United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

Paul M. Poehling, Patricia L. Poehling, Larry Vangen, and L-J Landing Corporation, a Minnesota Corporation, Plaintiffs, v. Lawrence Donald and Judith Ann Baeder, Defendants
(In re Lawrence Donald and Judith Ann Baeder, Debtors)
Bankruptcy Case No. MM7-90-02646, Adv. Case No. 90-0262-7

United States Bankruptcy Court
W.D. Wisconsin

July 26, 1991

Melvyn L. Hoffman, Hoffman/Addis, La Crosse, WI, for plaintiffs.
Peter M. Gennrich, Jenswold, Studt, Hanson, Clark & Kaufmann, Madison, WI, for defendants.

Robert D. Martin, United States Bankruptcy Judge.

MEMORANDUM DECISION

Lawrence and Judith Baeder, the debtor-defendants, have moved this court to dismiss the case. Because affidavits were filed by the plaintiffs in opposition to defendants' motion, I treated the motion as one for summary judgment, and upon conclusion of the hearing, took the matter under advisement.

Four causes of action are before the court. First, all plaintiffs, Paul and Patricia Poehling, Larry Vangen, and L-J Landing Corporation, claim that the debts owed to them are nondischargeable under 11 USC § 523(a)(2)(A) as money obtained by "false pretenses, a false representation, or actual fraud." Second, plaintiff L-J Landing Corporation claims that the debt owed to it is nondischargeable under 11 USC § 523(a)(4) "for fraud or defalcation while acting in a fiduciary capacity." Third, plaintiff Paul Poehling claims that the debt owed to him is nondischargeable under 11 USC § 523(a)(4), on grounds of embezzlement.[(1)] Fourth, plaintiff Paul Poehling claims that the debt owed to him is nondischargeable under 11 USC § 523(a)(6) for "willful and malicious injury by the debtor." In addition, defendants raise the issue of whether corporate debts guaranteed by defendants are nondischargeable in the debtors' personal bankruptcy.

According to the admissions contained in the defendants' answer to the plaintiffs' complaint, as well as the admitted facts contained in the joint pre-trial statement, the following facts are not in dispute:

1. Defendants, Lawrence and Judith Baeder, are individuals, husband and wife, residing in McFarland, Wisconsin.

2. Plaintiffs, Paul and Patricia Poehling are individuals, husband and wife, residing in LaCrosse, Wisconsin, whose respective occupations are as a life insurance salesman and

a homemaker.

3. Plaintiff, Larry Vangen, is an individual residing in LaCrosse, Wisconsin, whose occupation is as a certified public accountant.

4. Plaintiff, L-J Landing Corporation, is a Minnesota corporation, owned and operated by Linden E. Saline, who resides in Dresbach, Minnesota.

5. Defendants formerly operated and were the sole shareholders of Video Tonite, Inc., a Wyoming corporation.

6. Video Tonite, Inc.'s business operations entailed a variety of services related to the servicing of video-tape rental displays for supermarkets in Wisconsin.

7. The capitalization of Video Tonite, Inc. was based in large part upon the infusion of funds from the plaintiffs, among others, who were offered "Master Equipment Leases" of video-tapes and related items, in return for their contribution of capital to be used to purchase the video-tapes and equipment to be leased to the various grocery stores under contract with Video Tonite, Inc.

8. Lease payments totalling $26,028.00 were due to be paid over thirty-six (36) months to Paul Poehling.

9. Lease payments totalling $34,729.20 were due to be paid over sixty (60) months to Patricia Poehling.

10. Lease payments totalling $34,729.20 were due to be paid over sixty (60) months to Larry Vangen.

11. Lease payments totalling $88,125.60 were due to be paid to L-J Landing Corporation.

12. Defendants were parties in the capacity of guarantors to the contractual arrangements entered into between plaintiffs and Video Tonite, Inc.

Each of the plaintiffs has filed an affidavit in opposition to the defendants' motion to dismiss the case. These affidavits indicate, inter alia, that:

13. Mr. and Mrs. Poehling and Mr. Vangen each invested $20,000.00 in Video Tonite, Inc.

14. L-J Landing Corporation, through Lindon Saline, invested $50,000.00 in Video Tonite, Inc.

15. Each of the plaintiffs believed, based upon representations of either defendant Lawrence Baeder or Video Tonite, Inc. agent William A. Peterson, that his, her, or its investment would be used to purchase only new tapes and display equipment.(2)

16. At no time were plaintiffs were ever informed, nor did they believe, that the tapes later identified to the contract were, as they now believe, taken out of the existing inventory of Video Tonite, Inc.

17. If plaintiffs had known that the tapes purchased with their investments were used, or included the "Beta" format, they would not have invested with defendant Larry Baeder.

18. Plaintiffs believe that only a portion of their investments were used to purchase tapes and equipment in accordance with the contract, while the majority of the funds

were used to supplement Video Tonite, Inc.'s cash flow.

19. Plaintiffs Paul and Patricia Poehling believe that at the time of their respective investments, defendant Larry Baeder either knew or reasonably should have known that Video Tonite, Inc. was declining in profit such that solicitation of their investments was made with defendant Larry Baeder's imputed intent to injure their financial interests.

20. Plaintiffs Larry Vangen and L-J Landing Corporation, through Linden Saline, believe that at the time of defendant Larry Baeder's representations (relied upon by Mr. Vangen and L-J Landing Corporation) concerning use of investment proceeds, defendant Larry Baeder had no intention of using the proceeds in accordance with those representations.

21. Plaintiff L-J Landing Corporation and the defendants and/or Video Tonite, Inc, entered into an Agency Agreement, separate and apart from the Master Equipment Lease.

22. The plaintiffs' attorney, Melvyn L. Hoffman, has filed an affidavit incorporating by reference:

(a) a copy of William A. Peterson's billing invoice to Video Tonite, Inc. in the amount of $1,360.23 for services rendered in September, 1985; and

(b) a letter dated January 24, 1986, addressed to "Video Tonite, Inc. Equipment Lessors," signed by William A. Peterson, detailing "certain transactions by Video Tonite, Inc. that I do not believe were contemplated by the lessors at the time the leases were entered into," and notifying the lessors that he was terminating his relationship with defendants.

Defendants have filed a joint affidavit which indicates, among other things, that:

23. At all times relevant to this case, Lawrence Baeder was President and Judith Baeder was Vice-President/Secretary of Video Tonite, Inc.

24. On or about the following dates, Video Tonite, Inc. entered into the following contracts with the following plaintiffs:

9/6/85: #101 Master Equipment Lease with Patricia Poehling

10/24/85: Purchasing Agent Agreement with L-J Landing Corporation

10/24/85: #103 Master Equipment Lease with L-J Landing Corporation

10/24/85: #104 Master Equipment Lease with L-J Landing Corporation

10/29/85: #105 Master Equipment Lease with Larry Vangen

10/7/86: #108 Master Equipment Lease with Paul Poehling

25. All contracts referred to in Paragraph 24 except #108, with Paul Poehling, were negotiated by William Peterson alone.

26. Approximately 90% of the tapes were purchased new.

27. Approximately 10% of Video Tonite, Inc.'s previously owned tapes were assigned to the various leases, which defendants believe to have provided more variety in selection for each lessor.

28. Approximately 37% of the tapes were in Beta format and 63% in VHS format, which defendants perceived as the relative shares of the renting public utilizing Beta and VHS formats.

29. Incorporated by reference in defendants' affidavit, inter alia, are:

(a) a letter dated February 18, 1986 addressed to the attention of defendants inquiring about the validity of William Peterson's assertions as contained in his January 24, 1986 letter, signed by Lindon Saline on behalf of L-J Landing Corporation;

(b) a letter to Linden Saline dated February 25, 1986 addressing L-J Landing Corporation's concerns, signed by Lawrence Baeder on behalf of Video Tonite, Inc.;

(c) a letter to Larry Baeder dated June 30, 1986 inquiring about William Peterson's as contained in his January, 1986 letter, signed by Paul Poehling;

(d) a letter to Paul Poehling dated July 1, 1986 addressing the Poehlings' concerns, signed by Lawrence Baeder on behalf of Video Tonite, Inc.; and

(e) a letter to Lawrence Baeder dated July 18, 1986 indicating satisfaction with the July 1, 1986 response to the Poehlings' inquiries, signed by Paul Poehling.

30. In approximately July, 1986 plaintiff Larry Vangen orally contacted defendant Lawrence Baeder concerning William Peterson's January, 1986 letter; he was told the same information as was communicated to plaintiffs Poehling and L-J Landing Corporation, and indicated his satisfaction with respect thereto.

31. All sums of money paid by the plaintiffs to Video Tonite, Inc. were used to purchase tapes and equipment except for a fifteen percent purchase and processing fee.

32. Plaintiffs were informed of the fifteen percent purchase and processing fees when Lawrence Baeder responded to their inquiries regarding William Peterson's assertions.

33. Each plaintiff consented to the "fifteen percent" fee arrangements.

34. When the tape inventories were liquidated, plaintiffs received a flat dollar amount per tape and format from third-party buyers without regard to the age of each tape.

According to the joint pre-trial statement, the following facts are in dispute:

1. Specifics of disclosures of Video Tonite, Inc. by its agents and officers, to plaintiffs.

2. Nature and value of specific purchases of tapes and equipment by Video Tonite, Inc. for plaintiffs.

3. Value of leasehold inventories upon termination of Video Tonite, Inc.

4. Whether William Peterson was an agent of the defendants and/or Video Tonite, Inc.

5. The extent to which William Peterson represented the nature of the prospective investments by the plaintiffs with the defendants.

6. Whether plaintiffs consented to the procedures for tape acquisitions utilized by the corporation.

DISCUSSION

Summary judgment is appropriate only 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 judgment as a matter of law." FRCP 56(c); Bankruptcy Rule 7056. "Obviously not every fact is material, and materiality depends on the substantive law. Thus, if the disputed facts, regardless of which way they are resolved, would not affect the outcome of the case, they are not material and do not preclude summary judgment." In re Gray, 22 BR 676, 682 (Bankr WD Wis 1982).

With respect to the evidentiary burden in a motion for summary judgment, the court in In re Bailey stated:

The movant has the burden to demonstrate that there is no genuine issue of material fact in dispute. Celotex v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Furthermore, the evidence offered by the movant is viewed in a light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). However, once the Motion for Summary Judgment has been made and properly supported, Celotex, 477 U.S. at 324, 106 S.Ct. at 2553, the party opposing the motion may not rely on the mere allegations and denials contained in its pleadings, but must submit countervailing evidence to show that a genuine issue exists for trial. Fed.R.Civ.P. 56(e). No genuine issue for trial exists if the record, taken as a whole, does not allow a rational trier of fact to find for the nonmoving party. Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

In re Bailey, 113 BR 429, 434 (Bankr ND Ill 1990). "The standard of proof for the dischargeability exceptions in 11 U.S.C. §523(a) is the ordinary preponderance-of-the-evidence standard." Grogan v Garner, __ US __, 111 S Ct 654, 661 (1991).

A preliminary issue is whether the corporate debts guaranteed by the debtors are nondischargeable in their personal bankruptcy. The answer to this question rests, in part, upon the nature of the guarantees signed by the debtors. If the debtors guaranteed only payment of the corporate debts, these debts are potentially dischargeable in their personal bankruptcy. If, however, debtors guaranteed not payment, but performance, of the terms of the Master Leases, such guarantee might possibly form the basis for a nondischargeable debt in the debtors' personal bankruptcy. Unfortunately, none of the guarantees, nor the Master Leases for that matter, has been submitted for consideration by the court. It is thus impossible to determine the effect of the guarantees upon the viability of plaintiffs' causes of action.

However, personal liability on a corporate debt may exist even in the absence of a guarantee:

It is true that officers and directors of a corporation are generally not liable for the debts of the corporation merely because they are officers of directors or are engaged in the active management of the corporation. In re Penning, 22 B.R. 616, 618 (Bankr.E.D.Mich.1982). However, "[a] corporate agent cannot shield himself from personal liability for a tort he personally commits or participates in by hiding behind the corporate entity . . . " Oxmans' Erwin Meat Co. v. Blacketer, 86 Wis.2d 683, 692, 273 N.W.2d 285 (1979). In the bankruptcy case of In re Penning, the court was presented with the issue of "whether a debtor, by conduct as an officer of a corporation, may incur liability to a creditor of the corporation which is nondischargeable in his individual bankruptcy proceeding." 22 B.R. at 618. . . . In addressing the issue at hand, the court recited a "general rule"

that if an officer or agent of a corporation directs or participates actively in the commission of a tortious act or an act from which a tort necessarily follows or may

reasonably be expected to follow, he is personally liable to a third person for injuries proximately resulting therefrom. . . . The debt so created is nondischargeable in the officer's or director's personal bankruptcy (citation omitted).

Id. at 619.

In re Cullen, 71 BR 274, 281 (Bankr WD Wis 1987).

According to debtors' joint affidavit, at all times relevant to the case, debtors were officers of Video Tonite, Inc. The debtors are potentially personally liable for any torts they committed in their capacity as officers of Video Tonite, Inc., and the debts created by those tort liabilities nondischargeable in their personal bankruptcy, insofar as they fit within the parameters of plaintiffs' stated causes of action under 11 USC §§ 523(a)(2), (4), and (6). The fact that plaintiffs' claims are premised on obligations entered into by Video Tonite, Inc. is not fatal to plaintiffs' nondischargeability causes of action against defendants.[(3)]

Plaintiff L-J Landing Corporation claims, inter alia, that the debt owed to it is nondischargeable under 11 USC § 523(a)(4) "for fraud or defalcation while acting in a fiduciary capacity." In In re Donny this court quoted the following passage from Collier on Bankruptcy:

The qualification that the debtor be acting in a fiduciary capacity has consistently, since its appearance in the Act of 1841, been limited in its application to what may be described as technical or express trusts, and not to trusts ex maleficio that may be imposed because of the very act of wrongdoing out of which the contested debt arose. There is no reason to believe that Section 523(a)(4) will be construed otherwise. Thus, unless there be some additional fact, Section 523(a)(4), insofar as it relates to a debtor acting in a fiduciary capacity, does not apply to frauds of agents, bailees, brokers, factors, partners, and other persons similarly situated.

In re Donny, 19 BR 354, 356 (Bankr WD Wis 1982), citing 3 Collier on Bankruptcy ¶ 523.14 (15th ed 1981). See also Davis v Aetna Acceptance Corp., 293 US 328, 334, 55 S Ct 151, 154, 79 L Ed 393 (1934); Chapman v Forsyth, 43 US (2 How) 202, 207, 11 L Ed 236 (1844); Noble v Hammond, 129 US 65, 69, 9 S Ct 235, 237, 32 L Ed 2d 621 (1888); In re Gumieny, 8 BR 602, 605 (Bankr ED Wis 1981); In re Dawson, 16 BR 343 (Bankr ND Ill 1982).

Plaintiff L-J Landing Corporation premises its Section 523(a)(4) claim upon the existence of an "Agency Agreement," separate and apart from the "Master Equipment Lease." Neither document has been submitted for this court's consideration. It seems unlikely, however, that documents denominated "Agency Agreement" and "Master Equipment Lease" would contain an express trust, and plaintiff nowhere asserts that an express trust is included as part of either document. Nor has plaintiff alleged a statutory basis upon which the existence of such an express or technical trust may be said to exist. A Section 532(a)(4) fiduciary fraud claim is not viable in the absence of an express or technical trust. There exists no genuine issue of material fact with respect to plaintiff L-J Landing Corporation's Section 523(a)(4) claim, and defendants are entitled to summary judgment upon it as a matter of law.

All plaintiffs claim that the debts respectively owed to them are nondischargeable under Section 523(a)(2) as money obtained by "false pretenses, a false representation, or actual fraud." In In re Kimzey, the Seventh Circuit Court of Appeals stated:

To succeed on a claim that a debt is nondischargeable under section 523(a)(2)(A), a creditor must prove three elements. First, the creditor must prove that the debtor

obtained the money through representations which the debtor either knew to be false or made with such reckless disregard for the truth as to constitute willful misrepresentation. Carini v. Matera, 592 F.2d 378, 380 (7th Cir.1979). The creditor also must prove that the debtor possessed scienter, i.e., an intent to deceive. Gabellini v. Rega, 724 F.2d 579, 581 (7th Cir.1984). Finally, the creditor must show that it actually relied on the false representation, and that its reliance was reasonable. Carini, 592 F.2d at 381.

In re Kimzey, 761 F.2d 421, 423 (7th Cir 1985). The Court further indicated that, "[a]s for the scienter element of a section 523(a)(2)(A) claim, an intent to deceive may logically be inferred from a false representation which the debtor knows or should know will induce another to make a loan." Kimzey, 761 F2d at 424, citing Carini, 592 F2d at 380.

Plaintiff Paul Poehling claims that the debt owed to him is nondischargeable under 11 USC § 523(a)(4), on grounds of embezzlement. In In re Weber, the Seventh Circuit Court of Appeals stated:

Bankruptcy courts define embezzlement as the "fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." (citations omitted). To prove embezzlement, the creditor must show by clear and convincing evidence(4) that (1) the debtor appropriated funds for his or her own benefit; and (2) the debtor did so with fraudulent intent or deceit. (citations omitted).

In re Weber, 892 F2d 534, 538 (7th Cir 1989).

Plaintiff Paul Poehling also claims that the debt owed to him is nondischargeable under 11 USC § 523(a)(6), for willful and malicious injury. In In re Cullen this court stated:

Willful has been interpreted to mean deliberate or intentional. In re Ries, 22 B.R. 343, 346 (Bankr.W.D.Wis. 1982); In re Chambers, 23 B.R. 206, 210 (Bankr.W.D.Wis. 1982). . . . For a debtor's acts to be malicious, all that is required is that the debtor know that his act will harm another and proceed in that knowledge. In re Ries, 22 B.R. at 347. Under this standard there must be actual knowledge; a finding that the debtor should have known that harm would result will not suffice. Id. The debtor's knowledge may be inferred from his experience in business . . .

In re Cullen, 71 BR 274, 281-82 (Bankr WD Wis 1987).

Examination of the necessary elements of Section 523(a)(2)(A) fraud, Section 523(a)(4) embezzlement, and Section 523(a)(6) willful and malicious injury causes of action reveals that each contains an "intent" requirement. Plaintiffs and defendants dispute whether defendants possessed the "intent" necessary to render a debt nondischargeable under Section 523(a)(2)(A), (4), or (6). The Seventh Circuit Court of Appeals has indicated that "[c]ases in which the underlying issue is one of motivation, intent, or some other subjective fact are particularly inappropriate for summary judgment . . ." Conrad v Delta Airlines, Inc., 494 F2d 914, 918 (7th Cir 1974), citing Moore's Federal Practice ¶ 56.17 [41-1]. For this reason, summary judgment on plaintiffs' Section 523(a)(2)(A), (4), and (6) causes of action must be denied.(5)

END NOTES:

1. Plaintiffs' complaint originally included the allegation that the debt to Paul Poehling was nondischargeable under 11 USC § 523(a)(4) on the basis of "embezzlement or larceny," but plaintiffs have since withdrawn their larceny claim, (see plaintiffs' responsive brief (docket no. 16), at p 3).

2. Plaintiff Paul Poehling basis his belief that only new videotapes would be purchased upon defendant Lawrence Baeder's alleged statement to plaintiff Paul Poehling on the day he (Poehling) made his $20,000.00 investment to the effect that Lawrence Baeder needed the money deposited to an account at Norwest Bank that day, because he was going to Chicago the next day to purchase the tapes for use in the Appleton Pik-N-Save store.

3. Defendants may also be personally liable in their capacity as shareholders of Video Tonite, Inc. Wis Stat § 180.0622(2)(a) provides: "Except as provided in par. (b) or unless otherwise provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the acts or debts of the corporation, except that a shareholder may become personally liable by his or her acts or conduct other than as a shareholder. (emphasis supplied).

4. The standard of proof for the dischargeability exceptions in 11 U.S.C. §523(a) is not "clear and convincing evidence," but rather ordinary "preponderance-of-the-evidence." Grogan v Garner, __ US __, 111 S Ct 654, 661 (1991).

5. Defendants argue in essence that because plaintiffs allegedly "acquiesced" to the purchase of used videotapes, the intent requirements of Sections 523(a)(2)(A), (4), and (6) cannot be satisfied. However, even assuming for the sake of argument that plaintiffs did indeed "acquiesce" to the purchase of used videotapes, Seventh Circuit Court of Appeals has clearly indicated that "evidence of the creditor's knowledgeable acquiescence is relevant to whether the debtor had the requisite fraudulent intent, but neither dictates nor precludes a finding that the debtor had the necessary intent." In re Weber, 892 F2d 534, 539 (7th Cir 1989). Furthermore, all plaintiffs except Paul Poehling had invested in Video Tonite, Inc. prior to the communications concerning the purchase of used videotapes. Any fraud in inducing those plaintiffs to sign the Master Lease Agreements would not be negated by a subsequent disclosure of the true facts concerning business operations.