UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 12-16256
	)	
DAVID J. FULTON and TRICIA L. FULTON,	)	Chapter 7
	)	
Debtors.	)	Chief Judge Pat E. Morgenstern-Clarren
	)	
LEYSON ENTERPRISES, LLC,	)	Adversary Proceeding No. 12-1354
	)	
Plaintiff,	)	
	)	
v.	)	**MEMORANDUM OF OPINION**[1]
	)	
DAVID J. FULTON, *et al.*,	)	
	)	
Defendants.	)	

Creditor Leyson Enterprises, LLC filed this complaint seeking a determination that a debt owed by its former employees, debtors David Fulton and Tricia Fulton, is not dischargeable because it was the result of either (1) embezzlement or larceny; or (2) a willful and malicious injury inflicted by the debtors. *See* 11 U.S.C. § 523(a)(4) and (a)(6). For the reasons stated below, the debt is discharged.

JURISDICTION

Jurisdiction over this proceeding exists under 28 U.S.C. § 1334 and General Order No. 2012-7 entered by the United States District Court for the Northern District of Ohio on April 4, 2012. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I), and it is within the

[1] This opinion is not intended for publication, either print or electronic.

court's constitutional authority as analyzed by the United States Supreme Court in *Stern v. Marshall*, 131 S.Ct. 2594 (2011).

THE TRIAL

The plaintiff presented its case through the direct testimony of its owner Weert Ley and his son Stephen Ley, the testimony of David Fulton as if on cross-examination, and cross-examination of Tricia Fulton. The plaintiff also introduced a number of exhibits into evidence. In addition to the debtors testifying on their own behalf, they presented their case through the testimony of Michael Solomon, a former employee of the plaintiff.

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

BANKRUPTCY CODE §§ 523(a)(4) AND (6)

A consumer debtor's debts are discharged in a chapter 7 case with certain exceptions. 11 U.S.C. § 523. The exceptions raised in the complaint are debts (1) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny; and (2) for willful and malicious injury by the debtor to another entity or to the property of another entity. 11 U.S.C. § 523(a)(4) and (a)(6). The plaintiff must prove its case by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991).

Embezzlement and larceny under § 523(a)(4) are defined under federal law. *Bullock v. Bankchampaign, N.A.*, 133 S.Ct.1754, 1760-61 (2013). Embezzlement is defined as "the

fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." *Brady v. McAllister (In re Brady)*, 101 F.3d 1165, 1172-73 (6th Cir. 1996) (quotation marks and citation omitted). A creditor proves embezzlement by showing: (1) it entrusted its property to the debtor; (2) the debtor appropriated the property for a different use than that for which it was entrusted; and (3) circumstances indicating fraud. *Id.* at 1173. Larceny, on the other hand, is defined as "the fraudulent and wrongful taking and carrying away of the property of another with intent to convert such property to the taker's use without the consent of the owner." *Graffice v. Grim (In re Grim)*, 293 B.R. 156, 166 n.3 (Bankr. N.D. Ohio 2003). Larceny, therefore, requires that the original taking must have been unlawful, while embezzlement does not.

To recover under § 523(a)(6), a creditor must show both willful injury and malicious injury. *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 463 (6th Cir. 1999). An intentional act alone is insufficient; the injury itself must be intentional. *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998). At closing argument, plaintiff's counsel conceded that the evidence did not support the (a)(6) claim and it will not be discussed further here.

FACTS AND DISCUSSION

A. Leyson Enterprises LLC

Leyson Enterprises LLC is a small, family run business that sells and services small motorized equipment such as lawnmowers, snow blowers, and related landscaping equipment. Weert Ley's father started the business and Weert began working at the business as a boy. Weert, who is now 73, is the sole member of the LLC. When David Fulton was 12 years old, he

started to work part-time for Weert at Leyson (or its predecessor in interest). After graduating from high school, David came to work full-time and learned the business from Weert.

Tricia Fulton,[2] then known as Tricia Ley, began to work for the business in 1999. At that time, she was married to Weert's son Stephen and she routinely brought their two young daughters to work. Tricia did the bookkeeping and worked in the front office with sales of new equipment, while Weert and David did the repairs in the back workshop. For a short time, two other people worked on repairs with them.

In 2006, the company made some operational changes. First, at the suggestion of Leyson's CPA, the company moved away from manual records and began to computerize. Weert developed some familiarity with the computer, but only in a limited way. The second change had to do with credit cards. Up until then, the company did not have a credit card; instead, Weert had a personal credit card which Tricia or David would borrow when they needed to purchase something. They all agreed to open a new credit card account for the company with Shell because it had a rebate program. Weert, Tricia, and David each had a company credit card. Third, Weert agreed that Tricia and David could each get a cell phone. Weert, who viewed cell phones as unnecessary, did not want one for himself, but instead used one of theirs on occasion. The switch from a land line to the cell phones saved the company a great deal of money in long-distance calls when they contacted suppliers.

Even after the operational changes, Weert continued his long-standing practice of opening

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[2] This defendant also used the name Tricia Peckens (her birth name) and Tricia Ley (her name when married to her first husband). To avoid confusion, she will be referred to by her first name. Similarly, there are two people with the last name Ley; they will also be referred to by first names.

the mail. He would then give the bills to Tricia to pay. Occasionally, he asked her a question about the credit card bill and she answered it. Tricia would also reconcile the bank statements.

In 2007, Tricia and David began to negotiate with Weert to purchase Leyson because Weert wanted to pull back from some aspects of the business. In the initial discussions, they all anticipated that Weert would continue to work for the company after the sale doing repairs. David formed a corporation called Fulton Power House, LLC which was how he intended to operate the business.

B. Things Fall Apart

In July 2007, Tricia filed for divorce from Stephen Ley. Upon learning this, Weert said that he would not sell the business to Tricia. David proposed that he would buy the business individually, but Weert declined.

By letters dated October 12, 2007, David, Tricia, and the two other employees tendered their resignations effective November 21, 2007, thus giving six weeks notice. They all continued to work in the shop until the November 21, 2007 departure date. At some later point, David and Tricia married.

C. The State Court Lawsuit

Weert asked Stephen to review some of the company records for "unclassified" expenses. Stephen, who is a financial analyst at Progressive Insurance, did so. He and Weert sat down with hundreds of credit card receipts and considered whether in their opinions the receipts reflected business expenses or personal expenses of David or Tricia from 2005, 2006, and 2007. Stephen then compiled a chart of the charges that they believed fell into the latter category. The

compilation included cell phone bills, lunch bills, supply bills, and expenses for personal items such as clothes or food for Tricia and Stephen's daughters.

In January 2009, Leyson sued David and Tricia alleging that: (1) they converted company funds in an amount greater than $25,000.00; and (2) they acted fraudulently, with ill will, malice and conscious disregard of the company's rights, which entitled the company to punitive damages and attorney fees. The parties settled the matter by agreeing to a judgment in favor of Leyson in the amount of $44,175.86 plus interest and court costs.

For purposes of this bankruptcy case, that judgment establishes the amount of the debt. *See Packer, Thomas & Co. v. Eyster*, 709 N.E.2d 922, 928 (Ohio Ct. App. 1998) (stating that an agreed judgment is the same as a litigated one for purposes of preclusion); and *National City Bank v. Plechaty (In re Plechaty)*, 213 B.R. 119, 128-29 (B.A.P. 6th 1997) (stating that preclusion principles apply in dischargeability proceedings with respect to the amount of an Ohio judgment). On the other hand, whether the debt is dischargeable is left to this court. *Brown v. Felsen*, 442 U.S. 127, 138-39 (1979). As stated above, Leyson contends that the debt should not be discharged because it was incurred by larceny or embezzlement.

D. The Use of the Company Credit Card

The testimony showed that:

(1) For as long as Weert has run the business, he has always said that if someone spent money on the company's behalf (either cash or using a credit card), they needed to bring back a receipt;

(2) David and Tricia followed that policy;

(3) With Weert's knowledge and permission, Tricia and David would sometimes use the company credit card for personal expenses; and

(4) If David and Tricia did use the company credit card in that fashion, they were expected to reimburse the company.

The major factual disagreement is over whether lunch and cell phone expenses were personal or business, and whether David and Tricia fully reimbursed the company for those and other personal expenses charged to the company. As to the lunch issue, the testimony showed that it was common for Weert, Tricia, or David to take lunch orders from anyone working and bring back food from a fast food restaurant that was charged on the company credit card.

The testimony did not show that Weert told the others that he expected them to reimburse the company for this food and, in fact, month after month after month he received and reviewed credit card statements with such charges without raising any issue with either David or Tricia. The court concludes that the company did not expect David, Tricia, or any other employee to reimburse the company for these lunches.

The court reaches the same conclusion with respect to the cell phones. Weert did not think that cell phones were a necessary business expense, but he allowed David and Tricia to obtain and use them and, again, reviewed the cell phone bills for years without telling them that he expected them to reimburse the company.

As to the other expenses, the evidence suggested a discrepancy between the amount charged by Tricia and David and the amount reimbursed, but only in the most general way. The company followed a casual policy for tracking these reimbursements. Tricia testified without contradiction that she would reimburse for personal expenses charged to the credit card in one of

two ways: she would put the money in the cash register drawer or the safe the same day or she would wait until payday, have Weert cash her paycheck, and then put the money back. No one kept a running tally of the amount charged as against the reimbursements. As to David, he testified that in addition to directly reimbursing the company for some charges, he would sometimes use "banked hours" as a set-off against personal items charged on the credit card. These hours reflect time above 40 hours that he routinely worked without being paid. For years, David and Weert both worked more than 50 hours a week and in the busy season their hours climbed to 60 to 70 hours a week. The pay for each employee, however, stayed at 40 hours per week regardless of the number of hours worked. This did not seem to be a bone of contention between or among any of the parties; as is true of many small businesses, they simply did what needed to be done to get the work completed on time. While the court finds that David did routinely work more than 40 hours without being paid for those hours, it also finds that Weert never expressly agreed to a system of "banked hours" in which the unpaid time would be set off against the personal expenses. Instead, this casual set-off just developed over the years.

More fundamentally, even if Leyson had proved that David and/or Tricia failed to reimburse the company for some expenses, that is a far cry from larceny or embezzlement. Weert unquestionably permitted them to use the credit card as they did, which rules out larceny. Similarly, the evidence does not show that they embezzled anything because Weert expressly permitted them to use the credit card for personal items, and there are no circumstances showing fraud.

The court concludes that what happened in this sad case is this: Weert took David in as a teenager and, admirably, taught him the business. David testified that he viewed Weert as a

father. Weert planned to sell the business to David and Tricia; they intended to buy it and continue to run it with Weert's involvement. That plan fell apart when Tricia filed for divorce from Weert's son. With Weert declining to sell, David and Tricia decided to leave. At that point, Weert–with Stephen's help–began to comb through the records and concluded that Tricia and David had taken advantage of him financially. The evidence did not, however, show that there was anything in the financial relationship that even came close to larceny or embezzlement. Leyson did not, therefore, meet its burden of proving that the debt is not dischargeable.

CONCLUSION

For the reasons stated, the debt owed by Tricia Fulton and David Fulton to Leyson Enterprises, LLC is discharged. The court will enter a separate judgment reflecting this decision.

Pat E. Morgenstern-Clarren
Chief Bankruptcy Judge

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LEYSON ENTERPRISES, LLC,	)	Adversary Proceeding No. 12-1354
	)	
Plaintiff,	)	
	)	
v.	)	**JUDGMENT**
	)	
DAVID J. FULTON, *et al.*,	)	
	)	
Defendants.	)	

For the reasons stated in the memorandum of opinion entered this same date, the debt owed by defendant-debtors Tricia and David Fulton to plaintiff Leyson Enterprises, LLC is determined to be dischargeable and judgment on the complaint is, therefore, entered in favor of the defendant-debtors.

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
Chief Bankruptcy Judge