THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE	)	CASE NO. 97-53133
KATHLEEN M. BORAH	)	
DEBTOR	)	CHAPTER 7
	)	
D.D.D. ENTERPRISES, INC.	)	ADV. NO. 98-5026
PLAINTIFF	)	
	)	JUDGE MARILYN SHEA-STONUM
v.	)	
	)	
KATHLEEN M. BORAH	)	
DEFENDANT	)	**MEMORANDUM DECISION**

This matter came before the Court on plaintiff-corporation's complaint to determine the dischargeability of a debt pursuant to 11 U.S.C. §523(a)(4),[1] which was filed on January 28, 1998 and defendant-debtor's answer, which was filed on February 20, 1998. The Court held a trial in this matter on August 23 and 24, 1999. Appearing at the trial were Stephen Hobt, counsel for plaintiff-corporation, and Gregory Costabile, counsel for defendant-debtor. During the trial, the Court received evidence in the form of exhibits and in the form of testimony from the following: (1) defendant-debtor, Kathleen Borah; (2) Harry Davis, principal shareholder and secretary/treasurer of plaintiff-corporation; (3)

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[1] Plaintiff's complaint also makes reference to 11 U.S.C. §727 and 11 U.S.C. §523(a)(2). At the beginning of the trial in this matter plaintiff indicated that it was only proceeding under the provisions of 11 U.S.C. §523(a)(4). Accordingly, §727 and §523(a)(2)(A) will not be addressed further.

JoAnn Davis, president of plaintiff-corporation and wife of Harry Davis; (4) Rich Hartlieb, employee of plaintiff-corporation; (5) William Delphia, former employee of plaintiff-corporation; (6) James Busch, former employee of plaintiff-corporation; (7) Sam Bluso, employee of plaintiff-corporation; (8) Fred Blau, accountant for plaintiff-corporation; and (9) Dr. Philomena Luczek, M.D., defendant-debtor's former health care provider. At the conclusion of the trial, the Court instructed counsel to file post-trial briefs regarding certain issues that were raised but not fully addressed in closing arguments. Those pleadings were timely filed and the matter was then taken under advisement.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A), (I) and (J) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). Based upon testimony and evidence presented at the

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[2] Included in the pleadings in this adversary proceeding are proposed findings of fact and conclusions of law that the parties were required to file pursuant to multiple Court orders. On November 3, 1998, the Court entered an order requiring, *inter alia*, that by not later than January 8, 1999, each party was to file with the Court proposed findings of fact and conclusions of law regarding the parties respective positions in the case. This Court routinely requires such pleadings for several reasons, including organized communication regarding possible stipulations and regarding each counsel's view of the controlling law. Neither party abided by that provision in the Court's November 3rd Order and, on January 19, 1999, the Court entered another order requiring, *inter alia*, that the parties file proposed findings of fact and conclusions of law by not later than March 19, 1999. On March 23, 1999, plaintiff-corporation filed its proposed findings of fact and conclusions of law. Defendant-debtor did not file any such document. Thereafter, on July 22, 1999, the Court entered a Trial Order in this adversary proceeding setting forth, *inter alia*, that by not later than August 13, 1999, each party was to file proposed findings of fact and conclusions of law as to all issues that still remained in dispute in the case. On August 23, 1999, defendant-debtor filed her proposed findings of fact and conclusions of law. Plaintiff-corporation did not file an amended document and at the beginning of the trial in this matter, plaintiff-corporation indicated to the Court that it intended to rely upon the proposed findings of fact and

trial, the arguments of counsel and the pleadings in this adversary proceeding[2] and the main chapter 7 case, the Court makes the following findings of fact and conclusions of law.

FACTS

At the beginning of the trial, the parties presented the Court with a list of the following facts which they agreed were not in dispute.

1. That defendant-debtor was employed by plaintiff-corporation from August 1982 until August 9, 1995.
2. That during her employment with plaintiff-corporation, defendant-debtor was paid wages from plaintiff-corporation's payroll company and also received payment from plaintiff-corporation's corporate account.
3. That during defendant-debtor's employment with plaintiff-corporation, the company adopted and approved a practice of paying employees through its payroll company as well as in the form of a "side check" (as described below) from its corporate account.
4. That plaintiff-corporation's accountant, Fred Blau, was responsible for reviewing the payroll records and corporate check register.

In addition to the foregoing and, based upon the evidence presented at trial, the Court makes the following findings of fact:

5. That plaintiff-corporation was incorporated in 1982 and is in the business of commercial and residential sewer contracting and excavating.
6. That plaintiff-corporation employs approximately 35 employees, most of

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conclusions of law that it filed on March 23, 1999.

whom work outside of the company's office in jobs such as truck drivers, mechanics, estimators and engineers.

7. That at all times during her employment with plaintiff-corporation, defendant-debtor worked under the direct supervision of Harry Davis.

8. That Harry Davis is the principal shareholder and secretary/treasurer of plaintiff-corporation.

9. That from sometime in 1974 until sometime in 1982, defendant-debtor was employed by H.B. Davis Excavating, a company owned by Harry Davis and the predecessor entity of plaintiff-corporation.

10. That during her employment with plaintiff-corporation, defendant-debtor's duties included the bookeeping functions of issuing checks (including "side checks"), dispensing petty cash, recording checks in the corporate check register and keeping track of accounts payable and receivable.

11. That the additional employee compensation paid through the company's use of "side checks" included payment for items such as overtime and accrued but unused vacation.

12. That Harry Davis also used this "side check" practice to compensate employees in an unrelated farming company that he owns.

13. That plaintiff-corporation never withheld any payroll or other taxes from the additional income paid to its employees via "side checks" and never issued to its employees any federal or state withholding forms for those payments

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14. That defendant-debtor's reported payroll salary ranged from approximately $400.00 per week at the beginning of her employment with plaintiff-corporation to approximately $600.00 per week by the end of that employment.

15. That in addition to her regular salary and "side check" compensation, defendant-debtor also received extra "perks" from Harry Davis including the use of 4 automobiles.

16. That during her employment with plaintiff-corporation, defendant-debtor cashed and used the proceeds from checks that she had issued in either her name or the name of other employees.

17. That shortly after a 1994 Internal Revenue Service audit of Harry Davis and his farming company, plaintiff-corporation ceased its practice of using "side checks" to additionally compensate employees, with the exception of defendant-debtor.

18. That after plaintiff-corporation curtailed its practice of using "side checks," the compensation previously paid through those "side checks" was included in the employee paychecks issued by plaintiff-corporation's payroll company.

19. That Mr. Davis actively participates in all aspects of plaintiff-corporation's business, including overseeing field and office operations, reviewing books and records, reviewing financial statements and reviewing company tax returns.

20. That Fred Blau is and has been a certified public accountant since 1960.

21. That Mr. Blau was first retained by Harry Davis sometime in 1972.

22. That from sometime in 1982 until the present, Mr. Blau has been continually retained as plaintiff-corporation's accountant.

23. That as plaintiff-corporation's accountant, Mr. Blau's responsibilities have included preparing corporate tax returns, preparing employee payroll tax information, preparing worker compensation forms, reviewing payroll records and corporate check registers, reviewing financial statements necessary for bonding companies and reconciling bank statements.

24. That Mr. Blau was, at all time during his retention by plaintiff-corporation, aware of the company's use of "side checks."

25. That the payment of wages to employees via "side checks" was recorded on plaintiff-corporation's books as subcontractor expenses even though all individuals paid by "side checks" were plaintiff-corporation's employees.

26. That Mr. Blau was aware that the individuals listed in plaintiff-corporation's books as "subcontractors" were actually employees of plaintiff-corporation.

27. That from approximately 1982 to 1988, defendant-debtor was nominally president of plaintiff-corporation.

28. That sometime during March or April of 1994, JoAnn Davis was placed on plaintiff-corporation's payroll and began going into plaintiff-corporation's offices on a regular basis.

29. That JoAnn Davis did not discover that defendant-debtor had been and was still receiving "side checks" until sometime in August, 1995 when Ms. Davis answered a telephone call from the plaintiff-corporation's bank

regarding an overdraft and that shortly thereafter, defendant-debtor resigned as an employee of plaintiff-corporation.

30. That sometime shortly after defendant-debtor left plaintiff-corporation's employment, Harry and JoAnn Davis contacted the local police and assisted them with an investigation into defendant-debtor's activities relative to plaintiff-corporation.

31. That pursuant to that criminal investigation, defendant-debtor eventually pled guilty to one count of forgery of a $500.00 check in violation of Ohio Revised Code ("ORC") §2913.31 and one count of theft of property with a value being greater than $300.00 but less than $5,000.00 in violation of ORC §2913.02.

DISCUSSION

Pursuant to §523(a)(4), a discharge under §727 does not discharge individual debtors from any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." *See* 11 U.S.C. §523(a)(4). A plaintiff must prove all necessary elements of §523(a)(4) by a preponderance of the evidence, *Grogan v. Garner*, 498 U.S. 279, 291 (1991); *Barclays/American Business Credit, Inc. v. Adams (In re Adams)*, 31 F.3d 398, 394 (6th Cir. 1994), *cert. denied*, 513 U.S. 1111 (1995), and exceptions to discharge are to be strictly construed in debtor's favor. *Mfr. Hanover Trust v. Ward (In re Ward)*, 857 F.2d 1082, 1083 (6th Cir. 1988), *citing Gleason v. Thaw*, 236 U.S. 558, 562 (1915). In determining whether a plaintiff has proved the necessary elements of its case, the bankruptcy court, as trier of fact, must weigh conflicting facts, determine the credibility of witnesses and draw inferences from the evidence presented. *Investors Credit Corp. v. Batie (In re Batie)*, 995 F.2d 85, 88 (6th Cir. 1993); Fed. R.

Bankr. P. 8013.

Fraud or Defalcation in a Fiduciary Capacity

The first portion of §523(a)(4) excepts from discharge any debt "for fraud or defalcation while acting in a fiduciary capacity." Given the "fiduciary capacity" modifier, the Court need not consider whether defendant-debtor's actions were in the nature of fraud or defalcation unless it is first established that she performed the alleged acts while acting within a fiduciary capacity.

Under §523(a)(4), the term "fiduciary capacity" is construed very narrowly to apply only to an express or technical trust that was imposed before and without reference to the wrongdoing that caused the debt. *R.E. America, Inc. v. Garver (In re Garver),* 116 F.3d 176, 179 (6th Cir. 1997); *Brady v. McAllister (In re Brady),* 101 F.3d 1165, 1173 (6th Cir. 1996); *Carlisle Cashway, Inc. v. Johnson (In re Johnson),* 691 F.2d 249, 251 (6th Cir. 1982). Whether a relationship is a "fiduciary" one within the meaning of §523(a)(4) is a question of federal law; however, courts can look to state law to determine whether or not a trust obligation exists. *Texas Lottery Comm'n v. Tran (In re Tran),* 151 F.3d 339, 343 (5th Cr. 1998); *Tudor Oaks Ltd. Partnership v. Cochrane (In re Cochrane),* 124 F.3d 978, 984 (8th Cir. 1997), *cert. denied,* 118 S.Ct. 1044 (1998); *Lewis v. Scott (In re Lewis),* 97 F.3d 1182, 1185 (9th Cir. 1996).

During the trial and in its proposed findings of fact and conclusions of law, plaintiff-corporation did not set forth any legal authority to support a finding that defendant-debtor's relationship with it was of a "fiduciary" nature. *See, e.g., KV Pharmaceutical Co. v. Harland (In re Harland),* 235 B.R. 769, 779 (Bankr. E.D. Pa. 1999) (specifically noting that plaintiff in an action under §523(a)(4) bears the burden of establishing the existence of a "fiduciary relationship"). However, evidence was presented

regarding defendant-debtor's employment relationship with plaintiff-corporation. Accordingly, the Court will discuss whether, because of that employment relationship, defendant-debtor stood in a "fiduciary capacity" relative to plaintiff-corporation.

From sometime in 1982 until August 9, 1995, defendant-debtor was employed by plaintiff-corporation as a secretary and receptionist and, while so employed, she worked under the direct supervision of Harry Davis. Through the testimony of both defendant-debtor and Mr. Davis, defendant-debtor's employment duties were described as those typically associated with a "bookkeeper." Those witnesses explained that, in addition to her duties of issuing checks and dispensing petty cash, defendant-debtor would also maintain the check register and keep track of accounts payables and receivables.

The Court found no Ohio case law or statutory authority to support a finding that a fiduciary relationship existed between the parties. Particularly significant in this regard is that defendant-debtor always worked under the direct supervision of Mr. Davis. *See Yarosh v. Becane*, 406 N.E.2d 1355, 1360, 63 Ohio St. 2d 5, 11 (Ohio 1980) ("fiduciary relationship" found where employee required to perform duties that could not be delegated to average employee with knowledge of proper procedure because position requires special trust and confidence). *See also State ex rel Charlton v. Corrigan*, 521 N.E.2d 804, 806, 36 Ohio St. 3d 68, 71 (Ohio 1988) (indication of "fiduciary relationship" is degree of discretion employee has in carrying out duties).

The relationship also could not match the criteria of the "fiduciary capacity" requirement set forth in §523(a)(4).

> [C]ase authority recognizes that the traditional definition of "fiduciary" is not applicable in defining "fiduciary capacity" under section 523(a)(4). The general meaning of a fiduciary - a relationship involving confidence, trust and good faith - is far too broad for the purposes of section 523(a)(4). . . .The Supreme Court favors a narrow construction of the term "fiduciary capacity" and defines the term as having meaning arising from an express

or technical trust.

In re Twitchell, 91 B.R. 961, 964-65 (D. Utah 1988), *rev'd on other grounds*, 892 F.2d 86 (10th Cir. 1989), *citing Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 333 (1934). *Cf. KV Pharmaceutical Co. v. Harland (In re Harland)*, 235 B.R. 769 (Bankr. E.D. Pa. 1999) (employee-engineer who was entrusted with proprietary pharmaceutical research information did not rise to level of fiduciary for §523 purposes); *Novartis Corp. v. Luppino (In re Luppino)*, 221 B.R. 693 (Bankr. S.D.N.Y. 1998) (director of data processing division in large corporation was not a "fiduciary" for purposes of §523(a)(4) discharge exception); *The Ohio Company v. Maynard (In re Maynard)*, 153 B.R. 933 (Bankr. M.D. Fl. 1993) (registered broker-dealer did not stand in "fiduciary capacity" to employer, investment brokerage firm).

From approximately1982 to 1988, defendant-debtor also held the office of president of plaintiff-corporation. Pursuant to Ohio law, a corporate officer owes a fiduciary obligation to the corporation served. *See, e.g., Prodan v. Hemeyer*, 610 N.E.2d 600, 80 Ohio App.3d 735 (Ohio Ct. App. 1992). However, Mr. Davis testified that defendant-debtor was president "in name only" and was not responsible for duties that are usual of that office. In light of that testimony, the Court need not further analyze whether an individual's role as corporate officer of an Ohio corporation in general or defendant-debtor role as president of plaintiff-corporation in particular rises to the level of "fiduciary capacity" under the narrow construction of §523(a)(4).

Based upon the foregoing, the Court concludes that defendant-debtor's relationship with plaintiff-corporation was never of a "fiduciary" nature. Accordingly, plaintiff-corporation cannot satisfy the necessary requirement that its debt should be excepted from discharge as one "for fraud or defalcation while acting in a fiduciary

capacity."

Embezzlement

For purposes of an action under §523(a)(4), "embezzlement" is "the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." *Brady v. McAllister (In re Brady)*, 101 F.3d 1165, 1172-73 (6th Cir. 1996). In the case at bar, the parties do not dispute that defendant-debtor had, as a part of her employment duties, the authority to write checks on plaintiff-corporation's account. Therefore, to succeed on its claim that defendant-debtor embezzled its property, plaintiff-corporation must show that defendant-debtor was not lawfully entitled to use the funds at issue for the purposes for which they were in fact used. *Id.* at 1173. *See also Ball v. McDowell (In re McDowell),* 162 B.R. 136, 140 (Bankr. N.D. Ohio 1993).

Plaintiff-corporation argues that after it stopped routinely issuing "side checks" to employees in 1994, defendant-debtor continued issuing "side checks" to herself without company authority. Plaintiff-corporation also argues that from sometime in 1983 until she left the company's employ, defendant-debtor cashed other checks that she had issued, without company authority, in either her name or the name of other employees. In support of its arguments, plaintiff-corporation presented the Court with copies of hundreds of checks that were written between 1983 and 1994 and that total approximately

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[3] At the beginning of trial, counsel presented the Court with a 31 page document entitled "Undisputed Fact and Document Stipulation" which set forth, *inter alia*, a matrix of the approximately 550 checks at issue in this proceeding. The parties were only able to agree that defendant-debtor wrote and cashed approximately 361 of those checks and defendant-debtor steadfastly maintained that she was authorized to prepare and negotiate all of those checks. Plaintiff had the burden of proof as to whether or not defendant-debtor wrote and cashed the balance of the checks and, if so, that such acts

$239,000.00.[3]

Defendant-debtor does not dispute that she continued to issue "side checks" to herself even after the company stopped issuing those checks to other employees in 1994 and that she issued, cashed and used the proceeds from certain other corporate checks for her personal benefit. Instead she contends that such practices were done at the direction of Harry Davis and for the purpose of keeping the full amount of her compensation secret from JoAnn Davis. Although she acknowledged pleading guilty to one count of forgery of a $500.00 check and one count of theft of property with a value being greater than $300.00 but less than $5,000.00, defendant-debtor claimed that she did so due to bad legal advice.

Defendant-debtor also contends that, in addition to concealing her total compensation, Mr. Davis also requested that she keep other company information (such as a failure to pay employee payroll taxes, payments to Mr. Davis' children from a prior marriage and "pay offs" to city water departments) from his current wife. Defendant-debtor testified that her practice of concealing information began in 1983 when Harry and JoAnn Davis were married.

In support of her contentions, defendant-debtor testified that before she wrote any checks on plaintiff's corporate account she would first get approval from Harry Davis. That testimony was supported by William Delphia and James Busch, two former employees of plaintiff-corporation. In their testimony they indicated that, before

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were not authorized. Plaintiff presented that Court with no probative evidence with respect to those nearly 200 checks. For purposes of this opinion, and because sufficient evidence was not presented to enable the Court to meaningfully distinguish among the multitudes of checks, the Court will collectively reference all of the checks set forth on the matrix.

defendant-debtor would issue them checks for the purchase of work supplies or for the reimbursement of their own funds that they used to purchase work supplies, she would consult with Harry Davis. In evaluating this supporting testimony, the Court notes that Mr. Delphia had approximately 12 years in which to observe defendant-debtor's practice of writing checks as he was employed by plaintiff-corporation from its inception in 1982 until sometime in 1994.

When questioned about her practice of issuing and cashing corporate checks that were in either her name or the names of other employees, defendant-debtor offered several explanations. Defendant-debtor explained that on many occasions she would issue checks in Harry Davis's name, then go to the bank and cash those checks for spending money that Mr. Davis needed. Defendant-debtor testified that Mr. Davis would spend that money in various ways including paying general business expenses, providing money to his children from a prior marriage and making "pay offs" to city water department employees in exchange for special favors. As to the many nonpayroll checks she issued in her own name, defendant-debtor explained that those were issued for reimbursement purposes when she used her own funds for business reasons. Pursuant to defendant-debtor's testimony, such business reasons included purchasing office supplies and covering company overdrafts to the bank in an effort to protect Mr. Davis from embarrassment associated with bounced checks. Defendant-debtor also testified that whenever the company ran low on funds she would not issue herself "side checks" that were otherwise authorized by Mr. Davis.

Defendant-debtor's testimony that Harry Davis made "pay offs" to city water department employees was corroborated by the testimony of William Delphia and James Busch. Mr. Delphia testified that he was aware of such payments and explained that they

were made to enable plaintiff-corporation to get its excavation jobs done more quickly. Mr. Busch testified that, although he only heard rumors about plaintiff-corporation's use of "pay offs," he was aware that other businesses in the same line of work also used such "pay offs" in exchange for a more timely response by employees of certain water departments.

Defendant-debtor's testimony about concealing information from JoAnn Davis was also supported by testimony from current and former employees of plaintiff-corporation. Although none of the witnesses had first-hand knowledge of whether defendant-debtor's actions were done at the direction of Harry Davis, Sam Bluso testified that defendant-debtor confided to him that she was hiding company information from JoAnn Davis at Harry Davis's request. James Busch testified that, during his tenure with plaintiff-corporation, he heard numerous rumors and jokes that Harry Davis routinely hid company information from his current wife.

During the trial, defendant-debtor also called corporate accountant, Fred Blau, as a witness. In his testimony, Mr. Blau described himself as an "outside accountant" and indicated that Harry Davis defined his duties. As a part of those duties Mr. Blau testified that he would conduct a quarterly review of the company's general ledger whereby he would compare canceled checks against plaintiff-corporation's check register. Despite those quarterly reviews and despite the fact that the column on the check register listing payees was only ½ to ¼ inch from the column listing who endorsed the checks, Mr. Blau claimed that he never discovered that defendant-debtor was cashing corporate checks made out to other employees.

During most of the questioning by defendant-debtor's counsel, Mr. Blau was evasive and uninformative. Despite being retained by Harry Davis for more than 27 years,

Mr. Blau was often unable to answer even the most basic questions about Mr. Davis's business practices. Upon questioning by the Court, however, Mr. Blau became somewhat more responsive. He described Mr. Davis as a person who welcomed accounting advice and described their working relationship as one with open lines of communication. Notwithstanding that description, Mr. Blau testified that he never counseled Mr. Davis about potential liability for the use of "side checks" and indicated that Mr. Davis never asked him to be watchful of corporate employees who might abuse their authority by taking corporate funds.

The only testimonial evidence presented in support of its claim that defendant-debtor issued the subject checks for her own benefit and without the consent of the company was from Harry Davis and JoAnn Davis. JoAnn Davis's testimony is of little persuasive value, however, because she did not become actively involved in plaintiff's corporate affairs until sometime in 1994. Mr. Davis's testimony is also of little persuasive value given his failure to explain why, for a period of 11 years, neither he nor the corporate accountant were able to discover defendant-debtor's allegedly inappropriate practices. Such lack of explanation is especially troublesome given Mr. Davis's control over the company and Mr. Blau's responsibility for reviewing payroll records and corporate check registers that clearly showed that defendant-debtor cashed corporate checks that she issued in other employees' names. If, as plaintiff-corporation suggests, defendant-debtor did successfully embezzle approximately $239,000.00, why would Harry Davis still continue to retain Mr. Blau?

During the trial of this matter, considerable evidence was presented regarding Harry Davis's use of "side checks" to additionally compensate many of the employees of plaintiff-corporation as well as the employees of his unrelated farming business. By Mr.

Davis's own testimony, he admitted that plaintiff-corporation never withheld any payroll or other taxes from the "side check" compensation and never issued to its employees any federal or state withholding forms for those payments. Mr. Davis also testified that it was only because of a 1994 Internal Revenue Service audit of his personal finances and the finances of his farming company that plaintiff-corporation ceased its widespread practice of using "side checks." At the conclusion of trial, and because of the troubling testimony regarding Mr. Davis's deliberate and systematic nonpayment of taxes, the Court inquired as to whether plaintiff-corporation had amended its tax returns to account for the "side check" issues. Plaintiff-corporation's counsel indicated that, to date, no such remedial action had been taken.

His deliberate and systematic nonpayment of taxes, coupled with his inability to explain why defendant-debtor's allegedly inappropriate practices were not discovered for more than 11 years, completely undermines Mr. Davis's credibility. The credibility of Fred Blau was also severely undermined by his evasiveness, his inability to answer the most basic of questions about Mr. Davis's finances and the dereliction of his professional duties as plaintiff-corporation's accountant. Such lack of credibility of the two individuals charged with primary responsibility for plaintiff-corporation's finances stands in sharp contrast to defendant-debtor's testimony which was corroborated in many respects by witnesses who had nothing to gain.

Although defendant-debtor's guilty pleas to forgery and theft do not, in and of themselves, conclusively determine whether the resulting obligation is dischargeable,[4] that defendant-debtor pled guilty to certain crimes is a fact that the Court must consider in this

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[4] *See* discussion of collateral estoppel, pages 19-22, *infra*.

case. During trial, defendant-debtor admitted to entering into the guilty pleas but contended that she did so due only to bad legal advice. That contention was not supported by any evidence other than defendant-debtor's self-serving statements.[5]

A guilty plea is as much a conviction as a conviction following a trial by jury. *Gray v. Comm'r*, 708 F.2d 243, 246 (6th Cir. 1983), *cert. denied*, 466 U.S. 927 (1984). The guilty pleas at issue in this case were to one count of forgery of a $500.00 check in violation of ORC §2913.31 and one count of theft of property with a value being greater than $300.00 but less than $5,000.00 in violation of ORC §2913.02.[6] Because the Ohio statutes to which defendant-debtor pled guilty both speak to the use of property without proper authority, the Court finds that plaintiff-corporation has shown by a preponderance of the evidence that defendant-debtor was not lawfully entitled to use the funds addressed in those guilty pleas. However, the exact of amount of funds that defendant-debtor used without proper authorization is not readily determinable from the evidence presented at trial.

The forgery count addressed a sum certain of $500.00. However, the count regarding theft addressed a wide range of values from greater than $300.00 to less than $5,000.00. During the trial, plaintiff-corporation failed to introduce any evidence that

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[5] In her post-trial brief, defendant-debtor argued that her guilty pleas were not entered into knowingly and voluntarily and, in support of that argument, she set forth several statements of fact regarding the particular circumstances which prompted her to enter into the guilty pleas (i.e. that her state court legal counsel "cajoled" her into accepting the plea agreement and that that same counsel did not question witnesses she had presented to him to support her defense). During the trial, defendant-debtor did not introduce evidence to support those statements of fact and, accordingly, those unsubstantiated allegations will not be considered by the Court or addressed any further in this opinion.

[6] Although Ohio Revised Code §2913.02 is entitled "Theft," it covers a number of what were previously different offenses, including embezzlement.

could enable the Court to determine what amount within that large range represented the actual funds used by defendant-debtor without proper authority. Because plaintiff-corporation bore but failed to meet that evidentiary burden, the Court finds that, as to the plea of theft, $301.00 in unauthorized funds were used by defendant-debtor.

The exact nature of the relationships between defendant-debtor, Harry Davis and JoAnn Davis is not clear to the Court. Nor is it clear to what extent and for what exact purpose corporate information was kept from Ms. Davis. However, based upon the evidence presented at trial, it is clear that, other than the funds addressed by the guilty pleas, plaintiff-corporation has not shown by a preponderance of the evidence that defendant-debtor was not lawfully entitled to use all of the other funds at issue for the purposes for which they were in fact used.

Collateral Estoppel

Plaintiff-corporation also generally argued that defendant-debtor's state court guilty pleas to one count of forgery and one count of theft of property should collaterally estop her from relitigating the embezzlement issue under §523(a)(4). Because that argument was raised for the first time during plaintiff-corporation's closing argument, the Court ordered both parties to file post-trial briefs as to what effect, if any, those guilty pleas have on the outcome of this case. Although both parties filed such post-trial briefs, neither party discussed the issue of collateral estoppel pursuant to Ohio law.

The doctrine of collateral estoppel applies to bankruptcy proceedings and can be invoked in a nondischargeability action to prevent the relitigation of issues already decided by a state court. *Grogan v. Garner*, 498 U.S. 279 (1991). However, when applying the collateral estoppel doctrine, the principles of the Full Faith and Credit Statute (28 U.S.C. §1738) require a bankruptcy court to "give to a state-court judgment the same preclusive

effect as would be given that judgment under the law of the State in which the judgment was rendered." *Rally Hill Productions, Inc. v. Bursack (In re Bursack),* 65 F.3d 51, 53 (6th Cir. 1995), *citing Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). *See also Bay Area Factors v. Calvert (In re Calvert)*, 105 F.3d 315, 317 (6th Cir. 1997). Accordingly, it is Ohio substantive law (and not federal law, as the parties set forth in their post-trial briefs) that will dictate whether defendant-debtor's guilty plea has any preclusive effect in this case.

Pursuant to Ohio law, the doctrine of collateral estoppel bars relitigation of an issue if the same issue was actually and necessarily litigated in a prior action involving the same parties or their privies. *Manley v. Rufus Club Mozambique, Inc.*, 675 N.E.2d 1342, 1344, 111 Ohio App. 3d 260, 262, *citing Goodson v. McDonough Power Equipment, Inc.*, 443 N.E.2d 978, 2 Ohio St. 3d 193 (Ohio 1983).[7] The Ohio Supreme Court has held that strict mutuality of parties is a prerequisite to the application of collateral estoppel and that the burden of proof rests on the party asserting the doctrine. *Goodson v. McDonough Power Equipment, Inc.*, 443 N.E.2d 978, 2 Ohio St. 3d 193 (Ohio 1983).[8]

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[7] In Ohio, the doctrine of res judicata encompasses both estoppel by judgment and collateral estoppel. *Phillips v. Rayburn*, 680 N.E.2d 1279, 1283, 113 Ohio App. 3d 374, 379 (Ohio Ct. App. 1996). Estoppel by judgment prevents a party from relitigating the same cause of action after a final judgment has been rendered on the merits as to that party. *Id. See also, Manley v. Rufus Club Mozambique, Inc.*, 675 N.E.2d 1342, 1344, 111 Ohio App. 3d 260, 262 (Ohio Ct. App. 1996). Because the cause of action at issue here is one under bankruptcy law (and not state criminal law), estoppel by judgment cannot apply.

[8] The Ohio Supreme Court has noted that there may be some limited exceptions to the mutuality requirement of collateral estoppel. *See Goodson v. McDonough Power Equipment, Inc.*, 443 N.E.2d 978, 982, 2 Ohio St. 3d 193, 196 (Ohio 1983). Based upon the evidence presented, and because plaintiff-corporation has failed to set forth any legal argument regarding the matter, possible exceptions to the mutuality requirement do not appear to be present in this case and will not be addressed further.

Plaintiff-corporation was a not a party to the state court criminal action. Therefore, unless it was in privity with the State of Ohio for purposes of the criminal proceeding, the doctrine of collateral estoppel cannot apply. Generally, a person is in privity with another if he or she "succeeds to an estate or an interest formerly held by another." *Thompson v. Wing*, 637 N.E.2d 917, 922, 70 Ohio St. 3d 176, 183 (Ohio 1994); *Whitehead v. Gen Tel. Co.*, 254 N.E.2d 10, 15, 20 Ohio St. 2d 108, 115 (Ohio 1969). However, in certain situations, such as when dealing with the issue of collateral estoppel, the Ohio Supreme Court has determined that a broader definition of "privity" is warranted. In those cases, "privity is merely a word used to say that the relationship between the one who is a party on record and another is close enough to include that other within the res judicata." *Thompson v. Wing*, 637 N.E.2d 917, 922, 70 Ohio St. 3d 176, 183 (Ohio 1994).

With respect to the application of the doctrine of collateral estoppel in civil and criminal trials, the Ohio Supreme Court has recognized that there are several qualitative differences between the two actions which "militate against giving criminal judgments preclusive effect in civil or quasi-civil litigation." *Walden v. State*, 547 N.E.2d 962, 967, 47 Ohio St. 3d 47, 52 (Ohio 1989). For example, there are differing burdens of proof, differing rules of discovery and evidence, and differing rules of privilege and self-incrimination. *Id.*

In the within case, the most participation that plaintiff-corporation could have had in the criminal trial of defendant-debtor was that of prosecuting witness. It could not choose whether to impanel a jury, decide which witnesses to call or dictate whether or not defendant-debtor should be offered the ability to enter into a plea arrangement. Therefore, although plaintiff-corporation’s participation in the criminal action was an arguably

important one to the State of Ohio, it was not a close enough one to justify a finding of privity between the company and the state. *Cf. Phillips v. Rayburn*, 680 N.E.2d 1279, 113 Ohio App. 3d 374 (Ohio Ct. App. 1996) (alleged victim was not party in defendant's criminal assault prosecution and, thus, judgment in that prosecution did not have collateral estoppel effect in subsequent intentional tort action); *Manley v. Rufus Club Mozambique, Inc.*, 657 N.E.2d 1342, 111 Ohio App. 3d 260 (victim of shooting and state were not in privity at previous criminal prosecution of defendant, and, thus, acquittal of defendant on basis that he acted in self-defense did not bar victim's subsequent civil action seeking damages arising from shooting); *Atallah v. Midwestern Indem. Co.*, 551 N.E.2d 619, 40 Ohio App. 3d 146 (Ohio Ct. App. 1988) (plea of nolo contendere made by husband of insured under fire policy in criminal arson action arising out of fire in insured premises would not preclude insured from arguing that husband had not committed arson as she was not a party in the criminal case).[9]

Based upon the foregoing, the Court finds that the doctrine of collateral estoppel does not apply to this case. Accordingly, defendant-debtor's guilty plea to one count of forgery and one count of theft of property do not bar litigation of the §523(a)(4) embezzlement issue.

Larceny

Section 523(a)(4) also speaks to debts for larceny. Larceny is the fraudulent and wrongful taking and carrying away of the property of another with intent to convert the

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[9] Although defendant-debtor's state court guilty pleas do not preclude litigation of the embezzlement issue under §523(a)(4), those pleas may be (and in this case were) admitted into evidence and accorded whatever weight the factfinder deems appropriate. *See* Fed. R. Evid. 801(d)(2), 804(b)(3). The weight of that evidence is discussed on pages 17-18, *supra*.

property to the taker's use without the consent of the owner. *See KV Pharmaceutical Co. v. Harland (In re Harland)*, 235 B.R. 769, 776 (Bankr. E.D. Pa. 1999). As distinguished from embezzlement, the original taking in a action for larceny must be unlawful. *Id.* Because the parties do not dispute that defendant-debtor had the authority to write checks on plaintiff-corporation's account and because plaintiff-corporation did not raise the larceny provision of §523(a)(4) in either its complaint or during the trial of this matter, the larceny provision of §523(a)(4) need not be further addressed.

CONCLUSION

Based upon the foregoing, the Court determines that plaintiff-corporation proved by a preponderance of the evidence that $801.00 of its claim should be nondischargeable in defendant-debtor's bankruptcy case pursuant to §523(a)(4). The Court further determines that as to the balance of its claim, plaintiff-corporation has not proved by a preponderance of the evidence that such claim should be nondischargeable in defendant-debtor's bankruptcy case pursuant to §523(a)(4). A separate judgment consistent with these findings of fact and conclusions of law will be entered.

IT IS SO ORDERED.

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MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 11/30/99