2002 BNH 010 **Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 01-12733-JMD
Chapter 7

George B. Sloane,
Debtor

John Hancock Financial Services, Inc.,
Plaintiff

v. Adv. No. 01-1213-JMD

George B. Sloane,
Defendant

Alan L. Braunstein, Esq.
Renea I. Saade, Esq.
RIEMER & BRAUNSTEIN LLP
Bruce A. Harwood, Esq.
SHEEHAN PHINNEY BASS + GREEN, P.A.
Attorneys for Plaintiff

Peter V. Doyle, Esq.
SHAINES & McEACHERN, P.A.
Attorney for Debtor/Defendant

MEMORANDUM OPINION

I. INTRODUCTION

On November 30, 2001, John Hancock Financial Services, Inc. ("John Hancock") filed a complaint seeking to except from discharge pursuant to 11 U.S.C. § 523(a)(2)(A) and/or (a)(6) any obligation of George B. Sloane (the "Debtor") to John Hancock arising out of an agreement (the "Charter Agreement") between the Debtor's corporation, Atlantic Shores Packet Co., Inc. d/b/a Yankee Schooner Cruises (the "Company"), and John Hancock for the chartering of a vessel (the "Vessel") during the Tall Ships festivities in Boston in July 2000. On January 28, 2002, the Debtor filed a motion requesting that

the Court dismiss John Hancock's complaint on the grounds that John Hancock has no claims against the Debtor individually arising out of the negotiation and enforcement of the Charter Agreement as the Debtor was not a party to the Charter Agreement. The Court held a hearing on the Debtor's motion to dismiss on February 6, 2002, at which time the Court took the matter under advisement and ordered the parties to submit memoranda of law on the relevant issues.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

In order to grant a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), which is made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7012(b), the Court must accept the allegations of the complaint as true and make all reasonable inferences in favor of the plaintiff, and if, under any theory, the allegations are sufficient to state a cause of action in accordance with the law, the Court must deny the motion to dismiss. Alternative Energy, Inc. v. St. Paul Fire and Marine Ins. Co., 267 F.3d 30, 33 (1st Cir. 2001); Blackstone Realty LLC v. Fed. Deposit Ins. Corp., 244 F.3d 193, 197 (1st Cir. 2001); Vartanian v. Monsanto Co., 14 F.3d 697, 700 (1st Cir. 1994). Here, the Debtor argues that the allegations in John Hancock's complaint do not state a claim upon which relief can be granted as the Debtor is not individually liable to John Hancock and, therefore, John Hancock has no claim that could be excepted from discharge under either count of John Hancock's complaint.

Count I of the complaint seeks to except from discharge pursuant to section 523(a)(2)(A) all amounts owed to John Hancock arising from any and all claims that John Hancock has against the Debtor in connection with the negotiation and enforcement of the Charter Agreement as any such obligations are the result of the Debtor's false pretenses, false representation and/or actual fraud. In Count II, John

Hancock seeks to except from discharge pursuant to section 523(a)(6) all amounts owed to John Hancock arising from any and all claims that John Hancock has against the Debtor in connection with the negotiation and enforcement of the Charter Agreement as any such obligations are the result of the Debtor willfully and knowingly converting John Hancock's funds, which were delivered pursuant to the Charter Agreement, with the intent to deprive John Hancock of its property.

In order to succeed on its complaint, John Hancock must establish, first, that it has a claim against the Debtor and, second, that its claim should be excepted from discharge. The parties agree that a default judgment that entered in a state court action in Massachusetts is not a final judgment and therefore the Debtor is not collaterally estopped from challenging his liability to John Hancock.[1] Accordingly, the complaint itself must contain sufficient allegations that, if true, would establish that the Debtor, not just the Company, is liable to John Hancock for any misrepresentation or conversion that occurred in connection with the negotiation and enforcement of the Charter Agreement.

John Hancock's complaint, and the exhibits attached to it,[2] contain the following factual allegations, which for purposes of the instant motion, are accepted as true. The Debtor is the president, director, sole shareholder, and principal of the Company. The Debtor and John Hancock entered into negotiations regarding the Company chartering the Vessel to John Hancock for the Tall Ships festivities in Boston in July 2000. On or about April 5, 2000, John Hancock and the Company entered into the Charter Agreement, which was signed by a representative of John Hancock and by the Debtor as president of the "owner" of the Vessel, who was listed in the Charter Agreement as the Company. The

---

[1] John Hancock brought suit against the Debtor and the Company seeking to recover damages for breach of contract, conversion, misrepresentation and fraud, money had and received, and violation of Mass. G. Laws c. 93A. "Under Massachusetts law, collateral estoppel precludes relitigation of issues determined in prior actions between the parties or those in privity with the parties, [provided the issues] were actually litigated in the first action, and determined by a final judgment on the merits." Smith Barney, Inc. v. Strangie (In re Strangie), 192 F.3d 192, 194 (1st Cir. 1999) (citations and quotations omitted). Generally, collateral estoppel is not triggered under Massachusetts law by a nonappealable state court default judgment. Id. at 195.

[2] See Alternative Energy, 267 F.3d at 33-34 (indicating that exhibits to complaints can be considered in deciding a motion to dismiss); Blackstone Realty, 244 F.3d at 195 and n.1, 3.

Charter Agreement provided that the Vessel would be "in full commission and working order, seaworthy, clean, in good condition throughout and ready" for a charter from July 7, 2000 to July 13, 2000 (the "Charter Period"). The contract price was $45,000.00. At the time the Charter Agreement was executed, John Hancock delivered $22,500.00 to the Debtor in the form of check in that amount made payable to the Company. On or about June 6, 2000, John Hancock delivered a second check to the Debtor in the amount of $11,250.00 made payable to "Yankee Schooner Cruises." The Charter Agreement did not require the Company to treat any of these payments as a security deposit nor did it require the Company to hold such funds in escrow.

At the time the Debtor signed the Charter Agreement and received the funds paid by John Hancock, the Debtor had first hand personal knowledge that the Debtor could not and would not be able to supply the Vessel as agreed because the United States Coast Guard of Maine (the "Coast Guard") had ordered the Company to make extensive repairs to the Vessel. Further, the Debtor was aware that neither the Debtor nor the Company, which was insolvent and undercapitalized, had the financial wherewithal to pay for the repairs demanded by the Coast Guard, which were necessary to render the Vessel seaworthy to obtain clearance to sail and carry its full capacity during the Charter Period. The Debtor nonetheless executed the Charter Agreement on behalf of the Company and accepted John Hancock's initial payment, knowing full well that the Vessel could not be delivered to John Hancock in accordance with the terms and conditions of the Charter Agreement. On May 10, 2000, the Coast Guard notified the Debtor that his request for additional time to comply with its orders was denied. Despite knowing that it was not feasible to complete the repairs ordered by the Coast Guard, the Debtor accepted John Hancock's second payment on or about June 6, 2000.

On June 22, 2000, the Debtor notified John Hancock that the Vessel would not be available for the Charter Period. John Hancock was forced to hire substitute vessels and make other related arrangements on short notice which resulted in out-of-pocket expenses of nearly $80,000.00. At all times, the Debtor specifically represented to John Hancock that the Vessel would be available and would be

tendered for use by John Hancock during the Charter Period, as required by the Charter Agreement, at a time when the Debtor knew or should have known that there was no likelihood that the Vessel would be made available to John Hancock for the Charter Period.

John Hancock brought a state court action against the Debtor and the Company in Massachusetts in November 2000. The Debtor and the Company through counsel answered the state court complaint and the parties engaged in extensive discovery. After the Debtor and the Company failed to comply with certain discovery orders the state court held a hearing and issued a default judgment. The parties agree that the state court default judgment is not a final order and thus it cannot be used to collaterally estop the Debtor from denying liability to John Hancock.

III. DISCUSSION

A. Individual Liability of Corporate Officer

Under Massachusetts law,[3] corporations and their shareholders are generally deemed distinct legal entities, and corporate officers are not liable, in general, for actions they undertake as agents for a corporation. In re Plantation Realty Trust, 232 B.R. 279, 282 (Bankr. D. Mass. 1999) ("Without cause, a court cannot look beyond the corporation's legal structure and property to satisfy a judgment or to find legal accountability in others for actions taken in the corporate name."). See also Refrigeration Discount Corp. v. Catino, 112 N.E.2d 790, 793 (Mass. 1953). However, there are at least two situations where an officer of a corporation may be held responsible for his corporate actions. First, officers may be liable for corporate actions if grounds exist to "pierce the corporate veil." Plantation Realty Trust, 232 B.R. at 282 ("Under unusual circumstances, a court may disregard the corporate form, particularly to defeat fraud or remedy and injury."). Second, officers may be liable for any tortious activity in which they personally

[3] Because the validity, construction, and enforceability of the Charter Agreement is governed by Massachusetts law, the Court will consider Massachusetts law in determining whether John Hancock has set forth sufficient allegations in the complaint that, if true, would establish that it holds a claim against the Debtor. See Addendum to the Charter Agreement at ¶ 5.

participate. Frontier Mgmt. Co., Inc. v. Balboa Ins. Co., 658 F. Supp. 987, 991 (D. Mass. 1986); Refrigeration Discount, 112 N.E.2d at 794. At issue is whether John Hancock's complaint contains sufficient allegations which, if true, would establish grounds to pierce the corporate veil or would establish that the Debtor should be held liable for personally participating in torts against John Hancock.

A plaintiff seeking to pierce a corporate veil must allege and subsequently prove a set of facts sufficient to warrant the pierce. Sheppard v. River Valley Fitness One, L.P., 2002 DNH 020, at 30. The First Circuit has outlined twelve factors to be considered in deciding whether to pierce the corporate veil. Pepsi Cola Metro. Bottling Co. v. Checkers, Inc., 754 F.2d 10, 14-16 (1st Cir. 1985). These factors are: (1) common ownership; (2) pervasive control; (3) confused intermingling of business activity assets or management; (4) thin capitalization; (5) nonobservance of corporate formalities; (6) absence of corporate records; (7) no payment of dividends; (8) insolvency at the time of the litigated transaction; (9) siphoning away of corporate assets by dominate shareholders; (10) nonfunctioning officers and directors; (11) use of the corporation for transactions of the dominant shareholders; and (12) use of the corporation in promoting fraud. Id. See also Desmond v. State Bank of Long Island (In re Computer Eng'g Assocs., Inc.), 252 B.R. 253, 274-75 (Bankr. D. Mass. 2000); Plantation Realty Trust, 232 B.R. at 282; My Bread Baking Co. v. Cumberland Farms, Inc., 233 N.E.2d 748, 751-52 (1968).

Viewing John Hancock's complaint in the light most favorable to it, the Court finds that John Hancock has mentioned at most only three of these factors, namely, thin capitalization, insolvency at the time of the litigated transaction, and use of the corporation in promoting fraud, namely, the fraud in this case. To the extent that John Hancock referred to the fact that the Company was insolvent and undercapitalized at the time the Charter Agreement was executed and through the Charter Period, such references in the complaint relate solely to the fact that the Company did not have the financial wherewithal to pay for the repairs demanded by the Coast Guard. John Hancock has not articulated how or why these facts, standing alone, are enough to require the Court to disregard the corporate form and hold the Debtor liable for the Company's alleged wrongdoing. Further, nowhere in the complaint has

John Hancock alleged that the Debtor conducted the Company's business in a manner inconsistent with its separate legal identity–e.g., the Debtor failed to observe corporate formalities, keep corporate records, or pay corporate dividends or the Debtor used the Company for his own purposes and intermingled his assets with those of the Company–such that it would be unjust to require John Hancock to look only to the assets of the Company to satisfy any obligation arising from the negotiation and enforcement of the Charter Agreement. Thus, absent further allegations in John Hancock's complaint that the corporate form should be disregarded, the Court finds that John Hancock's complaint cannot withstand a motion to dismiss with respect to whether it can pierce the corporate veil to hold the Debtor personally liable.

"It is not necessary in all instances, however, to pierce the corporate veil in order to hold a corporate officer liable for a corporation's torts. A corporate officer is personally liable for a tort committed by the corporation that employs him, if he personally participated in the tort by, for example, directing, controlling, approving, or ratifying the act that injured the aggrieved party." Townsends, Inc. v. Beaupre, 716 N.E.2d 160, 164 (Mass. App. Ct. 1999). See also Refrigeration Discount, 112 N.E.2d at 793; Coe v. Ware, 171 N.E. 732, 734 (Mass. 1930).

> A corporate officer may be liable for his own fraudulent representations and is not protected because his representations were made while acting in official corporate capacity. What is required is some showing of direct personal involvement by the corporate officers in some decision or action which is causally related to plaintiff's injury. An officer who is a "moving, active conscious force" behind a corporate tort has been held liable for damage. An individual is not immunized as an officer of a corporation for the acts he is alleged to have committed personally. A corporate officer is liable for torts in which he personally participated whether or not he was acting within the scope of his authority.

Instant Image Print Shop, Inc. v. Lavigne, Keating, Halstead, Inc., 1998 Mass. App. Div. 74 (citations omitted). See also Bond Leather Co., Inc. v. Q.T. Shoe Mfg. Co., Inc., 764 F.2d 928, 938 (1st Cir. 1985) ("[I]t is settled that a corporate officer who commits a tort is personally liable for his actions and cannot seek refuge in the fact that he was acting for the corporation."); Frontier Mgmt., 658 F. Supp. at 993 ("[C]orporate officers may be liable for their own fraudulent misrepresentations, and they are not

protected merely because those representations were made while they were acting in their official corporate capacities.").

Taking the facts in the complaint as true for purposes of deciding the Debtor's motion, the Court finds that the Debtor, acting as president and principal of the Company, negotiated the Charter Agreement, made representations as to the Vessel's ability to charter, and accepted John Hancock's payments under the Charter Agreement. The Debtor alone provided the information that John Hancock used in deciding to enter into an agreement with the Company.

Under Massachusetts law, a plaintiff can recover for the tort of misrepresentation if: (1) the defendant made a false statement with knowledge of its falsity; (2) the false statement concerned a material fact; (3) the false statement was made to induce the plaintiff to act; (4) the plaintiff relied on the false statement; and (5) the plaintiff acted upon the false statement to his detriment. Bond Leather Co., 764 F.2d at 935 (citing Metropolitan Life Ins. Co. v. Dittmore, 727 F.2d 1, 4 (1st Cir. 1984), and Barrett Assocs., Inc. v. Aronson, 190 N.E.2d 867 (Mass. 1963)). See also Kelley v. LaForce, 279 F.3d 129, 142 (1st Cir. 2002); McEneaney v. Chestnut Hill Realty Corp., 650 N.E.2d 93, 96 (Mass. 1995); 48 Jordan L. Shapiro et al., Massachusetts Practice Collection Law § 12:4 (Supp. 2002). "Massachusetts law does not . . . require intent to deceive . . . . Rather, the only intent required is the intent that the plaintiff rely on the challenged false statements." Bond Leather, 764 F.2d at 937 n.6.

The Court finds that under the circumstances outlined in the complaint the Debtor cannot hide behind the Company's corporate form. John Hancock has alleged sufficient facts which, if true, would establish: (1) the Debtor made a misrepresentation to John Hancock that the Vessel would be in working condition and ready to charter during the Charter Period at time when the Debtor knew or should have known that the Vessel could not be chartered due to outstanding repair orders from the Coast Guard; (2) the Debtor's statements regarding the Vessel's ability to be chartered were material; (3) the Debtor's statements were made to induce John Hancock to execute the Charter Agreement; (4) John Hancock relied on the statements in deciding to execute the Charter Agreement; and (5) John Hancock was harmed

because it was required to hire other vessels during the Charter Period because the Vessel was not seaworthy during that time. Accordingly, John Hancock would have a claim against the Debtor for misrepresentation.

The Court also finds that John Hancock's complaint contains sufficient allegations which, if true, would warrant excepting this claim from discharge pursuant to section 523(a)(2)(A), as the elements of misrepresentation under Massachusetts law appear to be the same as the requirements under section 523(a)(2)(A),[4] except that section 523(a)(2)(A) requires the defendant to have intended to deceive and the plaintiff to have actually and justifiably relied upon the false statement. Reviewing the complaint in the light most favorable to John Hancock, the Court finds that John Hancock's allegations in Count I of the complaint are sufficient in this regard.[5]

B. Conversion

In Count II of the complaint, John Hancock states that the Debtor, without just cause or excuse, willfully and knowingly converted funds delivered by John Hancock to the Company, pursuant to the Charter Agreement, with the intent to deprive John Hancock of its property. John Hancock seeks to except from discharge any liability associated with such conversion.

> A plaintiff asserting a conversion claim under Massachusetts law must show that: (1) the defendant intentionally and wrongfully exercised control or dominion over the personal

---

[4] [I]n order to establish that a debt is nondischargeable because obtained by "false pretenses, a false representation, or actual fraud," [the First Circuit Court of Appeals has] held that a creditor must show that 1) the debtor made a knowingly false representation or one made in reckless disregard of the truth, 2) the debtor intended to deceive, 3) the debtor intended to induce the creditor to rely upon the false statement, 4) the creditor actually relied upon the misrepresentation, 5) the creditor's reliance was justifiable, and 6) the reliance upon the false statement caused damage.

McCrory v. Spigel (In re Spigel), 260 F.3d 27, 32 (1st Cir. 2001) (citing Palmacci v. Umpierrez, 121 F.3d 781, 786 (1st Cir. 1997)).

[5] While John Hancock has alleged reasonable, not justifiable, reliance, the Court notes that justifiable reliance is an easier allegation to prove and therefore sufficient for purposes of notice pleading.

> property; (2) the plaintiff had an ownership or possessory interest in the property at the time of the alleged conversion; (3) the plaintiff was damaged by the defendant's conduct; and (4) if the defendant legitimately acquired possession of the property under a good-faith claim of right, the plaintiff's demand for its return was refused.

Computer Eng'g, 252 B.R. at 276 (quoting Evergreen Marine Corp. v. Six Consignments of Frozen Scallops, 4 F.3d 90, 95 (1st Cir. 1993)). See also Kelley v. LaForce, 279 F.3d 129, 140 (1st Cir. 2002); Henry v. Nat'l Geographic Society, 147 F. Supp.2d 16, 21 (D. Mass. 2001); Kelly v. Dubrow, 2001 Mass. App. Div. 42; Schiappa v. Nat'l Marine Underwriters, Inc., 1999 Mass. App. Div. 122. Conversion does not require an intent to deprive the owner permanently of the property. Schiappa, 199 Mass. App. Div. 122. Rather, one only need intent to exercise dominion or control over the property of another and can be held liable for conversion even if the property over which he exercised control was believed to be his own. Id.

Considered in the light most favorable to John Hancock, the complaint establishes that John Hancock delivered money to the Company in the form of two checks, one in the amount of $22,500.00 and the other in the amount of $11,250.00, pursuant to the terms of the Charter Agreement. The Charter Agreement does not state that these funds were to treated as a security deposit or that the Company should hold them in escrow prior to the Charter Period. Therefore, John Hancock has not alleged, nor could it allege, that the Debtor was intentionally and wrongfully exercising control or dominion over John Hancock's money. John Hancock made payment on a contract to the Company. The complaint contains no allegation that the Company was limited in what he could do with the funds once received. Accordingly, the Court finds that John Hancock's complaint fails to set forth a sufficient basis for establishing that John Hancock has a claim for conversion. Thus, even though conversion is injury to property that may come within the exception to discharge under section 523(a)(6) for willful and malicious injury to property, see Haemonetics Corp. v. Dupre, 238 B.R. 224, 229-30 (D. Mass. 1999),

aff'd, 229 F.3d 1133 (1st Cir. 2000) (unpublished table decision), John Hancock has failed to establish that the Debtor is liable to it and therefore no claim exists to except from discharge.

IV. CONCLUSION

For the reasons outlined above, the Court grants in part and denies in part the Debtor's motion to dismiss. The Court finds that John Hancock's complaint sets forth sufficient allegations which, if true, would establish that the Debtor is individually liable to John Hancock for the tort of misrepresentation, and that such liability could be excepted from discharge under section 523(a)(2)(A) as a debt incurred through false pretenses, false representation, or fraud. Accordingly, Count I of the complaint survives the Debtor's motion to dismiss. John Hancock has not set forth sufficient allegations to establish that the Debtor is individually liable to John Hancock for the tort of conversion. Thus, there is no claim that can be excepted from discharge as a debt for willful and malicious injury under section 523(a)(6), and Count II of the complaint must be dismissed. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DATED this 25th day of March, 2002, at Manchester, New Hampshire.

J. Michael Deasy
Bankruptcy Judge