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UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

In Re)	Chapter 7
)	
RICHARD JAMES KUDLICKI, SR.)	No. 02-06640-GBN
and MICHELLE KUDLICKI,)	
)	
Debtors.)	
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J.E. SCHELLER PLUMBING, INC.,)	Adversary No. 02-00893
D/B/A JOEL'S QUALITY POOL &)	
SPA PLUMBING,)	
)	
Plaintiff,)	
)	
vs.)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
)	AND INTERIM ORDER
RICHARD JAMES KUDLICKI, SR.)	
and MICHELLE KUDLICKI,)	
)	
Defendants.)	
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The adversary complaint of J.E. Scheller Plumbing, Inc., d/b/a Joel's Quality Pool and Spa Plumbing ("Plaintiff") seeking a declaration of nondischargeability of its bankruptcy claim against Michelle Kudlicki and her marital community property interest ("Defendant" or "Debtor") was tried to this court as a bench trial on November 5 and December 9, 2004. Post trial briefing was completed on December 23, 2004. An interim order was entered on January 14, 2005 announcing the court's decision.

1 hearing was required to determine the liability of debtor and her
2 community property interest. Dkt. 47.

3 3. Debtor and her husband were the only owners and
4 officers of Canyon State Pools, Inc. Debtor was also a full time
5 Canyon employee, responsible for scheduling pool construction
6 work by subcontractors, such as plaintiff. This employment was
7 her primary income source. She would maintain a flow chart,
8 reflecting each pool project, owner, contract amount and
9 construction status. Debtor would monitor the status, contact
10 subcontractors and schedule their work as the project progressed.
11 Plaintiff's office manager would usually ask for debtor to
12 discuss jobs or payment, as she was considered their contact
13 person. It was vital for debtor, as scheduler, to know which
14 subcontractors were paid, so she would know who could be called
15 upon to subsequently work on a project. She would pay some
16 construction bills, which the company accountant would later
17 allocate to a particular project. She spoke to subcontractors
18 daily and knew that a number were unpaid. This had been occurring
19 for some time. She had access to the company checkbook, was a
20 signatory on the business account and would have the authority
21 and ability to access paper and computerized company financial
22 records².

23
24 ²Debtor's testimony regarding her actual ability to use the
25 "Quick Book" program to access Canyon computerized records was
26 confused. Mr. Kudlicki testified debtor received "some" training
27 on Quick Books from him. Debtor's denial on direct that she could
28 use Quick Books was impeached. On cross, she again appeared to
assert she could not use the product. Whether she actually
(continued...)

1 Debtor would deposit checks into the company banking account.

2 Her salary was \$ 2,200 monthly. Her husband was paid
3 \$ 4,000 net monthly. The Kudlickis received their full salary and
4 would also pay their employees, even when subcontractors were
5 unpaid. They also took salary and paid employees when state sales
6 taxes were delinquent. The Kudlickis did not miss a paycheck
7 until they closed Canyon on November 12, 2001. They would also
8 take personal loans from Canyon at 10% interest. Sometimes the
9 loans would be repaid and sometimes not. Canyon's business
10 declined in July and August of 2001, when pool sales dropped by
11 one-half. Debtor was impeached a number of times during her trial
12 testimony with her prior deposition testimony. Testimony
13 ("test.") of Michael J. Szobosan, Test. of Michelle Kudlicki,
14 Test. of Stacy Scheller, Test. of Daniel M. Merjil, Test. of
15 Janine Vance, Admitted exhibit ("Ex.") 6 at p. 3 (reflecting a
16 Department of Revenue levy of \$48,923.34 on August 29, 2001), Ex.
17 3 (Payroll checks for Richard and Michelle Kudlicki, June-August
18 2001), Ex. 31 (Company checks signed by debtor), Ex. 14 at
19 admission 9, p.10.

20 4. Debtor would contact pool owners for payment and
21 would talk to subcontractors about payment issues. She would be
22 the person to receive complaints from subcontractors about not
23 being paid. However, her husband, who was always Canyon's
24 president, made the decisions regarding which subcontractors

25 _____
26 2(...continued)
27 accessed computerized records is unimportant. See legal
28 conclusion 5.

1 interrogatories stated the furniture, appliances and home
2 furnishing purchases were funded in part from personal
3 construction draws on the Chandler home. However, the documents
4 defendants produced to establish this assertion do not support
5 their testimony. Homebuilder Scott Glynn's deposition testimony
6 is that Canyon State Pools was the Lariat Group's swimming pool
7 subcontractor and built the pool at the Chandler residence.
8 Ultimately Defendants purchased the home. Mr. Glynn produced
9 copies of Lariat checks representing July of 2001 payments of
10 \$9,300 and \$6,000 for pool and fence landscaping work done by
11 Canyon, but made payable to Mr. Kudlicki. Subcontractor's lien
12 releases were signed by Mr. Kudlicki on behalf of Canyon State
13 Pools. Although denying that the funds expended for personal
14 expenses came from payments made to Canyon, Mr. Kudlicki cannot
15 explain why he signed subcontractor lien releases for Lariat on
16 behalf of Canyon. It is clear to this fact finder that Canyon
17 constructed the pool at the Chandler residence. Debtor even
18 recalls being the scheduler for that job. The September 24, 2001
19 settlement statement for the Kudlicki \$366,000 mortgage note for
20 the home does not contain a line item allocation providing
21 funding for furniture or appliance purchases.

22 Mr. Kudlicki does not exactly know the source of
23 funding for the July furniture and appliance purchases. On cross-
24 examination he suggested funding could be from yard sales, for
25 which he has no receipts. He could not recall if the Lariat
26 checks were used as well. On redirect examination he testified

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1 only one yard sale was conducted, although additional asset sales
2 were made to friends over time. This information was not
3 previously provided in defendants' responses to plaintiff's
4 discovery requests. He denied the Lariat checks were payments to
5 Canyon, although he signed lien waivers on Canyon's behalf.
6 Canyon had a half dozen unpaid subcontractors in July of 2001. In
7 response to questions from the court, he testified money for
8 household furnishings also came from personal savings. Up to
9 \$10,000 of the savings were kept at home in a gun safe, rather
10 than in the couple's banking accounts. This particular
11 explanation was not provided in defendants' pretrial discovery
12 responses. Debtor testified the monies used for her July
13 cosmetic surgery came from her personal savings. No documentary
14 evidence of such savings was presented. Debtor has no idea where
15 the money for the spending on the house came from, how much money
16 was raised from a yard sale or how much money was put into the
17 house by the couple. The fact finder does not find defendants'
18 testimony regarding the source of funds for personal expenditures
19 to be credible.

20 This fact finder further determines that defendants'
21 testimony that no money derived from Canyon State Pool operations
22 was used to pay personal expenses during the time subcontractors
23 were going unpaid is not credible. The Court finds that the
24 source of funding for defendants' personal spending was their
25 community interest in the revenue from Canyon State Pools.
26 Szobosan test., Debtor test., Test. of Richard James Kudlicki,

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1 Sr., Ex. 12, Ex. 17 at construction project agreement, p.2, Ex.
2 4, Ex. 16 at p.3, Ex. 15 at pgs. 1-4, Ex. 17, Ex. 19 at pgs. 12-
3 15 and 22-24 of deposition of Diana Glynn. Also, see Ex. 19 at
4 Pgs.5-15, 26, 30-31, 33 and exhibits for Scott Glynn deposition.

5 5. On August 24, 2001, a month after spending at least
6 \$25,000 on the new Chandler home, Richard Kudlicki sent a letter
7 on Canyon State letterhead to plaintiff and other unpaid
8 subcontractors. He indicated a lack of working capital meant
9 "...we have in effect 'borrowed' the operating capital from our
10 partner businesses, such as yours..." and requested patience as
11 "Michelle and I have retained the services of a management
12 consultant..." Debtor "supposes" she saw this letter before it
13 went out. She recalls sitting in on some of the meetings with the
14 management consultant. Debtor test., Ex. 32.

15 6. To the extent any of the following conclusions of
16 law should be considered findings of fact, they are hereby
17 incorporated by reference.

18 **CONCLUSIONS OF LAW**

19 1. To the extent any of the above findings of fact
20 should be considered conclusions of law, they are hereby
21 incorporated by reference.

22 2. Jurisdiction of defendants' bankruptcy case is
23 vested in the United States District Court for the District of
24 Arizona. 28 U.S.C. §1334(a) (1994). That court has referred all
25 cases under Title 11 of the United States Code and all adversary
26 proceedings and contested matters arising under Title 11 or
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1 522. As a signatory on the company banking account, who actually
2 wrote company checks, she could have made payment to
3 subcontractors, such as plaintiff. She instead chose to write
4 personal checks for household furnishings.

5 The court concludes plaintiff's claim against debtor
6 is nondischargeable under *Tsurukawa II* on both an agency theory,
7 as a marital business partner and on her own personal conduct. As
8 an active officer and co owner of the business, she tolerated,
9 ratified and participated in her husband's improper use of
10 subcontractor trust funds in violation of 11 U.S.C. § 523(a)(4).

11 6. Community property is not liable for a debt unless
12 it is shown to be a community claim. *Case v. Maready (In re*
13 *Maready)*, 122 B.R. 378, 381 (Bankr. 9th Cir. 1991). A marital
14 community whose actions do not conform to the standards imposed
15 by law should not earn the discharge received by joint debtors
16 who did not engage in the proscribed conduct. *Valley National*
17 *Bank v. LeSueur (In re LeSueur)*, 53 B.R. 414, 416 (Bankr. D.Az.
18 1985). This is such a community. In this case the court has
19 concluded there is no "innocent spouse." Accordingly the tests
20 established for liability of the community based on the acts of
21 only one spouse are inapplicable. See *F.D.I.C. v. Soderling (In*
22 *re Soderling)*, 998 F. 2d 730, 733 (9th Cir. 1993).⁵ The court

23
24 ⁵Even assuming debtor had been an "innocent" spouse, her
25 husband's tortious acts committed with the intent of benefiting
26 the community by keeping the family pool business operating,
27 would still impose liability on the marital community, regardless
28 of whether the community actually received a benefit. *In re*
Monroe, 282 B.R. 219, 221 (Bankr. D.Az. 2002), *Selby v. Savard*,
(continued...)

1 12-341.01(A), *Galam v. Carmel (In re Larry's Apartment, L.L.C.)*,
2 249 F.3d. 832, 836-37 (9th Cir. 2001). Fees may be awarded under
3 the statute, even though a single act constitutes both a tort and
4 a breach of contract, as long as the tort action could not exist
5 but for the breach of contract. *Ford v. Revlon, Inc.*, 153 Ariz.
6 38, 45, 734 P.2d 580, 587 (1987) (Attorneys fees awarded in
7 sexual harassment case, as tort could not occur but for the
8 breach of the implied contract created by Revlon's policies and
9 procedures). *Sparks v. Republic National Life Insurance Co.*, 132
10 Ariz. 529, 543-44, 647 P. 2d 1127, 1141-42 (1982) (Attorneys fees
11 awarded as tort for breach of implied covenant of good faith
12 could not arise but for existence of the insurance contract).
13 *See, Barmat v. John and Jane Doe Partners A-D*, 155 Ariz. 519,
14 522-24, 747 P. 2d 1218, 1221-23 (1987) (No fees awarded when legal
15 malpractice action does not arise from contract). Plaintiff's
16 cause of action for fraud or defalcation while acting in a
17 fiduciary relationship could not arise but for defendants' breach
18 of the underlying plumbing services contract. 11 U.S.C. § 523
19 (a)(4). Accordingly, plaintiff's nondischargeable debt will
20 include reasonable attorneys fees and costs.

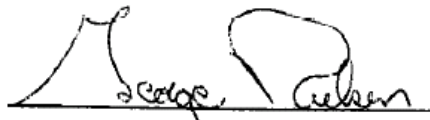
21 **ORDER**

22 IT IS ORDERED no later than ten days from the date of
23 these findings and conclusions, plaintiff will serve and file a
24 detailed attorneys fee application. Defendants will have seven
25 days from the date of service of the application to serve and
26 file objections. The court will thereafter resolve any disputes
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1 regarding the application and enter a final judgment.

2 DATED this 26th day of January, 2005.

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George B. Nielsen, Jr.
United States Bankruptcy Judge

Copies mailed this 26th day
of January, 2005, to:

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By /s/ Rachael M. Stapleton
Deputy Clerk