

Not Intended for Publication or Citation

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN RE: CASE NO. 09-15342)	
)	
ANNMARIE MILLER)	
)	
Debtor)	
)	
)	
TIMOTHY E. DEXTER)	
)	
Plaintiff)	
)	
vs.)	PROC. NO. 10-1029
)	
ANNMARIE MILLER)	
)	
Defendant)	

DECISION

At Fort Wayne, Indiana, on February 4, 2011.

This matter is before the court following trial of the issues raised in this adversary proceeding which seeks a declaration that the debtor/defendant's obligation to the plaintiff is non-dischargeable, pursuant to § 523(a)(4) of the United States Bankruptcy Code, as a debt for embezzlement or larceny. See, 11 U.S.C. § 523(a)(4). That debt is in the sum of \$31,213.00, and is represented by a judgment from the DeKalb Circuit Court. The judgment was entered after the debtor failed to deliver property to the plaintiff which the court had awarded him in the parties' divorce. The Circuit Court found that the debtor had "knowingly failed" to turn that property over to the plaintiff; in doing so "she knowingly exerted unauthorized control over his property" entitling him to treble damages and attorney fees "pursuant to Indiana Code 34-24-3-1." See, Plaintiff's Exhibit 4, Order Granting Motion to Enforce ¶ 13. The court's factual finding and the predicate for the award of treble

damages and attorney fees was that the debtor committed the crime of conversion, a Class A misdemeanor, which occurs when “a person . . . knowingly or intentionally exerts unauthorized control over property of another” I.C. 35-43-4-3.

If the debtor’s case was pending under Chapter 7, this court’s decision would be quite easy and it would not need to consider the question of embezzlement or larceny under § 523(a)(4). As determined by the DeKalb Circuit Court, the debtor’s obligation to her former husband fits quite comfortably into the exceptions to discharge found at § 523(a)(6), willful and malicious injury to property, and § 523(a)(15), debts, other than support, owed to a former spouse incurred in the course of a divorce. The debtor has, however, filed for relief under Chapter 13 of the United States Bankruptcy Code and so, should she successfully perform a Chapter 13 plan, debts for willful and malicious injury and non-support domestic relations obligations will be discharged. See, 11 U.S.C. § 1328(a)(2). As a result, the only basis for excepting the debtor’s obligation to the plaintiff from discharge is § 523(a)(4) – embezzlement or larceny.

The only evidence with regard to the debtor’s actions consists of the state court’s order granting the plaintiff’s motion to enforce (Exhibit 4) and its finding that the debtor committed the crime of conversion. Although the debtor attempts to deny it and would like to controvert that finding, the state court’s decision collaterally estops her from doing so. See, Grogan v. Garner, 498 U.S. at 284 n. 11, 111 S. Ct. 654 (1991). See also, In re Busick, 264 B.R. 518, 522 (Bankr. N.D. Ind. 2001). That decision satisfies all of the elements necessary to give preclusive effect to the state court’s finding. In re Staggs, 178 B.R. 767, 773-74 (Bankr. N.D. Ind. 1994) (discussing the elements of collateral estoppel). As a result, the proper question before this court is not what the debtor did, but rather whether what the state court found she did satisfies the requirements of embezzlement or

larceny under § 523(a)(4).

While the debtor's obligation to the plaintiff is determined by state law, whether or not that obligation is dischargeable is a matter of federal law. Grogan, 498 U.S. 279, 111 S.Ct at 657-58. So, the court must determine whether the state court's finding of criminal conversion under the Indiana Code contains the necessary factual elements for a finding of embezzlement or larceny under the Bankruptcy Code. Embezzlement and larceny under § 523(a)(4) are similar, differing only in how the debtor came by the property in question. If the original possession of the property was lawful, we are dealing with embezzlement. If, however, the original possession was wrongful, we are dealing with larceny. Matter of Brown, 399 B.R. 44, 47-48 (Bankr. N.D. Ind. 2008). In each instance, however, the plaintiff is required to prove fraudulent intent on the part of the debtor. See, Matter of Rose, 934 F.2d, 901, 903 (7th Cir. 1991) ("larceny is proven for § 523(a)(4) purposes if the debtor has wrongfully and with fraudulent intent taken property from its owner"); Matter of Weber, 892 F.2d 534, 538 (7th Cir. 1989) ("to prove embezzlement, the creditor must show . . . that (1) the debtor appropriated funds for his or her own benefit; and (2) the debtor did so with fraudulent intent or deceit.").

Decisions in both the Northern and Southern District of Indiana have considered the very question now before this court: Does criminal conversion under I.C. 35-43-4-3 constitute embezzlement or larceny under § 523(a)(4)? See, In re Luedtke, 429 B.R. 241, 256-57 (Bankr. N.D. Ind. 2010); In re Grigoletti, 2010 WL 5055927 (Bankr. S.D. Ind. 2010). Both Judge Klingeberger and Judge Metz have determined that criminal conversion under I.C. 35-43-4-3 lacks the intent which is necessary to a finding of larceny or embezzlement. Other bankruptcy decisions that have considered the issue have reached the same conclusion. See e.g., In re Foral, 2009 WL 916859 *3

(Bankr. D. Neb. 2009) (conversion is not embezzlement); In re Labidou 2009 WL 2913483 *4-5 (Bankr. S.D. Fla. 2009) (conversion is not larceny); In re Reynolds, 2006 WL 6592050 *3 (Bankr. N.D. Ga. 2006) (conversion is not larceny). See also, In re Wilson, 114 B.R. 249, 252 (Bankr. E.D. Cal. 1990). Instead of § 523(a)(4), § 523(a)(6) – willful and malicious injury – is seen as the appropriate vehicle for excepting debts arising out of conversion from the scope of a debtor’s discharge. See, Matter of Burdick, 65 B.R. 105, 107 (Bankr. N.D. Ind. 1986); Matter of Donny, 19 B.R. 354, 357 (Bankr. W.D. Wis. 1982).

The court agrees with these distinctions, especially in light of the proposition that exceptions to discharge are to be narrowly construed in favor of the debtor. Matter of Scarlata, 979 F.2d 521, 524 (7th Cir. 1992). The difference between conversion and theft under Indiana law is one of intent. Compare I.C. 35-43-4-2(a) (theft), with I.C. 35-43-4-3 (conversion). They both require the same knowing or intentional exercise of unauthorized control over another’s property, but conversion has no requirement that the defendant act with any intent; whereas theft requires an intent. The dischargeability exceptions of § 523(a)(4) and § 523(a)(6) make similar distinctions. Although the plaintiff argues that we can infer intent from the debtor’s actions, that is not an inference which the state court drew or a finding that it made. Had it done so it would have found the debtor guilty of theft not conversion. Since the state court made no findings with regard to the debtor’s intent, this court cannot use that decision to draw inferences or to reach conclusions the state court did not itself make.

The debtor’s obligation to the plaintiff would be dischargeable under either § 523(a)(6) or § 523(a)(15) if those exceptions applied in this case. They do not and the evidence does not support a finding of intent necessary to conclude that the debtor is guilty of either larceny or embezzlement,

under § 523(a)(4). Consequently, her obligation to the plaintiff is dischargeable should the debtor receive a discharge under § 1328(a). Judgment will be entered accordingly.

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