

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re: Case No. 05-38890-DDO

Meredith Ann Forgosh a/k/a/ Meredith Ann Chapter 7
Edelman Forgosh,

Debtor.

The Society of Lloyd's, ADV 06-3056

Plaintiff,

-v-

Meredith Ann Forgosh a/k/a Meredith Ann
Edelman Forgosh,

Defendant.

**NOTICE OF MOTION BY DEFENDANT MEREDITH ANN FORGOSH FOR LEAVE
TO APPEAL ORDER DATED SEPTEMBER 14, 2006**

TO: The Society of Lloyd's by and through its attorney, Eric A. Ruzicka, Esq., Dorsey & Whitney, LLP, Suite 1500, 50 South 6th Street, Minneapolis, MN 55402-1498.

1. Debtor, Meredith Ann Forgosh a/k/a Meredith Ann Edelman Forgosh, moves the court for leave to appeal the Order dated September 14, 2006.
2. Any response to this motion must be filed and delivered not later than 10 days after service of this Motion.
3. This court has jurisdiction over this motion pursuant to 28 U.S.C. §§158(a), Fed.R.Bankr.P.8001(b) and 8003 and Local Rule 8003-1.
4. Relevant facts:

This Chapter 7 bankruptcy case arose because of the judgment against Defendant obtained by Plaintiff in England and subsequently entered in the District Court of Ramsey County Minnesota.

In 1990, Defendant Meredith Ann Forgosh, then Meredith Ann Edelman, became a member of The Society of Lloyds, commonly referred to as a "Name," and remained a member through 1992. Lloyds has asserted that during the late 1980s and early 1990s it suffered underwriting losses of over \$12 billion, primarily because of liability for toxic torts. Lloyds pursued the Names to recover those underwriting losses. Defendant's obligations to Plaintiff are basically the same as the liability of a third-party guarantor who has liability even though she was not involved in the underlying transactions or occurrences that caused the debt. Plaintiff commenced a lawsuit against Defendant in England in 1998 and obtained a judgment about a month after commencing the litigation. The judgment amount today is approximately \$412,000. Six years later, on October 14, 2004, Plaintiff entered its judgment in the District Court of Ramsey County, Minnesota. Defendant filed for bankruptcy on October 13, 2005.

Plaintiff commenced an adversary proceeding seeking an order excepting its entire judgment amount from any discharge received by Defendant in her bankruptcy proceedings, based upon 11 U.S.C. §§ 523(a)(2), (a)(4) and (a)(6). Defendant moved to dismiss Plaintiff's Complaint because the facts as alleged by Plaintiff do not support its claims under those statutes. Defendant's Motion to Dismiss was based on the fact that none of the Plaintiff's allegations concerned conduct from which the debt arose. Shortly after Defendant moved to dismiss Plaintiff's Complaint, Plaintiff moved to amend its Complaint to add additional factual allegations. Plaintiff did not move to amend or add to any of its legal claims. Defendant opposed Plaintiff's Motion to Amend because it was made after the expiration of the statute of limitations for adversary proceedings in bankruptcy court and because the amendments did not relate back to the original Complaint. Defendant's Motion to Dismiss was heard by the Bankruptcy Court, Judge Dennis O'Brien, on September 13, 2006. Later in that same hearing,

Plaintiff's Motion for Leave to Amend was heard. On September 13, 2006, Judge O'Brien entered an Order granting Plaintiff's Motion to Amend, and on September 14, 2006,, Judge O'Brien entered an Order denying Defendant's Motion to Dismiss. The Orders were issued without any memoranda explaining the basis of the Court's decision. Defendant now seeks leave to appeal both of the Orders. Defendant has filed a separate Notice of Appeal for each Order, and has brought separate Motions for Leave to Appeal for each Order. This Motion concerns the Order of September 14, 2006, which denies Defendant's Motion to Dismiss.

5. The question presented by this appeal is:

Does Plaintiff's Complaint state a claim upon which relief can be granted?

ANSWER: No

6. The appeal should be granted because all of the factors considered by the court in exercising its authority to hear appeals weigh heavily in favor of granting Defendant's Motion for Leave to Appeal. *See, In re BTR Partnership*, 292 B.R. 188, 195 (U.S.D.C., D. Nebr. 2003).

(a) No factual determinations need to be made, and the questions involved are questions of law. For purposes of this Motion, the facts as alleged by Plaintiff in its Complaint are accepted as true.

(b) The question is controlling.

(c) There is a substantial ground for difference of opinion respecting the correctness of the bankruptcy court's decision. Plaintiff has asserted causes of action under three separate sections of 11 U.S.C. § 523: (a)(2), (a)(4) and (a)(6). Case law is clear as what must be alleged to state a claim under those sections and it is clear from Plaintiff's Complaint that it has failed to allege facts sufficient state a cause of action under each of those sections. The Order does not contain any explanation of the basis for denying Defendant's Motion to Dismiss all of Plaintiff's claims,

and the Court appears to have denied Defendant's Motion without separately considering the requirements of each section.

(i) 11 U.S.C. §523(a)(2) provides:

“(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--

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 (*emphasis added*).”

The language of the statute is clear that the debt itself must have been obtained by false statements or fraud in order to qualify for the exception to discharge. The case law interpreting this statute also makes it clear that the false statement for fraud must have occurred when the debt came into existence. “The language ‘obtained by’ clearly indicates that the fraudulent conduct occurred at the inception of the debt, i.e., the debtor committed a fraudulent act to induce the creditor to part with its money, property or services. *In re Hrabik*, 330 B.R. 765 (N.D. 2005). Plaintiff alleges fraud and false statements that occurred years after the inception of the debt. There is no allegation of fraud at the time Defendant became a Name. There is no allegation of a false financial statement or other written document, other than the 2005 Disclosure Statement. The debt arose in the early 1990s, when Plaintiff suffered its underwriting losses and sought reimbursement from Defendant. The acts complained of by Plaintiff occurred

in no earlier than 1996 and as late as 2006 and thus cannot serve as a basis for exception to discharge under 11 U.S.C. §523(a)(2).

(ii) 11 U.S.C. §523(a)(4) provides:

“(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—

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;”

“It has long been the law that the ‘fiduciary’ status in question under 11 U.S.C. §523(a)(4) must arise under an express, pre-existing trust.” *In re Bren, supra* at 696.

Clearly, there was no express, pre-existing trust in this case and Plaintiff has not alleged that there was. Thus, Defendant is not a fiduciary under the statute.

Plaintiff has not alleged facts that support the allegation that Defendant committed any act that could be considered embezzlement or larceny under the statute. “Embezzlement for purposes of 11 U.S.C. §523(a)(4) is defined as the ‘fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come.’ *In re Bren, supra* at 698, citing *Belfry v. Cardozo (In re Belfry)*, 862 F.2d 661, 662 (8th Cir. 1988). A discussion of the meaning of both embezzlement and larceny under 11 U.S.C. §523(a)(4) is set forth in *In re Routson*, 160 B.R. 595, 608-610 (Minn. 1993), citing *In re Fontenot*, 89 B.R. 575 (Bkrtcy. W.D.La.1988):

“Embezzlement is defined by Collier at paragraph 523.14 as: the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come. It differs from larceny in the fact that the original taking of the property was lawful, or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking.”

Plaintiff does not allege that Defendant was ever in possession of any of Plaintiff's property, either with or without the consent of the Plaintiff, and thus Defendant could not have committed embezzlement or larceny. Furthermore, all of the acts complained of by Plaintiff occurred years after the debt arose so they were not a cause of the debt.

(iii) 11 U.S.C. §523(a)(6) provides:

“(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;”

The Eighth Circuit has explained that under 11 U.S.C. §523(a)(6), the debt must come about because of Defendant's willful and malicious conduct. However, it is undisputed that the debt owed by Defendant to Plaintiff did not come about because of Defendant's conduct, willful, malicious, or otherwise. As alleged by Plaintiff, its underwriting losses were caused by toxic tort liability not caused by Defendant. Defendant has never caused any harm to Plaintiff's property: she was never in possession of nor did she ever have access to any of Plaintiff's property. Plaintiff's allegations concern only what Defendant allegedly did with her own property. Defendant is simply unable to pay the amount of the judgment against her. As was stated before, the debt at issue in this case arose well prior to any of the acts complained of by Plaintiff in its Complaint, so the statute does not create an exception to the discharge of this debt. *See, In re D'Amato*, ---B.R.---, 2006 W.L. 852103 (8th Cir.BAP (Mo.)).

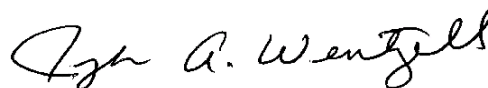
(d) An immediate appeal will materially advance the ultimate termination of the litigation. If it is determined that Plaintiff's Motion to Amend was untimely and that its Complaint fails to

state a claim upon which relief can be granted, then the Complaint should be dismissed and the case will be resolved.

(8) A copy of the September 14, 2006 Order is attached.

Dated: September 21, 2006

WENTZELL LAW OFFICE, P.L.L.C.

A handwritten signature in black ink that reads "Joseph A. Wentzell". The signature is written in a cursive style and is positioned to the left of a vertical line that extends downwards.

By: _____
Joseph A. Wentzell 170616
2855 Anthony Lane South, Suite 200
St. Anthony, Minnesota 55418
Voice 612.436.3292 Fax 612.788.9879
E-mail: Jwentzell@fosterbrever.com

ATTORNEY FOR DEFENDANT
MEREDITH A. FORGOSH

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re: Case No. 05-38890-DDO

Meredith Ann Forgosh a/k/a/ Meredith Ann Chapter 7
Edelman Forgosh,

Debtor. ADV 06-3056

The Society of Lloyd's,

Plaintiff,

-v-

Meredith Ann Forgosh a/k/a Meredith Ann
Edelman Forgosh,

Defendant.

ORDER

The Motion of Debtor to Dismiss Complaint by The Society of Lloyd's and request for an Order came on before the undersigned on the 13th day of September 2006. Joseph A. Wentzell appeared on behalf of Debtor. Other appearances were as noted on the record. The Court, having considered the evidence presented and having heard the arguments of counsel, and being fully advised of premises, and it appearing that due and proper notice of the motion has been given:

ORDERED

Debtor's Motion is DENIED.

Dated: September 14, 2006

BY THE COURT

/e/ Dennis D. O'Brien

Dennis D. O'Brien
UNITED STATES BANKRUPTCY JUDGE

NOTICE OF ELECTRONIC ENTRY AND FILING ORDER OR JUDGMENT Filed and Docket Entry made on 09/14/06 Lori A. Vosejka, By DLR
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Bankruptcy Noticing Center
2525 Network Place, 3rd Floor
Herndon, Virginia 20171-3514

CERTIFICATE OF SERVICE

District/off: 0864-3
Case: 06-03056

User: doretta
Form ID: pdf222

Page 1 of 1
Total Served: 3

Date Rcvd: Sep 14, 2006

The following entities were served by first class mail on Sep 16, 2006.
ust +US Trustee, 1015 US Courthouse, 300 S 4th St, Minneapolis, MN 55415-3070
dft +MEREDITH ANN FORGOSH, 16 SKI LANE, NORTH OAKS, MN 55127-6452
pla THE SOCIETY OF LLOYDS, C/O DORSEY & WHITNEY LLP, 50 S 6TH STE STE 1500,
MINNEAPOLIS, MN 55402-1498

The following entities were served by electronic transmission.
NONE.

TOTAL: 0

***** BYPASSED RECIPIENTS (undeliverable, * duplicate) *****

ust usta

TOTALS: 1, * 0

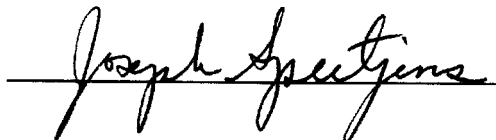
Addresses marked '+' were corrected by inserting the ZIP or replacing an incorrect ZIP.
USPS regulations require that automation-compatible mail display the correct ZIP.

I, Joseph Speetjens, declare under the penalty of perjury that I have served the attached document on the above listed entities in the manner shown, and prepared the Certificate of Service and that it is true and correct to the best of my information and belief.

First Meeting of Creditor Notices only (Official Form 9): Pursuant to Fed. R. Bank. P. 2002(a)(1), a notice containing the complete Social Security Number (SSN) of the debtor(s) was furnished to all parties listed. This official court copy contains the redacted SSN as required by the bankruptcy rules and the Judiciary's privacy policies.

Date: Sep 16, 2006

Signature:



UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re: Case No. 05-38890-DDO

Meredith Ann Forgosh a/k/a/ Meredith Ann Chapter 7
Edelman Forgosh,

Debtor.

The Society of Lloyd's, ADV 06-3056

Plaintiff,

-v-

Meredith Ann Forgosh a/k/a Meredith Ann
Edelman Forgosh,

Defendant.

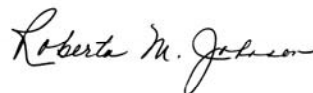
UNSWORN DECLARATION FOR PROOF OF SERVICE

I, Roberta M. Johnson, declare under penalty of perjury that on September 22, 2006, I mailed copies of the foregoing, Notice of Appeal, Appellant's Statement of Election Under 28 U.S.C. 158(c)(1)(A), Notice of Motion by Defendant Meredith Ann Forgosh for Leave to Appeal Order Dated September 14, 2006, and Unsworn Declaration for Proof of Service by first class mail postage prepaid to each entity named below at the address stated below for each entity:

Eric A. Ruzicka, Esq.
Todd Trumpold, Esq.
Dorsey & Whitney, LLP
Suite 1500
50 South 6th Street
Minneapolis, MN 55402-1498

Executed on: September 22, 2006

Signed /e/ Roberta M. Johnson



UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re: Case No. 05-38890-DDO

Meredith Ann Forgosh a/k/a/ Meredith Ann Chapter 7
Edelman Forgosh,

Debtor. ADV 06-3056

The Society of Lloyd's,

Plaintiff, ORDER

-v-

Meredith Ann Forgosh a/k/a Meredith Ann
Edelman Forgosh,

Defendant.

This Court has considered Defendant Meredith Ann Forgosh's Motion For Leave to Appeal Order Dated September 14, 2006.

IT IS HEREBY ORDERED that Defendant's Motion for Leave to Appeal is granted.

Dated: _____, 2006 BY THE COURT

Dennis D. O'Brien
United States Bankruptcy Judge