11 U.S.C. §523(a)(2)(A) to the extent that money, property, services, or an extension, renewal, or refinancing of credit, was obtained by–

> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or insider's financial condition[.]

The burden of proof is upon the creditor to show by a preponderance of the evidence that the debt is nondischargeable. *Grogan v. Garner,* 111 S. Ct. 654, 59 (U.S. 1991). The creditor must show (1) the debtor made false representations with the intent to deceive; (2) the creditor justifiably relied upon the debtor's false representations; and (3) the creditor sustained a loss as a result of the misrepresentation. *Schweig v. Hunter,* 780 F. 2d 1577 (11th Cir. 1986); *St. Laurent v. Ambrose,* 991 F. 2d 672 (11th Cir. 1993); *City Bank & Trust Co. v. Vann,* 1995 WL 582036 (11th Cir. 1995).

TDI asserts Debtor had a duty to disclose to the TDI board of directors his connection with GBS and ENCO and the fact that he expected to personally profit from the business transactions between GBS and TDI and between ENCO and TDI. TDI also asserts that Debtor's failure to disclose constituted a false representation made with intent to deceive. TDI contends the justifiable reliance element is satisfied because absent Debtor's disclosure, TDI had no reason to suspect Debtor's self-dealing and no reason to conduct an investigation to expose Debtor's conduct. TDI alleges it suffered a loss but that loss was not established by the Oklahoma Court and TDI does not seek in its motion for partial summary judgment a conclusion establishing damages. TDI does point out, however, that Debtor and the other Individual Plaintiffs collected from TDI approximately $3 million while the corresponding cost of goods was approximately $500,000.

The factual findings of the Oklahoma Court are sufficient to establish that Debtor had a duty to disclose, so that Debtor's failure to disclose constituted a fraudulent misrepresentation. The Oklahoma Court stated that the Individual Plaintiffs owed fiduciary duties to TDI, that the Individual Plaintiffs failed to disclose their involvement with GBS or ENCO and failed to disclose that they sought to profit personally from their involvement with GBS and ENCO. The Oklahoma Court enumerated the ways that the Individual Plaintiffs undertook to conceal their conduct. Although fraud was not a claim asserted by TDI in the Oklahoma Court and that court's order did not discuss the facts in the context of fraud and misrepresentation, the facts establish that Debtor had a duty to disclose, Debtor failed to disclose and did so with an intent to deceive. Absent disclosure, TDI justifiably relied on Debtor's duty not to engage in self-dealing to the detriment of TDI, and TDI was

damaged by Debtor's conduct. Plaintiff is entitled to a determination of nondischargeability under §523(a)(2).

Section 523(a)(4)

Pursuant to 11 U.S.C. §523(a)(4), a debt based on "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny" is nondischargeable. The U.S. Supreme Court has consistently interpreted "fiduciary" as used in §523(a)(4) narrowly, holding that the trust upon which the fiduciary relationship relies must be an express or technical trust. *Davis v. Aetna Acceptance Co.,* 293 U.S. 328 (1934).[2] The trust must have existed before and not as a result of the defalcation. *Id.*; *Lewis v. Short,* 818 F.2d 693 (9th Cir. 1987); *Murphy & Robinson Investment Co. v. Cross,* 666 F.2d 873 (5th Cir. Unit B 1982);[3] *Angelle v. Reed,* 610 F.2d 1335 (5th Cir. 1980).[4]

Whether a debtor stood in a "fiduciary capacity" to a creditor, for dischargeability purposes, is a question of federal law; state law, however, is important in determining whether a trust obligation existed. *Gupta v. Eastern Idaho Tumor Institute, Inc.*, 394 F. 3d 347 (5th Cir. 2005). In the case of *Blashke v. Standard,* 123 B.R. 444 (Bankr. N.D. Ga. 1991)(J. Bihary), the court recognized that the U.S. Supreme Court "has consistently interpreted 'fiduciary' in [§523(a)(4)] in a narrow and limited fashion." After an extensive

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[2]The *Davis* case was decided under §17(a)(4) of the Bankruptcy Act, which was transplanted virtually unchanged to §523(a)(4).

[3] Decisions of Unit B of the former Fifth Circuit are binding precedent in the Eleventh Circuit. Section 9, Public Law 96-452 (1980).

[4] *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.

discussion about the nature of the trust from which a fiduciary duty must arise to render §523(a)(4) applicable, the court concluded a general partner is not a fiduciary within the meaning of §523(a)(4) because the trust arises *ex maleficio*. *See also Holladay v. Seay*, 215 B.R. 780 (10th Cir. BAP 1997); *Pacific-Midwest Gas Co. v. Hutton,* 117 B.R. 1009 (Bankr. N.D. Okla. 1990). Although the Oklahoma Court found that the Individual Plaintiffs owed fiduciary duties to TDI, the nature and source of those duties were not discussed, nor has Plaintiff discussed Oklahoma law regarding the nature and source of a corporate officer's fiduciary duties. Therefore, whether a corporate officer's duties under Oklahoma law are the kind of fiduciary duties to which §523(a)(4) applies is unclear. The findings of the Oklahoma Court are insufficient to support a finding of nondischarge-ability under §523(a)(4).

Section 523(a)(6)

Section 523(a)(6) provides that a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity" is nondischargeable. Pursuant to *Kawaauhau v. Geiger,* 118 S.Ct. 974 (1998), debts arising from recklessly or negligently inflicted injuries do not fall within the willful and malicious injury exception to discharge. "The word 'willful' in (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." *Id.* at 977.

The factual findings of the Oklahoma Court establish the elements necessary to conclude that TDI's claims against Debtor are nondischargeable. Debtor's conduct was deliberate and was undertaken with the intent to cause harm to TDI. The extent to which he

carefully concealed his conduct demonstrates that he knew the dealings between TDI and GBS and ENCO would injure TDI, that he intended the injury, and that he sought to continue his conduct undetected for as long as possible. Debtor's conduct is an illustration of the type of conduct that cannot be described as negligent or even reckless. Debtor and the other Individual Plaintiffs carefully constructed a plan and used their positions to implement the plan and to conceal their actions from TDI. The factual findings of the Oklahoma Court present one of the clearest descriptions of willful and malicious conduct possible. Plaintiff is entitled to a determination of nondischargeability under §523(a)(6).

CONCLUSION

The factual findings of the Oklahoma Court preclude relitigation of those facts in this proceeding. Those findings show that Plaintiff is entitled to a determination of nondischargeability under §523(a)(2)(A) and (a)(6). Accordingly, it is hereby

ORDERED that Plaintiff's motion for summary judgment is ***granted.*** It is further

ORDERED that a Bankruptcy Rule 7016(b) Scheduling Conference will be held in this adversary proceeding at 11:00 a.m. on April 21, 2009, by telephone to determine how to proceed with a determination of damages.

The Clerk is directed to serve a copy of this order upon counsel for Plaintiff, counsel for Defendant, and the Chapter 7 Trustee.

IT IS SO ORDERED, this the 17th day of March, 2009.

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE