
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
NORTHERN DIVISION

In re:

WILLIAM MACK STODDARD,
Debtor.

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:
:
: Bankruptcy Number 89B-04078
:
: [Chapter 7]

MARY M. STODDARD,
Plaintiff,

:
: Adversary Proceeding Number
: 89PB-0694

vs.

WILLIAM MACK STODDARD,
Defendant.

MEMORANDUM DECISION

Dale E. Stratford, Esq., Ogden, Utah, appeared for Mary M. Stoddard, Plaintiff.

Dale M. Dorius, Esq., Brigham City, Utah, appeared for William Mack Stoddard, Defendant.

The matter before this court is an objection to the dischargeability of a debt brought pursuant to 11 U.S.C. § 523(a)(4).¹ I have jurisdiction to enter a final judgement

¹

All future references are to Title 11 of the United States Code unless noted.

for damages and for nondischargeability of a debt pursuant to 28 U.S.C. § 1334(a) and 28 U.S.C. § 157(a). This is a core proceeding as set forth in 28 U.S.C. § 157(b)(2)(I).

The matter was tried on May 2, 1990, and taken under advisement. After carefully considering the evidence before me, assessing the credibility of the witnesses, and after independently reviewing the applicable case law, I now enter the following Memorandum Decision as allowed by Bankruptcy Rule 7052.

FACTUAL SUMMARY

Mary M. Stoddard, a/k/a Mary Hansen, (Mary) married William Mack Stoddard (Mack) on October 23, 1982. Both Mary and Mack had previously been married and each had several children. On October 22, 1982, Mack drafted and they both executed a prenuptial agreement which released either party from making a claim against property held prior to the marriage in the event of a divorce. The intent of the parties was to keep their premarital property separate and apart from marital property so that each party could dispose of or retain their premarital property as each saw fit.

On November 24, 1982, Mack and Mary each executed a Last Will and Testament which included a list of their assets at the time of the marriage. This document was also drafted by Mack. Mack listed, among other things, cash of \$1,000, real estate including Mack's Pharmacy, and inventory and accounts payable attributed to Mack's Pharmacy. He also listed stock certificates valued at \$10,000 in Brigham Investment Co.,

Inc. Mary listed \$40,000 in U.S. Treasury notes, and \$40,000 in a CMA account, including stocks and bonds, held at Merrill Lynch Fenner Pierce and Smith Inc. (Merrill Lynch).

Mary and her son, Kelly Stone, had opened an account with Merrill Lynch prior to the marriage. On September 3, 1982, Mary deposited \$35,000 in that account and on September 22, 1982, deposited an additional \$5,000. Mary's \$40,000 U.S. Treasury note became due, and on December 1, 1982, Mary and Mack went to the office of Merrill Lynch and the \$40,000² was deposited into the joint CMA account of Mary and Kelly Stone.

Mack repeatedly suggested that Mary was not achieving a reasonable rate of interest upon her investments. He induced Mary to commit the funds in the CMA account to his control for the alleged purpose of maximizing their income. To this end, the funds in Mary and Kelly's joint account were transferred to a joint CMA account with Mack. Kelly's name was removed from the account. Mary contributed a total of \$76,912 to the account, and Mack contributed \$7,045 according to an account statement dated March 25, 1983.³

Mary entrusted the account to the control of Mack for the purpose of maximizing the income from the account. Mary anticipated using the income from the

² Mack asserted the \$40,000 deposited was his cash which he kept in his store, rather than in a bank, in order to avoid a judgment creditor. The cash was not included on the list of assets attached to his Last Will and Testament. I find his testimony not to be credible.

³ Mack testified that the 1,000 shares of Firestone sold for \$1,000.

account for living expenses with the principle remaining in the account.⁴ Mack changed the address of the account statement to Mack's Pharmacy and thereafter Mary was not privy to the monthly account statements. Mary wrote checks upon the CMA account until approximately March of 1985, at which time Mack took her checkbook away from her.

Beginning in October of 1983, Mack began to draw against the CMA account in the approximate amount of \$2,151 each month for the purpose of making the mortgage payment on the pharmacy. A total of \$86,091 was paid to First Interstate Bank on the mortgage. The funds paid to First Interstate Bank were Mary's funds. Eventually the account funds were depleted. Mary ultimately contacted Merrill Lynch and learned that the account had been used as a margin account and had a negative balance of \$4,000.

Mary and Mack, after a brief separation, elected to purchase a home. Because of a judgment against Mack, financing for the home was difficult to obtain. They eventually closed on a home with a purchase price of \$33,750. The earnest money receipt, which both Mary and Mack executed, indicated the title of the home would be in the names of Wm. M. Stoddard and Mary M. Stoddard, his wife, as joint tenants. The parties executed a note for the principle amount of \$30,250 on December 11, 1986, which was due "April 11, 1986" (sic). Long term financing was not obtained for the purchase of the home and between December of 1987 and April of 1988, \$10,710 was withdrawn from the CMA account for the purchase of the home. Mack caused Brigham Investment Company, Inc., an entity in which Mack had an interest, to purchase the home for an undisclosed

⁴ The funds deposited by Mary represented the settlement of Mary's deceased husband's estate.

amount, and by warranty deed recorded April 7, 1987, the home was conveyed to Brigham Investment Company, Inc.

ISSUE PRESENTED

Mary asserts the funds placed in her CMA account were trust funds over which Mack was the trustee, and that he converted the funds to his own use, thereby breaching his fiduciary duty to her. Alternatively, Mary asserts that Mack embezzled a total of \$80,000 of her funds which were in the joint account. She asserts that the sums used by Mack should be returned to Mary or judgment rendered in her favor, and that such judgment should be nondischargeable. Mack denies he acted as a trustee over Mary's funds. He further asserts that Mary used other joint monies in excess of those used by him from the CMA account.

DISCUSSION

Section 523(a)(4) provides that section 727 does not discharge an individual debtor from any debt for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny. Exceptions to discharge under section 523(a)(4) must be narrowly construed against the creditor and in favor of the debtor. *Orem Postal Credit Union v. Twitchell (In re Twitchell)*, 91 B.R. 961, 963 (D. Utah 1988). They must be proven by clear and convincing evidence. *In re Crook*, 13 B.R. 794 (Bankr. D. Me. 1981).

Mary must prove that Mack committed a defalcation while acting as a fiduciary as defined by federal, not state law. *Joseph v. Stone (In re Stone)*, 91 B.R. 589, 593 (D. Utah 1988). Under the *Stone* and *Twitchell* cases, Mary must first establish an express, technical or statutory trust. Mack must be the trustee of an intentionally created technical or statutory trust, having property of Mary constituting the trust res in his control. *In re Twitchell*, 91 B.R. at 965-66. A breach of contract is insufficient. "Further, the debt alleged to be nondischargeable must arise from a breach of the trust obligations imposed by law and not from any breach of contract." *Purcell v. Janikowski (In re Janikowski)*, 60 B.R. 784, 788 (Bankr. N.D.Ill. 1986).

The trust instrument Mary relies upon is the prenuptial agreement. A careful reading of the document does not reveal any trust relationship, nor does it disclose a trust res. I am obligated to strictly construe such documents in favor of Mack. I conclude that there is no clear establishment of a trust res, of any intent to create a trust, or of any trust relationship. Therefore, the action for defalcation while acting in a fiduciary capacity fails.

Section 523(a)(4) also provides that a debt is nondischargeable if obtained by embezzlement. Embezzlement is to be determined under federal common law. *In re Storms*, 28 B.R. 761 (Bankr. E.D. N.C. 1983). Embezzlement is defined as "the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." *In re Carlton*, 26 B.R. 202 (Bankr. M.D. Tenn. 1982) (citing *Moore v. United States*, 160 U.S. 268, 269 (1895)). As applied to this case, federal

common law embezzlement requires that Mary's funds lawfully came into Mack's possession. Mary willingly placed Mack's name on the joint account and allowed him control of the account for the purpose of maximizing the interest on the account. Mack was not, however, authorized to withdraw principle from the account for his own use.

Federal common law embezzlement also requires that Mack either fraudulently intended to appropriate the funds to himself or that he deceitfully did so. *In re Beasley*, 62 B.R. 653, 654 (Bankr. W.D.Mo. 1986); *Great Am. Ins. Co. v. Graziano (In re Graziano)*, 35 B.R. 589, 594 (Bankr. E.D.N.Y. 1983); and, *In re Carlton*, 28 B.R. at 205. Intent can be implied from the totality of the circumstances surrounding the events. It is unnecessary for me to find intent to defraud. It is sufficient that I find that Mack willfully and maliciously intended to borrow property for a short period of time even if there was no intent to inflict injury, but on which injury was in fact inflicted. H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 364 (1978).

I conclude that Mack deceitfully converted the funds to his own use. He withheld the account statements from Mary so that she would not know of his systematic withdrawals from the account. He prohibited her from using her checkbook, so any inquiry she may have had as to the account balance would have been minimized. He refused to provide her with information regarding the account when requested to do so. I find that Mack intentionally and maliciously intended to obtain Mary's funds and converted them to his own use.

Mack also embezzled funds from Mary in the transaction regarding the house. \$10,710 was withdrawn from the CMA account for the purchase of the home. Mary signed the earnest money receipt which reflected that the home was to be held in joint tenancy. She signed the promissory note. She was not informed that the Warranty Deed was placed in the name of Brigham Investment Co. Inc. Considering the totality of the transaction, I conclude that Mack deceitfully appropriated Mary's funds to his own use, or the use of his controlled corporation, without her consent and through deception.

CONCLUSION

Mary has proven by clear and convincing evidence that Mack deceitfully appropriated to his own use funds which he lawfully acquired. Those funds totaled \$76,912, which constitute the principle amount transferred to the joint account. Interest accrued on the account has not been proven. The amounts paid from the CMA account for the purchase of the house are contained within the aforestated figure. Mary is therefore entitled to judgment in the amount of \$76,912, and said judgment is nondischargeable in this chapter 7 case.

DATED this 10 day of May, 1990.



JUDITH A. BOULDEN
United States Bankruptcy Judge