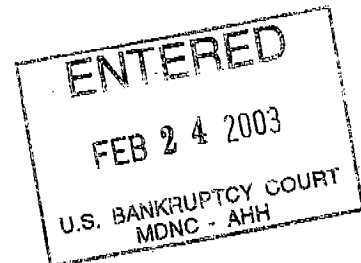


UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION



IN RE:

Thomas D. Nickol and
Scarlet Knight Nickol, a/k/a
Scarlet Ann Dalton,

Debtors.

Case No. 01-13611C-7G

Cleo F. Denny,

Plaintiff,

v.

Scarlet Knight Nickol, a/k/a
Scarlet Ann Dalton,

Defendant.

Adversary No. 02-2009

JUDGMENT

This dischargeability proceeding came before the court for trial on February 2, 2003. Durant M. Glover appeared on behalf of the plaintiff and Wayne E. Crumwell appeared on behalf of the defendant.

FACTS

From 1999 through September of 2000, the defendant was employed at a bowling pro shop owned and operated by the plaintiff in Greensboro, North Carolina. Because the defendant's duties included paying the bills for the pro shop, the defendant was authorized to write checks on the checking account for the pro shop. The six checks giving rise to this proceeding were written by the defendant while the plaintiff was on a vacation trip for

several months during the Summer of 1999 and total \$3,006.75. The plaintiff testified that the checks had nothing to do with his business and were not authorized or approved by him. The defendant admitted issuing the checks and admitted that the checks were written to pay for personal items. However, defendant testified that the plaintiff authorized her to write the checks in order to make gifts to her. While the plaintiff admitted making a number of gifts to the plaintiff, he denied that the checks in question were approved by him as gifts for the defendant.

The plaintiff maintains that the checks give rise to an indebtedness which is nondischargeable pursuant to § 523(a)(4) of the Bankruptcy Code. In addition to denying that plaintiff is entitled to any relief under § 523(a)(4), the defendant asserts that sanctions should be imposed against the defendant under Rule 9011 of the Federal Rules of Bankruptcy Procedure.

ANALYSIS

Under § 523(a)(4) of the Bankruptcy Code, a discharge under Chapter 7 does not discharge a debt for fraud or defalcation while acting in a fiduciary capacity or for embezzlement or larceny. In order to prevail under this provision, plaintiffs have the burden of showing by a preponderance of the evidence that the defendant committed a "defalcation" while acting in a "fiduciary" capacity or that the defendant is guilty of larceny or embezzlement. See In re Swanson, 231 B.R. 145, 148 (Bankr. D.N.H. 1999).

A "defalcation" under § 523(a)(4) is a misappropriation of funds held in a fiduciary capacity or a failure to properly account for such funds, and may occur without any conduct which rises to the level of fraud, embezzlement or misappropriation. See In re Ansari, 113 F.3d 17, 20 (4th Cir. 1997). In the present case, whether there was a "defalcation" depends upon whether the checks were authorized or approved by the plaintiff. If so, there was no defalcation, larceny or embezzlement by the defendant for purposes of § 523(a)(4).

It is undisputed that there was more than an employer/employee relationship between the plaintiff and defendant. It also is undisputed that during the relationship of the plaintiff and defendant, which extended over a period of several years, the plaintiff made a number of gifts to the defendant, some of which were expensive and which, in the aggregate, greatly exceeded the \$3,006.75 represented by the six checks involved in this case. In fact, the plaintiff at one point wrote that he had made more than \$50,000.00 in gifts for the defendant.

The plaintiff admitted that he learned about one of the checks while he was on vacation and became aware of the other checks shortly after returning. Notwithstanding his knowledge that the checks had been written by the defendant, the plaintiff continued both his personal and employer relationship with the defendant. In fact, the plaintiff never terminated the defendant's employment,

which continued until the plaintiff quit her job with the plaintiff in September of 2000. Thereafter, the plaintiff attempted to persuade the plaintiff to return to her employment with him and to resume their personal relationship. According to the evidence, it was only after the defendant had declined plaintiff's entreaties that he began to assert that the checks were unauthorized and to insist upon repayment.

The evidence was conflicting and inconclusive as to whether the defendant knew that the checks were going to be written and approved of them beforehand. The evidence established by a clear preponderance, however, that the defendant was aware of all of the checks by August of 1999, and that he ratified and approved defendant's issuance of the checks and treated the checks as additional gifts for the defendant.

Taken as a whole, the evidence was insufficient to establish either a defalcation, embezzlement or larceny on the part of the defendant and, hence, failed to establish any grounds for relief under § 523(a)(4). Likewise, there has been no showing that sanctions should be imposed against defendant or his counsel under Rule 9011. Rule 9011 is applicable where a complaint or other pleading is filed without making an appropriate inquiry as to whether the pleading is well grounded in fact and law or the pleading is interposed for an improper purpose. Given the relationship between these parties and the nature of the conduct

giving rise to the claim alleged by the plaintiff, there is not a sufficient basis for concluding that either of these circumstances has occurred in this proceeding. Accordingly, this adversary proceeding will be dismissed with neither party obtaining any relief against the other party.

Now, therefore, it is ORDERED, ADJUDGED AND DECREED that the plaintiff shall have no relief from the defendant and the defendant shall have no relief from the plaintiff and this adversary proceeding shall be and hereby is dismissed with prejudice.

This 24th day of February, 2003.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge