IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF IOWA

IN THE MATTER OF:	:	
Norman Eugene Lettington, Maxine Ann Lettington, Debtors.	:	Case No. 97-04083-C J Chapter 7
Clark W. Betts, Sr., Plaintiff,	:	Adv. Pro. 97-97284
v.	:	
Norman Eugene Lettington, Maxine Ann Lettington, Defendants.	:	

MEMORANDUM OF DECISION

Pro se Creditor Clark W. Betts, Sr. ("Betts") filed a complaint against Chapter 7 Debtors Norman Eugene and Maxine Ann Lettington ("Lettingtons"). Betts asks the Court to except from discharge the outstanding balance on the $5,000.00 he loaned the Lettingtons on October 29, 1991 and on the $10,000.00 he loaned them on December 20, 1993. He relies on 11 U.S.C. sections 523(a)(2)(A) or (B), 523(a)(4), or 523(a)(6).

At the close of Betts' case-in-chief on March 19, 1999, the Lettingtons moved for a directed verdict. Having carefully reviewed the record and the arguments of the parties, the Court now enters its decision.

The Court has jurisdiction of this matter pursuant to 28 U.S.C. section 1334 and the standing order of reference entered by the U.S. District Court for the Southern District of Iowa. This is a core matter under 28 U.S.C. section 157(b)(2)(I).

BACKGROUND

Betts and Maxine Ann Lettington ("Maxine") were married in 1974. One child was born of that marriage—Clark Betts, Jr. ("the son"). Maxine filed for divorce in 1982. The Iowa District Court for Polk County entered its dissolution decree in February 1983. That court ordered Betts to pay Maxine $433.00 per month in child support.

Maxine married Norman Eugene Lettington ("Norman") in the summer of 1986.

On December 11, 1986 Betts wrote his attorney about recovering loan balances from Maxine. He also asked for assistance in obtaining a $100.00 decrease in his child support obligation, an increase in visitation rights, and a restraining order preventing the Lettingtons from leaving the state.

On February 23, 1987 Betts' attorney wrote Maxine a demand letter requesting repayment of loans made in excess of $14,000.00. He also advised he would be filing an application to modify the child support obligation from $100.00 per week to $50.00 per week. As an alternative, he proposed that Betts cease making child support payments until the loans were repaid.

Betts ended up requesting a modification of child support. The state court granted a reduction to $60.00 per week, commencing December 1, 1987. The findings of fact reference a $20,000.00 loan the Lettingtons obtained for home improvements, including a new deck. The record contains a copy of the Lettingtons' July 30, 1987 home improvement mortgage that also references a deck.

On January 7, 1988 Betts' attorney wrote Maxine's attorney requesting that Betts be allowed to exercise his visitation rights. On January 27, 1988, March 4, 1988, March 20, 1988, and March 27, 1988, Betts wrote Maxine regarding the visitation schedule.

On July 5, 1988 the state court entered another order modifying the decree of dissolution by reducing Betts's support obligation to $55.00 per week, commencing July 1, 1988. Meanwhile, Maxine dismissed an Iowa Supreme Court appeal of a matter she had brought against Betts.

On June 5, 1989 Betts wrote the Lettingtons a letter in which he stated: "I'm sick and tired of others thinking I still owe them a nickel of the money I earn and of them expecting to spend it for me. In the future I don't expect to be asked for any more money. If you do, I'll say just take it out of the money you say you are going to pay me when you win the lottery . . ." (Exhibit 85 at 3.)

On January 9, 1990 Maxine executed a note addressed "To Whom It May Concern" stating that she "agreed to make no attempt to raise child support during the year of 1990, with the advance support by Clark Betts, Sr. of $2,000.00 on January 9, 1990 and will settle the Gaudineer debt without interest if the court will allow it." (Exhibit 7 at 1.) Betts did pay Maxine $2,000.00 by check dated January 9, 1990.

On May 14, 1990 Betts and Maxine entered into another agreement regarding advanced child support. Betts would advance $2,500.00 on May 14, 1990 and $2,500.00 on May 31, 1990. In return, Maxine agreed to a number of provisions, including that she "will not ask Clark Betts for anything ever again except for the remaining child support Clark Betts owes" and if she "reneges on this agreement in favor of an action against Clark Betts Maxine Lettington instructs her attorney to cease and desist and for the assigned judge to dismiss her claims for violation of this agreement." (Exhibit 8 at 1.) Betts and Maxine endorsed this agreement before a notary public. Betts did pay Maxine $2,500.00 by check dated May 14, 1990 and $2,500.00 by check dated May 31, 1990.

On September 20, 1990 Betts loaned Maxine $300.00. According to Betts' Final Pretrial Statement, there is no unpaid balance.

On December 5, 1990 Betts wrote Maxine a letter in response to what he captioned "Maxine asking for a $5,000.00 loan. Answer: No!". (Exhibit 10 at 1.) In the text of the letter, Betts detailed the reasons for refusing the loan and provided a brief chronology of his life for the years 1974 to 1988.

Regardless of the May 14, 1990 agreement and the December 5, 1990 response, Maxine asked for and Betts loaned her $900.00 on May 24, 1991 and $5,000.00 on October 18, 1991. Betts mortgaged his home, inherited from his mother debt free, in order to provide the latter loan. Betts and Maxine signed a contract regarding the repayment of the $5,000.00.

Among other things, the typed portions of the contract stated that "Maxine Lettington promises to repay the $5,000 loan plus all costs plus $100 up front for the favor in 24 monthly installments by pre dating 24 checks on her checking account. The loan may be paid off in advance." (Exhibit 14 at 4.) Norman signed the predated checks. The Lettingtons made 11 payments of $250.03 on this loan.

On April 7, 1992 Betts loaned Maxine $1,400.00 for a television. He charged a $100.00 loan fee. Maxine gave Betts 10 predated checks, each in the amount of $150.00. No balance remains on this loan.

In March of 1993, Betts married a woman named Kay.

Betts gave Norman $277.00 by check dated December 17, 1993. According to the notation on the check, the amount was for the graduation expenses of the son.

On December 20, 1993 Betts and the Lettingtons signed a document captioned "CONTRACT (An oath to perform in the future)," with the stated purpose being "for another loan to consolidate other bills of theirs due or past due into a workable amount and get themselves out of debt and with me." (Exhibit 25 at 5.) Betts agreed to loan them $10,000.00 at 8% interest for 30 months. The cost of the loan was $1,753.40. A payment of $391.78 was due on the 20th of each month, beginning in January 1994. Betts again mortgaged his home to provide the loan. The Lettingtons made 7 payments of $391.78 and one additional payment of $91.78 on this loan.

Betts testified Maxine misled him by inviting him to meet for lunch and then asked him for a loan at that meeting. He maintained she exercised undue influence over him to obtain the loan. Maxine, on the other hand, testified she sought the loan from Betts because he was always willing to lend money to her. She alleged Betts made improper physical advances toward her at the luncheon meeting.

Betts further testified that it was his intention the $10,000.00 loan remain a secret from Kay and that the contract bound the Lettingtons to keep that confidence. He maintained Maxine nevertheless revealed the circumstances of the loan to Kay and that led to considerable marital strife for him. Maxine, on the other hand, testified Kay probably overheard mention of the loan in one of Betts' telephone conversations with her about the son's support.

Betts also testified that it was his understanding the $10,000.00 would be used to pay off the amount the Lettingtons owed on their deck. He contended that was not done because their bank records illustrated that the loan proceeds were dissipated in the span of two weeks in December 1993 and the July 30, 1987 home improvement mortgage was

not released until April 28, 1994. On cross-examination, Betts admitted he did not know the nature of the various debits appearing on bank records for the period of time he questioned.

In January 1994 Betts paid the attorney, chosen by Maxine, to represent the son in a drug case.

In July 10, 1994 Betts wrote Maxine a demand letter because the Lettingtons had missed their May and June payments on the December 20, 1993 loan. In this correspondence, Betts reiterated the sacrifices he had made. He reminded Maxine that "I loaned to you to pay off debts so you won't have payments and interest." (Exhibit 34 at 1.) On August 13, 1994 Betts again wrote Maxine about the tardiness of her loan payments.

Then on September 18, 1994 Betts wrote his attorney regarding his support obligations now that the son was 18 and had graduated from high school. He was willing to continue paying something. On September 23, 1994 Betts wrote Maxine regarding his decision to provide support in the amount of $50.00 per month. On September 26, 1994 Betts wrote Norman about the matter. Betts then wrote a check, dated September 30, 1994 and payable to the son and Maxine, in the amount of $300.00 for September assistance.

On October 3, 1994 Betts again wrote Maxine about support issues. Betts next wrote a check, dated October 4, 1994 and payable only to the son, in the amount of $300.00. Following that, he wrote a check, dated October 31, 1994 and payable to Maxine, in the amount of $600.00 for the son's support. Then he wrote a check, dated November 4, 1994 and payable only to the son, in the amount of $260.00.

On December 15, 1994 Betts resumed writing Maxine about the money she owed him. On June 7, 1995 Betts sent the Lettingtons a written itemization of amounts past due. On June 29, 1995 Betts wrote the Lettingtons another demand letter. On July 15, 1995 Betts sent a follow-up letter requesting the Lettingtons' plan for repayment.

During this period of time, Betts loaned a gun to one of Maxine's daughters from a previous marriage. That daughter, Tracy Hardin, used the gun to shoot her ex-husband's girl friend. Betts wrote a check, dated July 23, 1995 and payable to Maxine, in the amount of $2,000.00 for Tracy's criminal trial. At the time of the bankruptcy trial, Tracy was serving a mandatory life sentence for first degree murder.

On August 7, 1995 Betts wrote the Lettingtons indicating he understood they would not be able to pay him for the time being but stated he expected payment in January 1997. Betts also indicated he would not write them again about their indebtedness to him.

On September 29, 1995 Betts wrote the Lettingtons to report that a representative of the owners of Tracy's apartment had contacted him for the August rent even though the Lettingtons had represented they would take care of the matter. Betts stated "I'm not going to write another long pleading letter detailing what you owe and guaranteed by repeated broken promises." He then proceeded to vent his frustration in the remainder of the otherwise short letter. (Exhibit 62 at 3.)

On October 10, 1995 Betts' attorney wrote the Lettingtons to advise that his client intended to file a breach of contract lawsuit against them in state court. In lieu of that course of action, the attorney enclosed a Conditional Confession of Judgment, two

Promissory Notes, and a mortgage for their consideration. The Lettingtons did not sign the documents.

On April 2, 1996 Betts' attorney filed the lawsuit as promised. On April 7, 1996 Norman left Betts a telephone message indicating he planned to repay Betts and requesting Betts get out of his life.

During this time frame, Kay left Betts.

On July 23, 1997 Betts wrote Maxine. Among other things, he reported he was being sued as a result of Tracy's actions and that he now needed help with his own legal expenses.

In a Uniform Scheduling Order entered on August 28, 1997, the Iowa District Court for Polk County set Betts' lawsuit against the Lettingtons for trial on November 25, 1997.

On September 5, 1997 the Lettingtons filed their petition for relief under Chapter 7 of the United States Bankruptcy Code. That filing stayed the state court action.

On December 9, 1997, the deadline date for filing objections to discharge and complaints to determine dischargeability pursuant to 11 U.S.C. section 523(c), Betts submitted a document captioned "Notice to Challenge Discharge of Debt." On December 12, 1997 the Court entered an order returning the document because it was not accompanied by the appropriate filing fee, lacked a cover sheet and summons, and did not include the address or telephone number of the signer. On December 18, 1997 Betts corrected the deficiencies and filed a motion asking the Court to file his paperwork as of the date it was originally tendered. On December 22, 1997 the Court granted the motion but specifically noted that "[t]hough pro se plaintiff does not cite any subsection of

section 523(a) in the complaint, the court construes this action as one to determine the dischargeability of a debt and not as an action to challenge the general discharge of all debts." Accordingly, the general discharge of debts that was entered automatically on December 10, 1997 was not vacated and the pending controversy has proceeded as a dischargeability action.

According to Betts' calculations, the Lettingtons owed him $6,030.20 on the 1991 loan and $10,600.00 on the 1993 loan as of the Chapter 7 petition date. Despite the fact the Lettingtons listed the debt owed Betts at $17,000.00 on Schedule F (Creditors Holding Unsecured Nonpriority Claims), they contend in their Final Pretrial Statement that they owe him a total of $8,665.34.

DISCUSSION

Federal Rule of Bankruptcy Procedure 7052 makes Federal Rule of Civil Procedure 52 applicable in adversary proceedings. The latter rule states in relevant part:

> (c) Judgment on Partial Findings. If during a trial without jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

Fed. R. Civ. P. 52(c). Accordingly, for Betts to defeat the Lettingtons' motion for directed verdict, the record as of the close of his case-in-chief must establish a prima facie case under one or more of the following relevant provisions of section 523:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt—
>
> . . . .
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, 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;
>
> (B) use of a statement in writing--
>
> (i) that is materially false;
>
> (ii) respecting the debtor's or an insider's financial condition;
>
> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
>
> (iv) that the debtor caused to be made or published with intent to deceive;
>
> . . . .
>
> (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. § 523.

Betts bears the burden of proving by a preponderance of the evidence that the debts in issue are nondischargeable. See Grogan v. Garner, 498 U.S. 279, 291, 111 S.Ct. 654, 661 112 L.Ed.2d 755 (1991).

Section 523(a)(2)(A)

In order for a debt to be declared nondischargeable under section 523(a)(2)(A), a creditor must prove that money or property was obtained through false pretenses, a false representation, or actual fraud. In simplest terms, a "false pretense" is an implied misrepresentation; a "false representation" is an express misrepresentation; and actual fraud includes anything said, done or omitted with the intention of deceiving or cheating

another. See In re Moen, 238 B.R. 785 (B.A.P. 8th Cir. 1999); In re Faulk, 69 B.R. 743, 750-51 (Bankr. N.D. Ind. 1986). Distinguishing the three prongs of section 523(a)(2)(A) in a particular case may not be significant. See In re Baietti, 189 B.R. 549, 553 (Bankr. D. Me. 1995), abrogated on other grounds, Field v. Mans, 157 F.3d 35, 40 (1st Cir. 1998). It may be difficult. Moen, 238 B.R. at 794.

Regardless of the specific label attached to the statement or conduct, a creditor generally must prove the following elements of a section 523(a)(2)(A) case:

(1) that the debtor made a representation that was false;

(2) that the debtor realized the representation was false when it was made;

(3) that the debtor planned on the false representation misleading the creditor;

(4) that the creditor justifiably relied on the false representation; and

(5) that the creditor suffered a loss as a proximate result of that representation. See Matter of Van Horne, 823 F.2d 1285, 1287 (8th Cir. 1987) (setting forth the five elements but indicating reliance must be reasonable), abrogated on other grounds, Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991); In re Ophaug, 827 F.2d 340 (8th Cir. 1987) (holding reliance in fact is enough); and Field v. Mans, 516 U.S. 59, 116 S. Ct. 437, 133 L.Ed.2d 351 (1995) (holding reliance must be justifiable—that is, something more than reliance in fact but something less than strict reasonable reliance).

The record reveals that Betts was crititical of Maxine's spending habits before and after they were divorced and that he had attempted to collect past loans from her long before he entered into the two contracts in issue. Hence, his insistence that she sign the May 14, 1990 agreement regarding never asking him for money again and his negative response to her request for money later in 1990 had some meaning at that juncture in time. Though he

relies on those documents is support of his contention Maxine acted in a fraudulent manner, those documents lost any meaning when he changed his mind and loaned her the $900.00 in May 1991 and the $5,000.00 in October of 1991.

Betts, however, contends Maxine had some undue influence over him with respect to both the 1991 and the 1993 loan. In essence, he asks the court to find such undue influence existed and to equate it with the type of conduct or statement section 523(a)(2)(A) addresses. The Court has not found any case law that would support such a holding and will not blaze such a subjective trail at a right angle to the clear path of the statute and controlling case law.

As for the 1993 loan, Betts maintains the Lettingtons misled him about the nature of the loan because they exhausted the $10,000.00 between December 20, 1994 and January 5, 1994 and, therefore, could not have applied the amount to the home improvement mortgage that was not released until April 1994. Though the 1993 contract makes passing reference to the Lettingtons' deck, the agreement in no way bound the Lettingtons to use the loan proceeds to pay off that particular debt. Betts' follow-up correspondence seemingly acknowledges that point by reference to the Lettingtons' general indebtedness. Furthermore, Betts did not establish by a preponderance of the evidence that the Lettingtons did not use the monies to pay off their debts.

In sum, the record reveals that the Lettingtons sought financial help from Betts because he would loan money to them despite their less than stellar repayment history. Indeed, Betts anticipated trouble when he loaned them money and so stated many times over. The Lettingtons made some but not all the payments on the loans in issue. Some but not all of those payments were timely. At best, the record supports a finding that the

Lettingtons breached their 1991 and 1993 promises to pay. It does not support finding that they had no intention to perform when they made the promises. A promise to perform acts in the future ordinarily does not qualify as a fraudulent representation merely because the promise is subsequently breached. See In re Shea, 221 B.R. 491, 497 (Bankr. D. Minn. 1998).

Even if the Court could find that that Maxine knowingly made a false representation with the intent of misleading Betts regarding the 1991 loan and that the Lettingtons did likewise with respect to the 1993 loan, the record would not support finding Betts justifiably relied on the representations. Moreover, the record would not even support finding that he relied in fact on those representations. By his own admission and argument, Betts simply was unable to say "no" to the requests for money. Whether his belief that Maxine exercises undue influence over him is closer to the truth than Maxine's belief that he willingly loans her money so he can have control over her life is of no moment.

Section 523(a)(2)(B)

Section 523(a)(2) divides all statements into two mutually exclusive categories. Section 523(a)(2)(A), discussed above, includes acts or statements, even those made orally, but excludes statements regarding a debtor's financial condition. Section 523(a)(2)(B) governs only written statements concerning a debtor's financial condition. Hence, to prevail under section 523(a)(2)(B), Betts must first establish there was a written financial statement concerning the Lettingtons' financial condition. While some courts equate written statements with balance sheets showing the debtor's net worth, others consider a broader class of statements relating to a debtor's financial condition. See First Nat. Bank of Olathe,

Kansas v. Pontow, 111 F.3d 604, 609 (8th Cir. 1997) (citing cases following both approaches).

Reviewing the record under the expansive standard, the Court finds no such document with respect to either the October 29, 1991 loan or the December 20, 1993 loan. The record contains many documents created by Betts that discuss at length the financial condition of the parties. Section 523(a)(2)(B) does not contemplate consideration of such documents. At Betts' request, the parties did provide him with predated checks for the 1991 loan. A check, however, is not generally considered a "statement in writing" for purposes of section 523(a)(2)(B). See In re Lahiri, 225 B.R. 582 (Bankr. E.D. Pa. 1998). See also Williams v. United States, 458 U.S. 279, 102 S. Ct. 3088, 73 L.Ed.2d 767 (1982) (holding that a check is not a "statement or report" for purposes of 18 U.S.C. section 1014).

Accordingly, Betts has not established the threshold element of a cause of action under section 523(a)(2)(B). Therefore, it is not necessary for the Court to analyze the record vis-a-vis the other elements of that section.

Section 523(d)

In their answer to the complaint, the Lettingtons ask the Court to award them costs and attorney fees pursuant to 11 U.S.C. section 523(d). That section provides:

> (d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

11 U.S.C. § 523(d). The loans in issue were consumer debts as defined by 11 U.S.C. section 101(8).

Though the court has basically found that Betts' position with respect to section 523(a)(2)(A) and (B) was not substantially justified, the special circumstances of this case would make the requested award unjust. Betts was not represented by counsel. The Lettingtons were represented by two attorneys. The record is complex due in part to Betts' duplication of certain parts of letters and other documents but also due to the long and difficult history between the parties. The applicable law is specific and detailed. While Betts briefed, albeit in layperson's terms, sections 523(a)(2)(A) and (B), 523(a)(4) and 523(a)(6) in his nine page final pretrial statement, the Lettingtons' attorneys briefed only section 523(a)(2)(A) in two pages. Finally, the Court does not doubt that Betts proceeded to trial honestly believing he had sufficient proof to except the debts in issue from discharge under one or more of the sections in issue.

Section 523(a)(4)

11 U.S.C. section 523(a)(4) renders a debt for fraud or defalcation while acting in a fiduciary capacity, for embezzlement, or for larceny nondischargeable. The section "was intended to reach those debts incurred through abuses of fiduciary positions and through active misconduct whereby a debtor has deprived others of their property by criminal acts; both classes of conduct involve debts arising from the debtor's acquisition or use of property that is not the debtor's." In re Boyle, 819 F.2d 583, 588 (5th Cir. 1987).

Fraud Or Defalcation While Acting In A Fiduciary Capacity

Whether a relationship can be characterized as "fiduciary" is a question of federal law. See In re Cochrane, 124 F.3d 978, 984 (8th Cir. 1997). The fiduciary capacity must arise from an express trust or technical trust, not from a constructive trust or mere contractual relationship. See id.; Werner v. Hofmann, 5 F.3d 1170, 1172 (8th Cir. 1993).

Betts contends Maxine was in a fiduciary capacity because he placed a great deal of trust in her. However, as defined by federal law, that relationship does not amount to a fiduciary one. The record contains no evidence of an express or technical trust as defined by controlling case law.

Embezzlement

The embezzlement exception to discharge requires Betts establish the Lettingtons fraudulently appropriated the loans he gave them. See Werner v. Hofmann, 5 F.3d 1170, 1172 (8th Cir. 1993) (stating creditor must establish the debtor improperly used the creditor's property before complying with some obligation to the creditor); In re Belfry, 862 F.2d 661, 663-64 (8th Cir. 1988) (stating creditor must prove the purpose for which the debtor used entrusted funds was not lawful).

Both the 1991 and the 1993 contracts reveal that Betts loaned the money to assist the Lettingtons with their financial problems. Contrary to Betts' assertions, the documents do not require the funds to be applied to a particular debt, like the home improvement mortgage. Betts' suspicions that the Lettingtons used the funds for purposes other than those for which they sought his help is not supported by a preponderance of the evidence. At best, the lawful obligation under either document is repayment of the loaned amount according to the terms of the agreement. While the record suggests they breached those agreements, it does not support finding they embezzled any funds.

Larceny

Larceny is equated with the fraudulent and wrongful taking of another person's property with the intent to convert that property to one's own, all without the consent of

the owner. Hence, the larceny exception to discharge does not apply if the Lettingtons' original possession of Betts' property was lawful. Werner v. Hofmann, 5 F.3d 1170 (8th Cir. 1993). The record is clear. The Lettingtons did not fraudulently or wrongfully take the $5,000.00 in 1991 or the $10,000.00 in 1993. Betts loaned those amounts to them.

Section 523(a)(6)

To prevail under this section, Betts must establish that the Lettingtons willfully and maliciously injured him or his property. There must be evidence of a deliberate or intentional injury, not merely a deliberate or intentional act that leads to an injury. See Kawaauhau v. Geiger, 523 U.S. 57, 118 S.Ct. 974, 140 L. Ed.2d 90 (1998). While "willful" means headstrong and knowing conduct, "malicious" means conduct targeted at the creditor at least in the sense that the conduct is certain or almost certain to cause harm. See In re Scarborough, 171 F.3d 638, 641 (8th Cir. 1999).

Betts argues that Maxine told Kay about the 1993 loan, contrary to his stated request in the contract, and he suffered a loss of consortium as a result of that communication. Maxine generally denied doing so and speculated that Kay likely overhead her and Betts discussing the matter during one of their phone calls. The court observes that Maxine was generally a credible, albeit distraught, witness. Moreover, the record supports that explanation insofar as it leaves one wondering how Kay could not have known what was going on given all the letters Betts wrote and all the calls he made to Maxine.

Even if the Court could find that Maxine spoke with Kay about the 1993 loan and that such conduct was willful, there is no evidence that Maxine intended Betts to suffer the loss of consortium. Despite her proclivity to seek money from Betts, there is no

indication Maxine desired to come between him and Kay. That is, Maxine did not act maliciously.

Finally, the record does not support a finding that the Lettingtons acted willfully when they failed to complete the payments on the 1991 and 1993 loans. Even if the Court could find that they deliberately stopped making payments to Betts, there is no evidence that they intended Betts to suffer economically as a result. Such a breach of contract does not per se preclude discharge. See In re Phillips, 882 F.2d 302, 305 (8th Cir. 1989); In re Long, 774 F.2d 875, 882 (8th Cir. 1985).

CONCLUSION

WHEREFORE, the Court finds that:

(1) Betts has not met his burden of establishing nondischargeability under 11 U.S.C. section 523(a)(2)(A) or (B), section 523(a)(4) or section 523(a)(6) and, therefore, the Lettingtons' Rule 52(c) motion must be granted and the adversary proceeding dismissed.

(2) Special circumstances make an award under 11 U.S.C. section 523(d) unjust and, therefore, the parties shall bear their own costs.

A separate Order and Judgment shall be entered accordingly.

Dated this 29th day of March, 2000.

LEE M. JACKWIG
U.S. BANKRUPTCY JUDGE