

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

IN RE:

JAMES WAYNE LOWERY,
Debtor.

Case No. 00-26537whb
Chapter 7

SUN ENTERPRISES, INC.,
Plaintiff,

v.

Adversary Proc. No. 00-0499

WAYNE LOWERY,
Defendant.

MEMORANDUM OPINION AND ORDER
ON COMPLAINT TO DETERMINE DISCHARGEABILITY

In this adversary proceeding, a complaint was filed by Sun Enterprises, Inc. (“Sun”) seeking a determination that a judgment debt of \$43,118.54 was excepted from the Debtor’s discharge pursuant to 11 U.S.C. § 523(a)(4)’s exception “for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.” The Debtor, who was originally represented by counsel that was permitted to withdraw, appeared for trial *pro se*.

The Plaintiff filed a pretrial brief, essentially asserting that it was entitled to a judgment of nondischargeability based upon the preclusive effect of the judgment from the Circuit Court of Shelby County, Tennessee. In a prebankruptcy suit in the Circuit Court, Sun had obtained a default judgment on September 14, 1999, for the \$43,118.54. The Debtor’s chapter 7 bankruptcy was filed on June 2, 2000; therefore the amount of the debt to Sun was fixed prior to the bankruptcy filing, and that judgment amount is entitled to preclusive effect. Sun, however, without relief from the automatic stay, returned to the Circuit Court and obtained an amended judgment on September 1, 2000, which did not change the amount but added “which he [Lowery] embezzled and wrongfully

took from Sun Enterprises, Inc.” Sun argued in this Court that preclusion attached to this amendment as well, but the Court disagrees.

As stated, the amended judgment was obtained postbankruptcy and without relief from the automatic stay of § 362(a). The amendment of the judgment to add an underlying factual basis for the judgment, and grounds for the § 523(a)(4) exception, was a judicial, fact-finding function of the state court requiring more than mere ministerial acts by the Circuit Court. As such, the actions in the state court violated the automatic stay and are voidable by the effect of § 362(a). *See, e.g., Soares v. Brockton Credit Union (In re Soares)*, 107 F.3d 969 (1st Cir. 1997).

This Court, therefore, heard proof on March 20, 2001, from Sun and the Debtor. The proof established that the Debtor had been employed previously by Sun as its general manager of a Scottish Inn motel in Shelby County, Tennessee. As such, he was responsible for making daily reports on income and expenses, as well as making the required deposits to Sun’s local bank account. Although on one hand the Debtor appeared to be denying embezzlement, with his contention that he had used some of the money that should have been deposited for required expenditures at the motel, the Debtor did not support that testimony with any proof of his expenditures on Sun’s behalf. Sun’s proof included deposit slips made out by the Debtor but for which deposits were not actually made. In an effective admission of wrongdoing, the Debtor returned approximately \$1,350 to Sun when he was asked about money missing from the safe. More importantly, the Debtor admitted that, when confronted by Dr. Ray, Sun’s principal, of missing money, the Debtor signed Exhibit 6. This was a specifically worded “Agreement” acknowledging that the Debtor “embezzled money in the order of tens of thousands of dollars...” In that Exhibit, the Debtor agreed to make monthly payments to Sun, but none have been made.

The proof as a whole, including the Debtor’s admissions, establish that the Debtor did embezzle money from Sun while he was employed as its motel manager. The amount of the debt has been established by the prebankruptcy judgment, although Sun’s proof before this Court also supported that amount. *See Exhibits 1, 2, 3, 4, 7, 8, and 9.*

IT IS THEREFORE ORDERED that, based upon the proof before this Court, the Court finds that the Debtor did embezzle funds from the Plaintiff, Sun Enterprises, Inc., and the Court concludes that the prebankruptcy judgment for \$43, 118.54 is excepted from the Debtor’s general discharge

pursuant to 11 U.S.C. § 523(a)(4). Interest on and collection of the nondischargeable judgment shall be under the laws of the State of Tennessee and the procedures of the Circuit Court of Shelby County, Tennessee, where the monetary judgment was obtained.

The Exhibits introduced by Sun shall be returned to Roscoe Feild, attorney for Sun, after a judgment on this Order becomes final and with no appeal pending.

SO ORDERED this 3rd day of April, 2001.

William Houston Brown
UNITED STATES BANKRUPTCY JUDGE

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