

**March 15, 2011**

**Blaine F. Bates**  
Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE TENTH CIRCUIT**

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IN RE AKTHAM SAWAGED,  
Debtor.

BAP No. CO-10-058

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MAJED IBDAIWI and MOSES  
SAWAGERD,  
Plaintiffs – Appellants,

Bankr. No. 08-10344  
Adv. No. 08-01304  
Chapter 7

v.

OPINION\*

AKTHAM SAWAGED,  
Defendant – Appellee.

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Appeal from the United States Bankruptcy Court  
for the District of Colorado

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Before MICHAEL, NUGENT, and THURMAN, Bankruptcy Judges.

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THURMAN, Bankruptcy Judge.

Although the Appellants requested oral argument, Appellee did not file a brief and, after examining the Appellants' brief and the appellate record, the Court determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012.<sup>1</sup>

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\* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

<sup>1</sup> See *Order Submitting Appeal Without Oral Argument*, Docket No. 30 (Feb. 15, 2011).

Majed Ibdaiwi and Moses Sawaged<sup>2</sup> (the “Appellants”) appeal the Bankruptcy Court’s dismissal of their complaint against Aktham Sawaged (the “Debtor”), alleging defalcation by him while acting in a fiduciary capacity, pursuant to 11 U.S.C. § 523(a)(4).<sup>3</sup> We affirm.

## I. BACKGROUND

The Appellants jointly operated a number of gasoline station/convenience stores in Colorado that they leased from Peerless Tyre Company (“Peerless”), which were operated under the name “U Pump It.” In January 2006, the Appellants orally agreed to allow their relatives, Debtor and his father, Shafiq Sawaged (“Shafiq”), to assume management of a U Pump It store in Loveland, Colorado (the “Store”). The oral agreement contemplated that the Debtor and Shafiq would be fully responsible for the Store’s operating expenses and would keep all profits from sales of gas and Store inventory. Pursuant to the oral agreement, the Debtor took possession of the Store in January.

In February 2006, the parties’ agreement was reduced to writing by Appellant Ibdaiwi. The Debtor signed the single-page agreement, but Shafiq did not. The written agreement requires the Store manager to pay utilities, telephone, and garbage bills, and to pay taxes to the city and state. The provision given the most significance by the Appellants provides, “3) [v]ery important that the second party [Debtor] responsible for depositing the gas income daily to Peerless Tyre Company account in a bank and the second party responsible to pay if any short occurs in the gas income.” The agreement further provides that the Appellants were responsible to pay the Debtor for running the Store “whatever income that

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<sup>2</sup> Mr. Moses Sawaged’s surname is listed as “Sawagerd” in official court records; however, as it is spelled “Sawaged” by his attorney, this Court will adopt that spelling throughout this Opinion.

<sup>3</sup> Unless otherwise specified, all further statutory references in this decision will be to the Bankruptcy Code, which is Title 11 of the United States Code.

results from gas and store commission.”

The Appellants, and thus the Debtor, were required to pay Peerless for gas sales, minus a variable commission. A statement was run each day that showed both the Store’s gasoline sales and the amount required to be deposited to the Peerless account pursuant to the terms of the Appellants’ lease.<sup>4</sup> The daily statements that the Debtor prepared while acting as manager of the Store were agreed to be accurate as to sales and money owed to Peerless. However, in April 2006, there were two occasions on which Peerless received statements but no deposits. The April shortages occurred on April 23, 2006, in the amount of \$4,236.41, and April 30, 2006, in the amount of \$4,886.48. In meetings with Peerless, the Appellants, and the Debtor, the Debtor “acted confused” about what had happened to the money and insisted that he had made the deposits. However, the Debtor did not have deposit slips to back up his assertions. While still protesting his responsibility for the April shortages, the Debtor subsequently agreed to pay the shortages by adding the sum of \$50 to future daily amounts owed to Peerless pursuant to the Store’s daily reports. Although the Debtor apparently made the \$50 daily payments for some period of time, the number of such payments is not clear from the record.

In July 2006, over a period of approximately two weeks, the Store accumulated another \$19,158.16 in shortages.<sup>5</sup> Again, the Debtor responded to Peerless’s inquiries by insisting that he had made all of the deposits. The

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<sup>4</sup> Although the lease between the Appellants and Peerless was not included in the appellate record, testimony at trial established that the lease precluded subleasing, and that the Appellants remained liable to Peerless for payment of the gasoline it provided to the Store.

<sup>5</sup> The July shortages, like the April shortages, were determined from the daily reports that were generated by the Debtor. The daily reports for the period from July 10 through July 23 indicated that payments owed to Peerless for the Store’s gasoline sales totaled \$90,750.05, but the deposits to Peerless’s account totaled only \$71,591.89, thus leaving the deposits “short” \$19,158.16.

Appellants terminated the Debtor's management of the Store, and paid Peerless the Store's total shortages, in the total amount of \$25,361.05.<sup>6</sup> The Appellants then filed suit against the Debtor and Shafiq in state court, alleging both theft and breach of contract. On July 25, 2007, the state court ruled against the Appellants on the theft claim, but granted them judgment against the Debtor only, for breach of contract.<sup>7</sup> The Debtor filed his petition for Chapter 7 relief on January 11, 2008. On April 8, 2008, the Appellants filed the present adversary proceeding against the Debtor, seeking to have the state court judgment declared to be non-dischargeable.

On June 28, 2010, the Bankruptcy Court issued a scheduling order, which set trial on the Appellants' complaint for August 6, 2010. On July 15, 2010, the Appellants moved that the trial date be vacated on the ground that Appellant Moses Sawaged would be unable to attend trial on the scheduled date because he would be out of the country until mid-September. The Appellants' motion to vacate, which was not opposed by the Debtor, was denied by the Bankruptcy Court on July 21, 2010. The matter was tried on August 6, 2010.

## II. APPELLATE JURISDICTION

This Court has jurisdiction to hear timely filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit unless one of the parties elects to have the district court hear the appeal.<sup>8</sup> In this case, the Appellants timely filed a notice of appeal from the bankruptcy court's

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<sup>6</sup> The Appellants actually paid Peerless the sum of \$23,561.42, a difference explained by them as resulting from some credits owed to them by Peerless. Nonetheless, the state court judgment that forms the basis for their claim in this proceeding is in the amount the Appellants actually paid.

<sup>7</sup> The Appellants appealed this judgment, but only as to the court's finding of no liability for Shafiq. The Debtor did not appeal.

<sup>8</sup> 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-3.

order dismissing their complaint, which is a final order for purposes of appeal.<sup>9</sup> Neither party has elected to have the district court hear this appeal, and this Court therefore has appellate jurisdiction.

### III. ISSUES AND STANDARD OF REVIEW

The issues raised by the Appellants are:

1. Whether the Bankruptcy Court erred in ruling that the Appellants failed to prove a defalcation by the Debtor while acting in a fiduciary capacity.

A bankruptcy court's determination of dischargeability of a debt is the resolution of a legal issue based on the facts presented. Thus, this issue raises mixed questions of law and fact.<sup>10</sup> We review the fact findings upon which the legal conclusion is based for clear error, and review the conclusion itself *de novo*.<sup>11</sup> Review of a trial court's factual findings under the clearly erroneous standard is "significantly deferential,"<sup>12</sup> and requires the appellate court to give due regard to the trial court's opportunity to judge witnesses' credibility.<sup>13</sup>

2. Whether the Bankruptcy Court properly denied the Appellants' motion to vacate the trial date.

A bankruptcy court's procedural rulings, such as whether or not to continue a trial date, are reviewed for abuse of discretion.<sup>14</sup> Under that standard, this Court will affirm unless it has "a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the

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<sup>9</sup> *Dimeff v. Good (In re Good)*, 281 B.R. 689, 694-95 (10th Cir. BAP 2002) (judgment dismissing § 523 complaint was final for purposes of appeal).

<sup>10</sup> *Melquiades v. Hill (In re Hill)*, 390 B.R. 407, 410 (10th Cir. BAP 2008).

<sup>11</sup> *Id.*

<sup>12</sup> *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 623 (1993).

<sup>13</sup> Fed. R. Bankr. P. 8013.

<sup>14</sup> *Reed v. Bennett*, 312 F.3d 1190, 1193 n.1 (10th Cir. 2002) (denial of motion to continue trial).

circumstances.”<sup>15</sup>

#### IV. DISCUSSION

##### A. Dischargeability Under § 523(a)(4)

Section 523 provides exceptions to the general rule that all unsecured debts are discharged in bankruptcy. The specific provision upon which the Appellants rely, § 523(a)(4), provides that a Chapter 7 discharge does not discharge an individual from a debt for his “defalcation while acting in a fiduciary capacity.” We note at the outset that exceptions to discharge, including this one, “are to be narrowly construed, and because of the fresh start objectives of bankruptcy, doubt is to be resolved in the debtor’s favor.”<sup>16</sup> Moreover, the party seeking to have a debt declared non-dischargeable bears the burden of proving each element of the discharge exception by a preponderance of the evidence.<sup>17</sup> With respect to the Appellants’ § 523(a)(4) claim, the elements they were required to prove at trial were: 1) the existence of a fiduciary relationship, and 2) a defalcation in the duties imposed by that relationship on the Debtor. Failure to prove the existence of a fiduciary relationship results in the conclusion that the discharge exception is not applicable.<sup>18</sup>

Significantly, the existence of a fiduciary relationship under § 523(a)(4) is

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<sup>15</sup> *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (internal quotation marks omitted).

<sup>16</sup> *Bellco First Fed. Credit Union v. Kaspar (In re Kaspar)*, 125 F.3d 1358, 1361 (10th Cir. 1997).

<sup>17</sup> *Grogan v. Garner*, 498 U.S. 279, 291 (1991).

<sup>18</sup> *Horejs v. Steele (In re Steele)*, 292 B.R. 422, 434 (Bankr. D. Colo. 2003). See also, *Cash Am. Fin. Servs. v. Fox (In re Fox)*, 370 B.R. 104, 115 (6th Cir. BAP 2007) (there can be no defalcation if the required fiduciary relationship does not exist).

determined as a matter of federal law.<sup>19</sup> Within the Tenth Circuit, a § 523(a)(4) fiduciary relationship exists only where a debtor has been entrusted with money pursuant to “an express or technical trust.”<sup>20</sup>

Express trusts are those trust relationships which are intentionally entered into by the parties. An express trust may involve a formal declaration of trust or a situation where the intention of the parties to form a trust relationship may be inferred by the surrounding facts and circumstances. . . . A technical trust is distinguished from an express trust in that the intention of the parties is not relevant. In a technical trust, the trust obligations are imposed on the parties.<sup>21</sup>

Thus, a technical trust may be determined to exist by virtue of a statutorily imposed duty.<sup>22</sup> However, “[f]or a state statute to create an express or technical trust for nondischargeability purposes, the statute must define the trust res, establish trustee duties, and impose the trust prior to any wrongdoing creating the obligation.”<sup>23</sup>

In the present case, the Appellants principally rely on the relationship between the parties to establish their claim that the Debtor owed them a fiduciary duty. While acknowledging that “generic duties of trust and confidence” do not rise to the level necessary to establish a fiduciary relationship under § 523(a)(4),<sup>24</sup> the Appellants assert that “courts are quicker to find fiduciary duties in relationships with parties to whom special trust is often given,” and that such

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<sup>19</sup> *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1371 (10th Cir. 1996).

<sup>20</sup> *Id.* at 1371-72. *See also Allen v. Romero (In re Romero)*, 535 F.2d 618, 621 (10th Cir. 1976).

<sup>21</sup> *In re Steele*, 292 B.R. at 427 (citation omitted).

<sup>22</sup> *In re Romero*, 535 F.2d at 621-22.

<sup>23</sup> *Tway v. Tway (In re Tway)*, 161 B.R. 274, 279 (Bankr. W.D. Okla. 1993).

<sup>24</sup> Revised Brief of Appellants at 8, ¶ 18.

relationships should include relatives.<sup>25</sup> This argument does not mesh with the case law specifically holding that a § 523(a)(4) fiduciary relationship requires either an express trust in the parties' contract or a trust that is specifically imposed by statute. Although we do not doubt that the Appellants trusted the Debtor, their cousin, to treat them fairly and in good faith, that is not the issue under § 523(a)(4). Thus, within this Circuit, "when a fiduciary duty under 11 U.S.C. § 523(a)(4) is found, the cases universally find a much more specific basis for the duty than those general duties of good faith and fair dealing."<sup>26</sup>

A number of cases from other jurisdictions, which are instructive, have held that gas station managers do not owe a fiduciary duty to the station's owner that is within the parameters of § 523(a)(4).<sup>27</sup> In one such case, *In re Walker*,<sup>28</sup> the debtor had worked for the plaintiff as a service station manager for three years when plaintiff discovered various shortages in his accounting. Although the debtor denied any knowledge either of the shortages or of what had happened to the money, he signed a promissory note for the full amount claimed by plaintiff because he was contractually responsible for any shortages that did occur. In denying plaintiff's claim that its debt was non-dischargeable pursuant to § 523(a)(4), the bankruptcy court noted that "[a] service station manager, even though he has the responsibility of collecting the proceeds of sales from the

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<sup>25</sup> *Id.* at 10, ¶ 21.

<sup>26</sup> *In re Steele*, 292 B.R. at 428 (§ 523(a)(4) fiduciary exception not triggered by corporate director/shareholder relationship).

<sup>27</sup> *See, e.g., Colonial-Interstate, Inc. v. Ayers (In re Ayers)*, 83 B.R. 83 (Bankr. M.D. Ga. 1988); *Pride Fuels, Inc. v. Ogg (In re Ogg)*, 40 B.R. 609 (Bankr. N.D. Tex. 1984); *DL&B Oil Co. v. Dawson (In re Dawson)*, 16 B.R. 343 (Bankr. N.D. Ill. 1982).

<sup>28</sup> *Mullis v. Walker (In re Walker)*, 7 B.R. 563 (Bankr. M.D. Ga. 1980).

station accounting therefor and depositing cash amounts thereof, is not a fiduciary.”<sup>29</sup> The court further noted that ruling otherwise, “would make the general managers of all retail outlets fiduciaries,” which was a result it did not believe was intended by § 523(a)(4).<sup>30</sup>

Similarly, *In re Dawson*<sup>31</sup> involved a “trusted agent” of the plaintiff, who was charged with managing one of plaintiff’s gas stations. As in the present case, the debtor in *Dawson* was required to collect gas receipts and to deposit them on a daily basis. When shortages were discovered, the station was closed. The debtor responded to the shortages by stating that “there was a bookkeeping problem or the funds were at his house.”<sup>32</sup> The bankruptcy court, relying on numerous previous cases finding no fiduciary duty under similar circumstances, ruled that the facts before it did not demonstrate the existence of a technical trust, and were therefore insufficient to establish that the debt was non-dischargeable.

Accordingly, viewing the foregoing, we agree with the Bankruptcy Court’s conclusion that the Appellants failed to prove the existence of a fiduciary relationship between themselves and the Debtor that is sufficient to establish non-dischargeability of their debt. Therefore, there is no need to address the issue of whether or not the Debtor’s conduct constituted a “defalcation” of his duty.

#### B. Motion to Vacate Trial Date

The Appellants’ brief describes a series of events in the course of their adversary proceeding that they claim will lead this Court to conclude that “they

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<sup>29</sup> *Id.* at 564.

<sup>30</sup> *Id.*

<sup>31</sup> *In re Dawson*, 16 B.R. 343.

<sup>32</sup> *Id.* at 344.

were treated unfairly” by the Bankruptcy Court’s denial of their motion to vacate the trial date.<sup>33</sup> The Appellants then state that they leave the resolution of this issue “entirely [within] this Court’s judgment and fairness.”<sup>34</sup> Unfortunately, this is not how the appellate process works. Federal Rule of Bankruptcy Procedure 8010 requires appellate briefs to include an argument section that “contain[s] the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.”<sup>35</sup> Failure to comply with Rule 8010 constitutes a waiver of a party’s appellate argument.<sup>36</sup> On this issue, the Appellants admittedly do not cite any legal authority, and their “argument” consists of a one-paragraph assertion that the bankruptcy court was “unfair.” Such assertions do not constitute an adequate appellate argument.

Nonetheless, we will briefly consider whether the record reflects that denial of the Appellants’ one and only request for an extension rises to the level of an abuse of discretion. The first reason given by the Bankruptcy Court for denial of the Appellants’ motion was that the adversary proceeding had been pending for over two years and had been “mired in repeated continuance, unnecessary

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<sup>33</sup> Revised Brief of Appellants at 14, ¶ 27.

<sup>34</sup> *Id.*

<sup>35</sup> Fed. R. Bankr. P. 8010(a)(1)(E). *See also* Fed. R. App. P. 28(a)(9)(A) (appellant’s argument must contain “appellant’s contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies”).

<sup>36</sup> *FDIC v. Schuchmann*, 235 F.3d 1217, 1230 n.11 (10th Cir. 2000). *See also* *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998).

complications, undue delay and missteps by counsel in prosecuting this case.”<sup>37</sup> The court also noted that, if a continuance was granted, the matter could not be placed back on its calendar for “several months,” which delay it found “unacceptable for case management purposes and timely adjudication of long-standing disputes.”<sup>38</sup>

The Appellants would have this Court believe that blame for virtually all delay should be assigned to the Debtor. However, the Bankruptcy Court obviously did not see it that way and, upon our review of the Bankruptcy Court’s docket, we conclude that it did not commit reversible error in denying the motion. On the contrary, it appears that the amount of time the adversary proceeding was pending may be attributed to a number of factors, including both sides’ failures to follow court procedure, the volume of the trial court’s docket, and events beyond anyone’s control, such as the death of the Debtor’s second attorney. Delays apparently attributable to the Appellants were that: 1) it took four complaints to finally have one that adequately stated their claim; 2) an Order to Show Cause was issued for failure to prosecute the case; and 3) their request for hearing on the Debtor’s default was denied on the basis that they failed to file a “legally sufficient motion for default.”

In any event, besides the age of the pending adversary proceeding, the Bankruptcy Court also denied the Appellants’ motion because it was filed without an accompanying proposed order, as is required by the Bankruptcy Court’s local rules, and the Appellants’ counsel had “declined” court staff’s request for such an

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<sup>37</sup> *Order Denying Motion to Vacate and Re-Set Trial* at 1, ¶ 1, in App. at 167.

<sup>38</sup> *Id.* at ¶ 3.

order.<sup>39</sup> Failure, followed by refusal, to comply with a court’s local rules justifies denial of the motion even where, as here, the motion was unopposed and the breached rule apparently exists for the court’s own convenience. It is not our job to second guess the Bankruptcy Court’s reasoning, only to determine if its decision “exceeded the bounds of permissible choice in the circumstances.”<sup>40</sup>

In addition, the Appellants’ suggestion that they were unfairly surprised by the Bankruptcy Court’s “unilateral” scheduling of the trial date is not well taken. In fact, a trial previously had been scheduled for June 3, 2010, which was converted to a non-evidentiary hearing and status and scheduling conference by the court based on the death of the Debtor’s attorney. At that hearing, the parties were directed to file a stipulated pre-trial statement by June 18, after which, the court would set a new trial date. On June 28, 2010, ten days after the joint pre-trial statement was filed, the court issued a scheduling order setting trial for August 6, 2010. On July 15, the Appellants filed a motion to vacate the trial date, asserting that Moses Sawaged was, at that time, on a trip to the Middle East and would not return until mid-September. It is unlikely that the Appellants were unaware, at the time of the scheduling conference a month earlier, that Moses Sawaged would soon be out of the country for an extended period of time, yet the Appellants did not inform the judge of that fact until their motion was filed approximately three weeks prior to the scheduled trial. There is nothing in the record indicating that Mr. Sawaged’s absence was an emergency trip or that more prompt notice to the Court could not have been made. Considering all of these

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<sup>39</sup> *Id.* at ¶ 2. Although it appears from the Bankruptcy Court’s docket that a proposed order was ultimately filed on July 22, 2010, that filing was a day after the motion had been denied.

<sup>40</sup> *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994).

circumstances, we cannot conclude that the Bankruptcy Court's decision to deny the motion to vacate the trial date constitutes an abuse of discretion.

Significantly, however, even if the Bankruptcy Court had erred by refusing to vacate the trial date, we would deem such error to be harmless. The Appellants list a number of things about which Moses Sawaged would have testified if he had attended the trial.<sup>41</sup> None relates to the ultimate conclusion that the Debtor was not a fiduciary within the scope of § 523(a)(4). As such, his testimony would not have changed the outcome of the trial.

We therefore determine the Appellants' appeal of the denial of their motion to vacate the trial date to be without merit.

#### V. CONCLUSION

We affirm the Bankruptcy Court's determination that the Appellants failed to prove that their claim is non-dischargeable under § 523(a)(4), and also affirm the denial of the Appellants' motion to vacate the trial date.

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<sup>41</sup> Revised Brief of Appellants at 6-7, ¶ 13.