

In re Pederson 388-02868-S7
In re Sammis 388-03118-P7
Maginnis v. Pederson 88-0444
Maginnis v. Sammis 88-0451
Peterson v. Pederson 88-0465
Peterson v. Sammis 88-0489
D. Or. Civ. No. 90-417-MA

2/8/91 Judge Marsh affirming Judge Luckey unpublished

The district court found that there was substantial evidence to support the bankruptcy court's finding that the defendants failed to properly account to their partners and diverted partnership assets. Accordingly, the bankruptcy court did not err in concluding that the debts to the partners were nondischargeable under 11 U.S.C. § 523(a) (4).

P89-32(16) (Underlying opinion 8/21/89)

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DAVID A. PETERSON and
ROBERT SEAPY,

Plaintiffs-Appellees,

v.

MARK P. SAMMIS,

Defendant-Appellant,

Civ. No. 90-465-MA

In re GARY W. PEDERSON,

Debtor.

Case No. 388-02868-S7

In re MARK P. SAMMIS,

Debtor.

Case No. 388-03118-P7

Adversary Nos. 88-0444, 88-0451,
88-0465, 88-0489.

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1 MARSH, Judge.

2 This is an appeal from the bankruptcy court's decision that
3 defendants breached their fiduciary duties to plaintiffs and that
4 plaintiffs' debts to defendants are therefore not dischargeable
5 in bankruptcy. Defendants appeal from the bankruptcy court's
6 decision on the grounds that the bankruptcy court's findings of
7 facts are not supported by the evidence, the defendants were given
8 an insufficient opportunity to conduct discovery and the trial of
9 the two defendants should have been severed. For the reasons set
10 forth below, defendants' appeal is denied and the decision of the
11 bankruptcy court is affirmed.

12 BACKGROUND

13 Plaintiffs originally filed actions in Multnomah County
14 Circuit Court against defendants Pederson and Sammis, among
15 others. In those cases, plaintiffs, limited partners in Bar 71
16 Investors Limited Partnership ("Bar 71"), and PSA Livestock
17 Investors Limited Partnership ("PSA Livestock"), argued that
18 defendants, general partners in PSA Livestock and Bar 71, violated
19 securities laws, breached their fiduciary duties, committed common
20 law fraud and violated Oregon and Federal RICO laws in connection
21 with their management of PSA Livestock and Bar 71. Defendant
22 Pederson stipulated to the entry of judgment against him in the
23 amount of \$80,750 and final judgment on this stipulation was
24 entered by the Multnomah County Circuit Court on April 29, 1988,
25 shortly before defendant filed for bankruptcy. Stipulated
26 judgment was also entered against defendant Sammis on April 29,

3 - OPINION

1 1988 in the amount of \$80,750.

2 Plaintiffs Peterson and Seapy also moved for and obtained
3 summary judgment against defendant Sammis in the state court
4 proceeding based on their claims of fraud and securities law
5 violations. With respect to plaintiffs Peterson and Seapy's
6 motion for summary judgment against defendant Pederson, defendant
7 Pederson filed for bankruptcy on the day the motion was argued and
8 the motion was therefore denied.

9 Upon defendants' filing of bankruptcy petitions, plaintiffs
10 initiated this adversary proceeding in bankruptcy court.
11 Plaintiffs object to the discharge of their debts and judgments
12 against defendants in bankruptcy on the ground that these
13 obligations were incurred as a result of defendants' fraud and
14 breach of their fiduciary duties. Plaintiff Maginnis and
15 plaintiffs Peterson and Seapy's claims were consolidated in a
16 five-day trial before the Honorable C.E. Luckey which began on May
17 15, 1989. On August 21, 1989, Judge Luckey filed his opinion and
18 held that the debts and judgments were not dischargeable in
19 bankruptcy. While Judge Luckey rejected plaintiffs' fraudulent
20 conduct claim finding that the prospectus "did not in itself
21 contain intentional misrepresentations by the defendants upon
22 which the plaintiffs reasonably relied," the court found that
23 defendants "did not conduct themselves in a manner consistent with
24 their duty as general partner fiduciaries." In re Pederson &
25 Sammis, Adv. Nos. 88-0444, 88-0451, 88-0465, 88-0489 slip op. at
26 5 (Bkrptcy. D. Or. August 21, 1989). In particular, the court

1 found that defendants acted in conflict of interest, failed to
2 make timely accounting to the limited partners as required under
3 the limited partnership agreements and diverted funds from PSA
4 Livestock and Bar 71 Ranch to PSA Investments, a partnership in
5 which both defendants were general partners, at a time at which
6 both PSA Livestock and Bar 71 Ranch were short of funds. The
7 court found that there was a commingling of PSA Livestock and Bar
8 71 Ranch's funds in other accounts controlled by Pederson, Sammis
9 and their controlled entities and that this commingling was
10 contrary to the partnership agreements and defendants' fiduciary
11 duties. The court also found that, contrary to the mandates of
12 the partnership agreements, there was discriminatory and unequal
13 treatment of the limited partners relating to buy-back agreements
14 and pay-backs and that both defendant Pederson and defendant
15 Sammis participated in excessive withdrawals from PSA Livestock
16 and Bar 71 Ranch.

17 STANDARDS

18 A bankruptcy court's findings of fact are reviewed under the
19 clearly erroneous standard. In re Globe Investment & Loan Co.,
20 867 F.2d 556, 559 (9th Cir. 1989); Bankruptcy Rule 8013. Under
21 the clearly erroneous standard of review, an appellate court must
22 accept the lower court's findings of fact unless upon review the
23 appellate court is left with the definite and firm conviction that
24 a mistake has been committed. United States v. United States
25 Gypsum Co., 333 U.S. 364, 395 (1948); United States v. Silverman,
26 861 F.2d 571, 576-77 (9th Cir. 1988).

DISCUSSION

1 Under Oregon law, general partners are accountable as
2 fiduciaries. Accordingly, "[e]very partner must account to the
3 partnership for any benefit, and hold as trustee for it any
4 profits derived by the partner without the consent of the other
5 partners from any transaction connected with the formation,
6 conduct, or liquidation of the partnership or from any use by the
7 partner or its property." ORS 68.340. See also In re Short, 818
8 F.2d 693 (9th Cir. 1987); Ragsdale v. Haller, 780 F.2d 794 (9th
9 Cir. 1986). The partnership agreements at issue in this case also
10 provided that the general partners "shall have fiduciary
11 responsibility for the safekeeping and use of all funds and assets
12 of the Partnership whether or not in its immediate possession or
13 control, and it shall not employ, or permit another to employ such
14 funds or assets in any manner except for the exclusive benefit of
15 the Partnership." Debts incurred through a breach of fiduciary
16 duty have been held to be nondischargeable in bankruptcy. See
17 e.g. In re Harris, 458 F. Supp. 238, 243 (D.Or. 1976), aff'd, 587
18 F.2d 451 (9th Cir. 1978); In re Owens, 54 B.R. 162, 165 (Bkrptcy.
19 D. S.C. 1984).

20 The record contains substantial evidence supporting the
21 bankruptcy court's decision that defendants breached their
22 fiduciary duties. Accountings were not timely nor properly made
23 to limited partners. Funds were diverting from the partnerships
24 including through the issuance of a \$90,000 check from PSA
25 Livestock to PSA Investment Company as well as through defendants'
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1 appropriation of funds direct to themselves. Monies were repaid
2 to certain investors but not to others with funds being used to
3 repay a single investor without the limited partners knowledge or
4 consent. All of this occurred at a time when the partnerships
5 were in a serious financial condition.

6 Many of the objections raised by defendants against the
7 bankruptcy court's findings and conclusions concern plaintiffs'
8 fraud allegations. As stated above, the bankruptcy court rejected
9 plaintiffs' fraud claim as not being supported by the evidence.

10 I also find that no reversible error exists based on
11 defendants' claim that they only completed discovery on the eve of
12 trial. Likewise, with respect to the bankruptcy court's decision
13 to consolidate these four cases for trial, there is no showing
14 that defendants were prejudiced by this consolidation.

15 CONCLUSION

16 Having reviewed the record, I find that the bankruptcy court
17 did not err in finding that defendants' debts to plaintiffs were
18 not dischargeable in bankruptcy because these debts arose as a
19 result of defendants' breach of their fiduciary duties.
20 Accordingly, defendants' appeal is denied and the bankruptcy
21 court's decision is affirmed.

22 DATED this 8 day of February, 1991.

23 Malcolm F. Marsh
24 Malcolm F. Marsh
25 United States District Judge
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