UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	
	)	CHAPTER 7
CARMEN P. CIVIELLO and NANCY J. CIVIELLO,	)	CASE NO. 02-65172
Debtors.	)	JUDGE RUSS KENDIG
	)	ADV. PRO. NO. 03-6022
MILDRED CUNNINGHAM,	)	
Plaintiff,	)	
vs.	)	**MEMORANDUM OF DECISION**
CARMEN P. CIVIELLO, JR.,	)	
Defendants.	)	

This matter is before the court upon the motion for summary judgment filed by Carmen Civiello (hereafter "Defendant") and the brief in opposition filed by plaintiff Mildred Cunningham (hereafter "Plaintiff") in the within adversary proceeding.

JURISDICTION

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) and the general order of reference entered in this district on July 16, 1984. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I) and (J). The following constitutes the court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

FACTS AND ARGUMENTS

On October 25, 2002, Defendant filed his voluntary Chapter 7 petition. On February 14, 2003, Plaintiff filed a complaint seeking a determination that a $35,000 debt owed by Defendant to Plaintiff is non-dischargeable pursuant to 11 U.S.C. §§ 523(a)(2) and (4), and further seeking a determination that Defendant is not entitled to discharge pursuant to 11 U.S.C. §§ 727(a)(2) and (4).

Plaintiff alleges that Defendant, an insurance agent, fraudulently induced her to invest in a payphone scheme. Plaintiff invested $35,000.00 to purchase five "smart phones" expecting to receive a fourteen percent annual return on her investment, but instead lost the entire amount. Plaintiff states in her complaint that Defendant represented to her that this investment was no risk and entirely reputable when, in fact, it was a fraudulent "Ponzi"

scheme. Plaintiff alleges that Defendant was aware of the fraudulent nature of this investment. Plaintiff further contends that Defendant stood in a fiduciary position toward Plaintiff and that Defendant committed fraud or defalcation while acting in that fiduciary capacity.

On November 3, 2003, Defendant filed his motion for summary judgment. He argues that the debt at issue does not fall within the purview of §523(a)(2) because the debtor made no material misrepresentations. Defendant contends that he always advised plaintiff that there was some risk involved in the investment. He argues that plaintiff's previous sworn statements indicate that Defendant did not make any false or incorrect statements to her. As for §523(a)(4), Defendant argues that there must be an express trust and recognizable corpus in order for the discharge exception for defalcation by fiduciary to apply. He contents that this was not present in this case. Further, Defendant's relationship with Plaintiff did not qualify as a fiduciary relationship. Thus, the debt is not excepted from discharge by §523(a)(4).

Plaintiff filed her response on November 25, 2003. She argues that material issues of fact remain as to whether Defendant made false representations to induce her to buy payphones. She claims that Defendant never told her how risky the payphone investment was. As for §523(a)(4), Plaintiff argues that under Ohio law, a fiduciary relationship arises whenever both parties understand that special confidence and trust has been reposed. Ohio courts have recognized that fiduciary duties may arise in an insurance agent/customer context.

ANALYSIS

I. Standard of Review

Motions for summary judgment are governed by Fed. R. Civ. P. 56, as adopted by Fed. R. Bankr. P. 7056. The rule provides that a motion for summary judgment should be granted "forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In reviewing a motion for summary judgment, "'the inferences to be drawn from the underlying facts contained in the [moving party's] materials must be viewed in the light most favorable to the party opposing the motion.'" Adickes v. S. H. Kress and Co., 398 U.S. 144, 158-59 (1970) (quoting U.S. v. Diebold, Inc., 369 U.S. 654, 655 (1962)). If the evidence as presented "could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citing First Nat'l Bank of Ariz. v. Cities Serv. Co, 391 U.S. 253, 288-89 (1968)).

The moving party "bears the initial responsibility of informing the . . . court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Thereafter, the nonmoving party must come forward and demonstrate

the existence of genuine issues of material fact. The nonmoving party cannot merely rely on the pleadings or a mere scintilla of evidence to demonstrate the existence of such facts, but instead must specifically set forth evidence sufficient to demonstrate the existence of disputed material facts. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Celotex, 477 U.S. at 324; *Cities Serv.*, 391 U.S. at 288. Only facts which could conceivably impact the outcome of the litigation are material. See Liberty Lobby, 477 U.S. at 248.

II. Plaintiff Fails to Allege Facts Which Would Give Rise to a Cause of Action Under 11 U.S.C. §523(a)(2).

Debt is excepted from discharge under §523(a)(4) "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4). The phrase "while acting in a fiduciary capacity" qualifies "fraud or defalcation" but not "embezzlement" or "larceny." 4 Collier on Bankruptcy, ¶ 523.10[1][c] (15th ed. rev. 2002).

In order to prove defalcation under §523(a)(4) it must be shown that: 1) there is a fiduciary relationship; 2) the fiduciary relationship was breached; and 3) the breach produced a resulting loss. R.E. America, Inc. v. Garver (In re Garver), 116 F.3d 176, 178 (6th Cir. 1997). The Sixth Circuit noted that the question of who is a fiduciary is one for federal law to decide, but state law is useful to determine when a trust relationship exists. Carlisle Cashway, Inc. v. Johnson (In re Johnson), 691 F.2d 249, 251 (6th Cir. 1982). The fiduciary relationship embraced by §523(a)(4) is limited to those instances where a technical or express trust has been created. Id. "The debtor must hold funds in trust for a third party to satisfy the fiduciary relationship element of the defalcation provision of §523(a)(4)." Garver, 116 F.3d at 179. An express trust requires: (1) an intent to create a trust, (2) a trustee, (3) a trust res, and (4) a definite beneficiary. Graffice v. Grim (In re Grim), 293 B.R. 156, 166 (Bankr. N.D. Ohio 2003). A technical trust requires: (1) a segregated trust res, (2) identifiable beneficiaries, and (3) affirmative trust duties established by contract or statute. Id.

The court finds that Plaintiff fails to establish the necessary elements under §523(a)(4) since Plaintiff has failed to produce any evidence of an express or a technical trust. Plaintiff's argument is that case law in Ohio allows the creation of fiduciary duties from informal business relationships where a special trust or confidence has been reposed. Even if the court finds that such a relationship exists in this case, this alone is not enough to meet the requirements of §523(a)(4). The Cashway and Garver cases dictate that not any fiduciary relationship will suffice; it must be a fiduciary relationship where a technical or express trust has been created. In this case, Plaintiff's dealing with the Defendant did not establish a trust. Defendant did not hold funds for Plaintiff or act as trustee for funds of Plaintiff. He made a sales pitch directing her in how to dispose of her funds. While arguably the nature of the sales pitch and the relationship between the parties might have given rise to fiduciary type obligations to disclose all relevant information about the transaction, such as the risks involved, these fiduciary obligations did not extend to any identifiable res and, therefore, involved no trust.

For these reasons, the court finds Defendant's motion for summary judgment on the issue of whether Defendant's debt to Plaintiff is excepted from discharge under 11 U.S.C. §523(a)(4) to be well taken and, therefore, granted.

III. Plaintiff Has Demonstrated That a Material Issue of Fact Exists Concerning Whether an Exception Under Section 523(a)(2) Is Warranted.

The court finds that material issues of fact remain in dispute with regard to whether Defendant's debt to Plaintiff is excepted from discharge under §523(a)(2). Therefore, defendant's motion for summary judgment with regard to plaintiff's claim under §523(a)(2) is denied.

In order to exempt a debt under 11 U.S.C. §523(a)(2)(A), a creditor must prove: (1) the debtor received money through a material misrepresentation, (2) debtor knew representation was false or was grossly reckless as to its truth, (3) debtor intended to deceive the creditor, (4) the creditor justifiably relied on the misrepresentation, and (5) this reliance was the proximate cause of the loss. Longo v. McLaren (In re McLaren), 3 F.3d 958, 961 (6th Cir. 1993).

Defendant, in his motion for summary judgment, claims that no material misrepresentation was made to Plaintiff. Defendant asserts that he advised Plaintiff about the risks associated with the payphone investment, and advised her that an annuity would be safer. He swears to this in an affidavit and offers this as his proof that no misrepresentations were made. Def. Mot. For Summ. Judg., Affidavit of Carmen Civiello. Defendant also argues that Plaintiff testified in a state court action that she did not know that anything debtor told her was incorrect, wrong or false. However, the portion of Plaintiff's testimony cited by the Defendant is not conclusive on this point, especially when considered in a light most favorable to Plaintiff.

Plaintiff, however, states in an affidavit attached to her response that the Defendant guaranteed her a fourteen percent return, and he stated that he would not have shown the payphone investment to her if there was any risk involved in it at all. Plaintiff's Brief in Opposition to Defendant's Mot. For Summ. Judg., Affidavit of Mildred Cunningham. Her affidavit also avers that Defendant "guaranteed" that she would receive a bigger paycheck each month if she invested in the payphone program. Id.

The above makes clear that there are material facts in dispute. Specifically, it is unclear what, if any, representations were made by Defendant to Plaintiff. Defendant met his burden as movant for summary judgment by giving evidence that he made no misrepresentation to Plaintiff. However, Plaintiff has in turn met her burden and demonstrated that a material issue of fact exists by producing more than a mere scintilla of evidence, her affidavit.

IV. Conclusion

For the reasons set forth above, Defendant's motion for summary judgment is GRANTED as to Plaintiff's action to except from discharge under 11 U.S.C. §523(a)(4) and DENIED as to Plaintiff's action under §523(a)(2)(A).

So Ordered.

DEC 16 2003

/s/ Russ Kendig

RUSS KENDIG
U.S. BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 16th day of December, 2003, the above Memorandum of Decision and Order was sent via regular U.S. Mail to:

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