

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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October 14, 1999

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Subject: *State of South Dakota v. Margaret A. Lowe*
(*In re Lowe*), Adversary No. 99-5006;
Chapter 7; Bankr. No. 98-50456

Dear Counsel:

The matters before the Court are Defendant-Debtor's July 22, 1999 MOTION FOR JUDGMENT ON THE PLEADINGS [or], ALTERNATIVELY FOR SUMMARY JUDGMENT and Plaintiffs' July 30, 1999 MOTION FOR SUMMARY JUDGMENT. These are core proceedings under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court will deny Plaintiffs' MOTION and will grant Defendant-Debtor's MOTION to the extent that no relief will be provided to Plaintiff Prince of Peace Retirement Community, Inc., under 11 U.S.C. § 523(a)(4).

SUMMARY. Eileen M. "Mary" Lowe (Mary Lowe) became a resident of the Prince of Peace Retirement Community, Inc., a long-term nursing care facility on June 12, 1995. Her admission documents were signed by her daughter, Margaret A. Lowe, who provided Prince of Peace with a 1993 power of attorney on behalf of Mary Lowe. In December 1997, Mary Lowe was approved to receive government benefits for her long term care.

Margaret Lowe (Debtor) filed a Chapter 7 petition on August 21, 1998. Among her scheduled unsecured creditors was Prince of Peace for \$42,834 in medical bills.

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On February 26, 1999, James W. Ellenbecker, the temporary guardian and conservator of the estate of Mary Lowe and Prince of Peace filed an adversary complaint against Debtor seeking a denial of discharge or, in the alternative, a determination that their claims against Debtor are non dischargeable under 11 U.S.C. § 523(a)(4). Their complaint was based on Debtor's alleged failure to disclose that she held \$1,000 in cash belonging to her mother, that she had control over all her mother's assets, that she received some income from her mother's assets, and that the debt owed to Prince of Peace arose because Debtor had failed to properly use her mother's assets to pay for her mother's care at Prince of Peace. Ellenbecker became Mary Lowe's permanent conservator on March 15, 1999.

Debtor answered on April 5, 1999. She denied the allegations of fraudulent misrepresentations in or omission from her bankruptcy schedules and statement of financial affairs and she denied any fraudulent conduct toward Plaintiffs. In later discovery, Debtor admitted that she had control over her mother's assets pre-petition and that she had not disclosed this status in her bankruptcy schedules and statements. She also admitted that available resources for paying her mother's bills included her mother's Social Security benefits and a South Dakota state pension.

On July 22, 1999, Debtor moved for summary judgment against Plaintiff Prince of Peace on the grounds that Prince of Peace can not maintain a non dischargeability action against Debtor because Prince of Peace is not a creditor and because Prince of Peace has not alleged any facts showing that Debtor had a fiduciary relationship with it. Debtor also argued that Plaintiff Prince of Peace had not alleged facts to support a denial of discharge of a particular debt for embezzlement or larceny under § 523(a)(4).

Plaintiffs moved for summary judgment on July 30, 1999 on the grounds that the present record supports their allegations that Debtor stood as a fiduciary to her mother, that Debtor had improperly used her mother's assets, that Debtor failed to pay for her mother's medical care at Prince of Peace, and that Debtor did not properly disclose in the bankruptcy her fiduciary relationship to her mother and her possession of her mother's assets. In addition for a request that Debtor be denied a discharge or that Plaintiffs' claims be declared non dischargeable, Plaintiffs also asked for relief from the automatic stay so that they could proceed against Debtor in another forum to recover on their claims. Plaintiffs admit that the amount of her mother's assets that Debtor may have mishandled is unknown. The Administrator of Prince of Peace filed an affidavit in support of Plaintiffs' MOTION.

Debtor responded to Plaintiffs' motion and filed an affidavit on August 11, 1999. She argued that the law does not support

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Plaintiffs' contention that she (Debtor) had a contractual or fiduciary relationship with Prince of Peace. She emphasized that Plaintiffs have made only vague allegations regarding the misuse of her mother's assets and have failed to show how the use of her mother's funds relates to the bill owed Prince of Peace for her mother's care. In the affidavit, Debtor stated that upon advice of legal counsel, her mother's assets were transferred to Debtor and other family members in anticipation of her mother later needing Medicaid or Medicare assistance for nursing home care. She also said that some of her mother's assets were used for Debtor's and Debtor's family's care during the years that they cared for her mother.

SUMMARY JUDGMENT STANDARD. Summary judgment is appropriate when "there is no genuine issue [of] material fact and . . . the moving party is entitled to a judgment as a matter of law." F.R.Bankr.P. 7056 and F.R.Civ.P. 56(c). The matter must be viewed in the light most favorable to the party opposing the motion. *F.D.I.C. v. Bell*, 106 F.3d 258, 263 (8th Cir. 1997); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1490 (8th Cir. 1992) (quoting therein *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587-88 (1986), and cites therein). Further,

the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial.

Amerinet, 972 F.2d at 1490 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). The movant meets this burden if he shows that the record does not contain a genuine issue of material fact and he points out that part of the record that bears out his assertion. *Handeen v. LeMaire*, 112 F.3d 1339, 1346 (8th Cir. 1997) (quoting therein *City of Mt. Pleasant, Iowa v. Associated Electric Coop, Inc.*, 838 F.2d 268, 273 (8th Cir. 1988)). No defense to an insufficient showing is required. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 156 (1970) (cite therein); *Handeen*, 112 F.3d at 1346. If the movant meets his burden, however, the non movant, to defeat the motion, "must advance specific facts to create a genuine issue of material fact for trial." *Bell*, 106 F.3d at 263 (quoting *Rolscreen Co. v. Pella Products of St. Louis, Inc.*, 64 F.3d 1202, 1211 (8th Cir. 1995)). The non movant must do more than show there is some metaphysical doubt; he must show he will be able to put on admissible evidence at trial proving his allegations. *Bell*, 106 F.3d 263 (citing *Kiemele v. Soo Line R.R. Co.*, 93 F.3d 472, 474 (8th

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Cir. 1996), and *JRT, Inc. v. TCBY System, Inc.*, 52 F.3d 734, 737 (8th Cir. 1995)).

PRINCE OF PEACE'S STANDING. On the present record, the Court is satisfied that Prince of Peace has standing. So far, the record shows that Prince of Peace sent Debtor a bill for her mother's care and that Debtor included the bill on her bankruptcy schedules. Those events appear to fall within the broad definition of "claim" provided by 11 U.S.C. § 101(5), which covers even disputed and equitable claims. What, if any, contractual obligation Debtor had to Prince of Peace and any amount owed on a contract still need to be litigated. Therefore, Debtor's MOTION regarding Prince of Peace's lack of standing as a creditor will be denied.

NON DISCHARGEABILITY: DEBTOR'S FIDUCIARY STATUS. The fiduciary capacity necessary for a debt to be declared non dischargeable under 11 U.S.C. § 523(a)(4) must arise from an express, not constructive, trust. *Barclays American/ Business Credit, Inc., v. Long (In re Long)*, 774 F.2d 875, 878-79 (8th Cir. 1985).

It is the substance of a transaction, rather than the labels assigned by the parties, which determines whether there is a fiduciary relationship for bankruptcy purposes.

Long, 774 F.2d at 878-79 (citing *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 333 (1934)). The fiduciary relationship to which § 523(a)(4) applies does not cover trusts imposed on transactions by operation of law or as a matter of equity. *ITT Life Insurance Co. v. Haakenson (In re Haakenson)*, 159 B.R. 875, 887 (Bankr. D.N.D. 1993). Whether a party is a fiduciary under § 523(a)(4) is a question of federal law. *Kunzler v. Bundy (In re Bundy)*, 95 B.R. 1004, 1013 (Bankr. W.D. Mo. 1989). However, state law is relevant when deciding whether a *express* trust relationship exists. *Ragsdale v. Haller*, 780 F.2d 794 (9th Cir. 1986); *Bundy*, 95 B.R. at 1013.

The record clearly shows that Debtor served as her mother's fiduciary until a conservator was appointed. A separate question is whether Debtor was also a fiduciary of Prince of Peace. The record does not support that conclusion. Plaintiffs have presented no express agreement that made Debtor a fiduciary for Prince of Peace. Moreover, that status cannot be created in equity. At most, they had a contractual relationship. Therefore, Plaintiff Prince of Peace's non dischargeability claim under § 523(a)(4) against Debtor as a fiduciary must fail. Debtor's MOTION will be granted to that extent.

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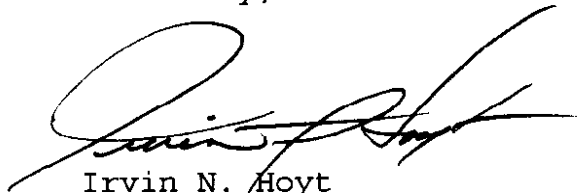
NON DISCHARGEABILITY: EMBEZZLEMENT AND LARCENY. Debtor has contended that Plaintiff Prince of Peace cannot maintain an embezzlement or larceny claim under § 523(a)(4) because no property of Prince of Peace is at issue. Prince of Peace has not disputed that contention. Its non dischargeability complaint clearly relied on the fraud or defalcation by a fiduciary provision of § 523(a)(4). Debtor's MOTION will be granted on that issue. The only non dischargeability complaint under § 523(a)(4) that will need to be tried is Plaintiff Ellenbecker's.

DENIAL OF DISCHARGE. The present record is insufficient for the Court to tie any dissipation of Mary Lowe's assets by Debtor to the failure of Prince of Peace being paid for her care and then to tie that event to a subsection of § 727(a). Testimony and other evidence is needed to explain transactions and the dissipation of Debtor's mother's assets. Further, Plaintiffs need to identify through an amended complaint the subsections of § 727(a) on which they intend to present evidence at trial so that the issues are appropriately narrowed.

RELIEF FROM THE AUTOMATIC STAY. Finally, in their summary judgment motion Plaintiffs have asked for relief from the automatic stay to go to another court to have their claims determined and to begin collection actions. A request for relief from the stay must be filed in the main bankruptcy case with a notice to parties in interest. The Court may then address that issue.

An order will be entered denying Plaintiffs' MOTION and denying in part and granting in part Defendant-Debtor's MOTION. This matter will be set for a second pre-trial conference and a trial unless relief from stay is promptly obtained to litigate some issues in another forum. Within twenty days, Plaintiffs shall file an amended complaint that sets forth the specific subsections of § 727(a) on which they will present evidence at trial.

Sincerely,



Irvin N. Hoyt
Bankruptcy Judge

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.

OCT 14 1999

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

By M. Kay Lewis

NOTICE OF ENTRY
Under F.R. Bankr.P. 6022(a)
Entered

OCT 14 1999

INH:sh

CC: adversary file (docket original; copies to parties interest, including Trustee Dennis C. Whetzal)

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

Case: 99-05006 Form id: 122 Ntc Date: 10/14/1999 Off: 3 Page : 1

Total notices mailed: 5

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