

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



| | | |
|--------------------------|---|-------------------------------------|
| In re: |) | Case No. 04-23186 |
| |) | |
| JAMES M. SAWYER and |) | Chapter 7 |
| DELORES L. SAWYER, |) | |
| |) | Judge Pat E. Morgenstern-Clarren |
| Debtors. |) | |
| _____ |) | |
| |) | |
| INTERNATIONAL FIDELITY |) | Adversary Proceeding No. 05-1033 |
| INSURANCE COMPANY, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | <u>MEMORANDUM OF OPINION</u> |
| |) | |
| JAMES M. SAWYER, et al., |) | |
| |) | |
| Defendants. |) | |

The plaintiff International Fidelity Insurance Company filed a complaint to determine the dischargeability of a debt owed by the debtor-defendants, James Sawyer and Delores Sawyer. The company moves for summary judgment on counts II and III, which are based on bankruptcy code §§ 523(a)(4) and (6), alleging that there are no material issues of fact and it is entitled to judgment as a matter of law. The debtors oppose the motion.¹ For the reasons stated below, the motion is denied.

¹ Docket 15, 16, 17, 18, 21.

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).

THE SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c) (made applicable by FED. R. BANKR. P. 7056). *See also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The movant must initially demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. at 323. The burden is then on the non-moving party to show the existence of a material fact which must be tried. *Id.* The non-moving party may oppose a proper summary judgment motion “by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves” *Celotex Corp. v. Catrett*, 477 U.S. at 324. All reasonable inferences drawn from the evidence must be viewed in the light most favorable to the party opposing the motion. *Hanover Ins. Co. v. American Eng’g Co.*, 33 F.3d 727, 730 (6th Cir. 1994). Summary judgment may be granted when “the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.” *Northland Ins. Co. v. Guardsman Prods., Inc.*, 141 F.3d 612, 616 (6th Cir. 1998) (quoting *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992)).

FACTS AND DISCUSSION

I.

The debtor James Sawyer was the president and chief executive officer of Meroe Contracting and Supply Company. Meroe entered into construction contracts with the Ohio Department of Transportation and the United States Department of the Interior. International Fidelity Insurance Company (Fidelity) provided Meroe with performance and payment bonds on two such contracts.² James Sawyer and Delores Sawyer, individually, entered into an indemnity agreement with Fidelity that provided in part:

INDEMNITY

SECOND: The Contractor and Indemnitors shall exonerate, indemnify and keep indemnified the Surety from and against any and all liability for losses and/or expenses of whatsoever kind or nature (including but not limited to, interest, court costs and counsel fees) and from and against any and all such losses and/or expenses which the Surety may sustain and incur: (1) By reason of having executed or procured the execution of the Bonds, (2) By reason of the failure of the Contractor or Indemnitors to perform or comply with the covenants and conditions of this Agreement or (3) In enforcing any of the covenants and conditions of this Agreement. Payment by reason of the aforesaid causes shall be made to the Surety by the Contractor and Indemnitors as soon as liability exists or is asserted against the Surety, whether or not the Surety shall have made any payment therefore. Such payment shall be equal to the amount of the reserve set by the Surety. In the event of any payment by the Surety the Contractor and Indemnitors further agree that in any accounting between the Surety and the Contractor, or between the Surety and the Indemnitors, or either or both of them, the Surety shall be entitled to charge for any and all disbursements made by it in good faith in and about the matters herein contemplated by this Agreement under the belief that it was liable for the sums and amounts so disbursed, or that it was

² The complaint refers to two contracts, but the summary judgment motion refers to three. It is not necessary to resolve this discrepancy in connection with this motion.

necessary or expedient to make such disbursements, whether or not such liability, necessity or expediency existed; and that the vouchers or other evidence of any such payments made by the Surety shall be prima facie evidence of the fact and amount of the liability to the Surety.

The indemnity agreement provides further:

TRUST FUND

FOURTH: If any of the Bonds are executed in connection with a contract which by its terms or by law prohibits the assignment of the contract price or any part thereof, the Contractor and Indemnitors covenant and agree that all payments received for or on account of said contract shall be held as a trust fund in which the Surety has an interest, for the payment of obligations incurred in the performance of the contract and for labor, materials, and services furnished in the prosecution of the work provided in said contract or any authorized extension or modification thereof; and, further, it is expressly understood and declared that all monies due and to become due under any contract or contracts covered by the Bonds are trust funds, whether in the possession of the Contractor or Indemnitors or otherwise, for the benefit of and for payment of all such obligations in connection with any such contract or contracts for which the Surety would be liable under any of said Bonds, which said trust also inures to the benefit of the Surety for any liability or loss it may have or sustain under any said Bonds, and this Agreement and declaration shall also constitute notice of such trust.

On February 20, 2004, Meroe filed its chapter 7 bankruptcy case. Fidelity claims that Meroe did not properly apply funds received under the contracts, which caused Fidelity to be responsible for deficiencies under the bonds. Those amounts are the subject of this adversary proceeding.

II.

A chapter 7 debtor's debts are discharged with certain exceptions. Fidelity's motion relies on these two exceptions:

(a) A discharge under section 727 . . . does not discharge an individual debtor from any debt—

(4) for . . . defalcation while acting in a fiduciary capacity . . .
[or]

* * *

(6) for willful and malicious injury by the debtor to another entity [.]

11 U.S.C. §§ 523(a)(4) and (6).

III.

In count II of the complaint, Fidelity alleges that the Sawyers each committed defalcation while acting in a fiduciary capacity. In its summary judgment motion, Fidelity relies on the trust fund paragraph in the indemnity agreement quoted above. According to the contract language, the trust fund provision applies to a bond executed in connection with a contract which by its terms or law prohibits the assignment of the contract price. Fidelity did not present evidence to establish that the bonds at issue fall into this category. While Fidelity did attach a large volume of paper to its motion, it did not identify any particular part of a contract showing that the contracts at issue have the cited prohibition. It is Fidelity's burden, as the movant, to do so. Absent that evidence, Fidelity failed to establish that there is no genuine issue of material fact and it is entitled to judgment under § 523(a)(4) as a matter of law. The motion on count II is, therefore, denied.

IV.

Second, Fidelity argues it is entitled to summary judgment on count III, in which it seeks to except its debt from discharge because the debt is for willful and malicious injury by the

debtors to another entity or the property of another entity. See 11 U.S.C. § 523(a)(6). In *Kawaauhau v. Geiger*, 523 U.S. 57(1998), the Supreme Court considered whether this exception covers acts done intentionally that cause injury or instead applies only to acts done with the actual intent to cause injury. The Court held that only acts done with the intent to injure come within this exception. In applying this standard, the Sixth Circuit has clarified that “unless ‘the actor desires to cause [the] consequences of his act, or . . . believes that the consequences are substantially certain to result from it,’ he has not committed a willful and malicious injury as defined under § 523(a)(6).” *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 464 (6th Cir. 1999) (quoting Restatement (Second) Torts § 8A, at 15 (1964)).

Fidelity relies on two arguments to prove that the debt is not discharged under § 523(a)(6):

1. “Mr. Sawyer admitted in his deposition that he knowingly used funds from the Meroe general account, which included hundreds of thousands of dollars paid on bonded projects (i.e., trust funds), for expenses relating to unbonded projects, including those relating to his construction of the Golden Dolphin Spa and other properties;” and

2. Fidelity proved malice because “[t]he use of the trust funds was a ‘conscious disregard of [Defendants’] duties under the Indemnity Agreement.’”³

Bearing in mind that all evidence must be construed in the light most favorable to the non-moving party, the deposition testimony shows that Mr. Sawyer deposited money relating to bonded projects in the general Meroe account, which account was used among other things to pay for projects not covered by bonds. This does not prove that Mr. Sawyer acted with the intent to cause Fidelity to be responsible on the bonds or that he believed the consequence was

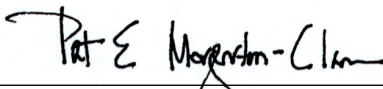
³ Summary judgment motion at 17.

substantially likely to flow from his act. Fidelity does not argue that the contract prohibited Meroe from depositing the funds in this fashion, so the act of putting the money into the general account does not alone prove any relevant fact. Moreover, the Sawyers correctly point out that Fidelity does not identify any evidence at all that would result in a finding of liability as to Mrs. Sawyer. Further, Fidelity did not support with evidence the second argument that the Sawyers used funds in conscious disregard of a duty owed to Fidelity. In fact, Fidelity “admits that Mr. Sawyer did not act with specific intent and did not actively seek to injure [Fidelity].”⁴ Fidelity did not, therefore, meet its burden of proving that there is no genuine issue of material fact and that it is entitled to judgment on count III.

CONCLUSION

For the reasons stated, Fidelity’s motion for summary judgment is denied. A separate order will be entered reflecting this decision.

Date: 8 September 2005



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk’s office email and the Bankruptcy Noticing Center

⁴ Fidelity reply brief at 8.

THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

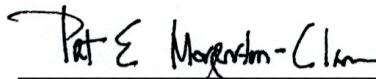


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| |) | |
| Defendants. |) | |

For the reasons stated in the memorandum of opinion filed this same date, International Fidelity Insurance Company's motion for summary judgment is denied. (Docket 15).

IT IS SO ORDERED.

Date: 8 September 2005



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center