2003 BNH 023 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. 03-13112-MWV
Chapter 7

Derek LeClair,
Debtor

William and Mary Kiernan, Trustees
of the Kiernan Family Trust,
Plaintiffs

v. Adv. No. 03-1507-MWV

Derek LeClair,
Defendant

David M. Groff, Esq.
LAW OFFICE OF DAVID M. GROFF
Attorney for the Plaintiffs

Michael J. Scott, Esq.
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Attorney for the Defendant

MEMORANDUM OPINION

The Court has before it the complaint of William Kiernan and Mary Kiernan, Trustees of the Kiernan Family Trust ("Plaintiffs") against Derek LeClair, the Debtor/Defendant ("Defendant"). Counts I and II allege that the debt owed to the Plaintiffs be excepted from discharge pursuant to section 523(a)(2)(A) and (a)(6) of the Bankruptcy Code. Counts III through V allege that the Debtor's discharge be denied pursuant to section 727(a)(2)(A), (a)(3) and (a)(4)(A). The trial was held on May 26, 2004, and the parties submitted post-trial memoranda on June 15, 2004.

JURISDICTION

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).

DISCUSSION

At the start of the trial, the Plaintiffs and Defendant stipulated to the facts as found by the Rockingham County Superior Court in its June 27, 2003, order, which the Court incorporates by reference. (Pls.' Ex. 101.) As a result of that superior court proceeding, the Plaintiffs herein received a judgment in the amount of $85,151 plus interest and costs. That court also ruled in favor of the Defendant herein denying the claim under N.H. RSA 358.

The underlying dispute arises out of a construction contract whereby the Defendant agreed to complete the construction of the Plaintiffs' house. The superior court found that the Defendant overcharged the Plaintiffs the sum of $32,651. It further found that there was defective workmanship, which would cost the Plaintiffs $52,500 to repair. It was essentially a breach of contract action, other than the RSA 358 allegation, which was denied.

Count I of the complaint alleges that the Defendant's obligations to the Plaintiffs should be excepted from discharge pursuant to section 523(a)(2)(A). The representations relied on are in paragraph 8 of the complaint, that the Defendant was an experienced building contractor, that he was fully insured and that he could complete the construction by March 2001. The superior court found that the Defendant "told the defendants (Plaintiffs herein) he was experienced in performing and overseeing construction, which is true." Collateral estoppel or issue preclusion applies in section 523 actions. Grogan v. Garner, 498 U.S. 279, 284 n.11, 111 S.Ct. 654, 658 n. 11, 112 L.Ed.2d 755 (1991). The Court finds that the doctrine applies here and that the Plaintiffs are estopped from alleging that the representation was false.

As to the representation that he was fully insured, the allegation was not pursued at trial, and there was insufficient evidence that the representation was false.

Finally, the third representation is that he could complete the construction by March 2001. In order for the misrepresentation to be false, there must be evidence that at the time the Defendant made the representation, he knew it was false. There is no such evidence. The fact that the project was not completed by March, by itself, is insufficient to make a finding that the representation was false when made. Count I is denied.

Count II of the complaint alleges that the Defendant's actions constitute willful and malicious injury to property and should be excepted from discharge pursuant to section 523(a)(6). Paragraph 12 of the complaint alleges the willful and malicious conduct to be the Defendant's deviation from the construction plans and the Defendant's conversion of the Plaintiffs' funds.

The evidence did support a finding that the Defendant did, in fact, deviate from the plans. However, the Plaintiffs must show that by deviating from the plans, the Defendant intended to cause harm to the personal property of the Plaintiffs. See In re Kawahuhau v. Geiger, 523 U.S. 57, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998). The evidence does not support such a finding. While the Defendant may have had insufficient experience to deviate from the plans, the Court cannot find that he intended to cause harm to the Plaintiffs.

The second allegation, that he converted funds of the Plaintiffs, apparently arises out of the "extras" that the Defendant charged the Plaintiffs, which the superior court found he was not entitled to. This finding by the superior court was based on a "contract" analysis that under his agreement with the Plaintiffs, he had no right to charge for extras and that there was no documentation that the Plaintiffs agreed to the extras. Conversion under New Hampshire law requires the intentional exercise of dominion or control of a chattel that seriously interferes with the rights of another. See Eckel Ind., Inc. v. Primary Bank, 26 F.Supp.2d 313 (D.N.H. 1998). While the superior court found that the Defendant did not

contractually have the right to charge the extras, the monies were voluntarily paid to him by the Plaintiffs. Count II is denied.

Count III alleges that the Debtor's discharge should be denied pursuant to section 727(a)(2)(A) asserting that the Defendant, with the intent to hinder, delay or defraud, transferred or concealed property within one year of the filing of his petition. The petition was filed on September 10, 2003. The gravamen of the count is that the Defendant deposited funds in an Alpha Con, LLC, account, which was maintained by his wife.

The evidence produced at trial indicated that Alpha Con was organized on January 18, 2002, and began operations on May 20, 2002, when it received its federal tax ID number. Alpha Con did not file bankruptcy. The Defendant's testimony, corroborated by his wife, was that at the time they started Alpha Con, they believed they would win the superior court lawsuit, which they had initiated. There was further testimony that it was the Defendant's wife's idea to start Alpha Con after they were married to attempt to isolate them from personal liability in the future. While the Defendant's position that he is not an employee of Alpha Con is hard to comprehend, there is insufficient evidence that the creation of Alpha Con over a year before the adverse judgment in the superior court was done with the requisite intent to hinder, delay or defraud the Plaintiffs or any other creditor. Once formed, the Defendant did business under the Alpha Con entity and did not change his course of conduct after the adverse judgment. Count III is denied.

Count IV alleges that the Defendant's discharge should be denied for failure to maintain adequate business records pursuant to section 727(a)(3). Whether the Defendant maintained adequate business records is considered in relation to his occupation, financial situation, education, experience, sophistication and any other circumstance that may be relevant. In re Strbac, 235 B.R. 880, 882 (B.A.P. 6th Cir. 1999).

In the instant case, the Defendant testified that he was not good with paperwork. He also testified, as he did in the superior court case, that certain of the records concerning the Plaintiffs' contract

were lost when he moved from one residence to another. Tax returns and check ledgers were produced at trial. The Defendant's uncle, Mr. Zube, testified that he prepared the tax returns from information supplied by the Defendant, mostly in the form of check ledgers. He also testified that, although the record keeping was not what an accountant would like to see, it was sufficient to prepare the tax returns, which he felt fairly represented the Defendant's financial condition. The fact that some records were lost is insufficient in this case to make a finding that the Defendant failed to keep adequate financial records. Based on the Debtor's education, occupation and sophistication, or lack thereof, the Court finds that the records are adequate. Count IV is denied.

Count V alleges that the Defendant made a false oath or account by not listing all his property in his bankruptcy schedules and during his testimony at the section 341 meeting. In order for the Plaintiffs to prevail on the 727(a)(4), it must be shown that Defendant knowingly and fraudulently made a false oath or account. See In re Schifano, 378 F.3d 60, 67 (1st Cir. 2004). In support of this allegation, the Plaintiffs state that the Defendant failed to list his tool trailer and some staging as an asset in his schedules. The Defendant testified at trial that he believed the trailer and staging was included in the "tools" that were listed in the amount of $5,000. The Court believes this testimony to be credible and an honest mistake. There is no evidence that the omission, if there was one, was done knowingly and fraudulently, as the trailer was evidently in full view at the Defendant's residence. Brought to the Defendant's attention, the schedules were amended to be more specific, but the value of the assets did not change, nor was there any evidence of additional value. Count V is denied.

The last remaining issue is the Plaintiffs' counsel's request for attorney fees in connection with his motion to compel and his motion for contempt concerning discovery matters. The Court finds these fees to be justified under the circumstances and orders the payment of $1,000 to Plaintiffs' counsel.

CONCLUSION

This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate final judgment consistent with this opinion.

DATED this 15th day of November, 2004, at Manchester, New Hampshire.

/s/ Mark W. Vaughn
Mark W. Vaughn
Chief Judge