

**IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION**

IN RE: JAMES A. PONZINI, DEBTOR

**4:00-bk-45223 E
CHAPTER 7**

BENNIE BEARD

PLAINTIFF

VS.

AP NO. 01-ap-4039

JAMES A. PONZINI

DEFENDANT

**ORDER STRIKING DEFENDANT'S RESPONSE TO MOTION FOR SUMMARY
JUDGMENT AND GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff Bennie Beard's Motion for Summary Judgment filed on August 8, 2002, is before the Court. On October 22, 2002, the Court served a Notice of Opportunity to Respond on *pro se* Defendant/Debtor James A. Ponzini giving him twenty days to respond to Plaintiff's Motion for Summary Judgment. Debtor's response was due November 12, 2002. Debtor did not file a response to Plaintiff's motion until November 18, 2002. The Court's Notice of Opportunity to Respond specifically stated that failure to file a response would be deemed a statement of no opposition to the relief requested, and that the Court may subsequently enter an order allowing the relief requested. Because Debtor did not timely file a response to Plaintiff's Motion for Summary Judgment, the Court hereby **STRIKES** the response filed by Debtor on November 18, 2002, from the Court's record. The Court recognizes that it is striking a pleading of a *pro se* litigant, but attorneys and laymen must abide by deadlines fixed by the court. The Court's Order provided accessible and clear directions. Being a *pro se* litigant does not give a party license to disregard a clearly communicated direction stated in a court order. *See Downs v. Westphal*, 78 F.3d 1252, 1257 (7th Cir. 1996).

Because the Defendant's responsive pleading is stricken, the factual allegations made by Plaintiff in his summary judgment motion, complaint and accompanying affidavits and exhibits will be accepted as true. Because no material issue of fact remains to be decided, the Court will determine whether Plaintiff is entitled to summary judgment as a matter of law. The issue before the Court is whether a judgment obtained by Plaintiff against Debtor in Pulaski County Circuit Court should be excepted from discharge in Debtor's bankruptcy pursuant to 11 U.S.C. §§ 523 and/or 727. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I), and the Court has jurisdiction to enter a final judgment in this case. The following constitutes findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

FACTS

Plaintiff and Debtor were in business together in a de facto partnership which arose by the course of dealing between the parties. More than three years ago, the Debtor was personally served with a summons and complaint filed in the Circuit Court of Pulaski County, Arkansas (the "**State Court**"). Count I of the Complaint alleged that Debtor breached an agreement with Plaintiff in which Debtor promised to pay Plaintiff the sum of \$11,800.95 to reimburse Plaintiff for the remainder of approximately \$30,000.00 of partnership income which Debtor had previously converted to his own personal use. The Complaint alleged that Debtor only made payments totaling \$6,000.00. Count II of Plaintiff's Complaint sought compensatory and punitive damages for misrepresentation, fraud and conversion. Specifically, the Complaint alleged that Debtor had cheated his partner, Plaintiff, by removing partnership money from the stream of income of the partnership without disclosing the same to Plaintiff. The Complaint also alleged

that after agreeing to repay the money withheld, Debtor again embarked upon the same conduct. Debtor did not respond to Plaintiff's Complaint, and a default judgment was entered against him in the State Court on June 28, 1999. With respect to Count I of the Plaintiff's Complaint, the State Court awarded Plaintiff \$5,800.95, plus attorneys' fees and costs totaling \$600.00 and post-judgment interest at the annual rate of 10.0%. With respect to Count II of the Plaintiff's Complaint, the State Court awarded Plaintiff \$60,000.00 in compensatory damages, \$100,000.00 in punitive damages and post-judgment interest at the annual rate of 10.0%.

Debtor filed bankruptcy on November 14, 2000, the same day a deposition was scheduled in connection with the collection of the State Court judgment. Despite two opportunities in Rule 2004 examinations, Debtor has yet to produce all of his banking records, and he has yet to produce a check register showing cash flow in and out of his account. He has failed to explain why two checks were made out reflecting earnest money payments for houses which are not reflected on his bankruptcy schedules. He has also refused to produce records of income for the year 2000 either by way of W-2s or 1099s. It is impossible to determine the Debtor's income from the records presented, and it is impossible to determine whether Debtor has actually participated in the purchase of real property by use of the earnest money checks mentioned above, or to track the flow of money in the event that the monies were returned to the Debtor.

To thwart Plaintiff's collection efforts, the Debtor has also hidden behind a non-existent corporation, The Appraisal Group, Inc., to conduct all of his business transactions. According to the Debtor's testimony in 2004 examinations, the Debtor maintained a bank account in the name of "The Appraisal Group, Inc." after it ceased business operations in 1997. Because The Appraisal Group, Inc.

is not named in the judgment obtained by Plaintiff, Debtor is able to conceal assets in The Appraisal Group, Inc.'s bank account.

DISCUSSION

Plaintiff contends that his debt should be excepted from Debtor's discharge under 11 U.S.C. § 523(a)(4), or alternatively, that Debtor should be denied a discharge under 11 U.S.C. § 727(a)(2)-(3), (4)(A), and (5). Because the Court finds the debt to be excepted from discharge under § 523(a)(4), it need not decide whether the debt is also nondischargeable under § 727.

Section 523(a)(4) provides, in part:

(a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt –

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny.

“Embezzlement, for purposes of [section 523(a)(4)], is the fraudulent appropriation of property of another by a person to whom such property has been entrusted or into whose hands it has lawfully come.” *In re Belfry*, 862 F.2d 661, 662 (8th Cir. 1988) (citations omitted). Taking Plaintiff's allegations as true, Debtor embezzled funds from the Plaintiff and Debtor's business which lawfully came into his hands as a partner in the business. Furthermore, the State Court default judgment awarding Plaintiff relief on the allegations made in its complaint (including fraud and embezzlement) is entitled to collateral estoppel effect in this proceeding. *See In re Cagle*, 253 B.R. 437, 439-440 (E.D. Ark. 2000). Accordingly, the debt arising from the State Court judgment in favor of Plaintiff is excepted from Debtor's discharge pursuant to § 523(a)(4).

CONCLUSION

The Court finds that the response filed by Debtor on November 18, 2002 should be stricken from the Court's record, and the debt arising from the State Court judgment in favor of Plaintiff is excepted from Debtor's discharge. Accordingly,

It is **ORDERED** that the Debtor's response be **STRICKEN** from the Court's record, and that Plaintiff's Motion for Summary Judgment is **GRANTED**.

IT IS SO ORDERED.



**HONORABLE AUDREY R. EVANS
UNITED STATES BANKRUPTCY JUDGE**

December 13, 2002

cc: Mr. Raymond Harrill, Harrill & Sutter, P.L.L.C.
Ms. Rita Looney
Mr. M. Randy Rice, Chapter 7 Trustee
U.S. Trustee