JUDGE NINFO

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

WEGMANS FOOD MARKETS, INC.,

Appellant,

-vs-

RUSSELL G. MACARTHUR,

Appellee.

DECISION AND ORDER

00-CV-6276 CJS

At issue in this appeal from Bankruptcy Court is the question of whether or not, under 11 U.S.C. § 523, the conduct of the debtor/appellee in giving two employees payroll checks drawn on a bank account which he knew was closed, creates a non-dischargeable debt, as to appellant, who subsequently cashed such checks. By his Decision and Order dated April 28, 2000, the Honorable John C. Ninfo, II, Chief U.S. Bankruptcy Judge for the Western District of New York, found that such debt was dischargeable. For the reasons that follow, that Decision and Order is affirmed.

BACKGROUND

For purposes of this appeal, the Bankruptcy Court's findings of fact may not be disturbed unless the Court finds that they are clearly erroneous. Fed. R. Bankr. P. 8013 ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses."). The Court has reviewed the entire record in this matter, and concludes that the Bankruptcy Court's findings of fact

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are not clearly erroneous.

Since the facts of this action were set forth in the Bankruptcy Court's Decision and Order, the Court will not repeat them here. It is sufficient to note that this matter primarily involves two payroll checks, both dated July 29, 1994. In July of 1994, the debtor/appellee, Russell G. MacArthur ("MacArthur"), was doing business as Accent Painting and Power Washing, and in that capacity, he had several employees, including John DeCaro ("DeCaro") and Grant Browne ("Browne"). On or about July 22, 1994, MacArthur issued DeCaro and Browne payroll checks for that week, drawn on a bank account which he had closed in June of 1994. DeCaro and Browne then negotiated the checks to appellant, Wegmans Food Markets, Inc. ("Wegmans"), in exchange for cash. Neither DeCaro nor Browne learned that the checks were returned for insufficient funds until some time after the events as described in the Bankruptcy Court's Findings of Facts.[1] On or about July 29, 1994, MacArthur again issued payroll checks, drawn on the closed account, to DeCaro and Browne. There is nothing in the record to indicate that MacArthur made any specific representations about the checks before giving them to DeCaro and Browne.

Browne and DeCaro proceeded to cash their checks at one of Wegmans' supermarkets, each using his Wegmans' check cashing card. Of course, the checks were dishonored, since MacArthur had closed the account. At trial, MacArthur testified, "I knew the [payroll checking] account was closed so I knew there was no way they [my

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[1] Appellees liability as to these two checks, as well as a judgment against him by appellant, is not at issue in this appeal, as the dischargeability of those debts were resolved by stipulation of the parties. (*See*, Brief Submitted on Behalf of Appellant [#4], pp. 2-3.).

employees] were going to get money from me." (*Id.*, p. 55). The Court notes that MacArthur testified both, that he did not know how he was going to pay his payroll, and that at the time he issued the bad checks, he intended to transfer funds into another account and reissue checks. (*Id.*, p. 56). Wegmans obtained judgments against Browne and DeCaro, but apparently has not enforced those judgments. (*Id.*, p. 25).

On March 25, 1999, MacArthur filed a petition initiating a Chapter 7 Bankruptcy. On June 15, 1999, Wegmans commenced an adversary proceeding, seeking a ruling that his liability on the payroll checks was nondischargeable debt, pursuant to 11 U.S.C. §§ "523(a)(2)(A) and 523(a)(4) and other relevant statutes." (Adversary Proceeding Cover Sheet). At the beginning of the trial, Wegmans' counsel reiterated that he was proceeding solely pursuant to Sections 523(a)(2)(a) and 523(a)(4):

> THE COURT: Let's start from square one. Are you going to proceed on two causes of action, 523(a)(2)(A) and 523(a)(4); is that correct?
>
> MR. RYEN: That's right.

(Trial Transcript, p. 8). In his closing argument, appellant's counsel referred to both fraud and larceny. (*Id.*, p. 62).

Following trial, Judge Ninfo issued a Decision and Order (*In re MacArthur*, 247 B.R. 613 (W.D.N.Y. 2000)), finding that the debt was dischargeable. In his Decision and Order, Judge Ninfo found that Wegmans was pursuing its claim solely under 11

U.S.C. § 523(a)(4), and not § 523(a)(2)(A) or § 523(a)(6).[2] Nonetheless, he analyzed Wegmans' claim under all three sections, finding: 1) that § 523(a)(2)(A), pertaining to debts incurred by false pretenses, false representations, or fraud, did not apply because MacArthur had not obtained money, property, or services by false pretenses by issuing the payroll checks; 2) that § 523(a)(6), pertaining to debts incurred through willful and malicious injury, did not apply, because MacArthur had not intended the actual injury caused to appellant as a result of the bad checks; and 3) that § 523(a)(4), pertaining to debt incurred by larceny, did not apply, since MacArthur never took, obtained, or withheld any property from appellant. (Bankruptcy Court Decision and Order, pp. 6-11).

In this appeal, Wegmans contends that by signing and issuing payroll checks on an account he knew was closed, MacArthur : 1) committed fraud, "by falsely representing with an intent to deceive that the check is payable according to its terms and on which representation all subsequent holders of the check may reasonably rely"; 2) committed a willful and malicious injury; and 3) committed larceny. (Amended Appellant's Statement of the Contents of the Record on Appeal and Issues on Appeal).

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[2]The Bankruptcy Court based its finding that appellant was not pursuing a claim under § 523(a)(2)(A) on the fact that appellant had only mentioned § 523(a)(4) in its pre-trial memo of law (Decision and Order, p. 6), however, the trial transcript indicates that the pre-trial memo was not intended to cover all of appellant's claims, but was only intended to address one issue related to the larceny theory, which apparently had been discussed by counsel and the court prior to trial.(*See*, Trial Transcript, pp. 4, 8). It is unclear why the court discussed § 523(a)(6), since it does not appear appellant was pursuing that claim at trial.

ANALYSIS

On an appeal from Bankruptcy Court, a District Court "may affirm, modify, or reverse," "or remand with instructions for further proceedings. Fed. R. Bank. P. 8013. The Bankruptcy Court's conclusions of law are subject to a *de novo* review. *See, In re Arochem Corp.*, 176 F.3d 610, 620 (2d Cir. 1999). Section 523 of the Bankruptcy Code, 11 U.S.C. § 523, entitled "Exceptions to Discharge," states, in relevant part:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt-
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> ***
>
> (2) for money, property, [or] services ... to the extent obtained by-
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;
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> ***
>
> (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;
>
> ***
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

11 U.S.C.A. § 523 (West 1984 & Supp. 2000).

At the outset, the Court notes that, for the first time in this action, Wegmans is attempting to argue a claim under § 523(a)(6). As noted above, at trial, Wegmans' counsel expressly stated that appellant was pursuing claims only with regard to Sections 523(a)(2)(a) and 523(a)(4). Accordingly, Judge Ninfo's analysis of § 523(a)(6) is mere dicta. It is the law in this Circuit that "issues not raised in the bankruptcy court cannot generally be raised for the first time on appeal." *In re D.A. Elia Construction Corp.*, Nos. 99-CV-0546E(H), 94-BK-10866K, 2000 WL 1375739 at *7 (W.D.N.Y. Sep. 22, 2000)(Citations omitted). Wegmans has not addressed this procedural bar or

otherwise shown why the Court should consider a claim under § 523(a)(6) which it did not raise at trial. Accordingly, the Court will not consider Wegmans' arguments with regard to that section.

The Court will next examine Wegmans' claim under § 523(a)(2)(a). It is well settled that

> [t]o sustain a cause of action under this section, Plaintiff must establish by a preponderance of the evidence that [debtor]: (1) made false representations, (2) which he knew were false at the time they were made, (3) which were made with the intent to deceive, (4) upon which Plaintiff relied, and (5) which reliance caused Plaintiff to suffer a loss.

In re Kressner, 206 B.R. 303, 309 (S.D.N.Y. 1997)(citations omitted). Judge Ninfo found that MacArthur had not obtained money, property or services by false pretenses, false representation, or actual fraud. With regard to DeCaro and Browne, he reasoned that appellee had not obtained their services by fraud, because by the time he gave them the bad payroll checks July 29, 1994, they had already performed the services for which they were purportedly being paid, i.e., they were being paid on a Friday for work they had performed that week. With regard to Wegmans, Judge Ninfo further found that MacArthur had not obtained money, property, or services from the supermarket as a result of the bad checks being cashed there.

Applying the applicable principles of law to the facts of this case, the Court finds that Wegmans has established the first three elements of fraud, namely, that MacArthur, with the intent to deceive, made false representations which he knew were false at the time. In this regard, the Court is aware that the issuance of bad check, without more, is not considered to be a false statement or representation. *Williams v. United States*, 458 U.S. 279, 284 (1982). However, in the instant case, MacArthur gave

his employees checks drawn on a bank with which he no longer had an account. If nothing else, MacArthur, in so doing, made a false statement that he had a payroll checking account. *See, United States v. Worthington*, 822 F.2d 315, 316 (2d Cir. 1987)(Holding that, "the act of printing the name of a nonexistent drawee bank on a check fits squarely within the dictionary definition of 'false statement.'").

However, as Judge Ninfo found, MacArthur did not receive anything as a result of his fraudulent act, and therefore, Wegmans cannot satisfy the fourth and fifth requisite elements of fraud. MacArthur did not receive Browne's and DeCaro's services as a direct result of the act of issuing the paychecks on July 29, 1994, rather, the services had already been performed at that time.[3] Other Bankruptcy Courts have held that the issuance of a check to pay an antecedent debt, such as for services already performed, does not constitute fraud. *See,e.g., Forbes v. Four Queens Enterprises, Inc.*, 210 B.R. 905, 912 (D.R.I. 1997)(Finding that that § 523(a)(2)(a) did not apply where the debtor had used a bad check to pay a pre-existing debt). Moreover, MacArthur did not receive anything from Wegmans. To the extent Wegmans suffered a loss for the amounts it paid to DeCaro and Browne, the record indicates that, in deciding to cash the checks, Wegmans was not relying upon any particular express or implied representation by MacArthur. Rather, Wegmans was relying on a general assumption, clearly untrue, that "all checks are good," but more importantly, it was relying upon its check-cashing agreements with Browne and DeCaro: "[W]e have reliance on the check being good to the extent that we assume all checks are good,

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[3] The Court takes judicial notice of the fact that July 22 and 29, 1994, were Fridays.

and we also rely on the fact that the customer has personally warranted that the check is good based on the [check-cashing] agreement that they subscribed to." (Trial Transcript, pp. 22-23). As the record indicates, Judge Ninfo found that, in deciding to cash the subject checks, Wegmans was relying on Browne and DeCaro's warranties that the checks were good. (*Id.*, p. 23). Accordingly, the Court finds that Wegmans has not proven the essential elements of a claim under § 523(a)(2)(A).

The Court will next consider Wegmans' claim under § 523(a)(4) on the ground of larceny. It has been held that

> Section 523(a)(4) embraces three separate types of conduct: "larceny", "embezzlement", and "fraud or defalcation in a fiduciary capacity". Each type of conduct is to be defined and determined under federal law. For purposes of Section 523(a)(4), federal common law defines "larceny" as the "fraudulent and wrongful taking and carrying away [of] the property of another with intent to convert such property to the taker's use without the consent of the owner."

In re Rivera, 217 B.R. 379 (D. Conn. 1998)(citations omitted). Wegmans has not produced any case in which, under facts similar to those alleged here, a debtor was denied a discharge on the grounds of federal common-law larceny, nor is the Court aware of any such authority. Wegmans does argue that debtor's actions constitute larceny under the New York Penal Law, § 155.05. However, as noted above, "in the absence of a plain indication of an intent to incorporate diverse state laws into a federal ... statute, the meaning of the federal statute should not be dependent on state law." *Turley*, 77 S.Ct. at 399. Moreover, under New York Law, a person does not commit the crime of larceny where he issues a bad check to pay an existing debt. *People v. Campobello*, 546 N.Y.S.2d 62, 64 (4th Dept. 1989); *People v. Gasbara*, 468 N.Y.S.2d

54, 55 (3d Dept. 1983). As discussed above, the Court finds that MacArthur's checks were payment on an existing debt, since Browne and DeCaro had already performed the work for which they were owed payment. Nevertheless, Wegmans contends that MacArthur stole its property, since it subsequently gave up money when DeCaro and Browne cashed the checks. However, if MacArthur did not commit larceny against DeCaro and Browne, he cannot be found to have committed larceny as against Wegmans because they subsequently, without MacArthur's knowledge, cashed the checks at Wegmans. Accordingly, the Court finds that MacArthur did not commit larceny within the meaning of § 523(a)(4).

MacArthur's actions were clearly wrong. However, as Judge Ninfo noted in his Decision and Order, "not every wrongful or even criminal act by a debtor which results in indebtedness is nondischargeable, only those specifically excepted from discharge by Congress in Section 523." (Decision and Order, p. 11).

CONCLUSION

For the reasons stated above, the Decision and Order of the Bankruptcy Court is Affirmed.

So ordered.

Dated: Rochester, New York
July 11, 2001

ENTER:

Charles J. Siragusa

CHARLES J. SIRAGUSA
United States District Judge

ATTEST: A TRUE COPY
U.S. DISTRICT COURT, WDNY
RODNEY C. EARLY, CLERK

By Jacqueline Lawrence
Deputy Clerk

Original Filed 7-13-01

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Wegmans Food Market

Plaintiff(s)

v. 6:00-cv-06276

MacArthur

Defendant(s)

PLEASE take notice of the entry of an ORDER filed on 7/13/01, of which the within is a copy, and entered 7/13/01 upon the official docket in this case. (Document No. 11 .)

Dated: Rochester, New York
July 13, 2001

RODNEY C. EARLY, Clerk
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Enclosure
TO:
David MacKnight, Esq.