

1 WRITTEN DECISION - NOT FOR PUBLICATION

2

3 ENTERED MAR 20 2014

4 FILED

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

CLERK, U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY BC DEPUTY

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

11	In re)	Case No. 09-02350-PB7
)	Adv. No. 09-90301-PB
12	ADOLFO CASTILLO, Jr. and)	
	ANA CASTILLO,)	ORDER ON TRUSTEE'S
13)	MOTION FOR
)	PARTIAL SUMMARY
14	Debtors,)	JUDGMENT
	_____)	
15)	
	GREGORY A. AKERS, Chapter 7)	
16	Trustee of the bankruptcy estate)	
	of William Juarez)	
17)	
	Plaintiff,)	
18)	
	v.)	
19)	
	ADOLFO CASTILLO, Jr. and)	
20	ANA CASTILLO,)	
)	
21)	
	Defendants.)	
22	_____)	

23 This case has followed a tortuous path to the present

24 juncture. The underpinnings began when Ana Castillo's step-

25 father filed his own chapter 7 bankruptcy. In that case his

26 chapter 7 trustee, Gregory Akers (Trustee), obtained a fraudulent

1 transfer judgment against Ana. That judgment was not appealed
2 and is final.

3 Ana and her husband, Adolfo Castillo, filed their own
4 bankruptcy. Mr. Akers has filed a complaint objecting to
5 discharge under 11 U.S.C. § 727, as well as objecting to the
6 dischargeability of the particular debt owed to the Juarez estate
7 because of the fraudulent transfer judgment. The Trustee
8 asserted that the debt was excepted from discharge under §§
9 523(a)(2), (a)(4) & (a)(6).

10 During pretrial proceedings before another judge of this
11 Court, the Court issued a Notice of Intended Trial Procedure. In
12 it, the Court reviewed the status of the case and stated that the
13 evidentiary excerpts provided by the Trustee on the § 727 issues
14 were sufficient to establish a prima facie case, shifting the
15 burden of going forward to Ms. Castillo. Because no evidentiary
16 objections had been timely filed by Ms. Castillo, the Court
17 observed those items would be admitted at trial. The Court set
18 out a brief roadmap of the issues to be tried on the § 727
19 allegations.

20 The Court then wrote:

21 The final claim is to except the judgment in favor
22 of the Plaintiff from discharge under § 523(a)(4).
23 After presiding at the [fraudulent conveyance] trial,
24 this Court is familiar with the underlying facts and
25 the resulting judgment. The funds Ana Castillo moved
26 from the joint account with William Juarez to her
individual account was money held in trust for William
Juarez. The issues remaining for trial on that claim
will focus on whether there was a defalcation by Ana
Castillo in her role as the trustee of that trust.

1 Doc. 60, p.2. It appears from the foregoing that the Trustee's
2 claims of nondischargeability under 11 U.S.C. § 523 (a)(2) and
3 (a)(6) were disposed of during pretrial proceedings, leaving the
4 § 727 and § 523(a)(4) claims for resolution by trial.

5 The case did go forward for trial, and after post-trial
6 proceedings the Court entered an amended judgment on April 18,
7 2012. The Court ruled that the trustee's objections to discharge
8 under § 727 were denied. However, the Court found the fraudulent
9 conveyance judgment nondischargeable under 11 U.S.C. § 523(a)(4).
10 (Doc. 108). Ms. Castillo timely appealed that judgment to the
11 Ninth Circuit Bankruptcy Appellate Panel (BAP). The Trustee
12 filed a cross-appeal on the judgment in Ms. Castillo's favor on
13 the § 727 claims.

14 On appeal, the BAP affirmed the trial court's denial of the
15 § 727 allegations by the Trustee, but vacated and remanded the
16 judgment in the Trustee's favor on the § 523(a)(4) count. At the
17 center of the BAP's ruling on the § 523(a)(4) claim was the
18 unsettled record in the trial court focusing on that claim. The
19 BAP noted: "the court expressed a willingness to consider
20 additional legal argument on the § 523(a)(4) claim because the
21 relevant legal issues had not been adequately addressed in either
22 the Fraudulent Transfer Action or in the Discharge Action, and
23 because the Castillos did not have legal representation." (BAP
24 Memorandum, Doc. 111 p.7).

25 The BAP noted the trial court's statement at the time it
26 ruled on the § 727 claims that it felt the debtors should consult

1 counsel on the § 523(a)(4) claim. The BAP stated: While the
2 bankruptcy court was focused on additional legal argument, it
3 also left open the possibility that it might hold a further
4 evidentiary hearing:....." "The court later reiterated that it
5 ultimately might decide to hold another evidentiary hearing in a
6 scheduling order entered on May 2, 2011. In that order the court
7 further indicated that all § 523(a)(4) issues, including the
8 fiduciary capacity and defalcation issues, were still open
9 issues:....." (Doc. 111 p.8).

10 Ms. Castillo filed a supplemental brief in which she argued
11 that any disbursements she made were "with the express consent"
12 of her mother, her step-father, or both. In support, she
13 proffered written declarations and deposition excerpts of the
14 parents, to which the Trustee objected. One of those objections
15 was that the proffered testimony was contradicted by earlier
16 testimony of the parents and inconsistent with it.

17 At a subsequent hearing, the trial court "stated that it
18 would not benefit from hearing the additional evidence Ms.
19 Castillo proposed to offer." (Doc. 111, p.10). The BAP framed
20 its view of the trial court's ruling and stated: "In the process,
21 the court excluded the additional evidence Ms. Castillo had
22 sought to offer and disregarded her claim that her disbursement
23 of the proceeds had been authorized by the Juarezes." (Doc. 111,
24 p. 11).

25 The focus of the BAP on review was on the denial of the
26 opportunity to Ms. Castillo to present the supplemental evidence

1 from her parents. The BAP characterized her argument as claiming
2 "that the bankruptcy court erred when it declined to consider her
3 additional evidence." (Doc. 111, p. 14). The BAP then presumed
4 that the court had declined to hear the evidence because it
5 thought it irrelevant. Having set up its strawman argument, it
6 proceeded to explain why the proffered evidence was relevant.

7 The BAP concluded:

8 [W]e hold that the bankruptcy court erred as a matter
9 of law when it declined to consider whether Ms.
10 Castillo was authorized to use the Proceeds in the ways
11 that she did. As a result, the court also erred when
12 it excluded Ms. Castillo's additional evidence on
13 relevancy grounds.

14 (Doc. 111, pp. 17-18).

15 Following remand, the case was reassigned to this judge, and
16 a status conference was set. At that conference, the Court set a
17 deadline for Ms. Castillo to file an amended witness list, and
18 for the Trustee to file any objections. Ms. Castillo complied,
19 naming her mother and her stepfather. The Trustee filed multiple
20 objections, including that her parents should have been included
21 on the original witness list and were not newly discovered or not
22 reasonably discoverable earlier. The Trustee also reargued his
23 assertions to the BAP that the more recently proffered testimony
24 of the parents was inconsistent with earlier statements and
25 testimony they had given.

26 The BAP discussed the Trustee's objections at some length,
and rejected them on multiple grounds. Doc. 111, p. 9, 14. At
footnote 16 the BAP wrote:

1 Akers strenuously and at length has asserted that
2 the Juarezes' later statements regarding the use of the
3 Proceeds were inconsistent with their earlier
4 testimony, going so far as to characterize the later
5 statements as fraud on the court. However,
6 notwithstanding Mr. Akers' presentation, it is still
7 conceivable that the Juarezes might have been able to
8 reconcile or at least explain the differences in their
9 various statements if they had been given the
10 opportunity to testify at a further evidentiary
11 hearing. The bankruptcy court as trier of fact needed
12 to find whether the Juarezes' various statements
13 regarding the Proceeds were credible. In other words,
14 the issue of the Juarezes' veracity went to the weight
15 and credibility that should have been given to their
16 declarations and not to their admissibility.

17 Doc. 111, p. 20, fn. 16.

18 At a subsequent status conference, the Court required Ms.
19 Castillo to provide the current address and phone number for her
20 parents so their depositions could be arranged. Obtaining the
21 participation of the Juarezes in depositions was protracted by
22 medical issues, a motion to compel, and a protective order.
23 Ultimately, they were obtained. Thereafter, the Trustee filed a
24 motion for summary judgment, arguing, in part, that Ms. Castillo
25 should not be permitted to claim the existence of a genuine issue
26 of material fact from the allegedly inconsistent statements of
the Juarezes.

Neither party to the summary judgment motion had raised,
much less addressed the Supreme Court's decision in Bullock v.
BankChampaign, N.A., ___ U.S. ___, 133 S.Ct. 1754, decided May 13,
2013, and directly addressing the elements of 11 U.S.C. §
523(a)(4). So the Court invited supplemental briefing, which was

\\

1 provided. Following argument, the matter was taken under
2 submission.

3 The short answer to the Trustee's motion was provided by the
4 BAP in footnote 16. There are issues of fact on which this Court
5 must take testimony from the Juarezes. In his motion, the
6 Trustee seeks to preclude the Court from doing so on the theory
7 that Ms. Castillo cannot raise a genuine issue of material fact
8 by inconsistent statements. Whatever else may be said about that
9 argument in this context, the BAP has already rejected that
10 argument and ruled that any inconsistencies go to "weight and
11 credibility", not to admissibility. The Court has to decide
12 those issues after hearing the testimony, rather than resolving
13 them by the Trustee's efforts to impeach the Juarezes by use of
14 paper declarations and no live testimony.

15 For the foregoing reasons, the Trustee's motion for summary
16 judgment is denied without prejudice. This adversary proceeding
17 will be set for status conference on April 21, 2014 at 10:00
18 a.m., Department 4, Room 328, 325 West F Street, for the purpose
19 of setting the date and time for concluding the trial on the
20 Trustee's claim under 11 U.S.C. § 523(a)(4), on the issues of
21 whether the Proceeds were held in trust following the transfer to
22 Ms. Castillo's account; whether those facts were sufficient to

23 \\\

24 \\\

25 \\\

26 \\\

1 make her a fiduciary as to those funds within the meaning of §
2 523(a)(4); and, if so, whether she committed any defalcation
3 within the meaning of § 523(a)(4) as explained by the Supreme
4 Court in Bullock.

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IT IS SO ORDERED.

DATED: MAR 19 2014



PETER W. BOWIE, Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
325 West F Street, San Diego, California 92101-6991

In re Bankruptcy: Adolfo Castillo, Jr. and Ana L. Castillo Case No. 09-02350-PB7
Adversary: Gregory A. Akers v. Adolfo Castillo, Jr. and Ana Castillo Adv. No. 09-90301-PB

CERTIFICATE OF MAILING

The undersigned, a regularly appointed and qualified clerk in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

ORDER ON TRUSTEE'S MOTION FOR PARTIAL SUMMARY JUDGMENT

was enclosed in a sealed envelope bearing the lawful frank of the bankruptcy judges and mailed to each of the parties at their respective addresses listed below:

Nannette Farina
Law Offices of Nannette Farina
401 West A Street, Ste. 1760
San Diego, CA 92101

Ana Castillo
191 Marigold Place
Chula Vista, CA 91910

Said envelope(s) containing such document was deposited by me in a regular United States Mail Box in the City of San Diego, in said District on March 20, 2014.



Lisa Cruz, Deputy Clerk

Notice Recipients

District/Off: 0974-3

User: bcary

Date Created: 3/20/2014

Case: 09-90301-PB

Form ID: pdf01

Total: 3

Recipients of Notice of Electronic Filing:

aty Nannette Farina nannettefarina@gmail.com

TOTAL: 1

Recipients submitted to the BNC (Bankruptcy Noticing Center):

df Adolfo Castillo, Jr. 191 Marigold Pl Chula Vista, CA 91910
df Ana Castillo 191 Marigold Pl Chula Vista, CA 91910

TOTAL: 2