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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
2011-02-25 10:11
NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:) Case No. 00-11149
)
JOSEPH C. WISNIEWSKI and) Chapter 7
MERCEDES WISNIEWSKI,)
)
_____ Debtors.) Judge Pat E. Morgenstern-Clarren
)
LAKE COUNTY BOARD OF MENTAL) Adversary Proceeding No. 00-1158
RETARDATION AND)
DEVELOPMENTAL DISABILITIES,)
)
Plaintiff,)
) **MEMORANDUM OF OPINION**
)
v.)
)
JOSEPH C. WISNIEWSKI, et al.,)
)
Defendants.)

Pre-petition, Joseph Wisniewski (the “Debtor”) served as guardian of the person and estate for his 65 year old great-aunt Rhea Newman, who is mentally retarded. At the Debtor’s request, The Lake County Board of Mental Retardation and Developmental Disabilities¹ (the “Board”) provided residential care to Ms. Newman for several months. The bill for those services remains largely unpaid. The Board contends that the Debtor is not able to account for his use of his ward’s funds and asks that the debt be found nondischargeable under 11 U.S.C. § 523(a)(4) as a debt for defalcation while acting in a fiduciary capacity.¹ The Debtor denies that this case comes within an exception to discharge.

¹ The original Complaint also named debtor Mercedes Wisniewski as a defendant. The Complaint against her was dismissed. (Docket 40).

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JURISDICTION

The Court has jurisdiction to determine this matter under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 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).

FACTS

The parties submitted Joint Stipulations of Fact. (Docket 31). The Board also presented these witnesses at trial: Ava Wade, case manager; Susan March, Board finance director; and the Debtor as if on cross-examination. The Debtor presented his case through the Stipulations, his own testimony, and cross-examination of the other Board witnesses.

These findings of fact reflect the Court's determinations of credibility. In weighing the evidence and determining the credibility of the witnesses, the Court considered the witness' demeanor, the substance of the testimony, and the context in which the statements were made, recognizing that a transcript does not convey tone, body language or nuance of expression. FED. R. BANKR. P. 7052, incorporating FED. R. CIV. P. 52.

I. The Board's Respite Care Program

The Board provides important services to retarded and disabled persons, as well as to their caregivers. One such service is the respite care program which offers relief to families who care for persons with disabilities. Under the program, the Board cares for the client 24 hours a day on a temporary basis, so that the primary caregivers may go on vacation or otherwise have free time knowing that their loved one is taken care of. Emergency services are also available when a client loses a caregiver. Respite care includes food, housing, and medical attention. The Board charges a minimal amount for this service and reduces even that rate based on family

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circumstances.

II. The Debtor's Service as Guardian for Rhea Newman

The Debtor served as legal guardian for the person and estate of his great-aunt Rhea Newman, a 65 year old mentally retarded woman, from February 6, 1997 through October 27, 1998. (Stipulation of Fact ¶¶ 3, 4). He was appointed to that position by the Cuyahoga County Court of Common Pleas, Probate Division. As part of his responsibilities, the Debtor opened a bank account in Ms. Newman's name and listed himself as guardian. He deposited Ms. Newman's monthly social security checks (\$579.00 a month) into this guardianship account.

Ms. Newman lived with the Debtor's family until November 25, 1997 when the Debtor asked that she be removed because she was disrupting the family. Board case workers assessed Ms. Newman, determined that she was eligible for services, and admitted her into the respite program on a full-time basis at the Debtor's request. (Stipulation of Fact ¶ 5). Ms. Newman stayed in the program for the remainder of 1997. There is no dispute over the 1997 bill.

Still at the Debtor's request, Ms. Newman continued to live full time in the respite program from January 1, 1998 through August 31, 1998 (with a short stay elsewhere), which resulted in a bill of \$4,762.92. This charge did not include clothing and other personal items donated to Ms. Newman by the staff when the Debtor did not provide her with those items. Ms. Newman received social security benefits totaling \$4,632.00 during this same period. Following his usual practice, the Debtor deposited those funds into the guardianship account. The Debtor, however, paid only part of Ms. Newman's 1998 Board bill, leaving an unpaid balance of \$3,412.92.

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(Stipulation of Fact ¶ 6). The guardianship account statement for the period ending September 15, 1998 showed a balance of \$12.63.

What, then, became of Ms. Newman's money during the time that the Board was taking care of her? The Debtor testified generally that he used all of the funds to pay Ms. Newman's expenses. During discovery, the Debtor produced copies of checks from the guardianship account totaling about \$4,155.00. He thought it was possible that he had receipts to account for the balance of the funds, but he did not offer them into evidence. The question of how the Debtor expended Ms. Newman's funds is central to this dispute and if the Debtor really had receipts, the Court believes he would have presented them at trial.

The Court also did not find credible the Debtor's explanation of how he spent Ms. Newman's funds. For example, the Board's attorney questioned the Debtor about these checks:

1. Check 141 dated January 4, 1998 for \$300.00 payable to "89 Deli." Ms. Newman lived in the respite program when this check was written. The Debtor testified that he cashed this check to obtain payment for back rent Ms. Newman owed him under a rental agreement. He did not identify the terms of the rental agreement or the dates of the missing payments. The Debtor also did not explain why Ms. Newman fell behind in the rent when he was the one who controlled the guardianship account and could have written a timely check to himself for the rent when it was allegedly due.

2. Check 173 dated June 14, 1998 for \$100.00 payable to Mercedes Wisniewski, the Debtor's then-wife, that says "rent" in the memo portion. The Debtor testified that this was also for back rent. By this time, however, Ms. Newman had been living in the respite program for

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several months, so the rent could again have related only to the period before November 1997.

And again, the Debtor did not provide details of why the payment was owed.

3. Check 163 dated May 14, 1998 for \$350.00 payable to Mercedes Wisniewski. The Debtor testified that this was spent on clothing and personal hygiene items for Ms. Newman. He did not provide receipts, identify the time period in which the items were purchased, or describe the purchases with specificity.

4. Check 171 apparently dated June 1, 1998 for \$50.00 payable to Mercedes Wisniewski. The Debtor did not have an explanation for how this related to Ms. Newman.

5. Check 165 dated May 17, 1998 for \$100.00 payable to Ameritech. The Debtor testified that this was payment for an old telephone bill of Ms. Newman's. He did not have the phone bill or provide information about the specific charges.

The Board also introduced into evidence numerous checks drawn to "Cash" during the time that Ms. Newman was in the respite program. Although the Debtor testified that these amounts were used by Mercedes Wisniewski to take Ms. Newman clothes shopping, and that he had receipts for those excursions that he had given to his attorney, he did not offer the receipts into evidence.

The Court concludes, after considering all of the evidence, that the Board proved that the Debtor failed to account for his use of Ms. Newman's funds during 1998.

III. Termination of the Debtor's Guardianship

The probate court addressed, but did not resolve, the issue of the Debtor's use of Ms. Newman's funds. On October 27, 1998, the Debtor resigned as guardian. (Stipulation of Fact ¶ 9). The probate court accepted the resignation and ordered the Debtor to file a final account

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and full settlement of his guardianship. (Stipulation of Fact ¶ 10). The Debtor failed to file the account and was removed as guardian. (Stipulation of Fact ¶ 11). At trial, the Debtor testified that he did eventually file the final account, although he did not have a copy with him. Once again, this is an important issue and the Court finds that if the Debtor had filed the final account he would most likely have introduced it into evidence at trial or provided a satisfactory explanation for not introducing it. The Court draws the inference from the failure to do so that the Debtor did not file the account.

DISCUSSION

The Board asserts that the debt is nondischargeable under Bankruptcy Code § 523(a)(4) because it is a debt for “defalcation while acting in a fiduciary capacity[.]” The Board argues first, that the Debtor was acting in his fiduciary capacity as a guardian when the debt was incurred and second, that the Debtor’s failure to file a guardianship accounting amounts to defalcation. The Debtor disagrees with both arguments.

I. The Debt

The Debtor scheduled this debt as undisputed when he filed his Chapter 7 case.² Consistent with the schedules, the Debtor did not dispute his liability for the debt at trial, although he did, of course, dispute whether it was nondischargeable.

II. 11 U.S.C. § 523(a)(4)

A Chapter 7 discharge does not discharge an individual debtor from a debt for “defalcation while acting in a fiduciary capacity[.]” 11 U.S.C. § 523(a)(4). The Board bears the

² The debt is listed under Deepwood Center, which is the residential center where Ms. Newman lived while in the respite program.

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burden of proving that its debt comes within this exception to discharge. To meet this burden, the Board must prove by a preponderance of the evidence that: (1) an express or technical trust governed the property at issue; (2) the Debtor acted in a fiduciary capacity; and (3) the Debtor violated his fiduciary duties by committing defalcation. *R.E. Am. Inc. v. Garver (In re Garver)*, 116 F.3d 176 (6th Cir.1997); *Capitol Indem. Corp. v. Interstate Agency, Inc. (In re Interstate Agency, Inc.)*, 760 F.2d 121 (6th Cir. 1985).³

A.

“[T]he defalcation provision of § 523(a)(4) is limited to only those situations involving an express or technical trust relationship arising from placement of a specific res in the hands of the debtor.” *In re Garver*, 116 F.3d at 180. “The term ‘fiduciary’ under section 523(a)(4) ‘ . . . does not extend to implied trusts, which are imposed on transactions by operation of law as a matter of equity’.” *Brady v. McAllister (In re Brady)*, 101 F.3d 1165, 1173 (6th Cir. 1996) (quoting *Riden v. Sigler (In re Sigler)*, 196 B.R. 762, 764 (Bankr. W.D. Ky. 1996)). This requirement derives from *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 333 (1934), where the Supreme Court noted that “[i]t is not enough that, by the very act of wrongdoing out of which the contested debt arose,

³ The Board argues that a different standard of proof applies, citing *Antlers Roof-Truss & Builders Supply v. Storie (In re Storie)*, 216 B.R. 283 (B.A.P. 10th Cir. 1997). The Board contends that once it has met its burden of showing that the Debtor was a fiduciary and that the debt arose because he did not pay funds entrusted to him, the burden shifts to the Debtor to prove that he complied with his fiduciary duties. *See also, Otto v. Niles (In re Niles)*, 106 F.3d 1456 (9th Cir. 1997) (holding that upon a creditor’s proof that the debtor was a fiduciary to whom funds had been entrusted the burden shifted to the debtor to account for the funds received). That standard of proof has not been adopted by the Sixth Circuit. In *Peoples Bank & Trust Co. of Hazard v. Penick (In re Penick)*, 149 F.3d 1184, *4 (6th Cir. 1998) (unpublished table decision) the Sixth Circuit stated that the party requesting a determination of non-dischargeability for fiduciary defalcation under § 523(a)(4) bears the burden of proving that the debtor misappropriated or failed to account for trust funds. In any event, the result in this case is the same regardless of how the burden of proof is allocated.

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the bankrupt has become chargeable as a trustee ex maleficio. He must have been a trustee before the wrong and without reference thereto.” State law determines whether an express or technical trust existed in this case. *See In re Interstate Agency, Inc.*, 760 F.2d at 124. If so, “[d]efalcation then occurs through the misappropriation or failure to properly account for those trust funds.” *In re Garver*, 116 F.3d at 180 (citation omitted).

The Debtor, as guardian of Ms. Newman’s estate under Ohio law, held her assets as a fiduciary under an express trust. *See Western Surety Co. v. Dauterman (In re Dauterman)*, 156 B.R. 976, 980 (Bankr. N.D. Ohio 1993) (holding that a guardian of estate appointed under Ohio law is a fiduciary who holds property for the ward subject to an express trust); *Ohio Cas. Ins. Co. v. Kern (In re Kern)*, 98 B.R. 321, 323 (Bankr. S.D. Ohio 1989) (“As guardian of the estate . . . Debtor held \$37,500 in trust and certainly occupied the position of a fiduciary under Ohio law.”). This conclusion is based on the nature of a guardianship relationship under Ohio law. As a starting point, a guardian is defined as a fiduciary under the Ohio Revised Code. Ohio Rev. Code § 2109.01 (West 2000). The Debtor, as guardian of Ms. Newman’s estate, was required to “secure, preserve, and account for [her] property.” *In re Guardianship of Lombardo*, 86 Ohio St.3d 600, 608, 716 N.E.2d 189, 196 (1999). Ohio law also required the Debtor to: (1) file a full inventory of Ms. Newman’s real and personal property; (2) manage the financial estate for Ms. Newman’s best interest; and (3) pay all of Ms. Newman’s just debts out of her estate. Ohio Rev. Code §§ 2111.14(A), (B), and (C) (West 2000). The Debtor was required to deposit Ms. Newman’s funds in a fiduciary account and was prohibited from making personal use of them. Ohio Rev. Code §§ 2109.41 and 2109.43 (West 2000). The Debtor was also required to file periodic fiduciary accounts as guardian and a final account within 30 days after the termination

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of his trust. *See generally*, Ohio Rev. Code § 2109.30 (West 2000). Consequently, when the Debtor received Ms. Newman's social security benefits and deposited them into the guardianship account, he did so as a fiduciary holding the property in an express trust within the meaning of § 523(a)(4).⁴

Additionally, when the Debtor asked the Board to care for Ms. Newman, he made that request in his fiduciary capacity. Ohio law required the Debtor, as guardian over Ms. Newman's person, to "provide suitable maintenance for [her] when necessary, which shall be paid out of the estate[.]" Ohio Rev. Code § 2111.13(A)(2) (West 2000). This means that the Debtor had an obligation both to provide for Ms. Newman's daily needs and to pay for the resulting debt against her estate. In Ohio, suitable maintenance for a mentally retarded person such as Ms. Newman who is in residential care includes the right to an appropriate, safe, and sanitary living environment, to food, and to timely access to medical treatment. *See* Ohio Rev. Code § 5123.62 (West 2000). The Board met each of these needs at the Debtor's request. The Debtor had a corresponding obligation to the Board to pay the bill "out of [his ward's] estate." Ohio Rev. Code § 2111.14(C). This is, then, a debt that arose while the Debtor was acting in a fiduciary capacity.

The Debtor argues that while he was Ms. Newman's fiduciary, he was not *the Board's* fiduciary within the meaning of § 523(a)(4). He contends that the parties' relationship was instead an ordinary commercial one that falls outside the scope of the statute. The Board, on the other hand, contends that there was a fiduciary relationship based on the "special relationship that

⁴ This is not to say that such an account must always exist in order to come within this section.

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is created between a guardian and a residential facility[]” under Ohio law. (Plaintiff’s Supplemental Brief at 3). To the extent that the Board must prove that the Debtor acted as the Board’s fiduciary in addition to acting as Ms. Newman’s fiduciary, Ohio law again supports the Board’s position.

As discussed above, the Board met the Debtor’s statutory fiduciary responsibilities to Ms. Newman at the Debtor’s request; when the Board did so, it gave rise to the Debtor’s corresponding fiduciary obligation to both Ms. Newman and the Board to pay for the services rendered. Also, under Ohio law a guardian who improperly administers the estate is personally liable for a ward’s debts. Ohio Rev. Code § 2111.151(B)(3) (West 2000). *See In re Guardianship of Skrzyniecki*, 118 Ohio App.3d 67, 691 N.E.2d 1105 (Ct. App. 1997). This suggests that the guardian’s fiduciary duty to manage the ward’s estate extends to creditors of that estate, at least in a case such as this where the creditor meets the ward’s critical needs at the guardian’s request. This conclusion is supported by Ohio case law which recognizes that those creditors have an interest in the guardianship estate. For example, an estate creditor is an interested party that may challenge a guardian’s administration of the estate. *In re Guardianship of Skrzyniecki*. Also, an estate creditor is a party in interest to an action to surcharge a guardian for mismanagement of an estate. The policy behind this is to insure that the creditor has “the opportunity to protect its interest in the ward’s estate.” *In re Stapler*, 107 Ohio App.3d 528, 532, 669 N.E.2d 77, 79 (Ct. App. 1995). *See also, In re Guardianship of Skrzyniecki* (acknowledging a creditor’s ability to surcharge a guardian for the mismanagement of estate funds). As a result, the Debtor also had a fiduciary duty to the Board under the circumstances of this case.

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Based on the above, the Court concludes that this is a debt incurred while the Debtor was acting in a fiduciary capacity and while he was holding Ms. Newman's assets under an express trust.

B.

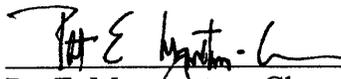
The Debtor's second argument is that he did not commit defalcation with respect to Ms. Newman's estate. He contends instead that the Board was not paid because the estate was insolvent.

The parties stipulated that the Debtor failed to file a final account and was removed as guardian of Ms. Newman's estate based on this failure. As noted in *In re Garver*, defalcation includes not only the misappropriation of trust funds, but also the "failure to properly account for those trust funds." *In re Garver*, 116 F.3d at 180. The Debtor failed to file the final account required by Ohio law. Ohio Rev. Code § 2109.30. The Board also proved at trial that the Debtor failed to account for the funds. This failure to properly account for Ms. Newman's funds amounts to defalcation under § 523(a)(4).

CONCLUSION

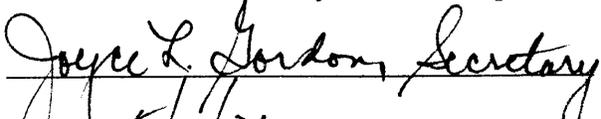
For the reasons stated, the debt owed to the Board is nondischargeable under 11 U.S.C. § 523(a)(4). A separate order will be entered in accordance with this Memorandum of Opinion.

Date: 2 May 2001



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Edwin Hargate, Esq.
Wendy Smither, Esq.

By:  Secretary
Date: 5/2/01

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JOSEPH C. WISNIEWSKI and)	Chapter 7
MERCEDES WISNIEWSKI,)	
)	
_____ Debtors.)	Judge Pat E. Morgenstern-Clarren
)	
LAKE COUNTY BOARD OF MENTAL)	Adversary Proceeding No. 00-1158
RETARDATION AND)	
DEVELOPMENTAL DISABILITIES,)	
)	
Plaintiff,)	
)	
v.)	
)	<u>JUDGMENT</u>
JOSEPH C. WISNIEWSKI, et al.,)	
)	
Defendants.)	

For the reasons stated in the Memorandum of Opinion filed this same date,

IT IS, THEREFORE, ORDERED, that judgment is entered in favor of the Plaintiff, Lake County Board of Mental Retardation and Developmental Disabilities. The debt owed by Defendant-Debtor Joseph Wisniewski to the Board is nondischargeable under 11 U.S.C. § 523(a)(4).

Date: 2 May 2001

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

Served by mail on: Edwin Hargate, Esq.
Wendy Smither, Esq.

By: Joyce L. Gordon, Secretary
Date: 5/2/01