UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re	)	
	)	
Daniel Paul Sissel	)	Case No. 04-16004
	)	
	)	Adversary No. 04-1383
Debtor	)	Chapter 7
	)	
----------	)	
	)	
Herman Morgan	)	
	)	Judge Burton Perlman
	)	
Plaintiff	)	
	)	
vs.	)	
	)	
Daniel Paul Sissel	)	
	)	
	)	
Defendant	)	

DECISION

In a simple and short complaint, Plaintiff alleges that

Defendant “converted to his own use” certain funds which were insurance proceeds for wind damage to real estate. Plaintiff asserts that the proceeds constitute a debt owing to him which should be held non-dischargeable.

This court has jurisdiction of this matter pursuant to 28 U.S.C. §1334(b) and the General Order of Reference entered in this district. This is a core proceeding arising under 28 U.S.C. §157.

The proceeding came on for trial before the court. Testimony was taken and exhibits received. From the evidence we find the following facts. Plaintiff for some years has been a catastrophe adjuster and currently resides, and for some time has resided, in Racine, Wisconsin. Plaintiff had formerly been a resident of Portsmouth, Ohio where the several transactions involved in this case occurred.

In the early 1990's the parties to this lawsuit entered into what they called a partnership. This was done only verbally. The partnership was to acquire properties with money therefor to be provided by Plaintiff while Defendant provided maintenance and collected rents. Defendant put in no money. Title to properties was taken in Defendant’s name because there were federal tax claims against Plaintiff and he feared that the government would take any property in his name. Four rental

properties were acquired. One was identified as the West End Furniture building at 518 Second Street in Portsmouth. Another was 524 Second Street identified as the “motorcycle shop”. In addition there were two Walnut Street properties. Plaintiff had said that he would from time to time be in Portsmouth and would help Defendant, but he was seldom if ever in Portsmouth. The parties were fifty/fifty partners. Plaintiff entered into the partnership because he hoped that it would develop enough income so that he could afford to come back and live in Portsmouth. He, however, knew that Defendant needed help in the management of the buildings. The purchase price for the West End Furniture building on Second Street was $50,000.00. Plaintiff contributed $10,000.00 to acquire it. Defendant obtained a mortgage for the balance.

There came a time which may have been as early as 1997 when the parties decided to dissolve the partnership. Defendant wanted out of the arrangement because he found managing and maintaining the properties was getting too much for him. Plaintiff believed that the partnership was dissolved. The dissolution gave Plaintiff the West End Furniture building and the motorcycle shop building, the two Second Street properties. Title to all the properties remained in Sissel. In the dissolution Defendant retained the Walnut Street properties.

On April 7, 2001 there was serious damage to the roof by the wind at the West End Furniture building. A claim on account of the damage was submitted to the insurance company. The insurance company issued a check on account of that damage on October 12, 2001 in the amount of $23,197.65. The check was issued to payees Dan Sissel and Citizens Deposit. Citizens Deposit released the check to Sissel who cashed it. After the dissolution, Plaintiff collected rent from the West End Furniture building. Plaintiff then gave checks to Defendant to pay taxes and insurance, as well as to make mortgage payments on that building.

In 2002 Plaintiff filed suit in State Court against Defendant. While a transcript of a deposition of Plaintiff Morgan here, taken in the State Court case, has been made a part of the record by agreement of the parties in this case, there is no indication of the basis for that State Court litigation. While Defendant had collected the insurance proceeds prior to the initiation of the State Court litigation, it does not appear that a recovery of that amount was the substance of the State Court litigation. The State Court litigation terminated with a settlement by the parties in 2003. The settlement is part of the record on the deposition of Plaintiff Morgan taken in that lawsuit. The agreement was as follows:

> It’s my understanding that we have an agreement between Mr. Morgan and Mr. Sissell involving the litigation in this case number 02-CIN-0289; that as part of that agreement, that Mr. Sissell will have undisputed ownership from Mr. Morgan on the properties located at primarily the 518 Second Street, which is also known as the West End Furniture building; that with that, that Mr. Morgan will sign a deed back to Mr. Sissell on the property at 524 Second Street, also known as the motorcycle shop; that the other properties that were already exchanged between the parties known as Poor Boys, 2926 Walnut Street, and the property on Sixth Street that I don’t have the address of, would remain Mr. Sissell’s - 1410 Sixth Street; that in exchange, Mr. Sissell will pay to Mr. Morgan the sum of $51,000; that Mr. Sissell will sign a note with interest to begin 30 days from today’s date at the rate of 11 percent, and that he’ll have no later than six months to close on that with interest added to the payment to Mr. Morgan; that Mr. Morgan will provide receipts and/or cancelled checks involving payments made to Chase Kennedy; and that he’s agreed to sign a joint letter to the tenants currently on the West End Furniture property indicating that Mr. Sissell will take over the property upon closing; and that he’ll also sign a cancellation of note and mortgage that was originally on the property also known as Poor Boys on Walnut Street.

By its language, it may be seen that the agreement was contingent upon a payment by Defendant to Plaintiff of $51,000. Defendant never made that payment.

The foregoing is the factual background relevant to this case. We look now to see whether Plaintiff has established a basis for liability. In his complaint, Plaintiff cites only 11 U.S.C. §523 (a)(2)(A). To make out a case under that section, Plaintiff must show that the money in question was obtained by

"false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial conditions;". The burden which a Plaintiff seeking to establish nondischargeability of a debt must carry, is to prove the case by a preponderance of the evidence. Grogan v. Garner 498 U.S. 279, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991)

In the Sixth Circuit a §523 (a)(2)(A) case must meet the standard set In re Rembert 141 F.3d 277 (6th Cir. 1998). In Rembert the Court held:

> In order to except a debt from discharge under § 523 (a)(2)(A), a creditor must prove the following elements: (1) the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the approximate cause of loss. See *Longo vs McLaren* (In re McLaren), 3 F.3d 958, 961 (6th Cir. 1993) In order to accept a debt from discharge, a creditor must prove each of these elements by a proponderance of the evidence. See *Grogan vs Garner,* 498 U.S. 279, 291, 111 S.Ct. 564, 661, 112 L. ED 2d 755 (1991). Further, exceptions to discharge are to be strictly constructed against the creditor. See *Manufacturer's Hanover Trust vs Ward* (In re Ward), 857 F. 2d 1082, 1083 (6th Cir. 1988).

We look to the evidence in the record before us to test whether Plaintiff has proved the Rembert elements. The evidence shows that after the wind damage occurred Plaintiff spent $7,500.00 out of his pocket to stop the roof on the building

from leaking. This by no means remedied all the damage which had been done, for there was damage to the interior as well as to the roof. It is uncontested that the insurance company gave Defendant a check in the amount of $23,197.65 on account of the wind damage to the West End Furniture building. Prior to this time Plaintiff and Defendant had agreed to dissolve their partnership, and in the dissolution Plaintiff took the West End Furniture building. Upon dissolution, he collected rents from the building, and paid the expenses in operating the building. Except for the fact that legal title remained in Defendant, the parties treated the West End Furniture property as that of Plaintiff. The insurance check for wind damage was paid to Defendant because he was the title owner of the building. Both parties knew, however, that Plaintiff was the equitable owner of the building. After Defendant received the insurance check, Plaintiff asked that it be turned over to him. Defendant refused to do so. He refused, he said, because he could have the work done more cheaply then the amount of the check. In fact, however, Defendant did not use the money from the insurance check to complete the repair of the wind damage at the West End Furniture building. It is clear that Defendant made a misrepresentation to Plaintiff regarding the repair of the wind damage, because it was implied in his response to Plaintiff that

he could have the work done at less expense, that the complete repair would be done, and that at least part of the insurance payment was going to be used for that purpose. It was not. Instead, Defendant used the money to “fix up” the other buildings which had been held by the parties jointly during their partnership. So there was a misrepresentation by Defendant to Plaintiff.

The second necessary element in a fraud case is intent to deceive. After a careful review of the record, the court concludes that Plaintiff has failed to prove this element. The history between the parties, where they had been engaged in a joint enterprise in which Defendant had the responsibility for maintenance of the properties, while Plaintiff had taken up residence away from Portsmouth, suggests that it may be that at the time that he made the statement Defendant intended to perform it, but later exigencies compelled him to do otherwise. There is no evidence, even circumstantial, that Defendant intended to deceive Plaintiff, when he made the statement committing him to repairing the roof. Plaintiff has failed to prove his fraud case.

While not stated in his complaint, in his pre-trial statement, Plaintiff asserts that the insurance check “was

embezzled by the bankrupt in violation of 11 U.S.C. §523 (a)(4)".

The elements of an embezzlement case are;

> A creditor proves embezzlement by showing that: (1) he entrusted his property to the debtor; (2) the debtor appropriated the property for a use other than that for which it was entrusted; and (3) the circumstances indicate fraud. Brady, supra, at 1172-1173; *Ball vs McDowell* (In re *McDowell*), 162 B.R. 136, 140 Bankr. N.D. Ohio 1993).
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> *Aristocrat Lakewood Nursing Home vs Dryja (In re Dryja) 259 BR 629* Bankr. N.D. Ohio 2001)

The first step that Plaintiff must take to prove his case of embezzlement is to prove that the res in question, the $23,197.65 payment, was his property. We conclude that it was. After the dissolution of the partnership between the parties in 1999, Plaintiff was at least the equitable owner of the West End Furniture building. He collected the rents there, and he paid the various expenses in maintaining and operating the building, utilities, taxes, insurance, and mortgage. When the wind damage loss occurred at the building, he filed the claim with the insurance company. It would be inequitable then to hold that the insurance payment on account of the wind damage loss was not his property.

As to the balance of the first element to make out an embezzlement, it can fairly be said that Plaintiff entrusted the

insurance payment to Defendant. This is the only conclusion that can be reached when Plaintiff allowed legal title to remain in Defendant, and it was this which enabled Defendant to secure possession of the insurance payment.

The second element of the test for embezzlement is also met. The insurance payment was entrusted to Defendant for the purpose of repairing the damage for which the insurance claim was made, and Defendant did not do that. Instead he used the fund for other purposes.

Finally, we hold that the surrounding circumstances do indicate fraud on the part of Defendant. He was a party to the agreement of dissolution and knew that Plaintiff exercised all aspects of ownership of the West End Furniture building. Further, he knew of the wind damage loss and that the purpose of the insurance payment was to repair that loss. He knowingly disregarded his obligations pursuant to the agreement of dissolution that he entered into with Plaintiff when he devoted the insurance proceeds to other purposes.

The evidence is that when Plaintiff asked Defendant to give him the check from the insurance company, Defendant responded that he could do the work for less money than the amount of the check. Implicit in this is that he would see that the wind damage was repaired. It was not. Instead, Defendant used the

money for maintenance in his other properties. The circumstances indicate fraud.

In reaching a conclusion on this matter we adopt and keep in mind the following statement:

> The proper inquiry for the court concerning the intent of the debtor is whether there is "intent to convert, not intent to harm." *In re Taylor*, 58 B.R. at 855. Thus, ill will toward the plaintiff is unnecessary and a plaintiff "need not prove that the debtor acted out of spite, ill will, or hatred in order to prove embezzlement within the meaning of section 523(a)(A)."
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> In re McKnew 270 B.R. 593 (Bkrtcy E.D.Va. 2001)

Actual fraud has been defined as consisting

> of any deceit, artifice, trick, or design involving direct and active operation of the mind, used to circumvent and cheat another - something said, done or omitted with the design of perpetrating what is known to be a cheat or deception.
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> 4 Collier on Bankruptcy (15th ed rev)§523.08(1)(3).

Defendant's conduct is clearly within that language. We hold, therefore, that Defendant embezzled the insurance proceeds from Plaintiff.

Defendant argues that he should not be held liable in this case because there was an accord and satisfaction. Defendant's basis for saying this is a claim that the settlement agreement entered into between the parties in 2003, the terms of which are detailed above, ended Defendant's obligation to Plaintiff for the insurance payment. The 2003

settlement agreement was subsequent to Defendant's acceptance of the insurance payment.

"Accord and satisfaction" is defined at 1 Am Jur 2d Accord and Satisfaction §1 as:

> A method of discharging a claim whereby the parties agree to give and accept something other than that which is due in settlement of the claim and to perform the agreement. An "accord" is the agreement, and "satisfaction" is its execution or performance.

At §47 that treatise states:

> ...failure to make a payment or otherwise perform an act required by a new agreement entered into in satisfaction of a claim leaves such an agreement a mere executory accord which is unenforceable and will not bar an action on the original obligation.

Defendant's accord and satisfaction argument fails. There is no showing in the record before the Court that in entering into the agreement in 2003, the parties were negotiating in respect to the insurance payment. Instead, it was an agreement whereby Plaintiff would be divested of all property in Portsmouth since he no longer intended to return to Portsmouth. Additionally, the agreement in 2003 was an executory bilateral contract, the vital condition of which was that Defendant would pay $51,000 to Plaintiff to conclude the transaction. That payment was never made. Thus, even if there had been an accord, there was no satisfaction of it. The defense of accord and

satisfaction fails.

In view of the foregoing discussion, we hold that Defendant has embezzled the sum of $23,197.65 from Plaintiff, that such a debt is owed by Defendant to Plaintiff, and it is nondischageable.

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