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Re: DIANA BRYANT
CASE NO. 00-64966

LETTER DECISION AND ORDER

At its regular motion term in Utica, New York, on November 27, 2001, the Court heard oral argument regarding the motion by Murray Kirshtein, Esquire ("Kirshtein"), as guardian of George Tapper ("Tapper"), to dismiss the case of Diana Bryant ("Debtor") or alternatively to convert the case to chapter 7. The matter was adjourned to the December 20, 2001, motion calendar. After oral argument on December 20, 2001, the Court advised the parties that it had concluded that the Debtor was ineligible to maintain her case pursuant to chapter 13 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code")and indicated that a letter-decision to that effect would be forthcoming.

On October 10, 2000, Debtor filed for relief under chapter 7 of the Code. By ex parte application and order, the Debtor converted the case to chapter 13 on February 16, 2001. On September 27, 2001, Kirshtein, who was not listed as a creditor in Debtor's original petition, filed a proof of claim in Debtor's case in the principal amount of $220,000. The total of Debtor's unsecured non-priority debts as set forth in her original petition was $133,835.77. This amount did not reflect the debt owed to Kirshtein.

According to Kirshtein, the relationship between Debtor and Tapper arose in July 1997, when Debtor was hired to provide day care service for the aging Tapper. During that time, Kirshtein asserts that Debtor abused her professional responsibilities and coerced Tapper to transfer certain of Tapper's stock to Debtor. Due to Tapper's advanced age and his diminished mental capacity, Kirshtein argues that the circumstances in this matter "constitute 'badges of fraud.'" The Supplemental Affidavit of Kirshtein's attorney, Louis Levine ("Levine"), filed November 27, 2001, at p.2., asserts that the claim filed on Tapper's behalf is grounded in conversion or alternatively in constructive trust. To verify Tapper's mental state, Kirshtein has filed a letter from Tapper's doctor stating that he diagnosed Tapper with Alzheimer's Disease in July 1996.

On November 8, 2001, Kirshtein filed this motion to dismiss or to convert to chapter 7. The motion is grounded in Code § 109(e), which states that "[o]nly an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $269,250 . . . may be a debtor under chapter 13 of this title." According to Kirshtein, Debtor's total unsecured claims exceed $350,000. For this reason, Kirshtein argues that Debtor does not qualify for relief under chapter 13, and this Court should dismiss her case

or convert it to chapter 7.

In response, Debtor contests Kirshtein's argument that Tapper was not competent when the transfer occurred in May 1997. According to Debtor, at the time of the transfer, Tapper was free to do with his property as he wished. Debtor further challenges the motion by arguing that Kirshtein has failed to prove that the stock transfer occurred as a result of Debtor's bad faith or fraud. Finally, Debtor objects to the validity of Kirshtein's claim in Debtor's bankruptcy case because the underlying cause of action on which the claim is based is time barred pursuant to the relevant statutes of limitations.

In response to Debtor's statute of limitations argument, Kirshtein notes that the claim at issue is grounded in either conversion or constructive trust. The New York State statute of limitations for conversion is three years and for constructive trust is six years. *See* New York Civil Practice Law and Rules ("CPLR") §§ 213(1), 214 (McKinney 1990). Kirshtein argues that, since Tapper was diagnosed with Alzheimer's disease in 1996, the statutes of limitations on actions arising from events after that diagnosis should be tolled pursuant to CPLR section 208, due to Tapper's "insanity." Additionally, Kirshtein asserts that the filing of Debtor's petition on October 10, 2000, further tolled the applicable statutes of limitations, pursuant to Code § 108(c).

As an initial matter, the Court finds that Kirshtein's claim is not barred by the statutes of limitations. The earliest that either party has asserted the transfer of stocks to have taken place was July 1997. Because the cause of action for Kirshtein's claim is alternately based on two valid legal theories, the Court finds that, not withstanding tolling provisions, even if the underlying action would be barred by the three-year time limit on conversion actions, it would in no event fall outside the six-year constructive trust statute of limitations. For this reason, the Court

concludes that the applicable statutes of limitations do not bar Kirshtein from asserting his claim in this Court. Consequently, no further analysis is necessary regarding the tolling effect of Code § 108(c) or section 208 of the CPLR.[1]

The Second Circuit's treatment of Code § 109(e) was comprehensively set forth in *In re Mazzeo*, 131 F.3d 295 (2d Cir. 1997). In *Mazzeo*, the chapter 13 debtor was held individually responsible by both the state and federal governments for his employer's failure to turn over tax money withheld from employees' paychecks in the amounts of $381,451.99 and $989,491.22 respectively. *See Mazzeo*, 131 F.3d at 299. The state government joined the federal government in moving to dismiss the debtor's chapter 13 case because his noncontingent, liquidated, unsecured debts exceeded the amount allowed under Code § 109(e). *See id.* at 300. The Second Circuit ultimately concluded that the debtor's tax debt was noncontingent and liquidated and, therefore, ought to be considered in the determination of a dismissal pursuant to Code § 109(e). *See id.* at 305. In so finding, the *Mazzeo* court engaged in a thorough analysis of the language comprising Code § 109(e). In particular, contextual interpretations of "noncontingent" and "liquidated" were set forth.

According to *Mazzeo*, a debt is noncontingent when "all of the events giving rise to liability for the debt occurred prior to the debtor's filing for bankruptcy." *Id.* at 303 (citations omitted). In contrast, a contingent debt is "one which the debtor will be called upon to pay only

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[1]Code § 108(c) would provide Kirshtein no relief if the statute of limitations had run on either of his claims before the bankruptcy petition was filed because that provision "only calls for applicable time deadlines to be extended for 30 days after notice of the termination of a bankruptcy stay, if any such deadline would have fallen on an earlier date." *Aslanidis v. U.S. Lines, Inc.*, 7 F.3d 1067, 1073 (2d Cir. 1993). Notably, Code § 108(c) "does not provide for tolling of any externally imposed time bars." *Id.*

upon the occurrence or happening of an extrinsic event which will trigger . . . liability." *Id.* at 303 (quoting *Brockenbrough v. Commissioner*, 61 B.R. 685, 686 (W.D. Va. 1986)). Significantly, the *Mazzeo* court further states that, "[a]lthough the creditor's ability to collect the sum due him may depend upon adjudication, that does not make the debt itself contingent." *Id.* Rather than focusing on adjudication, the concept of contingency is concerned with the point in time when the liability or obligation to answer for a claim arises. *See id.* at 303 (citing *In re Knight*, 55 F.3d 231, 236 (7th Cir. 1995).

With this basis of Second Circuit law, it appears as though the debt in the present matter is noncontingent. The transfer of stock in this matter took place in either 1997 or 1998. Debtor may or may not be liable for a legal wrong committed in those transactions, but the happening of no future event is needed for that liability to be triggered. Whether or not she is liable depends only on facts that existed at the time the bankruptcy petition was filed in 2000. Moreover, pursuant to *Mazzeo*, a judicial determination on liability is unnecessary to a finding of noncontingency. For these reasons, Debtor's debt to Kirshtein's is most appropriately classified as noncontingent.

Addressing the meaning of "liquidated," *Mazzeo* relies on the following principle:

> The terms "liquidated" and "unliquidated" generally refer to a claim's value (and the size of the corresponding debt) and the ease with which that value can be ascertained. The concept of liquidation for purposes of section 109(e) relates only to the amount of liability not the existence of liability. If the value of the claim is easily ascertainable, it is generally viewed as liquidated. If that value depends instead on a future exercise of discretion, not restricted by specific criteria, the claim is unliquidated.
>
> Thus, the courts have generally held that a debt is "liquidated" . . . where the claim is determinable by reference to an agreement or

by a simple computation.

Id. at 304. *Mazzeo* further notes that, although some courts have held that the existence of a dispute, without more, is sufficient to render a claim unliquidated, "the vast majority of courts have held that the existence of a dispute over either the underlying liability or the amount of a debt does not automatically render the debt either contingent or unliquidated." *Id.* at 305.

Based on the foregoing, it appears as though Kirshtein's claim is also liquidated. Kirshtein's claim for $220,000 is grounded in the allegation that Debtor unlawfully appropriated stocks from Tapper by preying on his old age and feeble mind. In order to compute the value of Kirshtein's claim, one merely needs to determine the value of the stocks on the dates of the transactions and add those figures together based on the quantity of stocks transferred. Since Debtor evidently does not challenge the fact that the stocks were transferred, it would likely be possible to ascertain the names and amounts of the stocks transferred and the dates on which the transactions took place.[2] *See* Memorandum of Debtor's attorney, Edward G. Kaminski ("Kaminski"), filed November 20, 2001, at 1 (stating that the conveyance at issue took place in

[2]Levine filed a Supplemental Affidavit on December 18, 2001, which purports to set forth the value of the stock wrongfully transferred by Tapper to Debtor. In support, Levine attaches portions of the transcript of an examination of Debtor on January 25, 2001, regarding another matter. The transcript reflects amounts of certain stock transferred to Debtor. Schedule D of Debtor's 1999 federal income tax returns, reflecting capital gains and losses, is also attached. That exhibit shows the dates that certain stocks were acquired and sold and the amount of gain resulting from the sales. Kirshtein further asserts that, although Debtor does not concede to the transfer by Tapper of some of the stock reflected in her tax returns, Kirshtein "believes" the stock to have been obtained from Tapper. It appears evident that Kirshtein does not know definitively the exact stock that Debtor received from Tapper, the number of shares that were transferred or the dates that the transfers took place. With these figures, Kirshtein would be able to determine the exact amount of its claim. Despite the possible obstacles to obtaining the correct data, however, Kirshtein's claim nonetheless qualifies for consideration in the unsecured debt limit of Code § 109(e).

1997 when Tapper was legally free to do whatever he wished with his assets). Because the meaning of "liquidated" depends only on the amount of liability and not the existence thereof, Kirshtein's claim can be deemed "liquidated," as the amount can be readily determined. Moreover, Debtor's dispute of the liability to Kirshtein will not defeat the claim's existence for Code § 109(e) purposes.

Although *Mazzeo* addressed the terms of Code § 109(e) in the context of government claims for unpaid taxes, courts confronting the issue in terms of claims based on alleged tortious acts similar to those alleged in the present matter have also found the debt to be noncontingent and liquidated. For example, the debtor in *In re McGovern*, 122 B.R. 712, 713-14 (Bankr. N.D. Ind. 1990), was accused of misappropriating a substantial amount of funds from a non-profit organization while he was serving as its executive director. Like Debtor in the present matter, the debtor in *McGovern* denied all of the operative facts concerning liability on the claim. *See id.* at 714. In analyzing the meanings of "noncontingent" and "liquidated," the *McGovern* court noted that tort claims will rarely be contingent because the events giving rise to a tort claim have usually already occurred, and liability is not dependant on some future event. *See id.* at 716. However, the decision further states that, in contrast, tort claims will also usually be unliquidated, particularly where claims for injuries to persons or properties are concerned because judgment and discretion are needed to determine the amount of loss. *See id.* After noting this presumption against finding tort claims to be "liquidated," *McGovern* concluded nonetheless that the particular claim in that matter ought to be characterized as "liquidated." *See id.* at 717. In arriving at this conclusion, the court stated that, although "judgment and discretion must necessarily play a role in determining the existence of liability, the amount of any liability will require only simple

arithmetic." *Id*; *see also In re Jordan*, 166 B.R. 201 (Bankr. D. Me. 1994) (holding that employer's claim against employee-bankruptcy debtor for misappropriation of funds was contingent and liquidated).

Likewise, in *In re McGarry*, 230 B.R. 272 (Bankr. W.D. Pa. 1999), a chapter 13 debtor, who was an independent stock broker, was accused by certain clients of improperly advising them regarding their investments. *See McGarry*, 230 B.R. at 274. Accordingly, they filed claims in the debtor's bankruptcy case. *See id.* The debtor's clients in *McGarry* asserted that their damages could be measured by the consideration they paid for the property less its fair market value at the time of purchase. *See id.* The debtor countered that the process of such calculations would be too arduous. *See id.* To this, the *McGarry* court responded by stating "[t]hat such calculations may be time-consuming and difficult, but the amount of the claims is determined by reference to a specific standard and, therefore, for purposes of determining eligibility for Chapter 13 relief, the claims must be counted as liquidated." *Id.*

Pursuant to Second Circuit law as set forth in *Mazzeo*, as well as the rationale underlying other persuasive decisions, the Court finds Kirshtein's claim in the present matter to be most appropriately deemed "noncontingent" because all of the events giving rise to the claim had occurred by the time Debtor filed her petition. The claim is also "liquidated," as that term is used in Code § 109(e) because its value can be determined with relative ease by reference to a mathematical computation. Consequently, Kirshtein's claim must be included in the analysis of the debt limitation set forth in Code § 109(e). Because the total of Debtor's noncontingent, liquidated, unsecured debts exceeds the amount set forth in Code § 109(e), the Court finds Debtor

ineligible for relief under chapter 13 of the Code.[3]

IT IS SO ORDERED.

Dated at Utica, New York

this 28th day of December 2001

STEPHEN D.GERLING
Chief U.S. Bankruptcy Judge

[3] The Court notes that the instant motion seeks in the alternative to convert this case to one pursuant to Chapter 7. In addition a motion by Creditor AmeriCu Credit Union to convert Debtor's case from chapter 13 to chapter 7 was filed on May 2, 2001. That motion remains pending before this Court and is to be scheduled for an evidentiary hearing at a date to be determined. Accordingly, the Court will join Kirshtein's conversion motion with that of AmeriCU and hear evidence on both motions at the time of the hearing to be scheduled.