§ 523(a)(4)

Richard Clapp v. Janet Loprinzi, Adversary No. 89-3005
In re Janet Loprinzi, Case No. 388-04612-DDS7

2/14/90 CEL Unpublished

The creditor of a corporation sought a determination that a judgment debt was nondischargeable under § 523(a)(4) because the debtor, a director of a real estate sales corporation, breached her fiduciary duties to the creditor. Case law supports the proposition that a person who fraudulently diverts corporate assets for personal benefit is liable for a debt of the corporation as a nondischargeable obligation.

The debtor admitted using corporate assets for a personal vacation and keeping proceeds from the sale of the corporation without paying creditors. The court held that the debtor breached her fiduciary duty to the creditor of the corporation and that the judgment debt is nondischargeable.

P90-9(4)

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re: JANET LOPRINZI, Debtor.	Case No. 388-04612-S7
RICHARD CLAPP, Plaintiff, v. JANET LOPRINZI, Defendant.	Adversary No. 89-3005 MEMORANDUM OPINION

Plaintiff, defendant and her former spouse were real estate salesmen in an office which defendant and her ex-husband decided to leave to form an office of their own. To do so, they needed to associate someone with an Oregon real estate broker's license. Plaintiff had one, and agreed to become president of the new firm, Aztec Properties, Inc. in May, 1977. He was to receive a salary or wages and commissions from the firm. Plaintiff also later paid for an interest in the firm and became entitled to an interest as a minority shareholder. Although he was president, plaintiff left the management of the firm to the defendant and her then husband, as directors of Aztec. The salary compensation was paid to the plaintiff for a number of months but the plaintiff alleges he was not paid all the wages to which he was entitled, and some of the commissions. He alleges that as directors of Aztec Properties, Inc., in managerial control, the debtor and her ex-husband fraudulently used funds of the corporation for their own benefit in violation of their fiduciary duty to him as a minority shareholder and creditor of the corporation and that the obligation he claims due should be nondischargeable in the defendant's individual bankruptcy. The defendant's ex-husband was discharged in an earlier bankruptcy (In re Scott Espedal). A judgment based upon an action by the plaintiff and arbitration award was entered in the circuit court of the State of Oregon for Multnomah County, in favor of the plaintiff against Aztec, and against the defendant herein (as Janet Espedal) in favor of Aztec in August of 1984.

The debtor's voluntary Chapter 7 case was filed in 1988.

The plaintiff timely filed his complaint seeking determination that the debt due him from Aztec is a nondischargeable obligation due him from the defendant because of her alleged breach of her fiduciary duties to him as a creditor of Aztec under the provisions of 11 U.S.C. § 523(a)(4).

Defendant urges that Aztec, not the plaintiff, is the real party-in-interest and that nondischargeability based upon breach of fiduciary duty of a corporate officer requires a pre-existing express trust from which assets are diverted.

The reported cases, however, support the proposition that a person who fraudulently diverts corporate assets to that person's own benefit may be held personally liable for a debt of the corporation as a nondischargeable obligation. See In re Decker, 36 B.R. 452 (D.C. N. Dakota 1988); In re Gottheiner, 3 B.R. 404 (Bankr. N.D. Cal. 1980); Lasagna Inc. v. Foster, 609 F.2d 392 (9th Cir. 1979), cert. denied 446 U.S. 919 (1980).

Defendant acknowledged use of corporate assets by herself and her husband for an out-of-state vacation at a time when they lacked personal funds to vacation. Upon sale of their stock and assets of Aztec to third parties, defendant and her husband kept all the proceeds for themselves and admittedly paid no others therefrom, although repaying to themselves alleged loans to Aztec. Cf. Pepper v. Litton, 308 U.S. 295 (1939); Lasagna, Inc. v. Foster, supra.

The court finds the testimony of the defendant less than fully candid and often evasive. The plaintiff was less than faithful to his nominal title as president of the corporation, but the defendant and her ex-husband managed the business generally excluding the plaintiff from its operation and challenging his interest in it.

This court relies on the state court judgment only for the amount of the debt due the plaintiff. See In re Decker, supra.

This court finds on the basis of the record and evidence, giving only limited weight to the state court findings, that the conduct of the defendant constituted breach of her fiduciary duty to the plaintiff as a creditor of the corporation, assets of which she participated in diverting to her own benefit contrary to 11 U.S.C. § 523(a)(4).

Separate judgment shall therefore be entered that the obligation determined due the plaintiff from Aztec Properties, Inc. in the judgment entered in the circuit court of the State of Oregon for Multnomah County in Civil Case No. A 8003-01436, that court, is determined to be a nondischargeable obligation due the plaintiff herein against the defendant in these proceedings.

Each party in these nondischargeability proceedings shall bear his or her own costs and attorney fees.

This Memorandum Opinion contains the court's Findings of Fact and Conclusions of Law and pursuant to Bankruptcy Rule 7052 they will not be separately stated.

DATED this ______ day of February, 1990.

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C. E. LUCKEY
Bankruptcy Judge