

FILED & ENTERED

MAY 27 2015

CLERK U.S. BANKRUPTCY COURT
Central District of California
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ORDER NOT FOR PUBLICATION
UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re:

DONG YUN PARK and
JUNG AE PARK,

Debtors.

Case No. 2:13-bk-25652-RK

Chapter 7

Adv. No. 2:13-ap-01897-RK

ANGEL IMPORTS, LLC,

Plaintiff,

vs.

DONG YUN PARK and
JUNG AE PARK,

Defendants.

**ORDER APPROVING IN PART AND
DISAPPROVING IN PART STIPULATION
FOR JUDGMENT**

On January 29, 2015, the parties in this adversary proceeding filed a Stipulation for Entry of Judgment for Nondischargeability of Debt between Plaintiff Angel Imports, LLC ("Angel Imports" or "Plaintiff") and Defendants Dong Yun Park and Jung Ae Park (the "Parks" or "Defendants") (the "Stipulation"). ECF 49. The Stipulation and lodged judgment would except from discharge a debt of \$1,514,732.06 owed by the Parks to Angel Imports, pursuant to 11 U.S.C. §§ 523(a)(2)(A), (a)(4), and (a)(6). Based on the record before the court at the time that the Stipulation was filed, the court was not

1 satisfied that Plaintiff had established a prima facie case for liability of Defendants under
2 those provisions of the Bankruptcy Code in order for the court to approve the Stipulation,
3 and therefore, issued an Order to Show Cause Why Plaintiff is Entitled to the Full Amount
4 Requested on February 3, 2015. ECF 51. In response to the Order to Show Cause,
5 Plaintiff submitted a supplemental brief responding to that order to show cause on
6 February 10, 2015. ECF 54. However, the court determined that this supplemental brief
7 did not fully address its concerns regarding the adequacy of Plaintiff's evidentiary
8 showing in support of the Stipulation, and at the hearing on the order to show cause on
9 February 17, 2015, the court ordered Plaintiff to submit further briefing. In response to
10 the court's directive, Plaintiff submitted its Second Supplemental Brief on March 17,
11 2015, which set forth Plaintiff's rationale for why it is entitled to prejudgment interest of 10
12 percent for some of its claims based on California Probate Code §§16440(a)(1) and
13 16441(a)(1). ECF 60. The court entered an Order for Further Briefing and Continuance
14 of Hearing on Proposed Judgment on March 30, 2015, asking Plaintiff to explain its
15 argument for liability and prejudgment interest. ECF 64. In response to this order,
16 Plaintiff filed its Supplemental Third Brief on May 12, 2015. ECF 67.

17 Based on this record, including the supplemental filings by Plaintiff as described
18 herein, as well as Defendants' consent to judgment as set forth in the Stipulation and the
19 lack of objection to entry of judgment or any of Plaintiff's supplemental filings, the court is
20 now satisfied that Plaintiff has made an adequate evidentiary and legal showing that it
21 has established a prima facie case to support a finding of nondischargeability of debt
22 owed by Defendants to Plaintiff under 11 U.S.C. §§ 523(a)(2)(A), (a)(4), and (a)(6),
23 though only under the embezzlement test of § 523(a)(4), and not under the other test of
24 this subsection for fraud or defalcation while acting in a fiduciary capacity.

25 **Plaintiff Has Not Made a Prima Facie Case Under 11 U.S.C. § 523(a)(4) for Fraud or**
26 **Defalcation in a Fiduciary Capacity**

27 To establish liability under the tests of fraud or defalcation while acting in a
28 fiduciary capacity of 11 U.S.C. § 523(a)(4), the fiduciary relationship must be one arising

1 from an express or technical trust. 4 March, Ahart, and Shapiro, *California Practice*
2 *Guide: Bankruptcy*, ¶22:609 (2014), *citing inter alia*, *In re Cantrell*, 329 F.3d 1119, 1125
3 (9th Cir. 2003) and *In re Honkanen*, 446 B.R. 373, 378 (9th Cir. BAP 2011). According to
4 Plaintiff, Defendants agreed to guarantee the obligations of Hip & Hip, Inc., a California
5 corporation and a managing member of Plaintiff, under the 2006 Agreements, and Hip &
6 Hip, Inc., had agreed under these agreements to sell Plaintiff's products and collect the
7 sales proceeds and hold them in trust for Plaintiff. *Proposed Findings of Fact and*
8 *Conclusions of Law attached to Plaintiff's Third Supplemental Brief*, ECF 68; *Joint Pretrial*
9 *Order*, ECF 35 at 2, ¶ 8. "Under California law an express trust requires five elements:
10 (1) present intent to create a trust; (2) trustee; (3) trust property; (4) a proper legal
11 purpose; and (5) a beneficiary. California Probate Code §§ 15201-15205; *Keitel v.*
12 *Heubel*, 103 Cal. App. 4th 324, 337 (2002)(citation omitted). A technical trust under
13 California law is described as "those arising from the relation of attorney, executor, or
14 guardian, and not to debts due by a bankrupt in the character of an agent, factor,
15 commission merchant, and the like." *Royal Indemnity Co. v. Sherman*, 124 Cal. App. 2d
16 512, 515 (1954); *Young v. Clark*, 7 Cal. App. 194, 196 (1907). A technical trust is not one
17 implied by contract. *Young v. Clark*, 7 Cal. App. at 197; *In re Honkanen*, 446 B.R. 373,
18 378-379 and nn. 6 and 7. Here, the record before the court indicates that the relationship
19 between Plaintiff and Defendants was contractual, i.e., Defendants agreed to guarantee
20 the contractual obligations of Hip & Hip, Inc., which agreed to sell Plaintiff's products,
21 collect and hold in trust the sales proceeds, and if any party is to be deemed a trustee, it
22 would be Hip & Hip, Inc., a separate legal entity from Defendants. Thus, the evidence in
23 the record is insufficient to show that there was an intent by the parties to create a trust,
24 to designate Defendants as trustees, or to identify trust property to be held by Defendants
25 as trustees, which means this was not an express or technical trust as to Defendants,
26 and taking it out of the scope of liability under 11 U.S.C. § 523(a)(4) for fraud or
27 defalcation while acting in a fiduciary capacity. Therefore, the court determines that
28 Plaintiff has not submitted sufficient evidence to show that Defendants were in a fiduciary

1 relationship with it arising from an express or technical trust, and thus, it has not made a
2 prima facie case for relief under the fraud or defalcation tests of 11 U.S.C. § 523(a)(4).

3 **Plaintiff Is Entitled to a Partial Award of Prejudgment Interest**

4 Plaintiff contends that it is entitled to prejudgment interest based on the application
5 of state law in California Probate Code §16440(a)(1), describing that statute as providing
6 that “Under California law, a trustee who commits a breach of trust is liable for the ‘loss or
7 depreciation in value of the trust estate resulting from the breach of trust.’” *See Plaintiff’s*
8 *Second Supplement Brief*, ECF 60 at 9:1-7 (page:line(s)). As discussed above, Plaintiff
9 has not shown that a trust was created by Defendants, or that Defendants were acting as
10 trustees. California Probate Code §82(a) defines a trust to include: “(1) An express trust,
11 private or charitable, with additions thereto, wherever and however created. (2) A trust
12 created or determined by a judgment or decree under which the trust is to be
13 administered in the manner of an express trust.” Because no trust was created here as
14 between Plaintiff and Defendants, California Probate Code §16440 does not apply, and
15 Plaintiff is not entitled to prejudgment interest for the \$479,614.50 portion of the debt
16 owed by Defendants based on the claim under 11 U.S.C. § 523(a)(4) allegedly
17 attributable to Defendants’ breach of trust.

18 Plaintiff argues that it is entitled to prejudgment interest on the \$782,256 portion of
19 the debt owed by Defendants to it based on the claim under 11 U.S.C. § 523(a)(2)(A)
20 based on the federal judgment rate of interest under 28 U.S.C. § 1961(a). *See Plaintiff’s*
21 *Second Supplemental Brief*, ECF 60 at 10:23-12:2, *citing inter alia, Payne v. Brace (In re*
22 *Brace)*, 131 B.R. 612 (Bankr. W.D. Mich. 1991). Parties such as Plaintiff may be entitled
23 to prejudgment interest as “an element of complete compensation.” 3 Jones, Rosen,
24 Wegner and Jones, *Rutter Group Practice Guide: Federal Civil Trials and Evidence*, ¶
25 19:511 at 19-114.2 (2014), *quoting, West Virginia v. United States*, 479 U.S. 305, 310
26 (1987). “In the absence of an applicable federal statute, prejudgment interest is
27 discretionary with the court.” *Id.*, ¶ 19:512. As explained by one commentary,
28 “[p]rejudgment interest is awarded to compensate a party for the lost opportunity to use

his or her money between the time a claim accrues and the time of judgment.” *Id.*, ¶
19:511.1 at 19-114.2, *citing inter alia*, *West Virginia v. United States*, 479 U.S. at 308-309
and *Bernard v. Theobald*, 721 F.3d 1069, 1078 (9th Cir. 2013). The court determines
that prejudgment interest should be awarded at the federal judgment rate as computed
by Plaintiff in the amount of \$13,378.51 (debt of \$782,256.00 x (0.34% ÷ 365 days per
year) x 1,836 days). *See Plaintiff’s Second Supplemental Brief*, ECF 60 at 10:23-12:2.
The court so exercises its discretion to award prejudgment interest in the absence of an
applicable federal statute in that the parties agreed in the Stipulation that Plaintiff should
be awarded prejudgment interest, and such an award furthers the purpose of affording
complete compensation to Plaintiff. *West Virginia v. United States*, 479 U.S. at 310.

Based on inclusion of proper prejudgment interest, the court determines that
 $\$479,614.50 + \$782,256.00 + \$13,378.51 = \$1,275,249.01$ is the proper amount of the
judgment that Plaintiff is entitled to.

Accordingly, it is HEREBY ORDERED as follows:

1. The stipulation for judgment entered into by Plaintiff and Defendants is
approved in part and disapproved in part.
2. The court determines that a total debt of \$1,275,249.01 owed by Defendants to
Plaintiff should be excepted from discharge pursuant to 11 U.S.C. §§
523(a)(2)(A), 523(a)(4) (embezzlement) and 523(a)(6), including prejudgment
interest.
3. A judgment consistent with the analysis set forth in this order will be separately
entered.

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1 4. In light of the court's rulings as set forth in this order, the continued hearing on
2 the matter set for June 2, 2015 at 3:00 p.m. is hereby vacated.

3 IT IS SO ORDERED.

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23 Date: May 27, 2015



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25 Robert Kwan
26 United States Bankruptcy Judge
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