

In re) Case No. 08-26680-A-7
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THEODORE E. HONKANEN and)
MARCELLA J. HONKANEN,)
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Debtor.)
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_____) Adv. No. 08-2469
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SUSAN J. ARCHER,)
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Plaintiff,)
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vs.)
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MARCELLA J. HONKANEN,)
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Defendant.)
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Plaintiff Susan Archer's complaint asserts that her claim against defendant Marcella Honkanen is made nondischargeable by 11 U.S.C. § 523(a)(4).¹ This court agrees because another court previously determined that the defendant owed the plaintiff a

¹ Actually, the plaintiff is now the chapter 7 trustee of Ms. Archer, J. Michael Hopper. Ms. Archer filed her own chapter 7 petition, Case No. 09-28930. The court permitted Mr. Hopper to intervene prior to trial.

1 fiduciary duty and her intentional breach of that duty injured
2 the plaintiff. The resulting damages are nondischargeable.

3 The defendant acted as the plaintiff's real estate broker in
4 a pre-petition transaction. In that transaction, the plaintiff
5 attempted to purchase real property from a third party. The
6 defendant represented the plaintiff in that transaction.

7 When the transaction was not consummated, the plaintiff
8 filed suit against the defendant in state court. The state court
9 suit accused the defendant of performing her duties negligently
10 and of an intentional breach of her fiduciary duty. This alleged
11 breach consisted of making intentional misrepresentations to the
12 plaintiff concerning a real estate purchase agreement and the
13 sufficiency of the plaintiff's performance under it, in addition
14 to failing to disclose the inadequacy of the her performance.

15 The plaintiff further accused the defendant of breaching her
16 fiduciary duty of loyalty by acting in the interests of the
17 seller rather than in the plaintiff's interest. This was done by
18 falsely informing the seller that the plaintiff could not satisfy
19 the financing requirements for the purchase and was in breach of
20 the sale agreement.

21 The state court lawsuit resulted in a jury verdict awarding
22 damages to the plaintiff. The jury's special verdict concluded
23 that the plaintiff's total damages were \$356,000. Even though
24 the jury apportioned negligence between the parties, finding the
25 defendant 70% at fault and the plaintiff 30% at fault, it awarded
26 the plaintiff 100% of her damages. This apparent inconsistency
27 in the verdict is explained by the fact that the jury also
28 concluded that defendant had breached her fiduciary duty to the

1 plaintiff when she made the intentional misrepresentations and
2 breached her duty of loyalty. This is clear from the jury's
3 special verdict which awarded the plaintiff her entire \$356,000
4 loss, not just 70% of it.

5 Section 523(a)(4) provides that an individual is not
6 discharged "from any debt for fraud or defalcation while acting
7 in a fiduciary capacity, embezzlement, or larceny."

8 The fiduciary capacity requirement applies only to debts for
9 fraud or defalcation. Embezzlement and larceny do not require
10 the existence of a fiduciary relationship. See Cal-Micro, Inc.
11 v. Cantrell (In re Cantrell), 329 F.3d 1119, 1125 (9th Cir.
12 2003); see also Lewis v. Scott (In re Lewis), 97 F.3d 1182, 1185
13 (9th Cir. 1996); Transamerica Commercial Fin. Corp. v. Littleton
14 (In re Littleton), 942 F.2d 551, 555 (9th Cir. 1991).

15 Only two questions exist under section 523(a)(4) when fraud
16 or defalcation are involved: whether the defendant committed
17 fraud or defalcation and whether it was committed in relation to
18 the debtor's fiduciary responsibilities. Bugna v. McArthur (In
19 re Bugna), 33 F.3d 1054, 1057 (9th Cir. 1994).

20 The definition of fiduciary capacity under section 523(a)(4)
21 is a question of federal law. Cantrell, 329 F.3d at 1125. The
22 state law does not control the definition of fiduciary. Id. The
23 fiduciary relationship must arise from an express or technical
24 trust that was imposed before and without reference to the
25 wrongdoing that caused the damage to the plaintiff. Id. (citing
26 Lewis, 97 F.3d at 1185). Courts rely on state law only to
27 ascertain whether the required trust relationship exists.
28 Cantrell, 329 F.3d at 1125. Thus, the defendant was not a

1 fiduciary merely because the state court concluded that she was a
2 fiduciary.

3 The Ninth Circuit has held that the fiduciary duty a real
4 estate broker owes her client under California law makes the
5 broker a fiduciary for purposes of section 523(a)(4). Bugna, 33
6 F.3d at 1057 (citing Woosley v. Edwards (In re Woosley), 117 B.R.
7 524, 529 (B.A.P. 9th Cir. 1990)). There is no dispute in this
8 case that the defendant served as a real estate broker for the
9 plaintiff. Hence, in this case the defendant was the plaintiff's
10 fiduciary.

11 For purposes of section 523(a)(4), defalcation is defined as
12 the misappropriation of trust funds or money held in any
13 fiduciary capacity. Lewis, 97 F.3d at 1186. Here, the plaintiff
14 is not alleging a defalcation by the defendant.

15 Under section 523(a)(4), a fiduciary who commits an actual
16 fraud may not discharge the resulting liability. See Roussos v.
17 Michaelides (In re Roussos), 251 B.R. 86, 94 (B.A.P. 9th Cir.
18 2000); see also Bell v. Berry (In re Berry), 174 B.R. 449, 453
19 (Bankr. N.D. Tex 1994). To prove actual fraud, the plaintiff
20 must prove: (1) a misrepresentation, concealment or nondisclosure
21 of a material fact; (2) made intentionally by the defendant; (3)
22 with the intent and purpose to deceive the plaintiff; (4)
23 justifiable reliance by the plaintiff; and (5) a resulting
24 injury. Odorizzi v. Bloomfield School Dist., 246 Cal. App. 2d
25 123, 128 (1966).

26 The complaint alleges that the "[d]efendant . . . assured
27 [p]laintiff that her tender of performance was adequate."
28 "Plaintiff was advised by [d]efendant . . . that her tender of

1 these items satisfied her requirements under the contract."
2 "Said representation was intentionally false." Complaint ¶ 7.
3 "Defendant . . . intentionally concealed the seller's objections
4 from [p]laintiff, denying her the opportunity to cure the
5 defaults." Complaint ¶ 8. "Such statements . . . were made with
6 the intent to induce the [p]laintiff to breach the 2004
7 [c]ontracts and induce seller to cancel the [c]ontracts, all to
8 [p]laintiff's direct detriment." Complaint ¶ 10. The complaint
9 also refers to harm sustained by the plaintiff in the amount of
10 \$356,000, resulting from the defendant's actions. Complaint ¶
11 15. These allegations mirror allegations appearing in the state
12 court complaint. See Trial Exhibit 2, ¶ 7-15.

13 By virtue of these allegations, the plaintiff is asserting
14 that the defendant committed actual fraud in connection with her
15 duties as the plaintiff's real estate broker. They state a claim
16 for fiduciary fraud.

17 The plaintiff proved these allegations in state court. As
18 noted above, the jury found for the plaintiff on both her
19 negligence and intentional breach of fiduciary duty claims.
20 Having actually litigated the existence of a fiduciary duty and
21 the breach of that duty by making intentional misrepresentations,
22 the doctrine of issue preclusion prevents the defendant from
23 relitigating these issues. See Grogan v. Garner, 498 U.S. 279,
24 284 (1991). California law is in accord. See Gayden v.
25 Nourbakhsh (In re Nourbakhsh), 67 F.3d 798, 800 (9th Cir. 1995);
26 Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir.
27 2001). Even assuming issue preclusion did not prevent
28 relitigation of the issues, the defendant offered no exculpatory

1 evidence.

2 Therefore, the judgment of the state court is made
3 nondischargeable by section 523(a)(4). Counsel for the plaintiff
4 shall lodge a conforming order.

5 Dated: November 24, 2009

6 By the Court

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9 Michael S. McManus, Judge
10 United States Bankruptcy Court
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