United States District Court
Southern District of Texas

Case Number: 04-3618

ATTACHMENT

Description:

☐ State Court Record ☐ State Court Record Continued

☐ Administrative Record

☐ Document continued - Part _____ of _____

☐ Exhibit to: _____
number(s) / letter(s) _____

Other: 80-90

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from the Brio/DOP Litigation as well as related expenses, at no time did the Debtor provide him with one. [FOF No. 42]. In lieu of an explanation of the amount of monies received and on what they were expended, the Debtor wrote at least two letters to Rainey in which she laboriously tried to rationalize why she was not paying Rainey his agreed upon percentage of the Brio/DOP Litigation fees. In these letters, the Debtor turns around the argument and tells Rainey that it is *he*, not she, who is attempting to modify their arrangement. [FOF Nos. 40 and 41]. Fourteen months after executing the Agreement, the Debtor's apparent non-payment, failure to produce an accounting, and lack of communication had become so flagrant that Rainey sent a letter to Williams asserting a claim to his portion of such litigation fees that Williams might still have under his control. [FOF No. 43]. One month later, Rainey filed the 1998 Lawsuit against the Debtor in state court. [FOF No. 44].

As the trier of fact, this Court finds that by using Brio/DOP Litigation fees to pay her own expenses and not pay Rainey his full share of the monies, the Debtor's actions were intended to injure Rainey. Under the "objective" *Miller* test, the Debtor's actions were substantially certain to, and did, cause Rainey harm. This Court finds it inconceivable that any objective observer would think otherwise. Thus, the Debtor's non-payment of Rainey's share of the Brio/DOP fees meets the seminal *Kawaauhau* test of a "deliberate or intentional injury." Under these circumstances, this Court finds that the Debtor's actions caused a "willful and malicious injury" to Rainey under § 523(a)(6) and, hence, his claim is not dischargeable.

F. Are any of the affirmative defenses asserted by the Debtor meritorious?

In her Original Answer to Rainey's Complaint to Determine Dischargeability of Debt, Counterclaim and Request for Jury Trial (the Answer) (Docket No. 25), the Debtor raises seven affirmative defenses.

1. Duress

In ¶ 43 of the Answer, the Debtor alleges that Rainey induced her to modify their original oral agreement and execute the Agreement by subjecting her to "extreme duress." Texas law has been clear for the past eighty years that economic duress only occurs if the following elements are present: (1) a party threatens action, or commits an act, without legal right to do so; (2) the threat or action was of such a character as to destroy the other party's free agency; (3) the threat or action overcame the other party's free will and caused her to do that which she would not otherwise do and was not legally bound to do; (4) the restraint caused by such threat was imminent; and (5) the other party had no present means of protection. *Sudan v. Sudan*, 145 S.W.3d 280, 286 (Tex. App – Houston [14th Dist.] 2004, no pet. h.); *Chapman's Children's Trust v. Porter & Hedges, L.L.P.*, 32 S.W.3d 429, 443 (Tex. App. – Houston [14th Dist.] 2000, pet. den.); *see Dale v. Simon*, 267 S.W. 467, 470 (Tex. 1924).

The foundational requirement for economic duress is a threat, or act, by the opposing party without legal right. The Debtor has neither alleged nor proven that Rainey threatened her under these conditions. Even if this Court were to accept the Debtor's testimony as entirely true—that Rainey hounded her to sign the Agreement—Rainey was well within his rights to make this request.[51] In addition, the Debtor never complained of duress until Rainey attempted to collect on the Agreement in this Court. "A party cannot sit idly by and receive benefits under a contract and then later raise claims of economic distress." *Hotel Employees & Rest. Employees Union v. Sage Hospitality Res.,*

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[51]The Debtor's testimony was that Rainey came over to her house at 11:30 p.m. at night and told her that he would leave the Davenport Law Firm unless she signed the Agreement. [Transcript D1, p. 42, lines 18 - 21]. Rainey's recollection was that the Agreement was signed at the Debtor's law firm. Regardless of when and where the Debtor signed the Agreement, the fact is that she signed the Agreement and knew full well what she was signing. That Rainey threatened to leave the firm if she refused to sign the Agreement does not make the Agreement unenforceable.

L.L.C., 299 F. Supp. 2d, 461, 466 (W.D. Pa. 2003) (citing *Seal v. Riverside Savings Bank,* 825 F. Supp. 686, (E.D. Pa. 1993)). The Debtor's silence, in effect, ratified the Agreement. *Id.* at 466. Accordingly, this Court finds that duress is not a defense to the Debtor's voluntary execution of the Agreement, which underpins the Judgment and Rainey's claim.

2. Failure of consideration

In ¶ 44 of the Answer, the Debtor alleges that Rainey did not provide consideration, presumably for their original oral agreement as later reflected in the Agreement. Rainey was the Debtor's employee, and the Agreement explicitly states that the assignment of 15% of the Brio/DOP Litigation was a condition of his employment with her firm. [FOF Nos. 8 and 20]. This assignment represented compensation for the work he performed while in her employ. Rainey was employed by the Debtor for approximately four years, from October of 1993 until September 15, 1997. This Court finds that four years of work is sufficient consideration for whatever amount of money the Debtor was willing to pay at the time she agreed to the compensation.

The Debtor apparently has concluded that she made a bad bargain with Rainey and does not want to comply with either the Agreement, the Mediation Settlement Agreement, the $150,000.00 promissory note, or the resulting Judgment. However, it is not the province of this Court to relieve her of a bad bargain, no matter how harsh. *Wooten Prop., Inc. v. Smith*, 368 S.W.2d 707, 709 (Tex. Civ. App. - El Paso 1963, writ ref'd); *River Birch, Inc. v. Robin & Assocs., Inc.,* 906 So.2d 729, 737 (La. Ct. App. 1 Cir. 2005). Her later assertions that Rainey did not deserve the compensation to which she agreed does not relieve the Debtor of her obligation to him.

3. Payment

In ¶ 45 of the Answer, the Debtor states that she has paid all or part of monies owed to

Rainey under "their agreement." The Debtor paid Rainey a total of $400,00.00 in 1997 under the Agreement. [FOF Nos. 26, 28 and 31]. Despite paying him $400,000.00, the Debtor still owed Rainey the sum of $157,620.82 under the Agreement. [FOF No. 97]. Thereafter, as a result of the mediation, the Debtor and Rainey entered into the Mediation Settlement Agreement. [FOF No. 49]; and as required by this document, the Debtor executed a promissory note for $150,000.00, bearing interest at 15% per annum, to be repaid in sixty consecutive monthly installments of $3,160.73, beginning on August 1, 2000. [FOF No. 50]. Thus, the $157,620.80 obligation owed by the Debtor to Rainey under the Agreement was converted into a promissory note obligation of $150,000.00. Thereafter, the Debtor made thirteen consecutive monthly payments of $3,160.73, but then failed to make further payments. [FOF No. 55]. The Debtor's thirteen payments constitute payment, and therefore the Debtor's affirmative defense is meritorious to the extent—and only to this extent—that those thirteen payments were made pursuant to the note. Beyond that, this particular affirmative defense fails.

4. Accord and satisfaction

In ¶ 46 of the Answer, the Debtor raises a defense of accord and satisfaction. The Debtor has failed to show that Rainey has entered into an agreement with her to accept an amount less than that required by the Mediation Settlement Agreement, the $150,000.00 note, the Judgment or his proof of claim. Consequently, accord and satisfaction is not a meritorious defense.

5. Contributory negligence, failure to mitigate damage, and sole proximate cause

In ¶ 47 of the Answer, the Debtor states that after Rainey left her employ, she asked him to pursue work on the Davenport/Brio Litigation, and he refused to do so. The Debtor alleges that Rainey's refusal to work on such litigation operated as contributory negligence resulting in the

Debtor's withdrawal and failure to receive additional fees from the Davenport/Brio Litigation. The Debtor further alleges that Rainey's refusal to resume work on the Davenport/Brio Litigation was a failure to mitigate damages and/or was the sole proximate cause of $150,000.00, plus interest and attorney's fees, of damages alleged by Rainey.

While it may be correct that the Debtor might not have withdrawn from the Davenport/Brio Litigation and might have received additional fees therefrom had Rainey resumed work on such litigation, it is of no significance to this proceeding. Rainey had no duty to resume work on the Davenport/Brio Litigation. "[A] discharged employee need not accept an offer of re-employment where to do so would constitute a disadvantageous renegotiation of his rights and remedies thereunder." *Piutau v. Fed. Express Corp.*, 2003 WL 1936125, at *2 (N.D. Cal. 2003) (quoting *Schwartz v. Solo Cup Co.*, 112 Ill. App.3d 632 (Ill. App. Ct. 1983)). The Debtor's obligation under the Agreement was to pay Rainey 15% of net fees received from those suits in the Brio/DOP Litigation that generated payments to the Davenport Law Firm. This obligation was reduced to a sum certain by the Mediation Agreement, the $150,000.00 note, and again by the Judgment. Rainey's claim reflects the award from the Judgment. Consequently, these affirmative defenses are not viable.

6. Offset

In ¶ 48 of the Answer, the Debtor proposes that if it is determined that Rainey, not the Debtor, referred Brio/DOP cases to the firm of Reich & Binstock, then any recovery by Rainey in this proceeding should be offset by any payment Rainey receives from Reich & Binstock from such cases. The representation of any litigant by Reich & Binstock has not been otherwise addressed by the Debtor and is irrelevant to this proceeding.

7. Lack of ripeness

In ¶ 49 of the Answer, the Debtor states that Rainey seeks to recover under the original oral agreement and/or the Agreement. The Debtor argues that the Brio/DOP Litigation has not yet been concluded and that total gross recovery from such litigation, related direct expenses and, hence, net recovery is unknown. Under this argument, according to the Debtor, the amount due Rainey is undetermined at this time.

The Debtor is incorrect: Rainey does not directly seek recovery based on their original oral agreement, the Agreement, the Mediation Settlement Agreement or the $150,000.00 note. Instead, Rainey's claim is based on the Judgment, which is res judicata;[52] and the issue at bar is the nondischargeability of this claim. The dischargeability of Rainey's claim is, of course, perfectly ripe for consideration at this time and by this Court.

In the alternative, were this Court to consider the Debtor's argument on its face, this Court would nonetheless find it specious. In the Answer, the Debtor asserts that according to the original agreement, "all offsets for expenses are made before a final accounting is done and monies are due to be paid to Plaintiff [Rainey]."[53] The Debtor's prior actions belie this assertion. The Debtor had used Brio/DOP Litigation fees for both personal expenses and general expenses of her law firm; she has paid Rainey some portion of the fees due to him; and yet, she has provided no complete and accurate accounting of revenues and expenses related to this litigation. It is difficult for this Court to find that the Debtor has ever actually believed her own assertion, much less that the Debtor intended to act on it. Even if the Debtor had such a belief, she is equitably estopped from asserting

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[52] See discussion at ¶ **C**, above.

[53] The Answer, ¶ 49.

this affirmative defense. *Maguire Oil Co.*, 69 S.W. 3rd at 367; *Corman*, 796 S.W. 2d at 792. Consequently, this defense to Rainey's claim is without merit.

VI. CONCLUSION

Sir Walter Scott, the Scottish author and novelist, once wrote: "Oh what a tangled web we weave, when first we practise to deceive!" [54] His observation aptly describes the Debtor in this adversary proceeding. She persuaded Rainey to come work at her firm by orally promising to pay him a percentage of net fees generated from certain litigation. Yet, she did not pay him a dime when O'Quinn paid her $162,514.03 in the wake of the settlement proceeds paid in the O'Quinn/Brio Litigation. [FOF No. 15]. Nor did she disclose to Rainey that O'Quinn, before remitting any monies to the Debtor's firm, deducted several hundred thousand dollars for obligations that the Debtor personally owed to O'Quinn on a loan that O'Quinn had extended to the Debtor for the purchase of, among other things, a home on Sunset Blvd. in Houston. [FOF No. 15]. Then the Debtor, in an effort to keep Rainey at her firm, executed the Agreement in November of 1996, promising in writing to pay Rainey 15% of net fees received by the Davenport Law Firm. Yet, when the Williams/Brio Litigation was settled, Williams paid the Davenport Law Firm $2,745,447.39 in September of 1997 rather than the $3,645,872.00 that should have been paid based upon the disbursement sheet that Williams sent to the Debtor. [FOF Nos. 25, 29 and 30].[55] The Debtor never explained to Rainey why Williams failed to pay $3,645,812.00 as opposed to $2,745,447.39, nor did she ever provide an accounting to Rainey regarding the $932,177.10 of expenses deducted for

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[54]Sir Walter Scott, *Marmion, Canto vi. Stanza 17.* The Court notes that the word "practise" is not misspelled in this quotation.

[55]The disbursement sheet shows that the gross fee allocation for the Davenport Law Firm was $4,577,929.04 and that the expense allocation for the Debtor's firm was $932,117.10. Subtracting $932,117.10 from $4,577,929.04 results in a net fee figure of $3,645,811.94.

the Williams/Brio Litigation. Indeed, the Debtor never disclosed to Rainey that Williams paid her firm another $469,619.28 on July 30, 1998, 15% of which Rainey was entitled.[56] Is it any wonder that Rainey sued the Debtor in the 1998 Lawsuit, and then sued her again in the 2001 Lawsuit when she defaulted under the promissory note and Mediation Settlement Agreement?

But the Debtor's pattern of deception did not stop with her conduct toward Rainey. She continued her attempts to deceive through her litigation strategy in this Court. She attempted to convince this Court that her position from the very outset has been that Rainey was not entitled to receive a penny until (a) every suit comprising the Brio/DOP Litigation was over; (b) all expenses relating to all of these suits were deducted from all fees paid; and (c) a surplus existed after all of these expenses were deducted. The Debtor took this position despite:

—Never telling Rainey in 1996 that this was her interpretation of their oral arrangement.

—Never telling Rainey in 1997 that this was her interpretation of the Agreement.

—Spending the fees herself as soon as they were remitted to the Davenport Law Firm from settlements in any of the suits, with the expenditures being on her personal items as well as general overhead at her firm.

—Making three payments to Rainey in September of 1997 totaling $400,000.00 after Williams paid a substantial portion of the Davenport Law Firm's share of the fees.

—Telling Rainey in 1998 that "you have made a sizeable and by most people's standards 'great' profit on top of a healthy salary. On the other hand, I have and will continue to absorb a stagging (sp) loss. In view of these facts my feeling again is that we are more than right with each other." (emphasis added).

—Never objecting to Rainey's proof of claim.

The Debtor's actions and words in 1996, and thereafter, reveal why the Debtor failed to pay

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[56]Williams therefore paid a total of $3,215,066.00 (i.e., $2,745,447.00 plus $469,619.00) to the Debtor. Given that the disbursement sheet shows that the Debtor's firm had gross fees in the amount of $4,577,929.04, and expenses in the amount of $932,117.10, the net fees that Williams should have paid to the Debtor's firm was $3,645,811.94, and the Debtor has failed to account for the difference of $430,745.94.

Rainey all that he was entitled. She was dissatisfied with the results of the Brio/DOP Litigation and she wanted to spend the fees that were paid on personal expenses and her firm's overheard rather than fulfill her obligation to Rainey. Indeed, the Debtor's actions are understandable—however inappropriate—when one focuses on the fact that during this period of time, the Debtor had personal expenses of between $27,000.00 - $30,000.00 per month, including a monthly house payment of approximately $5,000.00. [FOF No. 39]. Unfortunately for the Debtor, her justification as to why she did nothing wrong—namely, that Rainey is not entitled to a dime until all the Brio/DOP Litigation is over—cannot withstand scrutiny.

Nor was the Debtor's attempt to create a new interpretation of the Agreement her only unsavory tactic at trial. Although she never once criticized Rainey for his work during his entire four year tenure at her firm, and although she made concerted efforts to convince him to stay at her firm—not the least of which was her execution of the Agreement in November of 1996—and although she made several attempts to persuade him to continue working on the Davenport/Brio Litigation after his departure from her firm, she nevertheless testified repeatedly at trial what a miserable attorney Rainey was when he worked at her firm.[57] This Court believes that the Debtor took this approach at trial in an effort to prejudice this Court towards Rainey so that it would conclude either that Rainey had no claim or, even if he did, the claim was dischargeable. The Debtor's tactics will not work. The Debtor's affirmative defense of contributory negligence on Rainey's part—namely, that his failure to continue to work on the Davenport/Brio Litigation led to no fees being received from those lawsuits—reflects that, in fact, the Debtor believed that Rainey was a competent attorney, at least when she filed her answer and affirmative defenses to the

[57]Attached as **Appendix C** are some of the comments that the Debtor made at trial about Rainey's incompetence.

complaint in this adversary proceeding. The Debtor speaks out of both sides of her mouth. Accordingly, this Court sees only one side of the Debtor: one of deceit.

At trial, the Debtor testified that "You know, I'm probably one of the most ethical lawyers you'll ever meet." [Transcript D1, p. 241, lines 3 - 5]. Based upon the Debtor's testimony and the exhibits introduced at trial, this Court disagrees and finds that the Debtor's unethical conduct has made Rainey's claim against her to be nondischargeable.

For the reasons set forth above, this Court holds that:

(1) Rainey's claim against the Debtor totals $171,807.35, plus accrued interest at the rate of 18% per annum as set forth in the Judgment, which began accruing on June 2, 2003, the date the Debtor filed her Chapter 11 petition, and will continue to accrue until the Judgment is paid in full.[58]

(2) This claim is nondischargeable under 11 U.S.C. §523(a)(4) because the Debtor embezzled the funds that she should have paid to Rainey;

(3) In the alternative, even if this Court is incorrect that the Debtor embezzled the funds, the Debtor's spending the funds constitutes a willful and malicious injury by the Debtor to Rainey under 11 U.S.C. § 523(a)(6), thereby making Rainey's claim nondischargeable; and

(4) Each party is to bear his or her own fees and costs for the prosecution and defense of

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[58]Post-petition interest on a debt not discharged in bankruptcy under Bankruptcy Code § 523(a) is both allowable and appropriate and will survive the bankruptcy and remain a personal liability of the Debtor. *Bruning v. United States*, 376 U.S. 358 (1964) (post-petition interest permitted on a nondischargeable tax debt); *In re Hanna*, 872 F.2d 829 (8th Cir. 1989); *In re Hunter*, 771 F.2d 1126, 1132 (8th Cir. 1985) ("Ancillary obligations such as attorneys' fees and interest may attach to the primary debt; consequently, their status depends on that of the primary debt."); *In re Oxford Inv. Co.*, 246 F. Supp .651 (S.D. Cal. 1965); *In re Florida v. Ticor*, 164 B.R. 636 (B.A.P. 9th Cir. 1994); *In re Levinson*, 58 B.R. 831 (Bankr. N.D. Ill. 1986) (claimant is entitled to post-petition interest on debt found to be nondischargeable under § 523) *aff'd Klingman v. Levinson*, 66 B.R. 548 (N.D. Ill. 1986), *Klingman v. Levinson*, 831 F.2d 1292 (7th Cir. 1987) and *Klingman v. Levinson*, 877 F.2d 1357 (7th Cir 1989).

this adversary proceeding. This Court takes no position as to the propriety of Rainey seeking recovery of the fees and expenses that he has incurred in the event the Debtor appeals this Court's judgment.

A separate Judgment consistent with this Memorandum Opinion will be issued and docketed simultaneously with the entry of this Judgment on the docket.

Signed this 7th day of February, 2006.

Jeff Bohm
United States Bankruptcy Judge

cc: (1) Valorie Davenport
Davenport Legal Group
440 Louisiana, Suite 1210
Houston, Texas 77002

(2) Michael M. Essmyer
Essmyer & Tritico
4300 Scotland
Houston, Texas 77007