

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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11/2/99 FRA Unpublished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).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

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

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

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

7 II. FACTS

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

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

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

1 representative for Plaintiff. In the course of these discussions
2 Mr. Meyers, on behalf of MLSI, faxed a proposed contract on August
3 11, 1993. The communication begins with the statement that Mr.
4 Meyers was writing "to clarify the interest, as part of our proposed
5 agreement that we discussed recently." The letter goes on to state
6 that MLSI's current monthly sales were running at \$720,000, its
7 current monthly gross profit was 19.8% [presumably of sales], and
8 that its average monthly sales was between \$500,000 and \$700,000.
9 The letter does not state what time period the average refers to.
10 The letter goes on to say that "our sales can realistically be up to
11 \$1.6 million a month with the proper buying power behind us." The
12 letter goes on to claim that "using a conservative monthly sales
13 figure and average GP" [the conservative sales figure being \$720,000
14 per month], Plaintiff's annual net gain from the proposed sales
15 relationship would be \$360,480.

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

25 // // //

26 // // //

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

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

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

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

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

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

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

8 III. ISSUES

9 The issues presented in this case are:

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

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

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

18 IV. DISCUSSION

19 A. *Liability to Empire*

20 Effect of MLSI Judgment

21 As noted, a default judgment on Empire's claims against MLSI
22 was entered by the State Circuit Court. Federal Courts of the Ninth
23 Circuit give the same effect to a State Court default judgment that
24 the Courts of the State itself give. Gayden v. Nourbakhsh, 67 F.3d
25 798, 800 (9th Cir. 1995). Under Oregon law, a default judgment
26 admits the truth of all material allegations of the complaint.

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

4 The MLSI judgment thus establishes that MLSI converted funds
5 belonging to Plaintiff, and that Plaintiff was damaged by that
6 conversion to the tune of \$225,615.37. Under principles of *res*
7 *judicata* this Court is bound by that determination. In re Comer,
8 723 F.2d 737, 740 (9th Cir. 1984).

9 B. *Meyers' Personal Liability to Empire*

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

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

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

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

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

8 Meyers' stated goal was to gain control of the funds, noting
9 to an employee that "possession is nine-tenths of the law." It is
10 clear that he maneuvered to obtain control of the funds in order to
11 support his position in a dispute with Plaintiff regarding the
12 timing and calculation of commissions. This constitutes an act of
13 conversion under Oregon law. See Mistola v. Toddy, 253 Or. 658,
14 663-664, 456 P.2d 1004, 1007 (1969); Reagan v. Certified Realty Co.,
15 47 Or.App. 35, 613 P.2d 1075 (1980).

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

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

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

5 *C. Dischargeability of Empire's Claim*

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

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

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

26 // // //

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

5 *D. Denial of Discharge*

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

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

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

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

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

8 V. CONCLUSION

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

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

18
19
20 FRANK R. ALLEY, III
21 Bankruptcy Judge

22 cc: Mr. R. Scott Palmer
23 Mr. Greg Veralrud
24 Mr. Benjamin Meyers

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