In the United States Bankruptcy Court

for the Southern District of Iowa

THEODORE BLAIR BURGHOFF *Debtor(s).*	Bankruptcy No. 05-10947 Chapter 7
MICHAEL CAIN and CHARLOTTE CAIN *Plaintiff(s)* vs. THEODORE B. BURGHOFF *Defendant(s)*	Adversary No. 05-30210

ORDER RE: PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This matter came before the undersigned for telephonic hearing on November 9, 2006 on Plaintiffs' Motion For Summary Judgment. Edward F. Noyes appeared for Debtor Theodore Burghoff. Jay B. Marcus and John Courtade appeared for Plaintiffs Michael and Charlotte Cain. After hearing arguments of counsel, the Court took the matter under advisement. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I).

STATEMENT OF THE CASE

Plaintiffs' complaint seeks, in part, to except debt from discharge under §§523(a)(4) and (6). Debtor and Plaintiffs were partners in an investment and securities trading firm called Speed Diamond. During the course of that partnership, Debtor allegedly misappropriated Plaintiffs' investment funds for his personal use and for various other investment schemes.

Plaintiffs filed a prepetition action against Debtor in the Iowa District Court for Jefferson County. The court granted summary judgment on several causes of action and awarded $131,436 in damages. The court also left open the possibility for Plaintiffs to recover further damages resulting from Debtor's misrepresentations. About a month after Plaintiffs obtained summary judgment against Debtor, he filed for Chapter 7 bankruptcy. In response, Plaintiffs filed an adversary action for exceptions to discharge under 11 U.S.C. §523 and to establish damages.

Plaintiff's adversary complaint seeks denial of discharge in multiple counts. Count I seeks relief pursuant to §523(a)(4) and §523(a)(6). Count II seeks relief pursuant to §523(a)(4). Count III seeks relief pursuant to §523(a)(6). Count IV alleges breach of contract. Count V alleges negligence and gross negligence. Count VI seeks relief pursuant to §523(a)(2)(A) alleging fraud. Plaintiff's Motion for Summary Judgment is limited to allegations under §§523(a)(4) and 523(a)(6).

Plaintiffs allege that Mr. Burghoff's conduct constitutes defalcation under §523(a)(4) and willful and malicious conversion under §523(a)(6). They further allege that principles of collateral estoppel establish that there are no genuine issues of fact in dispute. Plaintiffs have requested that the Court grant summary judgment on the issues of liability and exception to discharge. They wish to litigate the extent of damages at trial.

Debtor contends that principles of collateral estoppel do not apply since the Jefferson County court did not fully litigate the issues in dispute. Debtor also challenges the extent of his liability for any damages incurred by the Plaintiffs and

therefore asserts that this matter is not yet ripe for summary judgment.

FACTS

Debtor and Plaintiffs reside in Fairfield, Iowa. They became acquainted through the Maharishi University, where Plaintiff Michael Cain instructed Debtor in art history during the 1980s. After graduating from college, Debtor pursued a career in trading bonds and securities.

Returned to Fairfield, began working with a classmate - buying securities in IPOs, and selling them at a premium. Apparently these . . .

Plaintiffs were told that the Partnership had to remain a secret.

Debtor gave them yearly accountings.

Debtor's accountant testified that he was never givne sufficient information to accurately calculate the earnings of the partnership.

Each year, . . . this appears to be an arbitrary figure.

Withdrew expenses, etc.

According to the Plaintiffs, Debtor began giving them informal investment advice in the early-1990s. (Pls.' Compl. at 3.)

In 1993, Plaintiffs and Debtor formed an investment partnership called Speed Diamond. Under this arrangement, Plaintiffs were to contribute capital to the partnership while Debtor was to manage the funds by purchasing and selling securities. Plaintiffs contributed $50,000 in 1993 and an additional $81,436 in 1998. During the course of the partnership, Debtor periodically provided financial reports to Plaintiffs. In 2002, Debtor reported that the Speed Diamond investment account held $302,867.97. (Pls.' Ex. 4.) In 2003, Debtor supplied documentation that the account held $304,712.30. (Pls.' Ex. 5.) Plaintiffs allege that they filed and paid income tax statements based upon Debtor's financial reports. (Pls. Compl., ¶ 19.)

Under the terms of the Speed Diamond Partnership Agreement, the partnership was to terminate and assets were to be distributed to its partners on December 31, 2003. (Pls.' Compl. Ex. B.) At the end of 2003, Plaintiffs requested about $20,000 or $30,0000 from their equity in Speed Diamond. (Pls.' Aff. at ¶ 7.) Mr. Burghoff allegedly distributed $7,000 instead, claiming difficulties with his pending divorce had tied up his funds. (Id.) Plaintiffs' subsequent requests for the distribution of their equity in the partnership were unsuccessful. (Id. at ¶ 8.)

In August 2004, Plaintiffs filed the prepetition action against Debtor in the Iowa District Court for Jefferson County, alleging conversion, breach of contract, breach of fiduciary duty, common law fraud, negligence and for an accounting. About a year later, Plaintiffs filed a motion for summary judgment with the Jefferson County court. Debtor filed a response and resistance to Plaintiffs' summary judgment motion. However, since these documents were filed about ten days late, the court did not consider them in ruling upon Plaintiffs' motion. In its ruling, the court discussed the standards for summary judgment and then granted Plaintiffs' motion as to Debtor's liability for breach of contract, conversion, breach of fiduciary duty and negligence. The court awarded Plaintiffs a minimum of $131,436, which was the total amount of their initial investment in the Speed Diamond partnership. Finally, the court determined that its ruling would leave undecided the extent to which Plaintiffs should be allowed to recover damages in excess of the minimum amount awarded through the summary judgment. The primary reason for the partial ruling was to afford Plaintiffs the opportunity to prove damages they incurred by paying income taxes on the profits fraudulently reported by Debtor.

After Plaintiffs obtained summary judgment, Debtor filed his Chapter 7 petition. In response, Plaintiffs filed this adversary complaint seeking to establish an exception to discharge and the opportunity to prove the full extent of the damages they incurred. Plaintiffs now seek summary judgment on the issues of liability and exception to discharge as to the Counts alleging violations of §523(a)(4) and §523(a)(6). They allege that Debtor's conduct constitutes a defalcation

while acting in a fiduciary capacity, which is grounds for exception to discharge under §523(a)(4) of the Bankruptcy Code. Additionally, Plaintiffs assert that Debtor's actions rise to the level of willful and malicious conversion, which is grounds for exception to discharge under §523(a)(6). Lastly, Plaintiffs contend that the Jefferson County summary judgment collaterally estops Debtor from re-litigating whether he committed willful and malicious conversion or a defalcation while acting as a fiduciary.

CONCLUSIONS OF LAW

In order to grant Plaintiffs' motion for summary judgment under Bankruptcy Rule 7056 (Fed. R. Civ. P. 56), Plaintiffs must show the absence of any genuine issue of fact. The material offered in support of the motion must be viewed in a light most favorable to the party opposed to the summary judgment, "giving that party the benefit of all reasonable inferences to be drawn from the facts." Howard v. Russell Stover Candies, Inc., 649 F.2d 620, 623 (8th Cir. 1981). The Eighth Circuit has recognized that "summary judgment is a drastic remedy and must be exercised with extreme care." Wabun-Inini v. Sessions, 900 F.2d 1234, 1238 (8th Cir. 1990). Furthermore, "where mental state or intent (particularly willfulness) is at issue, summary judgment must be granted with caution, as usually such issues raise questions for determination by a factfinder." United States v. One 1989 Jeep Wagoneer, 976 F.2d 1172, 1176 (8th Cir. 1992) (citations omitted).

A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Fed. R. Civ. P. 56(c). However, this type of partial judgement is in the nature of a pretrial order and not a "final" decision. See In re Farley, Inc. 146 B.R. 739, 743 (Bankr. N.D. Ill. 1992).

§523(a)(4) DEFALCATION WHILE IN A FIDUCIARY CAPACITY

Under the Bankruptcy Code, debts for defalcation while acting in a fiduciary capacity are excepted from discharge. 11 U.S.C. §523(a)(4). "Two issues are presented in a challenge to dischargeability under §523(a)(4): (1) whether the debtor was acting in a fiduciary capacity; and (2) whether a defalcation occurred." In re Wilson, 127 B.R. 440, 443 (Bankr. E.D. Mo. 1991). Plaintiffs have the burden of proving the elements of their §523(a)(4) claim by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 286-287 (1991). The exceptions to discharge under 11 U.S.C. § 523(a) must be strictly construed in favor of the debtor. Werner v. Hofmann, 5 F.3d 1170, 1172 (8th Cir. 1993).

Whether a relationship is a fiduciary relationship under the Code is an issue of federal law. In re Cook, 263 B.R. 249, 254 (Bankr. N.D. Iowa 2001) (citations omitted). The fiduciary status necessary for purposes of §523(a)(4) is "more narrowly defined than that under the general common law [and] the broad, general definition of fiduciary - a relationship involving confidence, trust and good faith - is inapplicable." In re Shahrokhi, 266 B.R. 702, 707 (B.A.P. 8th Cir. 2001); see also 4 Collier on Bankruptcy ¶ 523.10[1][d] (15th ed. rev. 2006) (discussing narrow construction of "fiduciary" under § 523(a)(4) compared with state law). The defalcation exception does not apply to a constructive trust or a mere contractual relationship. Werner v. Hofmann, 5 F.3d 1170, 1172 (8th Cir. 1993). The fiduciary relationship "must be one arising from an express or technical trust that was imposed before and without reference to the wrongdoing that caused the debt." In re Cochrane, 124 F.3d 978, 984 (8th Cir. 1997). Generally, the term "fiduciary" under § 523(a)(4) "does not extend to the more general class of fiduciaries such as agents, bailees, brokers, factors, and partners." In re Heister, 290 B.R. 665, 673 (Bankr. N.D. Iowa, 2003) (citations omitted) (emphasis added).

Bankruptcy courts regularly look to state law to determine whether a fiduciary capacity exists. Barclays American/Business Credit, Inc. V. Long, 774 F.2d 875, 878 (8th Cir. 1985). "The law of the jurisdiction in which a partnership has its chief executive office governs relations among partners and between the partners and the partnership." Iowa Code § 486A.106(1). The Speed Diamond partnership agreement lists the address of the principal office of the partnership as: 7611 South Orange Blossom Trail, Orlando, FL 32809. (Pls.' Compl. Ex. B.) The agreement also includes a caveat that the principal office of the partnership is subject to change. (Id.)

Counsel for the parties have not specifically pled which state's law controls the issue of whether Debtor was acting in a fiduciary capacity. The parties to the agreement currently reside in Fairfield, Iowa, and appear to have resided there during the entire existence of the partnership. Further, the partnership has not been in operation since December, 2003. The Court concludes that the state with the most significant relationship to the parties is Iowa. Veasley v. CRST Int'l,

Inc., 553 N.W.2d 896, 897 (Iowa 1996) (recognizing that Iowa has adopted the "most significant relationship" test); see also Pro Edge, L.P. v. Gue, 374 F. Supp. 2d 711, 736 (N.D. Iowa 2005) ("The law of the state chosen by the parties to govern their contractual rights and duties will be applied ... unless the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice."). Accordingly, the Court will apply the laws of the state of Iowa.

Iowa Code § 486A.404(2)(a) addresses general standards of conduct within a partnership. It states that partners owe each other the basic fiduciary duties of loyalty and care. Iowa Code § 486A.106(1). As part of a partner's duty of loyalty, he or she must "account to the partnership and hold as trustee for the partnership any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property." This provision of the Iowa Code is identical to § 21 of the Uniform Partnership Act. See Unif. Partnership Act § 21 (1914).

Courts are split on the issue of whether one partner owes other partners the type of fiduciary duty contemplated by §523(a)(4). Generally, when a fiduciary obtains money or property as a result of a breach of fiduciary duties, a court will impose a constructive trust for the benefit of the partnership. Triple Five of Minnesota, Inc. v. Simon, 404 F.3d 1088, 1099 (8th Cir. 2005). However, the defalcation exception does not apply to constructive trusts. Werner, 5 F.3d at 1172. In the bankruptcy context, some courts construing § 21 of the Uniform Partnership Act have found that it creates an express trust, while others have held that it clearly cannot create such a relationship. See Benson v. Richardson, Civ. No. 86-2009, 1990 WL 290144 (N.D. Iowa July 16, 1990) (discussing split in authority). In interpreting the term "fiduciary" in the bankruptcy context, the Supreme Court has stated:

> The second point is, whether a factor, who retains the money of his principal, is a fiduciary debtor within the act. If the act embrace such a debt, it will be difficult to limit its application. It must include all debts arising from agencies; and indeed all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate.

Chapman v. Forsyth, 43 U.S. 202, 208 (1844). The reasoning in Chapman was later approved by the Supreme Court in Davis v. Aetna Acceptance Co., 293 U.S. 328 (1934). Thus, the Supreme Court's interpretation of the term "fiduciary" in Chapman and Davis appears to be "limited to the class of fiduciaries including trustees of specific written declarations of trust, guardians, administrators or public officers, and, absent special considerations, does not extend to the more general class of fiduciaries." Holman, 42 B.R. at 851; accord Heister, 290 B.R. at 673.

Additionally, some courts which hold that § 21 of the Uniform Partnership Act creates an express trust between partners have done so for reasons that are at odds with established law within the Eighth Circuit. In concluding that a partner relationship rises to the level required by § 523(a)(4), the Bankruptcy Court for the Middle District of Florida stated the problem with cases holding otherwise was "the courts' reliance on the supposed requirement that there must be an express or technical trust before the relationship is deemed to be fiduciary within the meaning of that term used in §523(a)(4) of the Bankruptcy Code." In re Cramer, 93 B.R. 764, 767 (M.D. Fla. 1986). This statement clearly contradicts established law within the Eighth Circuit that the fiduciary relationship "must be one arising from an express or technical trust." Cochrane, 124 F.3d at 984.

In Benson v. Richardson, 1990 WL 290144 at *59, the Northern District of Iowa relied on the line of cases, including Cramer, which hold that the partner relationship rises to the fiduciary level required by § 523(a)(4). Id. In Benson, residents of Illinois and Iowa formed a limited partnership to invest in real estate and other commercial opportunities. Id. at *2-3. As it turned out, the general partners began "investing" in sham properties and misappropriating partnership funds. Id. In determining whether the general partners had committed a defalcation while acting in a fiduciary capacity, the court extensively analyzed partnership law of Iowa, as well as Illinois. Id. at *58-59. The court acknowledged the deep divide that exists within bankruptcy courts when it comes to determining whether § 21 of the Uniform Partnership Act, as adopted by most states, creates an express trust. Id. In the end, the court determined that "under the specific facts of this case, the requisite trust status existed." Benson, 1990 WL 290144 at *59.

Indeed, even when a partner relationship exists, the determination of whether "the requisite trust status" exists is a fact-intensive inquiry. Just three years after the Benson court stated that "Illinois case law [deems] the partner's duty to be as

a trustee," Id. at *59, the Northern District of Illinois held "that the duties imposed by Illinois law are insufficient to create the type of fiduciary relationship recognized under §523(a)(4)." Johnson v. Woldman, 158 B.R. 992, 996 (N.D. Ill. 1993). In affirming the lower court's decision in Johnson, the Seventh Circuit addressed the division of authority over whether fiduciary obligations between equals, including general partners in a partnership, are encompassed within §523(a)(4). In re Woldman, 92 F.3d 546 (7th Cir. 1996). The court concluded "that section 523(a)(4) reaches only those fiduciary obligations in which there is substantial inequality in power or knowledge in favor of the debtor." Id. This conclusion comports with the view that absent special considerations, the term "fiduciary" under § 523(a)(4) does not extend to the more general class of fiduciaries, including partners." Heister, 290 at 673.

Although the term "fiduciary" is construed narrowly under the Code, a "defalcation" is evaluated by an objective standard and is "construed broadly." In re Kondora, 194 B.R. 202, 208 (Bankr. N.D. Iowa 1996). A defalcation "can be a mere deficit resulting from the debtor's conduct, even though he derived no personal gain therefrom." Smith v. M&M Commodities, Inc., 72 B.R. 61, 63 (N.D. Iowa 1987). It can be "the slightest misconduct, and it may not involve misconduct at all. Negligence or ignorance may be a defalcation." Id.

§523(a)(6) WILLFUL AND MALICIOUS CONVERSION

Under § 523(a)(6) of the Bankruptcy Code, debts for "willful and malicious" conversion can be excepted from discharge. 11 U.S.C. §523(a)(4). Conversion is the "act of wrongful control or dominion over another's personal property in denial of or inconsistent with that person's possessory right to the property." Ezzone v. Riccardi, 525 N.W.2d 388,396 (Iowa 1994). "Willful" and "malicious" are two separate elements and Plaintiffs must prove each in order to receive an exception to discharge. In re Scarborough, 171 F.3d 638, 641 (8th Cir. 1999).

The "willful" element of § 523(a)(6) requires Plaintiffs to prove "deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998). Reckless or negligent conduct is not sufficient. Id. at 62.

The "malicious" element requires Plaintiffs to show Debtor's conduct was targeted at them, at least in the sense that the conduct was certain or almost certain to cause them harm. In re Madsen, 195 F.3d 988, 989 (8th Cir. 1999). The standard of proof for malice does not require spite, ill will, or personal animosity. In re Fors, 259 B.R. 131, 137 (B.A.P. 8th Cir. 2001).

COLLATERAL ESTOPPEL

Plaintiffs claim that the Jefferson County summary judgment establishes that Debtor's conduct constituted willful and malicious conversion and a defalcation while in a fiduciary capacity. The Court must apply the substantive law of issue preclusion of Iowa, the forum state. In re Foushee, 283 B.R. 278, 284 (N.D. Iowa 2002). Under Iowa law, a party is precluded from relitigating an issue when (1) there is an identity of issues in the current or prior litigation; (2) the issue was raised and actually litigated in the prior action; (3) the issue was material and relevant to the disposition of the prior action; and (4) determination of the issue was necessary and essential to the prior judgment. Id. (citations omitted). Generally, under Iowa law, the "actually litigated" requirement of issue preclusion is not met where a judgment in a prior action is entered on a default for failure to appear or plead. In re Ziadeh, 276 B.R. 614, 619 (Bankr. N.D. Iowa 2002). Judgment by confession, consent or default does not fulfill the "actually litigated" requirement of issue preclusion. Id.

Nonetheless, a party may "actually litigate" an issue on summary judgment. Bell v. Douglass, 184 B.R. 301,305 (N.D. Ill. 1995) (applying Iowa law). However, in Bell, the bankruptcy court concluded that issue preclusion was not applicable where summary judgment had been granted based on unanswered requests for admissions. Id. at 303. The summary judgment contained no independent findings and the debtor was not actively involved in the proceedings. Id. Under those circumstances, the bankruptcy court concluded that issue preclusion was not applicable. Id. at 305.

On the other hand, preclusive effect "can occur, even if an issue is not 'actually litigated', when the party sought to be estopped had a full and fair opportunity and an adequate incentive to litigate the particular issue in the first action." In re Hodges, 271 B.R. 347, 351 (Bankr. N.D. Iowa 2000). Thus a full trial on the merits is not necessary; yet in between the two extremes of a full blown trial which precludes subsequent litigation and a default judgment in which the defendant

never participates, there is "a twilight zone courts must address on a case-by-case basis." Ziadeh, 276 B.R. at 619-20.

ANALYSIS

Plaintiffs first contend that they are entitled to summary judgment on the issue of Debtor's defalcation while acting in a fiduciary capacity. To prevail on this part of their motion, Plaintiffs are required to demonstrate by a preponderance of evidence that Debtor was acting in a fiduciary capacity as contemplated by §523(a)(4) and that a defalcation occurred. Wilson, 127 B.R. at 443. Determining whether "the requisite trust status" exists is a fact-intensive inquiry. See Benson 1990 WL 290144, at *59.

Plaintiffs' summary judgment motion implies that state partnership laws make Debtor a fiduciary under §523(a)(4). (Pls.' Mot. Summ. J. at 8). However, the term "fiduciary" in the bankruptcy context does not extend "to the more general class of fiduciaries ... including partners," absent special considerations. Heister, 290 B.R. at 673. Plaintiffs have not asserted that any special considerations exist in the Speed Diamond partnership. Their memorandum in support of summary judgment references cases involving "money managers." In none of those cases, however, did the parties enter into any type of partner relationship. (Pls.' Mot. Summ. J. at 7-8.) Under the correct set of circumstances, the requisite trust status may exist between co-partners. Benson 1990 WL 290144, at *59. On the record presented here, however, Plaintiffs have not established by a preponderance of the evidence that such circumstances existed within the Speed Diamond partnership. Accordingly, Plaintiffs have not demonstrated the absence of any genuine issue of fact on whether Debtor was a "fiduciary" as contemplated under §523(a)(4).

Plaintiffs next assert that they are entitled to summary judgment on the issue of Debtor's "willful and malicious conversion." The "willful" element of §523(a)(6) requires Plaintiffs to prove "deliberate or intentional injury. Kawaauhau, 523 U.S. at 61. The "malicious" element requires Plaintiffs to show Debtor's conduct was targeted at them, at least in the sense that the conduct was certain or almost certain to cause them harm. Madsen, 195 F.3d at 989.

The Eighth Circuit has recognized that "where mental state or intent (particularly willfulness) is at issue, summary judgment must be granted with caution, as usually such issues raise questions for determination by a factfinder." One 1989 Jeep Wagoneer, 976 F.2d at 1176. The record before the Court raises an issue of intent, especially as to the "willful" element of §523(a)(6). Plaintiffs' assert Debtor stated in a letter that he may have been "negligent" with Plaintiffs' funds. (Pls.' Mot. Summ. J. Ex. 3.) However, under the Code, "reckless or negligent conduct is not sufficient" to demonstrate willfulness. Kawaauhau, 523 U.S. at 61. Exercising the "extreme care" required in summary judgment proceedings, Sessions, 900 F.2d at 1238, the Court must conclude that Plaintiffs have not established by a preponderance of the evidence that Debtor's conduct was "willful and malicious."

Lastly, Plaintiffs assert that they are entitled to summary judgment based on principles of collateral estoppel. There are several circumstances under which a party is precluded from re-litigating an issue already decided against him. For example, re-litigation is precluded when (1) there is an identity of issues in the current or prior litigation and (2) the issue was raised and actually litigated in the prior action. Foushee, 283 B.R. at 284. The fact that the Jefferson County court did not consider Debtor's untimely resistance to Plaintiffs' summary judgment motion does not by itself preclude the application of collateral estoppel. See In re Fishman, 215 B.R. 733, 735 (Bankr. E.D. Ark. 1997).

However, the Court is concerned that issues at stake in this adversary action were not "actually litigated" in the Jefferson County proceedings. For example, the state court did not determine whether Debtor's conversion of Plaintiffs' funds was willful or malicious. "Conversion" in Iowa is the "wrongful" taking of another's property in bad faith. Ezzone, 525 N.W. 2d at 396. Proof of conversion alone does not require a showing that the defendant acted with willful or malicious intent. Indeed, because of the brevity of the state court's judgment, it is unclear whether it decided the issue of intent under any standard sufficient to hold the debt excepted from discharge by preclusion. (See (Pls.' Compl. Ex. A.)

The state court judgment also granted summary judgment relating to Debtor's breach of fiduciary duty. (Id.) Nonetheless, the fiduciary status necessary for purposes of §523(a)(4) is "more narrowly defined than that under the general common law [and] the broad, general definition of fiduciary - a relationship involving confidence, trust and good faith - is inapplicable." In re Shahrokhi, 266 B.R. 702, 707 (B.A.P. 8th Cir. 2001). Thus Debtor's breach of fiduciary duty was not decided under a standard sufficient to hold the debt excepted from discharge by preclusion.

Although Plaintiffs' motion for summary judgment is well-supported, the importance of the discharge in bankruptcy and the intensely factual nature of the issues in this case require the Court to deny the motion as to Plaintiffs' claims under §523(a)(4) and §523(a)(6) and as to the doctrine of collateral estoppel as it relates to those sections of the Bankruptcy Code.

WHEREFORE, Plaintiffs' Motion for Summary Judgment is DENIED.

DATED AND ENTERED: December 27, 2006.

Paul J. Kilburg
U.S. Bankruptcy Judge