

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE: \*  
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ANGELO G. DePASCALE and, \*  
NELDA O. DePASCALE, \* CASE NUMBER 05-43659  
\*  
Debtors. \*  
\*  
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\*  
DAVID SPOTTS, \*  
\* ADVERSARY NO. 05-4225  
Plaintiff, \*  
\*  
vs. \*  
\*  
ANGELO G. DePASCALE, et al., \*  
\* HONORABLE KAY WOODS  
Defendants. \*  
\*

\*\*\*\*\*  
ORDER DENYING MOTION TO ALTER OR AMEND  
JUDGMENT ENTERED ON SEPTEMBER 8, 2006  
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On September 8, 2006, this Court entered a Memorandum Opinion and Order that dealt with cross motions for summary judgment filed by the parties to this adversary proceeding. The Court concluded that (i) the debt represented by the Judgment on the Complaints (as defined in the Memorandum Opinion) was dischargeable, (ii) the debt represented by the Judgment for Attorneys' Fees (as defined in the Memorandum Opinion) was non-dischargeable, and (iii) Plaintiff lacked standing to pursue his state law claim in this Court.

On September 18, 2006, Plaintiff David M. Spotts

("Plaintiff") filed Motion of Plaintiff, David Spotts, to Alter or Amend Judgment Entered on September 8, 2006 ("Motion to Amend"). In the Motion to Amend, Plaintiff states that he "seeks modification or clarification as to the finding [that Plaintiff does not have standing to pursue his state law claims] on two questions." Plaintiff then proceeds to raise only one question regarding the issue of standing, *i.e.*, "are [the state law claims] dismissed or is the matter stayed until such time as Plaintiff may have standing?"

Regarding the alleged cause of action based on 11 U.S.C. § 523, Plaintiff argues (again) that the amount of the Judgment on the Complaints demonstrates that such judgment was based on willful and malicious injury to Plaintiff. Plaintiff argues that, to the extent this Court found no facts to support such an inference, that is because Plaintiff failed to bring all relevant facts to the attention of the Court in his prior motion for summary judgment. Debtors/Defendants Angelo G. DePascale and Nelda O. DePascale ("Defendants") filed Debtors' Response to Plaintiff's Motion to Alter or Amend Judgment, which merely argues that the motion is unfounded and should be denied.

In his Motion to Amend, Plaintiff seeks a "second bite at the apple" to try to raise a genuine issue of material fact when he failed to do so in both his motion for summary judgment and his response to Defendants' motion for summary judgment. The Court held that the debt evidenced by the Judgment on the Complaints was

dischargeable because it was based on breach of contract; the amount of such Judgment is the amount Plaintiff asserted Defendants owed him in the Complaint filed in the Municipal Court. There is nothing in the Judgment on the Complaints (or any part of the record before the Court at the time summary judgment was granted in favor of Defendants on this issue) from which an inference can be drawn that the Magistrate turned the Judgment on the Complaints into an award of damages for willful and malicious injury - instead of the breach of contract action that was pled - *based solely upon the amount* of the Judgment on the Complaints. Nothing in the Motion to Amend alters this fact or causes the Court to alter or amend its decision on this issue.

Plaintiff fixates on footnote seven (page 21) of the Memorandum Opinion, but that fixation is meritless because the footnote is dicta. The Court did not base any part of its decision on Plaintiff's "unclean hands." Plaintiff had argued in his motion for summary judgment that "[t]he Municipal Court . . . entered judgments on January 21, 2005 against [Defendants] as sanctions in the full amounts of the loans, notwithstanding that everyone agreed about \$14,000.00 principal, plus interest, had been paid, and for \$3,000 in attorney fees." In support of this statement, Plaintiff cited the Court to Exhibits 8 and 9 to the Motion, which are the two judgment entries. Exhibit 8 is the Judgment on the Complaints and Exhibit 9 is the Judgment for Attorneys' Fees. Exhibit 8 provides that "Magistrate David C.

Sheldon recommended . . . that judgment be rendered against each of the defendants for the relief demanded in the respective complaints, plus attorney's fees, for the failure of the respective defendants to appear for the scheduled depositions." (Ex. 8, p.1.) This Exhibit is consistent with the Court's finding that the Magistrate made the award "for the relief demanded in the . . . complaints," *i.e.*, breach of contract, because the Defendants had failed to appear at depositions as ordered and, thus, thwarted Plaintiff's ability to conduct discovery. This conclusion is bolstered by Exhibit 9, which specifically deducted 30% from the requested attorneys' fees because that percentage of time was spent on "non-discovery issues." The Judgment for Attorneys' Fees demonstrates that Defendants were sanctioned for failing to appear at the discovery depositions in an amount to compensate Plaintiff's attorney for fees connected with pursuing such unproductive discovery. If, as Plaintiff argues, the entire amount of the Judgment on the Complaints was to compensate Plaintiff for Defendants' "willful and malicious injury" to Plaintiff, to be consistent, the Municipal Court would not have limited the award of attorneys' fees to discovery issues. By entering two separate judgment entries, the Municipal Court recognized that the Judgment on the Complaints was for breach of contract and the Judgment for Attorneys' Fees was a sanction for failing to appear at depositions. If the Judgment on the Complaints was an award for the tort of willful and malicious injury, the attorneys' fees could

have been (and likely would have been) awarded in the same judgment entry and would not have been reduced to compensate Plaintiff's attorney only for a "reasonable fee for discovery work in Ashtabula County." (Ex. 9, ¶ 4.)

Furthermore, Plaintiff conceded - or at least argued in the alternative - in his motion for summary judgment that "[t]he state court judgments, or at least part of them, are non-dischargeable pursuant to 11 U.S.C. § 523(a)(6): being for willful and malicious injury by the debtor to another entity or the property of another entity." (Plaintiff's Motion for Summary Judgment, p. 14. Emphasis added.) This Court agreed that the Judgment for Attorneys' Fees was non-dischargeable, but did not so agree regarding the Judgment on the Complaints.

Regarding the state law claims, this Court held that Plaintiff did not have standing to pursue them. Plaintiff questions whether this means that the state law claims are dismissed or merely stayed. Nowhere in the Memorandum Opinion and Order does the Court indicate that any part of the adversary proceeding is stayed. Although Plaintiff attempts to allege facts upon which to base a fraudulent transfer action, Plaintiff has not alleged that Defendants owe him a debt as a result of any alleged fraudulent transfer of real or personal property. Neither is there any judgment relating to any alleged fraudulent transfer. In order for Section 523 to be applicable, it is axiomatic that there must be a *debt*. "A discharge under section 727 . . . does not discharge

an individual debtor from any debt - . . . ." 11 U.S.C. § 523(a). The instant adversary proceeding contains two counts. The first count relates to the non-dischargeability of the Judgment on the Complaints and the Judgment for Attorneys' Fees. The second count alleges that "claims and/or debts" relating to alleged "fraudulent conveyances and conspiracy to defraud creditors, particularly Plaintiff" are non-dischargeable. (Complaint, ¶ 6.) Although Plaintiff refers to the alternative of "claims and/or debts," Plaintiff fails to assert that there is any debt certain owing with respect to Count Two. Plaintiff acknowledges that the alleged fraudulent conveyance related to and affected all creditors, as well as himself. As the Court has held, to the extent there is any cause of action for fraudulent conveyance or conspiracy to defraud, such cause of action belongs to the estate and must be asserted by the Chapter 7 Trustee; Plaintiff no longer has standing to continue any such action. As pointed out, Plaintiff never sought leave to modify the stay to prosecute the state law claims in state court nor has he demanded the Trustee to pursue such claims for the benefit of the estate. To the extent that the Memorandum Opinion and Order needs clarification, this Court holds that Count Two of the Complaint is dismissed.

Plaintiff has provided no reason for this Court to alter

or amend its prior Memorandum Opinion and Order. Accordingly, the Motion to Amend is hereby denied.

IT IS SO ORDERED.

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Honorable Kay Woods  
United States Bankruptcy Judge