

In the United States Bankruptcy Court

for the Northern District of Iowa

GAYLE C. BROCKHOFF
Debtor.

Bankruptcy No.85-02520W

CYNTHIA R. CHAMBERLIN
Plaintiff

Adversary No. 87-0282W

vs.

GAYLE BROCKHOFF
Defendant.

MEMORANDUM OF DECISION AND ORDER RE: MOTION FOR SUMMARY JUDGMENT

The matter before the Court is the Motion for Summary Judgment filed by Debtor-Defendant Gayle C. Brockhoff. A hearing was held February 18, 1988 in Waterloo, Iowa. The matter was submitted to the undersigned for consideration. This is a core proceeding pursuant to 28 U.S.C. 157(b)(2)(I).

I.

On August 17, 1987, Cynthia R. Chamberlin, Plaintiff, filed a Complaint for Determination Excepting Debt from Dischargeability pursuant to 11 U.S.C. 523. Plaintiff alleged the following:

1. Plaintiff holds an unsecured claim against Debtor.

2. Debtor sold Plaintiff certain real estate on contract on January 26, 1979.

3. Since the date of sale, Plaintiff has fulfilled her

contractual obligation to Debtor by paying \$425.00 per month to either Debtor's mortgagee, First Federal Savings Bank of Waterloo, Iowa (Bank), or on demand by Debtor, directly to Debtor.

4. Debtor was acting in a fiduciary capacity for "Plaintiff wherein the [Debtor] was obligated to apply the contract payments, as made by the Plaintiff, directly to the consecutive monthly installments of Three Hundred Eighty-five & 31/100 (385.31) Dollars to [Bank] pursuant to the terms and conditions of one promissory note given by the [Debtor] to said lending institution."

5. Debtor "ceased making any payments, whatsoever, to [Bank], which fact was unknown to the Plaintiff inasmuch as the Plaintiff continually fulfilled her obligation under the Real Estate Contract by remitting the monthly installments to the [Debtor]."

6. Debtor, without Plaintiff's knowledge, filed a petition in bankruptcy but did not name Plaintiff as a creditor.

7. Subsequent to Debtor's discharge, Bank filed a foreclosure action and named Plaintiff as a contract purchaser and a party in possession of the real estate. Upon foreclosure, Plaintiff was forced to move from the property due to her inability to satisfy a deficiency judgment of \$47,574.47.

8. Plaintiff filed a crossclaim against Debtor in the foreclosure action to recover \$5,100.00 Plaintiff paid Debtor on the Real Estate Contract and for an additional \$1,500.00 Plaintiff paid Debtor under an Amendment to the Real Estate Contract.

In summary, Plaintiff argues Debtor was acting in a fiduciary capacity for Plaintiff when she accepted contract payments that were once made to Bank; that Debtor's failure to apply the payments to Debtor's mortgage was a fraudulent act under 11 U.S.C. 523(a)(4); and therefore, Debtor's debt to Plaintiff should be excepted from discharge.

In support of her Motion for Summary Judgment, Debtor contends, assuming *arguendo* all facts alleged by Plaintiff are true, there is no material question of fact and Debtor is entitled to judgment is a matter of law. Debtor characterizes the critical threshold question is one of law: Whether a fiduciary relationship existed between the parties under the facts as alleged in Plaintiff's Complaint.

Plaintiff resists the Motion for Summary Judgment and argues that whether a fiduciary relationship existed is a material question of fact.

II.

Summary judgment is proper when no genuine issue of material fact exists, and the movant is entitled to judgment as a matter of law. Sommers v. Budget Marketing, Inc., 667 F.2d 748, 749 (8th Cir. 1982); Bankr. R. 7056. The facts are considered in a light most favorable to the non-movant and the non-movant is entitled to all reasonable inferences which may be derived from the underlying facts as shown by the pleadings, depositions and affidavits presented. *Sommers*, 667 F.2d at 749-50. If the moving party fails to show the absence of a genuine issue of material fact, summary judgment will be denied even though there are no conflicting evidentiary matters. Foster v. Johns-Manville Sales Corp., 787 F.2d 390, 393 (8th Cir. 1986).

Under 11 U.S.C. 523(a)(4), a debt "for fraud or defalcation while acting in a fiduciary capacity" is not dischargeable. The concept of a fiduciary under 523(a)(4) is a question of federal law; it has been given a strict and narrow application. *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 333 (1934). The requisite fiduciary capacity under 523(a)(4) must arise from an express or technical trust. *Id.* (cited in Smith v. M & M Commodities, Inc. (In re Smith), 72 B.R. 61, 62 (Bankr. N.D. Iowa 1987)). The fiduciary relationship must be established prior to the creation of the debt which arose from the alleged wrongdoing. *Davis*, 293 U.S. at 333. Whether an express trust exists may be determined under state law. Smith, 72 B.R. at 62 (citing Devaney v. Deloogoff (in re Deloogoff), 600 F.2d 166, 169 (8th Cir. 1979)); see also MacArthur Co. v. Crea (In re Crea), 31 B.R. 239, 244 (Bankr. D. Minn. 1983).

III.

Upon consideration in a light most favorable to the non-movant of the pleadings and affidavits submitted by the parties, the Court can only conclude that the fiduciary relationship necessary for a determination of non-dischargeability under 523(a)(4) did not exist between Plaintiff and Debtor.

Plaintiff has not alleged that a fiduciary relationship arose expressly from any agreement entered into by the parties nor has Plaintiff alleged that a technical trust, which would comport with the requirements for a fiduciary relationship under 523(a)(4), was created by operation of state law. See Deoogoff, 600 F.2d at 168-70; Smith, 72 B.R. at 62-63; see also Angelle v. Reed (In re Angelle), 610 F.2d 1335, 1340-41 (5th Cir. 1980).

The Court is unable to glean from the pleadings and affidavits that anything more than a creditor/debtor relationship existed between Plaintiff and Debtor. Barclays American/Business Credit, Inc. v. Long (In re Long), 44 B.R. 300, 305 (Bankr. D. Minn. 1983), aff'd., 774 F.2d 875 (8th Cir. 1985); see also United Retailers v. Falk (In re Falk), 3 B.R. 266 (Bankr. D. N.J. 1980). Plaintiff has alleged nothing more than that a fiduciary relationship was created when Debtor, through her attorney, demanded payments under the contract be made to Debtor rather than the mortgagee. This is not enough.

In the absence of an allegation or affirmation of any facts showing that the requisite fiduciary relationship under 11 U.S.C. 533(a)(4) existed between the parties, Debtor is entitled to summary judgment as a matter of law.

ORDER

IT IS THEREFORE ORDERED that Debtor Gayle Brockhoff's Motion for Summary Judgment is granted.

SO ORDERED ON THIS 11th DAY OF MARCH, 1988.

William L. Edmonds
Bankruptcy Judge