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MAR 25 2014

CLERK U.S. BANKRUPTCY COURT  
Central District of California  
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UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SAN FERNANDO VALLEY DIVISION

In re:

Nicholas Davis

Debtor(s).

Sarah Cheiker, John F Lambert, Linda  
Russell

Plaintiff(s),

v.

Nicholas Davis

Defendant(s).

CHAPTER 7

Case No.: 1:13-bk-10794-MT

Adv No: 1:13-ap-01096-MT

**MEMORANDUM OF DECISION  
RE: MOTION FOR SUMMARY  
JUDGMENT**

Date: February 12, 2014

Time: 1:00 p.m.

Courtroom: 302

On May 7, 2013, Plaintiff John Lambert, Jr. on behalf of Sarah Cheiker and Linda Russell, Esq. in her capacity as Conservator for Sarah Cheiker (“Plaintiffs”), filed this adversary proceeding against Debtor Nicholas Davis (“Defendant”). The complaint alleged causes of action under §§ 523(a)(2)(A), (a)(4), (a)(6) and §§ 727(a)(2), (a)(3), and (a)(5).<sup>1</sup>

<sup>1</sup> Unless otherwise noted, all code sections refer to Title 11, United States Code.

1 A related adversary case by these same Plaintiffs was also brought against another debtor,  
2 Jonathan Stevens (“Stevens”) See Adversary Case no.13-01107. Similarly, the adversary  
3 complaint against Stevens alleged causes of action under §§ 523(a)(2)(A), (a)(4), (a)(6) and §§  
4 727(a)(2), (a)(3), and (a)(5). Summary judgment has been granted in that case on the § 523(a)(4),  
5 § 727(a)(2); and § 727(a)(5) claims.

6 Both adversaries involve the same facts, parties, and allegations of defendants’ financial  
7 exploitation of an elderly woman named Sarah Cheiker (“Ms. Cheiker”). Ms. Cheiker is an 88-  
8 year old woman, currently residing in the Fryeburg Residential Care Center in Fryeburg, Maine.  
9 Ms. Cheiker suffers from Chronic Obstructive Pulmonary Disease, Atherosclerotic Cardiovascular  
10 Disease, hearing loss, and visual impairment, among other ailments. On or about May 2, 2012,  
11 Linda Russell (“Russell”) was appointed to be Cheiker’s temporary conservator by the Oxford  
12 County Probate Court. On or about May 9, 2012, Russell, through her counsel, John Lambert  
13 (“Lambert”), filed a state court complaint against Barbara Davis, Nicholas Davis, Jonathan  
14 Stevens, and Amanda Stevens (the “State Court Action”) See Ex. 1 to Plaintiffs’ Ex. List (State  
15 Court Complaint). The state court complaint alleges, among other things, claims for negligence,  
16 breach of fiduciary duty, negligent infliction of emotional distress, intentional infliction of  
17 emotional distress, conversion, and improvident transfer. The facts surrounding the causes of  
18 action relate to alleged financial exploitation of Ms. Cheiker by the Davis’ and Stevens’.

19 After extensive investigation, the Lincoln County Superior Court in Maine entered a  
20 Judgment and Commitment in State of Maine v. Nicholas Davis for a felony charge of  
21 Intentionally Endangering the Welfare of Dependent Person in violation of 17-A MRSA §  
22 555(1)(B). Defendant pled nolo contendere and did not dispute the facts surrounding the charge.  
23 Defendant was found guilty and sentenced to three years of prison time, which was suspended in  
24 full, placed on probation for 2 years, and ordered to pay \$5,000 as restitution for the benefit of  
25 Ms. Cheiker. See Ex. 17 (Judgment) and Ex. 20 (Transcript of Defendant’s sentencing hearing  
26 on April 26, 2012) to Plaintiffs’ Ex. List.

27 On or about February 07, 2013, Debtor filed a voluntary chapter 7 bankruptcy in this  
28 Court. Debtor listed solely \$50.23 in cash on hand and a \$650,000.00 unsecured non-priority  
claim for the debt relating to the State Court Action. See Schedule F.

Plaintiffs filed a Relief from Stay Motion seeking to continue the Maine State Court  
Action, which was granted. (Docket #18).

Plaintiffs have now moved for summary judgment under § 523(a)(4), § 727(a)(2); and §  
727(a)(5) only. Defendant only responded to the § 727(a)(2) claim by stating that he transferred  
properties by quit claim deed to avoid foreclosure and that when Defendant Jonathan Stevens  
[sic] filed bankruptcy over ten months later, he did not own any real property and did not conceal  
any assets.

Defendant argues there are triable issues of material fact. Specifically, in the Statement  
of Genuine Issues, Defendant disputes five facts: #12, 13, 24, 36, and 37. Defendant disputes  
other facts on an evidentiary basis, but not as a factual statement (facts #3, 4, 7, 8, 9, 25).  
Defendant refers to an “Objection to Proffered Evidence, filed concurrently herewith,” but no  
such document appears to have been filed or attached to the Opposition. (The Court notes that

1 this Opposition appears to be fundamentally identical to the opposition filed in response to the  
2 MSJ filed in the related adversary in the Stevens' case).

3 **Summary Judgment**

4 Summary judgment should be granted "if the pleadings, depositions, answers to  
5 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no  
6 genuine issue as to any material fact and that the moving party is entitled to a judgment as a  
7 matter of law. FRCP 56(c) (incorporated by FRBP 7056).

8 The moving party has the burden of establishing the absence of a genuine issue of  
9 material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party shows the  
10 absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings  
11 and identify facts that show a genuine issue for trial. Id. at 324. The court must view the  
12 evidence in the light most favorable to the nonmoving party. Bell v. Cameron Meadows Land  
13 Co., 669 F.2d 1278, 1284 (9th Cir.1982). All reasonable doubt as to the existence of a genuine  
14 issue of fact should be resolved against the moving party. Hector v. Wiens, 533 F.2d 429, 432  
15 (9th Cir.1976). The inference drawn from the underlying facts must be viewed in the light most  
16 favorable to the party opposing the motion. Valadingham v. Bojorquez, 866 F.2d 1135, 1137  
17 (9th Cir.1989). Where different ultimate inferences may be drawn, summary judgment is  
18 inappropriate. Sankovich v. Insurance Co. of N. Am., 638 F.2d 136, 140 (9th Cir.1981).

19 The facts that Defendant identifies as "disputed" are not material or there is no evidence  
20 in support of defendant's assertions. Defendant has not provided documents or sworn statements  
21 to support its disputed facts. See Defendant's Opposition to Motion for Summary Judgment,  
22 Docket no. 18 ("Opposition"). In addition, Defendant failed to appear at the hearing held on  
23 February 12, 2014.

24 **§ 523(a)(4) – Defalcation**

25 A debtor is not entitled to discharge from any debt "for fraud or defalcation while acting  
26 in a fiduciary capacity, embezzlement, or larceny." § 523(a)(4). To except a debtor from  
27 discharge for fraud or defalcation while acting in a fiduciary capacity under section 523(a)(4), a  
28 plaintiff must establish that a fiduciary relationship existed and that a defalcation occurred. In re  
Chapman, 125 B.R. 284, 286-86 (Bankr. S.D. Cal. 1991). The fiduciary relationship must have  
been created before the act of wrongdoing. Ragsdale v. Haller, 780 F.2d 794, 796 (9th Cir.  
1986). The Supreme Court recently clarified the term, "defalcation" in Bullock v.  
BankChampaign, N.A., 133 S.Ct. 1754, 1759 (2013), holding that where there is no bad faith,  
moral turpitude or other immoral conduct, defalcation as used in 11 U.S.C. § 523(a)(4) requires  
an "intentional wrong." This includes not only conduct that the fiduciary "knows is improper,"  
but also "reckless conduct of the kind that the criminal law often treats as the equivalent." Id.  
Thus, where actual knowledge of wrongdoing is lacking, conduct will be considered sufficiently  
reckless to constitute defalcation where the fiduciary consciously disregards (or is willfully blind  
to) a substantial and unjustifiable risk that his/her conduct will turn out to violate a fiduciary  
duty. Id. That risk must be of such a nature and degree that, considering the nature and purpose

1 of the actor's conduct and the circumstances known to him, its disregard involves a "gross  
2 deviation" from the standard of conduct that a law-abiding person would observe in the actor's  
3 situation. *Id.* at 1760. This standard requires a higher degree of intent or recklessness than that  
4 previously applied by the Ninth Circuit in *In re Sherman*, 658 F.3d 1009 (9th Cir. 2011)  
(*abrogated by Bullock*).

5 In this case, the Defendant admitted to having a fiduciary duty to Ms. Cheiker. During the  
6 sentencing hearing in the Lincoln County Superior Court Criminal Action ("Sentencing  
7 Hearing"), the State Attorney ("Mr. Wright") presented its case to the court as if it had gone to  
8 trial. *See* Ex. 21 to Plaintiff's Ex. List (Official Transcript, April 26, 2012 hearing), 10-14. Mr.  
9 Wright said he would have had Ms. Cheiker testify that Defendant and Ms. Davis took care of  
10 her and were directly responsible for her health and welfare, and that she did not have the  
11 opportunity or ability to care for herself financially, or buy necessities over the past three years.  
12 *See Id.* 13:5-12. Defendant was responsible for her feeding and medical care, and assumed that  
13 duty of care. *Id.* 13:13-14. Defendant said he was given guardianship over Ms. Cheiker by the  
14 courts in California. *See* Ex. 9 (Lincoln County Sherriff's Office Narratives/Hatch) pg. 3. In  
15 addition, Defendant had been granted power of attorney over her affairs. *Id.* 13:13-16 *see also*  
16 Ex. 1 to Plaintiff's Ex. List (State Court Complaint) pg. 7 ¶ 45 ("The execution of the Uniform  
17 Statutory Form of Power of Attorney dated December 20, 2006 established [Defendant] as a  
18 fiduciary of Sarah Cheiker"). The power of attorney gave Defendant complete access to all of  
19 Ms. Cheiker's assets. At the Sentencing Hearing, Defendant answered in the affirmative that he  
20 had accepted responsibility for her care. *See* Ex. 21 to Plaintiff's Ex. List (Transcript in Barbara  
21 Davis sentencing hearing), 13: 24-25. The Maine court only narrowly focused on material  
22 endangerment (having to do with material support owed to Ms. Cheiker and the question of  
23 neglect) and not financial exploitation for purposes of Defendant's sentencing but the undisputed  
24 finding of a fiduciary duty was the same for either situation. *See* Ex. 20 to Plaintiff's Ex. List  
25 (Official Transcript, April 26, 2012 hearing), 37:15-18 and Ex. 21 pg. 28:12-15.

18 The undisputed facts, as detailed in the Maine record, demonstrate that Defendant  
19 maintained a fiduciary duty, and participated in reckless conduct that meets the heightened  
20 standard clarified in *Bullock*. Defendant was not only given power of attorney over Ms.  
21 Cheiker's assets, he was also aware that Ms. Cheiker depended on him for her care. It is  
22 undisputed that in July 2011, Defendant along with Stevens, drove Ms. Cheiker to the last  
23 location prior to being found, lied to the hotel manager that Cheiker was a middle-aged artist  
24 who wanted to be left alone, and left her there with very little food and resources. Based on the  
25 undisputed facts in the record, Defendant was aware that his conduct constituted a high risk to an  
26 elderly woman who suffers from medical problems.

23 The facts taken from Ms. Cheiker before her abandonment are discussed further as part of  
24 the 727 discussion that follows.

25 Accordingly, Plaintiffs' defalcation claim under § 523(a)(4) is granted.

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1 **§ 727(a)(2)- Transfer of Assets**

2 A debtor shall be denied discharge if he has “transferred, removed, destroyed, mutilated,  
3 or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed,”  
4 property of the debtor within one year before the filing of the petition and with the intent to  
5 hinder, delay, or defraud a creditor. To establish a § 727(a)(2)(A) claim, plaintiff must prove  
6 “(1) a disposition of property, such as transfer or concealment, and 2) a subjective intent on the  
7 debtor’s part to hinder, delay or defraud a creditor through the act of disposing of the property.”  
8 Hughes v. Lawson (In re Lawson), 122 F.3d 1237, 1240 (9th Cir. 1997). “Both elements must  
9 take place within the one-year pre-filing period ...” Id.

10 In this case, there were numerous admissions by Defendant in the reports written by  
11 police and FBI agents following the discovery of Ms. Cheiker in the hotel. Defendant has not  
12 submitted any evidence to contradict these prior statements. According to the reports, Defendant  
13 admitted that he liquidated Ms. Cheiker’s assets, including at least \$600,000 from the sale of her  
14 home, which he had reinvested in real estate in his god daughter’s name [Amanda Stevens]. See  
15 Ex. 6 to Plaintiff’s Ex. List (Lambert Declaration) pg. 4 ¶ 17. Defendant stated, “they invested  
16 approximately \$600,000 in properties in Maine, California, New York and several other states”.  
17 See Ex. 8 to Plaintiff’s Ex. List (Lincoln County Sherriff’s Office Narratives/ Hatch) pg. 3. It is  
18 uncontested that Stevens, using Ms. Cheikers money obtained from Defendant, purchased six  
19 different properties in Maine in 2010. See Statement of Material Facts ¶ 18-24 for the list of the  
20 properties and the purchase prices of the properties (collectively the “Maine properties”). The  
21 Maine properties were transferred to a Peter and Becky Robichaud on or about April 27, 2012 in  
22 lieu of foreclosure. See Ex. 10 (Warranty Deed) and Ex. 11(Quit Claim Deed) to Plaintiff’s Ex.  
23 List. During this time, Defendant held on to the beneficial interest in the properties. He stated,  
24 “[t]hat on April 12, 2012, I had problems paying the mortgage on the properties I had. That  
25 facing foreclosure I voluntarily gave all the properties back to lender”. See Opposition,  
26 attachment no. 2 (Declaration of Defendant Nicholas Davis) ¶ 9. Thus, Defendant, acting in  
27 concert with Stevens, admitted to being involved with the transfer of properties to the lender, the  
28 Robichauds, and he provided no accounting of any of the funds invested or lost in any of the  
properties.

20 Defendant permitted the transfer of the Maine properties within one year of filing for  
21 bankruptcy but did not include these properties in his Statement Of Financial Affairs (“SOFA”).  
22 In addition, Defendant listed “None” for all property transferred within two years immediately  
23 preceding the commencement of his bankruptcy (paragraph 10 of Defendant’s SOFA), despite  
24 the transfers in April 2012. Although Defendant claims that he filed bankruptcy over ten months  
25 after the transfer, it is still within the one-year time frame of § 727(a)(2).

24 The evidence is uncontroverted that Defendant liquidated Ms. Cheikers assets, and then  
25 transferred the money to Stevens, who purchased the six Maine properties and transferred them  
26 to the Robichaud’s within one year of his petition date. Defendant admitted having beneficial  
27 interest, even though the properties were not in his name. He then failed to disclose the Maine  
28 properties and the criminal action against him in his bankruptcy petition. The Defendant  
proffered no explanation or accounting as to the value of the Maine Properties he transferred,  
stating only that they were facing foreclosure. He has been silent concerning any property in  
New York, or California that he admitted in earlier statements. The only reasonable inference to

1 be made from such non-disclosure is an intent to hinder, delay, or defraud creditors. Thus, given  
2 the nature of the nondisclosures, Defendant permitted the transfer of the Maine properties with  
such intent.

3 Accordingly, Plaintiffs' § 727(a)(2)(A) claim is granted.  
4

5 **§ 727(a)(5)- Failure to Explain Losses**

6 A debtor is denied a discharge if the debtor "failed to explain satisfactorily any loss of  
7 assets or deficiency of assets to meet the debtor's liabilities." § 727(a)(5). Under § 727(a)(5) an  
8 objecting party bears the initial burden of proof and must demonstrate: (1) debtor at one time, not  
9 too remote from the bankruptcy petition date, owned identifiable assets; (2) on the date the  
10 bankruptcy petition was filed or order of relief granted, the debtor no longer owned the assets;  
11 and (3) the bankruptcy pleadings or statement of affairs do not reflect an adequate explanation  
12 for the disposition of the assets. Retz v. Samson (In re Retz), 606 F.3d 1189, 1193 (9th Cir.  
2010). Whether a debtor has satisfactorily explained a loss of assets is a question of fact. A  
debtor's failure to offer a satisfactory explanation when called on by the court is a sufficient  
ground for denial of discharge under 11 U.S.C.S. § 727(a)(5). Id.

13 Here, Defendant lists \$50.23 cash on hand in Schedule B and over \$686,000 in liabilities,  
14 all of which are unsecured. Defendant however, did not dispute that he had control of Ms.  
15 Cheiker's assets, including \$600,000 from the sale of her home, which was reinvested in the  
16 name of Jonathan and Amanda Stevens. It is undisputed that Stevens purchased six properties in  
17 Maine, in his name and Amanda Stevens' name, in 2010. It is undisputed that these properties  
18 were granted back to the Robichauds in April 2012. The only response by Defendant to these  
19 facts is that he was having difficulty in paying the lender, who retained a mortgage on the  
20 properties, and that he had to surrender the properties in lieu of foreclosure. See Supra  
21 Declaration of Nicholas Davis, ¶ 9.

22 Defendant's response gives little information to the Court as to what happened to the  
23 \$600,000 that was transferred to Mr. Stevens' name and is insufficient as a matter of law. With  
24 respect to the property transactions, Defendant has presented no information as to how much of  
25 the \$600,000 actually went into the properties. According to Maine public records, Stevens  
26 spent \$590,000 to purchase at least 5 properties. See Ex. 1 to Plaintiffs' Ex. List (State Court  
27 Complaint) pg. 5. No information, however, was presented in Defendants bankruptcy petition, or  
28 opposition to the motion for summary judgment as to the values of the properties, what sort of  
down payments were made, or how much was financed by the Robichauds or other sources.  
Although, the Robichauds' retained a mortgage in the properties, no information or  
documentation was provided by the Defendant as to the note or obligation secured by the  
mortgage, or any payments made on any such obligation. The April 2012 grant deed states that  
the transfer was made from the Stevens to Robichauds "for consideration paid". It is not clear if  
that consideration was just in lieu of foreclosure or some other form of consideration. It was the  
Defendant's duty to provide an explanation in his response.

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1 When a creditor brings an objection under section 727(a)(5), the debtor must be prepared  
2 to respond with specific information to adequately explain the loss of assets. A debtor cannot  
3 omit information from his schedules and force the trustee and creditors to search through his  
4 paperwork to determine what happened to assets. Rather, the debtor has an affirmative duty to  
5 provide specific information when asked. Once the Plaintiffs demonstrated that Davis did not  
6 have sufficient explanations as to losses of his assets, it was up to Davis to provide countering  
7 evidence to establish the existence of a genuine issue of material fact.

8 In this case, no accounting was submitted. Thus, Defendant has failed to explain what  
9 happened to the \$600,000 taken from the sale of Ms. Cheiker home, not to mention any other  
10 assets stolen from her. The suggestion that the money was all abandoned to the Robichauds is an  
11 unsatisfactory explanation and not supported by anything other than a conclusory statement. The  
12 materials provided raised more questions about what happened to the money than they answered.

13 Accordingly, Plaintiffs' § 727(a)(5) claim is granted.  
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24 Date: March 25, 2014

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26 Maureen A. Tighe  
27 United States Bankruptcy Judge  
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