

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

In re)	Chapter 11
)	
JAMES M. DONNAN, III and)	Case No. 11-31083-JPS
MARY W. DONNAN,)	
)	
Debtors.)	
_____)	
)	
VALERIE V. FENNELL,)	
)	
Plaintiff,)	Ad. Pro No.
)	
v.)	
)	
JAMES M. DONNAN, III,)	
)	
Defendant.)	
_____)	

**COMPLAINT OF VALERIE V. FENNELL, AS EXECUTOR,
TO DENY DISCHARGE OF DEBT**

Valerie V. Fennell (“Mrs. Fennell”), as executor of the probate estate (the “Probate Estate”) of Dr. Stephen S. Fennell (“Dr. Fennell”) hereby avers:

A. PARTIES, JURISDICTION AND VENUE

1. Dr. Fennell engaged in two investment contracts with GLC Limited (“GLC”), copies of which are included in Mrs. Fennell’s proof of claim, filed on August 22, 2011, and designated as Claim 13-1; they are described below. Dr. Fennell died on May 30, 2011. As noted above, Mrs. Fennell is the executor of his probate estate.

2. The defendant (“Mr. Donnan”) filed this bankruptcy case as a chapter 11 case on July 1, 2011, and, with Mrs. Donnan, remains a debtor in possession.

3. This adversary proceeding is brought under 11 U.S.C. § 523(c)(1) and F.R.B.P. 7001(6) (“a proceeding to determine the dischargeability of a debt”).

4. The district court has jurisdiction over this complaint under 28 U.S.C. § 1334.

5. Venue is proper here under 28 U.S.C. § 1409(a).

6. This bankruptcy court has authority to enter a final judgment in this adversary proceeding as follows:

a. 28 U.S.C. § 157(a) permits the district court to refer matters to bankruptcy judges;

b. The district court has referred matters to bankruptcy judges to the extent permitted in 28 U.S.C. § 151-58;

c. 28 U.S.C. § 157(b)(1) provides that bankruptcy judges “may hear and determine” and may issue final judgments, on matters that (i) are referred as set forth in the subparagraph just above, and (ii) are “core proceedings;”

d. The complaint commences a core proceeding under 28 U.S.C. § 157(b)(2) (I) (“determinations as to the dischargeability of particular debts”).

7. With apologies for a triple negative, Stern v. Marshall, ___ U.S. ___, 2011 U.S. LEXIS 4791 (June 23, 2011), does not render the authority set forth just above unconstitutional, because the complaint does not seek “a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim” (last paragraph of majority opinion). Rather, the complaint seeks final judgment on a uniquely federal law issue – the discharge or not of personal liability on a particular debt – that may be resolved only in the process of ruling on a creditor’s proof of claim.

B. NARRATIVE

8. GLC Limited (“GLC”) was formed in March, 2004, originally with its principal business being the sale and/or redistribution of wholesale retail consumer products.

9. Mr. Donnan solicited investments for GLC.

10. By agreement with GLC, Mr. Donnan received a commission of 15-20% of each investment that Mr. Donnan solicited.

11. The terms for each investment in GLC were similar, as follows: investors generally agreed to invest in GLC funds for 6 months to 1 year at interest rates ranging from 50-70% per annum; principal and interest were generally due upon maturity of the agreement.

12. In general, as part of his inducement to invest, Mr. Donnan told potential investors that the purpose of the investment was for GLC to purchase inventory.

13. In general, as part of his inducement to invest, Mr. Donnan told potential investors that most or all of the inventory that the investor’s money would buy was pre-sold.

14. Based upon GLC’s new management’s preliminary financial analysis for the years 2007 through 2010, a disparity exists between amounts invested in GLC by the investors and the actual inventory purchases by GLC (in dollars):

Year	Investor Money	Inventory Purchased
2007	799,000	775,000
2008	12,349,000	2,100,000
2009	33,411,000	5,281,000
2010	35,357,000	3,637,000
Total	\$81,916,000	\$11,793,000

15. Dr. Fennell was a highly regarded maxillofacial surgeon. He was diagnosed with leukemia. In an increasingly desperate effort to pay for his own medical bills, he bought Mr. Donnan’s story about GLC’s inventory purchases. As noted above, Dr. Fennell died on May 30, 2011.

16. The Fennell Claim seeks \$427,500. It contains two exhibits: Exhibit A is the contract for Dr. Fennell's investment of \$150,000 to GLC on May 1, 2010. Exhibit B is the contract for Dr. Fennell's additional investment of \$300,000 on September 1, 2010. Dr. Fennell received one \$22,500 payment from GLC, and Mr. Donnan may have sent Dr. Fennell another \$25,000.

17. Dr. Fennell sent each of his investments identified above directly to GLC by wire transfer through instructions that Mr. Donnan gave him.

18. Dr. Fennell's worsening medical condition dramatically increased his need for income for two reasons: (i) his ability to earn money decreased; and (ii) his medical expenses increased.

19. Dr. Fennell's medical condition adversely affected his mental condition, in particular, his ability to make sound financial decisions. The adverse effect increased as the leukemia worsened.

20. Mr. Donnan personally solicited Dr. Fennell to invest.

21. Mr. Donnan was then known to Dr. Fennell and others in the Athens area as a man of honesty and integrity.

22. Mr. Donnan explained to Dr. Fennell that GLC needed the investments to purchase inventory, and made no mention of any other need for the investments.

23. Mr. Donnan knew when he took Dr. Fennell's money that GLC was using investors' money in great part to pay interest and principal on earlier investments and to pay himself and other GLC insiders, rather than to buy inventory. For the purposes of this adversary proceeding, we define the solicitation of investments ostensibly for a legitimate purchase, combined with the actual use of those investments primarily to pay interest or principal on earlier

investments, or to pay the solicitors and their agents, as a “Ponzi scheme.” Its eponym is well known; see, e.g., Cunningham v. Brown, 265 U.S. 1 (1924).

24. On at least one of the two occasions, Mr. Donnan knew when he took Dr. Fennell’s money that he would send some or all of that money straight to another investor as soon as Dr. Fennell’s money hit the GLC account.

25. Mr. Donnan knew when he took Dr. Fennell’s money that GLC was not paying its debts as they came due.

26. Mr. Donnan knew when he took Dr. Fennell’s money that GLC was going to use that money primarily or completely to pay interest or principal on earlier investments, and/or to pay Mr. Donnan and possible others a solicitation fee, and not to buy inventory.

27. Mr. Donnan vigorously urged Dr. Fennell to invest, even after learning of Dr. Fennell’s dire medical condition and questionable mental condition, after learning that GLC was not paying its debts as they came due, and with knowledge that GLC, through Mr. Donnan and others, was engaged in conduct defined above as a Ponzi scheme.

28. Dr. Fennell justifiably relied on Mr. Donnan’s representations.

29. Mr. Donnan’s acts in obtaining Dr. Fennell’s investments for GLC violated state and federal securities laws.

C. REQUESTS FOR RELIEF

Count I: Nondischargeability under 11 U.S.C. § 523(a)(2)

30. Mrs. Fennell hereby adopts all paragraphs above by reference under F.R.Civ.P. 10(c), made applicable by F.R.B.P. 7010.

31. Mr. Donnan’s acts described above constitute “false pretenses” as those words are used in 11 U.S.C. § 523(a)(2), namely, both an implied misrepresentation or conduct which

creates and fosters a false impression, and inducements to invest based on a contrived and misleading understanding of the transaction. (We take these definitions from Burke v. Riddle (In re Riddle), 2011 Bankr. LEXIS 2226 (Bankr. N. D. Ga. 2001, J. Bonapfel), which that opinion quotes from earlier cases.)

32. Mr. Donnan's acts described above constitute "false representation[s]" as those words are used in 11 U.S.C. § 523(a)(2), namely, express misrepresentations of fact. (Again the definition is from Burke v. Riddle.)

33. Mr. Donnan's acts described above constitute "actual fraud" as those words are used in 11 U.S.C. § 523(a)(2), namely, deceit, artifice, trick or design involving direct and active operation of the mind, used to circumvent and cheat another. (Again the definition is from Burke v. Riddle.)

34. Mr. Donnan acted with an intent to deceive, as may be inferred from the knowledge that he had when he solicited and took Dr. Fennell's money, the personal profits he gained from such investments, and Mr. Donnan's recognition of the need to keep getting investments so that the company would not collapse. These inferred facts are set forth in the paragraphs adopted by reference.

35. Mrs. Fennell is entitled to except Mr. Donnan's debt to her from discharge under 11 U.S.C. § 523(a)(2).

Count II: 11 U.S.C. § 523(a)(4)

36. Mrs. Fennell hereby adopts all paragraphs above before the beginning of Section C by reference under F.R.Civ.P. 10(c), made applicable by F.R.B.P. 7010.

37. Mr. Donnan's acts described above constitute "embezzlement" as those words are used in 11 U.S.C. § 523(a)(4), namely, the "fraudulent appropriation of property by a person to

whom such property has been lawfully entrusted[.]” Moore v. United States, 160 U.S. 268, 269 (1895), quoted in Griff v. Marsh (In re Marsch), 449 B.R. 431, 437 (Bankr. N.D. Ga. 2011) (Judge Murphy).

38. The fraudulent appropriation was the use of Dr. Fennell’s money for anything other than the purchase of inventory.

39. Mrs. Fennell is entitled to except Mr. Donnan’s debt to her from discharge under 11 U.S.C. § 523(a)(4).

Count III: 11 U.S.C. § 523(a)(6)

40. Mrs. Fennell hereby adopts all paragraphs above before the beginning of Section C by reference under F.R.Civ.P. 10(c), made applicable by F.R.B.P. 7010.

41. Mr. Donnan’s acts described above constitute the “willful and malicious injury by the debtor to another entity or to the property of another entity” as those words are used in 11 U.S.C. § 523(a)(6). Dr. Fennell is the “another entity” in that quote.

42. The injury was “malicious” because Mr. Donnan took it wrongfully and without just cause, even if Mr. Donnan acted without personal hatred, spite, or ill-will to Dr. Fennell. See Burke v. Riddle, cited above, and its quotation of Hope v. Walker (In re Walker), 48 F.3d 1161, 1164 (11th Cir. 1995).

43. The injury was “willful” because when Mr. Donnan took Dr. Fennell’s money, there was an objective certainty that an injury would occur, whether or not Mr. Donnan subjectively intended to harm Dr. Fennell or Dr. Fennell’s property. Again see Burke v. Riddle and its citations.

44. Mrs. Fennell is entitled to except Mr. Donnan’s debt to her from discharge under 11 U.S.C. § 523(a)(6).

WHEREFORE Mrs. Fennell prays under any and all counts that Mr. Donnan's debt to her be established as the net loss from her husband's investments in GLC, that the debt be excepted from discharge, and that the court grant such further relief as is just.

Dated: October 27, 2011
Atlanta, Georgia

/s/Bill Rothschild
William L. Rothschild
Georgia Bar No. 616150
Ogier, Rothschild, Rosenfeld & Ellis-Monro
P.C.
170 Mitchell Street, S.W.
Atlanta, GA 30303-3424
404/525-4000
404 526 8855 fax
br@eorrlaw.com

R. Keegan Federal, Jr.
R. Keegan Federal, Jr.
GA Bar No.: 257200
FEDERAL & HASSON, LLP
Two Ravinia Drive
Suite 1776
Atlanta, GA 30346
Tel: 678-443-4044
Fax: 678-443-4081
keegan@federalhasson.com

John W. Timmons, Jr.
Georgia Bar No.: 712700
Timmons Warnes & Associates LLP
244 E. Washington Street
Athens, GA 30603-8012
Tel: (706) 549-0010
Fax: (706) 546-8017
Email: john@classiccitylaw.com

Counsel for Mrs. Fennell