

**United States Bankruptcy Court  
Western District of Wisconsin**

Cite as: [Unpublished]

**Richard Kemis, Plaintiff, v.  
Wayne C. O'Loughlin and Judith A. O'Loughlin, Defendants**  
(In re Wayne C. O'Loughlin, Judith A. O'Loughlin, Debtors)  
Bankruptcy Case No. 85-01543-7, Adv. Case. No. A85-0305-7

United States Bankruptcy Court  
W.D. Wisconsin, Eau Claire Division

June 29, 1987

Guy T. Ludvigson, for plaintiff.  
Don Paul Novitzke, for debtors/defendants.

Thomas S. Utschig, United States Bankruptcy Judge.

**MEMORANDUM OPINION, FINDINGS OF FACT,  
AND CONCLUSIONS OF LAW**

Richard Kemis (plaintiff), by Guy T. Ludvigson, has filed a complaint pursuant to 11 U.S.C. § 523(a)(2)(A) and Bankruptcy Rule 4007 seeking to have an obligation of the debtors excepted from their bankruptcy discharge. The debtors appear by Don Paul Novitzke and object to the complaint. A trial was held in this matter on February 11, 1987, and the issues have been submitted to the court for determination through briefs.

The plaintiff and Wayne O'Loughlin (debtor) began doing business together in a partnership type of arrangement in the summer of 1982. The business started primarily as a retail floorcovering operation. These parties subsequently entered into a written partnership agreement on July 28, 1983. Judith O'Loughlin did not enter into the partnership agreement. The partnership was eventually terminated by a written dissolution agreement executed on October 2, 1984. Under the terms of the dissolution agreement the debtor was to pay the plaintiff \$30,000 and was to indemnify and hold the plaintiff harmless from all the liabilities of the partnership. The debtor also executed a promissory note on October 2, 1984, evidencing and stating the terms of payment of the \$30,000 obligation to the plaintiff.

The debtor attempted to continue the business operation; however, the business proved unsuccessful and the debtor had to close the business down in June of 1985 due to financial difficulties. The business had significant liabilities after it ceased operation. The plaintiff remained personally liable on some of the obligations of the defunct business and has had to pay obligations of the business.

The plaintiff now seeks to have the court determine that the debt owed to him by the debtor is a non-dischargeable obligation. Initially the plaintiff argues that the debt

is non-dischargeable on the basis of fraud. The plaintiff further argues that the debtor was a partner and had a fiduciary duty to properly wind up the affairs of the partnership.

At the trial on this matter a motion was made to dismiss Judy O'Loughlin from the proceeding because she was not a partner. The evidence at trial revealed that she was not a partner to the business enterprise. The evidence further revealed that she was not involved in any fraudulent activity. Hence, the motion to dismiss Judy O'Loughlin from this proceeding should be granted.

Section 523(a)(2)(A) of the Bankruptcy Code provides:

11 USCS § 523. Exceptions to discharge

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

\* \* \*

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

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

The plaintiff has the burden of proving all of the elements of this exception to discharge. In re Hosking, 19 B.R. 891 (Bankr. W.D. Wis. 1982); In re Pauli, (Bankr. W.D. Wis. Adv. # 85-353 Sept. 5, 1986). The standard of proof required under this section of the Bankruptcy Code is clear and convincing evidence. In re Misjak, 26 B.R. 914 (Bankr. W.D. Wis. 1983).

There was no evidence presented indicating that the debtor intended to defraud the plaintiff either when entering into the partnership or in the dissolution of the partnership. Nor was there a showing that the debtor converted assets of the business to his personal use with the intent to defraud his creditors. Instead, the evidence revealed that the debtor simply could not generate sufficient money from the business enterprise to keep the business operation going. It is the opinion of the court after witnessing the testimony presented at trial that the debtor did not have the intent to defraud any of his creditors.

The plaintiff argued at trial and by post-trial briefs that the debtor was a fiduciary of the partnership and the obligation owed by the debtor to the plaintiff should be excepted from discharge pursuant to § 523(a)(4) of the Bankruptcy Code. The plaintiff asserts that § 178.18(1) of the Wisconsin Statutes imposes a fiduciary relationship on the parties. This argument is without merit. The use of the term "fiduciary capacity" in § 523(a)(4) of the Bankruptcy Code is limited to technical or express trusts. In re Donny, 19 B.R. 354 (Bankr. W.D. Wis. 1982). Property held by agents or partners or other persons does not create a fiduciary relationship under federal bankruptcy law. In re Drake, 5 B.R. 149, 152 (Bankr. D. Idaho 1980).

Finally the plaintiff asserts in his post-trial brief that the obligation owed to the plaintiff by the debtor should be excepted from discharge pursuant to § 523(a)(6) of the Bankruptcy Code. Section 523(a)(6) provides for exception from discharge for obligations incurred by willful and malicious injury to another entity or property of another entity. The evidence presented at the trial on this matter did not reveal that

there was any willful or malicious act on the part of the debtor that caused injury.

It is the conclusion of the court that the plaintiff has not sustained the burden of proving that the obligation owed by the debtor to the plaintiff should be excepted from discharge. Instead, the evidence produced at trial indicated that this obligation should be discharged in debtor's bankruptcy case.

This opinion shall constitute findings of fact and conclusions of law in accordance with Bankruptcy Rule 7052.