United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

The Olsten Corporation, Plaintiff, v. Patricia G. Hass, Defendant
(In re Patricia Gayle Hass, Debtor)
Bankruptcy Case No. 97-23003-7; Adv. Case No. A97-2247-7

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

August 18, 1999

Brian G. Weber, Johns, Flaherty & Rice, S.C., La Crosse, WI, for plaintiff.
William G. Skemp, William Skemp Law Firm, S.C., La Crosse, WI, for defendant.

Thomas S. Utschig, United States Bankruptcy Judge.

MEMORANDUM OPINION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

The facts of this case are as follows. The debtor, Patricia Hass, was a licensee of the Olsten Corporation until December 28, 1989. She served as an area representative for the plaintiff's temporary services business in La Crosse, Wisconsin. The parties had a written agreement dated June 18, 1985, which covered the terms of their arrangement. Part of this agreement was that the business would be operated under the name of "Olsten Temporary Services." The plaintiff alleges that in August of 1989, the debtor violated the contract and began operating a business known as "Olympic Temporary Services" on the same premises as the licensed business.[(1)]

According to the plaintiff, the contract between the parties obligated Ms. Hass to forward all client payments to Olsten's headquarters, and Olsten would thereafter wire sufficient funds back for her to make payroll and other expenses. However, over the course of several months prior to the termination of their relationship, it appears that Ms. Hass violated the terms of this arrangement and deposited nine checks totaling $99,825.00 into her own account. The last of these deposits was apparently made during the time the debtor began operating Olympic Temporary Services on the Olsten premises. The plaintiff contends that these funds were used for business and personal expenses unrelated to Olsten Temporary Services and that Ms. Hass also intermingled bank and other account assets of Olsten with her own.

It appears from the record that upon discovering these irregularities, Olsten took steps to terminate its arrangement with Ms. Hass and sought restitution of the funds it believed had been improperly diverted by her. In 1994, Ms. Hass was convicted of embezzlement.[(2)] After her sentencing in the criminal matter, an order determining restitution was entered by a state court referee. This order determined that Ms. Hass should be responsible for paying restitution of the base amount of $99,825.00, together with interest and costs, for a total award of $127,521.16. See exhibit "C" to

the affidavit of Brian Weber in support of the plaintiff's motion for summary judgment. Meanwhile, in early 1995 a jury rendered a verdict in favor of Olsten against her. The parties have provided the Court with a copy of the jury verdict and judgment in the civil case which reflects an award on a breach of contract claim for $43,500.00, an award for conversion of $130,000.00, and an award of punitive damages of $172,500.00. See exhibit "D" to the affidavit of Sonja Davig Huesmann in opposition to the plaintiff's motion for summary judgment; exhibit "E" to the affidavit of Brian Weber in support of plaintiff's motion. As far as can be ascertained, Ms. Hass has never made any payment on either the judgment or the restitution award.

Ms. Hass does not dispute that she took the money. She does, however, contend that she was *entitled* to take the money. According to her, Olsten owed her a "substantial" sum of money which made it "necessary" for her to borrow funds from another business operation to help pay the operating expenses of Olsten of La Crosse.[(3)] Since Olsten was not paying her the money she believed was due, she applied the nine checks from one of Olsten's customers in repayment of this loan.[(4)] Despite the results in the prior proceedings, she continues to maintain her innocence, and has on several occasions sought to withdraw her Alford plea and have her proverbial "day in court."[(5)] In addition, she brought suit against a number of the witnesses who testified against her in the civil trial, alleging that they perjured themselves.[(6)] The long and the short of it is that she does not view herself as having committed any wrongful act in her handling of Olsten's money and believes that any judgment or restitution award in favor of Olsten should be discharged.

While there is no constitutional or "fundamental" right to a discharge in bankruptcy, the intent of the bankruptcy code is to provide debtors with a "fresh start." Grogan v. Garner, 498 U.S. 279, 111 S. Ct. 654, 112 L. Ed. 2d 755, 764 (1991). As the Grogan court stated:

> [A] central purpose of the [bankruptcy] Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." [citation omitted]

112 L. Ed. 2d at 764. Grogan also recognized, however, that the "opportunity for a completely unencumbered new beginning" is limited to the "honest but unfortunate debtor." Id. at 764-65. Olsten contends that Ms. Hass is not such a debtor and filed this adversary proceeding objecting to the discharge of its claim. Olsten believes that the debt is nondischargeable under either 11 U.S.C. §§ 523(a)(4) or (a)(6).

Since excepting a debt from discharge can significantly impact the debtor's ability to make a fresh start, all such exceptions are to be strictly construed in favor of the debtor and against the creditor, who also bears the burden of proof. In re Scarpinito, 196 B.R. 257 (Bankr. E.D. N.Y. 1996); see also In re Dempster, 182 B.R. 790 (Bankr. N.D. Ill. 1995); In re Cox, 182 B.R. 626 (Bankr. D. Mass. 1995); Matter of Gross, 175 B.R. 277 (Bankr. N.D. Ind. 1994). These exceptions to discharge should be confined to those "plainly expressed," Kawaauhau v. Geiger, 523 U.S. 57, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998), and must be construed with an eye toward the equitable principles underlying the bankruptcy law. Matter of Faden, 96 F.3d 792 (5th Cir. 1996). The grounds for excepting a debt from discharge must be proven specifically, and the proof must be directed at one of the types of obligations specified in § 523(a). A debt should not be excepted from discharge on "general equitable considerations." In re Parnes, 200 B.R. 710 (Bankr. N.D. Ga. 1996).

Motions for summary judgment are governed by Fed. R. Civ. P. 56, made applicable to bankruptcy proceedings pursuant to Fed. R. Bankr. P. 7056. This rule provides in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56. In ruling on a motion for summary judgment, the Court's function is to determine whether a genuine issue as to any material fact exists, not to resolve any factual issues. Celotex Corp. v. Catrett, 477 U.S. 317, 330, 106 S. Ct. 2548, 2556, 91 L. Ed. 2d 265 (1986). Summary judgment should be granted if there can be but one reasonable conclusion as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

11 U.S.C. § 523(a)(4) provides that a debtor may not discharge any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." Embezzlement is usually defined as the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come. In re Conder, 196 B.R. 104, 110 (Bankr. W.D. Wis. 1995); see also Matter of Weber, 892 F.2d 534, 538 (7th Cir. 1989). To demonstrate that a debtor committed embezzlement, a creditor must prove that specific property was entrusted to the debtor, the debtor appropriated the property for a use other than that for which it was intended, and the debtor acted with fraudulent intent. Conder, 196 B.R. at 110; Weber, 892 F.2d at 538; In re Belfry, 862 F.2d 661, 662 (8th Cir. 1988); In re Kressner, 155 B.R. 68, 74 (Bankr. S.D. N.Y. 1993).

"Fraudulent intent" may be demonstrated by reference to the surrounding circumstances, but those circumstances must demonstrate that the debtor committed fraud in fact, involving moral turpitude or intentional wrongdoing, rather than implied or constructive fraud. In re Gumieny, 8 B.R. 602, 605 (Bankr. E.D. Wis. 1981). Therefore, it is not sufficient for the creditor to prove that the debtor misappropriated funds for her own use; the plaintiff cannot succeed on its claim unless it demonstrates that she acted with fraudulent intent. Kressner, 155 B.R. at 74; see also In re Rigsby, 152 B.R. 776, 778 (Bankr. M.D. Fla. 1993).

Under 11 U.S.C. § 523(a)(6), a debtor may not discharge a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." Injury under this section includes common law conversion, or the "wrongful exercise of dominion or control over chattel." Conder, 196 B.R. at 112; see also In re Cilek, 115 B.R. 974, 998 (Bankr. W.D. Wis. 1990). A debtor's conversion or sale of property in which another claims an interest is thus subject to scrutiny. However, a simple breach of contract will not preclude a discharge; the debtor must have acted "with malice by intending or fully expecting to harm the economic interests of the creditor." In re Long, 774 F.2d 875, 882 (8th Cir. 1985).

To succeed under § 523(a)(6), the plaintiff must prove that the injury was the result of conduct by the debtor which was both willful *and* malicious. Conder, 196 B.R. at 112. For an act to be willful, it must be intentional or deliberate. For it to be malicious, the intent must be to harm. Id. The Supreme Court's recent decision in Kawaauhau v. Geiger, 523 U.S. 57, 118 S. Ct. 974, 140 L. Ed. 2d 90, 95 (1998), states the following:

> [T]he (a)(6) formulation triggers in the lawyer's mind the category "intentional torts," as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend "the *consequences* of an act," not simply "the act itself."

[citation omitted; emphasis in original]

Olsten submits that as a result of the prior criminal conviction and the civil jury verdict, there is sufficient evidence of either embezzlement or willful and malicious injury to justify excepting this debt from discharge. Given the presence of the prior litigation, the question the Court must address is whether those prior decisions are to be given preclusive effect in this adversary proceeding. Collateral estoppel or "issue preclusion" refers to the effect a prior judgment has in foreclosing litigation of an issue of law or fact that has been actually decided or litigated in the initial action. Meyer v. Rigdon, 36 F.3d 1375, 1378 n.1 (7th Cir. 1994). While the Supreme Court has held that res judicata does not apply in bankruptcy dischargeability proceedings, see Brown v. Felsen, 442 U.S. 127, 99 S. Ct. 2205, 60 L. Ed. 2d 767 (1979), under appropriate circumstances collateral estoppel may preclude a party in a bankruptcy adversary proceeding from relitigating issues which were previously decided in another forum. Grogan, 112 L. Ed. 2d at 763 n.11.

Certain conditions must be met before the prior judgment may be given such preclusive effect:

1. The issue sought to be precluded must be the same as that involved in the prior action.

2. The issue must have been actually litigated.

3. The determination of the issue must have been essential to the final judgment.

4. The party against whom estoppel is invoked must be fully represented in the prior action.

Klingman v. Levinson, 831 F.2d 1292, 1295 (7th Cir. 1987). Ultimately, collateral estoppel applies in a bankruptcy dischargeability proceeding if a prior, non-bankruptcy court has made specific, subordinate, factual findings on an issue identical to the dischargeability issue in question, and if the facts supporting the prior court's findings are discernible from the record. Matter of Dennis, 25 F.3d 274 (5th Cir. 1994); In re Wald, 208 B.R. 516 (Bankr. N.D. Ala. 1997); In re Weinstein, 173 B.R. 258 (Bankr. E.D. N.Y. 1994); In re Leigh, 165 B.R. 203 (Bankr. N.D. Ill. 1993).

Ms. Hass does not believe that the prior judgments are entitled to this type of preclusive effect. She argues that her Alford plea and subsequent conviction for embezzlement did not "actually litigate" the issues now before this Court. She also submits that the jury verdict is at best conclusive evidence that she breached her contract with Olsten, not that she committed either embezzlement or a willful and malicious act. Under Wisconsin law, wrongful or unlawful intent is not an element of conversion, and she accurately points out that the jury instructions reflect this fact. See Donovan v. Barkhausen Oil Company, 200 Wis. 194, 199, 277 N.W. 940 (1929) (wrongful intent or bad faith are not essential elements of conversion).[(7)]

The Court is mindful that the doctrine of collateral estoppel is intended to protect litigants from the burden of having to decide an issue which has already been conclusively decided in a previous proceeding. Meyer, 36 F.3d at 1379. Having lost in

one forum, a party should not be entitled to relocate the litigation and get a second "kick at the cat." What happened in the prior proceedings cannot simply be discounted, but must be given as full effect as possible under principles of both comity and judicial economy. Ultimately, whether these concerns dictate giving preclusive effect to certain factual findings requires a careful review of the circumstances of the prior proceedings.

The Court turns first to the criminal proceedings. It is true, as Ms. Hass points out, that she entered an Alford plea rather than face a jury. The Court acknowledges that there are cases and circumstances under which a conviction based upon a guilty plea would not be given preclusive effect. See In re Farley, 156 B.R. 486 (Bankr. W.D. Pa. 1993); In re Johns, 158 B.R. 687 (Bankr. N.D. Ohio 1993); In re Kalita, 202 B.R. 889 (Bankr. W.D. Mich. 1996). However, these cases are readily distinguishable from the present case.

In Farley, the debtor was a tax preparer who had pled guilty to preparing a false tax return. The indictment charged that he had prepared a return for a client and falsely claimed a deduction for a $15,000.00 interest payment which the client never actually made. In the debtor's bankruptcy, the former client contended that the guilty plea should be given preclusive effect as to the issue of the debtor's alleged false representation that the payment would be deductible. The court properly concluded that the issue of any representation made by the debtor to the client was not part of the prior criminal proceeding, and held that it was not bound by the criminal conviction in determining whether the client's claim could be discharged. 156 B.R. at 492.

In both Johns and Kalita, the debtor pled *nolo contendere*, or "no contest," to a criminal charge of felonious assault. Both courts refused to consider the criminal conviction as having any preclusive effect because of the essential difference between a guilty plea and a plea of *nolo contendere*. According to Black's Law Dictionary, the primary difference between a guilty plea and a plea of *nolo contendere* is that "the latter may not be used against the defendant in a civil action based upon the same acts." See Black's Law Dictionary 1048 (6th ed. 1990); Kalita, 202 B.R. at 896. Johns, 158 B.R. at 690. In essence, such a "no contest" plea is an admission only for the purpose of the criminal proceeding, and the defendant in that context has a justifiable expectation that the plea will not have any subsequent adverse effect.

Other courts have concluded that a conviction resulting from a guilty plea may in fact be given preclusive effect. See In re Bou Carro, 210 B.R. 13, 16 (Bankr. D. Puerto Rico 1997) (debtor's guilty plea in connection with fraud allegations collaterally estopped him from contesting the issue); In re Currey, 154 B.R. 977, 980-81 (Bankr. D. Idaho 1993) (debtor pled guilty to fraudulent tender of worthless checks; collateral estoppel applied); In re LaVita, 150 B.R. 3, 6-7 (Bankr. D. Mass. 1993) (debtor admitted sufficient facts in prior criminal matter to be found guilty of offering forged instrument, and was collaterally estopped from relitigating issue of larceny in dischargeability proceeding). The question really does not appear to hinge upon the lack of an actual trial, but rather the nature of the plea and the surrounding proceedings. In the cases cited by the debtor, the prior proceeding was either unrelated to the subsequent adversary action or involved a debtor who entered a plea which was specifically premised upon the belief that it could not be used in a subsequent civil action. The Court must consider whether Ms. Hass's embezzlement conviction likewise lacks these elements of finality.

In this case, the debtor entered an Alford plea. This type of plea stems from the

U.S. Supreme Court's decision in North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). In Alford, the defendant pled guilty to second degree murder. Before accepting the plea, the trial court considered the statements of several witnesses, all of whom suggested the defendant was guilty. When questioned about his plea, the defendant testified that he did not commit the crime but was pleading guilty because he feared imposition of the death sentence. Upon appeal, the Supreme Court stated:

> [W]hile most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime. Nor can we perceive any material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence when . . . a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt.

27 L. Ed. 2d at 171.

Wisconsin apparently first adopted this type of "conditional" guilty plea in the case of State v. Johnson, 105 Wis. 2d 657, 314 N.W.2d 897 (Wis. App. 1981). In that case, the court concluded that an Alford plea could be accepted by a trial court where, "despite [the] defendant's protestations of innocence, the trial court determines that the prosecutor's summary of the evidence the state would offer at trial is strong proof of guilt." Id., 105 Wis. 2d at 663. The Wisconsin Supreme Court confirmed that such pleas were acceptable in State v. Garcia, 192 Wis. 2d 845, 532 N.W.2d 111 (Wis. 1995), and stated that use of this type of plea gives a defendant a "valuable option." Id., 192 Wis. 2d at 857. The use of an Alford plea allows a defendant to plead guilty yet "publicly maintain his innocence to avoid ridicule or embarrassment," or "because he does not think the jury will believe his claim of self-defense or accident." Id.

The critical element of the Alford plea in the present case is that it can only be accepted where there "is strong evidence of actual guilt." Id. at 859. The state court judge conducted a hearing and concluded that there was sufficient evidence to justify acceptance of Ms. Hass's plea. Critically, Ms. Hass did not plead no contest, although that appears to have been an option and there is a spot on the judgment of conviction where a "no contest" plea could have been entered. See exhibit "B" to the affidavit of Brian Weber in support of plaintiff's motion for summary judgment.[(8)] There is no evidence that she had a justifiable expectation her Alford plea could not be used against her in subsequent litigation. Rather, this is a case more akin to LaVita, where even though the debtor did not plead guilty, he nonetheless admitted sufficient facts from which a guilty finding could be imposed. The court noted that had the debtor pled guilty, there would be "no question" that he was precluded from relitigating the issue. LaVita, 150 B.R. at 7. The court stated:

> [T]he Debtor admitted to sufficient facts for guilty findings to enter. He was represented by counsel at the time he admitted to sufficient facts. He did not assert a right to a jury trial. He did not appeal the guilty findings. The Court finds that although the issues were not actually litigated in the sense that a trial was conducted by the state court judge, [the debtor] had the opportunity to litigate the issues either initially or by way of an appeal for a trial de novo,

> but chose not to do so. Under these circumstances, his admission to sufficient facts was the functional equivalent of a guilty plea.

Id.

In this case, the state court judge only accepted Ms. Hass's Alford plea after a hearing and a determination that there was "strong evidence" of her actual guilt. What is more, he believed so strongly in the evidence that rather than accept the district attorney's suggestion of probation, he sentenced her to prison. The subsequent restitution award is still further proof of the strength of the evidence against her. Unlike Farley, the conviction for embezzlement directly relates to the present adversary proceeding.[(9)] Therefore, the Court concludes that the embezzlement conviction is entitled to preclusive effect. As a result, the restitution award resulting from the embezzlement conviction is nondischargeable under § 523(a)(4), and summary judgment is appropriate on that ground.

The Court now turns to the civil judgment, which Olsten submits is conclusive evidence in support of its § 523(a)(6) claim. The debtor is correct that in many instances a breach of contract or simple conversion may not rise to the level of willful and malicious conduct contemplated by § 523(a)(6). See Geiger, 140 L. Ed. 2d at 95. However, despite the Supreme Court's dictate that the exceptions to discharge should be "confined to those plainly expressed," nothing in the Geiger decision *precludes* a breach of contract or conversion claim from rising to the level of willful and malicious conduct. Rather, Geiger simply reflects the reality that it is not enough for the plaintiff to document a "knowing breach of contract." Id. The breach must be willful and malicious. As the court stated in Long:

> Debtors who willfully break security agreements are testing the outer bounds of their right to a fresh start, but unless they act with malice by intending or fully expecting to harm the economic interests of the creditor, such a breach of contract does not, in and of itself, preclude a discharge.

774 F.2d at 882.

In this case, the state court jury found a breach of contract and conversion, and awarded punitive damages. The Court agrees with the debtor that neither award, standing alone, would support a finding of collateral estoppel on the plaintiff's § 523(c)(6) claim, as neither claim *required* a finding that the debtor's conduct was willful or malicious. But the claims cannot be considered in a vacuum. The jury also awarded punitive damages, and the factual findings in support of that award must also be taken into account.

The debtor suggests that the punitive damages are per se dischargeable, arguing that they of necessity were awarded based on conduct which was not willful and malicious because the underlying claims did not require such factual findings. The relationship between punitive damage awards and the underlying claims is not so clearly delineated. Punitive damages are undoubtedly ancillary to the underlying claim; like interest, costs or attorneys' fees, they can be awarded only if the plaintiff prevails. In that context, the dischargeability of punitive damages hinges upon the underlying debt. If the primary debt is nondischargeable, "ancillary obligations" are nondischargeable as well. Klingman v. Levinson, 831 F.2d 1292, 1296 (7th Cir. 1987).[(10)]

Unlike attorneys' fees or costs, however, punitive damages may only be awarded upon specific additional factual findings. A jury may not award punitive damages for

every breach of contract or conversion claim; rather, the jury must have reached specific factual findings concerning the underlying claims. For example, in this case the jury was instructed as follows:

> Punitive damages may be awarded, in addition to compensatory damages, if you find that the defendant's conduct was outrageous. A person's conduct is outrageous if the person acts either maliciously or in wanton, willful, or reckless disregard of the plaintiff's rights. Acts are malicious when they are the result of hatred, ill will, a desire for revenge, or inflicted under circumstances where injury is intended. A person's conduct is wanton, willful, and in reckless disregard of the plaintiff's rights when it demonstrates an indifference on his or her part to the consequences of his or her actions, even though he or she may not intend insult or injury.

See exhibit "F" to the affidavit of Brian Weber in support of plaintiff's motion for summary judgment.

These instructions reflect the symbiotic relationship between punitive damages and the underlying award. Not only do the punitive damages arise from the underlying conduct, but the award of punitive damages also constitutes an additional layer of factual findings about the conduct. The question here is whether those additional findings are sufficient to preclude relitigation of the willful or malicious nature of the debtor's conversion of Olsten's money. The Court concludes that the jury's verdict does not contain sufficient specific factual findings to invoke the use of collateral estoppel. See Dennis, 25 F.3d at 278 (prior court's factual findings must be discernible from the record).

In this case, the jury was simply asked whether the debtor's conduct was "outrageous." The problem with this question is that the jury instructions permit an award of punitive damages on a broader basis than § 523(a)(6) contemplates. Under Geiger, "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." 140 L. Ed. 2d at 97. The jury instructions permit the imposition of punitive damages even where the defendant "may not intend insult or injury," and the verdict form did not require a specific finding regarding the nature of the debtor's acts. In its reply brief, Olsten ventures an opinion when it suggests that the jury found Ms. Hass's conduct willful and malicious. For an act to be "malicious," the intent must be to harm. Conder, 196 B.R. at 112. Intentional torts generally require that the actor intend the consequences, not just the act. Geiger, 140 L. Ed. 2d at 95. The jury verdict does not make such findings, and the instruction permitted an award of punitive damages under a standard of conduct which would be dischargeable in bankruptcy. Because the verdict does not contain sufficient factual findings, it is not entitled to preclusive effect. The plaintiff's motion for summary judgment under § 523(a)(6) must therefore be denied.

Accordingly, the plaintiff's motion for summary judgment is granted as to its claim under § 523(a)(4) and denied as to its claim under § 523(a)(6). The restitution award in the principal amount of $127,521.16, together with all ancillary charges awarded in the restitution order, is nondischargeable.

This decision shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and Rule 52 of the Federal Rules of Civil Procedure.

END NOTES:

1. According to Olsten, Ms. Hass canceled her listing for "Olsten Temporary

Services" in the La Crosse, Wisconsin telephone directory at this time. She also transferred the telephone number to the new business and listed the same business address. She created a yellow pages ad for Olympic Temporary Services, apparently maintaining the same size, content, and color of the previous "Olsten" advertisements. She contacted larger accounts and notified them that she would no longer be affiliated with Olsten but was instead now operating Olympic. And finally, she created new business cards and retyped her manuals and forms to reflect the new business.

2. Apparently, Ms. Hass entered an "Alford plea" in the criminal matter while simultaneously maintaining her innocence. The plea was part of a negotiated plea agreement between Ms. Hass and the district attorney's office. Interestingly enough, the plea agreement contemplated that she would be placed on probation for a period of three years, during which time she was to enter into a restitution arrangement with Olsten. See statement as to negotiated plea attached as exhibit "E" to the affidavit of Sonja Davig Huesmann in opposition to the plaintiff's motion for summary judgment. However, when the state court judge sentenced Ms. Hass, he made findings which reflected his belief that she not only committed a crime but sought to conceal it. See transcript attached as exhibit "A" to the affidavit of Brian Weber in support of the plaintiff's motion for summary judgment at pp. 46-47. The judge sentenced her to "an indeterminate term not to exceed three years" in prison, rather than probation. Id. at 50-51.

3. This other business was La Crosse Mail Center, a mail bar-coding service and "collateral agent" of the U.S. Postal System. The debtor apparently operated this business from 1981 through 1993. See affidavit of Patricia Hass in opposition to plaintiff's motion for summary judgment. According to the report of the referee determining restitution in the criminal matter, she "verbally gifted" this business to her son. See exhibit "C" to the affidavit of Brian Weber in support of plaintiff's motion for summary judgment at paragraph K.3.

4. It appears that Ms. Hass has been reluctant to document the amount allegedly owed to her by Olsten. Only in connection with her latest effort to rescind her Alford plea did she engage an accountant who has proffered documentation that Olsten owed her money. Even this evidence, however, seems to indicate that Ms. Hass took $67,000.00 more than she was entitled to receive. See Exhibit "A" to the affidavit of Jay Jaehnke in opposition to plaintiff's motion for summary judgment. Further, as indicated in the plaintiff's reply brief, she appears to have had ample opportunity to present evidence of this alleged loan during the state court proceedings and failed to do so.

5. Her original request to withdraw the plea was denied in January of 1993. See affidavit of Ellen M. Frantz in support of plaintiff's motion for summary judgment at paragraph 5. During the pendency of this adversary proceeding, Ms. Hass again attempted to withdraw the plea, and was again unsuccessful.

6. This lawsuit was dismissed by agreement of the parties in December of 1996. See exhibit "C" to the affidavit of Ellen M. Frantz in support of the plaintiff's motion for summary judgment.

7. The jury instructions specifically state:

> Wrongful or unlawful intent is not an element of conversion. Thus, it is not necessary that Patricia Hass knew that Olsten was entitled to possession of the property or that Patricia Hass intended to interfere with Olsten's

possession. It is simply enough that Patricia Hass intended to deal with the property in a way that would seriously interfere with Olsten's possession.

See Instruction to Question No. 3, attached as exhibit "F" to the affidavit of Brian Weber in support of the plaintiff's motion for summary judgment.

8. The conviction judgment instead noted that Ms. Hass entered an "Alford plea."

9. Ms. Hass was charged with nine counts of embezzlement, all of which related directly to Olsten's claims against her. The indictment charged that she had "intentionally" transferred, concealed, or retained the checks without Olsten's consent and "with the intent to convert [the checks] to her own use." See exhibit "C" to the affidavit of Sonja Davig Huesmann in opposition to plaintiff's motion for summary judgment. These charges are virtually identical to the definition of "embezzlement" under § 523(a)(4). See Conder, 196 B.R. at 110.

10. The debtor argues in her brief that punitive damages can be discharged as they are not compensatory in nature. This argument cannot survive the Supreme Court's decision in Cohen v. De La Cruz, 523 U.S. 213, 118 S. Ct. 1212, 140 L. Ed. 2d 341, 347 (1998), where the Court concluded that § 523(a) is "best read" to prohibit the discharge of *any* liability resulting from the proscribed conduct or obligation.