

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Central Division

In re:)	Bankr. No. 00-30031
)	
JAMES DOUGLAS DONOVAN)	Chapter
Soc. Sec. No. 503-72-0635)	
Debtor.)	
)	
JIM BROWN, dba 3B Farms)	Adv. No. 00-3004
Plaintiff,)	
)	
-vs-)	DECISION RE:
)	DISCHARGEABILITY OF
JAMES D. DONOVAN)	CLAIM HELD BY J. BROWN
Defendant.)	

The matter before the Court is a complaint seeking a determination of the dischargeability of a debt under 11 U.S.C. §§ 523(a)(2), (a)(4), or (a)(6). This is a core proceeding under 28 U.S.C. § 157(b)(2). This Decision and subsequent order and judgment shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, the Court concludes that Plaintiff Jim Brown's claim against Defendant-Debtor James D. Donovan is non dischargeable under § 523(a)(4).

I.

James D. Donovan ("Debtor" or "Donovan") filed a Chapter 7 petition in bankruptcy on April 4, 2000. On July 7, 2000, Jim Brown timely filed a non dischargeability complaint. He sought a determination of whether his unscheduled claim against Debtor for converted grain was non dischargeable under either 11 U.S.C. §§ 523(a)(2), (4), or (6).

A trial was held December 18, 2000. Appearances included Brent A. Wilbur for Plaintiff Jim Brown and Joan E. Powell for

Defendant-Debtor Donovan. Plaintiff presented some exhibits and the testimony of several witnesses. Defendant-Debtor did not present any evidence nor appear himself.

Delane Thom, the general manager of Northern Plains Cooperatives (formerly the Potter County Co-op) in Gettysburg, South Dakota, testified that the Co-op regularly paid employees of Jim Brown,¹ at Brown's request, by selling grain from Brown's inventory at the Co-op. The Brown employees paid in this manner included Donovan. Donovan was consistently paid \$2,200 every month.

Thom also testified that Donovan himself sold grain to the Co-op one time on an advance contract in late December 1995. Donovan pledged 4,000 bushels of wheat and received a 70% advance (\$12,000) on the contract. The contract was signed by Shawn Donovan, James Donovan's brother, on the Co-op's behalf and then reviewed by Thom. Thom said he did not know of any wheat farm that James Donovan had, but understood that Donovan would get the wheat from the Lower Brule Reservation.

The Co-op's records indicate that Donovan delivered grain several times between March 1, 1996 and April 4, 1996 to fulfill the contract. The net bushels delivered were 4,021.70. After the last delivery on April 4, 1996, Donovan received a second, final check from the Co-op for \$5,695.42.

Shawn Donovan testified that he was employed by the Co-op. He

¹ Jim Brown did business as Three B Farms.

said that when he made the advance contract with his brother, he did not know for sure how his brother intended to fulfill the contract since his brother did not have a farm. His brother James, however, had told him that the wheat to fulfill the advance contract would come from the Lower Brule Reservation based on a tribal allocation to be given to James' wife. Shawn Donovan acknowledged that the local sheriff later questioned him about grain that Brown reported missing. He said he told the sheriff that he did not know anything about the missing grain, but he did advise the sheriff that his brother James had asked him to forge some grain tickets before the end of 1995. Shawn Donovan also testified that as the time for a criminal trial of James Donovan regarding wheat missing from Brown's farm approached, James Donovan changed his story. James Donovan then told his brother Shawn that the wheat for the advance contract came from Brown as an employee bonus and that Brown had told him (James Donovan) not to tell other employees about the bonus.

Jim Brown testified that he employed James Donovan full time beginning in the autumn of 1994 until 1997. By 1997, Donovan was earning \$2,200 per month.

Brown stated that he learned some of his grain was missing in 1997 when grain, with a loan on it held by Commodity Credit Corporation, was hauled to town and he found that some bins were not as full as they should have been. Brown said he questioned Donovan; Donovan told Brown that he had moved some grain to other

bins to prevent spoilage. Based on a report from another employee, Ed Kleinsasser, and a neighbor, Brown later suspected that Donovan may have taken the grain. Brown contacted the Co-op and learned that Donovan had sold grain there. At that time and at all times subsequent, Brown was not aware of any personal farming operation that Donovan or his wife had. Brown next went to the local sheriff, who handled the missing grain as a criminal matter.

Following an investigation, criminal charges were brought against Donovan. A jury acquitted him of fraudulently taking the grain from Brown.

Brown acknowledged that his employees' monthly wages were paid from grain reserves at the Co-op. According to a completed W-2 form for Donovan, Brown paid Donovan \$26,500 (reported as commodities in lieu of wages) in 1996. Brown also said that he has given his employees an annual bonus of \$1,000, but that he wrote checks himself for these; he did not use grain reserves to pay the bonuses. He specifically testified that he never gave Donovan an employee bonus of grain valued over \$15,000.

Brown acknowledged that sometimes grain is moved from one bin into another to prevent or reduce spoilage. He said he had no personal knowledge of any of his grain needing to be moved in the spring of 1996 to prevent spoilage.

Edward Kleinsasser, another employee of Brown's, testified that he too is paid by the Co-op from Brown's grain reserves. Kleinsasser also stated that he gets a bonus of \$1,000 at Christmas

time, but that the bonus is not paid from grain sales at the Co-op.

Kleinsasser stated that in early 1996, James Donovan told him that he was hauling grain to town. Kleinsasser did not question him further, but he did observe Donovan driving one of Brown's truck in the grain storage areas.

James Brisco testified that he has worked for Brown since mid-1995. He said he had no recollection of grain being moved between bins on Brown's farm in April 1996. Brisco said Donovan told him that Donovan and his wife had 4,000 to 5,000 bushels of wheat to sell and that they were using Brown's trucks to haul it from Lower Brule to Gettysburg. Brisco said Donovan said they were hauling it to Gettysburg, rather than to an elevator closer to Lower Brule, because Gettysburg paid a better bonus price for high protein wheat.

In closing, Brown's counsel argued that the testimony and exhibits establish that James Donovan stole grain from Brown and sold it to the Co-op in his own name. Donovan's counsel argued that the Court must find that no fraud occurred because a jury had acquitted Donovan on related criminal charges. Donovan's counsel also portended that the wheat Donovan possessed was given to him by Brown as an employee bonus.

At the trial, the Court ruled that § 523(a)(6) did not apply based on *Kawaauhau v. Geiger*, 523 U.S. 57 (1998). The Court took under advisement whether § 523(a)(4) applied.

II.

To prevail on a non dischargeability complaint, the creditor must establish by a preponderance of the evidence all of the elements required. *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991). The elements that must be established to prove that a debt is non dischargeable under 11 U.S.C. § 523(a)(4)² because the debt arose from larceny³ are: there was by debtor a wrongful (without permission) taking and carrying away of property; the property taken by the debtor was owned by another; and the debtor took the property with an intent to use it for his own benefit. *Kansas Bankers Surety Co. v. Eggleston (In re Eggleston)*, 243 B.R. 365, 378 (Bankr. W.D. Mo. 2000).

III.

Brown has shown by a preponderance of the evidence that his claim against James Donovan should be non dischargeable under § 523(a) because it arose from larceny. Testimony by Brown, who employed Donovan, and fellow employees Kleinsasser and Brisco, established that Donovan took grain from Brown's bins in early 1996 without authorization from Brown; the grain was not removed to

² Since Brown's claim is found to be non dischargeable under § 523(a)(4), the Court does not reach the question of whether it is also non dischargeable under § 523(a)(2), which was also cited by Brown.

³ Donovan did not have authorized possession of Brown's grain within the scope of his employment so embezzlement is not at issue. See *E.W. Wylie Corp. v. Montgomery (In re Montgomery)*, 236 B.R. 914, 923 (Bankr. D.N.D. 1999).

prevent spoilage. Testimony and exhibits from Thom, the Co-op manager, established that Donovan sold grain in early 1997 to the Co-op for a personal financial gain of \$17,695.42. Testimony from Donovan's brother Shawn and Brown established that James Donovan had no known personal source for the grain that he sold to the Co-op. Testimony by Brown and three of his employees established that Brown had no policy of paying employees bonuses in the form of grain. Brown testified that he specifically never paid a large bonus to Donovan in the form of grain, nor did he otherwise give permission to Donovan to take the grain and use it for Donovan's own benefit.

There was no evidence to dispute this testimony and supporting documents. Accordingly, the elements for larceny have been established and Brown's claim against Donovan shall be found non dischargeable under § 523(a)(4).

That a state court jury acquitted Donovan in a criminal trial of wrongfully taking Brown's grain is not dispositive here.⁴ *Perdue v. Caffey (In re Caffey)*, 248 B.R. 920, 922-23 (Bankr. N.D. Ga. 2000); *DeBellis v. Maula (In re Maula)*, 166 B.R. 49, 51-52 (Bankr. M.D. Pa. 1994). The standard of proof in state court for the criminal trial was "beyond a reasonable doubt," S.D.C.L.

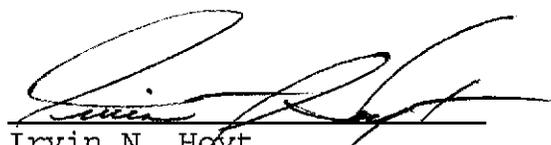
⁴ Had the state court jury found Donovan guilty of the criminal charges in state court, collateral estoppel may have applied. See, e.g., *Hobson Mould Works, Inc. v. Madsen*, 195 F.3d 988, 989-90 (8th Cir. 1999); *Erickson v. Roehrich (In re Roehrich)*, 169 B.R. 941, 943-44 (Bankr. D.N.D. 1994) (several cites therein).

§ 23A-22-3, which the state apparently did not meet. In this civil proceeding, the lower standard of proof is a preponderance of the evidence, as established by *Grogan v. Garner*. Brown has met that standard.

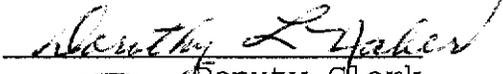
Counsel for Brown shall prepare an appropriate order and a judgment.

Dated this 7 day of February, 2001.

BY THE COURT:


Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: 
Deputy Clerk



I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to the parties on the attached service list.

FEB 07 2001

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By: 

NOTICE OF ENTRY
Under F.R. Bankr.P. 9022(a)
Entered

FEB 07 2001

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

Case: 00-03004 Form id: 122 Ntc Date: 02/07/2001 Off: 3 Page : 1
Total notices mailed: 3

Defendant Donovan, James Douglas Box 905, Pierre, SD 57501
Aty Powell, Joan E. 102 S. East Street, Gettysburg, SD 57442
Aty Wilbur, Brent A. PO Box 160, Pierre, SD 57501-0160