

1. Does the principal of res judicata apply to the issue of whether a partnership existed?
2. If a partnership did exist, was it a fiduciary relationship under 11 U.S.C. §523(a)(4)?

3. May the Bankruptcy Court adopt the State Court's findings as to defalcation on the part of the debtor?

Summary of Law and Conclusions

Issue No. 1. 28 U.S.C. §1738 (full faith and credit provisions).

The debtor, Mr. Belville, cites Brown v. Felsen, 442 U.S. 127 (1979) in asserting that res judicata does not bar a Bankruptcy Judge from going behind a State Court judgment to determine dischargeability of debt. While this Court accepts the ruling of Brown in that regard, it does not believe that the case prevents a Bankruptcy Judge from adopting a finding of fact by the State Court Judge. The issue of the existence of a partnership was fully litigated in the State Court, and the Court found that a partnership between the plaintiff and the debtor existed. This Court may adopt that finding, and does so adopt it, without jeopardizing its right to determine the dischargeability of any debts that arose out of that partnership.

Issue No. 2. The question is: Does the existence of a partnership create a fiduciary duty, one partner to another with a debt arising from such partnership being nondischargeable? U.S.C. 11 §523(a)(4) states:

"A discharge under §727, 1141, or 1328(b) of this Title does not discharge an individual debtor from any debt for fraud or defalcation while acting in a fiduciary capacity."

The debtor, Belville, argues that a partnership was not intended by the framers of the Bankruptcy Act to be considered a fiduciary relationship and cites In re Holman, 42 B.R. 848 (Bankr. E.D. Mo. 1984) as support for this proposition. In Holman, the Bankruptcy Court for the Eastern District of Missouri found that a partnership was not a "fiduciary" relationship as that term is used in §523(a)(4), in spite of the existence of a Missouri statute which designated a partner as trustee of certain partnership funds. The applicable Nebraska statute, §67-321 (R.R.S. 1981), is nearly identical to Missouri's. However, in 1985, the Eighth Circuit in In re Long, 774 F.2d 875 (1985), stated its agreement with cases holding that state statutes may create fiduciary status in corporate officers which is cognizable in bankruptcy proceedings. Although In re Long dealt with corporate officers, this Court believes that the same principal applies to partnership statutes. Section 67-321 Nebraska Revised Statutes (Reissue 1981) expressly creates a trust relationship between partners. Therefore, applying In re Long, a partnership is a fiduciary relationship within the meaning of U.S.C. 11 §523(a)(4). Thus, Conot and Belville, having been found to have a partnership relationship, also were in a fiduciary relationship to one another.

The applicable language in the Long case is:

"The Code does not reach constructive trustees, designated as such because of misconduct. We recognize that there are cases charging individuals, by virtue of their corporate officer status, with the corporation's fiduciary duties. (citations omitted) To the extent that these cases hold that a statute or other state law rule may create fiduciary status in an officer which is cognizable in bankruptcy proceedings, we agree." In re Long, 774 F.2d 875 at 878 (1985).

The Nebraska statute regarding the relationship of partners is:

Nebraska Revised Statute §67-321 (Reissue 1981). Partner accountable as fiduciary. (1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.

Issue No. 3. This Court adopts the State Court factual findings and finds the debt nondischargeable. The State Court, in its memorandum decision on March 2, 1985, found that Belville had control of the partnership account and used it as his own. While this Court is aware that it may make its own determination as to the dischargeability of any debt, See Brown, supra, it sees no reason to dispute the State Court's findings of fact with regard to Belville's use of the partnership account. Further, based on the State Court's finding of fact, this Court finds that Belville's activities with regard to the partnership account did rise to the level of defalcation. U.S.C. 11 §523(a)(4) bars discharge of Belville's debt. "Defalcation is broader than 'embezzlement' and probably than 'misappropriation.'" Collier on Bankruptcy, §523.14[b], page 523-96 (15 Ed. 1980).

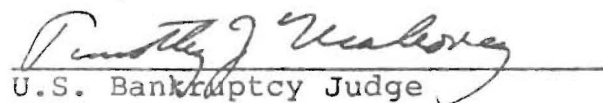
"'Defalcation' includes failure by a fiduciary to account for money he received in a fiduciary capacity; it is sufficient if misrepresentation is due to negligence or ignorance, and it is irrelevant whether default by a fiduciary was innocent." In re Byrd, Bkrtcy. VA., 15 B.R. 154, 156; from 11A Words and Phrases 16, Defalcation (1984 Cumulative Pocket Part).

Decision

Applying res judicata to the State Court's findings of fact, the debtor was in partnership with the plaintiff. Further, this partnership was a fiduciary relationship under 11 U.S.C. §523(a)(4). Finally, the debtor defalcated while acting in a fiduciary capacity. 11 U.S.C. §523(a)(4) therefore applies to bar discharge of debtor's debt to plaintiff. Summary judgment against debtor/defendant granted.

DATED: October 29th, 1986.

BY THE COURT:


U.S. Bankruptcy Judge

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