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5 UNITED STATES BANKRUPTCY COURT
6 EASTERN DISTRICT OF CALIFORNIA
7

8
9 In re) Case No. 10-38007-E-7
10)
11 GLENDA S. GOLDEN and)
JOSHUA M. GOLDEN,)
12)
Debtors.)
13 _____)
14)
ARNOLD CHUNG and) Adv. Pro. No. 11-2741
14 JANICE CHUNG,) Docket Control No. KY-1
15)
Plaintiffs,)
16 v.)
17)
GLENDA S. GOLDEN and)
17 JOSHUA M. GOLDEN,)
18)
Defendants.)
19 _____)

20 This memorandum decision is not approved for publication and may
21 not be cited except when relevant under the doctrine of law of
the case or the rules of claim preclusion or issue preclusion.

22 MEMORANDUM OPINION AND DECISION

23 Arnold Chung and Janice Chung, the Plaintiffs, seek partial
24 summary judgment on their § 523 nondischargeability complaint
25 against Joshua Golden, one of the Defendant-Debtors. Plaintiffs
26 have provided evidence in the form of the Defendant's deposition
27 transcript and various discovery documents. The Plaintiffs' motion
28 for relief looks to find an amount \$275,367.97 as nondischargeable

1 in the Defendant's bankruptcy case pursuant to 11 U.S.C.
2 § 523(a)(4) [breach of fiduciary duties for an asserted
3 partnership], only one of several causes of action in the
4 Complaint.

5 Federal Rule of Civil Procedure Rule 7(b), incorporated by
6 Federal Rule of Bankruptcy Procedure 7007, requires that "The
7 motion must: . . . (B) state with particularity the grounds for
8 seeking the order; and (C) state the relief sought." Properly
9 pleading the grounds with particularity in the motion is not
10 optional, but "must" be done by the movant. It is not for the
11 court to traverse through other pleadings or extensive points and
12 authorities to piece together the basis for movant's motion or the
13 relief actually sought.

14 The Defendant responds by disputing the form of investment,
15 whether a partnership was formed, the time line of investments,
16 what assets were part of the claimed partnership, and general
17 denials of statements. No evidence was submitted by the Defendant
18 in support of any points.

19 **FEDERAL COURT JURISDICTION**

20 Jurisdiction for this Adversary Proceeding and Summary
21 Judgment Motion exists pursuant to 28 U.S.C. §§ 1334 and 157(a),
22 and the referral of bankruptcy cases and all related matters to the
23 bankruptcy judges in this District. ED Cal. Gen Order 182, 223.
24 This Adversary Proceeding is a core matter arising under Title 11,
25 including 11 U.S.C. §§ 523. 28 U.S.C. § 157(b)(2)(I). Proper
26 notice was provided pursuant to Local Bankruptcy Rule 9014-1(f)(1)
27 and opposition was filed by the opposing Defendant.

28 ///

SUMMARY JUDGMENT STANDARD

In an adversary proceeding, summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), *incorporated by* Fed. R. Bankr. P. 7056. The key inquiry in a motion for summary judgment is whether a genuine issue of material fact remains for trial. Fed. R. Civ. P. 56(c), *incorporated by* Fed. R. Bankr. P. 7056; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986); 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.11[1][b] (3d ed. 2000) ("Moore").

"[A dispute] is 'genuine' only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute [over a fact] is 'material' only if it could affect the outcome of the suit under the governing law." *Barboza v. New Form, Inc. (In re Barboza)*, 545 F.3d 702, 707 (9th Cir. 2008) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

The party moving for summary judgment bears the burden of showing the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). To support the assertion that a fact cannot be genuinely disputed, the moving party must "cit[e] to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A), *incorporated by* Fed. R. Bankr. P. 7056.

In response to a properly submitted motion for summary judgment, the burden shifts to the nonmoving party to set forth

1 specific facts showing that there is a genuine dispute for trial.
2 *Barboza*, 545 F.3d at 707 (citing *Henderson v. City of Simi Valley*,
3 305 F.3d 1052, 1055-56 (9th Cir. 2002)). The nonmoving party cannot
4 rely on allegations or denials in the pleadings but must produce
5 specific evidence, through affidavits or admissible discovery
6 materials, to show that a dispute exists. *Id.* (citing *Bhan v. NME*
7 *Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991)). The nonmoving
8 party "must do more than simply show that there is some
9 metaphysical doubt as to the material facts." *Matsushita Electric*
10 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

11 In ruling on a summary judgment motion, the court must view
12 all of the evidence in the light most favorable to the nonmoving
13 party. *Barboza*, 545 F.3d at 707 (citing *County of Tuolumne v.*
14 *Sonora Community Hospital*, 236 F.3d 1148, 1154 (9th Cir. 2001)).
15 The court "generally cannot grant summary judgment based on its
16 assessment of the credibility of the evidence presented." *Agosto v.*
17 *INS*, 436 U.S. 748, 756 (1978). "[A]t the summary judgment stage[,]
18 the judge's function is not himself to weigh the evidence and
19 determine the truth of the matter[,] but to determine whether there
20 is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

21 **EVIDENCE PRESENTED BY THE PARTIES**

22 Discovery concluded on June 29, 2012. Dckt. 10. The evidence
23 provided to the court by the Plaintiffs consists of:

24 1) Accounting records produced by Defendant for Norcal
25 Nutrition, Vision Captured, and Celeswiss, Inc.

26 2) Deposition transcript of Defendant, Joshua Golden, taken
27 May 21, 2012.

28 3) Defendant's response to Plaintiffs' Request for Admissions.

1 No other party declarations or affidavits have been filed with the
2 court in this case.

3 No evidence was provided in opposition to the Motion for
4 Partial Summary Judgment. The Defendant has asserted that the
5 Plaintiffs have failed to establish that a fiduciary relationship
6 existed between the Plaintiffs and Defendant Joshua M. Golden.
7 Opposition, Dckt. 39. In the Points and Authorities, the Defendant
8 asserts that there are disputed facts, but does not provide
9 evidence of the dispute.

10 **PLAINTIFFS ARE NOT ENTITLED TO SUMMARY JUDGMENT**

11 As discussed above, the moving party bears the burden of
12 showing the absence of a genuine issue of material fact by citing
13 to particular parts of materials in the record. The Plaintiffs
14 have cited all facts directly to the materials provided by the
15 Defendant or the Defendant's own testimony during deposition.

16 The burden shifts to the nonmoving party to set forth specific
17 facts showing that there is a genuine dispute for trial. However,
18 the nonmoving party cannot rely on allegations or denials in their
19 pleadings and instead must cite to specific evidence in the record.
20 Even within the undisputed facts section of the Defendant's points
21 and authorities, the Defendant fails to cite to the record in
22 support of his assertions. Within the disputed facts, the
23 Defendant simply disagrees with the Plaintiffs' Separate Statement
24 of Undisputed Facts without providing specific evidence within the
25 evidence to support the disagreement.

26 To prevail in a summary judgment motion, the moving party must
27 present sufficient evidence to support their entitlement to
28 judgment as a matter of law. The Motion is premised on the court

1 finding that there exists a partnership or partnerships between the
2 Plaintiffs and Defendant.

3 The Plaintiffs' motion makes several assertions that
4 presumably are issues the Plaintiffs are looking for the court to
5 review for partial summary judgment. Specifically, in the Points
6 and Authorities, the Plaintiffs claim the following three claims:

- 7 A. Joshua Golden was a fiduciary of the Chungs.
8 B. The Chungs entrusted with Joshua Golden funds to be
9 held and used for the benefit of the Chungs.
10 C. Joshua Golden misappropriated funds he held on
11 behalf of the Chungs and failed to properly account
12 for such funds.

13 Based on the evidence presented, no contradicting evidence
14 having been presented by the Defendant, and the court not being
15 asked to assess the credibility of witnesses, the court determines
16 that the following facts are not in material dispute:

17 Joshua Golden first met Arnold and Janice Chung at 18 a Seminar on insurance products in 2005.	Joshua Golden Deposition Transcript ("JGT"), Ex. B, Dckt. 36, 9:4-9
19 Joshua Golden sold a life insurance policy to 20 Janice Chung in June 2005.	JGT, 9:21-10:5
21 Joshua Golden had his next business dealings with 22 Arnold and Janice Chung in 2008. The dealings 23 related to a gym project in Virginia.	JGT, 16:12-17:04
24 The gym project was to provide management 25 consulting services to an operating gym in 26 Virginia.	JGT, 19:1-6
27 Joshua Golden had never previously provided such 28 consulting services to a gym.	JGT, 19:13-15
Arnold and Janice Chung provided \$5,000.00 to Joshua Golden for the gym project.	JGT, 22:11-15
The \$5,000.00 for the gym project was for travel expenses for two people to travel to Virginia.	JGT, 27:15-17

1	No persons traveled to Virginia for the gym project.	JGT, 27:17-19
2		
3	Joshua Golden did not provide a written accounting to Arnold and Janice Chung for the gym project.	JGT, 23:4-12.
4	Joshua Golden started a video documentary project in October 2007.	JGT, 29:17-22.
5		
6	The first phase of the video documentary was completed in late March 2008.	JGT, 29:22-23
7	The video documentary project was stopped in August 2009, with approximately 10-12 minutes of footage completed.	JGT, 100:6-11
8		
9	Arnold and Janice Chung became involved in Joshua Golden's video project in September or October 2008.	JGT, 32:20-33:3
10		
11	Arnold and Janice Chung ceased their involvement in the video documentary in March 2009.	JGT, 33:4-1
12	Arnold and Janice Chung invested \$22,800.00 with Defendant for the purchase of Celeswiss, Inc.	JGT, 87:2-6
13	Arnold and Janice Chung invested \$35,000.00 with Defendant for funding Norcal Nutrition.	JGT, 87:11-14
14		
15	Arnold and Janice Chung invested \$5,000.00 with Defendant for Norcal Nutrition.	JGT, 87:15-18
16	Norcal Nutrition opened in October 2009 and ceased operation ("kicked out") end of June 2011.	JGT, 67: 20-22
17	Monies obtained for the video documentary was used to open Norcal Nutrition.	JGT, 99: 24-25, 100: 1-3
18		
19	Arnold and Janice Chung invested \$120,000.00 with Defendant for Vision Captured in March 2009.	JGT, 51:2-9; 87:19 - 88:13
20	Arnold and Janice Chung incurred obligations for credit cards ("business credit cards") used by Joshua Golden in connection with their transactions with Joshua Golden.	JGT, p. 88 - 93
21		
22	Joshua Golden made a charge on the business credit cards at Placer Tactical to purchase rifle parts for assembly and resale; Defendant never sold any rifles.	JGT, p. 137:19-138:25
23		
24		
25	Joshua Golden made charges for personal transactions on business credit cards.	JGT, 131-132, 135, 137, 143, 147, 149; Request For Admissions, Ex. C, Dckt. 36, #42
26		
27		
28		

1 **CLAIM 1 - Defendant was a Fiduciary of the Plaintiffs Based on a**
2 **Partnership Existing Between the Parties**

3 To support this claim, the Plaintiffs seek to demonstrate that
4 the Chungs and Joshua Golden were partners, and by operation of
5 California partnership law, owed each other fiduciary duties along
6 with the duties of loyalty and care. The Ninth Circuit has held
7 that under California law, partners are trustees with respect to
8 partnership property for the purpose of section 523(a)(4).
9 *Ragsdale v. Haller*, 780 F.2d 794, 795-96 (9th Cir. 1986).
10 Plaintiffs cite California Corporations Code § 16202(a), "the
11 association of two or more persons to carry on as co-owners a
12 business for profit forms a partnership, whether or not the persons
13 intend to form a partnership." The Plaintiffs then cite to two
14 admissions: (1) Defendant owned a business with Mr. Chung; (2)
15 Intent to operate a business for profit with Mr. Chung.

16 However, the Plaintiffs have failed to address the issues
17 raised by subsection (c) of California Corporations Code § 16202,
18 which addresses how to determine if a partnership has been formed.
19 Subsection (c) of this Corporations Code section provides,

20 (1) Joint tenancy, tenancy in common, tenancy by the
21 entirety, joint property, common property, or part
22 ownership does not by itself establish a partnership,
even if the co-owners share profits made by the use of
the property.

23 (2) The sharing of gross returns does not by itself
24 establish a partnership, even if the persons sharing them
25 have a joint or common right or interest in property from
which the returns are derived.

26 Cal. Corp. Code § 16202(c)(1), (2).

27 Plaintiffs argue that there is a presumption of a partnership
28 if profits are shared arising under California Corporations Code

1 § 16202(c)(3), which provides,

2 (3) A person who receives a share of the profits of a
3 business is presumed to be a partner in the business,
4 unless the profits were received for any of the following
5 reasons:

6 (A) In payment of a debt by installments or
7 otherwise.

8 (B) In payment for services as an independent
9 contractor or of wages or other compensation to an
10 employee.

11 (C) In payment of rent.

12 (D) In payment of an annuity or other retirement
13 benefit to a beneficiary, representative, or
14 designee of a deceased or retired partner.

15 (E) In payment of interest or other charge on a
16 loan, even if the amount of payment varies with the
17 profits of the business, including a direct or
18 indirect present or future ownership of the
19 collateral, or rights to income, proceeds, or
20 increase in value derived from the collateral.

21 (F) In payment for the sale of the goodwill of a
22 business or other property by installments or
23 otherwise.

24 This presumption is rebuttable. 4-24 BALLANTINE AND STERLING CALIFORNIA
25 CORPORATION LAWS § 616.

26 What the court does not have in front of it is undisputed
27 evidence that profits were shared, and if shared, that it was not
28 for one of the reasons stated in subparagraph (c)(3), including
payment of debt, interest or charge on a loan (including right to
income, proceeds, or increase in value from the collateral). "The
presumption of partnership from an agreement to share profits,
however, will not alone sustain a finding that a relationship is a
partnership." *Id.*, citing *Bank of California v. Connolly*, 36 Cal.
App. 3d 350 (1973), decided under the pre-1977 Uniform
Partnership Act provisions enacted by the California Legislature.

1 Further, if the person does not have the right to manage or share
2 in the management, participation in profits may not alone make that
3 person a partner. BALLANTINE AND STERLING CALIFORNIA CORPORATION LAWS
4 § 616[2], citing pre-1977 Uniform Partnership Act cases. Creation
5 of a partnership is something more than one person providing money
6 to another person.

7 As discussed in this section in BALLANTINE AND STERLING, "This
8 intention [to form a partnership] must be ascertained from the
9 nature of the relationship agreed upon, rather than from the
10 designation the parties have given it. The objective terms of the
11 agreement, and not the subjective or undisclosed intention of the
12 parties, are controlling." *Id.*, § 616[1]. When a person asserts
13 that he or she is a partner with the right to share in profits,
14 there is also an implicit obligation to bear losses of the
15 partnership (with the exception of it being a limited partnership).
16 *Id.*, § 616[4].

17 The Plaintiffs assert there was one continuous partnership,
18 however no evidence has been provided as to the interests being
19 acquired in the six asserted investments. The court has been hard
20 pressed to follow what was being acquired and for what purpose. An
21 example is the acquisition of Celeswiss, Inc. Presumably, this was
22 a corporation (Inc.) and as such, acquisition was of common stock.
23 It is unclear from the evidence presented if this was a partnership
24 or simply a joint undertaking, and how it relates to the "Virginia
25 Gym" investment.

26 Starkly absent, notwithstanding the 99 pages of discovery
27 responses provided as the evidence in support of the Motion, is any
28 testimony of the Plaintiffs stating that they were entering into

1 partnerships with the Defendant. There is no evidence as to how
2 and what the Plaintiffs did in connection with this partnership,
3 how they accounted for the partnership interests and liabilities on
4 their tax returns and financial statements, and what they did to
5 assert their rights and manage their obligations as partners.

6 The evidence presented is not clear that there was a
7 partnership, whether formal or informal, between these parties. To
8 the extent that there could be a rebuttable presumption, the
9 Plaintiff has not presented the court with evidence of a right to
10 profits of the type not excluded from the presumption under
11 California Corporations Code § 16202(c)(3). The court cannot
12 determine from the evidence presented what relationship existed,
13 which endeavors, if any, were partnerships, and where there is one
14 massive partnership as Plaintiffs allege. These parties have
15 engaged in significant, multiple financial transactions, which
16 appear to have been done on a handshake and nod of the head. The
17 credibility of witnesses and proper documentation of the
18 transactions are necessary for this court to make a determination
19 as to the relationship or relationships which existed and exist
20 between the parties.

21 **CLAIM 2 - Defendant was Entrusted With Funds to be Held and Used in**
22 **the Partnership for the Benefit of the Plaintiffs**

23 The Plaintiffs have failed to provide a concise argument to
24 support this claim. It appears to derive from the claim of
25 partnership. However, the phrasing of the claim appears to imply
26 that the Defendant was to invest funds on behalf of the Plaintiffs.
27 This appears to contradict the claim that the parties were partners
28 in a partnership since funds would have necessarily have been

entrusted for the benefit of the partnership, were it a partnership.

CLAIM 3 - Defendant Misappropriated Funds

The Plaintiffs have stated that the Defendant has misappropriated funds. Plaintiffs point to the documents provided as an inadequate accounting of how the partnership funds were spent. Presuming Plaintiffs prove there was a partnership created by law, in California the Uniform Partnership Act of 1994 controls the rights and responsibilities of the partners.

This Act includes California Corporations Code § 16403, which states "a partnership shall keep its books and records, if any, in writing..." The Plaintiffs had a right during the partnership to inspect the books and any information reasonably required for the partner's rights and duties under the partnership agreement or this chapter. So there was no requirement for either partner to maintain the books of the partnership.

Plaintiffs assert that Defendant's failure to provide a complete accounting for all funds spent in the manner suggested imputes liability for the full amount invested. Evidence in the deposition and motions suggest that at least some of the transactions appear to be investments in the skill of the Defendant (researching, Virginia Gym, video project). Others appear to be possible investments of or financing by the Plaintiffs, such as the purchase of Celeswiss, Inc. To what extent Defendant was obligated to account for monies spent is unclear. Presumably Plaintiffs would not dispute that \$22,800.00 was spent to acquire Celeswiss, Inc. and was paid to a party for that interest.

These issues are important as the Plaintiffs pray the court

1 hold the entire amount invested or spent on credit during the
2 alleged extended business relationship with the Defendant
3 nondischargable. A violation of the obligation of good faith and
4 fair dealing would allow for every presumption to be made against
5 the Defendant. Testimony by the Defendant indicates that of the
6 clearly personal purchases described, he repaid those "loans" from
7 his own personal account. Cal. Corp. Code § 16404(3)(f). Neither
8 party has provided evidence to support the exact amounts and dates
9 personal items were charged, repaid, or not repaid from personal
10 accounts. Furthermore, no evidence was submitted about any
11 agreements between the "partners" as to compensation,
12 responsibilities, etc.

13 While Plaintiffs argue that under the principles enunciated in
14 *Otto v. Niles (In re Niles)*, 106 F.3d 1465 (9th Cir. 1997), once the
15 use of entrusted money is shown, then the burden shifts to the
16 fiduciary to show that the use was not improper. However, this
17 claim is premised on there being a partnership, which the court
18 cannot determine on this summary judgment motion based on the
19 evidence presented.

20 CONCLUSION

21 In an adversary proceeding, summary judgment is proper when
22 "the movant shows that there is no genuine dispute as to any
23 material fact and the movant is entitled to judgment as a matter of
24 law." Fed. R. Civ. P. 56(a), incorporated by Fed. R. Bankr. P.
25 7056. The Plaintiffs have submitted evidence demonstrating there
26 is no genuine dispute as to any material fact. The Defendant's
27 denials unsupported by evidence are insufficient to bring any of
28 the facts into dispute.

However, Plaintiffs have failed to provide sufficient facts to entitle them to judgment as a matter of law. The court cannot determine, on a motion for summary judgment with the evidence submitted whether a partnership or partnerships existed, and if so, to what extent and on what terms. The motion for summary judgment is denied.

The court does find that the facts stated above are not in material dispute and are deemed determined for all purposes in this adversary proceeding pursuant to Federal Rule of Civil Procedure 56(g) and Federal Rule of Bankruptcy Procedure 7056.

The motion for summary judgment is denied, and the court makes the above determination of summary adjudication.

The court shall issue an order consistent with this Ruling. This Memorandum Opinion and Decision constitutes the court's Findings of Fact and Conclusions of Law.

Dated: March 1, 2013

/s/
RONALD H. SARGIS, Judge
United States Bankruptcy Court