

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
ROBERT J. WESOLOWSKI and	)	CASE NO. 13-32025 HCD
BEVERLY J. WESOLOWSKI,	)	CHAPTER 7
	)	
DEBTORS.	)	
	)	
TARGET DISTRIBUTING,	)	
	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 13-3047
	)	
ROBERT J. WESOLOWSKI and	)	
BEVERLY J. WESOLOWSKI,	)	
	)	
DEFENDANTS.	)	

Appearances:

R. William Jonas, Jr., Esq., counsel for plaintiff, Hammerschmidt, Amaral & Jonas, 137 North Michigan Street, South Bend, Indiana 46601; and

Robert J. Wesolowski and Beverly J. Wesolowski, *pro se*, 58188 Wayne Lane, South Bend, Indiana 46619.

MEMORANDUM OF DECISION

At South Bend, Indiana, on March 18, 2014.

Before the court is the Motion for Summary Judgment filed by Target Distributing, plaintiff, against the chapter 7 debtors Robert J. and Beverly J. Wesolowski, defendants. The Motion is based upon the plaintiff's Complaint to Determine Dischargeability of Debt, which sought that the defendants' debt to the plaintiff be declared nondischargeable under 11 U.S.C. § 523(a)(4) and (6) and that the damages amount be trebled under Indiana Code § 34-24-3-1. For the reasons that follow, the court grants the plaintiff's Motion for Summary Judgment in part and denies it in part.<sup>1</sup>

BACKGROUND

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<sup>1</sup> The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

According to the undisputed facts, Robert Wesolowski worked for Target Distributing for more than 40 years. He was fired in November 2012 after Target's owner discovered that he had embezzled more than \$500,000.00 between 2006 and 2012. Robert Wesolowski's wife Beverly became aware of her husband's misdeeds and accepted the benefits of his theft. When the theft was discovered, the plaintiff and the defendants executed an "Agreement to Make Restitution." In that Agreement, signed on January 18, 2013, Robert Wesolowski admitted that, during his employment as Office Manager, he "stole (embezzled)" at least \$553,669.00 from Target. Beverly Wesolowski admitted that she received benefits from the stolen money. In partial restitution, they turned over to Target checks in the amount of \$15,496.64 and \$12,217.76; cash in the amount of \$3,000.00; and a 2004 Ford Escape with an estimated value of \$2,500.00. They agreed to pay Target \$500.00 per month until the balance was paid in full. They also agreed:

- (a) that all tax refunds, gifts, inherited amounts, and raffle or lottery proceeds would be turned over;
- (b) that the debt would be excluded from any discharge the Wesolowskis might receive in bankruptcy proceedings pursuant to 11 U.S.C. § 523(a)(4) and § 1328(a)(2);
- (c) that the Agreement supported a judgment of nondischargeability of this obligation;
- (d) that the Agreement was binding on the Wesolowskis, their heirs, successors, assigns, estates, and personal representatives;
- (e) that, if Wesolowski failed to perform, Target would be entitled to specific performance; and
- (f) that, if Wesolowski breached the Agreement, Target would be entitled to recover costs and reasonable attorney fees incurred in the enforcement of any of its rights in the Agreement.

R. 1, Ex. A, at ¶¶ 3-11.

Robert Wesolowski filed a *pro se* Answer to the Complaint. In it, he admitted that he took money from Target. He stated that felony charges were pending against him in state court and that he would pay whatever amount he was adjudged to owe to Target. He added that he was receiving counseling for gambling and depression.

The plaintiff then moved for summary judgment against the defendants. It sought judgment against Robert Wesolowski in the amount of \$1,559,863.80 plus \$7,694.25 in reasonable attorney fees. It sought judgment against Beverly Wesolowski in the amount of \$519,954.60 plus \$7,694.25 in legal fees. The Motion was supported by a Statement of Material Facts, which set forth the defendants' admissions in the Agreement and the plaintiff's acknowledgment that the defendants had paid back \$33,714.40 and still owed Target \$519,954.60 plus attorney fees.

Also supporting the Motion for Summary Judgment was a Memorandum of Law. In it the plaintiff explained that it requested treble damages only against Robert, "although it could likely make a case for them" against Beverly. R. 9 at 1. It reiterated the defendants' admissions, noted that the defendants in the Agreement had acknowledged the debt to be nondischargeable, and argued that the defendants' debt for embezzlement of Target's funds was excepted from discharge under § 523(a)(4). It further claimed that attorney fees were properly charged to the defendants on two grounds. First, under the Agreement, the Wesolowskis agreed to be responsible for attorney fees if litigation was necessary to enforce the Agreement. Second, the plaintiff argued that attorney fees were incorporated in the treble fee damage statute, Indiana Code § 34-24-3-1.

Two affidavits were filed in support of the Motion for Summary Judgment. Attorney Joseph Amaral declared that he had represented Target, expending 26.91 hours of legal services at \$275.00 per hour, for a total fee of \$7,694.25.<sup>2</sup> The Affidavit of Norm DeBoever, principal of Target, affirmed that he signed the Agreement and received the defendants' restitution payments in the amount of \$33,714.40. He confirmed that the remaining balance was \$519,954.00 plus the attorney fees the plaintiff incurred.<sup>3</sup>

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<sup>2</sup> Exhibit 2, which was intended to itemize the affiant's reasonable and necessary services on behalf of the plaintiff, was referenced in the Affidavit but was not appended to it.

<sup>3</sup> The court accepts the balance declared by Target's principal, \$519,954.00, as the amount of actual damages claimed by the plaintiff.

Robert and Beverly Wesolowski filed a voluntary chapter 7 bankruptcy case on July 10, 2013. At the § 341 meeting, the debtors stated that they were not seeking a discharge of the Target obligation. After the Chapter 7 Trustee filed his Report of No Distribution, the Order of Discharge was entered for each debtor, and the case was closed thereafter. In this adversary proceeding, the plaintiff seeks to enforce the Agreement and to assert a claim for treble damages against Robert Wesolowski.

### DISCUSSION

Under Rule 56(c) of the Federal Rules of Civil Procedure, made applicable in this court by Rule 7056 of the Federal Rules of Bankruptcy Procedure, 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); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). In order to avoid trial, the moving party bears the burden of showing that no genuine issue of material fact is in dispute. See *Anderson*, 477 U.S. at 256; *Celotex*, 477 U.S. at 322. “To avoid summary judgment . . . the nonmoving party [is] required to set forth ‘specific facts showing that there is a genuine issue for trial,’ Fed. R. Civ. P. 56(e), and, further [has] to produce more than a scintilla of evidence in support of his position.” *Silk v. City of Chicago*, 194 F.3d 788, 798 (7th Cir. 1999). In order to demonstrate that a real factual dispute exists, the nonmovant must produce evidence of the dispute rather than relying solely on the allegations or denials in its pleadings. See *Barber v. United States (In re Barber)*, 236 B.R. 655, 659 (Bankr. N.D. Ind. 1998); N.D. Ind. L.B.R. B-7056-1. Summary judgment must be granted “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 at trial.” *Celotex*, 477 U.S. at 322.

In this case, the defendants filed an Answer agreeing with the facts set forth in the Agreement between the plaintiff and defendants. They admitted that Robert Wesolowski stole or embezzled Target's funds. The plaintiff's summary judgment claim of embezzlement is based upon § 523(a)(4), which excepts from a debtor's discharge any debt "for . . . embezzlement or larceny." 11 U.S.C. § 523(a)(4).

(1) Nondischargeability of the Debt

When challenging a debtor's right to discharge a debt, "[p]rinciples of bankruptcy jurisprudence dictate that exceptions to discharge are to be construed strictly against a creditor and liberally in favor of the debtor." *In re Pawlak*, 467 B.R. 462, 468 (Bankr. W.D. Wis. 2012) (citing *In re Chambers*, 348 F.3d 650, 654 (7th Cir. 2003); *In re Scarlata*, 979 F.2d 521, 524 (7th Cir. 1992)). In order to succeed under § 523(a)(4), the party objecting to the discharge of the debt bears the burden of proof by a preponderance of the evidence. *See Grogan v. Garner*, 498 U.S. 279, 291, 111 S. Ct. 654, 112 L.Ed.2d 755 (1991).

The Seventh Circuit Court of Appeals has defined embezzlement as the "fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." *In re Weber*, 892 F.2d 534, 538 (7th Cir. 1989) (quoting *Moore v. United States*, 160 U.S. 268, 269, 16 S. Ct. 294, 295, 40 L.Ed. 422 (1895)). "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." *Id.*; *see also In re Wood*, 503 B.R. 705, 711 (Bankr. W.D. Wis. 2013). It must demonstrate, with respect to each defendant, the liability of each and the extent to which that liability is excepted from his and her discharge. *See In re Baker*, 2011 WL 4549156 at \*4 (Bankr. S.D. Ind. Sept. 28, 2011).

The uncontested facts in this adversary proceeding are actually quite scanty. The defendant Robert Wesolowski admitted that, during his 40 years of employment as an Office Manager for Target, he stole or embezzled approximately \$553,669.00 from Target. Beverly Wesolowski admitted receiving benefits from the stolen money. The Agreement for the most part focused on the requirements and methods of restitution. The court finds that neither the Agreement nor any document filed in this adversary

proceeding presented facts demonstrating Robert Wesolowski's appropriations of funds, his and his wife's benefit from them, and his intent to defraud the plaintiff. The plaintiff, relying on Robert Wesolowski's admission that he "stole (embezzled)," did not address or prove the criteria of § 523(a)(4).

Nevertheless, the court concludes that the Agreement, the plaintiff's Complaint, and the defendants' Answer, which did not deny the plaintiff's allegations, make clear that there is no genuine issue as to any material fact. Robert Wesolowski admitted that he stole or embezzled at least \$553,669.00 from Target between 2006 and 2012. He admitted that he had a gambling problem. His confession to the embezzlement of over half a million dollars from Target over so many years is sufficient proof that he appropriated funds with fraudulent intent for his own benefit. Therefore the court finds that the debt Robert Wesolowski owes to the plaintiff is excepted from his discharge under § 523(a)(4).

However, the court cannot find that Beverly Wesolowski's obligation is excepted from her discharge. The Complaint alleged that she became aware of her husband's misdeeds and accepted the benefits of the stolen money. The Agreement states that she "acknowledge[d] receiving benefits from the stolen money and recognize[d] her obligation to repay." R. 1, Ex. A at 1. From the sparse factual allegations presented herein, it is clear that only Robert Wesolowski appropriated the funds from Target. There is no allegation or description to suggest that Beverly Wesolowski appropriated funds or had any intent to defraud the plaintiff. Having shown only that Beverly Wesolowski benefitted from the funds, Target failed in its burden of proving that she was individually liable under § 523(a)(4). The court finds, therefore, that the debt Beverly Wesolowski owes to Target is eligible for discharge.

Having determined the nondischargeability of the debt under the embezzlement exception, § 523(a)(4), and having found that the plaintiff did not attempt to prove that the defendants violated § 523(a)(6), the court denies the plaintiff's undeveloped cursory claim of nondischargeability under (a)(6).

(2) Amount of the Debt

A bankruptcy judge is authorized to find a debt nondischargeable and to determine the dollar amount of the debt. *See Wallner v. Liebl (In re Liebl)*, 434 B.R. 529, 536 (Bankr. N.D. Ill. 2010) (citing *In re Hallahan*, 936 F.2d 1496, 1508 (7th Cir. 1991)). The Supreme Court has held that the bankruptcy court can determine the amount of a debt that is excepted from discharge under § 523(a)(2)(A), and can include treble damages, attorney fees, and costs pursuant to state law. *See Cohen v. de la Cruz*, 523 U.S. 213, 223, 118 S. Ct. 1212, 1219, 140 L.Ed.2d 341 (1998). Since *Cohen*, courts have found that a treble damages award may be nondischargeable under § 523(a)(4). *See Roussos v. Michaelides (In re Roussos)*, 251 B.R. 86, 94 (9th Cir. B.A.P. 2000); *In re Luedtke*, 429 B.R. 241, 252 n. 26 (Bankr. N.D. Ind. 2010).

In the Agreement, Robert Wesolowski admitted he embezzled \$553,669.00 from the plaintiff. Norm DeBoever, Target's principal, verified that he received restitution payments of \$33,714.40 and that the remaining balance was \$519,954.00. The court concludes that Target is entitled to nondischargeability judgment against Robert Wesolowski pursuant to § 523(a)(4) in the amount of \$519,054.00.

(3) Trebling of the Debt

The plaintiff seeks to treble the amount of the debt owed by Robert Wesolowski pursuant to Indiana Code § 34-24-3-1, Indiana's Crime Victims' Compensation Act ("CVCA").<sup>4</sup> It is a civil statute that allows a person or entity who has had a financial loss resulting from a violation of one of the listed criminal statutes to sue for actual and exemplary damages. The amount of those punitive damages is within the

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<sup>4</sup> Indiana Code § 34-24-3-1 provides, in pertinent part:

Damages in civil action. If a person . . . suffers a pecuniary loss as a result of a violation of IC 35-43, IC 35-42-3-3, IC 35-42-3-4, or IC 35-45-9, the person may bring a civil action against the person who caused the loss for the following:

- (1) An amount not to exceed three (3) times:
  - (A) the actual damages of the person suffering the loss . . . .
- (2) The costs of the action.
- (3) A reasonable attorney's fee. . . .

court's discretion. *See In re Robinson*, 2012 WL 4344608 at \*8 (Bankr. S.D. Ind. Sept. 21, 2012) (granting double, not triple, damages under § 34-24-3-1). It is also within its discretion to decline to impose exemplary damages. *See In re Baker*, 2011 WL 4549156 at \*7 (denying exemplary damages).

Under the CVCA, the plaintiff first must prove that the defendants' actions against the plaintiff violated one or more of the enumerated crimes listed in the statute. *See id.* at \*4, n.5 (stating that, to prevail, a plaintiff must prove the elements of a particular criminal statute). Once the plaintiff proves "by a preponderance of the evidence that the criminal act was committed by the defendant," it then can bring a civil action against the defendants who caused the monetary loss. *Ruse v. Bleeke*, 914 N.E.2d 1, 8 (Ind. App. 2009) (reviewing elements of alleged criminal theft by deception, Ind. Code § 35-43-4-3).

In this case, the plaintiff has not alleged that the defendants violated any of the Indiana Code provisions listed in § 34-24-3-1. In Indiana, the crime of "embezzlement" has been incorporated into the state's general theft statute, Indiana Code § 35-43-4-2. *See Harris v. State*, 659 N.E.2d 522, 528 (Ind. 1995). However, the plaintiff did not claim a violation of that statute. Nor did it use the language of the statute in order to demonstrate that the defendants' actions fell under its criteria. *See In re Baker*, 2011 WL 4549156 at \*4. The court was provided no factual description of the defendants' conduct. In sum, the plaintiff failed to demonstrate its right to recover under the CVCA by proving all the elements of an underlying criminal act. Having failed in its burden of proving a violation of a state statute included in Indiana Code § 34-24-3-1, the plaintiff provided no basis for recovery under § 34-24-3-1. For that reason, the plaintiff is not qualified to claim entitlement to exemplary damages under the CVCA.

The court also notes two factors that would lead the court to decline to award exemplary damages. First, it is clear from the scanty record before the court that the defendants sincerely intended to repay the plaintiff. Second, the plaintiff is a business, a sophisticated "victim" that apparently had insufficient safeguards and failed to discover the defendant's embezzlement for years. *See In re Baker*, 2011 WL 4549156 at \*8 (denying exemplary damages to an imprudent company, determining it should not be

rewarded with a windfall). The court limits the plaintiff's award to the actual pecuniary losses established by the plaintiff, \$519,954.00.

(4) Attorney fees

The plaintiff requests attorney fees pursuant to Indiana Code § 34-24-3-1 and the Agreement between the parties.

Typically, under the "American Rule" applied in federal litigation, the prevailing litigant is not entitled to collect an attorney's fee from his opponent unless authorized by a federal statute or a valid contract between the parties. This general rule applies to litigation in bankruptcy courts.

*In re Bauman*, 461 B.R. 34, 49-50 (Bankr. N.D. Ill. 2012) (citing cases) (denying fees under § 523(a)(4)).

The plaintiff's claim of attorney fees under the CVCA fails. Without the initial proof of a violation of an underlying criminal statute, the plaintiff is not entitled to exemplary damages or attorney fees. The court determines that attorney fees are not recoverable under the CVCA in this case.

However, the plaintiff also argues that attorney fees are recoverable under the Agreement between the plaintiff and defendants. The Wesolowskis agreed to be responsible for attorney fees if litigation was necessary to enforce the Agreement. They also agreed that their debt to Target "would be excluded from discharge in any bankruptcy proceedings pursuant to 11 U.S.C. § 523(a)(4)." At the § 341 meeting of creditors, the debtors again declared that the debt to Target was not dischargeable in their bankruptcy case. In the Answer, however, the defendant Robert Wesolowski, while professing his willingness to cooperate, disputed the amount of money at issue and stated that he would agree to pay whatever the judge in the state court criminal matter determined was due and owing. *See* R. 4. For those reasons, the court finds that litigation appears to have been necessary to clarify the amount of the obligation at issue. Accordingly, under the terms of the Agreement, the defendants agreed to pay the reasonable attorney fees of the plaintiff. *See* R. 1, Ex. A, ¶ 11.

The plaintiff has specified attorney fees in the amount of \$7,694.25. The court finds, however, that counsel for the plaintiff failed to submit its itemized time record and explanation of the services rendered

to the plaintiff in asserting its nondischargeability claim. It therefore directs the plaintiff to file its detailed itemization in the prosecution of this adversary proceeding within fourteen (14) days of the date of this Memorandum of Decision.

#### CONCLUSION

For the reasons set forth in this Memorandum of Decision, the Motion for Summary Judgment of the plaintiff Target Distributing against the defendants Robert J. and Beverly J. Wesolowski is granted in part and denied in part. Summary judgment is entered in favor of Target Distributing and against Robert J. Wesolowski pursuant to 11 U.S.C. § 523(a)(4). The relief sought in the Complaint to Determine Dischargeability of Debt is granted in the amount of \$519,954.00 as to Robert J. Wesolowski. Summary judgment pursuant to 11 U.S.C. § 523(a)(6) is denied. The plaintiff's treble damages request under Indiana Code § 34-24-3-1 is denied.

Summary judgment is denied against the defendant Beverly J. Wesolowski pursuant to 11 U.S.C. § 523(a)(4) and § 523(a)(6). The relief sought in the Complaint to Determine Dischargeability of Debt is denied as to Beverly J. Wesolowski.

The plaintiff's request for attorney fees will be determined by separate Order.

SO ORDERED.

/s/ HARRY C. DEES, JR.  
Harry C. Dees, Jr., Judge  
United States Bankruptcy Court