

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO**

In re:)	
)	
PENNY McHUGH,)	Case No. 02-25625 DEC
SSN: xxx-xx-6476)	
)	Chapter 7
Debtor.)	
)	
WILLIAM L. DOIG, M.D., P.C.,)	
)	
Plaintiff,)	
)	Adversary No. 03-1100 HRT
v.)	
)	
PENNY McHUGH)	
)	
Defendant.)	

**ORDER RE: FIRST AMENDED COMPLAINT TO DETERMINE
DISCHARGEABILITY OF DEBT AND TO OBJECT TO GRANTING DISCHARGE**

Plaintiff filed his Complaint to Determine Dischargeability of Debt and to Obkect [sic] to Granting Discharge on February 5, 2003. A summons was issued on the same date giving Defendant 30 days from the summons date in which to respond to the allegations in the complaint. Plaintiff filed his First Amended Complaint to Determine Dischargeability of Debt and to Object to Granting Discharge on February 12, 2003. A return of service was filed by Plaintiff showing that Plaintiff served Defendant via regular first class United States mail by mailing the summons and First Amended Complaint to Defendant and to her attorney in her chapter 7 bankruptcy case. The mailing was done on February 11, 2003.

On April 7, 2003, Plaintiff filed his Motion for Default Judgment. The record indicates that no responsive pleading was filed by Defendant prior to the filing of Plaintiff's Motion for

Default Judgment or since. On April 28, 2003, the Court entered Defendant's default and set the matter for a default hearing to determine whether or not judgment should issue in the matter.

A default hearing was held on May 20, 2003. At that time, the Court heard Plaintiff's evidence and the arguments of counsel.

The First Amended Complaint prays for relief under four causes of action as follows:

- I. Objection to Discharge 727(a)(2)(A) or (B) (Property Transfer)
- II. Objection to Discharge 727(a)(4)(A) (False Oath)
- III. Exception to Discharge 523(a)(6) (Willful and Malicious)
- IV. Exception to Discharge 523(a)(2)(A) (Fraud)

The Court denies judgement as to Plaintiff's First cause of action. Sections 727(a)(2)(A) and 727(a)(2)(B) provide generally that a debtor may be denied a discharge in bankruptcy if the debtor, with intent to hinder, delay, or defraud either creditors or an officer of the estate, has transferred or concealed assets of the debtor within one year prior to bankruptcy or property of the estate after filing her bankruptcy case. But, it appears from the allegations in the First Amended Complaint that the property which was the subject of this cause of action was property of Physician Support Management, Inc., ("PSM") a corporate entity. As such, Debtor's dealings with corporation property, in her capacity as president of the corporation, are separate and distinct from her dealings with her own personal property. Therefore, allegations with respect to the property of PSM are not relevant to an allegation that Debtor transferred or concealed either her property or property of the estate so long as the corporate entity remains intact.

Plaintiff clearly recognizes this fact and also argues that cause exists to pierce the corporate veil and find that the corporation is a mere alter-ego of the Debtor herself.

While no one factor controls the analysis, a variety of considerations are used to determine whether the corporate form should be disregarded. These include (1) whether the corporation is operated as a separate entity, (2) commingling of funds and other assets, (3) failure to maintain adequate corporate records, (4) the nature of the corporation's ownership and control, (5) absence of corporate assets and undercapitalization, (6) use of the corporation as a mere shell, (7) disregard of legal formalities, and (8) diversion of the corporation's funds or assets to noncorporate uses.

Newport Steel Corp. v. Thompson, 757 F. Supp. 1152, 1156-57 (D. Colo. 1990) (citations omitted). Neither the allegations contained in the First Amended Complaint nor the evidence adduced at the default hearing squarely addresses the factors that this Court would need to find to justify disregarding the corporate form. Consequently, the Court will deny the relief requested in Plaintiff's First cause of action.

The relief requested in Plaintiff's Second cause of action will also be denied. That cause of action seeks to deny Defendant her discharge under § 727(a)(4) which provides that a debtor may be denied a discharge if "the debtor knowingly and fraudulently, in or in connection with the case . . . made a false oath or account." 11 U.S.C. § 727(a)(4). The allegations with respect to this cause of action are a mixture of assertions that Debtor failed to list property and income of the corporation in her schedules and failed to make full disclosure of her own financial dealings. But, with respect to corporate property and income, a review of the schedules reveals that Debtor does fully disclose her ownership interest in the corporation. The corporation's property is not the Debtor's property, so the Court finds no failure on the Debtor's part that corporate property and income are not listed in her individual bankruptcy schedules. Again, the Court does not find that cause exists to disregard the corporate entity. Debtor did omit some individual information from the schedules, such as her divorce case, which properly should have been reflected. The

Court does not find that those allegations rise to the level of a knowing and fraudulent false oath. The relief requested in Plaintiff's Second cause of action will be denied.

In Plaintiff's Third cause of action, he alleges that the debt owed to him by Debtor should be excepted from discharge under § 523(a)(6) on account of willful and malicious injury. However, the actions alleged in this count are primarily actions of the corporation in failing to fully honor provisions in the contract between Plaintiff and the corporation. Other actions relate to business practices of the corporation which harmed the Plaintiff. With no basis upon which the Court can disregard the corporate form, the relief requested in Plaintiff's Third cause of action must be denied.

Plaintiff alleges that Defendant committed the tort of intentional fraud in his Fourth cause of action and that damages accruing to Plaintiff on account of that fraud should be excepted from discharge under § 523(a)(2)(A). Plaintiff alleges that, during negotiations for the sale of his medical practice to PSM, Defendant represented to him that a physician served on the corporation's board of directors and that the corporation operated several other medical practices. Plaintiff alleged in his First Amended Complaint and also testified at the default hearing that those representations proved to be false. He testified that he relied upon those representations and that, but for those representations, he would not have entered into a contract to sell his medical practice to PSM.

The Court finds that the allegations in the First Amended Complaint, and the evidence adduced at the default hearing, support a cause of action against the debtor individually under § 523(a)(2)(A). By reason of Defendant's default, those allegations go unchallenged. They are sufficient for the Court to find that the harm incurred by Plaintiff on account of Defendant's

fraud should be nondischargeable. Unlike the Court's analysis of Plaintiff's first three causes of action, wherein the Plaintiff unsuccessfully tried to hold Defendant liable for failure to disclose corporate information or for breaches of corporate contracts, the corporate form is of no consequence where Defendant's torts are concerned. An individual is responsible for the torts which she commits regardless of whether or not the tort is committed in the course of her duties as officer or employee of a corporate entity. *See Lobato v. Pay Less Drug Stores, Inc.*, 261 F.2d 406, 408-409 (10th Cir. 1958); *Hemelt v. Pontier*, 165 B.R. 797, 799-800 (Bankr. D. Md. 1994); *Virدانco, Inc. v. MTS Int'l*, 820 P.2d. 352, 355 (Colo. Ct. App. 1991); *Gallie v. Ram Assoc. Mgmt. Serv., Inc.*, 757 P.2d 176, 177 (Colo. Ct. App. 1988); *Sanford v. Kobey Bros. Const. Corp.*, 689 P.2d 724, 725 (Colo. Ct. App. 1984). Thus, it is unnecessary to pierce the corporate veil with respect to fraud committed by Defendant.

In Plaintiff's affidavit, he lists damages in the amount of:

1. \$139,059.00 unpaid principal with respect to the agreement for the purchase of his medical practice;
2. \$17,000.00 paid by Plaintiff to retire a loan that was the responsibility of PSM under the purchase agreement;
3. \$4,600.00 attorney fees paid to enforce the purchase agreement;
4. \$750.00 attorney fees paid to Plaintiff's attorney in this adversary proceeding; and
5. \$150.00 filing fee for this proceeding.

Section 523(a)(2)(A) allows this Court to find that a debt is nondischargeable "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . false pretenses, a false representation, or actual fraud" 11 U.S.C. § 523(a)(2)(A). The Court finds that the first two items of damages constitute an extension of credit made to

Defendant on as a consequence of her fraud. The attorney fees expended to enforce those obligations, while they may be enforceable under the parties' contract, are not a proper element of damages in this nondischargeability action based upon Defendant's fraud. *American First Credit Union v. Gagle (In re Gagle)*, 230 B.R. 174, 184-85 (Bankr. D. Utah 1999). Therefore, it is

ORDERED that judgment is granted in favor of Plaintiff and against Defendant in the amount of \$156,059.00; it is further

ORDERED that, pursuant to 11 U.S.C. § 523(a)(2)(A), said judgment is nondischargeable.

Dated this _____ day of June, 2003.

BY THE COURT:

Howard R. Tallman, Judge
United States Bankruptcy Court