

The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.



Dated: July 06 2005

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:)	Case No.: 04-37450
)	
Steven Russell Lee)	Chapter 7
and Peggy Joe Lee,)	
)	Adv. Pro. No. 04-3485
Debtors.)	
)	Hon. Mary Ann Whipple
Timber Lake At The Woods Condo-)	
miniums Unit Owners Association,)	
)	
)	Plaintiff,
)	
v.)	
)	
Steven Russell Lee,)	
)	
)	Defendant.

MEMORANDUM OF DECISION AND ORDER
REGARDING MOTION FOR DEFAULT JUDGMENT

Timber Lake At The Woods Condominiums Unit Owners Association, d/b/a Timber Lake Unit Owners Association, d/b/a Timber Lake Condo Association (“Plaintiff”), is before the court on its Motion for Default Judgment in this adversary proceeding.

On December 22, 2004, Plaintiff filed a Complaint to Determine Dischargeability of Debt, and Objecting to Discharge, alleging that, as a member of Plaintiff’s board of managers and as its treasurer, Steven Russell Lee (“Defendant”) embezzled or converted approximately \$128,000 of Plaintiff’s funds. Defendant is the Chapter 7 Debtor in Case No. 04-37450 pending in this court. Count One of the complaint seeks a determination that the debt to Plaintiff arising from such conduct is nondischargeable pursuant to 11 U.S.C. § 523(a)(2), (4), and (6). Count Two of the complaint seeks, in the alternative, judgment barring Defendant’s discharge pursuant to 11 U.S.C. § 727(a)(2)-(5). The demand for judgment in the complaint seeks a money judgment against Defendant in the amount of \$128,000.00, plus attorney’s fees and costs.

The court has jurisdiction of this adversary proceeding under 28 U.S.C. §1334(b) and the general order of reference entered in this district. Proceedings to determine dischargeability of debts and objections to discharge are core proceedings that this court may hear and decide. 28 U.S.C. § 157(b)(1) and (b)(2)(I) and (J).

On January 7, 2005, the clerk issued a Summons and Notice of Pre-Trial Conference, which set February 7, 2005, as the deadline for an answer or motion in response to the complaint and scheduled a pretrial conference for February 22, 2005. Process was properly served on Defendant on January 10, 2005, by mailing copies of the summons and complaint to him at the address set forth in his petition and to his attorney. Fed. R. Bankr. P. 7004(b)(9). Defendant did not timely file an answer or motion and did not appear at the pretrial conference.

On March 8, 2005, Plaintiff filed the motion presently before the court. The motion seeks a default judgment on Count One of the complaint in the amount of \$128,000.00 plus attorney’s fees and costs, and a declaration that the indebtedness evidenced by the judgment is nondischargeable.¹ Also on March 8,

¹ The motion does not seek judgment on or address Count Two of the complaint, and so the court
(continued...)

copies of the motion were served on Defendant's attorney by mail and electronically, and were served on the Defendant by mail. The court conducted a hearing on the motion on April 5, 2005, at which Defendant did not appear. On April 29, 2005, Plaintiff filed an affidavit substantiating \$85,000.00 in actual damages and stating that Plaintiff had by then incurred \$20,757.84 in legal fees and costs as a result of Defendant's conduct. Also on April 29, copies of the affidavit were served on Defendant and his attorney in the same manner as the Motion for Default Judgment. Defendant has not responded to the motion or affidavit. Defendant has thus failed to plead and otherwise defend this adversary proceeding as provided by the Federal Rules of Bankruptcy Procedure and the Federal Rules of Civil Procedure. Plaintiff is therefore entitled to a default judgment in its favor. Fed. R. Bankr. P. 7055; Fed. R. Civ. P. 55(a), (b)(2).

As a result of Defendant's default, the court treats the well-pleaded factual allegations of the complaint as true. Also, the facts set forth in the supplemental Affidavit of Dana A. Lambillotte have not been contested. The facts in the complaint and in the affidavit establish that Plaintiff is entitled to judgment in its favor excepting a debt owed to it by Defendant from his Chapter 7 discharge under 11 U.S.C. § 523(a)(4) as a debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny."

The Sixth Circuit Court of Appeals has determined that bankruptcy courts have jurisdiction to enter money judgments in dischargeability proceedings. *Longo v. McLaren (In re McLaren)*, 3 F.3d 958, 966 (6th Cir. 1993). Plaintiff's complaint demands a money judgment in addition to a determination that the debt

¹ (...continued)

will treat the motion as a notice of voluntary dismissal insofar as that claim is concerned. *See* Fed. R. Bankr. P. 7041; Fed. R. Civ. P. 41(a)(1). Nor do the complaint or affidavit set forth any facts, as opposed to a conclusory statement of the law, providing a basis for denial of Defendant's discharge under Section 727(a)(1)-(5) of the Bankruptcy Code. Rule 7041 provides, however, that no complaint objecting to a debtor's discharge shall be dismissed without notice to the trustee, the United States trustee and any other persons that the court may direct, and only on terms deemed proper. The purpose of this rule is to permit any party that may have been relying on the commencement of a discharge objection to intervene, and also to ensure that a debtor is not being permitted to in effect "buy" a discharge. *ITT Fin. Servs. V. Corban (In re Corban)*, 71 B.R. 327,329 (Bankr. M.D. La. 1987). Thus, before final judgment can be entered in this adversary proceeding, the court will require Plaintiff to give notice of such apparently intended dismissal.

owed to Plaintiff is excepted from Defendant's discharge. A judgment by default is limited by Rule 54(c), Fed. R. Bankr. P. 7055; Fed. R. Civ. P. 55(d), which provides that a "judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment." Fed. R. Bankr. P. 7054; Fed. R. Civ. P. 54(c). The demand for relief in Plaintiff's complaint requests a money judgment of \$128,000.00, plus attorney's fees and costs. The Lambillote affidavit proves damages in the amount of \$85,000.00, which is the amount of judgment that will be entered by court as established by the evidence. See Fed. R. Bankr. P. 7055; Fed. R. Civ. P. 55(b)(2); Fed. R. Bankr. P. 9017; Fed. R. Civ. P. 43(e).

Regarding the request for an award of attorney's fees, "it is well-established that in the case of a tort involving elements of fraud, malice, or insult where it is determined that punitive damages are warranted, attorney fees may also be awarded as compensatory damages. However, attorney fees may not be recovered in such a case unless the circumstances justify an award of punitive damages." *Farmers St. Bank & Trust Co. v. Mikesell*, 51 Ohio App. 3d 69, 86 (1990) (citing *Roberts v. Mason*, 10 Ohio St. 278, 281 (1959)) (other citations omitted). Thus, under Ohio law, punitive damages need not be actually awarded in order to award attorney's fees, but the circumstances must be such that punitive damages could be included in the judgment. *United Power Co. v. Matheny*, 81 Ohio St. 204, (1909). As most recently stated by the Ohio Supreme Court: "This court . . . has heretofore adopted and applied the rule approved by courts of last resort of several other states that facts which justify the infliction of exemplary damages will also justify the jury in adding the amount of counsel fees to the verdict, not as a part of exemplary damages, but as compensatory damages." *N.Y., C. & St. L. R. Co. v. Grodek*, 127 Ohio St. 22, 24 (1933). Plaintiff's claim constitutes a "tort involving elements of fraud, malice, or insult," and so it is proper under Ohio law to include an award of attorney's fees as part of compensatory damages. The Lambillote affidavit establishes that the attorney's fees incurred are \$20,757.54.

There is, however, a procedural impediment to Plaintiff's request for an award of attorney's fees as part of the money judgment. Rule 7008(b) of the Federal Rules of Bankruptcy Procedure provides: "A request for an award of attorney's fees shall be pleaded as a claim in a complaint, cross-claim, third-party complaint, answer, or reply as may be appropriate." Thus, attorney's fees must be sought in a bankruptcy adversary proceeding by a separate count of the complaint or other pleading and not merely in the prayer

for relief. *E.g.*, *Leonard v. Onyx Acceptance Corp.*, Nos. 02-8125, Civ. 03-1117 ADM, 2003 WL 1873283, at *2 (D. Minn. Apr. 11, 2003); *Citibank USA, N.A. v. Spring (In re Spring)*, Nos. 03-35552 (LMW), 04-3007 (LMW), 2005 WL 588776, at *6 (Bankr. D. Conn. Mr. 7, 2005); *Garcia v. Odom (In re Odom)*, 113 B.R. 623, 625 (Bankr. C.D. Cal. 1990); *see V.M. v. S.S. (In re S.S.)*, 271 B.R. 240, 244 (Bankr. D.N.J. 2002). Plaintiff's complaint is divided into two counts, neither of which sets forth a claim for attorney's fees; rather, that request is included only in the prayer for relief. Thus, in the absence of amendment of the complaint to set forth such a claim, the court will not grant a default judgment for attorney's fees notwithstanding the demand in the prayer for relief. As Defendant has not served any responsive pleading, Plaintiff is permitted to amend its complaint "as a matter of course at any time." Fed. R. Bankr. P. 7015; Fed. R. Civ. P. 15(a). As final judgment cannot be entered at this time due to the pendency of the § 727 claim, *see* Fed. R. Bankr. P. 7054; Fed. R. Civ. P. 54(b), pending notice of dismissal of same by Plaintiff under Rule 7041 of the Bankruptcy Rules, the court will consider any amended complaint filed within 10 days of the order implementing this memorandum in connection with its entry of a default judgment, including attorney's fees as established by the Lambilotte affidavit. In the absence of an amended complaint setting forth a claim for attorney's fees under Rule 7008 of the Bankruptcy Rules, the court will not include attorney's fees in the final judgment.²

Subject to further proceedings as a result of the actions specified below, the court will enter a separate order granting the motion for default judgment and a separate final judgment as set forth above. For good cause shown,

IT IS ORDERED that, on or before 14 days from the date of this memorandum of decision, Plaintiff shall file and serve on the trustee and the United States trustee, as well as on any creditor requesting notice in the underlying chapter 7 case of Defendant, notice of its intended dismissal of its claim objecting to Defendant's discharge, with a specification appearing thereon that any objection to dismissal shall be filed and served within 10 days of service of the notice; and

² Service and filing of an amended complaint will extend to Defendant a new period of time in which to move or plead in response to the amended complaint, Fed. R. Bankr. P. 7015; Fed. R. Civ. P. 15(a), a risk for Plaintiff to evaluate in connection with its decision to amend.

IT IS FURTHER ORDERED that Plaintiff shall file and serve its amended complaint, if any, on or before 14 days from the date of filing of this memorandum of decision.