UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re:

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| DALE D. KUNKEL,<br>*Debtor* | : | Case No. 01-25282T |
| | : | |
| EUGENE S. JASIN<br>SAUCON VALLEY HOMES, INC.<br>SAUCON HOME CONSTRUCTION, INC.,<br>*Plaintiffs* | : | |
| | : | |
| *v.* | | Adv. No. 02-2076 |
| | : | |
| DALE H. KUNKEL, aka<br>DALE D. KUNKEL,<br>*Defendant* | : | |
| | : | |

**ORDER**

AND NOW, this 31st day of January, 2006, it is ORDERED that JUDGMENT ON THE COMPLAINT IS ENTERED IN FAVOR OF DEFENDANT AND AGAINST PLAINTIFFS as the court find that the debt in issue is DISCHARGEABLE under 11 U.S.C. §523(a)(4) and (6).[1]

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1. This Order shall constitute the Findings of Fact and Conclusions of Law mandated by Fed. R. Bankr. P. 7052, which makes Fed. R. Civ. P. 52 applicable to adversary proceedings in bankruptcy cases.

Plaintiffs first argue that the debt allegedly owed to them by Defendant should be found nondischargeable under section 523(a)(4) because Defendant allegedly committed fraud or defalcation while acting in a fiduciary capacity. As the party objecting to discharge, Plaintiff bears the burden of proving the elements required under section 523(a)(4) by a preponderance of the evidence. Harris v. Dawley (In re Dawley), 312 B.R. 765, 775 (Bankr. E.D. Pa. 2004). In addition, to effectuate the "fresh start" policy underlying the Bankruptcy Code, exceptions to discharge are construed strictly against creditors and liberally in favor of debtors. Fox v. Shervin (In re Shervin), 112 B.R. 724, 730 (Bankr. E.D. Pa. 1990); First Valley Bank v. Ramonat (In re Ramonat), 82 B.R. 714, 718 (Bankr. E.D. Pa. 1988).

The definition of "fiduciary" for purposes of section 523(a)(4) is a question of federal law. See Tudor Oaks Ltd. Partnership v. Cochrane (In re Cochrane), 124 F.3d 978, 984 (8th Cir.1997), cert. denied, 522 U.S. 1112 (1998); The Cadle Co. II, Inc. v. Hartman (In re Hartman), 254 B.R. 669, 672 (Bankr. E.D. Pa. 2000); Spinoso v. Heilman (In re Heilman), 241 B.R. 137, 155 (Bankr. D. Md. 1999). The term is limited

to instances involving express or technical trusts which were "imposed before and without reference to the wrongdoing that caused the debt." Lewis v. Scott (In re Lewis), 97 F.3d 1182, 1185 (9th Cir. 1996). In other words, to disqualify a debt from discharge under section 523(a)(4), the fiduciary duty must have existed prior to the transaction from which the debt arose and the debt must have arisen as a result of the fiduciary acting in that capacity. Lewis, 97 F.3d at 1185; Hartman, 254 B.R. at 672. Moreover,

> 'fiduciary capacity' generally has a narrower meaning in bankruptcy than its traditional common law meaning. The latter, 'involving a person who stands in a special relationship of trust, confidence, and good faith, is 'far too broad for purposes of bankruptcy law.'' (citations omitted). According to the Tenth Circuit Court of Appeals,'[n]either a general fiduciary duty of confidence, trust, loyalty, and good faith (citations omitted), nor an inequality between the parties' knowledge or bargaining power (citation omitted), is sufficient to establish a fiduciary relationship for purposes of dischargeability.' Fowler Brothers v. Young (In re Young), 91 F.3d 1367, 1372 (10th Cir. 1996). For purposes of §523(a)(4), a fiduciary relationship requires an express or technical trust. ...
>
> Although the questions of what constitutes 'fiduciary capacity' under §523(a)(4) is determined by federal law, state law is important in determining whether trust obligations exist. An express trust under Pennsylvania law requires that there be (1) a trustee (2) an ascertainable res, and (3) a beneficiary for whom the property is held. The parties must also manifest their intent to create a trust.

Dawley, 312 B.R. at 777-78. Here, as in Dawley, Plaintiffs have failed to establish the presence of an ascertainable trust res or the trust-like obligations that evidence an intention that a trust be imposed under common law. Accordingly, we conclude that Plaintiffs failed to establish that Defendant was acting in a fiduciary capacity when he committed the alleged misconduct. See Dawley, 312 B.R. at 778-79. See also Hartman, 254 B.R. at 672-73; Woodstock Housing Corp. v. Johnson (In re Johnson), 242 B.R. 283, 294 (Bankr. E.D. Pa. 1999); Ramonat, 82 B.R. at 719-20.

However, even if we were to assume that the prerequisite fiduciary capacity existed, we nonetheless would enter judgment on the complaint in favor of Defendant on the section 523(a)(4) count as we find that Plaintiffs failed to meet their burden of proving that Defendant committed fraud or defalcation.

Under section 523(a)(4), Plaintiffs must prove fraud involving moral turpitude or intentional wrong for the debt to be found nondischargeable. Allentown Supply Co. v. McCurdy, 45 B.R. 728, 731 (Bankr. M.D. Pa. 1985); see also Collier on Bankruptcy, 15th Ed. Rev. ¶523.10[1] at 523-70. Having reviewed the evidence before us, we conclude that Plaintiffs failed to prove that Defendant committed fraud. Rather, we find that Defendant offered credible evidence to explain the discrepancies complained of by Plaintiffs, including the allegation that Defendant wrongfully paid salary and benefits to Ms. Bernhardt after she was no longer employed by Saucon Valley Homes, Inc. Specifically, on this issue, we find that Defendant offered credible evidence to establish that Ms. Bernhardt was still performing duties for Saucon Valley Homes, Inc. during the time frame that Plaintiffs allege Defendant wrongfully paid her and provided her with benefits. As for the remaining infractions alleged by Plaintiffs, we conclude that the evidence presented by Plaintiffs was insufficient to support a finding of fraud or intentional wrongdoing by Defendant and that Defendant

offered credible evidence to explain the alleged infractions complained of by Plaintiffs, including evidence to establish that DK Designs performed valuable services for Saucon Valley Homes, Inc. for which it was properly compensated and that the payments received by Defendant from Saucon Valley Homes, Inc. were recorded in the books and records of Saucon Valley Homes, Inc. We further find that Plaintiffs simply failed to meet their burden herein as the business and finances of Saucon Valley Homes, Inc. were loosely operated by both Plaintiff, Eugene Jasin ("Jasin"), and Defendant and that each of them operated the business to achieve the highest benefit for himself individually with little or no concern for the interests of the other.

The term "defalcation" is not defined in the Bankruptcy Code but includes the failure of a fiduciary to account for money received in a fiduciary capacity. McCurdy, 45 B.R. at 731. As we find that Plaintiffs failed to meet their burden of proving that Defendant acted in a fiduciary capacity, we need not reach the issue of whether Plaintiffs established defalcation. However, were we to reach this issue, we would be compelled to find that Plaintiffs failed to meet their burden of proving that Defendant failed to account for funds to which he was entrusted or otherwise engaged in defalcation.

Lastly, Plaintiffs argue that the debt allegedly owed to them by Defendant should not be discharged pursuant to 11 U.S.C. § 523(a)(6), which states that a discharge in bankruptcy "does not discharge an individual debtor from any debt for willful and malicious injury by the debtor to another entity." The Third Circuit Court of Appeals held that "a debtor's actions are willful and malicious under §523(a)(6) if they either have a purpose of producing injury or have a substantial certainty of producing injury." Conte v. Gautam (In re Conte), 33 F.3d 303, 307 (3rd Cir.1994); accord Geiger v. Kawaauhau (In re Geiger), 113 F.3d 848, 852-54 (8th Cir. 1997), aff'd, 523 U.S. 57 (1998). Therefore, in order to have the debt allegedly owed to them by Defendant excepted from discharge under section 523(a)(6), Plaintiffs must show that Defendant acted deliberately and with substantial certainty that his actions would produce injury. Conte, 33 F.3d at 307-309. When a creditor challenges the dischargeability of a debt, the creditor bears the burden of proof and it is necessary that the creditor prove by a preponderance of the evidence that the debtor willfully and maliciously injured the creditor or his property. Grogan v. Garner, 498 U.S. 279, 288 (1991); DeMarco v. Grubb, (In re Grubb) 1996 WL 230019, *2 (E.D. Pa. May 3, 1996). In addition, consistent with the "fresh start" policy underlying the Bankruptcy Code, exceptions to discharge are construed strictly against creditors and liberally in favor of debtors. Shervin, 112 B.R. at 730; Ramonat, 82 B.R. at 718.

Here, the evidence offered by Plaintiffs was insufficient to meet their burden of proving that Defendant acted willfully and maliciously. Instead, as stated earlier, we find that Defendant offered credible evidence to explain the alleged infractions complained of by Plaintiffs, including evidence to establish that Ms. Bernhardt was still providing services to Saucon Valley Homes, Inc. during the period in question, that DK Designs performed valuable services for Saucon Valley Homes, Inc. for which it was properly compensated and that the payments received by Defendant from Saucon Valley Homes, Inc. were recorded in the books and records of Saucon Valley Homes, Inc. We further find that Plaintiffs failed to meet their burden of proving that Defendant's conduct was willful and malicious and that both Jasin and Defendant conducted the business of Saucon Valley Homes, Inc. in a loose manner to best further their individual interests while showing little or no regard for the interests of the other.

For all of the foregoing reasons, we conclude that Plaintiffs failed to meet their burden of proof herein and that therefore, the alleged debt is dischargeable under 11 U.S.C. §523(a)(4) and (6). Our decision today is consistent with the "fresh start" policy of the Bankruptcy Code, which allows an honest debtor to have a completely unencumbered new beginning. Grogan, 498 U.S. at 286-287. In our view, Defendant herein is

Reading, PA

THOMAS M. TWARDOWSKI
United States Bankruptcy Judge

entitled to that fresh start.