



Entered on Docket
March 21, 2007

Hon. Gregg W. Zive
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:

ALBERT PRESTON UNDERWOOD
and LINDA RAE UNDERWOOD, dba
BLACK ROCK CONSULTING, dba
DOCUMENTS TO GO, fdba ACTION
BAIL BONDS,

Bankr. No. 04-52071

Debtors.

RANGER INSURANCE COMPANY,
INC., a Delaware corporation,

Adv. No. 04-5254

Plaintiff,

vs.

ALBERT PRESTON UNDERWOOD
and LINDA RAE UNDERWOOD, et
al.,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
REGARDING COMPLAINT
OBJECTING TO DISCHARGE-
ABILITY OF DEBT

Defendants.

Albert P. Underwood, Linda Rae Underwood, dba Black Rock Consulting,
dba Documents to Go, fdba Action Bail Bonds filed the above captioned Chapter 7

1 bankruptcy case in the U.S. Bankruptcy Court, District of Nevada on July 9, 2004.

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3 Plaintiff, Ranger Insurance Company (“Ranger”), filed a Complaint
4 Objecting to Dischargeability of Debt on December 13, 2004. The Complaint
5 alleges three claims for relief: 1) the indebtedness owed by the Underwoods to
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7 Ranger is nondischargeable pursuant to 11 U.S.C. § 523(a)(2); 2) the indebtedness
8 owed by the Underwoods to Ranger is nondischargeable pursuant to 11 U.S.C. §
9 523(a)(4); and 3) the indebtedness owed by the Underwoods to Ranger is
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11 nondischargeable pursuant to 11 U.S.C. § 523(a)(6). Debtors/Defendants, Albert
12 Preston Underwood and Linda Rae Underwood (“Underwoods”), filed an Answer
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14 to the Complaint on January 6, 2005.

15 On December 30, 2005, Ranger filed a Motion for Summary Judgment, the
16 Underwoods filed an Opposition on February 2, 2006, and Ranger filed a Reply on
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18 February 16, 2006. A hearing was conducted regarding the Motion for Summary
19 Judgment on February 27, 2006. On March 21, 2006, the court entered an Order
20 Granting in part and Denying in part Ranger’s Motion for Summary Judgment.
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22 Specifically, the court ordered, in pertinent part, as follows 1)that the portion of the
23 Motion seeking summary judgment that the defendants owed Ranger a fiduciary
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25 duty with respect to the acquisition, control and disposition of collateral is
26 GRANTED; 2) that the portion of the Motion seeking summary judgment that
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28 Ranger has been damaged in the amount of at least \$41,845.74, plus reasonable

1 attorneys' fees and interest is GRANTED; 3) that the portion of the Motion seeking
2 summary judgment on the issue of causation between a breach of fiduciary duty in
3 connection with the acquisition, disposition and control of collateral and the
4 damage sustained by Ranger is DENIED; 4) that the portion of the Motion seeking
5 summary judgment on the remaining elements of damage is DENIED for
6 insufficiency of evidence; 5) that the portion of the Motion seeking summary
7 judgment that the remaining elements of damage are causally related to a breach of
8 fiduciary duty owed by the defendants is DENIED; and 6) that the portion of the
9 Motion that are denied, as well as the remaining claims for relief set forth in
10 Ranger's complaint, would be the subject of the scheduled trial.

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12 The Underwoods filed a Trial Brief on March 29, 2006, and a Trial
13 Statement on April 4, 2006. Ranger filed its Trial Statement on March 29, 2006.
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15 On March 31, 2006, the Underwoods filed a Request for Reconsideration of the
16 Court's Order of March 21, 2006. At the commencement of trial on April 6, 2006,
17 the court stated that it would not consider the Request for Reconsideration because
18 it was not properly noticed or set for hearing. (T, P. 10, L. 2-3).

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20 The trial commenced on April 6, 2006, and continued on May 1, 2006.
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22 Both Ranger and the Underwoods filed their Post-Trial Briefs on August 21, 2006.
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24 Final argument took place on September 22, 2006, and the matter was taken under
25
26 submission.
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1 **FINDINGS OF FACT; CONCLUSIONS OF LAW**

2 The court having read and considered the pleadings on file, declarations,
3 affidavits and exhibits admitted into evidence during the trial, and having heard
4 and considered the arguments of the parties, makes the following findings of facts
5 and states the following conclusions of law in addition and supplemental to
6 findings and conclusions placed on the record at trial pursuant to Fed. R. Bankr. P.
7 7052. Any finding of fact that is more properly deemed a conclusion of law shall
8 be deemed a conclusion of law.
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12 **I. Background**

- 13 1. Based on an Application for Bail Bond Agency dated December 1,
14 1997, Ranger and the Underwoods entered into a Bail Bond
15 Underwriting Agreement and a Letter of Underwriting Authority and
16 Instructions for Appearance Bonds dated January 5, 1998. (Exhibits 2
17 & 4).
18
19 2. The Underwoods' authority to execute bonds on behalf of Ranger
20 extended to bonds which did not exceed the sum of \$25,000.00
21 pursuant to the Letter of Underwriting Authority and Instructions for
22 Appearance Bonds dated January 5, 1998. (Exhibit 2).
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24 3. The Underwoods' authority to execute bonds on behalf of Ranger was
25 increased from \$25,000 to \$100,000 for each individual bond pursuant
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to a Letter of Underwriting Authority and Instructions for Appearance Bonds dated June 26, 2000. (Exhibit 3).

- 4. Under both the Letter of Underwriting Authority of January 5, 1998, and of June 26, 2000, the Underwoods had the authority to write bonds in excess of \$5,000 without full collateral when “unusual circumstances” so warranted. (Exhibits 2 & 3).
- 5. Ranger never provided any training to the Underwoods (TT, P. 9, L. 16-20), and the Underwoods were told by Ranger to exercise their own best judgment as to when “unusual circumstances” warranted the writing of bonds in excess of \$5,000 without full collateral (TT, P. 14, L. 1-2).
- 6. The Underwoods conducted their bail bond business with Ranger under the name of Action Bail Bonds. (TT, P.8. L. 1).
- 7. The Underwoods sold Action Bail Bonds pursuant to a Purchase and Consulting Agreement on April 27, 2001, for \$130,000. (Exhibit 7).
- 8. In a letter dated May 21, 2001, the Underwoods notified Ranger of the termination of the Bail Bond Underwriting Agreement. (Exhibit 8).
- 9. At issue in this case are sixteen bail bonds the Underwoods wrote and for which they submitted receipts of collateral received and third party indemnifications to Ranger between 1999 and the time they sold their

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business. Two of the bonds, for Juan Luis Garcia, were for the same criminal case. (Exhibits 13-28).

10. There is evidence that forfeiture judgments were entered on nine of the sixteen bonds. (Exhibits, 18-20, 22, 24-28).

11. The Underwoods did not fully pursue the collateral on the bonds. (T, P. 103, L. 7-25, P. 104, L. 1).

12. The Underwoods owed Ranger a fiduciary duty in connection with obtaining, maintenance, and disposition of the collateral. (Exhibit 4).

13. Ranger relied on the Underwoods to collect and pursue collateral in the event a criminal defendant failed to appear and there was a forfeiture. (T, P. 137, L. 16-19).

14. The Underwoods did not pay the forfeiture judgments.

15. Pursuant to the Bail Bond Underwriting Agreement, one percent of the total amount of penal liability written for each bond went into an “Indemnity Fund” or “Build-Up Fund” as security for any and all indemnifications. (Exhibit 4). The fund was created to protect Ranger from any liability that it had on bonds that could not otherwise be satisfied.

16. The Underwoods requested that Ranger satisfy forfeiture judgments from the Build-Up Fund. The Fund was depleted to satisfy any such

1 liabilities.

2 17. Ranger was the beneficiary of the Build-Up Fund; however, if excess
3 funds remained in the account after all bonds had been exonerated or
4 satisfied, then those funds were to be returned to the Underwoods.
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6 18. In addition to the amounts paid on forfeiture judgments from the
7 Build-Up Fund, Ranger paid an additional \$41,845.74 to satisfy the
8 remaining forfeiture judgments. In its Summary Judgment Order
9 dated March 21, 2006, this court found that Ranger met its burden of
10 proving that it had been damaged at least in the amount of \$41,845.74,
11 plus reasonable attorneys' fees and interest.
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15 **II. 11 U.S.C. § 523(a)(2), (4), (6)¹**

16 **A. 11 U.S.C. § 523(a)(2)**

17 1. Under 11 U.S.C. § 523 (a), "A discharge under section 727, 1141,
18 1228(a), 1228(b), or 1328(b) of this title does not discharge an
19 individual debtor from any debt--
20 individual debtor from any debt--
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22 (2) for money property, services, or an extension, renewal, or
23 refinancing of credit, to the extent obtained, by--
24

25 (A) by false pretenses, a false representation, or actual fraud,
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27 ¹ Nondischargeability must be proven by a preponderance of the evidence.
28 *Grogan v. Garner*, 498 U.S. 279, 285 (1991).

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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;”

2. The Ninth Circuit has employed a five-part test for determining when a debt is nondischargeable under § 523(a)(2)(A). The creditor must show that: (1) the debtor made the representations; (2) that at the time he knew they were false; (3) that he made them with the intention and purpose of deceiving the creditor; (4) that the creditor relied on such representations; (5) that the creditor sustained the alleged loss and damage as the proximate result of the representations having been made. *In re Britton*, 950 F.2d 602, 604 (9th Cir. 1991).

3. The test is virtually identical under § 523(a)(2)(B); however, under §

1 523(a)(2)(B), there must be some reliance on a materially false
2 financial statement. *Candland v. Insurance Co. of N. America (In re*
3 *Candland)*, 90 F.3d 1466, 1469 (9th Cir.1996).

- 4
5 4. The elements that must be proven to obtain a judgment under 11
6 U.S.C. § 523(a)(2)(A) and § 523(a)(2)(B) have not been satisfied.
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8 Ranger has not shown that the Underwoods made false representations
9 with the purpose of deceiving the creditor. Furthermore, although
10 Ranger relied on contractual documents and financial statements and
11 on the Underwoods to satisfy their fiduciary obligations, there was no
12 reliance on any misrepresentations that were made at the time of these
13 transactions.
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16 **B. 11 U.S.C. § 523(a)(4)**

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18 1. Under 11 U.S.C. § 523 (a), “A discharge under section 727, 1141,
19 1228(a), 1228(b), or 1328(b) of this title does not discharge an
20 individual debtor from any debt--
21 (4) for fraud or defalcation while acting in a fiduciary capacity,
22 embezzlement, or larceny;”
23
24 2. A debt is nondischargeable under 11 U.S.C. § 523(a)(4) where 1) an
25 express trust exists, 2) the debt was caused by fraud or defalcation,
26 and 3) the debtor acted in a fiduciary capacity at the time the debt was
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created. *In re Niles*, 106 F.3d 1456, 1459 (9th Cir. 1997).

3. “Whether a relationship is a ‘fiduciary’ one within the meaning of section 523(a)(4) is a question of federal law.” *In re Lewis*, 97 F.3d 1182, 1185 (1996) (citing *Ragsdale v. Haller*, 780 F.2d 794, 795 (9th Cir. 1986)).
4. “[T]he fiduciary relationship must be one arising from an express or technical trust that was imposed before and without reference to the wrongdoing that caused the debt.” *Id.*
5. Once the fiduciary relationship is shown to exist, there must be a defalcation. “Defalcation is defined as the ‘misappropriation of trust funds or money held in any fiduciary capacity; [the] failure to properly account for such funds.’” *Id.* at 1186 (quoting *Black’s Law Dictionary*, 417 (6th ed. 1990)).
6. “Under section 523(a)(4), defalcation, ‘includes the innocent default of a fiduciary who fails to account fully for money received.’” *Id.* (quoting *In re Short*, 818 F.2d 693, 694 (9th Cir. 1987)). “An individual may be liable for defalcation without having the intent to defraud.” *Id.*
7. “Basic principles of the law of fiduciaries therefore place the burden to render an accounting on the fiduciary once the principal has shown

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that funds have been entrusted to the fiduciary and not paid over or otherwise accounted for.” *In re Niles*, 106 F. 3d at 1462.

8. A fiduciary relationship existed between the Underwoods and Ranger. The relationship arose from an express trust; specifically, the Bail Bond Underwriting Agreement.
9. The actions of the Underwoods, viewed individually and in total, do not support a finding of any fraudulent or deceptive intent.
10. However, the Underwoods are liable for an innocent defalcation because they breached their fiduciary duties by failing to adequately account for collateral, pursue collateral, and exonerate bonds.
11. Any damages awarded to Ranger are nondischargeable under § 523(a)(4).

C. 11 U.S.C. § 523(a)(6)

1. Under 11 U.S.C. § 523 (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--
 - (6) for willful and malicious injury by the debtor to another entity or to the property of another entity; . . .
2. Ranger has not satisfied its obligation to prove that there was an intent by the Underwoods to act in a willful and malicious manner.

1 3. The elements that must be proven to obtain a judgment under §
2 523(a)(6) have not been satisfied.
3

4 **III. DAMAGES**

5 1. This court has already found that Ranger was damaged in the amount
6 of at least \$41,845.74, plus reasonable attorneys' fees and interest.
7 (Summary Judgment Order, March 21, 2006).
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9 2. Additionally, Ranger has established outstanding contingent liability
10 on open bonds in the amount of \$52,850.00. But for the depletion of
11 the Build-Up fund to indemnify Ranger for these contingent liabilities,
12 Ranger would have a source to turn to for satisfaction.
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14 3. Because the Underwoods breached their fiduciary duty in connection
15 with the collection and disposition of the collateral posted for each
16 bond at issue, Ranger is entitled to indemnification for its contingent
17 liability, and the \$52,850.00 should be deposited into the Build-Up
18 Fund and treated in accord with the terms and conditions regarding the
19 Build-Up Fund.
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22 4. Ranger shall file a satisfaction of judgment for open bonds as they are
23 exonerated.
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26 **IV. CONCLUSION**

27 For the foregoing reasons, this court finds the elements that must be proven
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1 to obtain a judgment under 11 U.S.C. §§ 523(a)(2) and (6) have not been satisfied.
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3 The elements that must be proven to obtain a judgment under 11 U.S.C. § 523(a)(4)
4 have been satisfied and any debt owed to Ranger is nondischargeable pursuant to
5 that section.

6
7 Damages have already been awarded in the amount of \$41,845.74.

8 Additional damages are hereby awarded in the amount of \$52,850.00, to be paid
9 into the Build-Up Fund, subject to reduction if Ranger does not have to pay on any
10 additional forfeited bonds. Ranger shall file a satisfaction of judgment for open
11 bonds as they are exonerated. A separate Judgment will be entered consistent with
12 these findings and conclusions.
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