FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
August 8, 2008
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE PATRICIA E. JOHNS, also known as Patricia Johns, Debtor.	BAP No. CO-08-014
MATINA SOUTSOS, Plaintiff – Appellee, v. PATRICIA JOHNS, Defendant – Appellant.	Bankr. No. 06-13681-MER Adv. No. 06-01787-MER Chapter 7 OPINION*

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

Before BOHANON, CORNISH, and RASURE, Bankruptcy Judges.

CORNISH, Bankruptcy Judge.

Patricia E. Johns appeals the bankruptcy court's nondischargeable judgment against her in the amount of $16,768.75 pursuant to 11 U.S.C. § 523(a)(6). Because she has failed to provide an adequate record for our review, we are compelled to affirm the bankruptcy court's decision.

I. FACTUAL BACKGROUND

In August 2004, debtor-appellant Patricia Johns ("Johns") and creditor-appellee Matina Soutsos ("Soutsos") began discussing the possibility of forming a

* This opinion is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

business venture to "fix and flip" residential properties. This is a term used to refer to the purchase and remodeling of a residence followed by a sale in a short period of time, hopefully at a profit. Soutsos is a real estate and mortgage broker who placed an advertisement in the newspaper regarding the business venture to which Johns responded. The terms and details of the business venture were never memorialized in writing. All actions taken in furtherance of the business venture were based upon oral agreements between the parties.

In October 2004, Johns and Soutsos located a suitable piece of real property in Aurora, Colorado, for their first fix and flip project ("Aurora Property"). The Aurora Property was acquired by Johns, who financed 100% of the purchase price, took title in her name and became solely liable on the mortgage. Soutsos agreed to pay certain expenses, including the mortgage payments and homeowners' association dues. To pay for the necessary renovations to the Aurora Property and other related expenses, Johns contributed approximately $6,000 and Soutsos contributed approximately $12,000. The parties further agreed that any profits left after recoupment of their contributions to the project would be equally split. The Aurora Property sold in January 2005, and each party received approximately $5,000 in profits. Soutsos also received a real estate commission and a mortgage origination fee on the sales transaction.

In February 2005, the parties located their second piece of residential property to fix and flip in Denver, Colorado ("Denver Property"). Again, the purchase of the Denver Property was 100% financed, with Johns's name alone on the title and mortgage, and Soutsos agreed to make the mortgage payments and pay the homeowners' association dues. In connection with this project, Soutsos contributed $16,768.75 toward the renovations and other related expenses, and Johns contributed $12,278.52. The Denver Property was put on the market on April 1, 2005. In May 2005, one contract for sale fell through, and subsequent marketing efforts with respect to the Denver Property were unsuccessful.

Because the Denver Property did not sell quickly, the relationship between the parties deteriorated, and the "agreement" between them was verbally altered. The terms of the "new agreement" between the parties are at the core of this dispute. However, the following facts are not contested. Johns moved into the Denver Property on June 24, 2005. Around that same time, Johns received $5,094.68 in insurance proceeds for fire damage to the Denver Property caused by the previous owners. Soutsos made the June mortgage payment, and Johns made the July and August mortgage payments on the Denver Property. On August 22, 2005, after Soutsos removed the Denver Property from any sales listing, Johns refinanced the original mortgage loan and received net proceeds of $1,588.40. On September 8, 2005, Johns closed a second mortgage on the Denver Property from which she received net proceeds of $24,662.16. Johns used these funds, which totaled $31,345.24, exclusively for her own purposes, and did not repay Soutsos her $16,768.75 contribution to the fix and flip project.

In December 2005, Soutsos filed suit against Johns in Colorado state court to "protect her interest in the [Denver] Property and to recover her investment."[1] Soutsos represented to the bankruptcy court that in May 2006, the state court orally granted judgment against Johns in the amount of $16,768.75 for the misappropriation of partnership property for her own benefit.[2] However, the alleged state court judgment was never reduced to writing or filed of record.

Johns filed for voluntary Chapter 7 bankruptcy relief on June 19, 2006. Soutsos filed this adversary proceeding on September 12, 2006, claiming that as a result of their unsuccessful Denver Property fix and flip project, Johns willfully and maliciously stole her funds and diverted them for personal use with the intent

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[1] *Complaint* at 3, ¶ 19, *in* Appendix to Defendant-Appellant's Opening Brief ("Appellant's App.") at 10.

[2] *Id.* at ¶ 20, *in* Appellant's App. at 10.

of permanently depriving her of the use of the funds.[3] Additionally, Soutsos requested that the bankruptcy court determine the amount of the claimed indebtedness to be nondischargeable based on 11 U.S.C. § 523(a)(4) and (6)[4] because Johns's actions constituted embezzlement or willful and malicious injury.

A trial was held on August 2, 2007, and the bankruptcy court heard testimony from both parties regarding the dispute that began when the Denver Property did not sell quickly upon completion of its renovation. The parties presented the bankruptcy court with very disparate accounts of their oral negotiations. Johns alleged that it was Soutsos who raised the possibility of Johns personally residing in the Denver Property and paying rent, an idea with which Johns purportedly disagreed.[5] Johns alleged she only reluctantly agreed to occupy and lease the Denver Property when Soutsos threatened to stop making the mortgage payments. According to Soutsos, she never raised the issue of Johns's possible occupation of the Denver Property because she believed Johns's smoking habit and her pet dog would depreciate the value of the property, making it more difficult to sell. Regardless of whose idea it was, Johns did in fact move into the Denver Property on June 24, 2005.

The bankruptcy court also heard testimony regarding the "new agreement" the parties entered into in late June 2005. Soutsos's version of the new agreement was as follows. Soutsos agreed to relinquish her claim to any profits from the sale of the Denver Property, if Johns agreed to refinance the property and use the proceeds to repay Soutsos her $16,768.75 contribution to the project. Johns would then assume all financial responsibility for the Denver Property and the

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[3] *Id.* at 4, ¶ 25, *in* Appellant's App. at 11.

[4] Unless otherwise indicated, all future statutory references are to the Bankruptcy Code, Title 11 of the United States Code.

[5] *Order* at 2-3, *in* Appellant's App. at 17-18.

parties would part ways. On the other hand, Johns alleged that Soutsos changed her mind about refinancing and attempted to obtain a line of credit for Johns which would allow her to cover the Denver Property expenses. When Johns declined to accept the proposed line of credit option, Soutsos made no further mortgage payments on the Denver Property and Johns refinanced. As detailed above, when all was said and done, Johns received $31,345.24 in insurance and refinancing proceeds and did not repay Soutsos her $16,768.75 contribution to the project.

On January 4, 2008, the bankruptcy court entered judgment in favor of Soutsos in the amount of $16,768.75, finding that Johns had committed the common law tort of conversion. The bankruptcy court further determined the conversion was willful and malicious, and therefore, that the judgment was nondischargeable pursuant to § 523(a)(6). Johns timely appeals.

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.[6] Neither party elected to have this appeal heard by the United States District Court for the District of Colorado. The parties have therefore consented to appellate review by this Court.

A decision is considered final "if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'"[7] In this adversary proceeding, the bankruptcy court entered a monetary judgment in favor of Soutsos against Johns and determined the debt could not be discharged. Nothing remains

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[6] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-1.

[7] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

for the lower court's consideration. Thus, the order of the bankruptcy court is final for purposes of review.

III. STANDARD OF REVIEW

The bankruptcy court's interpretation of a statute is reviewed *de novo*. On appeal, however, Johns does not dispute the bankruptcy court's interpretation of § 523(a)(6), but argues primarily that the bankruptcy court erred in finding that she willfully and maliciously converted property belonging to Soutsos in violation of § 523(a)(6). A determination of whether a party acted willfully and maliciously necessarily involves inquiry into and finding of intent, which is a question of fact.[8] We review the bankruptcy court's factual findings in support of its decision for clear error.[9] A factual finding is "clearly erroneous" when "'it is without factual support in the record, or if the appellate court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been made.'"[10] Additionally, under the clearly erroneous standard, this Court must defer to the bankruptcy court's assessment of the credibility of witnesses and other disputed facts.[11]

IV. ANALYSIS

Section 523, Exceptions to Discharge, provides in pertinent part:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –
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[8] *Waugh v. Eldridge (In re Waugh)*, 95 F.3d 706, 710 (8th Cir. 1996).

[9] *Las Vegas Ice & Cold Storage Co. v. Far W. Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990).

[10] *Id.* (quoting *LeMaire ex rel. LeMaire v. United States*, 826 F.2d 949, 953 (10th Cir. 1987)).

[11] *In re Ford*, 492 F.3d 1148, 1154 (10th Cir. 2007).

> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity[.][12]

Exceptions to discharge are to be narrowly construed in favor of the debtor so as to promote the "fresh start" policy of the Bankruptcy Code.[13] Under § 523, a creditor seeking to except its claim from discharge must prove the claim is nondischargeable by a preponderance of the evidence.[14]

In Colorado, common law tortious conversion is "any distinct, unauthorized act of dominion or ownership exercised by one person over personal property belonging to another."[15] "There is no doubt that an act of conversion, if willful and malicious, is an injury to property within the scope of [the § 523(a)(6)] exception."[16] The terms "willful" act and "malicious injury" are both critical to an objection raised under § 523(a)(6).[17] "Without proof of *both*, an objection to discharge under that section must fail."[18] "The word 'willful' in (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury."[19] Malicious injury requires a wrongful act done without just cause or excuse by a

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[12] § 523(a)(6).

[13] *See Jones v. Jones (In re Jones)*, 9 F.3d 878, 880 (10th Cir. 1993).

[14] *See Grogan v. Garner*, 498 U.S. 279, 287 (1991).

[15] *See Itin v. Ungar*, 17 P.3d 129, 135 n.10 (Colo. 2000) (quoting *Byron v. York Inv. Co.*, 296 P.2d 742, 745 (Colo. 1956)).

[16] *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 332 (1934) (referring to § 17(2) of the Bankruptcy Act of 1898, 11 U.S.C. § 35(2), the predecessor of § 523(a)(6), which used substantially the same language "wilful and malicious injuries to the person or property of another"); *see also Mitsubishi Motors Credit of Am., Inc. v. Longley, (In re Longley)*, 235 B.R. 651, 657 (10th Cir. BAP 1999).

[17] *Panalis v. Moore (In re Moore)*, 357 F.3d 1125, 1129 (10th Cir. 2004).

[18] *Id.*

[19] *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998).

debtor who intended the resulting injury.[20]

The requisite intent may be established by either direct or indirect evidence.[21] Intent of willful injury can be demonstrated indirectly by evidence of both the debtor's knowledge of the creditor's rights and the debtor's knowledge that the particularized injury will result from its conduct.[22]

After hearing the testimony of the parties, the bankruptcy court, in a detailed order, found that Johns exercised unauthorized dominion over Soutsos's contribution, thereby committing the common law tort of conversion. The bankruptcy court also found the injury was "willful" because Johns was aware that refusing to repay Soutsos would injure Soutsos and her interest in the Denver Property. Further, the bankruptcy court found the conversion was "malicious" because Johns's misappropriation of Soutsos's money and the proceeds from the refinancing was wrongful, unauthorized, intentional, and without justification or excuse.

On appeal, Johns argues the bankruptcy court erred in finding that she willfully and maliciously caused injury to Soutsos's property. As appellant, Johns has the burden of providing the appellate court with an adequate record for our review.[23] Because she is asking this Court to determine that a finding or

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[20] *Bombardier Capital, Inc. v. Tinkler (In re Tinkler),* 311 B.R. 869, 880 (Bankr. D. Colo. 2004) (citing *Tinker v. Colwell*, 193 U.S. 473, 486 (1904) (interpreting § 17(2) of the Bankruptcy Act of 1898, 11 U.S.C. § 35(2), the predecessor of § 523(a)(6), which used substantially the same language: "wilful and malicious injuries to the person or property of another").

[21] *Mitsubishi Motors Credit of Am., Inc. v. Longley, (In re Longley)*, 235 B.R. 651, 657 (10th Cir. BAP 1999)(citing *C.I.T. Fin. Servs. Inc. v. Posta (In re Posta),* 866 F.2d 364, 367 (10th Cir. 1989) (*overruled in part by Kawaauhau v. Geiger*, 523 U.S. 57 (1998)).

[22] *Id.* (citing *In re Pasek*, 983 F.2d 1524, 1527 (10th Cir. 1993) (*overruled in part by Kawaauhau v. Geiger*, 523 U.S. 57 (1998)).

[23] *Anstine v. Centex Home Equity Co., LLC (In re Pepper),* 339 B.R. 756, 760-61 (10th Cir. BAP 2006).

conclusion of the bankruptcy court is unsupported by or contrary to the evidence, Johns is required to include a transcript of all evidence relevant to such finding or conclusion.[24] "Indeed, when the record on appeal fails to include copies of the documents necessary to decide an issue on appeal, this Court is unable to rule on that issue and may summarily affirm the bankruptcy court."[25]

In the appendix to her brief, Johns is required to provide all transcripts, or portions of transcripts necessary for this Court's review.[26] However, Johns has provided only a partial transcript of the trial of this matter to the bankruptcy court– just scattered bits and pieces of the whole.[27] While we have snippets of the testimony given by Johns and Soutsos, the gaping holes in the trial transcript do not allow us to conduct a meaningful appellate review. As a result, we must accept the bankruptcy court's factual findings as true.

Taking the bankruptcy court's factual findings as true, its judgment is more than supported by the evidence. In the bankruptcy court's own words:

> The determination of this dispute has been made difficult by the lack of any formal documentation concerning the parties' business venture. In addition, the parties' respective stories regarding their agreements vary considerably. Because of the vastly divergent testimony, the credibility of the parties becomes paramount in this case. The Court has reviewed the testimony and considered the demeanor of both parties and finds Soutsos's version of events to be far more credible than the version offered by Johns. The Court finds Johns's testimony during the trial was evasive, self-serving and inconsistent with the overall circumstances of the parties' business transaction which was to locate inexpensive real estate, renovate the properties and sell them for a profit.[28]

Further, the bankruptcy court concluded that the new agreement between the

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[24] *Deines v. Vermeer Mfg. Co.*, 969 F.2d 977, 979 (10th Cir. 1992).

[25] *Lopez v. Long (In re Long)*, 255 B.R. 241, 245 (10th Cir. BAP 2000).

[26] Fed. R. Bankr. P. 8009; 10th Cir. BAP L.R. 8009-1(b)(5).

[27] It appears that only about one-fourth of the transcript is included in the Appellant's App.

[28] *Order* at 5, *in* Appellant's App. at 20.

parties, under which Soutsos would remove the Denver Property from any sales listing and in exchange Johns would repay Soutsos her contribution, was constructed by Johns "as a ruse to remove the last remaining obstacles to refinancing the [Denver] Property and assuming full control over the [Denver] Property."[29] On appeal, Johns has provided this Court with a record which contains nothing that allows us to conclude anything to the contrary.

V. CONCLUSION

Johns did not provide this Court with an adequate record for meaningful appellate review. Accordingly, the bankruptcy court's detailed and well-reasoned order granting judgment of $16,768.75 in favor of Soutsos and determining that the debt is nondischargeable pursuant to § 523(a)(6) must be affirmed.

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[29] *Id.* at 7, *in* Appellant's App. 22.

BOHANON, Bankruptcy Judge, concurring.

I concur in the result insofar as it affirms the Bankruptcy Court's entry of a declaratory judgment holding that the debt owed to Soutsos is excepted from Johns's discharge. However, it being my view the bankruptcy courts lack subject matter jurisdiction to enter money judgments on excepted debts, I would remand with instructions for the Bankruptcy Court to appropriately modify its judgment. *See Porter Capital Corp. v. Hamilton (In re Hamilton)*, 282 B.R. 22 (Bankr. W.D. Okla. 2002).