Not intended for publication

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

IN RE

Charles Crider dba
The Antiques Gallery and
Linda Beth Crider
aka Beth Jones Johns, **Case No. 98-14730**

Debtors. **Chapter 7**

Enid Jordan,

Plaintiff,

v. **Adv. Pro. No. 99-5080**

Charles Crider dba
The Antiques Gallery and
Linda Beth Crider
aka Beth Jones Johns,

Defendant.

MEMORANDUM OPINION AND ORDER RE
COMPLAINT OBJECTING TO DISCHARGE OF DEBT AND TO DETERMINE DISCHARGEABILITY

The Court conducted a trial in this matter on August 6, 1999. FED. R. BANKR. P. 7001. Pursuant to 28 U.S.C. § 157(b)(2), this is a core proceeding. After reviewing the testimony from the trial and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

Prior to the filing of the petition herein, Enid Jordan, ("Jordan"), placed several pieces of personalty with the debtors on a consignment basis. Such items included, but were not limited to, 15 pieces of fillagree and an oil painting titled "The Night Watch." According to the testimony at the trial, Jordan paid $150 for each piece of fillagree and $4,275.00 for the painting. The agreement with respect to the fillagree was that Jordan would receive 80% of the selling price and the debtor would receive the remaining 20%. With respect to the painting, the parties entered into a "Consignment Agreement," dated June 1, 1998, which contained the following provisions:

> a. Antique Gallery will repair the painting as needed.
> . . .
> d. All offers will be discussed with Mrs. Jordan prior to any transaction being completed.
> e. Mrs. Jordan will receive 60% of the selling price with the remainder going to the Antique Gallery.

Trial Exhibit 1.

The parties were in agreement at the trial that "The Night Watch" was in a rather dismal state when it was placed on consignment with the debtors. According to the debtor's testimony, the painting was torn in places, was aging and was full of holes, the largest of which was between 8 and 9 inches in diameter. Jordan herself testified that it had been stored in the garage prior to being placed on consignment.

When Jordan went to the Antiques Gallery to reclaim the personalty she had placed on consignment, neither the fillagree nor the painting were in the possession of the debtors. This absence was a surprise to Jordan since she had never been notified by the Criders that any of her personalty had been sold nor had she ever received any money for the items.

No proof was introduced at the trial as to what happened to the missing fillagree; however, the Court feels safe in assuming that their absence from the shop is indicative of the fact they were sold.

The debtor did admit at the trial that "The Night Watch" was sold in August 1998 for $2,000.00. Although the terms of the "Consignment Agreement" required the debtor to discuss all offers with Jordan before selling the painting, Crider sold "The Night Watch" without consulting Jordan. In fact, Crider's own testimony established that he never even told Jordan of the sale until the August 6th trial in this adversary proceeding. Crider admitted that in so doing he breached the June 1, 1998, "Consignment Agreement."

At the heart of this adversary proceeding is Jordan's contention that "The Night Watch" was worth more than the $2,000 selling price Crider obtained for it. Despite this contention, Jordan testified that Crider knew more about the value of the painting than she did. Although Jordan had proof of what she paid for the painting, she did not have proof of any other value the painting might have had.

II. CONCLUSIONS OF LAW

11 U.S.C. § 523(a)(4)

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) 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;

11 U.S.C. § 523(a)(4). Pursuant to §523(a)(4), a debt resulting from embezzlement by the debtor can be excepted from discharge. Under federal law, embezzlement is commonly defined as "the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." *In re Carlton*, 26 B.R. 202 (Bankr. M.D.Tenn. 1982) (quoting *Moore v. United States*, 160 U.S. 268, 269, 16 S.Ct. 294, 295, 40 L.Ed. 422 (1895)); *In re Sutton*, 39 B.R. 390, 395 (Bankr. M.D.Tenn. 1984). In order to prove embezzlement, one must establish "fraud in fact" which involves moral turpitude or intentional wrong. *Sutton* at 395. Embezzlement must be proven by clear and convincing evidence. *Id.*

In the case at bar, Jordan placed several items with the debtors on a consignment basis. The debtors never notified Jordan that any pieces of the fillagree had been sold or that the painting, "The Night Watch" had been sold. Jordan never received any money for these goods. When Jordan went to The Antiques Gallery to reclaim the fillagree and the painting, she found that they were no longer in the possession of the debtors.

Evidence was introduced at the trial that the painting was sold in August 1998 for $2000.00. No proof was introduced that the fillagree was sold; however the debtor did not dispute that such contention. Jordan did not receive any of the proceeds of these sales.

Jordan testified that she had paid $150.00 for each piece of fillagree; however, there was no proof introduced at the trial as to the value of the fillagree. Because of this lack of proof, the Court will value these at $100 apiece. Jordan testified that fifteen pieces of fillagree were missing. Both Jordan and Crider testified that the consignment agreement with respect to the fillagree was an 80%/20% arrangement. As a result, Jordan will be granted a non-dischargeable judgment against the debtors for $1200.00 for the fillagree.

As for the painting, Jordan testified that she paid $4,275.00 for the painting. It was in a state of disrepair at the time she placed it on consignment with the debtors. Pursuant to the June 1998 consignment agreement, the debtors were to repair the painting before offering it for sale and then

discuss any offers with Jordan prior to selling it. The proof at the trial firmly established that neither of these events took place. The Criders did not repair the painting and they sold it without discussing the $2,000 offer with Jordan. As a result of these two facts coupled with Jordan's testimony that Crider knew more about the value of the painting than she did, the Court finds that "The Night Watch" was worth $3,000.00. Because the agreement with respect to the painting was 60%/40%, the Court will grant Jordan a non-dischargeable judgment against the debtors for $1800.00 for the painting.

III. ORDER

It is therefore **ORDERED** that the Complaint Objecting to Discharge of Debt and to Determine Dischargeability is **GRANTED AS FOLLOWS:**

Enid Jordan is granted a non-dischargeable judgment against the debtors for $3,000.00. **IT IS SO ORDERED.**

By the Court,

G. Harvey Boswell
United States Bankruptcy Judge

Date: September 1, 1999