IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	)	
	)	
JAYNE D. POND	)	Case No. 99-3570 (MFW)
	)	Chapter 7
Debtor.	)	
______________________________	)	
	)	
JEANNETTE MOORE,	)	
Personal Representative of	)	Adversary Proceeding
Robert W. Pond, Jr., Deceased.	)	02-4628 (PBL)
	)	
Plaintiff.	)	
v.	)	
	)	
JAYNE D. POND,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION[1]

This action is brought to determine the dischargeability of a debt of Defendant, Jayne D. Pond ("Debtor" or "Defendant"). The Complaint was brought pursuant to 11 U.S.C. §§ 523(a)(2), (4), and (6); however, at trial, Plaintiff, Jeanette Moore ("Plaintiff") abandoned her contentions under §§ 523(a)(2) and (6). Thus, this Court is required to determine only whether the debt in question here is a debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny"[2] §523(a)(4). For the reasons set forth hereinafter, this Court

[1] This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052.

[2] Plaintiff does not allege fraud or larceny, only defalcation while acting in a fiduciary capacity or embezzlement.

determines that it is a debt under §523(a)(4), and that it is therefore nondischargeable in Debtor's bankruptcy.

I. FINDINGS OF FACT [3]

Debtor's father-in-law, Robert W. Pond, Jr., lived with and was cared for by Debtor and her husband for approximately 17 years, prior to his being placed in a Veterans Administration home in Philadelphia, Pennsylvania in 1995. It was then in early 1997 when apparently at the behest of his daughters, Robert W. Pond, Jr. executed a Durable Power of Attorney in favor of the Debtor. (Exhibits 2, 15) Later, the daughters told Debtor to sell the house, which was apparently unoccupied and owned jointly by Mr. Pond and his wife, who was then living with one of their daughters. The house was sold in January 1997, with the deeds[4] being signed by Debtor as Attorney in Fact for Mr. Pond and by the Attorney in Fact for Mr. Pond's wife, who was apparently Mr. Pond's daughter. The net sale proceeds were $69,879.14. (Exs. 3, 16) Half of the proceeds went to Mr. Pond's wife and the daughter with whom she was living. The Debtor received the other half of the proceeds, $34,939.57, and deposited the funds in her personal bank account.[5] Debtor testified that she did not intend to give any of the proceeds to Mr. Pond, asserting that it was hers alone. Later, in March of 1999, Debtor delivered a check for

[3] Exhibits admitted in evidence at trial on October 1, 2004 were submitted and offered by the parties jointly, with some duplication. They will be referred to herein by number as "(Exhibit __)."

[4] The property was conveyed by warranty deed and quit claim deed. (Exs. 4, 5, 17)

[5] Debtor testified that while Mr. Pond was living with her and her husband, and thereafter, while he was in the Veterans Administration home, Mr. Pond's pension and social security checks were commingled with her and her husband's funds, in an account carried in her name only. At no time, apparently, did Mr. Pond have a bank account in his name, either individually or with any other person.

$5,000.00 to Plaintiff (Exs. 6, 14), which she testified was all that she had left.[6]

Plaintiff was appointed guardian to Mr. Pond in January 2000 (Ex. 1) and in March 2000 a suit was initiated in Mr. Pond's name and on his behalf by Plaintiff in the Court of Chancery of the State of Delaware in and for Sussex County, seeking an accounting for the proceeds of the real estate conveyance and life insurance redemption[7], a constructive trust and/or resulting trust accounting, damages for breach of fiduciary duty, and further, alleging wrongful conversion of proceeds. (Ex. 7)

Before the Honorable Sam Glasscock, III, Master in the Court of Chancery, Plaintiff moved for partial summary judgment. The Master issued an oral draft report in which he granted the motion as to liability. In his oral draft report (Ex. 9), the Master acknowledged the existence and validity of the Power of Attorney held by Debtor, noted that Debtor had admitted using the proceeds from the sale of the house for her own use, and held that she clearly had the fiduciary duty to manage and use the proceeds for the benefit of Mr. Pond. The Master also noted that it was not clear whether liability should be in the full amount of the real estate proceeds retained by Debtor, there being a question as to whether the $5,000.00 payment made by the Debtor to the Plaintiff should be applied as an offset. The amount was deferred for a later inquisition of damages, if the parties could not agree on an amount. There is no indication from the record that either party took exception to any part of the draft oral report of the Master, or that either party

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[6] There is some question as to the source of the funds. Debtor testified that the $5,000.00 was the remainder of the settlement that she received from her husband's automobile accident. Plaintiff testified that the check was part of the proceeds from the sale of Mr. Pond's house.

[7] At trial, Debtor testified that there never was a life insurance policy for or on behalf of Mr. Pond that was redeemed.

gave any notice of disagreement or question with regard to it.

Subsequently Mr. Pond died in 2001, and Plaintiff was appointed his personal representative.

II. JURISDICTION

This Court has jurisdiction over this matter as a core proceeding pursuant to 28 U.S.C. §§ 1334 and 157 (b) (2) (I), (J), and (O).

III. DISCUSSION

Section 523(a)(4) of the Bankruptcy Code excepts from discharge any debt that involves fraud or defalcation while acting in a fiduciary capacity.[8] "Defalcation refers to a failure to produce funds entrusted to a fiduciary and applies to conduct that does not necessarily reach the level of fraud, embezzlement or misappropriation." 4 Collier on Bankruptcy ¶ 523.05 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev.) *See also, Quaif v. Johnson*, 4 F.3d 950, 955 ("Defalcation refers to a failure to produce funds entrusted to a fiduciary."); *Central Hanover Bank & Trust Co. v. Herbst*, 93 F.2d 510, 512 (2d Cir., 1937) (holding that defalcation may not rise to the level of fraud or embezzlement or even misappropriation). Therefore, for a debt to be nondischargeable under §523(a)(4) money or property must be misappropriated or converted while acting in a fiduciary capacity. *American Ins. Co. v. Lucas*, 41 B.R. 923, 925 (D. Pa., 1984).

It is well established under Delaware state law that a Power of Attorney creates a

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[8] Section 523(a)(4).

fiduciary relationship that is required under §523(a)(4). "A power of attorney creates a fiduciary relationship not unlike that created by a formal trust. As a fiduciary, the attorney-in-fact is subject to a duty of loyalty that obligates the attorney-in-fact to act at all times in the best interest of the principal, unless the principal validly consents to some different conduct." *Faraone v. Kenyon*, 2004 Del. Ch. LEXIS 26 (Del. Ch., 2004). "The creation of a power of attorney imposes the fiduciary duty of loyalty on the attorney-in-fact." *Schock v. Nash*, 732 A.2d 217, 225 (Del., 1999).

While Debtor testified that she did not fully understand the extent of her obligation to Mr. Pond under the Power of Attorney, she clearly admitted both at trial before this Court and before the Master in the Court of Chancery, to having retained and used the proceeds of the real estate transaction obtained by her pursuant to the Power of Attorney, as her own property without regard to Mr. Pond or his interest in those funds. Before the Master, she apparently also admitted that she was aware that she should return the funds, but was unable to do so due to intervening events which caused her to expend the funds for her own use (Ex. 9).

This Court finds that the Power of Attorney created an express trust under which Debtor was required to receive, hold and apply funds such as the proceeds from the sale of Mr. Pond's house for Mr. Pond's benefit and welfare. Just as she admitted before this Court and before the Master, she breached her fiduciary duty when she commingled the funds with her own and when she expended them for her own use and benefit exclusively. There can be no clearer example of "defalcation while acting in a fiduciary capacity" than is present in this case.

Contrary to the contention of Counsel for Debtor, this Court does not believe that it is, or should be necessary to find that the fiduciary acted recklessly or maliciously in order to satisfy

the statutory standard. In fact, defalcation does not require any intentional wrongdoing on the part of the debtor. *American Ins. Co. v. Lucas*, 41 B.R. 923, 925 (D. Pa., 1984). Even negligence or an innocent mistake that results in the misappropriation or failure to account for funds or property is defalcation. *Mountbatten Sur. Co. v. McCormick (in Re McCormick)*, 283 B.R. 680, 684 (Bankr. D. Pa., 2002) (quoting *Republic of Rwanda v. Uwimana (In re Uwimana)*, 274 F.3d 806, 811 (4th Cir., 2001)). That she acted willfully, that is, with knowledge of what she was doing, whether or not she recognized the precise legal ramifications of her actions, should be and is sufficient. In this case, Debtor even admitted before the Master that she knew she should return the funds.

This Court is fully aware of the fact that exceptions to discharge are construed strictly in favor of the debtor and against the persons seeking such exceptions. 4 Collier on Bankruptcy ¶ 523.05 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev.) ("In determining whether a particular debt falls within one of the exceptions of section 523, the statute should be strictly construed against the objecting creditor and liberally in favor of the debtor.") However, regardless of that fact, the defalcation in this case is so clear and the defense to the Complaint so weak, that no conclusion other than to determine the debt nondischargeable is possible.

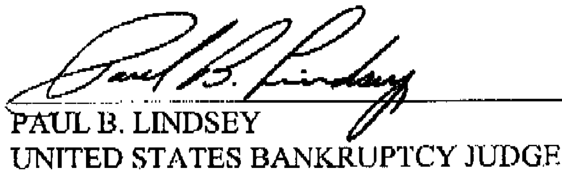
III. CONCLUSION

Debtor's obligation to the now deceased Mr. Pond, and now to Plaintiff in her capacity as his personal representative, will be hereby excepted from Debtor's discharge in bankruptcy. The precise amount of that debt, if not agreed between the parties, will be determined in the action pending between the parties in the Chancery Court of the State of Delaware.

Judgment in favor of Plaintiff and against Debtor in this adversary proceeding, declaring the debt of Debtor to Robert W. Pond, Jr. nondischargeable will be entered by separate instrument.

DATED: October 18, 2004.

BY THE COURT:



PAUL B. LINDSEY
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE: JAYNE D. POND Debtor.	)))))	Case No. 99-3570 (MFW) Chapter 7
JEANNETTE MOORE, Personal Representative of Robert W. Pond, Jr., Deceased. Plaintiff. v. JAYNE D. POND, Defendant.	)))))))))))	Adversary Proceeding 02-4628 (PBL)

ORDER

For the reasons set forth in the Memorandum Opinion of even date herewith, it is hereby Ordered that the debt of the Defendant to the Plaintiff, the amount to be determined by the pending action between the parties in Court of Chancery of the State of Delaware, is nondischargeable and shall be excepted from discharge in Debtor's Chapter 7 Bankruptcy Case.

IT IS SO ORDERED.

DATED: October 18, 2004

BY THE COURT:

PAUL B. LINDSEY
UNITED STATES BANKRUPTCY JUDGE