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 the Debtor's obligation to Amsol arising out of a deal to drill oil and gas wells in Louisiana. Count I of the Complaint 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 of the Complaint 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. Count III of the Complaint 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").

After discovery concluded, Amsol filed a motion seeking summary judgment in its favor on both the Complaint and the Counterclaim. The Court denied Amsol's motion as to the Complaint but granted the motion as to the Counterclaim. Thereafter the Court conducted a two day trial of this matter in January 2004, at which the Debtor and a representative of Amsol testified. At the conclusion of the evidence, the Court took the matter under advisement.

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") involving the drilling of oil wells in real property located in Louisiana (the "Property" or "Benson Field"). Under their agreement, JCI agreed to raise money for the development of the Benson Field and Langford agreed to do all drill-site title work and to manage and supervise all location work, drilling, completion, and production.

In 1997, Amsol and the Debtor, through one of his companies, Jaworski Consultants II, Inc. ("JCII"), a company he created to do business with Amsol, began discussing Amsol's potential involvement in the Benson Field project. In late September and early October 1997, it appeared that the parties had reached an agreement whereby Amsol would fund the drilling of twenty wells on the Property at the rate of $150,000 per well. Amsol's $3,000,000 contribution would be funded by Amsol's institutional shareholder 3i. The funds were to be transferred to JCII as follows: (1) $150,000 would be deposited into JCII's account upon the signing of the relevant legal documents; (2) $850,000 would be deposited into JCII's account as soon as the funds were released by 3i; and (3) the remaining $2,000,000 would be transferred to an escrow account with the funds being released upon the signature of Amsol's representative.

On October 27, 1997, Amsol informed the Debtor that 3i was unwilling to go forward with its funding of the Benson Field project and that Amsol had no other funding facilities available to it. On October 28, 1997, Amsol inquired whether the Debtor would consider changing the shape of their deal with Amsol committing to drill two wells, which would allow it to collect various reservoir and production data, before committing to drill further wells, twenty wells at a time.

The Debtor apparently agreed to engage in further discussions, and these discussions ultimately resulted in the execution of various agreements and the transfer of money from Amsol to 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. The parties to the Option Agreement further agreed that JCII would deliver to Amsol a detailed estimate of the costs for a drilling and testing program for two test wells according to the specifications given by Amsol. In accordance with the terms of the Option

Agreement, a principal of Amsol deposited $65,000 into JCII's bank account on December 22, 1997. The Option Agreement provided in relevant 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.

According to the Debtor, he needed the funds to be deposited by wire transfer, rather than by check, in order to provide JCII with immediate access to the funds given "the commitments we have, regarding the project." Within a day of receiving the funds, JCII transferred $18,015[1] to the Debtor's personal account and $35,000 to JCI. On December 31, 1997, JCII transferred the balance of the funds, or another $12,015, to his personal account. None of these funds were used for any authorized expenditures for the Benson Field project.

In accordance with the Option Agreement, JCII and Amsol executed a memorandum agreement (the "Memorandum Agreement"), the purpose of which was to provide the terms and conditions under which JCII would drill two oil wells on behalf of Amsol. After the drilling of the two test wells, there would be a ninety day test period after which Amsol would have ten days to decide whether it wanted to proceed with the drilling of another one hundred twenty oil wells or whether it wanted to terminate its involvement in the Benson Field project. The Memorandum

[1] The Debtor testified that his bank charged $15 for each wire transfer, which apparently is the reason that many of the transfers to be discussed in this opinion include a $15 amount.

Agreement specifically provided that Amsol's contribution for the two test wells would be "[a]t cost."

In connection with the execution of the Memorandum Agreement, several other agreements were executed and incorporated by reference into the Memorandum Agreement.[2] Prior to signing these agreements, the parties estimated that the cost for drilling the two test wells would be approximately $400,000, and on January 14, 1998, Amsol and the Debtor approved an authorized fund expenditure ("AFE") for the two test wells, which showed a cost of $200,500 to drill the first well and $203,500 to drill the second well. The AFE was signed two days before the final agreements were executed by the parties and before the remainder of Amsol's money was delivered by Amsol to JCII.

In the Memorandum Agreement, the parties referred to these other agreements (i.e., the Farmout Agreement, the Contribution Agreement, the Assignment, and the Operating Agreement) as Joint Exhibit 1 and indicated that these agreements were to be held in escrow by the parties' attorneys pending Amsol's decision regarding whether to proceed with further drilling after completion of the test well program. If Amsol were to elect not to proceed with further drilling, these agreements were to be declared null and void, except for Amsol's thirty-five percent interest

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[2] The other agreements consisted of (1) a farmout agreement executed by JCII and Sunbelt (the "Farmout Agreement"), in which Sunbelt granted a "farmout" of its oil, gas, and mineral leases in the Property to JCII; (2) a contribution agreement executed by JCII and Amsol (the "Contribution Agreement"), the purpose of which was to provide the terms and conditions under which Amsol would contribute cash to JCII in exchange for the drilling of up to one hundred twenty wells, in three groups of twenty wells and thereafter on a well to well basis, and to set forth a methodology for the return of Amsol's capital contribution under the agreement; (3) a conditional limited assignment of working interests executed by JCII and Sunbelt (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; and (4) an operating agreement executed by JCII as operator and by Amsol and Langford as non-operators (the "Operating Agreement"), which set forth JCII's obligations and responsibilities regarding drilling and development as well as the expenditures and liabilities of the parties.

in the two test wells. The parties further agreed that the Memorandum Agreement merged all prior undertakings, understandings, and agreements between the parties and was to constitute the entire contract between the parties. The Memorandum Agreement could not be varied, modified, or nullified unless in writing and executed by 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.

The Debtor has agreed that Amsol was to deliver the $400,000 to JCII for the costs to drill the two test wells. Upon receipt of this money, JCII began transferring the funds as follows:

Date	**Transferee**	**Transferor**	**Amount**
1/17/97	JCII	JCI	$100,000
1/20/98	JCII	JCI	35,000
1/29/98	JCII	Langford	10,015
2/3/98	JCII	JCI	15,000
2/6/98	JCII	JCI	7,500
2/9/98	JCII	JCI	15,000
2/26/98	JCII	JCI	20,000
3/6/98	JCII	JCI	5,000
3/20/98	JCII	JCI	10,000
3/20/98	JCII	Langford	12,015
3/30/98	JCII	JCI	5,000

3/30/98	JCII	Debtor	5,000
4/17/98	JCII	Langford	4,015
4/22/98	JCII	JCI	5,000
4/24/98	JCII	JCI	8,000
5/4/98	JCII	Langford	3,515
5/4/98	JCII	Debtor	5,000
5/11/98	JCII	Debtor	4,500
5/21/98	JCII	Debtor	6,000
5/26/98	JCII	Langford	3,515
5/29/98	JCII	JCI	2,500
6/2/98	JCII	Debtor	6,000
6/24/98	JCII	Debtor	6,000
2/18/9[9]	JCII	Langford	7,500

Within less than a month, between January 17, 1998, and February 9, 1998, JCII transferred $182,515 from its account, more than half of the January 16, 1998, deposit from Amsol. None of these transfers can be traced to expenses related to the drilling of the two test wells.

On February 3, 1998, JCII was advised that Amsol's management would require AFE Status Reports showing expended amounts, costs incurred and forecasts to complete with final forecast amounts. On February 25, 1998, Amsol notified the Debtor directly that it expected to be kept informed on a weekly basis of the costs incurred with respect to the two test wells as the first two test wells were being completed on a cost basis. In response, on March 3, 1998, JCII notified Amsol that to date only $24,900 had been spent on the project.[3] The Debtor failed to inform

[3] The Debtor itemized the expenses as follows: $12,000 for leasing; $1,100 for land man title work; $1,800 for permitting and surveying; and $10,000 for insurance.

Amsol that by that date approximately $267,500 of the original $400,000 had been transferred to other accounts of the Debtor, JCI, and Langford.

On March 4, 1998, Amsol's financial and administrative manager notified JCII of the reporting and documentation that it would need to submit to Amsol and noted that the reporting needs would be different for these two test wells because they were being charged to Amsol on a cost basis. Amsol requested copies of invoices for expenses that JCII claimed it had incurred to date. On March 11, 1998, JCII was further informed that it should be providing a bank/cash reconciliation report that would start with the $400,000 deposited and would provide details regarding checks written and the balance left in JCII's account. On March 19, 1998, the Debtor sent a letter to Amsol contradicting his March 3, 1998, letter and indicating that the money had been spent from "their own funds" not Amsol's funds. The Debtor did not raise any issue regarding the reporting requirements of Amsol with respect to the $400,000 deposited.

By the end of March 1998, only $64,000 remained of Amsol's initial deposit of $400,000. However, little to no progress had been made at the Benson Field. On April 27, 1998, the Debtor informed Amsol that only $29,100 had been spent on the project,[4] leaving a balance of $370,090. However, by the end of April 1998, only $44,287 remained in JCII's account. As the months continued, JCII continued to transfer money from its account. By the end of May 1998, only $16,742 remained in JCII's account; by the end of June 1998, only approximately $4,228 remained in JCII's account; and by the end of July 1998, only $325 remained in JCII's account. However JCII informed Amsol on June 2, 1998, that the preliminary expenses incurred to date had been paid by JCII: "none of AMSOL's funds have been used to date." When questioned by Amsol in the

[4] The Debtor itemized the expenses as follows: $12,000 for leasing; $1,100 for land man; $1,800 for permitting and surveying; $10,000 for insurance; $2,500 for TEC Engineering Deposit; $850 for Kent & Assoc. (plats); and $850 for Greer & Assoc. Corp. Registration.

middle of June regarding the location of the $400,000, which information Amsol needed in order to satisfy its auditors, the Debtor responded that the money was not being held in a bank account but rather was being held in the form of a certificate of deposit. As of July 20, 1998, the Debtor had not yet provided satisfactory evidence of the deposit to Amsol. Instead of providing such evidence, on that same date, the Debtor offered to place the $400,000 in an escrow account for Amsol with JCII drilling and completing the two test wells at its own expense. The Debtor made such a proposal at a time when the funds were almost depleted. Amsol did not accept the Debtor's offer.

Finally, in response to Amsol's year end request regarding proof of funds, on August 28, 1998, the Debtor informed Amsol that as of June 30, 1998, it was holding $400,000 for Amsol's benefit in an interest bearing account and that no funds had been expended as of that date.

During the spring and summer of 1998, there continued to be back and forth between JCII and Amsol regarding construction of the two test wells. The matters at issue included weather conditions, design specifications, leasing of the mineral rights, and title concerns. In addition, Amsol continued to request cost information, including copies of contracts and invoices. Progress on all matters was not forthcoming however. By October 1998, the Debtor began demanding evidence of a further funding commitment from Amsol and its investors regarding the one hundred twenty well option. That same month, Amsol notified the Debtor that it was considering litigation if drilling did not commence immediately.

On December 9, 1998, Amsol's attorney demanded an accounting of the $400,000 delivered by Amsol to the Debtor. No accounting was ever provided. Sometime in early 1999, the project stopped with the test wells never having been 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 provided for entry of an agreed judgment against the Debtor, JCI, and JCII only on the fraud count of Amsol’s thirteen count complaint, in the principal amount of $600,000. The Settlement Agreement further provided that the Debtor, JCI, and JCII would pay $100,000 by May 16, 2001, and then another $400,000 by August 14, 2001. If such payments were made, Amsol agreed to file a stipulation for dismissal with prejudice. In the event of a default, Amsol would be entitled to file the agreed judgment with the court and to take steps to collect. The Settlement Agreement also provided that if any legal action were instituted between the parties in connection with the Settlement Agreement, “the prevailing party shall be entitled to recover from the losing party all of its costs and expenses, including court costs and reasonable attorneys’ fees.”

The Debtor made the first payment required by the Settlement Agreement but defaulted when he failed to make the second payment by the August 14, 2001, deadline. The Debtor sought protection under Chapter 7 of the Bankruptcy Code on December 6, 2001. Amsol filed the Complaint on March 7, 2002, seeking to except the Debtor’s obligation to it from discharge.

III. DISCUSSION

Creditors that object to the dischargeability of a debt must prove each element of the exception under section 523(a) of the Bankruptcy Code by a preponderance of the evidence. 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). Because exceptions to discharge are narrowly construed in order to further the Bankruptcy Code’s “fresh start policy,” a creditor must demonstrate that its claim comes squarely within an exception to discharge contained in section 523(a). Palmacci, 121 F.3d at 786 (quoting Century 21 Balfour Real Estate v. Menna (In re Menna), 16 F.3d 7, 9 (1st Cir. 1994)).

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

Amsol seeks 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 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.

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)).

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 with the $400,000 Amsol was to transfer to JCII for that purpose. 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 Option Agreement and the Memorandum Agreement and Amsol forwarded money to JCII. If, at the time the parties entered into these 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. But if the Debtor had no intention of using the funds to drill the test wells at the time he executed the agreements, then the Court must find that the Debtor did in fact make a false statement with an intent to deceive.

As evidence of the Debtor's intention, Amsol points to the Debtor's course of conduct regarding the funds Amsol deposited into JCII's account. The Court agrees 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 at the time he entered into the agreements. It is undisputed that upon receipt of the $65,000 deposit the Debtor caused JCII to transfer all of these the funds into his personal account and into another business account before JCII even entered into the Memorandum Agreement on January 16, 1998. It is also undisputed that upon receipt of the $335,000 deposit from Amsol the Debtor caused JCII to transfer $135,000 into another business account within just a few days and that by the end of February 1998, more than $267,000 had been spent with at most only $24,900 having been spent on the Benson Field project, according to the Debtor's own contemporaneous records.

The Debtor argues that Amsol knew that he was going to use the money it transferred to JCII to keep himself and Langford in business until Amsol got a written commitment for the funding of additional wells. The Debtor states that Amsol knew what the Debtor was doing with the money and that he believed the Amsol officials, with whom he discussed these matters, when they told him they understood what he was doing.

The Debtor's version of the events was not supported by the evidence at trial. Neither the Debtor nor Amsol submitted any documentary evidence that would tend to show that Amsol transferred $400,000 to JCII as a means of keeping the Debtor, Langford, and their companies afloat pending a further commitment from Amsol and its investors to drill additional wells. Rather, the documentary evidence submitted by Amsol shows that Amsol repeatedly requested documentation and reporting from the Debtor as to how the $400,000 was being spent and in what accounts the money was placed. There are no documents in evidence that demonstrate that after receiving these requests, the Debtor informed Amsol that JCII was not required to account for the monies being spent because such funds were being used to keep the Debtor, Langford, and their companies in business. Instead, when pushed for supporting documentation, the Debtor changed his story and indicated that project expenses were being paid directly by JCII.

In addition, the record is devoid of any evidence that would show that the Debtor and JCII could have undertaken the drilling of the two test wells once the initial $65,000 deposit was spent. The Court finds this strong evidence that the Debtor had no ability and no intention to complete the wells at the time the Debtor executed the Memorandum Agreement on January 16, 1998.

Accordingly, the Court finds that the Debtor did make false statements when he indicated in the agreements that he would use the $400,000 from Amsol to drill the two test wells at cost (i.e., if the cost exceeded $400,000, Amsol would contribute additional funds for the drilling and if the cost were less than $400,000, Amsol would receive a refund of the difference). The Court finds further that the Debtor intended to deceive Amsol when it made such statements and that he intended to induce Amsol to rely upon these statements. In addition, the Court finds that Amsol actually relied upon the Debtor's false statements and that absent such false statements it would not have transferred $400,000 to JCII. Amsol's reliance was justifiable as there was nothing that would have alerted Amsol to JCII's fraudulent intentions. The Court further finds that the Debtor's false statements caused damage to Amsol, which damage amount was liquidated in the parties' Settlement Agreement.

For these reasons, the Court concludes that the Debtor's obligation to Amsol is non-dischargeable under section 523(a)(2)(A). Accordingly, the Court must grant judgment in favor of Amsol on Count I.[5] As noted, the Debtor's obligation to Amsol was settled under the terms of the Settlement Agreement, and $500,000 in principal presently remains unpaid. The fact that Amsol settled its fraud claim against the Debtor does not bar the Court from inquiring into the true nature of the debt, which this Court has done. Thus, in accordance with Archer v. Warner, 538 U.S. 314 (2003), the Court finds that the debt for money promised in the Settlement Agreement does amount to a debt for money obtained by fraud within the meaning of section 523(a)(2)(A). The Court finds further that under the terms of the Settlement Agreement Amsol was entitled to attorneys' fees and costs relating to recovery under the Settlement Agreement. Such fees and costs are also deemed non-dischargeable under section 523(a)(2)(A) consistent with the United States Supreme Court's ruling in Cohen v. de la Cruz, 523 U.S. 213, 223 (1998) (holding that any debt for fraud "encompasses any liability from money, property, etc., that is fraudulently obtained, including treble damages, attorney's fees, and other relief that may exceed the value obtained by the debtor.").

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

Amsol argues that it is entitled to 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

[5] The Court notes that Count I of the Complaint also sought relief under section 523(a)(2)(B). Amsol did not introduce any evidence to support its claim under section 523(a)(2)(B). Accordingly, that request for relief under Count I is denied.

fiduciary capacity; (2) defalcation while acting in a fiduciary capacity; (3) embezzlement; or (4) larceny. Amsol did not present sufficient evidence that would demonstrate the existence of a fiduciary relationship between Amsol and the Debtor where the term "fiduciary" has been limited to relationships involving either an express or technical trust and not trusts that are imposed by law as a remedy. See Peerless Ins. v. Swanson (In re Swanson), 231 B.R. 145, 148 (Bankr. D.N.H. 1999); Collenge v. Runge (In re Runge), 226 B.R. 298, 304 (Bankr. D.N.H. 1998); Reilly v. Beeman (In re Beeman), 225 B.R. 522, 525 (Bankr. D.N.H. 1998); Office of Public Guardian v. Messineo (In re Messineo), 192 B.R. 597, 600 (Bankr. D.N.H. 1996); BAMCO 18 v. Reeves (In re Reeves), 124 B.R. 5, 9 (Bankr. D.N.H. 1990). Amsol did not show that "the debtor 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; Messineo, 192 B.R. at 601; Ducey v. Doherty (In re Ducey), 160 B.R. 465, 469 (Bankr. D.N.H. 1993). Accordingly, Amsol's claim under the first two exceptions to discharge under section 523(a)(4) must be denied.

Excepting a debt for embezzlement under section 523(a)(4) requires a showing that:

1. The relevant property was rightfully in the possession of a non-owner;

2. The non-owner appropriated the property for a use other than for which it was intended; and

3. The circumstances indicate fraud.

See TransAmerica Comm. Fin. Corp. v. Littleton (In re Littleton), 942 F.2d 551, 555 (9^{th} Cir. 1991). Amsol did not demonstrate the first element of its embezzlement claim, namely, that the funds at issue were rightfully in the possession of a non-owner. Neither the Option Agreement nor the Memorandum Agreement expressly stated that the $400,000 in funds would continue to be Amsol's property pending the completion of the two test wells. Rather, these two agreements provided for an outright transfer of the funds to JCII. Despite the outright transfer, under the parties' agreements, JCII did remain obligated to expend the funds only on the construction of the two test wells. To the extent the cost for constructing the wells was less than the amounts estimated, JCII would remain obligated to return the remaining funds to Amsol because the parties agreed that Amsol was required to pay only the cost for construction and nothing more.

In order to except a debt based on larceny, a creditor must show the debtor fraudulently and wrongfully took the property of another with an intent to convert the property to the debtor's use without the consent of the owner. Collier on Bankruptcy ¶ 523.10[2] (Lawrence P. King et al. eds., 15th rev. ed. 2003). The evidence is undisputed that the original transfers in this case were not unlawful; rather, Amsol freely transferred the funds to JCII pursuant to the terms of the parties' agreements.

Because Amsol has failed to demonstrate that the Debtor's obligation to it should be excepted from discharge under any of the provisions of section 523(a)(4) of the Bankruptcy Code, Count II of the Complaint must be denied.

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).

The key element to Amsol's claim under section 523(a)(6) is whether the Debtor had actual intent to cause injury to Amsol. The Court finds that Amsol presented insufficient evidence on this issue. While it is clear to the Court that the Debtor did not intend to use the $400,000 transferred by Amsol for the actual drilling of the two test wells, the record is not clear that, in failing to use the funds for the wells and instead using the funds for other personal purposes, the Debtor acted willfully and maliciously, not merely recklessly or wantonly, and that he intended to cause actual harm and injury to Amsol. Accordingly, Count III of the Complaint must be denied.

IV. CONCLUSION

For the reasons explained in this opinion, the Court shall enter a separate judgment excepting the Debtor's obligation under the Settlement Agreement to Amsol under section 523(a)(2)(A). All other requests by Amsol to except the debt from discharge under section 523(a) of the Bankruptcy Code are denied. 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: February 20, 2004

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