

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: )  
)  
THOMAS A. HOLT, ) CASE NO. BK96-82049  
)  
DEBTOR. ) A98-8110  
\_\_\_\_\_)  
RICHARD J. HRUZA, JR., )  
) CH. 7  
Plaintiff, )  
vs. )  
)  
THOMAS A. HOLT, )  
)  
Defendant. )

MEMORANDUM

Hearing was held on May 18, 2000, on Motion for Summary Judgment. Appearances: Gregory Jensen for plaintiff and Joseph Badami for defendant. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(I).

Introduction

This matter is before the court on plaintiff's motion for summary judgment in an adversary proceeding to determine the dischargeability of a debt. In opposition, the defendant claims that summary judgment for the plaintiff is not appropriate and argues that the defendant's cross motion for summary judgment should be granted.

Previously, the plaintiff and defendant were adverse parties in litigation which occurred in the District Court of Valley County, Nebraska, and, later, the Nebraska Court of Appeals. The subject matter of that litigation concerned an oral agreement about two Merritt Trailers, a 1984 and a 1986, which agreement was entered into between the parties in 1992. The District Court of Valley County determined that, as a matter of law, the transaction entered into between the plaintiff and the defendant constituted a sale and not a lease. The district court also held that the repossession of the 1986 Merritt Trailer (Trailer) was wrongful. However, it held that only the defendant's company, and not the defendant

himself, was liable for the conversion because an employee of the company actually took possession of the Trailer, on order of the defendant.

On appeal, the Nebraska Court of Appeals affirmed and modified the holding. It held that the agreement entered into between the parties was a sale and not a lease. It further held that both the defendant and his company were liable for conversion in the wrongful taking of the 1986 Merritt Trailer from the plaintiff.

The defendant then filed for bankruptcy. The plaintiff brought this action alleging that the debt owed to him should be held nondischargeable under two theories. First, the plaintiff alleges that the actions of the defendant concerning the Trailer constitute embezzlement or larceny and are, therefore, nondischargeable pursuant to 11 U.S.C. § 523(a)(4). Second, the plaintiff alleges that the debt is nondischargeable based upon the willful and malicious injury provisions of 11 U.S.C. § 523(a)(6). Both parties have moved for summary judgment in the present action.

The plaintiff alleges that summary judgment is appropriate because, based upon the brief, depositions and prior judgments of both the District Court of Valley County and the Nebraska Court of Appeals, judgment as a matter of law in his favor is warranted. In opposition, the defendant argues that the decision of the Nebraska Court of Appeals is res judicata as to the present matter and that this court may not supplement the record by use of depositions taken in the previous litigation.

#### Decision

The opinion of the District Court of Valley County and the Nebraska Court of Appeals are not res judicata in this nondischargeability action because the issue of malice was not decided. Partial summary judgment is granted to the defendant on the issues of larceny, and embezzlement. Partial summary judgment is granted in favor of the plaintiff as to the willfulness of the defendant's behavior. The only issue remaining for trial then is the issue of whether the "conversion" by defendant fits the case law definition of malice under 11 U.S.C. § 523(a)(6).

#### Facts

1. In February 1992, the parties entered into an oral agreement concerning two Merritt Trailers.

2. The terms of the agreement stated that the plaintiff was to pay the defendant a \$6,000.00 down payment and make monthly payments of \$600.00 per Trailer commencing March 1, 1992, and ending in September 1993. At the end of this term, according to the agreement, plaintiff could purchase the Merritt Trailers for \$1.00.

3. This agreement was a sale agreement.

4. Plaintiff took possession of the Merritt Trailers in February of 1992 and commenced payments

5. The plaintiff's total obligations under the agreement were finished in August of 1992.

6. After August 8, 1992, the defendant converted the plaintiff's 1986 Merritt Trailer ("Trailer") by ordering an employee to repossess the Trailer.

7. The conversion continues. The defendant sold the Trailer and retained the proceeds thereof.

8. The conversion of the property was willful.

### Law

#### *I. Res Judicata and Collateral Estoppel*

Res Judicata, the general term for the binding effect of prior adjudication, can be divided into two categories. Lang v. Anderberg-Lund Printing Co., (In re Anderberg-Lund Printing Co.), 109 F.3d 1343, 1346 (8<sup>th</sup> Cir. 1997). On the one hand, claim preclusion (formerly known as res judicata) holds that the same claim cannot be litigated between the same parties or their privies after a final judgment upon the merits has been issued by a court of competent jurisdiction. Montana v. United States, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed. 2d 210 (1979). Issue preclusion (formerly known as collateral estoppel) "applies to legal or factual issues 'actually and necessarily determined,' with such a determination becoming conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. In re

Anderberg-Lund Printing Co. 109 F.3d at 1346. (quoting Montana v. United States, 440 U.S. at 153). Issue preclusion applies in bankruptcy dischargeability proceedings brought under Section 523(a). Grogan v. Garner, 498 U.S. 279, 284-85 n.11, 111 S. Ct. 654, 112 L.Ed. 2d 755 (1991); Hobson Mould Works, Inc. v. Lease (In re Lease), 195 F.3d 988, 989 (8<sup>th</sup> Cir. 1999).

If the parties have previously litigated an issue in a state court, the Bankruptcy Court will apply the law of issue preclusion of the state. Lease, 195 F.3d at 989; Harberer v. Woodbury County, 188 F 3d 957, 960-61 (8<sup>th</sup> Cir. 1999). According to Nebraska law, there are four conditions that must exist for the doctrine of issue preclusion to apply: (1) The identical issue was decided in a prior action, (2) There was a judgment on the merits which was final, (3) The party against whom the rule is applied was a party or in privity to the prior action, and (4) There was an opportunity to fully and fairly litigate the issue in the prior action. Stewart v. Hechtman, 254 Neb. 992, 995, 581 N.W.2d 416, 418 (1998), Cunningham v. Prime Movers, Inc., 252 Neb. 899, 567 N.W.2d 178 (1997). For purposes of issue preclusion, an issue is considered to be the "identical issue" in the absence of a significant factual change. Kopecky v. National Farms, Inc., 244 Neb. 846, 510 N.W.2d 41 (1994).

Most of the issues decided in the District Court of Valley County and the Nebraska Court of Appeals are seemingly identical to the issues to be decided in the present action. The facts upon which the actions in the state court case and the present case are the same. The issue in the state court proceeding, *inter alia*, was the defendant's conversion of the plaintiff's Trailer. In the instant action, the plaintiff is alleging larceny, embezzlement and willful and malicious acts that caused financial harm. These actions are based upon the same facts that were tried in the state court conversion action. Both actions are based upon the oral agreement between the plaintiff and the defendant. Both actions relate to the defendant's wrongful taking of the Trailer from the plaintiff.

However, in the state court actions, the malicious nature of the defendant's action was not tried, or at least no evidence of the trying of that issue is found on the record.

Malicious acts are those which "are targeted at a creditor at least in the sense that the conduct is certain or almost certain to cause financial harm." Lease, 195 F.3d at 989 (8<sup>th</sup> Cir. 1999). The Nebraska Court of Appeals specifically stated that a conversion may occur even if the defendant "committed that act of conversion in good faith." Hruza v. Holt, No.A-95-246(Neb. Ct. App. June 4, 1996) (citing 89 Trover & Conversion § 8 (1955)). Therefore, in finding the defendant had committed a conversion, the issue of willfulness was passed upon but the maliciousness of the defendant's behavior was not decided in the state court proceeding. The holding of the state court is not res judicata as to this issue and the record may be supplemented by extrinsic evidence.

As for the second requirement, that there was a final judgment on the merits in this case, a partial summary judgment motion was granted in the district court and later affirmed by the Court of Appeals. As for the third requirement, that the party against whom the rule is being applied was a party in the previous suit, the parties in the present action are identical. Finally, there was an opportunity to fully and fairly litigate the action in the previous actions.

## II. *Summary Judgment*

Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Embry v. Lewis, 2000 WL 730895 (8<sup>th</sup> Cir. 2000); Coplin v. Fairfield Public Access Television Comm., 111 F.3d 1395, 1401 (8<sup>th</sup> Cir. 1997). The creditor seeking to except the debt from discharge bears the burden of proof under Section 523 (a)(4) or (a)(6). In the present case, partial summary judgment is appropriate.

### A. *Larceny and Embezzlement*

11 U.S.C. § 523(a)(4) excepts from discharge any debt which results from embezzlement or larceny. Embezzlement is the appropriation by fraud of property by a person who has lawfully been entrusted with possession of the property. Brady v. McAllister (In re Brady), 101 F.3d 1165, 1172-73(6<sup>th</sup> Cir. 1996); Spinoso v. Heilman (In re Heilman), 241 B.R. 137,

171 (Bankr. D. Md. 1999). Larceny is the fraudulent and wrongful taking and carrying away of the personal property of another with the intent to convert the property to one's own use. The difference between embezzlement and larceny is that embezzlement requires that the original taking be lawful or consensual. Larceny, on the other hand, consists of the wrongful taking of another's property. When determining a claim under Section 523(a)(4), the bankruptcy court is not bound by the state law definition of larceny but may follow the federal common law definition of larceny which states that the taking must also be "felonious." Clarendon National Ins. Co. v. Barrett (In re Barrett), 156 B.R. 529 (Bankr. N.D. Tex. 1993). "Larceny" is a term used in the criminal law. It's civil analog is "conversion". The defendant did not commit an act of larceny. He was not convicted of a crime for the wrongful taking.

Additionally, the defendant did not commit the act of embezzlement. By definition, embezzlement occurs when the embezzler has rightful possession of another's property but disposes of it or uses it in an unlawful manner. Since the defendant did not have lawful possession, his disposition of the Trailer does not amount to "embezzlement". It has been found to be "conversion".

#### B. *Willful and Malicious Injury*

1. In Kawaauhau v. Geiger, 523 U.S. 57, 118 S.Ct. 974, 140 L.Ed.2d. 99 (1998) the United States Supreme Court held that in order for a debt to be held nondischargeable under Section 523(a)(6), the act causing the debt must be an intentional tort. In the present action, there is no question that defendant committed the intentional tort of conversion. He authorized the taking of the Trailer. His action for the purpose of 11 U.S.C. § 523(a)(6) was, therefore, "willful".

2. Section 523(a)(6) states that any debt for "willful and malicious injury by the debtor to another entity or to the property of another entity" shall be excepted from discharge. This section includes acts for willful and malicious conversion. 124 Cong. Rec. H11.095-6(daily ed. Sept. 28, 1978). In order to fit within the exception, the action causing the injury must be both willful and malicious. Such an act will be considered malicious if it was wrongful and without just cause or excuse even in the absence of hatred or ill will. Hope v. Walker (In re Walker), 48 F.3d 1161(11th

Cir. 1995). A technical conversion may lack any element of willful and maliciousness necessary to except the liability from discharge. Barclays American Business Credit Inc. v. Long (In re Long), 774 F.2d 875, 879 (8<sup>th</sup> Cir. 1985); Oetker v. Burlington (In re Burlington), 167 B.R. 157 (Bankr. W.D. Mo. 1994); Dahlgren & Co., Inc. v. Lacina (In re Lacina), 162 B.R. 267 (Bankr. D. N.D. 1993). The conduct has to be malicious in the sense that it is certain or almost certain to cause financial harm. In re Long, 774 F.2d at 881; United States v. Foust (In re Foust), 52 F.3d 766, 768 (8<sup>th</sup> Cir. 1995).

3. Although the parties litigated the issue of conversion in the state courts, the malicious nature of the defendant's behavior was never an issue. In its opinion, the Nebraska Court of Appeals noted that a conversion may occur even when the taking is in good faith or when the rights or title of the owner is unknown. See Hruza v. Holt, slip op. at 6 (citing to 89 C.J.S. Trover & Conversion § 8 (1955)). The only thing that the plaintiff had to show in order to prove conversion was "the immediate right to possession of the property at issue and its wrongful possession by the defendant." Barelmann v. Fox, 239 Neb. 771, 478 N.W.2d 548 (1992).

Whether the defendant's act was malicious is a material issue of fact. From the deposition and affidavit evidence, the court could make findings of fact on the malice issue. However, this matter is before the court on cross motions for summary judgment and it is inappropriate to determine material issues of fact in this context. Therefore, the clerk shall schedule a trial for one-half day on the fact question "Was the act of taking the Trailer not only 'willful', but 'malicious' in the sense that it was certain to cause financial harm to the plaintiff." In the alternative, the parties may stipulate that the court may treat the materials submitted on the motion as substantive evidence and rule on the issue without a trial.

Separate journal entry to be filed.

DATED: July 11, 2000

BY THE COURT:

/s/Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

Copies faxed by the Court to:

30 BADAMI, JOSEPH

Copies mailed by the Court to:

Gregory Jensen, P.O. Box 310, Ord, NE 68862  
United States Trustee

Movant (\*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

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FOR THE DISTRICT OF NEBRASKA

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<u>DEBTOR(S)</u>	)	
	)	CH. 7
RICHARD J. HRUZA, JR.,	)	Filing No.
Plaintiff(s)	)	
vs.	)	<u>JOURNAL ENTRY</u>
	)	
THOMAS A. HOLT,	)	DATE: July 11, 2000
	)	HEARING DATE: May 18, 2000
<u>Defendant(s)</u>	)	

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion for Summary Judgment.

APPEARANCES

Gregory Jensen, Attorney for plaintiff  
Joseph Badami, Attorney for defendant

IT IS ORDERED:

Partial summary judgment is granted to the plaintiff. However, a trial will be scheduled on the issue of "malice." Summary judgment is denied on the cross motion by defendant. See separate Memorandum entered this date.

BY THE COURT:

/s/Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

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