IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	
	)	
DONALD R. MOHLMAN, JR.,	)	
	)	CASE NO. BK02-82163
Debtor(s).	)	
	)	A02-8092
KATHRYN J. DERR, Receiver for Rambo Associates Property Management, Inc.,	)	
	)	
Plaintiff,	)	CH. 7
	)	
vs.	)	
	)	
DONALD R. MOHLMAN, JR.,	)	
	)	
Defendant.	)	

MEMORANDUM

Hearing was held in Omaha, Nebraska, on January 22, 2004, on cross-motions for summary judgment filed by the plaintiff (Fil. #39) and the defendant (Fil. #16). W. Eric Wood appeared for the debtor, and Kathryn Derr appeared as the receiver. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(I).

The debtor's motion will be denied. The receiver's motion will be granted in part.

I. Background

The debtor, Donald Mohlman, Jr., owned a construction project management firm. His former business associate Merle Rambo owned an architectural firm. In 1989, they joined their businesses and formed Rambo Associates Project Management, Inc. ("RAPMI"). They each owned 48 percent of the stock, and were officers and directors of the company. Mr. Mohlman subsequently took control of the company and its assets. Mr. Rambo left the company in 1999. Business operations ceased in 2000.

Lawsuits arose from the business dealings between the parties, who subsequently agreed to binding arbitration of their disputes. The arbitrator found, *inter alia*, that RAPMI should be liquidated, and he appointed a receiver to wind up the corporation's affairs. The arbitrator also reconciled the accounts of the parties vis-à-vis the corporation, and directed that amounts due to each party be paid over or offset against other indebtedness, as the case may be. The arbitrator's order was confirmed by the Douglas County District Court in May 2002, and Kathryn Derr was appointed receiver for the company. The debtor then filed his Chapter 7 bankruptcy petition.

Ms. Derr filed this adversary proceeding on behalf of RAPMI, alleging that the amounts Mr. Mohlman was found to owe RAPMI are non-dischargeable under 11 U.S.C. § 523(a)(4) for fraud, defalcation by a fiduciary, embezzlement, or larceny; and under § 523(a)(6) as willful and malicious injuries. She now seeks entry of summary judgment on causes of action two ("Mohlman Bonus"), three ("Mohlman Professional Fees"), five ("Vendor Payments"), six ("Mohlman Loan"), and seven ("Income Tax Debt"), totaling $398,202.26, because there are no genuine issues of material fact.

The debtor has also moved for summary judgment, asserting (1) that no factual issues exist as to the causes of action pled; (2) that the breaches, if any, of fiduciary duties do not rise to the level of those contemplated in § 523(a)(4); (3) that the alleged breaches of fiduciary duty were done on the advice of professionals, so state law protects the debtor; and (4) the arbitration award and judgment are not final and are not binding on the debtor.

II. Summary Judgment Standard

Summary judgment is appropriate only if the record, when viewed in the light most favorable to the non-moving party, shows 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(c) (made applicable to adversary proceedings in bankruptcy by Fed. R. Bankr. P. 7056); see, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986); Morgan v. Rabun, 128 F.3d 694, 696 (8th Cir. 1997), cert. denied, 523 U.S. 1124 (1998); Get Away Club, Inc. v. Coleman, 969 F.2d 664, 666 (8th Cir. 1992); St. Paul Fire & Marine Ins. Co. v. FDIC, 968 F.2d 695, 699 (8th Cir. 1992).

Essentially, the test is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. at 251-52. Moreover, although under Federal Rule of Civil Procedure 56 due deference must be given to the rights of litigants to have their claims adjudicated by the appropriate finder of fact, equal deference must be given under Rule 56 to the rights of those defending against such claims to have a just, speedy and inexpensive determination of the action where the claims have no factual basis. Celotex Corp. v. Catrett, 477 U.S. at 327.

The court's role is simply to determine whether the evidence in the case presents a sufficient dispute to place before the trier of fact.

> At the summary judgment stage, the court should not weigh the evidence, make credibility determinations, or attempt to determine the truth of the matter. Rather, the court's function is to determine whether a dispute about a material fact is genuine. . . . If reasonable minds could differ as to the import of the evidence, summary judgment is inappropriate.

Quick v. Donaldson Co., Inc., 90 F.3d 1372, 1376-77 (8th Cir. 1996) (internal citations omitted). See also Bell v. Conopco, Inc., 186 F.3d 1099, 1101 (8th Cir. 1999) (on summary judgment, court's function is not to weigh evidence to determine truth of any factual issue); Mathews v. Trilogy Communications, Inc., 143 F.3d 1160, 1163 (8th Cir. 1998) ("When evaluating a motion for summary judgment, we must . . . refrain from assessing credibility.").

"Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. "We look to the substantive law to determine whether an element is essential to a case, and only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Williams v. Marlar (In re Marlar), 252 B.R. 743, 751 (B.A.P. 8th Cir. 2000) (quoting Ries v. Wintz Properties, Inc. (In re Wintz Cos.), 230 B.R. 848, 858 (B.A.P. 8th Cir. 1999)) (internal

quotations omitted).

III. Discussion

A. Attacking the arbitration award

1. Rooker-Feldman doctrine

In most instances, the Rooker-Feldman doctrine operates to preclude lower federal courts from deciding a collateral attack on a state court decision. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983). Lower federal courts, including bankruptcy courts, lack subject matter jurisdiction to engage in appellate review of state court determinations. Goetzman v. Agribank, FCB (In re Goetzman), 91 F.3d 1173, 1177 (8th Cir. 1996) (citing Keene Corp. v. Cass, 908 F.2d 293, 296 (8th Cir. 1990)). The Rooker-Feldman doctrine is jurisdictional in nature and therefore its application cannot be waived. Blanton v. United States, 94 F.3d 227, 233-34 (6th Cir. 1996).

A Rooker-Feldman challenge to the court's jurisdiction may be raised at any time, by any party, or *sua sponte* by the court. Ritter v. Ross, 992 F.2d 750, 752 (7th Cir. 1993), cert. denied, 510 U.S. 1046 (1994). In determining whether Rooker-Feldman applies, the court must ascertain whether the party bringing the claim is seeking what in essence would be an appellate review of a state court decision. Car Color & Supply, Inc. v. Raffel (In re Raffel), 283 B.R. 746, 748 (B.A.P. 8th Cir. 2002) (citing Lemonds v. St. Louis County, 222 F.3d 488, 492 (8th Cir. 2000) (Rooker-Feldman "forecloses not only straightforward appeals but also more indirect attempts by federal plaintiffs to undermine state court decisions.")).

The doctrine applies to those claims that are "inextricably intertwined" with a state court judgment as well as those claims that were actually raised in the state court. Feldman, 460 U.S. 462, 483 n.16; Chaney v. Chaney (In re Chaney), 229 B.R. 266 (Bankr. D.N.H. 1999). A state claim is inextricably intertwined "if the federal challenge succeeds only to the extent that the state court wrongly decided the issues before it. . . . That is, Rooker-Feldman precludes a federal action if the relief requested in the federal action would effectively reverse the state court decision or void its holding." Snider v. City of Excelsior Springs, Mo., 154 F.3d 809, 811 (8th Cir. 1998).

"Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment." Keene Corp. v. Cass, 908 F.2d 293 at 296-97 (8th Cir. 1990) (citing Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 25 (1987) (Marshall, J., concurring).

Rooker-Feldman does not apply if there was no reasonable opportunity to raise the claim at issue. Niere v. St. Louis County, Missouri, 305 F.3d 834, 837 (8th Cir. 2002).

One of the grounds for the debtor's motion for summary judgment is the lack of finality to the arbitration award and judgment. The award was confirmed over the debtor's objection and judgment entered accordingly by the District Court of Douglas County. It was not appealed. It is a final judgment. Neb. Rev. Stat. § 25-2615 ("Upon the granting of an order confirming, modifying, or correcting an [arbitration] award, a judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree."). Thus, any attempt to indirectly appeal the award or judgment in this court is an impermissible collateral attack on the state court's decision.

2. Res judicata

In applying the Eighth Circuit test for whether the doctrine of res judicata bars litigation of a claim, the court examines whether (1) a court of competent jurisdiction rendered the prior judgment, (2) the prior judgment was a final judgment on the merits, and (3) both cases involved the same cause of action and the same parties. Canady v. Allstate Ins. Co., 282 F.3d 1005, 1014 (8th Cir. 2002). Issues which could have been raised in prior litigation, but were not, are barred as well. In re Martin, 287 B.R. 423, 432 (Bankr. E.D. Ark. 2003). "Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." Brown v. Felsen, 442 U.S. 127, 131 (1979).

The same test applies under Nebraska law. R.W. v. Schrein, 263 Neb. 708, 642 N.W.2d 505 (2002):

> [T]he doctrine of res judicata applies to bar relitigation of a matter that has been directly

> addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.

263 Neb. at 715, 642 N.W.2d at 511 (citing Baltensparger v. United States Dep't of Agric., 250 Neb. 216, 548 N.W.2d 733 (1996)).

As noted in the previous section, any attempt to relitigate the arbitration award in this court is precluded because the parties had a full and fair opportunity to raise all the claims they had in the state court litigation. A court of competent jurisdiction has rendered a final judgment on the merits of the dispute between these parties (or the receiver as RAPMI's privy). Moreover, the debtor's assertion of defenses such as acting on the advice of counsel could have been raised in the context of the arbitration, so they will not be further entertained in this forum.

B. Bases for excepting certain debts from discharge

1. § 523(a)(4) defalcation by a fiduciary

Section 523(a)(4) of the Bankruptcy Code excepts from discharge any debt for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.

"Acting in a fiduciary capacity" is limited in application to technical or express trusts, not to trusts that may be imposed because of the alleged act of wrongdoing from which the underlying indebtedness arose. See Barclays Am./Bus. Credit, Inc. v. Long (In re Long), 774 F.2d 875, 878-79 (8th Cir. 1985) (for purposes of § 523(a)(4) fraud or defalcation exception, fiduciary capacity must arise from express trust, not constructive trust or mere contractual relationship).

However, it is clear that a corporate officer and director owes a fiduciary duty to the corporation:

> The rule is thoroughly embedded in the general jurisprudence of . . . America . . . that the status of directors is such that they occupy a fiduciary relation toward the corporation and its stockholders,

> and are treated by courts of equity as trustees. Courts hold the directors of a corporation to the strictest accountability. Conduct inconsistent with any duty is condemned. The fiduciary relation is so vital that directors are not only prohibited from making profit out of corporate contracts, and from dealing with the corporation except upon the most open and on the fairest terms, but the rule of accountability is so strict that they are not permitted to anticipate the corporation in the acquisition of property reasonably necessary for carrying out the corporate purposes or conducting the corporate business.

Anderson v. Bellino, 265 Neb. 577, 588-89, 658 N.W.2d 645, 656 (2003) (quoting Nebraska Power Co. v. Koenig, 93 Neb. 68, 75, 139 N.W. 839, 841-42 (1913)).

According to the caselaw in the Eighth Circuit, a bankruptcy court can find a "defalcation" under 11 U.S.C. § 523(a)(4) without evidence of intentional fraud or other intentional wrongdoing. The Eighth Circuit Court of Appeals in the case of Tudor Oaks Ltd. P'ship v. Cochrane (In re Cochrane), 124 F.3d 978 (8th Cir. 1997), cert. denied, 522 U.S. 1112 (1998), stated:

> Defalcation is defined as the "misappropriation of trust funds or money held in any fiduciary capacity; [the] failure to properly account for such funds." Under section 523(a)(4), defalcation "includes the innocent default of a fiduciary who fails to account fully for money received." . . . An individual may be liable for defalcation without having the intent to defraud.

Cochrane, 124 F.3d at 984 (quoting Lewis v. Scott, 97 F.3d 1182, 1186 (9th Cir. 1996)).

In this case, the arbitrator specifically found that the debtor breached his fiduciary duties to RAPMI in taking a $130,000 bonus in 1999, and in diverting funds from RAPMI to pay professional fees for his personal benefit. The plaintiff is entitled to summary judgment as to those two issues. The arbitrator also directed Mr. Mohlman to make certain payments to or for the benefit of RAPMI because RAPMI was entitled to the money (*i.e.*, the vendor payments, the $30,000 personal loan, the taxes), but did not make a specific finding as to breached

fiduciary duties in those instances. It is clear that Mr. Mohlman was a fiduciary at all relevant times by virtue of his position as a RAPMI officer and director. Whether these actions constitute defalcations is a question of fact.

2. § 523(a)(6) willful and malicious conduct

The Eighth Circuit Court of Appeals has explained the elements of 11 U.S.C. § 523(a)(6) as follows:

> Under section 523(a)(6), a debtor is not discharged from any debt for "willful and malicious injury" to another. For purposes of this section, the term willful means deliberate or intentional. See Kawaauhau v. Geiger, 523 U.S. 57, 61, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998) (§ 523(a)(6) requires deliberate or intentional injury); In re Long, 774 F.2d 875, 881 (8th Cir. 1985) (to meet willfulness component of § 523(a)(6), debtor's actions creating liability must have been "headstrong and knowing"). To qualify as "malicious," the debtor's actions must be "targeted at the creditor . . . at least in the sense that the conduct is certain or almost certain to cause financial harm." In re Long, 774 F.2d at 881.

Hobson Mould Works, Inc. v. Madsen (In re Madsen), 195 F.3d 988, 989 (8th Cir. 1999).

Malice requires conduct more culpable than that which is in reckless disregard of the creditor's economic interests and expectancies. Johnson v. Logue (In re Logue), 294 B.R. 59, 63 (B.A.P. 8th Cir. 2003).

> The debtor's knowledge that he or she is violating the creditor's legal rights is insufficient to establish malice absent some additional aggravated circumstances. Conduct which is certain or almost certain to cause financial harm to the creditor is required. While intentional harm may be difficult to establish, the likelihood of harm in an objective sense may be considered in evaluating intent.

Id.

The arbitration award states that the $130,000 bonus was paid to Mr. Mohlman by RAPMI when RAPMI was insolvent or would

foreseeably become insolvent in the near future, and was paid without the consent or knowledge of Mr. Rambo. This indicates both willfulness and malice, in that the payment was certain to cause financial harm to the creditor. Questions of fact, however, exist as to the plaintiff's remaining allegations of willful and malicious conduct.

IV. Conclusion

By separate order, the receiver's motion for summary judgment will be granted as to the second cause of action, and as to the defalcation while acting as a fiduciary alleged in the third cause of action. It will be denied in all other respects.

Likewise, the debtor's motion for summary judgment will be denied in all respects.

A final, and appealable, judgment covering all the causes of action will be entered after trial of this matter.

DATED: March 26, 2004

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Notice given by the Court to:
*W. Eric Wood
*Kathryn J. Derr
U.S. Trustee

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

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	
	)	
DONALD R. MOHLMAN, JR.,	)	
	)	CASE NO. BK02-82163
Debtor(s).	)	
	)	A02-8092
KATHRYN J. DERR, Receiver for Rambo Associates Property Management, Inc.,	)	
	)	
Plaintiff,	)	CH. 7
	)	
vs.	)	
	)	
DONALD R. MOHLMAN, JR.,	)	
	)	
Defendant.	)	

ORDER

Hearing was held in Omaha, Nebraska, on January 22, 2004, on cross-motions for summary judgment filed by the plaintiff (Fil. #39) and the defendant (Fil. #16). W. Eric Wood appeared for the debtor, and Kathryn Derr appeared as the receiver.

In accordance with the Memorandum entered this date,

IT IS ORDERED: The receiver's motion for summary judgment is granted as to the second cause of action, and as to the defalcation while acting as a fiduciary alleged in the third cause of action. It is denied in all other respects.

IT IS FURTHER ORDERED: The debtor's motion for summary judgment is denied in all respects.

A final, and appealable, judgment covering all the causes of action will be entered after trial of this matter.

DATED: March 26, 2004

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

*W. Eric Wood
*Kathryn J. Derr
U.S. Trustee

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