Denial of Discharge
Dischargeability - § 523(a)(6)
Claim/Issue Preclusion

Meyers v. Empire Wholesale Lumber Co. 97-6263-fra/99-6079-fra

In re Benjamin Meyers 697-63375-fra7

11/2/99 FRA Unpublished

The Plaintiff, a commercial lumber broker, agreed to use the Defendant's wholly-owned corporation, Meyers Lumber Sales, Inc. (MLSI), as a sales representative. A broker acquires lumber from a mill at its own cost and the sales representative finds a buyer for the product. Once a buyer is identified, the product is shipped to the buyer and an invoice is generated by the broker which in turn pays an agreed commission to the sales representative.

In 1995, the Plaintiff learned that MLSI was selling lumber acquired by Plaintiff over its own invoice and that MLSI was retaining the proceeds. Plaintiff commenced an action in state court against MLSI and Meyers for breach of contract, a duty to account, conversion, and breach of an agreement to pay. Days before the date set for trial, Meyers filed bankruptcy and the case was dismissed as to him. MLSI failed to appear for trial and a default judgment was entered against it. As part of the ongoing pre-bankruptcy litigation, Meyers filed a counterclaim against Plaintiff alleging that Plaintiff had defamed him. The counterclaim was never adjudicated and Meyers never disclosed the existence of the claim on his schedules and thereafter claimed he had abandoned it. This action was brought against Meyers for the same claims as the state-court action as well as a claim alleging nondischargeability.

The bankruptcy court held that the default judgment against MLSI was preclusive in this court as to the amount of damages against MLSI. The facts adduced at trial in bankruptcy court made it clear that MLSI's activities were directed and controlled by Meyers and that they amounted to conversion under state law. The Plaintiff was damaged in the amount of $225,615 by Meyers' and MLSI's conversion of Plaintiff's property. Meyers, as an agent of the corporation, is liable in his own right for any torts committed by him, making him jointly and severally liable with MLSI. The debt is nondischargeable under § 523(a)(6). The facts indicated that Meyers also concealed property of the estate, in the form of the defamation claim, such that his discharge is denied under § 727(a)(2).

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re: BENJAMIN R. MEYERS, Debtor.	Case No. 697-63375-fra7
EMPIRE WHOLESALE LUMBER COMPANY, Plaintiff, vs. BENJAMIN MEYERS, Defendant.	Adversary No. 97-6273-fra
EMPIRE WHOLESALE LUMBER COMPANY, Plaintiff, vs. BENJAMIN MEYERS, Defendant.	Adversary No. 99-6079-fra MEMORANDUM OPINION

I. INTRODUCTION

In proceedings in both state and federal courts Plaintiff has pursued claims against Meyers Lumber Sales, Inc., and Defendant Benjamin R. Meyers, its president and sole shareholder. Plaintiff seeks money damages on the grounds that Defendants are accountable

to it for proceeds of certain lumber sales. Plaintiff further seeks, in this Court, judgments to the effect that its claim is not discharged in bankruptcy and further that Defendant Meyers should be denied a discharge altogether for violating Bankruptcy Code provisions regarding disclosure of assets. I find for the Plaintiff on all claims.

II. FACTS

Plaintiff is an Ohio corporation doing business throughout the country as a commercial lumber broker. Defendant was, at all material times, sole owner and president of Meyers Lumber Sales, Inc. (MLSI), a lumber sales representative doing business in Eugene.

In the ordinary course of the wholesale lumber business a broker procures product from a mill at its expense. Thereafter the product may be "remanufactured" for specific purposes. For example, cut lumber manufactured in a mill may be sent to a second mill to be fashioned into such things as molding, table legs, or venetian blind slats. The cost of the remanufacture is also borne by the broker. It is the sales representative's job to find a buyer for the finished product. Once the transaction is identified, the product is shipped to the purchaser and an invoice is generated by the broker and delivered to the purchaser. The purchaser pays the broker, which in turn pays the agreed upon commission to the sales representative.

In mid 1993 Plaintiff, acting through Mr. Pete Carroll, its executive vice president, and MLSI, acting through Defendant Meyers, began discussions regarding MLSI's proposal that it act as the sales

representative for Plaintiff. In the course of these discussions Mr. Meyers, on behalf of MLSI, faxed a proposed contract on August 11, 1993. The communication begins with the statement that Mr. Meyers was writing "to clarify the interest, as part of our proposed agreement that we discussed recently." The letter goes on to state that MLSI's current monthly sales were running at $720,000, its current monthly gross profit was 19.8% [presumably of sales], and that its average monthly sales was between $500,000 and $700,000. The letter does not state what time period the average refers to. The letter goes on to say that "our sales can realistically be up to $1.6 million a month with the proper buying power behind us." The letter goes on to claim that "using a conservative monthly sales figure and average GP" [the conservative sales figure being $720,000 per month], Plaintiff's annual net gain from the proposed sales relationship would be $360,480.

The balance of the letter sets out a proposal for terms. The proposed terms contemplated that profits or losses on particular loads of lumber would be divided 25/75, with the long share going to the sales representative. While many of the terms were consistent with ordinary trade practices, it differed significantly in two respects: it provided that commissions would be paid weekly, rather than after all of the product in a particular load was sold, and further provided for a 100% penalty in the event commissions were not paid when due.

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Mr. Carroll never responded to the letter. Plaintiff did, however, commence to do business with MLSI, and continued to do so for approximately two years.

In the summer of 1995 Plaintiff was advised that MLSI was selling lumber acquired by Plaintiff over its own invoice, and that MLSI was retaining the proceeds of those sales. When confronted personally, Meyers admitted to the sales, and that MLSI was indebted to Plaintiff for $225,615.37. Acting as president of MLSI, Meyers signed a written promise to pay that amount.

No such payment was made. Plaintiff eventually commenced an action in the Circuit Court for Lane County, Oregon, against MLSI and Benjamin Meyers. The four counts, against MLSI and Meyers individually, claimed liability for breach of contract, a duty to account, conversion, and breach of the August 1995 agreement to pay. A fifth claim against Benjamin Meyers alleged fraud in the inducement, based on the representation of current monthly sales.

Days before the time set for trial, Benjamin Meyers filed for relief under the Bankruptcy Code. As a result, the case was dismissed as to Benjamin Meyers. MLSI failed to appear for trial, and was found by the State Court to be in default. Based on that finding the Court entered a judgment on all four counts against MLSI in the sum of $225,615.37, plus Plaintiff's costs and disbursements.

Mr. Meyers' bankruptcy case was subsequently dismissed. An action against him, advancing the same claims as before was commenced in the United States District Court. Meyers then filed a second bankruptcy, and an action objecting to discharge was filed in

this Court. The District Court then transferred its case to this Court, and the two matters were consolidated for trial.

As part of the ongoing pre-bankruptcy litigation, Meyers filed a counterclaim against Plaintiff alleging that Plaintiff had defamed him. This claim has never been adjudicated. Defendant did not disclose the existence of the claim in his bankruptcy schedules, and thereafter claimed that he had "abandoned" it.

III. ISSUES

The issues presented in this case are:

1. Is Benjamin Meyers personally liable for the debt owed to Plaintiff by MLSI?

2. To the extent Benjamin Meyers is liable, is that debt excepted from discharge as having arisen from fraud, or use of a false financial statement?

3. Should Benjamin Meyers' discharge be denied because he willfully and fraudulently failed to disclose the defamation claim on his bankruptcy schedules?

IV. DISCUSSION

A. *Liability to Empire*

Effect of MLSI Judgment

As noted, a default judgment on Empire's claims against MLSI was entered by the State Circuit Court. Federal Courts of the Ninth Circuit give the same effect to a State Court default judgment that the Courts of the State itself give. Gayden v. Nourbakhsh, 67 F.3d 798, 800 (9th Cir. 1995). Under Oregon law, a default judgment admits the truth of all material allegations of the complaint.

Kerschner v. Smith, 121 Or. 469, 256 P. 195 (1927). The effect of the default judgment of the Oregon court is to establish all claims set out in the complaint that are material to the cause of action.

The MLSI judgment thus establishes that MLSI converted funds belonging to Plaintiff, and that Plaintiff was damaged by that conversion to the tune of $225,615.37. Under principles of *res judicata* this Court is bound by that determination. In re Comer, 723 F.2d 737, 740 (9th Cir. 1984).

B. *Meyers' Personal Liability to Empire*

It is clear from the record at trial that Meyers caused MLSI to acquire proceeds from the sale of lumber product bought and paid for by Empire. This was Empire's money, and not MLSI's. Rather than account to Plaintiff for these funds, Meyers spent them.[1]

MLSI, acting at Meyers' direction, acquired the funds by selling product procured by Empire, and issuing its own invoices. The effect was that payment for the product went to MLSI, rather than Empire as the agreement required.

Meyers' asserts that Plaintiff consented to this process in order to expedite sales of product remaining unsold. Mr. Carroll, Plaintiff's vice president, denies this. Defendant's claim on this point is not credible. On one hand he claims that he had permission to issue invoices, contrary to the original agreement, which would have (and did) result in the cash proceeds flowing to MLSI. On the other hand, he subsequently faxed a message to Mr. Carroll

[1] The record suggests that a considerable portion of these expenditures was for Mr. Meyers' personal benefit.

suggesting that Empire issue an invoice to MLSI for the remaining product. It is hard to see why this second step would have been necessary if permission had already been given to issue invoices directly. Moreover, considerable money was raised by factoring the invoices to a third party. There is no evidence that Meyers ever advised Empire that he was discounting these invoices, much less that he obtained their permission.

Meyers' stated goal was to gain control of the funds, noting to an employee that "possession is nine-tenths of the law." It is clear that he maneuvered to obtain control of the funds in order to support his position in a dispute with Plaintiff regarding the timing and calculation of commissions. This constitutes an act of conversion under Oregon law. See Mistola v. Toddy, 253 Or. 658, 663-664, 456 P.2d 1004, 1007 (1969); Reagan v. Certified Realty Co., 47 Or.App. 35, 613 P.2d 1075 (1980).

It is clear from the record at trial that all of MLSI's activities respecting Empire were directed by Mr. Meyers. Given the establishment of MLSI's liability in the State Court action, and the uncontradicted evidence of Meyers' control and direction of the corporation in this case, it follows that Meyers is jointly and severally liable for the damages established in the State Court case.

Meyers' argues that he is not personally liable because he acted at all times solely in his capacity as president of MLSI. While MLSI may have been the instrument, it is clear that Mr. Meyers was the one playing it. An agent who acts tortuously toward a third

party is not relieved of liability purely because of his agency status. Meyers and MLSI acted together to convert Plaintiff's property, and they are jointly and severally liable for the damages established by the State Court proceeding.

C. *Dischargeability of Empire's Claim*

Bankruptcy Code § 523(a)(6) excludes from discharge a debt for willful and malicious injury by the debtor to another entity or to the property of another entity. The willful and unlawful conversion of the Plaintiff's property, as occurred here, results in a debt which cannot be discharged by Mr. Meyers in this bankruptcy proceeding. See In re Wood, 96 B.R. 993 (9th Cir. BAP 1988).

Plaintiff also claims that its claim is not subject to discharge because Meyers fraudulently induced it to agree to do business with him in the first place. In initial written communications, MLSI, acting through Meyers, represented that the company was sustaining "current monthly sales" of $720,000, and experiencing a monthly gross profit of 19.8%." It was further stated that average sales were $500,000-$700,000. Ample and credible evidence was submitted at trial demonstrating that these figures were not even close to true.

Code § 523(a)(2)(B) excludes from discharge claims arising from "a statement in writing (i) that is materially false; (ii) respecting the debtor's or an insider's financial condition; (iii) on which the creditor . . . reasonably relied; and (iv) that the debtor caused to be made or published with intent to deceive."

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Here, Plaintiff's damages flow not from the inducement to do business, but Meyers' and MLSI's subsequent acts of conversion. As there is no nexus between the false statement and the actual injury, the claim under Code § 523(a)(2) cannot be sustained.

D. *Denial of Discharge*

Plaintiff seeks to deny Defendant his discharge in Bankruptcy, on two grounds: That he knowingly made a false statement under oath, see Code § 727(a)(4)(A), and that he willfully and fraudulently concealed assets from the trustee, §727(a)(2).

The evidence establishes that, at the time he filed his bankruptcy petition, Mr. Meyers believed he had a valuable claim against Empire and individuals acting on Empire's behalf. The schedules submitted with the petition for relief did not disclose the existence of the claim, which, upon filing, became an asset of the estate. The willful concealment of an estate asset, done with intent to hinder, delay or defraud creditors or the trustee, constitutes grounds for denial of discharge. 11 U.S.C. § 727(a)(2). Mr. Meyers explained the omission by testifying that he simply signed the schedules without paying attention to the details. This is not sufficient justification for execution of the inaccurate schedules, especially in light of the fact that the schedules were never amended.

After filing the bankruptcy petition, Mr. Meyers, on more than one occasion, attempted to assert the defamation claim for his own benefit. This belies his argument that the claim was without value, or that he had "abandoned" it. (Of course, once the

bankruptcy was filed the claim was not his to abandon.) In addition, the value of a concealed claim or asset is immaterial. Mr. Meyers further claims that post-petition assertion of the claim was done without his authority. This claim is not credible.

Mr. Meyers willfully, and with the intent to deprive the estate of its value, failed to disclose the existence of a cause of action. This constitutes grounds for denial of his discharge.[2]

V. CONCLUSION

Defendant Benjamin Meyers is indebted to Plaintiff for conversion of Plaintiff's property, in the sum of $225,615.37. That claim is not discharged. Moreover, having fraudulently sought to withhold an asset from the bankruptcy estate, Mr. Meyers is disqualified from obtaining any discharge in bankruptcy.

The foregoing constitutes the Court's findings of fact and conclusions of law, which will not be separately stated. Counsel for Plaintiff should submit a form of judgment consistent with the foregoing.

FRANK R. ALLEY, III
Bankruptcy Judge

cc: Mr. R. Scott Palmer
Mr. Greg Veralrud
Mr. Benjamin Meyers

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[2]In light of this disposition, the Court makes no finding respecting the Plaintiff's alternative claim under Code § 727(a)(4)(A).