

I HEREBY CERTIFY that this is a true and correct copy of the original on file in the office of the Clerk, United States Bankruptcy Court for the Northern District of Florida.

TRACI ABRAMS, Clerk, Bankruptcy Court

By Melissa McClure  
Deputy Clerk

UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF FLORIDA  
PENSACOLA DIVISION

IN RE

ELMER C. HILL  
Debtor

CASE NO. 92-04836

HAVOCO OF AMERICA  
Plaintiff

vs.

ADV. NO. 92-8071

ELMER C. HILL  
Defendant

O R D E R

This matter is before the Court on the Motion of Havoco for Summary Judgment. The Court has jurisdiction to decide this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). For the reasons indicated below, the Court is granting the Motion for Summary Judgment.

FINDINGS AND CONCLUSIONS

In this Adversary Proceeding, Havoco seeks a determination that its debt is excepted from discharge under 11 U.S.C. § 523(a)(4) and/or § 523(a)(6). Havoco is the holder of a \$15,000,000.00 judgment against the debtor which was rendered in December 1990 after a jury trial in the United States District Court for the Northern District of Illinois. A detailed history giving rise to the Illinois action is contained in the Seventh Circuit Court of Appeals decision affirming the jury's verdict and

96 AUG -8 PM 3:38

U. S. BANKRUPTCY COURT  
Northern District of Florida  
DATE ENTERED ON DOCKET:  
8/8/96

67

FILED

judgment in favor of Havoco and against Hill on four (4) counts, one each for conspiracy to defraud, breach of fiduciary duty, fraud and deceit, and tortious interference with contractual relations. See, Havoco of America, Ltd. v. Sumitoma Corporation of America and Elmer C. Hill, 971 F.2d 1332 (7th Cir.1992). In the instant case, Havoco seeks to except its debt from discharge on the ground that it constitutes a debt for fraud or defalcation while acting in a fiduciary capacity pursuant to 11 U.S.C. § 523(a)(4) and/or a debt for willful and malicious injury by the debtor to another entity or to the property of another entity pursuant to 11 U.S.C. § 523(a)(6). Havoco contends that all material issues of fact necessary to establish its entitlement to an exception from discharge have already been litigated between itself and Hill, were determined adversely to Hill, and pursuant to principles of collateral estoppel, may not be relitigated by Hill in the present case.

Issues of dischargeability are within the bankruptcy court's exclusive jurisdiction. However, the bankruptcy court may look to a prior nonbankruptcy court's "determination of subsidiary facts that were actually litigated and necessary to the decision" to bar relitigation of those same factual issues in a discharge exception proceeding. In other words, collateral estoppel principles apply to bankruptcy discharge exception proceedings. In re Shuler, 722 F.2d 1253, 1255 (5th Cir.), cert. denied, 469 U.S. 817, 105 S.Ct. 85, 83 L.Ed.2d 32 (1984); Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991); Brown v. Felsen, 442 U.S. 127, 99

S.Ct. 2205, 60 L.Ed.2d 767 (1979); In re Halpern, 810 F.2d 1061 (11th Cir.1987). Application of the doctrine of collateral estoppel in summary judgment proceedings merely denotes the court's "utilization [of] issue preclusion to reach conclusions about facts that the court would then consider as 'evidence of nondischargeability'" and is not be viewed as a relinquishment of its exclusive responsibility over dischargeability matters. Halpern, 810 F.2d at 1064 (citation omitted).

In order for collateral estoppel to apply, each of the following three elements must be satisfied:

(1) The issue at stake in the bankruptcy proceeding must be identical to the one involved in the prior litigation;

(2) The issue must have been actually litigated in the prior litigation; and

(3) The determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action.

Halpern, 810 F.2d at 1064; In re Held, 734 F.2d 628, 629 (11th Cir. 1984). The burden of proof is on the creditor to prove the necessary elements by a preponderance of the evidence. Grogan, 498 U.S. 279. On its motion for summary judgment, Havoco has provided the Court with the entire record of the four week Illinois trial, and the Court has reviewed extensively, the Sixth Amended Complaint in the Illinois action, the transcript of the four week trial of the Illinois action, the jury instructions given in the Illinois action, the jury verdicts, and the minute order and final judgment. Both parties have also provided the Court with legal briefs each containing extensive citations of authority.

The Sixth Amended Complaint alleges four counts against Hill: Count I - conspiracy to defraud; Count II - breach of fiduciary duty; Count III - tortious interference with contractual relations; and Count IV - fraud and deceit. The same factual allegations in the complaint against Hill form the basis for all four counts. In the jury charge as to Count I, conspiracy to defraud, the jury was charged that "Havoco has the burden of proving by clear and convincing evidence, first, conspiracy, and second, fraud." The jury was further charged that "[f]raud is an intentional misrepresentation or intentional concealment of a material existing fact made by one party which is reasonably relied on by another party to its detriment. To demonstrate fraud against defendant Hill, Havoco must prove, by clear and convincing evidence, each of the following:

1. The defendant made one or more misrepresentations, omissions, or concealments;
2. The misrepresentations, omissions, or concealments related to a material existing fact;
3. The defendant knew or should have known that the misrepresentations were false, or the omissions or concealments made other statements which were made materially misleading;
4. The defendant intended to induce plaintiff to rely upon the misrepresentations, or to cause injury to plaintiff resulting from the omissions or concealments;
5. The plaintiff justifiably relied upon the misrepresentations and suffered injury or damage as a result, or acted without knowledge of material facts which had been omitted or concealed and suffered injury or damage as a result."

As to Count I, the jury found for Havoco and against Hill and awarded compensatory damages in the amount of \$3,562,500.00 and

punitive damages in the amount of \$250,000.00.

As to Count II, breach of fiduciary duty, the jury was charged that it was alleged that "Hill breached a fiduciary ... duty he owed Havoco as an officer and director of Havoco by, one, failing to disclose all material information to Havoco, thus inducing Havoco to assign the Havoco/TVA coal supply contract to R&F Coal, or by, two, taking advantage for his benefit of business opportunities belonging to Havoco.... The three elements that Havoco must prove to establish a claim for breach of fiduciary duty against Hill are, as follows: First, Havoco must prove that at the time certain challenged actions occurred, Hill owed a fiduciary duty to Havoco. You are instructed that Hill was an officer and director of Havoco, and during that period he owed a fiduciary duty to Havoco.... Second, Havoco must prove that Hill breached a fiduciary duty to Havoco either by withholding material facts or misrepresenting them to the corporation, or by usurping a business opportunity that could otherwise have been pursued by the corporation. And, third, Havoco must prove that Hill's alleged breach was a proximate cause of damage to Havoco." As to Count II, the jury found for Havoco and against Hill and awarded damages in the amount of \$3,562,500.00.

With respect to Count III, tortious interference with contractual relations, the jury was charged that "[i]n order for Havoco to prove its claim for interference with a contractual relationship, Havoco has the burden of proving, by a preponderance of the evidence, the following:

1. The existence of a valid and enforceable contract between Havoco and the TVA;
2. Hill had knowledge of the Havoco/TVA Coal Supply Contract;
3. Hill intentionally interfered with the Havoco/TVA contract;
4. Hill's conduct caused TVA to subsequently breach the contract with Havoco;
5. Havoco sustained damages as a proximate result of Hill's interference with the Havoco/TVA Coal Supply Contract."

As to Count III, the jury found for Havoco and against Hill and awarded compensatory damages in the amount of \$3,562,500.00 and punitive damages in the amount of \$250,000.00.

Finally, as to Count IV, fraud and deceit, the jury was charged that Havoco had the burden of proving the elements of fraud, which were the same as outlined in the jury charge for fraud given with respect to Count I, conspiracy to defraud. The jury found for Havoco and against Hill as to Count IV, and awarded compensatory damages in the amount of \$3,562,500.00 and punitive damages in the amount of \$250,000.00.

Hill raised the affirmative defenses of waiver and/or release in response to each of the counts against him on which the jury was instructed that if any one of such defenses was proved, the verdict on that count should be for Hill. The jury rejected all such defenses.

Havoco maintains that the above verdicts are nondischargeable pursuant to 11 U.S.C. §523(a)(4) and (a)(6). To establish a claim of nondischargeability based on fraud or defalcation pursuant to

section 523(a)(4), Havoco must prove by a preponderance of the evidence that a fiduciary relationship existed between the parties and that Hill is guilty of defalcation or fraud while acting in his fiduciary capacity. See generally, Grogan, 498 U.S. 279 (burden of proof is preponderance of evidence, not higher standard of clear and convincing evidence); In re Pieper, 119 B.R. 837, 839 (Bankr. M.D.Fla.1990). The verdicts returned by the Illinois jury on Counts I, II, and IV of the Havoco complaint against Hill and a reading of the transcript clearly establish that the debts created by the judgment rendered on those three counts are for fraudulent conduct while acting in a fiduciary capacity. Further, Counts I and IV were rendered on clear and convincing evidence, a higher standard than required by Grogan. Counts I and IV show that Hill intentionally misrepresented material facts which he knew to be false or intentionally concealed or omitted material facts which said misrepresentations, concealments and/or omissions were reasonably or justifiably relied on by Havoco to its detriment. Additionally, Hill intended to induce Havoco to rely upon the misrepresentations, or to cause injury to Havoco resulting from the omissions or concealments and Havoco did in fact suffer injury or damage as a result of Hill's actions. The standard for reliance under a section 523(a)(2)(A), false pretenses, false representation, or actual fraud discharge exception is justifiable, which is a lower standard than reasonable reliance. Field v. Mans. A careful reading of that case leads this Court to conclude that the reasoning applied by the Supreme Court in reaching its decision

would apply in a section 523(a)(4) case. While Hill argues that it may be unclear what standard the jury held Havoco to, reasonable or justifiable, it is sufficient to meet that required of the Bankruptcy Code.

Count II supports the finding that Hill owed a fiduciary duty to Havoco "at the time certain challenged action occurred" and that Hill breached that duty. Moreover, this Court is bound by the instruction given the jury that "Hill was an officer and director of Havoco, and during that period he owed a fiduciary duty to Havoco." A reading of the trial transcript coupled with the jury instructions and verdicts clearly support the conclusion that the fraud found in Counts I and IV was committed during the time Hill owed a fiduciary duty to Havoco which he was found to have breached in Count II. See generally, e.g., In re Alexander, 166 B.R. 729 (Bankr.D.N.M.1993) (corporate officials are fiduciaries with respect to corporate opportunities and corporate property). Accordingly, the monetary judgments awarded in Counts I, II, and IV are found to be nondischargeable pursuant to 11 U.S.C. § 523(a)(4).

Section 523(a)(6) excepts from discharge debts incurred through willful and malicious injury. The Eleventh Circuit has "interpreted 'willful' to require 'a showing of an intentional or deliberate act, which is not done merely in reckless disregard of the rights of another. As used in section 523(a)(6), 'malicious' means 'wrongful and without just cause or excessive even in the absence of personal hatred, spite or ill-will.' Malice may be implied or constructive. In other words, 'a showing of specific

intent to harm another is not necessary." However, a deliberate or intentional injury or intentional action that is substantially certain to cause the injury is required. In re Walker, 48 F.3d 1161, 1163-65 (11th Cir.1995) (citations omitted). Applying these standards to the Illinois action, it is clear that the acts described in Counts I, II, III, and IV were intentional, deliberate acts, done without just cause, and designed to or substantially certain to cause injury to Havoco by stripping it of the TVA Coal Supply Contract; thus, they satisfy the definition of willful and malicious in the Bankruptcy Code. See generally, Alexander, 166 B.R. 729 (corporate officer's intentional misappropriation of company's customer list was willful and malicious under section 523(a)(6) and resulting state court judgment for such act was nondischargeable). Accordingly, the monetary judgments awarded in Counts I, II, III, and IV are found to be nondischargeable pursuant to 11 U.S.C. § 523(a)(6).

In concluding that the monetary judgments awarded Havoco are nondischargeable, both the compensatory and punitive portions are included. In the Eleventh Circuit, punitive damage awards flowing from the same course of conduct necessitating an award of compensatory damages are not dischargeable. In re St. Laurent, 991 F.2d 672, 677-681. While that case arose under section 523(a)(2)(A) and specifically limited the holding to that subsection, the appellate court noted that it had "no occasion to review the bankruptcy court's determination under § 523(a)(4)" and a determination under § 523(a)(6) was not sought. This court finds

the reasoning of the appellate court persuasive and applicable in the instant case, i.e., "[i]f a creditor is able to establish the requisite elements of Section 523, the creditor is entitled to collect the 'whole of any debt' he is owed by the debtor.'...[A] judgment requiring payment of punitive and compensatory damages for a common cause of fraudulent conduct is a 'debt' as defined by the Bankruptcy Code in § 523(a)." St Laurent, 991 F.2d at 679. Thus, the entire \$15,000,000.00 judgment is held to be nondischargeable. Now, therefore, it is

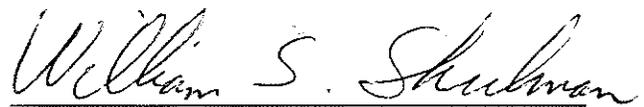
ORDER

ORDERED that the Plaintiff's motion for summary judgment be, and it hereby is, GRANTED; and it is further

ORDERED that the relief sought in the Plaintiff's Complaint against the Defendant be, and it hereby is, GRANTED; and it is further

ORDERED that a NONDISCHARGEABLE JUDGMENT be, and it hereby is, ENTERED in favor of the Plaintiff, Havoco of America, Ltd. and against the Defendant, Elmer C. Hill, in the amount of \$15,000,000.00.

DATED: August 8, 1996.

  
U.S. BANKRUPTCY JUDGE  
SITTING BY DESIGNATION