



Honorable Mike K. Nakagawa  
United States Bankruptcy Judge



Entered on Docket  
November 22, 2019

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

\* \* \* \* \*

In re:

ALAN CRISTOS JENN  
fdba ALAN DRONE  
fdba ALPHA DRONE,

Debtor.

SAM CHINKES (DECEASED), an  
individual; ANITA CHINKES-RATNER, as  
Trustee of the Sam Chinkes and Etta  
Chinkes Family Trust,

Plaintiffs,

v.

ALAN C. CHEN, an individual,

Defendant.

Case No.: 18-15103-MKN  
Chapter 7

Adv. Proc. No.: 18-01124-MKN

Date: August 15, 2019  
Time: 9:30 a.m.

**ORDER ON MOTON FOR PARTIAL SUMMARY JUDGMENT<sup>1</sup>**

On August 15, 2019, the court heard the Motion for Partial Summary Judgment (“SJ Motion”) brought by the plaintiff in the above-captioned adversary proceeding. The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

**BACKGROUND**

<sup>1</sup> In this order, all references to “AECF No.” are to the number assigned to the documents filed in the above-captioned adversary proceeding as they appear on the dockets maintained by the clerk of court. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to “FRCP” are to the Federal Rules of Civil Procedure.

1 On November 26, 2018, creditor Sam Chinkes (“Plaintiff”) filed an adversary complaint  
2 (“Complaint”) against Alan Cristos Jenn, debtor in the above-captioned Chapter 7 case  
3 (“Debtor”). (AECF No. 1). The Complaint seeks a determination that Plaintiff’s claim against  
4 the Debtor is excepted from discharge under Section 523(a)(2)(A) based on false representations  
5 made by the Debtor, as well as under Section 523(a)(4), based on the Debtor’s fraud or  
6 defalcation while acting in a fiduciary capacity. The Complaint also alleges that Plaintiff’s claim  
7 against the Debtor is excepted from discharge under Section 523(a)(19) based on the Debtor’s  
8 violation of federal and state securities laws. Additionally, the Complaint also seeks to deny the  
9 Debtor a Chapter 7 discharge altogether, based on Sections 727(a)(2)(A), 727(a)(3), and  
10 727(a)(4)(A). Finally, the Complaint seeks damages based on five additional claims based on  
11 state law.

12 On December 17, 2018, Debtor filed an answer (“Answer”) to the Complaint. (AECF  
13 No. 6). In his Answer, Debtor admits Paragraphs 1, 2, 3, 4, 5, 6, 26, 33, 58, 109, and 111 of the  
14 Complaint, but denies all other allegations of the Complaint.

15 On January 17, 2019, the parties filed a joint discovery plan. (AECF No. 7).

16 On April 5, 2019, Plaintiff filed the instant SJ Motion, accompanied by the declaration of  
17 his counsel. (AECF Nos. 17 and 18).

18 On June 12, 2019, counsel for the Plaintiff filed a notice of suggestion of death indicating  
19 that the Plaintiff died on April 10, 2019. (AECF No. 24).

20 On July 22, 2019, an order was entered permitting Anita Chinkes-Ratner, as trustee of the  
21 Sam Chinkes and Etta Chinkes Family Trust, to substitute as the Plaintiff. (AECF No. 33).

22 On July 30, 2019, a hearing was held on the SJ Motion, and was continued to August 15,  
23 2019.

24 On August 14, 2019, Plaintiff’s counsel filed a declaration attesting to his efforts to  
25 contact Debtor’s counsel, inasmuch as no opposition to the SJ Motion had ever been filed even  
26 though Debtor’s counsel had filed the Answer. (AECF No. 38).

27 On August 15, 2019, the hearing on the SJ Motion was concluded and the matter was  
28 taken under submission.

## DISCUSSION

The SJ Motion seeks entry of a judgment in favor of the Plaintiff on his damage claims under the Nevada fraudulent transfer statute as well as under the Nevada Deceptive Trade Practices statute.<sup>2</sup> Additionally, Plaintiff seeks a judgment denying discharge of such claims based on fraud under Section 523(a)(2)(A) as well as fraud and defalcation while acting in a fiduciary capacity under Section 523(a)(4).<sup>3</sup> Finally, Plaintiff seeks a judgment denying the Debtor's Chapter 7 discharge entirely under Sections 727(a)(2)(A), 727(a)(3), and 727(a)(4)(A).

The SJ Motion is accompanied by a copy of a Request for Admissions ("RFA") propounded by the Plaintiff to the Debtor on February 7, 2019. Plaintiff's counsel represents that no response to the RFA was received from the Debtor. Pursuant to FRCP 36(a)(3), a "matter is admitted" unless the party to whom the RFA is directed serves a written answer or objection. Under FRCP 36(b), a "matter admitted under this rule is conclusively established, unless the court, on motion, permits the admission to be withdrawn or amended." No motion has been brought by the Debtor seeking withdrawal or amendment. Other than the RFA, the SJ Motion is not accompanied by affidavits or declarations attesting to the facts alleged in the Complaint, nor authenticating any documentary evidence offered to establish the facts alleged in the Complaint. As previously mentioned, in his Answer to the Complaint, Debtor denied all of the material elements of each claim and legal theory asserted by the Plaintiff.

As the party seeking summary judgment, Plaintiff is required to establish that there is no genuine dispute as to any material fact and that he is entitled to judgment as a matter of law.

---

<sup>2</sup> Plaintiff apparently does not seek summary judgment on his state law claims under the Nevada Uniform Securities Act, for fraud and intentional misrepresentation, and breach of fiduciary duty under NRS 628A.020. Because all of the state law claims, if any, arose prepetition, all of them would be discharged under Section 727(b), unless the Plaintiff can demonstrate that they fall within an exception under Section 523. See 11 U.S.C. § 727(b) ["Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter..."]. Thus, for purposes of this SJ Motion, the court will address only the merits of Plaintiff's efforts to except his prepetition claims from discharge under Section 523, and to deny the Debtor's discharge under Section 727.

<sup>3</sup> Plaintiff does not seek summary judgment on his claim to deny discharge of debt under Section 523(a)(19).

1 Fed.R.Civ.P. 56(a). Unless they are actually or deemed admitted, subjective elements of the  
 2 Plaintiff's claims, such as intent, reliance, or other state of mind, are ill-suited to determination  
 3 by summary judgment. See, e.g., Plise v. Krohn (In re Plise), 719 Fed.Appx. 622, 624 (9th Cir.  
 4 2018) (summary judgment on false oath claim under § 727(a)(4)(A) vacated because summary  
 5 judgment is seldom possible where there are "factual issues (including those related to  
 6 intent)..."). Although the Debtor did not file an opposition to the SJ Motion, the court is  
 7 required to determine whether the Plaintiff has met his threshold burden of proof on the claims  
 8 for which he seeks judgment as a matter of law. See Cristobal v. Siegel, 26 F.3d 1488, 1494-95  
 9 (9th Cir. 1994); Lopez-Gomez v. Sessions, 693 Fed.Appx. 729, 731 (9th Cir. 2017); Johnson v.  
 10 Vintage Center LLC, 2019 WL 3714748, at \*2 (E.D. Cal. Aug. 7, 2019).

11 Other than the declaration of his counsel that accompanied the SJ Motion, there is no  
 12 testimony or other evidence offered by the Plaintiff to establish his reliance on any  
 13 representations or omissions attributable to the Debtor.<sup>4</sup> Additionally, other than what may be  
 14 deemed admitted pursuant to FRCP 36(b), there is no evidence to establish the Debtor's intent or  
 15 state of mind in connection with the claims alleged in the Complaint. Noticeably absent from the  
 16 RFAs were any requests for the Debtor to admit to a culpable state of mind, nor any requests for  
 17 the Debtor to admit to any actual or justifiable reliance by the Plaintiff. The absence of such  
 18 requests is hardly surprising given that the Debtor generally denied similar allegations when he  
 19 filed his Answer on December 17, 2018, and the Plaintiff propounded the RFAs in February  
 20 2019.

21 Absent testimony from the Plaintiff or the Debtor, or other evidence or relevant  
 22 admissions by the Debtor, Plaintiff has failed to meet his threshold burden of establishing the  
 23 absence of a genuine dispute of material fact regarding his dischargeability claims under  
 24 Sections 523(a)(2)(A) and 523(a)(4). See Turtle Rock Meadows, etc. v. Slyman (In re Slyman),  
 25 234 F.3d 1081, 1085 (9th Cir. 2000) (a claim for actual fraud under § 523(a)(2)(A) requires  
 26

---

27 <sup>4</sup> Plaintiff obviously will be unable to testify as to his actual and justifiable reliance in the  
 28 future. Absent some other admissible evidence, it is unlikely that the Plaintiff can meet his  
 burden of proof at trial under Section 523(a)(2)(A).

proof of, inter alia, the plaintiff's justifiable reliance of the debtor's statement or conduct); Bullock v. BankChampaign, N.A., 133 S.Ct. 1754, 1759 (2013) (a claim for fraud or defalcation while acting in a fiduciary capacity under § 523(a)(4) requires proof, inter alia, of bad faith, moral turpitude, or other immoral conduct by the debtor, or, proof that the debtor exhibited a conscious disregard for a substantial and unjustifiable risk that will turn out to violate a fiduciary duty).<sup>5</sup>

Similarly, Plaintiff has failed to meet his threshold burden for a denial of the Debtor's discharge under Sections 727(a)(2), 727(a)(3), and 727(a)(4). See Adeeb v. First Beverly Bank (In re Adeeb), 787 F.2d 1339, 1343 (9th Cir. 1986) (intent required under § 727(a)(2) established by debtor's admission that he transferred property to put it out of reach of creditors); Caneva. v. Sun Communities Oper. Ltd. P'ship (In re Caneva), 550 F.3d 755, 761 (9th Cir. 2008) (justification for failure to keep or preserve records under § 727(a)(3) negated by debtor's admission that he kept no records)<sup>6</sup>; Devers v. Bank of Sheridan (In re Devers), 759 F.2d 751, 753 (9th Cir. 1985) (debtor's actual intent must be proven under § 727(a)(4)(A) to deny discharge based on a knowing and fraudulent false oath).

Because the moving party has not met his threshold burden, the absence of opposition from the opposing party is not sufficient to permit summary judgment to be granted.

**IT IS THEREFORE ORDERED** that the Motion for Partial Summary Judgment, brought on behalf of plaintiff Sam Chinkes (Deceased), an individual; Anita Chinkes-Ratner, as Trustee of the Sam Chinkes and Etta Chinkes Family Trust, Adversary Docket No. 17, be, and the same hereby is, **DENIED**.

**IT IS FURTHER ORDERED** that a status conference in this adversary proceeding will be held on **December 12, 2019, at 10:00 a.m.**, in Courtroom 2, of this bankruptcy court. Counsel of record for both the Plaintiff and the Defendant are required to appear.

---

<sup>5</sup> Debtor has admitted that he owed fiduciary duties to Alan Drone, LLC fka Alpha Drone, LLC, as well as its members. See Answer at ¶ 1; Complaint at ¶ 58. Debtor does not admit any other allegations related to Plaintiff's claim under Section 523(a)(4).

<sup>6</sup> None of the admissions sought in the RFA address whether the Debtor or his businesses keep or preserve recorded information, nor do they address whether the Debtor can justify any demonstrated failure to do so.

Copies sent via CM/ECF ELECTRONIC FILING

# # #