**2003 BNH 024** **Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.**

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# UNITED STATES BANKRUPTCY COURT
# DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 01-13677-JMD
Chapter 7

Brian Leon Jaworski,
Debtor

Amsol, Inc.,
Plaintiff

v. Adv. No. 02-1029-JMD

Brian Leon Jaworski,
Defendant

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## MEMORANDUM OPINION

## I. INTRODUCTION

Amsol, Inc. ("Amsol") filed a complaint (the "Complaint") seeking to except from discharge any obligation from the Debtor to Amsol arising out of a deal to drill oil wells in

Louisiana. The complaint contains three counts: Count I seeks to except the debt under 11 U.S.C. § 523(a)(2)(A) as a debt obtained by false pretenses, false representations, or actual fraud and under 11 U.S.C. § 523(a)(2)(B) as a debt obtained through the use of false written statements regarding the Debtor's financial condition; Count II seeks to except the debt under 11 U.S.C. § 523(a)(4) as a debt for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny; and Count III seeks to except the debt under 11 U.S.C. § 523(a)(6) as a debt for willful and malicious injury. The Debtor filed a counterclaim (the "Counterclaim") which contains three counts: Count I seeks rescission of a settlement agreement into which the Debtor and Amsol entered during the course of pre-bankruptcy litigation; Count II seeks a determination that Amsol is liable to the Debtor for fraud; and Count III seeks a determination that Amsol committed fraud upon the court in which the pre-bankruptcy litigation was brought. Amsol has filed a motion (the "Motion") seeking summary judgment in its favor on both the Complaint and the Counterclaim.

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. BACKGROUND

In 1994 the Debtor's company, Jaworski Consultants, Inc. ("JCI"), entered in a joint venture agreement with Gerald T. Langford d/b/a Sunbelt Energy ("Langford" or "Sunbelt") whereby they agreed that each would have an undivided fifty percent interest in mineral rights in real property located in Louisiana (the "Property" or "Benson Field"). Under this agreement,

Sunbelt would provide 20,000 acres and drilling site work and JCI would provide necessary funding for the project.

Several years later the Debtor and Amsol began discussions regarding Amsol's potential involvement in the Benson Field venture. These discussions ultimately resulted in the execution of various agreements and the transfer of money from Amsol to another of the Debtor's companies, Jaworski Consultants II, Inc. ("JCII"). Specifically, on December 18, 1997, Amsol and JCII entered into an option agreement (the "Option Agreement") pursuant to which the parties indicated their intent to enter into a memorandum agreement on or before January 14, 1998, regarding the drilling and testing of wells on the Property. Exhibit F. On December 22, 1997, Kevan W. Fearnley, a principal of Amsol, deposited $65,000 into JCII's bank account in accordance with the terms of the Option Agreement, which provided in part:

1. Amsol has paid to Jaworski the sum of Forty thousand pounds sterling (£40,000.00) in consideration for entering this Option Agreement;

2. The aforesaid payment will be treated as part payment of the first cash paymnet [sic] due after completion of the Memorandum Agreement;

3. Amsol will deliver to Jaworski a description and specification for the Test Wells on or before 31st December 1997;

4. Jaworski will deliver to Amsol a detailed estimate of the cost of the drilling and testing program for the Test Wells according to the specification given by Amsol on or before 7th January 1998.

Id. In accordance with the Option Agreement, JCII and Amsol executed a memorandum agreement (the "Memorandum Agreement"),[1] the purpose of which was "to provide the terms and conditions under which [JCII] will drill two (2) oil wells ("the Test Wells") on behalf of Amsol and thereafter . . . one hundred and twenty (120) oil wells." Exhibit M. In connection with the

[1] There is some dispute as to when the Memorandum Agreement was executed. The Debtor states that it was executed on December 17, 1997, while Amsol states it was executed on January 16, 1998.

execution of the Memorandum Agreement, several other agreements were executed and incorporated by reference into the Memorandum Agreement.

First, JCII and Sunbelt executed a farmout agreement (the "Farmout Agreement"), in which Sunbelt granted a "farmout" of its oil, gas, and mineral leases in the Property to JCII.
JCII and Amsol executed a contribution agreement (the "Contribution Agreement"), the purpose of which was "to provide the terms and conditions under which Amsol will contribute cash to [JCII] in exchange for the drilling of up to one hundred and twenty (120) oil wells, in three (3) groups of twenty (20) wells . . . and thereafter on a well to well basis . . . ." Exhibit K. It also set forth a methodology for the return of Amsol's capital contribution thereunder. Because it was necessary that Sunbelt participate with JCII on a conditional and limited basis in the fulfillment of certain obligations of JCII to Amsol, JCII and Sunbelt also executed a conditional limited assignment of working interests (the "Assignment") pursuant to which Sunbelt agreed to conditionally assign over to Amsol a percent of its working interest net cash flow from each well, as required under a formula, until the capital repayment obligation of JCII to Amsol had been satisfied. Exhibit L. Lastly, all three parties, JCII, Amsol, and Langford, executed an operating agreement (the "Operating Agreement") which JCII executed as operator and which Langford and Amsol both executed as non-operators. Exhibit J. Among other things the Operating Agreement set forth JCII's obligations and responsibilities regarding drilling and development as well as the expenditures and liabilities of the parties.

On the same day that these various agreements were signed, Amsol wired $335,000 to JCII's bank account in accordance with the terms of the Memorandum Agreement which provided in relevant part:

> 1. Upon completion of this Agreement, Amsol shall deliver to [JCII] the sum of Four Hundred Thousand Dollars ($400,000).

2. Upon receipt by [JCII] of the aforesaid funds, JCII, as Operator, shall forthwith proceed with the drilling of the Test Wells in the Area of Interest to be drilled, completed and tested in accordance with the description and specification set out in Exhibit 2.

Exhibit M. The next day JCII wrote a check to JCI in the amount of $100,000. Within a few days, JCII wrote a second check to JCI in the amount of $35,000. Within the next few months, the balance of the $400,000 that had been deposited in JCII's bank account was withdrawn.

The test wells were never drilled. As a result, Amsol instituted a lawsuit in the United States District Court for the Eastern District of Texas in order to recoup the funds it had transferred to JCII. On February 15, 2001, the parties executed a mutual release and settlement agreement (the "Settlement Agreement"), which required the Debtor and JCII to pay $500,000 to Amsol in two payments by sometime in August 2001. The Debtor defaulted under the terms of the Settlement Agreement, and on December 6, 2001, he sought protection under Chapter 7 of the Bankruptcy Code. Amsol filed a complaint on March 7, 2002, seeking to except the Debtor's obligation to it from discharge.

## III. DISCUSSION

Under Rule 56(c) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056, a summary judgment motion should be granted only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that 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." "Genuine," in the context of Rule 56(c), "means that the evidence is such that a reasonable jury could resolve the point in favor of the nonmoving party." Rodriguez-Pinto v. Tirado-Delgado, 982 F.2d 34, 38 (1st Cir. 1993) (quoting United States v. One Parcel of Real Property, 960 F.2d 200, 204 (1st Cir. 1992)).

"Material," in the context of Rule 56(c), means that the fact has "the potential to affect the outcome of the suit under applicable law." Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st Cir. 1993). Courts faced with a motion for summary judgment should read the record "in the light most flattering to the nonmovant and indulg[e] all reasonable inferences in that party's favor." Maldonado-Denis v. Castillo-Rodriguez, 23 F.2d 576, 581 (1st Cir. 1994).

**A. Count I of the Complaint: 11 U.S.C. § 523(a)(2)**

Amsol seeks summary judgment with respect to its claim under section 523(a)(2)(A) of the Bankruptcy Code. Section 523(a)(2)(A) requires a creditor to demonstrate by a preponderance of the evidence the following elements:

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.

Grogan v. Garner, 498 U.S. 279, 291 (1991) (stating the standard of proof under section 523(a) is preponderance of the evidence); Palmacci v. Umpierrez, 121 F.3d 781, 787 (1st Cir. 1997) (same); McCrory v. Spigel (In re Spigel), 260 F.3d 27, 32 (1st Cir. 2001) (citing Palmacci, 121 F.3d at 786 (setting forth elements of section 523(a)(2)(A)). Exceptions to discharge are narrowly construed in order to further the Bankruptcy Code's "fresh start policy" and, for that reason, a creditor must demonstrate that its claim comes squarely within an exception to discharge contained in section 523(a). Palmacci, 121 F.2d at 786 (quoting Century 21 Balfour Real Estate v. Menna (In re Menna), 16 F.3d 7, 9 (1st Cir. 1994)).

Amsol argues that the Debtor made a false statement or misrepresentation when he represented in the Option Agreement and in the Memorandum Agreement that he would drill two test wells for Amsol. In determining whether the Debtor made a false statement, false representation, or committed actual fraud, the Court must examine the Debtor's actions and statements in light of the circumstances that existed at the time that JCII and Amsol entered into the various agreements and Amsol forwarded money to JCII. If, at the time the parties entered into the various contracts, the Debtor, through his company JCII, actually intended to use Amsol's money to dig the test wells, but the Debtor then later changed his mind or intervening events caused him to act otherwise, the Court must find that the Debtor made no false representation because a debtor's statement is a false representation only if, at the time the statement was made, the debtor did not intend to carry out the stated future action. Palmacci, 121 F.3d at 787. Even assuming for purposes of Amsol's summary judgment motion that it is correct when it states the Debtor made a false statement when he stated that he would drill the two test wells, the Court finds that there is a genuine issue regarding the Debtor's intentions at the time he made such a representation. Amsol states that it is "undisputed" that the Debtor never intended to drill the test wells. As evidence of the Debtor's intention, Amsol points to the Debtor's course of conduct regarding the funds Amsol deposited in JCII's account. While Amsol is correct that the Debtor's actions in transferring funds subsequent to Amsol depositing $65,000 and $335,000 into JCII's accounts may be evidence of the Debtor's fraudulent intent, the Court is unable to conclude from the summary judgment record that the Debtor possessed such intent where the Debtor has stated under oath in his verified objection to Amsol's motion that he "never intended to defraud Amsol" and that the reason the wells were never drilled was because of Amsol's failure to approve the test well specifications. See Doc. No. 40 at ¶¶ 28 and 29. Issues regarding intent are factual and difficult to establish absent an

evidentiary hearing where the Court can judge the credibility and demeanor of witnesses. See A.T. & T. Universal Card Servs. v. Burns (In re Burns), 196 B.R. 11 (Bankr. W.D.N.Y. 1996) ("[I]t is almost axiomatic that fraudulent intent is uniquely not susceptible to resolution 'on papers.'") (quoted in A.T. & T. Universal Card Servs. v. Berry (In re Berry), 197 B.R. 382, 383 (Bankr. M.D. Fla. 1996)); see also Collum v. Redden (In re Redden), 234 B.R. 49, 51 (Bankr. D. Del. 1999). Accordingly, the Court must deny Amsol's motion for summary judgment with respect to its claim under section 523(a)(2)(A) as set forth in Count I of the Complaint as there are genuine issues regarding the Debtor's intent.[2]

**B. Count II of the Complaint: 11 U.S.C. § 523(a)(4)**

Amsol argues that it is entitled to summary judgment on Count II of the Complaint wherein it seeks to have its debt excepted from discharge pursuant to section 523(a)(4). Section 523(a)(4) of the Bankruptcy Code provides four ways to except a debt from discharge: (1) fraud while acting in a fiduciary capacity; (2) defalcation while acting in a fiduciary capacity; (3) embezzlement; or (4) larceny.

> "Fraud" for purposes of section 523(a)(4) has "generally been interpreted as involving intentional deceit, rather than implied or constructive fraud." 4 Collier on Bankruptcy at ¶ 523.10[1][a] (15th rev. ed. 1998). "Fiduciary" as used in section 523(a)(4) "is limited to the class of fiduciaries including trustees of specific written declarations of trusts, guardians, administrators, executors, or public officers." BAMCO 18 v. Reeves (In re Reeves), 124 B.R. 5, 9 (Bankr. D.N.H. 1990); see also Peerless Ins. v. Swanson (In re Swanson), 231 B.R. 145, 148 (Bankr. D.N.H. 1999). The definition of "fiduciary" is limited to a relationship involving either an express or technical trust and not trusts that are imposed by law as a remedy. See Swanson, 231 B.R. at 148; Collenge v. Runge (In re Runge), 226 B.R. 298, 304 (Bankr. D.N.H. 1998); Beeman, 225 B.R. at 525; Office of Public Guardian, 192 B.R. at 600; Reeves, 124 B.R. at 7. In other words, section 523(a)(4) "is aimed only at the express trust situation in which the debtor

[2] The Court notes that Count I of the Complaint also seeks relief under section 523(a)(2)(B). Amsol did not make any reference to section 523(a)(2)(B) in its summary judgment motion. Accordingly, the Court has not addressed this claim. At trial, however, Amsol will need to introduce evidence regarding its claim under section 523(a)(2)(B) if it intends to pursue non-dischargeability under that subsection.

> either expressly signified his intention at the outset of the transaction, or was clearly put on notice by some document in existence at the outset, that he was undertaking the special responsibilities of a trustee to account for his actions over and above the normal obligations that contracting parties have to each other in a commercial transaction." Reeves, 124 B.R. at 10; see also Beeman, 225 B.R. at 525; Office of Public Guardian, 192 B.R. at 601; Ducey v. Doherty (In re Ducey), 160 B.R. 465, 469 (Bankr. D.N.H. 1993).

Flanagan v. Flanagan (In re Flanagan), 2000 BNH 049, at 5.

> "Defalcation" is defined as "a failure to observe clear and specific restrictions and limitation upon the fiduciary in either the trust document or the applicable statutory law and does not require as an element therefore some sort of bad faith on the part of the fiduciary . . . . [Defalcation also] includes innocent as well as intentional or negligent default so as to reach the conduct of all fiduciaries who are short in their accounts." Swanson, 231 B.R. at 148; Beeman, 225 B.R. at 525; Office of Public Guardian, 192 B.R. at 601; Ducey, 160 B.R. at 468. In order to prove defalcation, the plaintiff must show that the "fiduciary failed to return property or account for same, even though no fraud, embezzlement, or even misappropriation on the party of the fiduciary is shown." See Swanson, 231 B.R. at 149; Beeman, 225 B.R. at 525; Ducey, 160 B.R. at 468; Reeves, 124 B.R. at 6.

Id. at 6-7.

Amsol argues that "the existence of a fiduciary relationship between Amsol and the Debtor is evident by virtue of the Memorandum Agreement, the other documents between the parties and the parties' understanding." Motion at 19. In its view "the Memorandum Agreement itself shows that there was an express relationship because the Debtor was provided with Amsol's $400,000 to drill the Test Wells on behalf of Amsol." Id. In addition, Amsol argues that a fiduciary relationship existed between the parties based on "partnership principles." Id. at 20.

The Court is not convinced based on its initial review of the Memorandum Agreement that there was an express trust arrangement between the parties. The Court is even less certain that the parties were involved in some type of partnership. See Exhibit J at Article VII.A ("It is not the intention of the parties to create, nor shall this agreement be construed as creating, a mining or other partnership or association, or to render the parties liable as partners."). Therefore, the Court

is unable to conclude based on the summary judgment record that the Debtor was acting as some type of fiduciary within the meaning of section 523(a)(4). Accordingly, Amsol's motion for summary judgment with respect to Count II of the Complaint shall be denied.[3]

**C. Count III of the Complaint: 11 U.S.C. § 523(a)(6)**

Pursuant to section 523(a)(6) of the Bankruptcy Code a debt may be deemed non-dischargeable if it is the result of willful and malicious injury by the debtor to another entity or the property of another. In order to constitute a willful injury the act must be deliberate or intentional. Printy v. Dean Witter Reynolds, Inc., 110 F.3d 853, 859 (1st Cir. 1997). In other words, the act must be done intentionally and must necessarily cause harm or be substantially certain to cause harm. Id. However, "the word 'willful' in (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998). The malice required by section 523(a)(6) requires an intent to cause harm; recklessness or negligence will not suffice. Brown v. Timlake (In re Timlake), 2001 BNH 017, at 6 (citing Printy, 110 F.3d at 859; Geiger, 523 U.S. at 64). 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. Haemonetics Corp. v. Dupre, 238 B.R. 224, 229-30 (D. Mass. 1999).

In the Motion, Amsol states, without citation to any evidence in the summary judgment record, that "[t]he record reflects that the Debtor knew that he never intended to drill the Test Wells from the beginning. He knew that the money was not his." Motion at 21. As indicated

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[3] The Court notes that in Count II of the Complaint Amsol seeks to except any obligation of the Debtor to Amsol as a debt based on fraud and/or defalcation while acting in a fiduciary capacity and as a debt based on embezzlement and/or larceny. Amsol did not address the embezzlement or larceny theories in its motion for summary judgment. Unless Amsol can present evidence at trial that the Debtor has engaged in embezzlement or larceny within the meaning of the Bankruptcy Code, such claims will be denied.

above in the discussion regarding intent under section 523(a)(2)(A), the Court finds that there is a genuine dispute regarding this issue, regarding both whether the Debtor had fraudulent intent under section 523(a)(2)(A) and whether he had actual intent to cause injury to Amsol within the meaning of section 523(a)(6). Accordingly, Amsol's motion for summary judgment as to Count III must be denied.

**D. Count I of the Counterclaim: Rescission**

The Debtor seeks rescission of the Settlement Agreement into which he and Amsol entered during the course of pre-bankruptcy litigation. Amsol argues that it is entitled to summary judgment in its favor with regard to this count because (1) the Debtor executed the agreement on advice of counsel; (2) the Settlement Agreement does not contain any specific language that the Debtor cannot seek relief under the Bankruptcy Code; and (3) Amsol is not claiming that the Debtor's obligation to it is non-dischargeable based on the Settlement Agreement. Amsol argues that rescission of the Settlement Agreement would change nothing and would provide the Debtor with no meaningful relief.

Whether the Settlement Agreement can be rescinded depends upon Texas law. See Exhibit LL at ¶ 15. Under Texas law, a contract can be rescinded when a mutual mistake of fact has been made or when execution of the contract has been obtained by fraud. Bolle, Inc. v. Am. Greetings Corp., No. 05-02-01237-CV, 2003 WL 21508501, at *5 (Tex. App. July 2, 2003); Citizens Standard Life Ins. v. Muncy, 518 S.W.2d 391, 394 (Tex. Civ. App. 1974). A mistake of law is not grounds for rescission or cancellation of a contract. Marsh v. Marsh, 949 S.W.2d 734, 745 (Tex. App. 1997).

A party seeking to avoid a contract on the grounds of mutual mistake must show (1) a mistake of fact, (2) held mutually by the parties, (3) which materially affects the agreed-upon

exchange. Bolle, 2003 WL 21508501, at *6. The elements of fraud justifying rescission are (1) a false representation made by the defendant, (2) reliance on the representation by the plaintiff, (3) action in reliance thereon by the plaintiff, and (4) damage resulting to the defrauded party from such representation. Muncy, 518 S.W.3d at 394. The party seeking to rescind a contract has the burden of pleading and proving by a preponderance of the evidence every element of an action for rescission. Id.

The Debtor seeks to rescind the Settlement Agreement because he never would have signed it had he know that it "contained language that would deny him access to the relief afforded by the Bankruptcy Code." Counterclaim at ¶ 32. The Debtor has admitted however that he never read the Settlement Agreement. Affidavit at ¶ 42. Rather he relied upon his counsel who, he states, never informed him that by agreeing to a judgment on the fraud count of Amsol's complaint, Amsol's claim would be non-dischargeable in bankruptcy. The Debtor's failure to understand the legal effect of the Settlement Agreement in any bankruptcy filing is a mistake of law and, therefore, is not grounds for rescission of the Settlement Agreement under Texas law.

It does not appear that the Debtor is seeking rescission of the Settlement Agreement on the grounds of fraud. The Debtor has incorporated all of the allegations supporting his counterclaim into Count I of the Counterclaim, but did not actually allege that they constitute grounds for rescission based upon fraud. However, reading those allegations in the light most flattering to the Debtor, he has not alleged that Amsol made a false representation or that he had a legal basis to rely and actually relied on any such misrepresentation.

Accordingly, the Debtor has not set forth any legal basis in the Counterclaim for rescinding the Settlement Agreement. Thus, even if there are disputed facts surrounding the execution of the Settlement Agreement, such disputes are not material. The Debtor is legally

unable to set aside the agreement. For that reason Amsol is entitled to summary judgment on Count I of the Counterclaim.

**E. Count II of the Counterclaim: Fraud**

The Debtor seeks an award of damages from Amsol on the grounds that it fraudulently induced JCII to enter into the oil well transactions and agreements and that the Debtor suffered injury as a result. According to the Debtor he agreed to a deal with Amsol because Amsol represented that it had funds or had access to sufficient funds to drill the test wells and at least twenty more wells. The Debtor states those representations were false and they induced him to enter into the various agreements with Amsol to his detriment. Amsol seeks summary judgment on this count of the Counterclaim.

The Court has already determined that the Debtor did not set forth a legal basis in Count I of the Counterclaim for rescinding the Settlement Agreement. The Debtor is therefore bound by its terms. The Settlement Agreement provides that it resolves all disputes existing between the parties at the time it was executed. Accordingly, any claim by the Debtor that he was fraudulently induced to enter into the various agreements has been waived and released. He cannot seek to raise those issues in this adversary proceeding. For that reason, Amsol is entitled to summary judgment on Count II of the Counterclaim.

Even if the Court were to address Count II on the merits based on the summary judgment record before it, the result would not change. Amsol argues that it made no representation to develop more than the test wells or to provide additional funding beyond the initial $400,000. The Debtor admits that it "may be technically correct" that Amsol did not commit to develop more than the test wells. Affidavit at ¶ 38. If this is so, the Debtor cannot establish that he was harmed by any misrepresentations made by Amsol regarding funding. Absent an obligation to actually fund

further drilling, the Debtor could not expect such drilling to take place. The Memorandum Agreement makes clear that the obligations set forth in the Contribution Agreement regarding the funding and drilling of additional wells only come into "full force and effect" upon completion of the test well program. Exhibit M at page 2, ¶¶ 3-4. Upon completion of the test wells, Amsol would have ten working days to decide whether to proceed under the terms and conditions of the Contribution Agreement. Id. at ¶ 5. In the event that Amsol chose not to proceed with the additional wells, the terms and conditions set forth in "any and all other agreements" between the parties were deemed "null and void" and "of no further force and effect." Id. at ¶ 7. It is undisputed that completion of the two test wells was a condition precedent to Amsol's decision to proceed with further drilling and that the two test wells were never completed.

Thus, even assuming Amsol made false representations regarding its ability to fund drilling beyond the two test wells, the Debtor has failed to put forth any evidence in this summary judgment record which would demonstrate that his reliance on such misrepresentations directly caused him harm. Rather, the Debtor has stated merely that he "lost enormous sums of money in 1998" and that he and Langford would have received "tens of millions of dollars" if 120 wells had been drilled. Reply at ¶¶ 16 and 26. However, the Debtor has not alleged that Amsol was ever legally obligated to fund or proceed with wells beyond the two test wells.

The Debtor did not establish that there were any genuine issues as to any material facts, i.e., facts that would affect the outcome of the litigation. The Debtor has the burden of establishing Amsol's fraud. Reading Count II of the Counterclaim in the light most flattering to the Debtor, the Court finds that the Debtor has not alleged that Amsol was legally obligated to proceed with drilling beyond the two test wells. For that additional reason, Amsol's motion for summary judgment with respect to Count II of the Counterclaim shall be granted.

### F. Count III of the Counterclaim: Fraud on the Court

In Count III of the Counterclaim the Debtor asserts a claim for fraud upon the court in Texas in which the pre-bankruptcy litigation was brought. He claims that Amsol violated Federal Rule of Civil Procedure 11(b)(1) when it alleged that it had claims against the Debtor and his spouse. He also claims that Amsol committed a fraud upon the court by violating its instructions regarding the effect of the Settlement Agreement in bankruptcy. The Debtor seeks an award of damages for such alleged fraud. Amsol states in the Motion that it was warranted in filing a fraud count in the Texas pre-bankruptcy litigation and that it did not violate the Texas court's instructions that the Settlement Agreement could not prevent the Debtor from seeking bankruptcy relief and discharging the Debtor's debt to Amsol.

"The First Circuit has adopted a definition of fraud on the court applied by many other courts: 'A 'fraud on the court' occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense.'" Bezanson v. Gaudette (In re R&R Assocs. of Hampton), 248 B.R. 1, 5 (Bankr. D.N.H. 2000) (quoting Aoude v. Mobil Oil Corporation, 892 F.2d 1115, 1118 (1st Cir. 1989) (citations omitted)). Fraud on the court is interpreted narrowly. Id. at 7. "[A]n independent action for fraud on the court is 'reserved for those cases of 'injustices which, in certain instances, are deemed sufficiently gross to demand a departure' from rigid adherence to the doctrine of res judicata.'" Id. at 8 (citations omitted). Courts rarely award actual damages in an action brought for fraud on the court. Id. at 6.

In the instant case, the Debtor seeks an award of damages for fraud allegedly brought upon the Texas court by Amsol. In executing the Settlement Agreement the Debtor agreed to settle all

disputes contained in the pending lawsuit or which otherwise existed between the parties. The Debtor cannot seek a remedy in this Court for actions taken by either side during the course of the pre-bankruptcy litigation because actions which took place prior to the execution of the Settlement Agreement are no longer actionable in accordance with the very terms of the Settlement Agreement. Settlement Agreement at ¶ 10. Even if that were not true, the Debtor has failed to demonstrate that the Settlement Agreement precluded the Debtor from filing bankruptcy and attempting to discharge his obligation to Amsol. In addition, the Debtor has not shown on this summary judgment record what his actual damages are for Amsol's alleged fraud on the Texas court. For these reasons, Amsol shall be awarded summary judgment on Count III of the Counterclaim.

**IV. CONCLUSION**

For the reasons set forth in this opinion, the Court shall enter a separate order denying Amsol's motion for summary judgment on Counts I, II and III of the Complaint and granting Amsol's motion for summary judgment on Counts I, II and III of the Debtor's Counterclaim. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

ENTERED at Manchester, New Hampshire.

Date: August 21, 2003

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge