UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
KEVIN P. McCARTHY and	)	CASE NO. 05-39385 HCD
POLLY A. McCARTHY,	)	CHAPTER 7
	)	
DEBTORS.	)	
	)	
	)	
KRAMER CONSULTING, INC.,	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 06-3010
	)	
KEVIN P. McCARTHY,	)	
DEFENDANT.	)	
_____		
KEVIN P. McCARTHY,	)	
COUNTER-CLAIMANT,	)	
	)	
vs.	)	
	)	
KRAMER CONSULTING, INC.,	)	
COUNTER-DEFENDANT.	)	

Appearances:

Theodore R. Saker, Jr., Esq., attorney for plaintiff, Saker Law Offices, 1374 King Avenue, Columbus, Ohio 43212; and

R. William Jonas, Jr., Esq., attorney for defendant, Hammerschmidt, Amaral & Jonas, 137 North Michigan Street, South Bend, Indiana 46601.

MEMORANDUM OF DECISION

At South Bend, Indiana, on September 26, 2007.

Before the court is the Plaintiff's Motion for Partial Summary Judgment, filed on January 31, 2007, by the plaintiff Kramer Consulting, Inc. It is the plaintiff's second Motion for Partial Summary Judgment. After several extensions of time, the defendant Kevin P. McCarthy filed Defendant's Response in Opposition to Plaintiff's Second Motion for Partial Summary Judgment. For the reasons that follow, the court denies the Plaintiff's Motion.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(I) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

On September 28, 2006, this court issued its Memorandum of Decision and Judgment denying the Plaintiff's Motion for Partial Summary Judgment, filed by the plaintiff Kramer Consulting, Inc., against the defendant Kevin P. McCarthy. *See* R. 22, 23. The court first denied the defendant's counterclaim, which charged that the plaintiff willfully violated the automatic stay; it determined that there had been no violation of the automatic stay. With respect to Count I of the Complaint, the court found that the plaintiff was not a secured creditor with liens on the stock at issue, and it denied summary judgment on Count I. Concerning Count II, the breach of fiduciary duty claim under 11 U.S.C. § 523(a)(4), the court found that the plaintiff did not show that the Ohio District Court jury verdict concerning defalcation under Ohio law was rendered using the same elements of proof necessary to prove nondischargeability under § 523(a)(4). The court therefore denied summary judgment on Count II, as well.

The plaintiff now has filed a second Motion for Partial Summary Judgment, seeking summary judgment again on Count II of the complaint. *See* R. 34. It attached, as an Appendix, the transcript of the trial conducted in the United States District Court for the Southern District of Ohio, Eastern Division; the transcript

of the defendant's deposition conducted during the course of the litigation; and the trial exhibits submitted to the jury. *See* R. 35-44. The Motion began with 19 pages of material facts, with references to the transcript. It then stated that "the jury found [the defendant] to have breached the duties contained in Ohio Revised Code § 1701.59." R. 34 at 21. The plaintiff recognized that, "[i]n order to prevail, the definition of fiduciary duty as contained in the Ohio Revised Code § 1701.59 upon which the jury based its verdict against Defendant should be compared with the definitions of the aforementioned terms contained in 11 U.S.C. § 523(a)(4)." *Id.* at 26. After reviewing *In re Frain*, 230 F.3d 1014 (7th Cir. 2000), *Bank Calumet v. Whiters (In re Whiters)*, 337 B.R. 326 (Bankr. N.D. Ind. 2006), and two cases from the Second Circuit, the plaintiff presented the facts in its case to demonstrate that this court should find that summary judgment was warranted and that the claim under § 523(a)(4) was nondischargeable.

The defendant, in response, argued that there were genuine issues which precluded the entry of summary judgment. He asserted that there was an issue whether McCarthy's status as a fiduciary to the plaintiff in the Ohio litigation automatically rendered him a fiduciary for purposes of § 523(a)(4). He also claimed that the following related questions were genuine issues for trial: whether the Ohio litigation decided the same issues of fact and law as the ones at issue in this bankruptcy adversary proceeding; whether the jury's finding of fiduciary status under Ohio law required the preclusion of that issue in this adversary proceeding; and whether there were other issues of fact related specifically to the issue of fiduciary status in the nondischargeability action.

Discussion

This court renders summary judgment only if the record shows that "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056; *see Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. *See*

Celotex, 477 U.S. at 323. If the moving party satisfies its initial burden, then the nonmoving party must "go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). The court neither weighs the evidence nor assesses the credibility of witnesses. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

The plaintiff insists that the court should grant summary judgment to it on Count II of its Complaint and hold that its claim under 11 U.S.C. § 523(a)(4) is nondischargeable. It made the same argument in its first Motion for Partial Summary Judgment. In the first Motion, the plaintiff reported that the Ohio jury had rendered the verdict that the defendant Kevin McCarthy had "defalcated on his fiduciary duties to Plaintiff [Kramer Consulting]." *See* R. 22 at 19 (quoting plaintiff's brief, R. 20 at 6-7). The plaintiff then asked this court to find that the Ohio jury's verdict collaterally estopped or precluded further litigation of the same issues and facts in this dischargeability proceeding. Now, in the second Motion, the plaintiff seeks summary judgment of the same claim under Count II, but without the collateral estoppel argument. This time it presents the transcript of the Ohio district court proceeding and asks this court to review it and to render summary judgment.

In the first Motion, this court denied summary judgment on the ground that the plaintiff failed to show that the factual and legal bases presented in the Ohio district court trial were the same as those involved in this dischargeability proceeding. In order to grant summary judgment on Count II, this court said in its Memorandum of Decision denying its first Motion, "[t]his court must find . . . that the verdict in the [Ohio] fiduciary breach case was based upon the same facts necessary to except a debt from discharge 'for defalcation while acting in a fiduciary capacity' under § 523(a)(4)." R. 22 at 17-18. Even though the plaintiff acknowledged that, in order to prevail, it must compare the definition of "fiduciary duty" in O.R.C. § 1701.59 with its use as a term in 11 U.S.C. § 523(a)(4), *see* R. 34 at 26, the plaintiff never made such a comparison.

In *Ronk v. Maresh (In re Maresh)*, 277 B.R. 339 (Bankr. N.D. Ohio 2001), the Ohio bankruptcy court compared the Ohio statute O.R.C. § 1701.59(B) (upon which the plaintiff relies, *see* R. 34 at 21-22) with 11 U.S.C. § 523(a)(4). It first pointed out the well-established rule:

> [T]he precise scope of the defalcation exception to discharge under § 523(a)(4) is solely a question of federal law; . . . the label attached to the relationship by state law has no bearing on the nondischargeability of such debt. This rule, however, is subject to this caveat: the application of § 523(a)(4) may, and still frequently depends upon whether those obligations attendant to a fiduciary relationship are present under state law.

Id. at 348 (citations omitted). That court noted that the state statute "simply codifies Ohio's business judgment rule," *id.* at 349, and pointed out the differences between the state statute and the federal one, § 523(a)(4).

> In more specific terms, O.R.C. § 1701.59(B) does not define a trust res, nor does the statute spell out any of the trustee's fiduciary duties. These characteristics, however, . . . are necessary facets of a technical trust. In fact, it is clear that a total of three requirements must be met – none of which are present in this case – in order to establish the existence of a technical trust for purposes of § 523(a)(4): (1) the statute must specifically define the trust res; (2) the statute must spell out the trustee's fiduciary duties; and (3) the statute must impose a trust prior to and without reference to the wrong which created the debt. . . .
>
> Therefore, given that O.R.C. § 1701.59(B) does not create any specific trust res, the Court must . . . find that the Plaintiff will not, as a matter of law, be able to sustain her burden under the defalcation exception to discharge contained in § 523(a)(4).

Id. at 349-50.

This court finds that the plaintiff has failed to establish that the fiduciary duties under § 523(a)(4) are identical to the fiduciary duties under O.R.C. § 1701.59. It further finds that the plaintiff has not established that the jury's finding of defalcation and/or breach of fiduciary duty in the Ohio litigation was based on facts necessary to support a finding under the defalcation exception to discharge, § 523(a)(4). The court therefore determines that the plaintiff has failed to prove that there are no genuine issues as to any material fact and that the plaintiff is entitled to judgment as a matter of law.

Conclusion

For the reasons stated above, the court denies the Motion for Partial Summary Judgment filed by the plaintiff Kramer Consulting, Inc., against the defendant Kevin P. McCarthy. Further proceedings with respect to the plaintiff's Complaint will be set by separate order.

SO ORDERED.

/s/ Harry C. Dees, Jr.
HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT