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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

In re:	)	Case No. 98-52568
)	
JOHN ANDREW BURKE,	)	Chapter 7
Debtor.)	
	)	JUDGE MARILYN SHEA-STONUM
)	
)	
ALEXANDER ATHENS AND SANDRA	)	Adv. No. 98-5175
ATHENS,)	
Plaintiffs,)	
)	
v.	)	ORDER GRANTING
	)	DEFENDANT'S MOTION TO
	)	DISMISS COMPLAINT, IN PART,
	)	AND DENYING DEFENDANT'S
JOHN ANDREW BURKE,	)	MOTION TO DISMISS
Defendant.	)	COMPLAINT, IN PART

This matter came before the Court on defendant-debtor's motion to dismiss (the "Motion") the "Complaint Objecting to Discharge of the Debtor, to Determine Dischargeability of Certain Debts, and for Related State Tort Actions Against Debtor" (the "Complaint") and plaintiffs' response to the Motion (the "Response"). The Court held a pre-trial in this matter on November 17, 1999, at which time counsel indicated to the Court that the matter of whether the Complaint should be dismissed was ready to be decided on the pleadings. That 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. It is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A), (E) and (H) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b).

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BACKGROUND FACTS

On August 17, 1998, defendant-debtor filed a voluntary chapter 7 bankruptcy petition. On Schedule F - Creditors Holding Unsecured Nonpriority Claims, defendant-debtor listed plaintiffs as holding a disputed, "co-made corporate obligation" in the amount of \$437,000.00 and a disputed "claim for alleged breach of management agreement" in the amount of \$1,866.00. On November 30, 1998, plaintiffs filed the Complaint.

After determining that assets would be available for distribution, the chapter 7 trustee filed a "Request for Notice to Creditors" with the Bankruptcy Clerk of Court's Office. On May 11, 1999, the Clerk's office issued that notice. The notice set August 11, 1999 as the last date to file proofs of claim in this case and on June 9, 1999, plaintiffs filed their proofs of claim.

STANDARD OF REVIEW

In the Motion, defendant-debtor contends that Counts One, Three, Four and Five of the Complaint should be dismissed for failing to state a claim upon which relief can be granted pursuant to Fed. R. Bankr. P. 7012(b) and Fed. R. Civ. P. 12(b)(6). When considering such a motion to dismiss, a court must construe the complaint in the light most favorable to the non-moving party. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The issue that must be decided is not whether plaintiffs will ultimately prevail but whether plaintiffs are entitled to offer evidence to support the claims stated in their complaint. *Id.* Thus, a motion to dismiss for failure to state a claim will not be granted unless it appears *beyond doubt* that plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. *Id.* (*emphasis added*). However, a court need not accept as true legal conclusions and unwarranted factual inferences and it need not conjure up unpleaded facts that might turn a frivolous claim into a substantial one. *See, e.g., Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987).

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DISCUSSION

Count One: In Count One of the Complaint, plaintiffs do not set forth any Bankruptcy Code provision upon which they rely for relief. Although subtitled "Objection to Discharge of Debtor," Count One only addresses the dischargeability of certain debts and not the debtor's discharge. *Compare* 11 U.S.C. §523(a) *with* 11 U.S.C. §727(a). In paragraph 30 of the Complaint, plaintiffs allege that "the Debtor's current liabilities do not exceed his assets, and thus his debts are not dischargeable in bankruptcy." In paragraphs 31 through 35 of the Complaint, plaintiffs reference specific debts listed in defendant-debtor's bankruptcy petition and then set forth why those debts are not proper in or should not be recognized through defendant-debtor's bankruptcy case. In the last paragraph of Count One (¶36 of the Complaint), plaintiffs aver that "Debtor has sufficient assets to satisfy his liabilities" and contend that debtor should not, therefore, "be permitted to seek protection of the United States Bankruptcy laws."

In the Response, plaintiffs properly reference §727(a) as the statutory basis for a denial of defendant-debtor's discharge and then specifically reference §727(a)(2) as the basis for relief for Count One.¹ That Bankruptcy Code provision states as follows:

- (a) The court shall grant the debtor a discharge, unless -

- (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed,

¹ In the Response, plaintiffs also reference §727(a)(1) which provides that a court "shall grant the debtor a discharge, unless...the debtor is not an individual." No where else in the Response do plaintiffs reference this particular Bankruptcy Code provision or otherwise allege that defendant-debtor is not an individual. Accordingly, plaintiffs reference to §727(a)(1) will not be discussed further.

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or has permitted to be transferred, removed, destroyed, mutilated, or concealed -

(A) property of the debtor, within one year before the date of the filing of the petition.

Plaintiffs contend that defendant-debtor's assertion that Count One fails to state a claim upon which relief can be granted "places form over substance" because the general allegations in paragraphs 6 through 28 of the Complaint set forth "a series of allegations which assert that the defendant has removed, sequestered, and allegedly converted certain property of the plaintiffs to his own use" so that "the first count for relief represents a logical extension of those general allegations." As an example of this "logical extension," plaintiffs assert that their allegation that defendant-debtor "underestimated and/or under-reported his assets" is consistent with the theory of relief under §727(a) dealing with denial of discharge if assets are destroyed or concealed. Plaintiffs' argument strains even the liberal standard of review for a motion to dismiss and completely ignores the language of §727(a).

The general allegations in the Complaint describe various pre-petition transactions entered into by and among plaintiffs, defendant-debtor, defendant-debtor's wife and two corporations owned by defendant-debtor and his wife. The only potential reference in those general allegations that defendant-debtor "transferred, removed, destroyed, mutilated, or concealed" property can be found in the following paragraphs of the Complaint:

25. Debtor has willfully and intentionally injured the property of Burke Properties, Inc. by physically removing fixtures, causing damage to interior structures, and removing and disposing of or selling certain other property of Burke Properties, Inc., such as a large industrial cooler and other items, for the benefit of Debtor and to the detriment of the Athens, since the Athens have a security interest in said property.
26. The actions of Debtor in destroying, removing, and/or otherwise injuring the above-mentioned property were intentional, willful, malicious and wrongful

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acts that were done for the sole purpose of depriving the Athens of a means of satisfying or partially satisfying their judgment claims against Burke Properties, Inc..

However, no where in the Complaint do plaintiffs allege that the purportedly destroyed, removed and/or injured "property of Burke Properties, Inc." was also somehow the property of this individual debtor within one year before the filing of his bankruptcy petition (i.e. plaintiffs do not contend that Burke Properties, Inc.'s corporate veil should be pierced so as to treat defendant-debtor and the corporation as a single legal entity). In fact, in paragraph 27 of the Complaint, plaintiffs claim that "the Debtor has no legal interest in said property."

Just as the "general allegations" fail to provide a basis for claiming that defendant-debtor wrongfully manipulated his property within one year before he filed for bankruptcy, the allegation regarding "underestimated" or "under-reported" assets fails to provide a basis for claiming that defendant-debtor destroyed or concealed his property within that same one year time frame. To find otherwise, the Court would have to conjure up unpleaded facts to explain how or why the alleged underestimating and under-reporting were not the result of clerical errors or misjudgments regarding disputed liabilities but were instead the result of a calculated scheme by defendant-debtor to place his assets beyond the reach of his creditors. The liberal standard of reviewing motions to dismiss simply does not reach that far.

Even assuming that all of the factual allegations set forth in the Complaint are true, Count One of the Complaint cannot be construed as setting forth a claim pursuant to §727(a)(2) because the referenced actions have nothing to do with property of the debtor or with concealment and destruction of his assets. Accordingly, as it relates to Count One of the Complaint, the Motion to Dismiss is well taken and should be granted.

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Counts Three, Four and Five: In Counts Three, Four and Five of the Complaint plaintiffs again fail to set forth any Bankruptcy Code provision upon which they rely for relief. In those counts (subtitled "Malicious Prosecution," "Conversion," and "Breach of Management Agreement," respectively), plaintiffs allege that various pre-petition acts of defendant-debtor caused them harm. For example, in Count Three of the Complaint, plaintiffs set forth that:

55. Debtor's malicious civil prosecution against the Athens caused them damages believed to be in excess of \$25,000.00, plus attorney's fees, costs, and interest, and entitles the Athens to punitive damages.

In Count Four of the Complaint, plaintiffs set forth that:

57. Based upon information and belief, the Debtor intentionally, maliciously, knowingly, and wrongfully removed and took both fixtures and personal property located at 969 North Court Street and sold or disposed of said property to his benefit and to the detriment of the Athens. Based upon information and belief, the Debtor also caused damage to the structure of the premises located at 969 North Court Street, Medina, Ohio.

And, in Court Five of the Complaint, plaintiffs set forth that:

63. The Athens have been injured by the Debtor's breach [of the management agreement] in an amount described above, but believed to be in excess of \$10,000, which includes actual money misappropriated, attorneys' fees, costs, interest, and consequential damages.

In the Motion, defendant-debtor contends that because Counts Three, Four and Five allege tortious conduct that occurred pre-petition and because plaintiffs fail to specifically assert that any debt arising from such alleged conduct is non-dischargeable, they should be dismissed. According to defendant-debtor, the claims raised by Counts Three, Four and Five are beyond the jurisdiction of this Court because, upon the filing of defendant-debtor's bankruptcy case, those pre-petition tort claims were transformed into claims against the estate. That argument ignores the liberal standard this Court must apply in passing upon motions to dismiss and fails to evince that, without doubt, plaintiffs could

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prove no set of facts in support of their claims which would entitle them to relief.

Count Two of the Complaint (which defendant-debtor does not challenge) specifically references §523(a)(4) and (a)(6) of the Bankruptcy Code and also references many of the same factual allegations set out in Counts Three, Four and Five. When read in conjunction with Court Two, Counts Three, Four and Five seem to address (perhaps redundantly) the extent of plaintiffs' alleged injuries caused by defendant-debtor's alleged pre-petition conduct. It is precisely that conduct, rather than the debt itself, that is the focus of §§523(a)(4) and (a)(6) of the Bankruptcy Code:

- (a) A discharge under section 727...of this title does not discharge an individual debtor from any debt -

- (4) for fraud or defalcation which acting in a fiduciary capacity, embezzlement, or larceny;

- (5) for willful and malicious injury by the debtor to another entity or to the property of another entity.

Thus, unlike the allegations in Count One, which could provide no basis for relief under the Bankruptcy Code, the allegations in Counts Three, Four and Five, if proved true, could support a finding that defendant-debtor's pre-petition conduct generated debts which are not dischargeable in his bankruptcy. *Cf. N.I.S. Corp. v. Hallahan (In re Hallahan)*, 936 F.2d 1496 (7th Cir. 1991) (willful breach of contract found to be nondischargeable under §523(a)(6)); *Laganella v. Braen (In re Braen)*, 900 F.2d 621 (3rd Cir. 1990), *cert. denied*, 498 U.S. 1066 (1991) (state court malicious prosecution judgment found to be nondischargeable under §523(a)(6)); *National City Bank, Northwest v. Wikel (In re Wikel)*, 229 B.R. 6 (Bankr. N.D. Ohio 1998) (conversion of property may provide basis for cause

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of action under §523(a)(6)). Accordingly, as it relates to Counts Three, Four and Five of the Complaint, the Motion to Dismiss is not well taken and should not be granted.

CONCLUSION

Based upon the foregoing, **IT IS HEREBY ORDERED:**

1. That the Motion is granted, in part, so that Count One of the Complaint is dismissed;
2. That the Motion is denied, in part, so that Counts Three, Four and Five are not dismissed and shall remain a part of the Complaint;
3. That the pre-trial in this matter currently set for **January 26, 2000** at **3:00 p.m.** shall go forward as scheduled; and
4. That by not later than **January 21, 2000**, plaintiffs shall amend Counts Three, Four and Five of the Complaint to specifically reference what Bankruptcy Code provisions are being relied upon for relief.

A final entry of judgment consistent with the Court's findings in this Order will be entered separately.

MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 1/12/00