UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

RAYMOND N. KENKEL,
EVELYN KENKEL,

Debtors,

Case No. 86-832-W

Adv.Pro.No. 86-0147

INNK LAND & CATTLE COMPANY,

Plaintiff,

v.

RAYMOND N. KENKEL,
EVELYN KENKEL,

Defendants.

ORDER ON MOTION FOR SUMMARY JUDGMENT

On January 6, 1987 a pretrial conference on plaintiff's complaint to determine dischargeability of debt was held before this court in Council Bluffs, Iowa. At that time the court was presented with a motion for summary judgment filed on December 29, 1986 by defendant Evelyn Kenkel. The plaintiff was granted additional time to respond to the defendant's motion and a brief in opposition of motion for summary judgment was filed on January 20, 1987. Having considered the briefs filed by both parties and being fully advised, the court now makes the following decision and order on motion for summary judgment.

The debtors, Evelyn and Raymond Kenkel, filed a petition under Chapter 7 of the Bankruptcy Code on April 9, 1986. On June 25, 1986 the plaintiff, INNK Land & Cattle Company

(INNK), filed a complaint to determine dischargeability of debt. The plaintiff asserts that the debt in question is nondischargeable because the debtors committed defalcation while acting in a fiduciary capacity and willfully and maliciously caused injury to INNK.

In her motion for summary judgment Evelyn Kenkel asserts that she was merely a bookkeeper for INNK, not an officer or director, and there was no express trust between her and INNK. Therefore, any argument that the debt in issue is nondischargeable based on defalcation while acting in a fiduciary capacity is precluded by such facts. However, the plaintiff resists Ms. Kenkel's motion for summary judgment asserting that numerous genuine issues of fact must be determined by this court.

Bankruptcy Rule 7056 provides that Federal Rule of Civil Procedure 56, which governs motions for summary judgment, applies in bankruptcy adversary proceedings. The Eighth Circuit Court of Appeals has set forth the following standard:

> Summary judgment is appropriate only when the moving party satisfies its burden of showing the absence of a genuine issue as to any material fact and that it is entitled to judgment as a matter of law. In reviewing a motion for summary judgment, the court must view the facts in the light most favorable to the opposing party and must give that party the benefit of all reasonable inferences to be drawn from the facts. This Court often has noted that summary judgment is "an extreme and treacherous remedy," and should not be entered "unless the movant has established its right to a judgment with such clarity as to leave no room for controversy and unless the other party is not entitled to

> recover under any discernible circumstances."

Foster v. Johns-Manville Sales Corp., 787 F.2d 390, 391-92 (8th Cir. 1986) (citations omitted). Applying this standard to the case at hand reveals that an award of summary judgment is inappropriate.

It is clear from the face of the plaintiff's complaint, as well as from the cover sheet provided by the clerk of the bankruptcy court and completed by the plaintiff, that both 11 U.S.C. sections 523(a)(4) and 523(a)(6) are set forth as grounds to deny the dischargeability of debt. It is equally clear that the defendant's motion for summary judgment asserts the absence of a genuine issue of material fact only as to the section 523(a)(4) allegation in the complaint. Defendant's assertion that she was not an officer or director of INNK and did not enter into an express trust has no relevance to the claim that she willfully and maliciously injured INNK. Accordingly, issues of material fact exist with regard to the section 523(a)(6) claim and preclude the award of summary judgment.

This court is likewise not convinced that the defendant is entitled to judgment as a matter of law on the plaintiffs section 523(a)(4) complaint. Section 523(a)(4) provides that a debtor may not discharge a debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny." The phrase "while acting in a fiduciary capacity" does not qualify the words "embezzlement or larceny." See 3

Collier on Bankruptcy, § 523.14[3] at 523-95 (15th ed. 1986); Funventures in Travel, Inc. v. Dunn, 39 B.R. 249, 251 (Bankr. E.D. Pa. 1984).[1] Embezzlement is defined as "the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come." 3 Collier on Bankruptcy, 523.14[31 at 523-116.

In its resistance to defendant's motion for summary judgment INNK asserts that even absent a fiduciary capacity, this debtor's actions come within the term embezzlement in section 523(a)(4). Plaintiff's complaint alleges that the debtors agreed to contribute the Hart Ranch to the corporation in exchange for approximately 103,000 shares of stock. The complaint alleges that the ranch was never deeded to the corporation, although it was listed as a corporate asset and maintained with corporate funds. The complaint further alleges that the debtors leased and eventually sold the ranch and retained the sale proceeds contrary to their agreement with the corporation. Given the liberal spirit of the federal pleading rules, this court finds the allegations in the plaintiff's complaint sufficient to notify the defendants of facts supporting a claim of embezzlement under section 523(a)(4). See Fed. R. Civ. P. p. 8; 5 C. Wright & A. Miller, Federal Practice and Procedure § 1215 (1969). Since the allegations in defendant's motion for summary judgment do

[1] Section 17a(4) of the former Bankruptcy Act excepted debts that "were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity." Under that section, "while acting as an officer or in any fiduciary capacity" did qualify all wrongs enumerated. See 3 Collier on Bankruptcy, § 523.14[1][c] at 523-92 (15th ed. 1986).

not address an embezzlement claim under section 523(a)(4), issues of material fact remain and preclude an award of summary judgment.

The sole basis for defendant's motion for summary judgment is that there was no express trust between her and INNK so as to impose responsibility of a "fiduciary" within the meaning of section 523(a)(4). In its statement of facts the plaintiff contends that an express trust relationship did exist between INNK and Evelyn Kenkel. Furthermore, affiant Julian Rundle, a director and secretary of INNK, states "[tlhere was an express agreement between INNK and Ms. Kenkel that Ms. Kenkel would accurately, truthfully and honestly maintain all books, records and ledgers of INNK and all entries made therein." Given the differing interpretation of this material fact, summary judgment is not appropriate.

The court notes that the term "fiduciary" as used in section 523(a)(4) applies only to trustees of express trusts. In re Long, 774 F.2d 875, 878 (8th Cir. 1985). ordinarily, an express trust is one which is declared in writing. In re Pehkonen, 15 B.R. 577, 580 (Bankr. N.D. Iowa 1981). However, the intention to create an express trust may be established by consideration of the parties' words and conduct. Id. at 580-591; see also In re Schultz, 46 B.R. 880, 884, 885 (Bankr. Nev. 1985). In order to show that the debtor was a fiduciary, the court may look to state law, In re Anderson, 64 B.R. 331, 334 (Bankr. N.D. Ill. 1986) or may consider the nature of the employment relationship of the debtor and the creditor. In re

Golden, 54 B.R. 957, 964 (Bankr. Mass. 1985) (and citations therein). These considerations are not contained in the record before the court at this time.

WHEREFORE, based on the foregoing analysis, the defendant has failed to meet her burden of establishing a lack of a genuine issue as to any material fact.

THEREFORE, defendant's motion for summary judgment filed December 29, 1986 is denied.

Signed and filed this 6th day of April, 1987.

LEE M. JACKWIG

U.S. BANKRUPTCY JUDGE