

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF )

ARVIS N. WILLIAMS & )  
JANNIE A. WILLIAMS, )

CASE NO. BK80-2750

DEBTORS )

A81-140

GENERAL SERVICE BUREAU, INC., )  
Assignee of Nebraska )  
Psychiatric Institute, )

Plaintiff )

vs. )

ARVIS N. WILLIAMS & )  
JANNIE A. WILLIAMS, )

Defendants )

MEMORANDUM

This case comes before the court as an action to determine the dischargeability of an unsecured debt owed plaintiff as assignee of Nebraska Psychiatric Institute. The uncontroverted facts disclose that the debt owed the Institute for in-patient hospitalization of the debtors' minor son John had an unpaid balance of \$8,424.00 as of the date of trial. Nebraska Psychiatric Institute has assigned its claim to General Service Bureau, Inc.

At the time of her son's hospitalization, Jannie Williams maintained insurance under Blue Cross/Blue Shield through her employer Lozier Corporation. The policy covered benefits for the type of in-hospital patient care involved here. Mrs. Williams received a Blue Cross/Blue Shield check dated June 25, 1980, in the amount of \$8,435.58. No part of the proceeds of that check were applied by the debtors to the outstanding balance due and owing General Service Bureau as assignee. Neither has Blue Cross/Blue Shield paid Nebraska Psychiatric Institute or the plaintiff for the services provided, the benefits of which are represented by the check issued to the debtors.

This trial is a request by the plaintiff/creditor for the Court to determine the debt to be excepted from discharge according to §523(c) of the Bankruptcy Code. Further, the plaintiff alleges under §523(a)(4) fraud or defalcation while acting in a fiduciary capacity, or, in the alternative, under sub-paragraph (6), for willful and malicious injury by the debtors to another entity or to the property of another entity.

A finding under either §523(a)(4) or (6) would be sufficient to except the Nebraska Psychiatric Institute debt from discharge.

The issues to be determined by this hearing are first, whether a valid assignment of those benefits was made and not revoked prior to filing bankruptcy; secondly, if an assignment exists, whether the debtors' status as assignor is sufficient to create a fiduciary relationship; and thirdly, if no fiduciary relationship arose, whether the failure to apply those proceeds constituted willful and malicious injury.

Assuming arguendo that a valid assignment had been made, I turn to the issue of whether or not the failure to apply the proceeds received as major medical benefits in fact constituted fraud or defalcation by the debtor while acting in a fiduciary capacity pursuant to §523(a)(4).

The term "fiduciary" as used in the statutory provision has a narrow meaning, referring to technical or express trusts which exist apart from the particular transaction giving rise to the liabilities claimed to be nondischargeable and not referring to trusts implied by law from contract or trusts ex maleficio. Davis v. Aetna Acc. Co., 293 U.S. 298 (1934); 1A Collier on Bankruptcy, Section 17,24; Bryant v. Kinyon, 86 N.W. 531; Ryan Ready Mixed Concrete v. Caristo, 158 N.Y.S. 2d 451 (Supp. Ct. 1956); In re Dloogoff, 600 F. 2d 166 (8th Cir. 1979).

Under certain circumstances, an assignor may be in a fiduciary relationship to an assignee but the case law which addresses this issue cites attorneys, bank officers, executors of estates, administrators, guardians, presidents of private corporations entrusted with funds, and technical trustees. Collier on Bankruptcy, para. 523.14(c) (15th ed.) 523-102-104. I cannot find that the debtors in this case, despite their contractual obligation, had entered into such a fiduciary relationship with their assignee. Their relationship was simply that of a debtor and creditor, nothing more. Because the requisite fiduciary capacity does not exist, relief sought by the plaintiff under §523(a)(4) is unavailable.

Plaintiff next argues that the debtors' alleged conversion is willful and malicious. At trial, the debtors admitted having received the check and further admitted to having used the proceeds for their personal and household needs. Mrs. Williams testified that she telephoned Blue Cross upon receiving the check and inquired about its disposition. It was her understanding that the check was her own to use as she pleased and that pursuant to

some sort of agreement between her attorney and creditor, she and her husband would make monthly payments in the amount of \$200 in order to repay the \$8,000 debt, repaying the amount in a manner similar to their other reaffirmation agreements. Further, the check issued to the Williams' was a one-party check. There was no indication on its face nor in written communication from Blue Cross/Blue Shield or any creditor of the need to turn the check over upon its receipt.

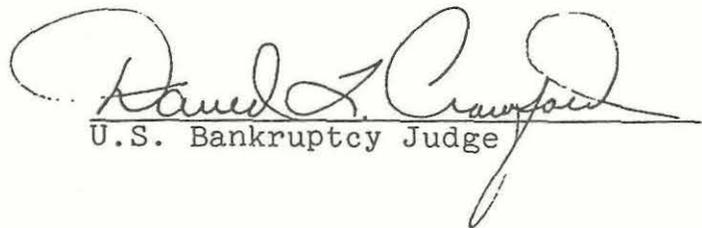
Under prior law, a series of cases determined that a reckless disregard for another's rights supported a finding of "willful and malicious" injury notwithstanding a lack of specific intent. The legislative history of the Code makes clear that those cases are rejected and that the standard under the new Bankruptcy Code requires deliberate or intentional acts. H. Rep. 95-595, 95th Cong., 1st Sess. (1977) 363; S. Rep. 95-989, 95th Cong., 2d Sess. (1978) 77-79.

Under the facts in evidence here there is neither conscious intent to interfere with the contract rights of the plaintiff nor does the debtor's conduct amount to gross disregard of the plaintiff's rights as the prior standard held.

The actions of Mr. and Mrs. Williams in the use of the proceeds from their major medical benefits were not sufficient under §523(c) of the Bankruptcy Code to warrant excepting the debt from discharge.

DATED: August 9, 1982.

BY THE COURT:

  
U.S. Bankruptcy Judge

Copies to:

John H. Bernstein, Attorney, 650 Continental Building, Omaha, Ne. 68102

James T. Boler, Attorney, 312 North 115th Street, Omaha, Ne. 68154