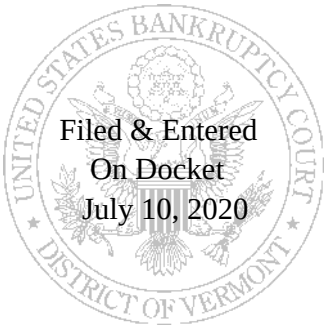
UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT



In re:
Kelly Bogie, **Chapter 7 Case**
Debtor. **# 19-10229**

Woodsville Guaranty Savings Bank,
Plaintiff,
v. **Adversary Proceeding**
Kelly Bogie, **# 19-01008**
Defendant.

INTERIM ORDER
GRANTING PLAINTIFF'S MOTION TO WAIVE RULE 5007-1(D) REQUIREMENT, RESCHEDULING HEARING ON PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT, AND DIRECTING PLAINTIFF TO FILE SUPPLEMENT

On May 29, 2019, Kelly Bogie (the "Debtor") filed a chapter 7 petition and included Woodsville Guaranty Savings Bank (the "Bank") as a secured creditor in her bankruptcy schedules. On September 5, 2019, before a discharge was entered in the chapter 7 case, the Bank filed a complaint (doc. # 1) to commence this adversary proceeding, seeking a determination that the Debtor's obligation to the Bank was not dischargeable under § 523(a) of the Bankruptcy Code. On January 31, 2020, the Bank filed a motion docketed as a "motion for default" (doc. # 9), which it subsequently withdrew (see docket entry dated February 5, 2020). On March 19, 2020, the Bank filed an amended complaint (doc. # 19), which did not alter any of its allegations against the Debtor or its prayer for relief.[1] The Bank describes its cause of action against the Debtor as follows:

> The basis for non-dischargeability is twofold: (1) under 11 U.S.C. §§ 523(a)(2), as Debtor made a false representation to Woodsville, when he entered into a Refinance of his prior debt with Woodsville in May of 2018 by offering collateral which he had already sold – a log loader, and a tractor with its attachments; and (2) [under] 11 U.S.C. §§ 523(a)(4), as Debtor committed a defalcation while in a

[1] The Bank amended its complaint to add jurisdictional language in accordance with Local Rule 7008-1(a) (see doc. # 14).

> fiduciary capacity when he sold the log loader out from a prior finance agreement, and the tractor and its attachments out from under a different finance agreement despite explicit and known obligations not to do so.
>
> …
>
> Debtor breached 11 U.S.C. §§ 523(a)(6) by converting lender's collateral into cash and receiving that cash without fulling paying off the obligation.

Doc. # 19, p. 2, ¶ 6, p. 5.

The Debtor does not have an attorney representing him in this adversary proceeding and has been proceeding ***pro se*** in the matter. The Debtor did not file any response or answer to the amended complaint. On May 1, 2020, the Bank filed an application for entry of default (doc. # 25), based on the Debtor's failure to answer. Due to a procedural deficiency in that application, it could not be processed until the Bank supplemented it, but once the supplement (doc. # 26) was filed, the Clerk promptly granted entry of default on June 5, 2020 (doc. # 27).

On June 10, 2020, the Bank filed two motions: a motion for entry of default judgment against the Debtor and a motion to waive the requirement for an official transcript of the meeting of creditors, as required by Local Rule 5007-1(d) (doc. ## 29, 30, respectively; together, the "Bank's Motions"). The hearing on the Bank's Motions are set for July 14, 2020. On June 22, 2020, the Debtor filed a typed, two-page, verified statement (doc. # 31, the "Debtor's Response") to address the allegations in the Bank's Motions. In that document, the Debtor asserts (i) she does not contest entry of judgment in the Bank's favor – and has not contested that at any point in this case; (ii) the debts to the Bank were refinanced several times, over several years, and during that time the amount of equipment the Debtor owned diminished; (iii) at the time of the last refinance the only equipment the Debtor had – and thus could pledge – to the Bank was a John Deere tractor; (iv) the Debtor failed to read the loan documents at the time of the most recent refinance (May 2018) and did not notice the documents listed more equipment than he owned at that time; (v) the Debtor made timely payments to the Bank up to and after the May 29, 2019 bankruptcy filing and indicated a willingness to reaffirm the debt with the Bank both in his petition and in communications with the Bank, through his bankruptcy attorney, post-petition; (vi) in March of 2020, it became apparent the Bank would not agree to settle this matter for the principal balance due plus the filing fee, so he stopped making payments; (vii) the Debtor never acted in any way which would justify the Bank proceeding to litigate this matter and incur additional legal fees pursuing this case against him; (viii) the Debtor does not object to the judgment other than the attorney's fees component; (ix) given that the principal debt is $7,425.95, the Debtor objects to legal fees of $5,635.50 being assessed against him. In his last paragraph the Debtor asks that the Court take into account the foregoing information and decide what is "equitable and just in this matter."

Based on that verified statement of the Debtor, THE COURT FINDS the record is sufficient for the Court to determine the Debtor-Defendant is not opposing entry of a default judgment in favor of the Plaintiff Bank, without need of an official transcript. Therefore, the Court will grant the Bank's motion to waive the requirement for an official transcript from the § 341 meeting of creditors.

With respect to the Plaintiff's motion for a default judgment, the Court begins by examining the legal basis for the judgment. The Bank seeks to have its debt excepted from the Debtor's discharge on three statutory grounds: (i) under § 523(a)(2) for falsely representing to the Bank what equipment he owned – and was pledging to the Bank as collateral – at the May 2018 refinance, (ii) under § 523(a)(4) for selling equipment which was collateral for the prior loans from the Bank, without notifying or obtaining the consent of, the Bank at a time when he knew he was under a contractual obligation not to do so; and (iii) under § 523(a)(6) for liquidating the Bank's collateral without applying the sale proceeds of that collateral to the Bank's debt (see doc. # 19, p. 2, ¶ 6, p. 5). Section 523 provides, in relevant part:

> (a) A discharge under section 727, 1141, 1192 [1] 1228(a), 1228(b), or 1328(b) 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(a) (emphases added).

To except the debt from discharge under § 523(a)(2)(A), the Plaintiff must show, *inter alia*, the Debtor knew the representation to be false at the time of the representation and made the representation with the intent and purpose of deceiving the Plaintiff. See Garceau Auto Sales, Inc. v. Carpenter (In re Carpenter), 2014 Bankr. LEXIS 2619, *7-8, 2014 WL 2708291 (Bankr. D. Vt. Jun. 13, 2014). To except the debt from discharge under § 523(a)(2)(B), the Plaintiff must show, *inter alia*, it reasonably relied on

the Debtor's statement, and the Debtor made the statement with intent to deceive. See 11 U.S.C. § 523(a)(2)(B).

Here, in the Debtor's Response, he admits that the document he signed at the refinancing was incorrect in that it listed equipment he no longer owned. However, he also asserts it was an inadvertent mistake caused by his failure to read the document, and specifically states he did not intend to misrepresent the list of equipment he owned. Moreover, there is no evidence in the record establishing that the Bank's reliance on the loan document's equipment listing was reasonable. Accordingly, since intentional misrepresentation is an essential element of a determination under both § 523(a)(2)(A) and (B), and since reasonable reliance is an additional essential element of a § 523(a)(2)(B) determination, THE COURT FINDS the record is insufficient to grant a default judgment under § 523(a)(2).

Similarly, the record is insufficient to determine if the injury the Debtor caused to the Bank by converting its collateral to cash was willful and malicious, since the Debtor's Response indicates the Debtor believes he notified the Bank of the earlier sales of equipment. Thus, THE COURT FINDS the record is insufficient to grant a default judgment under § 523(a)(6).

The final ground upon which the Bank seeks its judgment is that the Debtor committed a defalcation while in a fiduciary capacity under § 523(a)(4) when it sold the Bank's collateral. Based upon the facts asserted in the amended complaint, it also appears the Bank asserts the Debtor committed a larceny § 523(a)(4) when it sold the Bank's collateral.

The fiduciary relationship required to invoke defalcation under § 523(a)(4) must arise from an express or technical trust, which "prevent[s] the extension of the exception to ordinary commercial debts." Rentrak Corp. v. Ladieu (In re Ladieu), 2011 Bankr. LEXIS 721, *45–46, 2011 WL 748566 (Bankr. D. Vt. Feb. 24, 2011) (quoting The Andy Warhol Foundation for Visual Arts, Inc. v. Hayes (In re Hayes), 183 F.3d 162, 169 (2d Cir. 1999)) (also citing Congress Fin'l Corp. v. Levitan (In re Levitan), 46 B.R. 380, 385 (Bankr. E.D.N.Y. 1985) (finding "an agreement which is essentially a commercial security agreement in which the creditor has used trust language and imposed obligations on the debtor to secure repayment of his loan does not create the fiduciary relationship required by § 523(a)(4)")). For purposes of § 523(a)(4), both defalcation and larceny require a showing of actual wrongful intent. See Trs. of the Iron Workers Dist. Council Pension, Health & Welfare, Annuity, Vacation, & Educ. Funds v. Mayo (In re Mayo), 2007 Bankr. LEXIS 3197, *30 (Bankr. D. Vt. Sept. 17, 2007) (citing Denton v. Hyman (In re Hyman), 502 F.3d 61, 68 (2d Cir. 2007)).

Here, the Bank has not set forth facts establishing the Debtor was acting in a fiduciary capacity. Further, similar to §§ 523(a)(2) and (6) above, the record does not establish actual wrongful intent since the Debtor's Response indicates he believes he notified the Bank of the sales. Accordingly, THE COURT

FINDS the record is insufficient to grant a default judgment under § 523(a)(4) for either defalcation while in a fiduciary capacity or larceny.

The Court next scrutinizes the amount of the judgment the Bank seeks. The Bank's prayer for relief seeks a judgment in the amount of $13,533.58, which includes four components: $7,425.95 of unpaid principal, $122.13 of accrued unpaid interest, $5,635.50 for attorney's fees, and $350.00 for the filing fee (see doc. # 29, p. 4). While the record demonstrates there is no dispute with respect to the amount of the principal or interest due the Bank (see doc. ## 29-1, 31), in order to be allowed the attorney's fees, the movant must demonstrate the fees sought are authorized by the loan documents and are reasonable. See 11 U.S.C. § 330. As this Court has observed:

> The Court's determination [on fee applications] can sometimes appear quite harsh, when, as in the case at bar, the applicant proceeded in good faith to provide services that it deemed to be in the best interest of its clients (here, the Lenders); the ultimate obligor (here, the Debtor) had no input as to the level or nature of services provided; and, the Court determines that allowance of the full fee would not be reasonable. The risk of this outcome is, however, unavoidable whenever counsel is providing professional services to one client which, contractually, are assessable against another party. The burden is always on the professional to exercise particularly careful billing judgment when formulating their strategy. Therefore, when there is a contractual fee-shifting provision involved such that the party who is contractually obligated to pay the fee is someone different from (and often an adversary of) the applicant's client, it is incumbent upon the applicant to balance his or her professional obligation to represent the client zealously against the possibility that the party who will be charged the fee will only have to pay that amount which a court deems to be reasonable.

In re Crowley, 293 B.R. 628, 633–34 (Bankr. D. Vt. 2003) (internal citations and footnote omitted); see also In re Simpson, 2018 Bankr. LEXIS 4096, *3–4, 2018 WL 6975199, *1–2 (Bankr. D. Vt. Dec. 21, 2018) (citing In re Fibermark, 349 B.R. 385 (Bankr. D. Vt. 2006)).

Here, the Bank asserts its attorney's fees are authorized by the 2012, 2014, and 2018 loan documents (see doc. # 29, pp. 2–3), which are included in the record (see doc. # 19, pp. 8–17, see also doc. # 1-6). However, the $5,635.50 in attorney's fees the Bank seeks is equal to 75.89% of the amount of the unpaid principal balance and 41.64% of the total amount sought in the motion for default judgment. On its face, this appears to be unreasonable, as would any attorney fee which exceeds 15% of the principal balance due, in the absence of the opposing party taking actions that increased the litigation expense. Moreover, it appears the attorney's fees include total charges of over $1,100 to draft the original "motion for default" (doc. # 9), which was withdrawn, and the subsequent application for entry of default (doc. # 25) and motion for entry of default judgment (doc. # 29),[2] as well as travel time billed at the

[2] This includes $185 on November 7, 2019, to draft motion for default, review contracts, and draft correspondence, $111 on November 21, 2019, to draft affidavit and correspondence and add to motion for default, $342 on January 31, 2020, to finish

attorney's full hourly rate, and other time entries which appear to be excessive in light of the amount the Debtor owes the Bank.

Finally, the Court must take into account the Debtor's Response, in which he affirms he offered to reaffirm the full amount of the principal balance due the Bank, plus the Bank's costs, prior to the commencement of this litigation, in assessing the reasonableness of the attorney's fees the Bank seeks. In light of those assertions and the foregoing considerations bearing on the attorney's fees, THE COURT FINDS the record does not establish the fees the Bank seeks are reasonable.

In accordance with the above, THE COURT FINDS an evidentiary hearing must be held in order for the Bank to present evidence (i) to establish the factual and legal basis for a determination that the Bank's debt is excepted from the Debtor's discharge on at least one of the grounds asserted in the Bank's amended complaint, (ii) to demonstrate the reasonableness of the attorney's fees it seeks, and (iii) to challenge the veracity of any of the allegations in the Debtor's Response which the Bank disputes.

Consequently, IT IS HEREBY ORDERED that:

(1) **By July 20, 2020**, the Bank shall file

(a) a supplement to the motion for default judgment that identifies any statements in the Debtor's Response which it disputes; and

(b) a stipulation between the Bank, the Debtor, and the Trustee, which sets an evidentiary hearing, via Zoom, at which the Debtor and a Bank witness will testify as to the issues identified in this Order, unless

(c) the parties file a fully executed reaffirmation agreement prior to that day.

(2) The hearing on the Bank's motion for default judgment (doc. # 29), currently set for July 17, 2020, is continued **to July 24, 2020, at 3:30 p.m.**, with the date and time subject to change or cancellation based on the documents the Bank files by July 20, 2020.

(3) The Bank's Motion to waive the local rule 5007-1(d) requirement for a transcript (doc. # 30) is GRANTED, and that Motion is fully adjudicated by this Order.

SO ORDERED.

July 10, 2020
Burlington, Vermont

Colleen A. Brown
United States Bankruptcy Judge

motion for default, $76 on the same date to revise affidavit, $171 on February 4, 2020, to draft application for default, $171 on April 22, 2020, to draft request for entry of default and other default documents and draft correspondence, $57 on May 1, 2020, to revise and finish affidavit, and $76 on June 8, 2020, to draft request for judgment of non-dischargeability (see doc. # 29-2, pp. 10-12, 14–15).