

DO NOT PUBLISH

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re:	)	Bankruptcy Case
	)	No. 98-3-3174-STC
TUAN P. PHAN,	)	Chapter 7
a/k/a TUAN PHUNG PHAN,	)	
a/k/a TONY PHAN,	)	
	)	
Debtor.	)	
<hr/>		
TUONG-VAN THI CAT,	)	<b>Adv. Proc. No. 98-3-394-TC</b>
	)	
Plaintiff,	)	
vs.	)	
	)	
TUAN P. PHAN,	)	<b><u>MEMORANDUM DECISION</u></b>
a/k/a TUAN PHUNG PHAN,	)	
a/k/a TONY PHAN,	)	
	)	
Defendant.	)	
<hr/>		

The above-entitled nondischargeability action was tried to the court on July 7, 1999. Donald H. Cram appeared for Plaintiff. Defendant appeared in pro per. Upon due consideration, and for the reasons set forth below, I determine that Defendant's liability to Plaintiff is dischargeable in Defendant's chapter 7 bankruptcy.

1 **FACTS**

2 Plaintiff and Defendant are former husband and wife. Their  
3 marriage was dissolved by an order of the Circuit Court of Seminole  
4 County Florida on November 1, 1996. That order contained the  
5 following language regarding division of the couple's interest in  
6 a land trust.

7 The parties shall have equal interest in all three (3)  
8 land trusts as follows:

- 9 a. 36 acre property: 25% interest shall  
10 be divided with each party having  
11 12.5% interest.
- 12 b. 28.5 acre property: 28.5% interest  
13 shall be divided with each party  
14 having 14.25% interest.
- 15 c. 40 acre property: 10% interest shall  
16 be divided with each party having 5%  
17 interest.

18 Upon sale of the land trusts, the parties shall divide  
19 the proceeds equally, after any liabilities are paid,  
20 including the debt to Ming Yen.

21 Plaintiff's Exhibit 1 at 6.

22 Defendant sold both parties' interests in two of the  
23 properties later in November 1996. Although the purchase price was  
24 \$445,500, only \$3,060 remained after payment of the liens against  
25 the couple's interest in the properties. Defendant returned one  
26 half of the net proceeds (\$1,530) to Plaintiff in June 1987. Among  
27 the amounts deducted from the sale price for payment of liens was  
28 \$94,830 paid to Ming Yen for interest on a loan he made to the  
couple.

Plaintiff sued Defendant in the Seminole County Court in 1997,  
seeking damages arising from Defendant's sale of her interest in  
the land trusts. She alleged that Defendant had no authority to

1 sell her interest, and that she had suffered damage as a result of  
2 the sale because the sale price was too low and because the  
3 interest paid to Ming Yen was usurious. The trial court found for  
4 Plaintiff. The judge found that Defendant had no authority to sell  
5 Plaintiff's interest in the land trust, that the interest specified  
6 in the Ming Yen note was usurious, and that no interest could be  
7 collected under the note. The court awarded Plaintiff \$47,415,  
8 the amount of interest paid Ming Yen from her share of the sale  
9 proceeds. The court declined to award damages on Plaintiff's claim  
10 that the sale price was too low, finding that the evidence did not  
11 support that claim.

12 In his oral statement of decision, the Seminole County trial  
13 judge stated twice that Defendant had breached a fiduciary duty to  
14 Plaintiff in selling the property and paying interest to Ming Yen  
15 from Plaintiff's share of the proceeds without her permission.

16 But what happened -- what you've got here is you have  
17 Mr. Phan is in a fiduciary relationship to Ms. Cat  
because of the way the final judgment was ordered.

18 Plaintiff's Exhibit 3 at 19:10-13.

19 So my ruling -- the way I see this case is Mr. Phan  
20 breached his fiduciary duty to Ms. Cat when he sold  
the property without telling her about it.

21 Id. at 24:22-25. The trial judge did not specify further the  
22 nature of the fiduciary interest involved or how it arose. Neither  
23 Plaintiff's trial brief nor her counsel's opening and closing  
24 arguments cited any authority illuminating the nature of the  
25 fiduciary interest involved.

26

27

28

MEMORANDUM DECISION

1 **DISCUSSION**

2 Plaintiff seeks a determination that the \$47,415 judgment  
3 against Defendant is nondischargeable under 11 U.S.C. § 523(a)(4),  
4 because it is the result of Defendant's defalcation while acting in  
5 a fiduciary capacity.<sup>1</sup> It is well established that whether a  
6 relationship is a "fiduciary" one for purposes of section 523(a)(4)  
7 is a federal question, and that the term does not encompass every  
8 relationship that may be considered a fiduciary one under state  
9 law. See In re Lewis, 97 F.3d 1182, 1185 (9th Cir. 1996). "The  
10 broad, general definition of 'fiduciary' is inapplicable in the  
11 dischargeability context. Instead, the fiduciary relationship must  
12 be one arising from an express or technical trust that was imposed  
13 before and without reference to the wrongdoing that caused the  
14 debt." Id. at 1185 (citations omitted). Whether an express or  
15 technical trust exists is determined under state law. See id.  
16 at 1185.

17 There is no evidence that Defendant held the real property  
18 or proceeds in an express or technical trust that arose before  
19 Defendant's wrongful conduct. First, the dissolution order  
20 dividing the parties' interests in the real property contains no  
21 language suggesting the creation of a trust. Second, Plaintiff  
22 has not cited, and the court's research has not disclosed, any  
23 authority suggesting that the dissolution order created a trust by  
24 operation of Florida state law. Third, there is no evidence that  
25 Defendant was the trustee of the land trusts. The only evidence  
26 introduced on this question was Defendant's testimony that Ming Yen  
27 was the trustee of the land trusts. Fourth, the most reasonable  
28

**MEMORANDUM DECISION**

1 interpretation of the Florida judge's references to fiduciary duty  
2 is that Defendant held the proceeds of the sale in constructive  
3 trust as a result of the wrongful nature of his sale of Plaintiff's  
4 interest in the real property. It is well established, however,  
5 that a constructive trust does not create a fiduciary relationship  
6 within the meaning of section 523(a)(4). "It is not enough that by  
7 the very act of wrongdoing out of which the contested debt arose,  
8 the bankrupt has become chargeable as a trustee ex maleficio. He  
9 must have been a trustee before the wrong and without reference  
10 thereto." Lewis, 97 F.3. at 1185 (quoting Davis v. Aetna  
11 Acceptance Co., 293 U.S. 328, 333 (1934)).

12

13 **CONCLUSION**

14 Judgment will be entered for Defendant, because Plaintiff  
15 has failed to establish that Defendant was a "fiduciary" within  
16 the meaning of section 523(a)(4).

17

18

19 Dated: \_\_\_\_\_  
20 Thomas E. Carlson  
United States Bankruptcy Judge

21 1. In her complaint, Plaintiff also sought a determination  
22 of nondischargeability under 11 U.S.C. § 523(a)(6), on the theory  
23 that the debt in question arose as the result of Defendant's  
24 willful and malicious injury to Plaintiff. At trial, Plaintiff's  
25 counsel expressly stated that Plaintiff was no longer seeking  
26 relief under subsection (a)(6). In any event, the evidence does  
27 not support a determination of nondischargeability under  
28 subsection (a)(6). Plaintiff introduced no direct evidence that  
Defendant paid interest to Ming Yen with the intent to injure  
Plaintiff. Nor does it appear that the payment of interest to  
Ming Yen was so patently wrongful toward Plaintiff that  
Defendant's malice may be presumed. See In re Cecchini, 780 F.2d.  
1440, 1443 (9th Cir. 1986).

28

**MEMORANDUM DECISION**