

# Not Intended for Publication or Citation

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
FORT WAYNE DIVISION

IN RE: CASE NO. 08-13568	)	
	)	
RODNEY RAYMOND ABBOTT	)	
	)	
Debtor	)	
	)	
	)	
THOMAS A. BUNNER	)	
THOMAS A. BUNNER, D.D.S.	)	
	)	
Plaintiffs	)	
	)	
vs.	)	PROC. NO. 09-1039
	)	
RODNEY RAYMOND ABBOTT	)	
	)	
Defendant	)	

## DECISION

At Fort Wayne, Indiana, on January 13, 2010.

During their marriage, the debtor/defendant's now former wife embezzled money from her employer, the plaintiff in this case. By this adversary proceeding, the plaintiff seeks to hold the debtor liable for his former wife's actions, contending that, under non-bankruptcy law, he also committed or aided and abetted the commission of theft, criminal conversion, or fraud, and so is liable for enhanced damages and attorney fees under I.C. 34-24-3-1. The court is also asked to declare that this debt is non-dischargeable, pursuant to 11 U.S.C. §§ 523(a)(4) and/or (a)(6) as the result of embezzlement, larceny or a willful and malicious injury.

The matter is before the court on defendant's motion for summary judgment and plaintiff's

opposition thereto.<sup>1</sup> Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c) (made applicable in adversary proceedings by Fed. R. Bankr. P. Rule 7056). Thus, summary judgment is essentially an inquiry as to “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2512 (1986).

Rule 56 requires the moving party to inform the court of the basis of the motion and to identify “those portions of the ‘pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2553 (1986). Once

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<sup>1</sup>The court notes that neither party has complied with N.D. Ind. L.B.R. B-7056-1. This rule requires the movant to file a statement of material facts, identifying the facts as to which it contends there is no genuine issue and to support those facts with appropriate citations to admissible evidence. The party opposing the motion is then required to file a statement of genuine issues, identifying the material facts as to which it contends there is a factual dispute and to support its contentions with appropriate citations to admissible evidence. Ordinarily, this means that the court would not proceed any further in its evaluation of the motion. See, Waldridge v. American Hoechst Corp., 24 F.3d 918, 923 (7th Cir. 1994) (Such statements are “roadmaps, and without them the court should not have to proceed further. . .”). Here, however, the issue seems to be straight-forward enough. The essence of the motion is that the defendant is not able to produce any admissible evidence to prove its claim that the debtor is liable for his former wife’s misconduct. As such it calls for a relatively simple application of Celotex Corp. v. Catrett, 477 U.S. 317, 322 106 S.Ct. 2548, 2553 (1986) (“the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof.”). As a result, the court need only ask whether the plaintiff has come forward with sufficient evidence to prove that the debtor/defendant is, for some reason, liable for his ex-wife’s actions. If so, the motion should be denied. If not, it should be granted.

it has done so, the non-moving party must do more than merely raise some metaphysical doubt as to the material facts. Instead, it must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact requiring trial. Mataushita Electronic Industries Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 106 S.Ct 1348, 1356 (1986). See also, Holland v. Jefferson Nat. Life Ins. Co., 883 F.2d 1307, 1312 (7th Cir. 1989). It may oppose the motion with any of the evidentiary materials listed in Rule 56(c), but reliance on the pleadings alone is not sufficient to withstand summary judgment. Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir. 1983). In ruling on the motion, the court accepts as true the non-moving party's evidence, draws all legitimate inferences in favor of the non-moving party, and does not weigh the evidence or credibility of witnesses. Anderson, 106 S.Ct. at 2511.

When it comes to dischargeability, the plaintiff bears the burden of proving, by a preponderance of the evidence, that its debt should be excepted from the debtor's discharge, see, Grogan v. Garner, 498 U.S. 279, 111 S. Ct. 654 (1991), and those exceptions, see, 11 U.S.C. § 523(a), are narrowly construed in favor of the debtor. Matter of Scarlata, 979 F.2d 521, 524 (7th Cir. 1992). Yet, the provisions of § 523(a) do not make a debtor liable to a creditor. They merely determine whether an existing liability is a dischargeable one. That liability – the debt – is determined by non-bankruptcy law. Thus, the first step in determining whether or not a particular debt is dischargeable is to make certain that there is, indeed, a debt owing by the debtor to the creditor. Without such an obligation, there is no debt which could be excepted from the scope of the debtor's discharge. In re Sieger, 200 B.R. 636, 639 (Bankr. N.D. Ind. 1996); In re Wilder, 178 B.R. 174, 176-77 (Bankr. E.D. Mo. 1995). Cf., Matter of Hallahan, 936 F.2d 1496, 1508 (7th Cir. 1991) (“we think it preferable to allow bankruptcy courts ruling on the dischargeability of a debt to

adjudicate the issues of liability and damages also.”). That is also an issue as to which the plaintiff bears the burden of proof. In re Nored, 302 B.R. 833, 840 (Bankr. N.D. Miss. 2003). Thus, in one sense, plaintiff’s burden of proof is two-fold. It must demonstrate that, as a matter of non-bankruptcy law, the debtor owes it money and, if so, it must then prove that, as a matter of bankruptcy law, the debt is a non-dischargeable one.

Defendant’s motion for summary judgment is primarily focused on the first of these inquiries. In essence, it asks why he should be held liable for his former wife’s embezzlement and challenges the plaintiff to come forward with admissible evidence, not just allegations, that, if believed, would be sufficient to make that demonstration. Unless it is able to do so, the motion should be granted.<sup>2</sup> Celotex Corp., 477 U.S. at 322, 106 S.Ct. at 252.

There is no dispute that, through the misuse of credit cards and the theft of cash receipts, the debtor’s former wife (Cindy Abbott) embezzled money (the plaintiff says over \$247,000) while in the plaintiff’s employ. The question presented by the motion is why the debtor should be held liable for her actions. Since husbands and wives are liable only for their own debts, not those of their spouse, Bartrom v. Adjustment Bureau, Inc. 618 N.E.2d 1 (Ind. 1993), neither the marriage nor the fact that the misconduct took place during the marriage is sufficient to make the debtor liable for his former wife’s actions. Plaintiff contends, however, that the debtor knew what his (then) wife was

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<sup>2</sup>In addition to challenging the plaintiff’s ability to come forward with evidence demonstrating that the debtor is somehow jointly responsible for the embezzlement, the debtor has supported the motion with affidavits, from himself, his sons and his former wife, that state he did not participate in and had no knowledge of his former wife’s misconduct. Since, the nature of the facts in those affidavits is to offer evidence that would controvert what the plaintiff must prove in order to prevail, the debtor was not required to produce such evidence in order to move for summary judgment. See, Anderson, 477 U.S. 242, 106 U.S. 2505; Matter of Conolidated Industries, Corp., 330 B.R. 712, 716 (Bankr. N.D. Ind. 2005).

doing and that he benefitted from her misdeeds. As a result it argues that he too is guilty of criminal conversion (I.C. 35-43-4-3), theft (I.C. 35-43-4-2), or some kind of fraud (I.C. 35-43-5-1 et seq.) or at least of aiding and abetting those offenses (I.C. 35-41-2-4), which amounts to the same thing, and as such is liable for treble damages and attorney fees under I.C. 34-24-3-1.

All of the offenses the plaintiff charges the defendant with require proof that he acted “knowingly and intentionally”<sup>3</sup> I.C. 35-43-4-3, I.C. 35-43-4-2(a), (b), I.C. 35-41-2-4 or with “intent to defraud” e.g., I.C. 35-43-5-4(a). As proof of this level of knowledge and intent, the plaintiff offers the affidavit of counsel’s litigation specialist, Donna Poston. Ms. Poston states that she reviewed the bank records, from June 2004 through December 2008, for the joint account the Abbotts maintained. This review:

discovered numerous deposits made . . . by way of Automated Teller Machine deposits that were not readily attributable to wages from employment;

discovered numerous purchases, payments, and expenditures, that were made with funds deposited into the Abbott’s bank accounts through Automated Teller Machine Deposits;

revealed deposits so numerous and so large in amount that were not readily attributable to the Abbott’s work income that it would be unreasonable to believe Debtor/Defendant as the named account holder was not aware of said deposits;

revealed deposits not readily attributable to earned wages in amounts that enhanced the Abbott’s ability to pay expenses and debts;

revealed transfers made to Ray Abbott, son of the Debtor/Defendant and Cindy Abbott;

revealed purchases made in locales in the United States that are remote in location from Debtor/Defendant’s home;

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<sup>3</sup>“Intentionally” requires one to engage in conduct with the “conscious objective to do so.” “Knowingly” requires one to engage in conduct “aware of a high probability that he is doing so.” I.C. 35-41-2-2(a), (b).

revealed numerous and repeated overdrafts of the bank accounts. Poston Affidavit ¶¶ 6-9, 12-14.

The only specific information concerning any of the account's activities involved a deposit of \$6,110.10 in January 2005 and one for \$10,368.12 in February 2005, both made via an ATM, which are "not readily attributable to the earned wage income" of either Abbott. Poston Affidavit ¶¶ 10 & 11.

The court is willing to infer from Ms. Poston's affidavit that at least some of the embezzled funds were deposited into the Abbott's joint account. Yet, the plaintiff wants the court to go beyond this inference and also deduce that the debtor was aware of his former wife's misconduct and knowingly benefitted from it. That is not something the court can do given the facts that have been presented to it. Cf., American Intern. Adjustment Co. v. Galvin, 86 F.3d 1455, 1464 (7th Cir. 1996) ("an expert's opinion based on 'unsupported assumptions' and 'theoretical speculations' is no bar to summary judgment."); Mid-State Fertilizer Co. v. Exchange Nat'l Bank of Chicago, 877 F.2d 1333, 1339 (7th Cir.1989) ("An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process."). This is especially so since the debtor's affidavit states that he was not aware of his wife's illegal activity until he was contacted by the police, and his wife was the one responsible for the family's finances and paying the household's various bills and expenses. Affidavit of Rodney Abbott, ¶¶ 15-17. See also, Affidavit of Cindy Abbott, ¶¶ 7-9 (concerning debtor's lack of involvement or knowledge of her activities). While the plaintiff argues that the court should not believe the defendant, it has not come forward with any "specific facts" that controvert the statements in his affidavit. Instead, the plaintiff wants the court to disbelieve those statements and to (improperly) make a credibility determination in the context of summary judgment. See,

Anderson, 477 U.S. at 256-57, 106 S.Ct. at 2514. Moreover, we are to do so with regard to facts that controvert what the plaintiff will have to prove in order to prevail – that the debtor acted knowingly and intentionally, and/or with a particular intent – not facts the debtor would have to affirmatively prove. At best, the argument creates only “metaphysical doubt” as to the material facts, not the genuine issue needed to withstand summary judgment.

Plaintiff has not identified any decisions from Indiana’s courts that can stand for the proposition it apparently wants this court to embrace: if tainted funds are deposited into a joint account by one account holder, that is sufficient, without more, to charge the other account holder with knowledge of their improper origin and with liability for their disposition (to say nothing of any requirement for acting knowingly and intentionally). The closest it has come to doing so is Yoder v. Cromwell State Bank, 478 N.E.2d 131(Ind. Ct. App. 1985). There the bank was allowed to recover overdrafts from one account holder that were created when checks deposited by the other account holder did not clear. Yet, the reason the bank was able to do so was not because of any knowledge or intent on the part of the innocent account holder, but because a statute (I.C. 26-1-4-212(1)) made the bank’s customer liable for such charge backs. Id. at 136. This plaintiff has no similar statute to assist it.

Although Indiana’s courts do not seem to have been presented with the issues raised in this case – the liability of one spouse as a result of the other spouse’s financial misconduct – a number of bankruptcy courts have. See e.g., In re Tilley, 286 B.R. 782 (Bankr. D. Colo. 2002); In re Magpusao, 265 B.R. 492 (Bankr. M.D. Fla. 2001); In re Crider, 171 B.R. 909 (Bankr. N.D. Ga. 1994). Such decisions recognize that a wrongful intent or knowledge will not be attributed from one spouse to the other. Crider, 171 B.R. at 912; Magpusao, 265 B.R. at 498. But, if the debtor knows

their spouse is embezzling funds and then participates in their improper disposition, the debtor may be held liable for conversion. To do so, however, the “plaintiff must establish the defendant’s knowledge of the embezzlement, not simply his receipt of the embezzled funds . . . .” Tilley, 286 B.R. at 790. It must prove that the debtor/defendant “knew he was receiving embezzled funds.” Tilley, 286 B.R. at 791. Thus, it is the combination of knowledge and participation or knowing enjoyment that leads to liability. Magpusao, 265 B.R. at 498.<sup>4</sup>

The plaintiff has failed to come forward with any evidence creating an issue of fact that the debtor knew his wife was embezzling funds from the plaintiff, that he participated in those actions or that he knowingly received any benefits from them. All the plaintiff has shown is that some of the proceeds of her misconduct were deposited into the Abbott’s joint account and may have been spent on unidentified family expenses. That is not enough to make the debtor liable or to create a non-dischargeable debt. The motion for summary judgment will be granted, accord, Tilley, 286 B.R. at 782, and this action will be dismissed.

/s/ Robert E. Grant  
Chief Judge, United States Bankruptcy Court

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<sup>4</sup>Even where there is a combination of knowledge and participation – such as where the debtor accepts items he knows were illegally acquired – liability seems to be limited to the extent of those particular items. Magpusao, 265 B.R. at 501.