

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA**

Honorable Fredrick E. Clement
Fresno Federal Courthouse
2500 Tulare Street, 5th Floor
Courtroom 11, Department A
Fresno, California

PRE-HEARING DISPOSITIONS

DAY: WEDNESDAY

DATE: JANUARY 31, 2018

CALENDAR: 10:00 A.M. CHAPTER 7 ADVERSARY PROCEEDINGS

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling. These instructions apply to those designations.

No Ruling: All parties will need to appear at the hearing unless otherwise ordered.

Tentative Ruling: If a matter has been designated as a tentative ruling it will be called. The court may continue the hearing on the matter, set a briefing schedule or enter other orders appropriate for efficient and proper resolution of the matter. The original moving or objecting party shall give notice of the continued hearing date and the deadlines. The minutes of the hearing will be the court's findings and conclusions.

Final Ruling: Unless otherwise ordered, there will be no hearing on these matters. The final disposition of the matter is set forth in the ruling and it will appear in the minutes. The final ruling may or may not finally adjudicate the matter. If it is finally adjudicated, the minutes constitute the court's findings and conclusions. If the parties stipulate to continue the hearing on the matter or agree to resolve the matter in a way inconsistent with the final ruling, then the court will consider vacating the final ruling only if the moving party notifies chambers before 4:00 pm at least one business day before the hearing date: Department A-Kathy Torres (559)499-5860; Department B-Jennifer Dauer (559)499-5870. If a party has grounds to contest a final ruling because of the court's error under FRCP 60 (a) (FRBP 9024) ["a clerical mistake (by the court) or a mistake arising from (the court's) oversight or omission"] the party shall notify chambers (contact information above) and any other party affected by the final ruling by 4:00 pm one business day before the hearing.

Orders: Unless the court specifies in the tentative or final ruling that it will issue an order, the prevailing party shall lodge an order within 14 days of the final hearing on the matter.

1. [16-13454](#)-A-7 **IN RE: MARVIN/MAUREKA DAVIS**
[16-1108](#) [FEC-1](#)

PRE-TRIAL CONFERENCE RE: COMPLAINT
12-23-2016 [[1](#)]

OCEAN VIEW BIBLE FELLOWSHIP V.
DAVIS ET AL
MARY ANN O'HARA/ATTY. FOR PL.
RESPONSIVE PLEADING

Tentative Ruling

In light of the intended ruling on the plaintiff's motion for summary judgment the court suggests dismissal of the cause of action under 11 U.S.C. § 523(a) and entry of judgment.

2. [16-13454](#)-A-7 **IN RE: MARVIN/MAUREKA DAVIS**
[16-1108](#) [MAO-6](#)

MOTION FOR SUMMARY JUDGMENT
12-7-2017 [[29](#)]

OCEAN VIEW BIBLE FELLOWSHIP V.
DAVIS ET AL
MARY ANN O'HARA/ATTY. FOR MV.
ORDER DENYING, ECF NO. 47

Final Ruling

The matter was denied by order, December 14, 2017, ECF # 47.

3. [16-13454](#)-A-7 **IN RE: MARVIN/MAUREKA DAVIS**
[16-1108](#) [MAO-6](#)

AMENDED MOTION FOR SUMMARY JUDGMENT
12-19-2017 [\[49\]](#)

OCEAN VIEW BIBLE FELLOWSHIP V.
DAVIS ET AL
MARY ANN O'HARA /ATTY. FOR MV.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Summary Judgment

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Granted

Order: Civil minute order

Oceanview Bible Fellowship moves for summary judgment in its adversary proceeding to except from discharge a state court judgment in the amount of \$119,523.00 against defendants Marvin Davis and Maureka Davis, jointly and severally, for common law and statutory torts and in the amount of \$100,000 against defendant Marvin Davis only for punitive damages. It does so arguing issue preclusion based on a state court judgment, which the parties agree is now final. Defendants Davis oppose the motion, arguing they never intended to harm the plaintiff church and that the state court judge who decided the matter "got it wrong."

LEGAL STANDARDS

Federal Rule of Civil Procedure 56 provides for the court to grant summary judgment on a claim or defense "if 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. Civ. P. 56. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). "A fact is 'material' when, under the governing substantive law, it could affect the outcome of the case." *Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 322 F.3d 1039, 1046 (9th Cir. 2003) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

"In federal courts, the preclusive effect of a state court judgment is decided by the law of the state in which the judgment was rendered. *Gayden v. Nourbakhsh (In re Nourbakhsh)*, 67 F.3d 798, 800 (9th Cir. 1995). California has five prerequisites to the availability of issue preclusion: 'First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally,

the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.' *Harmon v. Kobrin (In re Harmon)*, 250 F.3d 1240, 1245 (9th Cir. 2001).

The party seeking to employ issue preclusion bears the burden of showing its applicability. *Vella v. Hudgins*, 20 Cal. 3d 251, 257 (1977). In deciding this issue, the court may consider the entire record, including the rendering court's Statement of Decision. Restatement (Second) of Judgments § 27 cmt. f (1982); *In re Lopez*, 367 B.R. at 105 (statement of decision); *Grenier v. Roback (In re Grenier)*, BAP No. NC-14-1396-KiTad, 2015 WL 3622712, at *2-3, *7 (9th Cir. BAP June 10, 2015) (same)." *In re Javahery*, No. 2:14-BK-33249-DS, 2017 WL 971780, at *5 (B.A.P. 9th Cir. Mar. 14, 2017)

DISCUSSION

Plaintiff's motion is narrowly tailored, seeking summary judgment only under 11 U.S.C. § 523(a)(4)(both defendants) and 11 U.S.C. § 523(a)(6) (Marvin Davis only). Amended Motion, p. 2, lines 2-13, December 19, 2017, ECF # 49; Amended Separate Statement of Undisputed Facts, December 19, 2017, ECF # 53. It does not pray relief under its 11 U.S.C. § 523(a)(2). *Id.*

Marvin Davis and Maureka Davis

Fiduciary Fraud and Defalcation

Fiduciary fraud or defalcation each require the arising from acts by a fiduciary and that fiduciary duty must arise from an express or technical trust. "When the nondischargeability complaint is based on fraud or defalcation in a fiduciary relationship, the creditor must prove: [1] the debtor was acting in a fiduciary capacity; and [2] while acting in that capacity, the debtor engaged in fraud or defalcation. [*In re Stanifer* (9th Cir. BAP 1999) 236 BR 709, 713]." March, Ahart & Shapiro, *California Practice Guide: Bankruptcy*, Discharge and Nondischargeability, Nondischargeable Debts § 22:607 (Rutter Group 2017).

"To prevail on a § 523(a)(4) nondischargeability claim, the plaintiff must prove the debtor's fraud or defalcation and that the debtor was acting in a fiduciary capacity when the debtor committed the fraud or defalcation. [*In re Honkanen* (9th Cir. BAP 2011) 446 BR 373, 378] Determined under federal law: The existence of a fiduciary relationship under § 523(a)(4) is a matter of federal law. [*In re Utnehmer* (9th Cir. BAP 2013) 499 BR 705, 712; *In re Berman* (7th Cir. 2011) 629 F3d 761, 767-768; *In re Nail* (8th Cir. BAP 2011) 446 BR 292, 299-300] Fiduciary capacity under state law insufficient: The definition of "fiduciary" for purposes of § 523(a)(4) is narrow; not all persons treated as fiduciaries under state law are considered to "act in a fiduciary capacity" for purposes of bankruptcy law. Thus, "[t]he broad, general definition of fiduciary—a relationship involving confidence, trust and good faith—is inapplicable." [*Double Bogey, L.P. v. Enea* (9th Cir. 2015) 794 F3d 1047, 1050 (brackets in original; internal quotes omitted); *In re Utnehmer*, supra, 499 BR at 712; *In re Davis* (BC ND CA 2013) 486 BR 182, 192]." *Id.* at 22:608-608.2

"Express or technical trust required: For purposes of § 523(a)(4), the fiduciary relationship must be one arising from an express or technical trust. [*Double Bogey, L.P. v. Enea*, supra, 794 F3d at 1050; *In re Cantrell* (9th Cir. 2003) 329 F3d 1119, 1125; *In re Lewis* (9th Cir. 1996) 97 F3d 1182, 1185]." *Id.* at 22:609.

As a rule, corporate officers are fiduciaries but not trustees with respect to corporate assets and not subject to the fiduciary duty exception of 11 U.S.C. § 523(a)(4). *In re Cantrell*, 329 F.3d 1119, 1126 (9th Cir. 2003). As a result, unless an exception to the general rule exists for this religious corporation, no trustee exists for the purposes of § 523(a)(4).

Trust Imposed by Statute

"Imposed by statute: For a trust relationship to be established under § 523(a)(4), **the applicable statute must clearly define fiduciary duties and identify trust property.** [*In re Honkanen*, supra, 446 BR at 379; *In re Hemmeter* (9th Cir. 2001) 242 F3d 1186, 1190; *In re Moeller* (BC SD CA 2012) 466 BR 525, 531-532]." *Id.* at 22:610. (emphasis added).

California Corporations Code § 9142 provides, "No assets of a religious corporation are or shall be deemed to be impressed with any trust, express or implied, statutory or at common law unless one of the following applies: (1) Unless, and only to the extent that, the assets were received by the corporation with an express commitment by resolution of its board of directors to so hold those assets in trust. (2) Unless, and only to the extent that, the articles or bylaws of the corporation, or the governing instruments of a superior religious body or general church of which the corporation is a member, so expressly provide. (3) Unless, and only to the extent that, the donor expressly imposed a trust, in writing, at the time of the gift or donation." *In re Islamic Society of San Francisco*, 2008 WL 704301 (Bankr. N.D. Cal. 2008).

Honkanen precludes finding a trust imposed by statute because Corporations Code § 9142(c) does not "clearly define fiduciary duties or identify trust property."

Express Trust

"Express trust under California law: Under California law, an express trust requires five elements: [1] present intent to create a trust; [2] trustee; [3] trust property; [4] a proper legal purpose; and [5] a beneficiary. [*In re Honkanen*, supra, 446 BR at 379, fn. 6]." *Id.* at 22:612.1.

Honkanen would also not find an express trust because the Certificate of Amendment of Articles of Incorporation indicates only that the purpose of the corporation is to "act as trustee under any trust incidental to the principal objects of the corporation and to receive, hold an administer, and expend funds and property subject to such trust." Exhibits in Support of Motion, p. 118, December 19,

2017, ECF # 52. It does not specify a present intent to create a trust, trust property or the beneficiary.

Technical Trust

"Technical trust under California law: A technical trust under California law arises "from the relation of attorney, executor, or guardian, and not to debts due by a bankrupt in the character of an agent, factor, commission merchant, and the like." [*In re Honkanen*, supra, 446 BR at 379, fn. 7 (internal quotes omitted)]." *Id.* at 22:612.2.

A technical trustee has not been demonstrated. Such trusts are generally limited to attorneys, executors or guardians. Sparse case law suggests that California would not recognize a technical trust under the circumstance. *In re Ward's Estate*, 125 Cal.App. 717 (1932); *In re Ping*, 506 B.R. 486, 494 (Bankr. S.D. Ohio 2014). As a consequence, no trust relationship has been shown and the plaintiff has not shown entitlement to summary judgment on the basis of fiduciary fraud or defalcation.

Embezzlement

"Embezzlement" is the fraudulent appropriation of property by one to whom it is entrusted or into whose hands it has lawfully come. [*Moore v. United States* (1895) 160 US 268, 269-270, 16 S.Ct. 294, 295; *In re Littleton* (9th Cir. 1991) 942 F2d 551, 555]. Embezzlement under § 523(a)(4) requires a showing of: [1] property rightfully in the possession of a nonowner; [2] nonowner's appropriation of the property to a use other than which it was entrusted; and [3] circumstances indicating fraud. [*In re Littleton*, supra, 942 F2d at 555; *In re Wada* (9th Cir. BAP 1997) 210 BR 572, 576]"

Fraudulent intent/circumstances indicating fraud: Embezzlement requires a fraudulent intent to deprive, which may be inferred from the debtor's conduct and the underlying circumstances. [*Savonarola v. Beran* (BC ND FL 1987) 79 BR 493, 496].

Fraudulent intent existed where Debtor/travel agent told Client she was unable to return \$84,000 of Client's funds because the funds were used to make nonrefundable travel deposits but later admitted the deposits were never made. [*In re Wada*, supra, 210 BR at 577].

Fraudulent intent may be found where a debtor sells mortgaged property and fails to remit the proceeds to the secured creditor or consignor. [*In re Blanton* (BC ED VA 1992) 149 BR 393, 394-395—debtor's sale of consigned automobiles and misappropriation of proceeds indicated fraudulent intent]." March, Ahart & Shapiro, *California Practice Guide: Bankruptcy*, Discharge and Nondischargeability, Nondischargeable Debts § 22:640-43 (Rutter Group 2017).

The particular issue here is whether there is identity of issues. The legal theories in play in the state court and bankruptcy court differ. Compare Judgment for breach of fiduciary duty and breach of

charitable trust, with Adversary Complaint under § 523(a)(4)(embezzlement). But the factual issue litigated was the same: Davis' appropriation of church asset for their personal benefit. Based on the record, this court finds sufficient identity of issues and will grant the motion on that basis.

Marvin Davis Only

"Section 523(a)(6) excepts from discharge debts for "willful and malicious injury" by the debtor to another. "Willful" means that the debtor entertained "a subjective motive to inflict the injury or that the debtor believed that injury was substantially certain to occur as a result of his conduct." *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1208 (9th Cir. 2001); *Carrillo v. Su (In re Su)*, 290 F.3d 1140, 1144 (9th Cir. 2002). Maliciousness is defined as "(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) done without justification or excuse." *Jercich*, 238 F.3d at 1209; *Thiara v. Spycher Bros. (In re Thiara)*, 285 B.R. 420, 427 (9th Cir. BAP 2002)." *In re Javahery*, No. 2:14-BK-33249-DS, 2017 WL 971780, at *8 (B.A.P. 9th Cir. Mar. 14, 2017)

"Debts incurred by conversion of another's property may be nondischargeable under § 523(a)(6). *Del Bino v. Bailey (In re Bailey)*, 197 F.3d 997, 1000 (9th Cir. 1999). The elements of conversion in California are the creditor's ownership or right to possession of property at the time of conversion, a wrongful act or disposition of that property by another, and damages. *In re Thiara*, 285 B.R. at 427. Proof of conversion under state law is a necessary but not sufficient basis to deny discharge under § 523(a)(6). *Id.* A creditor must also demonstrate that the injury was willful and malicious. *Id.* at *9.

Here, the court imposed punitive damages of \$100,000 under Cal. Civ. Code § 3294. *In re Plyam*, 530 B.R. at 465 (only intentional malice or fraud under Cal. Civ. Code § 3294(a) will support a finding of nondischargeability under 11 U.S.C. § 523(a)(6)). *Id.* at * 8. In this case, the court did so based on a finding of fraud, oppression and malice. Exhibit 3, p. 41, line 25, in Support of Motion, December 19, 2017, ECF # 52. The plaintiff has demonstrated willful and malicious injury and the motion will be granted.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Oceanview Bible Fellowship's motion has been presented to the court.

Having considered the motion, opposition, reply and ancillary documents,

IT IS ORDERED that the motion is granted to the extent provided herein and that the judgment entered in *Ocean View Bible Fellowship v. Davis*, No. 535073 (San Mateo Superior Court 2015) filed as Exhibit 2 in support of the Motion for Summary Judgment, December

19, 2017, ECF # 52, is excepted from the discharge described in 11 U.S.C. § 727.

IT IS FURTHER ORDERED that not later than 28 days hereafter, plaintiff Oceanview Bible Fellowship shall lodge a judgment consistent herewith and if plaintiff Oceanview Bible Fellowship fails to do so that the Clerk of the Court may administratively close the case;

IT IS FURTHER ORDERED that plaintiff Oceanview Bible Fellowship may recover costs of suits and shall do so in the manner and within the time prescribed by LR 292, *incorporated by* LBR 1001-1(c);

IT IS FURTHER ORDERED that if plaintiff Oceanview Bible Fellowship wishes to recover attorney's fees, if so entitled, it shall do so in the manner and within the time prescribed by LR 293, *incorporated by* LBR 1001-1(c);

4. [16-13454](#)-A-7 **IN RE: MARVIN/MAUREKA DAVIS**
[16-1108](#) [MAO-7](#)

MOTION TO DISMISS CAUSE(S) OF ACTION FROM COUNTS IV AND V OF COMPLAINT
1-11-2018 [[59](#)]

OCEAN VIEW BIBLE FELLOWSHIP V.
DAVIS ET AL
MARY ANN O'HARA/ATTY. FOR MV.

Final Ruling

Motion: Dismiss Counts IV and V of the Complaint (Claims Objecting to Discharge)

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Granted

Order: Civil minute order

Unopposed motions are subject to the rules of default. Fed. R. Civ. P. 55, *incorporated by* Fed. R. Bankr. P. 7055, 9014(c). Written opposition to this motion was required not less than 14 days before the hearing on this motion. LBR 9014-1(f)(1)(B). None has been filed. The default of the respondent is entered. The court considers the record, accepting well-pleaded facts as true. *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

DISMISSAL UNDER RULE 7041

"Rule 41 [of the Federal Rules of Civil Procedure] applies in adversary proceedings, except that a complaint objecting to the

debtor's discharge shall not be dismissed at the plaintiff's instance without notice to the trustee, the United States trustee, and such other persons as the court may direct, and only on order of the court containing terms and conditions which the court deems proper." Fed. R. Bankr. P. 7041. "Most bankruptcy judges require a plaintiff seeking to dismiss a § 727 action to give notice to any trustee appointed in the case, the U.S. Trustee and all creditors, informing the noticed parties they have a right to substitute in as plaintiff in the action instead of having the action dismissed." Kathleen P. March, Hon. Alan M. Ahart & Janet A. Shapiro, *California Practice Guide: Bankruptcy* ¶ 20:264, at 20-37 (rev. 2014); accord *In re Speece*, 159 B.R. 314, 321 (Bankr. E.D. Cal. 1993) (citing Fed. R. Bankr. P. 7041) ("[T]he rules of procedure forbid voluntary dismissal without notice to the case trustee and to the United States trustee, either of whom were entitled to bring the action in the first instance, so that they may have an opportunity to protect the rights of their constituencies.").

Plaintiff has moved to dismiss Counts IV and V of the Complaint (Claims Objecting to Discharge) in the present adversary proceeding. Rule 7041 applies. Notice has been given to all creditors, the trustee, and the U.S. Trustee, and none has objected or requested to be substituted in for the plaintiff. Accordingly, the court will grant the motion and dismiss the adversary complaint.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

Plaintiff Ocean View Bible Fellowship's motion to dismiss Counts IV and V of the Complaint (which are the claims objecting to discharge under § 727) has been presented to the court and notice has been provided to all creditors, the case trustee, and the U.S. Trustee. Having entered the default of respondent creditors, the case trustee, and the U.S. Trustee for failure to appear, timely oppose, or otherwise defend in the matter, and having considered the well-pleaded facts of the motion,

IT IS ORDERED that the motion is granted. The court orders that Counts IV and V of the Complaint (Claims Objecting to Discharge) in this adversary proceeding be dismissed without prejudice under Fed. R. Bankr. P. 7041 and Fed. R. Civ. P. 41(a)(2). A claim objecting to discharge under § 727 may be re-filed by the plaintiff or another creditor, the case trustee, or the U.S. Trustee, subject to the limitations of Fed. R. Bankr. P. 4004.