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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re:)	Case No. 08-30534-D-7
)	
ARNOLD GARY RUBENSTEIN,)	
)	
)	
Debtor.)	
_____)	
)	
KEITH ROYAL, Public)	Adv. Pro. No. 08-2596-D
Administrator, Administrator of)	
the Estate of Michele L.)	Docket Control No. GAR-1
Desiano,)	
)	
Plaintiff,)	
)	
v.)	
)	
ARNOLD GARY RUBENSTEIN,)	Date: January 14, 2009
)	Time: 10:00 a.m.
)	Dept: D
Defendant.)	

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

MEMORANDUM DECISION

On November 18, 2008, the defendant herein, Arnold Gary Rubenstein (who will be referred to as "the debtor") filed a Motion for Judgment on the Pleadings, bearing Docket Control No. GAR-1 (the "Motion"). For the reasons set forth below, the court will grant the Motion in part.

I. INTRODUCTION

In this adversary proceeding, Keith Royal, Public Administrator ("the plaintiff"), as administrator of the probate estate of Michele L. Desiano ("Ms. Desiano"), seeks a

1 determination that the debtor is liable to him for damages in
2 excess of \$300,000, plus punitive damages, and a determination
3 that such indebtedness is nondischargeable pursuant to 11 U.S.C.
4 § 523(a)(2)¹ (first and second causes of action) and § 523(a)(6)
5 (third cause of action).

6 The plaintiff's complaint hinges on a \$255,000 promissory
7 note allegedly made by the debtor as payor in favor of Ms.
8 Desiano prior to the latter's death in a car accident in 2005.
9 The plaintiff alleges that he, as the administrator of Ms.
10 Desiano's probate estate, acquired "all rights and claims herein
11 against [the debtor]" by assignment from the probate estate of
12 Jesse Arthur Baker, Ms. Desiano's husband, who was killed in the
13 same accident. In his § 523(a)(2) causes of action, the
14 plaintiff alleges that after Ms. Desiano's death and during the
15 plaintiff's administration of her probate estate, the debtor
16 concealed from the plaintiff the existence of the promissory note
17 and the true amount of the debt, produced a false promissory note
18 in a lesser amount and with different terms, testified falsely
19 about the promissory notes and the amount and terms of the debt,
20 and failed to pay to the probate estate the amounts due on
21 account of the debt.

22 The debtor contends that the plaintiff has not alleged that
23 the debtor obtained any money, property, services, or an

24
25 1. Unless otherwise indicated, all Code, chapter, section
26 and Rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
27 1330, and to the Federal Rules of Bankruptcy Procedure, Rules
28 1001-9036, as enacted and promulgated after the effective date
(October 17, 2005) of the Bankruptcy Abuse Prevention and
Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23
(2005) ("BAPCPA").

1 extension, renewal, or refinancing of credit from Ms. Desiano or
2 from the plaintiff, and thus, that the plaintiff has failed to
3 state a claim for relief under § 523(a)(2). The debtor also
4 asserts that the plaintiff has made no factual allegations that
5 would support the willful and malicious requirement of §
6 523(a)(6).

7 II. ANALYSIS

8 This court has jurisdiction over the Motion pursuant to 28
9 U.S.C. §§ 1334 and 157(b)(1). The Motion is a core proceeding
10 under 28 U.S.C. § 157(b)(2)(I). The Motion was brought pursuant
11 to Federal Rule of Civil Procedure 12(c), made applicable in this
12 proceeding by Federal Rule of Bankruptcy Procedure 7012(b).

13 A. Standards for Judgment on the Pleadings

14 Judgment on the pleadings is appropriate when the moving
15 party establishes on the face of the pleadings that there are no
16 issues of material fact and that he or she is entitled to
17 judgment as a matter of law. Hal Roach Studios v. Richard Feiner
18 & Co., 896 F.2d 1542, 1550 (9th Cir. 1989). The allegations of
19 the party opposing the motion must be accepted as true and are to
20 be construed in the light most favorable to that party. General
21 Conference Corp. v. Seventh-Day Adventist Church, 887 F.2d 228,
22 230 (9th Cir. 1989).

23 A motion for judgment on the pleadings must be denied unless
24 it appears "to a certainty" that no relief is possible under any
25 state of facts the plaintiff could prove in support of his or her
26 claim. Summit Media LLC v. City of Los Angeles, 530 F. Supp. 2d
27 1084, 1096 (C. D. Cal. 2008), citing Mostow v. United States,
28 966 F.2d 668, 672 (Fed. Cir. 1992).

1 B. False Pretenses, False Representations, Actual Fraud

2 Section 523(a)(2) excepts from discharge "any debt for
3 money, property, services, or an extension, renewal, or
4 refinancing of credit, to the extent obtained by false pretenses,
5 a false representation, or actual fraud, other than a statement
6 respecting the debtor's or an insider's financial condition."

7 Even assuming the allegations in the complaint to be true,
8 and construing them in the light most favorable to the plaintiff,
9 as to the § 523(a)(2) causes of action, the complaint fails to
10 state a claim upon which relief can be granted. Assuming that
11 the debtor incurred a debt in the amount of \$255,000, or in any
12 amount, to Ms. Desiano, there is no allegation that the debtor
13 obtained the funds, or any portion of them, from Ms. Desiano
14 through false pretenses, a false representation, or actual fraud.
15 Assuming for the sake of the Motion only that the debtor made
16 false statements or gave false testimony to the plaintiff or his
17 staff after Ms. Desiano's death, the fact is irrelevant because
18 the debtor did not obtain the \$255,000 by the use of those
19 statements or testimony.

20 The plaintiff cites Muegler v. Bening, 413 F.3d 980 (9th
21 Cir. 2005) and Cohen v. de la Cruz, 523 U.S. 213 (1998), for the
22 proposition that a creditor proceeding under § 523(a)(2) need not
23 establish that the debtor received any benefit, direct or
24 indirect, from his fraudulent conduct. In Cohen, the Supreme
25 Court held that § 523(a)(2)(A) "prohibit[s] the discharge of any
26 liability arising from a debtor's fraudulent acquisition of
27 money, property, etc., including an award of treble damages for
28 the fraud." 523 U.S. at 220-21.

1 The phrase ["to the extent obtained by" in §
2 523(a)(2)(A)] . . . makes clear that the share of
3 money, property, etc., that is obtained by fraud gives
4 rise to a nondischargeable debt. Once it is
established that specific money or property has been
obtained by fraud, however, "any debt" arising
therefrom is excepted from discharge.

5 Id at 218.

6 In the present case, the plaintiff does not allege that the
7 debtor obtained or received any portion of the \$255,000 through
8 fraud. In other words, unlike in Cohen, the plaintiff does not
9 allege that "specific money or property has been obtained by
10 fraud."

11 This distinction is well described in Sabban v. Ghomeshi (In
12 re Sabban), 384 B.R. 1 (9th Cir. BAP 2008):

13 While the Supreme Court held [in Cohen] that a debtor
14 need not "obtain" or receive money or property
15 fraudulently in order for creditor to prevail under
16 section 523(a)(2)(A), it repeatedly acknowledged that
the liability must "arise from" the fraud to be
17 nondischargeable. [fn] All such damages, including
statutory punitive damages "*assessed on account of the*
fraud," escape discharge.

18 384 B.R. at 6 (emphasis in original).

19 "The Supreme Court did not open the door for damages *not*
20 arising from fraud to be excepted from discharge." Id. at 6, n.
21 6 (emphasis in original).

22 Here, as to the \$255,000, there is no allegation of "any
23 liability arising from [the] debtor's fraudulent acquisition of
24 money, property, etc.," as the Cohen Court phrased it. The same
25 is true of the plaintiff's other alleged damages -- investigative
26 and research costs, attorney's fees, loss of use damages, damages
27 from loss of equity in real properties from which the debt might
28 have been satisfied, and punitive damages. Finally, those other

1 alleged damages do not constitute damages "assessed on account of
2 the [debtor's] fraud," like the treble damages assessed in Cohen.

3 In Muegler, also cited by the plaintiff, the court held:

4 It is only the fact of an adverse fraud judgment, and
5 nothing more, that is required for a debt to be
6 nondischargeable. Accordingly, we find that in light
of Cohen, the receipt of a benefit is no longer an
element of fraud under § 523(a)(2)(A).

7 413 F.3d at 984.

8 The precise question in Muegler was whether a fraud judgment
9 of a Missouri state court would be given preclusive effect in a
10 subsequent § 523(a)(2) action despite the absence of a
11 requirement in Missouri law that the wrongdoer have "received a
12 benefit" from his fraud. The facts of the debtor's conduct are
13 not set forth in the decision. However, given that the debtor
14 had been "found guilty [of] committing intentional fraud under
15 Missouri law," and given the court's reliance on Cohen, as well
16 as on M.M. Winkler & Assocs. and Pleasants,² there is no reason
17 to suppose the court intended to eliminate entirely the
18 requirement that the debtor have incurred the underlying debt
19 through fraud, false pretenses, or a false representation, or
20 otherwise have been liable for fraud under state law.³

21
22 2. Deodati v. M.M. Winkler & Assocs. (In re M.M. Winkler &
23 Assocs.), 239 F.3d 746, 751 (5th Cir. 2001) [if debt arises from
24 fraud, and debtor, although personally innocent, is liable for
that debt under state partnership law, debt is nondischargeable
under § 523(a)(2)]; Pleasants v. Kendrick (In re Pleasants), 219
25 F.3d 372 (4th Cir. 2000), see n. 3 below.

26 3. Similarly, the plaintiff's citations to McCoun v. Rea
27 (In re Rea), 245 B.R. 77 (Bankr. N.D. Tex. 2000), and Pleasants,
supra, do not assist him. Rea involved a stockbroker who made
28 false representations as a means of inducing the plaintiffs to
invest money with him. In Pleasants, the debtor had committed
(continued...)

1 In short, referring back to Cohen, "once it is established
2 that specific money or property has been obtained by fraud,
3 [. . .], 'any debt' arising therefrom is excepted from
4 discharge." In this case, even accepting as true all the facts
5 alleged by the plaintiff, the court cannot find that the
6 plaintiff or Ms. Desiano incurred \$255,000 in damages, or any
7 portion thereof, as a result of fraudulent conduct on the part of
8 the debtor. Nor were the plaintiff's other alleged damages
9 assessed on account of fraud in incurring the underlying
10 liability. Finally, those other damages do not flow in any way
11 from fraud in connection with the underlying liability. Thus,
12 the plaintiff's first and second causes of action fail to state a
13 claim upon which relief can be granted.

14 C. Willful and Malicious Injury

15 The Bankruptcy Code excepts from discharge a debt for
16 willful and malicious injury by the debtor to the person or
17 property of another. 11 U.S.C. § 523(a)(6). The "willful" and
18 "malicious" requirements are examined separately. Carrillo v. Su
19 (In re Su), 290 F.3d 1140, 1146 (9th Cir. 2002). The "willful"
20 requirement is satisfied "only when the debtor has a subjective
21 motive to inflict injury or when the debtor believes that injury
22 is substantially certain to result from his own conduct." 290
23 F.3d at 1142.

24 / / /

25 _____
26 3.(...continued)
27 fraud in inducing the plaintiffs to enter into a construction
28 contract with his unqualified firm. By contrast, the plaintiff
here relies solely on alleged representations made by the debtor
after Ms. Desiano loaned him the money.

1 The "malicious" test is met when the act is "(1) a wrongful
2 act, (2) done intentionally, (3) which necessarily causes injury,
3 and (4) is done without just cause or excuse." Petralia v.
4 Jercich (In re Jercich), 238 F.3d 1202, 1209 (9th Cir. 2001).
5 "[I]t is the wrongful act that must be committed intentionally
6 rather than the injury itself." Jett v. Sicroff (In re Sicroff),
7 401 F.3d 1101, 1106 (9th Cir. 2005), citing Murray v. Bammer (In
8 re Bammer), 131 F.3d 788, 791 (9th Cir. 1997) ("This four-part
9 definition does not require a showing of . . . an intent to
10 injure, but rather it requires only an intentional act which
11 causes injury.").

12 Resolution of the Motion with respect to the plaintiff's
13 third cause of action is a closer call. The debtor asserts that
14 the factual allegations in the complaint are not sufficient to
15 state a claim under § 523(a)(6). However, with respect to this
16 cause of action, the court cannot conclude "'to a certainty' that
17 no relief is possible under any state of facts the plaintiff
18 could prove in support of his . . . claim." See Summit Media
19 LLC, 530 F. Supp. 2d at 1096.

20 III. CONCLUSION

21 For the foregoing reasons, the court concludes that the
22 plaintiff's first and second causes of action fail to state a
23 claim upon which relief may be granted, and accordingly, as to
24 those two causes of action, the Motion will be granted. As to
25 the plaintiff's third cause of action, the Motion will be denied.

26 The court will issue an appropriate order.

27 Dated: January 26, 2009

_____/s/_____
ROBERT S. BARDWIL
United States Bankruptcy Judge