UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re: MARTIN PEMSTEIN and DIANA PEMSTEIN, Debtors. HAROLD PEMSTEIN, Plaintiff, v. MARTIN PEMSTEIN, DIANA PEMSTEIN, Defendants.	**Case No. 2:12-bk-15900 RK** **Chapter 11** **Adv. No. 2:12-ap-01291 RK** **ORDER ON DEFENDANT'S MOTION TO RECONSIDER FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER TRIAL ON 11 U.S.C. § 523(a)(4) CLAIM AND ORDER THEREON AS AMENDED**

Pending before the court in the above-captioned adversary proceeding is the motion of Defendant Martin Pemstein ("Defendant") to reconsider the court's findings of fact and conclusions of law after trial on 11 U.S.C. § 523(a)(4) claim and order thereon, entered on October 17, 2014. ECF 108. Defendant filed his original motion to reconsider on October 22, 2014, and he filed an amended motion to reconsider on November 23, 2014 ("Motion"). ECF 109 and 116. Plaintiff Harold Pemstein filed oppositions to the reconsideration motions. ECF 115 and 117. The court conducted hearings on the original and amended motions to reconsider on November 19, 2014 and December 17, 2014. Having considered the moving and opposing papers and the

written and oral arguments of the parties, the court hereby rules on defendant's motion to reconsider as amended.

The court construes Defendant's Motion to be made pursuant to Fed. R. Bankr. P. 9023 and Fed. R. Civ. P. 59 for new trial or to amend or alter judgment. See also, 10 Resnick and Sommer, *Collier on Bankruptcy*, ¶ 9023.04 at 9023-5 (16th ed. 2014)("Any motion that draws into question the correctness of the judgment is functionally a motion under Rule 9023, whatever its label. . . . A motion for reconsideration is to be treated as a motion under Rule 9023 . . . since it draws into issue the correctness of the trial court's decision.")(footnotes omitted). Defendant's motion to reconsider is not untimely as argued by plaintiff because the court has not entered judgment in this adversary proceeding and the 14-day period from entry of judgment to file a Rule 9023 motion has not yet run. Fed. R. Bankr. P. 9023. In its findings of fact and conclusions of law after trial and order entered on October 17, 2014, the court directed counsel for Plaintiff to submit a proposed judgment. ECF 108 at 8. Counsel for Plaintiff lodged a proposed judgment on October 23, 2014. ECF 111. The court has not entered the proposed judgment in light of Defendant's motion to reconsider.

Although the court overrules Plaintiff's timeliness objection to defendant's motion to reconsider, the court agrees with Plaintiff that there are no grounds to grant reconsideration here, and therefore, the court denies the motion. As *Collier on Bankruptcy* states,

> In court actions, the grounds for motions seeking new trials are usually stated as "[a]n intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice. As with motions seeking new trials in jury actions, a partial retrial limited to particular issues or parties may be granted. When the court considers such motions in non-jury actions, the proper relief to be accorded may only allow the taking of additional testimony or the amendment of findings of fact and conclusions of law. However, when the court is of the view that the mere taking of newly discovered evidence will not sufficiently accomplish substantial justice, a new trial, either whole or partial, may be ordered.

Collier on Bankruptcy, ¶ 9023.04 at 9023-3.

Defendant argues that the court's findings of fact and conclusions of law after trial on 11 U.S.C. § 523(a)(4) claim and order thereon should be amended to correct a clear error or prevent manifest injustice because the court's order approving stipulation to terminate purported leases between HMS Holding Company and the Pemma Corporation; and enter into new leases, in the Pemma Corporation and HMS Holding Company bankruptcy cases, Nos. SA-05-50043 JR Chapter 7 and SA-05-50044 JR Chapter 7 (Bankr. C.D. Cal., order entered on October 27, 2006, ECF 145) is a final order which has res judicata effect to preclude any finding that Defendant committed any defalcation respecting the collection of rent as a fiduciary for HMS Holding Company. A copy of this order was received as Exhibit D-3 at trial. According to Defendant, he, Plaintiff, and the bankruptcy trustee in the HMS Holding Company and Pemma Corporation bankruptcy cases stipulated that Defendant had collected all of the rents due HMS and that there was no failure to collect rent by him, which stipulation was approved by the court in this order. ECF 116 at 2-3. A copy of this stipulation was received as Exhibit D-4 at trial. Defendant argues that the state court erred in attributing uncollected rents to Defendant in the 2010 state court judgment, and also argues that the Bankruptcy Appellate Panel ("BAP") in prior proceedings in this case erred in its reliance on the 2010 state court judgment in holding that defendant could have committed a defalcation as to plaintiff. ECF 116 at 2-4; *see also, Pemstein v. Pemstein (In re Pemstein),* 492 B.R. 274 280-284 (9th Cir. BAP 2013).

The court has reviewed copies of the order and the underlying stipulation from the HMS Holding Company and Pemma Corporation bankruptcy cases referred to by Defendant and observes that the express language of the underlying stipulation reserves the rights of HMS and thus, Plaintiff Harold Pemstein, to seek additional rents from Pemma, which Defendant controlled. Exhibit D-4 at 32 (original pagination). The stipulation stated in pertinent part that "if it is determined as a matter of law that Pemma is obligated to pay rent in excess of said $45,000 then HMS, Harold Pemstein and Martin Pemstein agree not to seek any additional rent for anytime prior to November 1,

1998" and "[t]he only additional rent claim that HMS is reserving is the right to claim that an amount in excess of 60¢ a square foot that Pemma is or was obligated to pay to HMS was too low and Pemma, as a matter of law, was obligated to pay a greater sum." *Id*. Thus, the stipulation that Plaintiff Harold Pemstein would agree not to seek additional rent for the time period before November 1, 1998 left open the possibility that he could claim additional rent for the time period afterwards, i.e., 1998 to 2006. This time period was the basis for the 2010 state court judgment, and therefore, the order approving the stipulation in the HMS Holding Company and Pemma Corporation bankruptcy cases does not have preclusive effect that plaintiff may not assert a claim for uncollected rent against him based on a failure to collect market rent from Pemma, as argued by Defendant. *See* Exhibit 107.

The court also notes that this court, like the Bankruptcy Appellate Panel, is required to give full faith and credit to a valid and final state court judgment pursuant to 28 U.S.C. § 1738 and that the Bankruptcy Appellate Panel's prior holding that Defendant could have committed defalcation for purposes of Plaintiff's claim under 11 U.S.C. § 523(a)(4) is the law of the case. *In re Pemstein,* 492 B.R. at 280-284. Thus, in giving full faith and credit to the 2010 state court judgment and applying the prior holding of the Bankruptcy Appellate Panel as the law of the case, the court determines that it did not commit any clear error or that reconsideration is necessary to prevent manifest injustice. *Id.* The court further finds that there are no other bases raised in Defendant's motion to reconsider as amended to warrant a new trial or amendment of the findings of fact and conclusions of law after trial on 11 U.S.C. § 523(a)(4) claim and order thereon, such as an intervening change of controlling law or the availability of new evidence.

///

///

Therefore, for the foregoing reasons, Defendant's motion to reconsider as amended is denied.

IT IS SO ORDERED.

###

Date: January 6, 2015

Robert Kwan
United States Bankruptcy Judge