

THIS OPINION NOT INTENDED FOR PUBLICATION


UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION



In re:	)	Case No. 05-23389
	)	
KATHY J. MILLER,	)	Chapter 7
	)	
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
_____	)	
	)	
NAYLOR'S NUTRILAWN, INC.,	)	Adversary Proceeding No. 05-1651
	)	
Plaintiff,	)	
	)	
v.	)	<b><u>JUDGMENT</u></b>
	)	
KATHY J. MILLER,	)	
	)	
Defendant.	)	

For the reasons stated in the memorandum of opinion filed this same date, the plaintiff's motion for judgment on the pleadings is granted and the opposition is overruled. (Docket 8, 9). The \$49,102.00 debt owed by the defendant Kathy Miller fka Kathy Salucki to the plaintiff Naylor's Nutrilawn, Inc. is nondischargeable.

IT IS SO ORDERED.

  
 \_\_\_\_\_  
 Pat E. Morgenstern-Clarren  
 United States Bankruptcy Judge

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Debtor.	)	Judge Pat E. Morgenstern-Clarren
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NAYLOR’S NUTRILAWN, INC.,	)	Adversary Proceeding No. 05-1651
	)	
Plaintiff,	)	
	)	
v.	)	<b><u>MEMORANDUM OF OPINION</u></b>
	)	
KATHY J. MILLER,	)	
	)	
Defendant.	)	

The plaintiff Naylor’s Nutrilawn, Inc. filed this adversary proceeding to request that the indebtedness of the debtor Kathy J. Miller to Naylor’s be declared nondischargeable under 11 U.S.C. § 523(a)(4). Naylor’s moves for judgment on the pleadings and/or summary judgment and the debtor opposes the motion.<sup>1</sup>

**JURISDICTION**

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

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<sup>1</sup> Docket 8, 9.

## FACTS

These facts are alleged by Naylor's in its complaint and admitted by the debtor in her answer:<sup>2</sup> The debtor was known as Kathy J. Salucki when she was employed by Naylor's. During her employment, the debtor unlawfully forged checks and, by deception, unlawfully wrote checks on Naylor's accounts to non-existing Naylor creditors. The debtor then negotiated the checks and converted the proceeds to her own use. In September 1989, the debtor pleaded guilty to, and was convicted in the Court of Common Pleas of Summit County, Ohio of: (1) grand theft, Ohio revised code § 2913.02(A)(1), and (2) forgery, Ohio revised code § 2913.31(A)(2). After the debtor's conviction, Naylor's sued her, seeking compensatory and punitive damages for her conduct. On February 17, 1994, Naylor's obtained a default judgment against the debtor for \$49,102.00; half of these damages were compensatory and the other half were punitive. Naylor's was also awarded court costs. Under Ohio revised code § 1343.03, the unpaid amount of any judgment accrues interest until the date paid.

After the debtor filed her chapter 7 case on September 1, 2005, Naylor's filed this adversary proceeding asking for a determination that the debtor's liability to Naylor's is not dischargeable under 11 U.S.C. § 523(a)(4). Naylor's now moves for judgment on the pleadings and/or summary judgment.<sup>3</sup>

## JUDGMENT ON THE PLEADINGS STANDARD

Federal rule of civil procedure 12(c) provides that "after the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings."

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<sup>2</sup> Docket 1, 7.

<sup>3</sup> Docket 8.

FED. R. CIV. P. 12(b) (incorporated by FED. BANKR. R. 7012(b)). In a case between a single plaintiff and a single defendant, the only pleadings allowed are a complaint, an answer, a counterclaim, and a reply to a counterclaim. FED. R. CIV. P. 7(a) (incorporated by FED. BANKR. R. 7007). The pleadings in this case are, therefore, closed and the motion is timely. The legal standard to be applied to a motion for judgment on the pleadings is almost identical to that applied to a 12(b)(6) motion to dismiss for failure to state a claim, i.e., the pleadings are construed in the light most favorable to the non-moving party, the facts alleged by the non-moving party are accepted as true, and the question then is if there is any set of facts which could support the non-moving party's case. *See Kottmyer v. Maas*, 436 F.3d 684, 689 (6<sup>th</sup> Cir. 2006).

## **DISCUSSION**

### **A. 11 U.S.C. § 523(a)(4)**

An individual chapter 7 debtor is entitled to a discharge of all prepetition debts except for the debts identified in bankruptcy code § 523. Naylor's relies on the exception provided in § 523(a)(4), which states: "A discharge under § 727 of this title does not discharge an individual from any debt for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4). Specifically, Naylor's claims that the debtor committed embezzlement or larceny.

In this context, embezzlement is defined by federal common law as "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 (6<sup>th</sup> Cir. 1996) (internal quotation and citations omitted). Larceny, on the other hand, "is different in that the original taking must have been unlawful, and is defined as the fraudulent and wrongful taking

and carrying away of the property of another with intent to convert such property to the taker's use without the consent of the owner." *Williams v. Noblit (In re Noblit)*, 327 B.R. 307, 311 (Bankr. E.D. Michigan 2005) (internal quotation and citation omitted). Both offenses, therefore, involve fraudulent behavior, with the salient difference being the manner in which the actor gained control of the property at issue.

### **B. The Debtor's Admissions Support Judgment on the Pleadings**

The debtor's admissions establish that she committed either embezzlement or larceny under federal common law and that the debt owed to Naylor's resulted from that behavior. In particular, the debtor admits that: "[d]uring the course of Debtor's employment by Naylor's, she unlawfully forged Naylor's checks and, by deception, unlawfully wrote checks on Naylor's accounts to non-existent creditors of Naylor's which Debtor then negotiated and converted to her own use."<sup>4</sup> The admitted forging and writing of checks as a deceitful device to steal from Naylor's accounts suffices to make such theft fraudulent. *Cf. Graffice v. Grim (In re Grim)*, 293 B.R. 156, 163, 166 (Bankr. N.D. Ohio 2003) (holding that intent to defraud under § 523(a)(4) requires that the circumstances considered as a whole show deceptive conduct by the debtor indicating intent to deceive the creditor).

The only unanswered factual issue is whether the debtor came into control of Naylor's money lawfully or unlawfully. This does not, however, make a difference, because the debt is nondischargeable in either event. If the debtor was entrusted with Naylor's money or possessed it lawfully, then she fraudulently appropriated it, thus committing embezzlement. If, conversely, the debtor was neither entrusted with the money nor possessed it lawfully, then she fraudulently

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<sup>4</sup> Complaint ¶ 5; Answer ¶ 2. (Docket 1, 7).

took the money, “carried it away” from Naylor’s accounts, and converted it to her own use, establishing that she committed larceny. Given that either larceny or embezzlement would bar discharge under § 523(a)(4), it is not necessary to determine from the pleadings which of the two offenses the debtor committed, because the admissions show that she definitely committed one of the two.

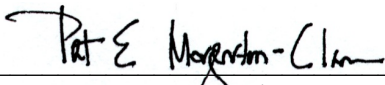
The party asking for a determination that a debt is not dischargeable must also prove that the debt resulted from the embezzlement or larceny. Here, the debtor admits that Naylor’s sued her for her conduct described above and won a default judgment for \$49,102.00.<sup>5</sup> Thus, the pleadings establish that Naylor’s is entitled to judgment as a matter of law.

### **C. Motion for Summary Judgment is Moot**

Given that the debtor’s admissions show that the debt is the result of either larceny or embezzlement, it is not necessary to determine the motion for summary judgment.

### **CONCLUSION**

For the reasons stated, the motion of plaintiff Naylor’s Nutrilawn for judgment on the pleadings will be granted. A separate judgment will be entered reflecting this decision.

  
\_\_\_\_\_  
Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

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<sup>5</sup> Complaint ¶¶ 7 and 8; Answer ¶ 2. (Docket 1, 7).