UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
ROGER & LINDA ALLINGTON,	)	CASE NO. BK99-42109
	)	
Debtors.	)	A00-4034
	)	
UNITED STATES OF AMERICA,	)	
	)	CH. 7
Plaintiff,	)	
vs.	)	
	)	
ROGER & LINDA ALLINGTON,	)	
	)	
Defendants.	)	

MEMORANDUM

Hearing was held in Lincoln, Nebraska, on January 30, 2002, on the United States of America's Motion for Summary Judgment (Fil. #18). Ellyn Grant appeared for the United States, and Bob Creager appeared for Linda Allington. This memorandum contains findings of fact and conclusions of law required by Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(I).

The motion is granted as to defendant Roger Allington, and the total amount of his obligation to the government is nondischargeable pursuant to 11 U.S.C. § 523(a)(2) and (13). The motion is denied as to defendant Linda Allington.

I. Standard of Review

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. Bankr. 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).

In ruling on a motion for summary judgment, the court must view the facts in the light most favorable to the party opposing the motion and give that party the benefit of all reasonable inferences to be drawn from the record. Widoe v. District No. 111 Otoe County Sch., 147 F.3d 726, 728 (8th Cir. 1998); Ghane v. West, 148 F.3d 979, 981 (8th Cir. 1998).

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 jury.

> 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.").

A genuine issue of material fact exists if: (1) there is a dispute of fact; (2) the disputed fact is material to the outcome of the case; and (3) the dispute is genuine, meaning a reasonable jury could return a verdict for either party. RSBI Aerospace, Inc. v. Affiliated FM Ins. Co., 49 F.3d 399, 401 (8th Cir. 1995).

Upon a motion for summary judgment, the initial burden of proof is allocated to the movant in the form of demonstrating "that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. at 325; see Prudential Ins. Co. v. Hinkel, 121 F.3d 364, 366 (8th Cir. 1997), cert. denied sub nom. Hinkel v. Hinkel, 522 U.S. 1048 (1998); Nelson v. Kingsley (In re Kingsley), 208 B.R. 918, 920 (B.A.P. 8th Cir. 1997).

When the movant makes an appropriate showing, the burden then shifts to the nonmoving party "to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(c), (e)).

To withstand a motion for summary judgment, the nonmoving party must submit "sufficient evidence supporting a material factual dispute that would require resolution by a trier of fact." Austin v. Minnesota Mining & Mfg. Co., 193 F.3d 992, 994 (8th Cir. 1999) (quoting Hase v. Missouri Div. of Employment Sec., 972 F.2d 893, 895 (8th Cir. 1992), cert. denied, 508 U.S. 906 (1993)). In this respect, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts; [it] must show there is sufficient evidence to support a jury verdict in [its] favor." Chism v. W.R. Grace & Co., 158 F.3d 988, 990 (8th Cir. 1998). "[T]he mere existence of a scintilla of evidence in favor of the nonmoving party's position is insufficient to create a genuine issue of material fact." Rabushka ex rel. United States v. Crane Co., 122 F.3d 559, 562 (8th Cir. 1997) (internal quotation marks omitted) (quoting In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig., 113 F.3d 1484, 1492 (8th Cir. 1997)), cert. denied, 523 U.S. 1040 (1998).

"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).

II. Facts

Here, the government has moved for summary judgment against both defendants on its complaint for a determination of nondischargeability of the debt owed to the U.S. Department of Agriculture. The complaint is based on allegations of fraud under 11 U.S.C. § 523(a)(2)(A) and (B) and the existence of an order to pay restitution as part of a federal criminal judgment under 11 U.S.C. § 523(a)(13).

The actions giving rise to the allegations involve government price support loans obtained by the Allingtons. Mr. Allington subsequently pleaded guilty to two counts of making false statements in connection with obtaining Commodity Credit Corporation (“CCC”) loans. He is currently serving a 13-month sentence in the federal prison system, and he was ordered to pay $138,963.90 in restitution to the CCC. Mrs. Allington was not charged with a crime, although the government is asserting in the context of this case that judgment should be entered against her because of her husband’s fraud.

A. Mr. Allington

1. 11 U.S.C. § 523(a)(2)(A) & (B)

In order for a debt to be declared nondischargeable under § 523(a)(2)(A) for fraud, the creditor must show, by a preponderance of the evidence, that: (1) the debtor made a representation; (2) the representation was made at a time when the debtor knew the representation was false; (3) the debtor made the representation deliberately and intentionally with the intention and purpose of deceiving the creditor; (4) the creditor justifiably relied on such representation; and (5) the creditor sustained a loss as the proximate result of the representation having been made. Universal Bank, N.A. v. Grause (In re Grause), 245 B.R. 95, 99 (B.A.P. 8th Cir. 2000) (citing

Thul v. Ophaug (In re Ophaug), 827 F.2d 340, 342 n. 1 (8th Cir. 1987), as supplemented by Field v. Mans, 516 U.S. 59 (1995)).

> "Actual fraud, by definition, consists 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." RecoverEdge L.P. v. Pentecost, 44 F.3d 1284, 1293 (5th Cir. 1995) (quoting 3 Collier on Bankruptcy ¶ 523.08[5], at 523-57 to 523-58 (footnote omitted)). "The concept of actual or positive fraud consists of something said, done, or omitted by a person with the design of perpetrating what he knows to be a cheat or deception." In re Stentz, 197 B.R. 966, 981 (Bankr. D. Neb. 1996).

Merchants Nat'l Bank of Winona v. Moen (In re Moen), 238 B.R. 785, 790-91 (B.A.P. 8th Cir. 1999).

To establish a debt as non-dischargeable under § 523(a)(2)(B), a creditor must prove, by a preponderance of the evidence, that (1) the debtor made (2) a statement in writing (3) respecting the debtor's financial condition (4) which was materially false and (5) made with the intent to deceive, and (6) which was reasonably relied upon by the creditor. Heritage Bank of St. Joseph v. Bohr (In re Bohr), 271 B.R. 162, 167 (Bankr. W.D. Mo. 2001).

As noted above, Mr. Allington pleaded guilty to two counts of obtaining money from the CCC through false statements. The essential elements for obtaining a conviction under 15 U.S.C. § 714m(a) are (1) a statement; 2) that is false; 3) the defendant knows it to be false; and 4) the defendant makes it for the purpose of either influencing action of the CCC or obtaining something of value under an act applicable to the CCC. United States v. Huntsman, 959 F.2d 1429, 1437 (8th Cir.), cert. denied, 506 U.S. 870 (1992).

In the criminal case against him, Mr. Allington admitted guilt to charges that

> in connection with loans obtained by Allington under the Farm Stored Loan Program he certified on a Farm Stored Loan Quantity Certification that certain quantities of corn and soybeans were in existence and

> were eligible to be pledged by him as collateral for a CCC price support loan and were stored in certain specified bins, when in truth and fact, as Allington well knew, the certified quantities of corn and soybeans did not exist, and were not stored in the specified bins, and were not eligible to be pledged by him as collateral for a CCC price support loan.

Indictment at 1-2 (Attachment 1 to Index of Evid. in Supp. of Pl.'s Mot. for Summary J. (Fil. #20)).

The evidence before the court establishes that Mr. Allington made written representations – knowing them at the time to be false – to the CCC for the purpose of obtaining money from the CCC. The CCC reasonably relied on those representations and loaned him $138,963.90. Mr. Allington has not put any of those facts into dispute. Judgment is therefore granted in favor of the United States, and the full amount of the debt is not discharged, pursuant to § 523(a)(2)(A).

2. 11 U.S.C. § 523(a)(13)

Congress added paragraph (13) to § 523(a) in 1994. It makes clear that any debt for payment of an order of restitution issued under Title 18 (Crimes and Criminal Procedure) of the U.S. Code is not dischargeable.

Mr. Allington pleaded guilty in April 2001 to two counts of making false statements to the CCC for the purpose of obtaining money. The specific statutory section to which he pleaded guilty is § 714m(a) of Title 15:

> Whoever makes any statement knowing it to be false . . . for the purpose of influencing in any way the action of the [Commodity Credit] Corporation, or for the purpose of obtaining for himself or another, money, property, or anything of value, under this subchapter, or under any other Act applicable to the [CCC], shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment by not more than five years, or both.

15 U.S.C. § 714m(a).

He was sentenced to serve a term of imprisonment and to pay restitution to the victim under 18 U.S.C. §§ 3663 and 3664. The

restitution order is therefore a debt of the type excepted from discharge pursuant to 11 U.S.C. § 523(a)(13). However, the government provided evidence at the hearing on the motion for summary judgment that the balance due on the restitution has been reduced to $126,776.41 because of an IRS setoff and a distribution from the Chapter 7 Trustee. Therefore, the balance of the debt resulting from the judgment of restitution, in the amount of $126,776.41 as of the hearing date, in favor of the CCC and against debtor Roger Allington is excepted from discharge under § 523(a)(13).

B. Mrs. Allington

There is no assertion that Mrs. Allington committed fraud to obtain loans from the CCC. The United States relies on Mrs. Allington's execution of a power of attorney form in 1992, which permitted her husband to act on her behalf in connection with government agricultural programs, to establish her liability for his fraudulent acts in 1998. Mrs. Allington's liability on the debt, if any, results from the imputation of Mr. Allington's fraud to her. Imputing fraud to a spouse requires a factual inquiry into the nature and extent of the debtors' business relationship.

Cases in which a debt is held nondischargeable as to one debtor spouse because of fraud committed by the other debtor spouse generally rely on an agency relationship between the debtors, based on a business relationship in addition to the marital relationship. See Walker v. Citizens State Bank (In re Walker), 726 F.2d 452 (8th Cir. 1984) (undisputed that wife was husband's agent when she operated his business); Allison v. Roberts (In re Allison), 960 F.2d 481, 485 (5th Cir. 1992) (undisputed that wife was not involved in and had no knowledge of husband's real estate scheme, so debt was dischargeable as to her). See also Luce v. First Equip. Leasing Corp. (In re Luce), 960 F.2d 1277 (5th Cir. 1992):

> We view the imputation issue as one about business partners. It is irrelevant to the determination of [Mrs.] Luce's debts under section 523(a)(2) that the business partners also enjoyed a marital relationship. The concepts of law we employ do not turn on the nature of the marital relationship, but on the nature of the business relationship between the Luces. . . . The picture of Billye Luce as a woman who dutifully served her husband's interests without questions and

> without options ignores the import of her college education and extensive business experience.

960 F.2d at 1284 n.10.

Courts generally have not imputed one spouse's wrongdoing to the innocent spouse where no agency relationship exists. Tsurukawa v. Nikon Precision, Inc. (In re Tsurukawa), 258 B.R. 192, 198 (B.A.P. 9th Cir. 2001). The marital relationship alone does not create an agency relationship, and without proof of a partnership or other agency relationship between the spouses, fraud cannot be imputed from one spouse to the other. Id.

In the case of American Charter Federal Savings & Loan Ass'n v. Harris (In re Harris), 107 B.R. 210 (Bankr. D. Neb. 1989), a debt was found to be nondischargeable as to the husband under § 523(a)(6) but dischargeable as to the wife because she did not participate in the conversion of collateral.

> [T]here is no evidence from which I would conclude that the breach of agreements were due to [Mrs. Harris'] conduct. There is no evidence that collateral was converted by her. Nor is there any evidence that her husband acted on her behalf or as her agent, or even that she received the benefits of any conversion of the property of American Charter. The acts and omissions of Robert Harris may not be imputed to Barbara Harris by virtue of their marital status. . . . I conclude simply that she was a party to agreements with American Charter, that the agreements were breached and that the debt due American Charter has not been paid.

107 B.R. at 215.

The extent of Mrs. Allington's knowledge of or participation in her husband's fraud is a question of fact. Neal v. Surls (In re Surls), 240 B.R. 899, 907-08 (Bankr. W.D. Mo. 1999); Walker, 726 F.2d at 454.

Therefore, the matter will be set for a one-half day trial to permit the parties to put on evidence as to whether Mr. Allington's fraud should be imputed to Mrs. Allington. Specifically, the parties should be prepared to address whether the Allingtons conducted their farming operation as partners; such inquiry will necessarily examine the scope of Mrs.

Allington's involvement in the business aspect of operating the farm as well as in the day-to-day work of the farm. Moreover, the question of whether Mrs. Allington knew, or should have known, of Mr. Allington's fraud is also relevant. The parties should also provide evidence as to whether the power of attorney was signed by Mrs. Allington in her capacity as a business partner or in her marital capacity only. Whether Mrs. Allington personally benefitted from her husband's fraud is irrelevant; a partner is deemed to benefit from the partnership's fraud. Deodati v. M.M. Winkler & Assocs. (In re M.M. Winkler & Assocs.), 239 F.3d 746, 749-50 (5th Cir. 2001).

III. Type of Judgment to Be Entered

At the hearing on the motion for summary judgment, counsel for Mrs. Allington raised a question as to whether the pleadings were sufficient to permit the court to enter a money judgment in favor of the government, or whether the judgment would simply be one of nondischargeability.

The court has the authority to, and will, enter a money judgment.

> Given the proposition that the district court, and bankruptcy court by delegation, have jurisdiction to determine allowance and dischargeability of claims, it follows under well established principles that the jurisdiction extends to the entry of judgment for the creditor in the amount of the debt.
>
> . . . [I]n federal court, the parties are to be granted the complete relief to which they are entitled. . . . [I]f the litigation over a disputed claim or an objection to claim involves a nondischargeable debt, the court does have subject matter jurisdiction to enter a final judgment as to the debt. The failure to enter a judgment would be inconsistent with the principles of judicial economy, final res judicata, and collateral estoppel. The entry of judgment in the amount of the debt does nothing more than grant relief to which the creditor is entitled based on matters that were either litigated or which, with reasonable diligence, could have been litigated.

Kinney v. Higher Educ. Assistance Found. (In re Kinney), 114 B.R. 670, 671 (Bankr. D. Neb. 1990).

See also Simek v. Erdman (In re Erdman), 236 B.R. 904 (Bankr. D.N.D. 1999):

> There is no question that bankruptcy courts have jurisdiction to make determinations with regard to the dischargeability of various debts. . . . The framers of the Bankruptcy Code were obviously aware that many debts sought to be rendered nondischargeable pursuant to § 523 would be in the nature of unliquidated claims, and indeed, most such actions are premised upon an unliquidated right to payment. Rendering a determination as to the nondischargeability of a particular debt in a specific sum is tantamount to liquidating the claim, and 28 U.S.C. § 157[b](2)(B) and (O) strongly suggest that bankruptcy courts have authority to liquidate all claims except personal injury and wrongful death claims. This court concludes that in § 523 actions where a specific sum has been determined to be nondischargeable, the claim thereby becomes liquidated to that extent, and a monetary judgment should be entered.

236 B.R. at 909-10. See also Cowen v. Kennedy (In re Kennedy), 108 F.3d 1015, 1017-18 (9th Cir. 1997) (collecting cases).

The debtors have not challenged the government's right to obtain a money judgment in this proceeding, and have therefore waived the right to do so. A money judgment will be entered against Mr. Allington and, if appropriate, against Mrs. Allington. The pleadings were sufficient to put the parties on notice that the government sought entry of a judgment for an amount certain as well as a determination that the debt is not dischargeable.

IV. Conclusion

The motion for summary judgment is granted as to Roger Allington. The total debt of $136,913.85 as of January 30, 2002, plus interest at the federal judgment rate, is excepted from discharge as to Roger Allington pursuant to 11 U.S.C. § 523(a)(2). The $126,776.41 balance due on the debt resulting from the restitution order entered against Roger Allington is excepted from discharge pursuant to 11 U.S.C. § 523(a)(13). To clarify, a sum total of $136,913.85 plus interest is non-dischargeable. The restitution amount is excepted from discharge under a separate statutory section but is subsumed in the total

amount of the debt.

The motion for summary judgment is denied as to Linda Allington. The adversary proceeding will be scheduled for a one-half day trial on the issue of whether fraud can be imputed to Mrs. Allington. This order is not a final order as to Mrs. Allington and is not subject to appeal at this time.

IT IS ORDERED the United States of America's Motion for Summary Judgment (Fil. #18) is granted as to Defendant Roger Allington. Separate judgment will be entered contemporaneously with this order.

IT IS FURTHER ORDERED the United States of America's Motion for Summary Judgment (Fil. #18) is denied as to Defendant Linda Allington. The Clerk of the Bankruptcy Court is directed to schedule a one-half day trial on the adversary complaint in Lincoln, Nebraska.

DATED: February 12, 2002

BY THE COURT:

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

Copies faxed by the Court to:

Copies mailed by the Court to:
U.S. Trustee
*Ellyn Grant, Asst. U.S. Atty., 487 Fed. Bldg., 100 Centennial Mall North, Lincoln, NE 68508
Roger Allington, FPD Yankton, P.O. Box 680, Yankton, SD 57078
Linda Allington, 13820 Cavalier St., Waverly, NE 68462
Robert Creager, Atty., 1630 "K" St., Lincoln, NE 68508

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

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
ROGER & LINDA ALLINGTON,	)	CASE NO. BK99-42109
	)	
Debtors.	)	A00-4034
	)	
UNITED STATES OF AMERICA,	)	
	)	CH. 7
Plaintiff,	)	
vs.	)	
	)	
ROGER & LINDA ALLINGTON,	)	
	)	
Defendants.	)	

JUDGMENT

For the reasons set forth in the separate Memorandum of today's date,

IT IS ORDERED the United States of America's Motion for Summary Judgment (Fil. #18) is granted as to Defendant Roger Allington. Judgment is hereby entered in favor of the United States in the total amount of $136,913.85 as of January 30, 2002, plus interest at the federal judgment rate. This debt is excepted from discharge pursuant to 11 U.S.C. §§ 523(a)(2) and (a)(13).

DATED: February 12, 2002

BY THE COURT:

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

Copies faxed by the Court to:

Copies mailed by the Court to:
U.S. Trustee
*Ellyn Grant, Asst. U.S. Atty., 487 Fed. Bldg., 100 Centennial Mall North, Lincoln, NE 68508
Roger Allington, FPD Yankton, P.O. Box 680, Yankton, SD 57078
Linda Allington, 13820 Cavalier St., Waverly, NE 68462
Robert Creager, Atty., 1630 "K" St., Lincoln, NE 68508

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