

FILED

OCT 28 2004

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

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| In re: |) | Chapter 7 |
| ANTHONY J. BARNETT and WILLINE |) | No. 4-03-bk-06828-JMM |
| D. BARNETT, husband and wife, |) | Adversary 4-04-ap-00041-JMM |
| _____ Debtors. |) | |
| NICOLE BARNETT WILLIAMS, a |) | MEMORANDUM DECISION GRANTING |
| married woman, |) | PARTIAL SUMMARY JUDGMENT |
| Plaintiff, |) | |
| vs. |) | |
| ANTHONY J. BARNETT and WILLINE |) | |
| D. BARNETT, husband and wife, |) | |
| _____ Defendants. |) | |

The Plaintiff has moved for summary judgment, contending that her parents, the Debtors, breached their fiduciary duties to her, defrauded her, and/or converted her property. Bankruptcy Code §§ 523(a)(2), (4), and (6) are implicated.

SECTION 523(a)(2)

Section 523(a)(2) encompasses the torts of fraud and misrepresentation. The affidavit of the Plaintiff does not sufficiently detail the traditional elements of fraud or misrepresentation and, therefore, summary judgment on those grounds will be denied.

SECTION 523(a)(4)

The undisputed evidence shows that the Debtors were the court-appointed representatives and conservators for the Plaintiff, their daughter, when she was a minor. In that capacity, they received

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1 \$41,104.95 as a settlement from a personal injury action, and deposited it into a bank account at Wells
2 Fargo Bank.

3 When the Plaintiff reached the age of majority, the conservatorship was terminated, and
4 the money, in the amount of \$41,880.16 was transferred to the Plaintiff, who acknowledged its receipt.

5 At that time, when the money was turned over to the Plaintiff, all fiduciary obligations
6 owed to the Plaintiff by the Debtors ended.

7 Thus, Plaintiff is not entitled to summary judgment against the Debtors pursuant to
8 § 523(a)(4). The motion will be denied on that basis.

9
10 **SECTION 523(a)(6)**

11
12 After the monies were delivered to the Plaintiff, she elected to leave her parents as
13 signatories on her bank account. She has filed an affidavit attached to her moving papers stating that,
14 without her permission or authority, they took said monies and converted them to their own use. That
15 affidavit was dated July 26, 2000, and is attached to the Statement of Facts attached to Plaintiff's Motion
16 for Summary Judgment.

17 The Debtors have failed to file any rebuttal affidavits or other documents that raise a
18 genuine issue of material fact. Therefore, the Plaintiff has proven herself entitled to summary judgment
19 on the § 523(a)(6) count.

20 In the U.S. Supreme Court case of *Kawauhau v. Geiger*, 523 U.S. 57 (1998), the
21 Supreme Court explained that for a § 523 (a)(6) cause of action to be viable, the injury inflicted must be
22 an intentional type that is targeted against the Plaintiff, with the knowledge that injury will inure to the
23 victim. The act must be deliberate or intentional. This element, if proven, satisfies the "wilful" element
24 of § 523 (a)(6).

25 The "malicious" element requires the showing of a wrongful act, done intentionally, that
26 is without just cause of excuse, and that causes injury. *In re Thiara*, 285 B.R. 420 (9th Cir. BAP 2002).

1 Here, the Debtors exercised unlawful dominion and control over the creditor/plaintiff's property, and have
2 provided no excuse, reason, or defense for such conduct. As a result, Plaintiff was injured by the loss
3 of that money. The loss is measured by the Superior Court Judgment of December 11, 2001, in the
4 amount of \$45,094.28.

5 Having satisfied the court that there are no genuine issues of material fact with regard to
6 the § 523 (a)(6) count, summary judgment is appropriate on that count.

7
8 **CONCLUSION AND RULING**

9
10 The Plaintiff's Motion for Summary Judgment will be granted in part and denied in part.
11 A partial judgment will be entered that:

12 1. Holds that the Judgment entered in Pima County Superior Court Case No. C-2000-
13 3925 on December 11, 2001 for \$45,094.28 is non-dischargeable in the Debtors' Chapter 7 case pursuant
14 to § 523(a)(6);

15 2. Awards Plaintiff her taxable costs in this matter, upon the filing, within 10 days
16 after entry of judgment, of a Bill of Costs; and

17 3. Denies summary judgment on the §§ 523(a)(2) and (4) counts.

18 Because this partial judgment has not disposed of those counts dealing with § 523(a)(2)
19 and (a)(4), Plaintiff's counsel should notify the court and opposing counsel if he intends to proceed with
20 the trial scheduled for Monday, November 1, 2004 at 2:30 p.m. (trial check-in) or whether he will
21 voluntarily dismiss those remaining counts.

22 A partial judgment will be entered simultaneously herewith.

23 DATED: October 28, 2004.

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26 JAMES M. MARLAR
UNITED STATES BANKRUPTCY JUDGE

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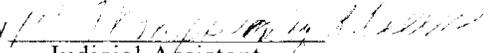
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By 
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