UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MICHIGAN

In re:

DUSTIN D. COLEMAN,

Debtor.
_____/

Case No. 23-01548-swd
Hon. Scott W. Dales
Chapter 13

DAVID M. ALLEN DDS & ASSOCIATES, LLC, d/b/a AFDENT,

Plaintiff,

v.

DUSTIN D. COLEMAN,

Defendant.
_____/

Adversary Pro. No. 23-80069

MEMORANDUM OF DECISION AND ORDER

PRESENT: HONORABLE SCOTT W. DALES
Chief United States Bankruptcy Judge

The issue plaintiff David M. Allen, DDS & Associates, LLC, or "AFDENT," raises in its present motion for summary judgment is the same issue remaining after the last: whether or to what extent the debt of defendant Dustin D. Coleman, reflected in the Agreed Judgment,[1] represents a non-dischargeable debt under 11 U.S.C § 523(a)(2), (a)(4), or (a)(6).[2] The principal differences between the present summary judgment motion (ECF No. 22, the "Motion") and the first are (1) AFDENT's addition of more information regarding Mr. Coleman's ex-husband's

[1] The capitalized terms in this opinion are the same as those in the Memorandum of Decision and Order dated May 23, 2024 (ECF No. 17, the "First MDO"). The court refers to the First MDO for a more complete recitation of the background of the parties' dispute.

[2] References to "Bankruptcy Code" or to specific statutory sections are to 11 U.S.C. §§ 101-1532. References to "Bankruptcy Rule" are to the Federal Rules of Bankruptcy Procedure. References to "Rule" are to the Federal Rules of Civil Procedure, made applicable to this proceeding by the Bankruptcy Rules.

embezzlement scheme, including the affidavit of Dr. David M. Allen, and (2) its expanded discussion of *Bartenwerfer v. Buckley*, 598 U.S. 69 (2023), the Supreme Court's recent decision involving a debtor's vicarious liability for fraud-related, non-dischargeable debts.

The Defendant filed his initial response, which did not include an affidavit, and during oral argument on the Motion the court announced its intention to allow him to supplement his response. *See* Fed. R. Civ. P. 56(e). After the Defendant supplemented his response, including with his affidavit, the court gave Plaintiff an opportunity to reply. Plaintiff replied on December 6, 2024. The matter is ripe for decision.

Neither the more robust discussion of *Bartenwerfer* nor the additional factual information persuades the court that AFDENT has met its summary judgment burden of establishing that the entire debt reflected in a civil judgment (the "Agreed Judgment") should be excepted from discharge under § 523(a). Therefore, the court will deny this Motion as it denied the last. *See* First MDO (ECF No. 17). The court applies the same summary judgment paradigm to the current Motion. *Id.* at pp. 2-3 (citing Supreme Court's 1986 summary judgment trilogy of *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986), and, 475 U.S. 574, 587 (1986)).

AFDENT is a dental practice in Fort Wayne, Indiana, that once employed Defendant's now ex-husband, Brian Nordan. Plaintiff alleges -- with considerable evidentiary support -- that Nordan unlawfully included Defendant on Plaintiff's employee payroll from 2012 to 2018, and that Nordan secretly charged numerous purchases and expenses to Plaintiff's firm for the benefit of himself and the Defendant, who were a couple during the relevant period (and, in time, were married). Eventually, Nordan's scheme came to light, and he and the Defendant faced federal criminal

charges, including wire fraud. Defendant pled guilty and agreed to a criminal restitution award in the amount of $149,756.00, which the court previously declared would survive his discharge.

As noted above, in addition to the restitution award, Defendant consented to the entry of the Agreed Judgment in the amount of $343,858.82, representing the debt at issue in AFDENT's current Motion. The debt reflected in the Agreed Judgment overlaps with the restitution award, as appears from the fact that Plaintiff must give the Defendant credit, dollar for dollar, to satisfy the former for any payments applied to the latter. As a practical matter, the parties are sparring over approximately $194,102.82 -- the difference between the prepetition criminal and civil awards, and therefore the amount of the debt that Plaintiff must prove represents an obligation falling under § 523(a).

Almost without exception, the Motion, supporting brief, and evidentiary support detail Nordan's fraudulent activities, and ask the court either to assume that the Defendant had to have known he was participating in a fraudulent scheme or, under *Bartenwerfer*, must bear the consequences of his ex-husband's fraud irrespective of his precise role in it. As the court suggested on the record, the first aspect of Plaintiff's argument depends on inference, and the second overstates *Bartenwerfer.*

The Defendant's recently filed affidavit declares, under penalty of perjury, that he worked for AFDENT from 2012-2018, the last two years as part of a "mutually agreed arrangement between Afdent Principals and [Nordan] to be part of the overall compensation package of my ex-spouse with health insurance eligiability [sic] coverage being the basis of this decision." Affidavit of Dustin D. Coleman dated Nov. 29, 2024 (the "Coleman Aff.") at ¶ 2 (ECF No. 32 at p. 2). This allegation, which may suggest AFDENT's principals' complicity in insurance fraud, is not entirely fanciful. And, even though the Defendant concludes his sworn statement with a highly improbable

remark that he is not aware that his ex-spouse exceeded his authority while at AFDENT, the court will not reject the affidavit in full (as AFDENT hints should happen) because courts do not judge credibility under Rule 56. Moreover, as the cases make clear, on a Rule 56 motion the court must draw inferences in favor of the non-moving party, here Mr. Coleman. His affidavit contradicts Dr. Allen's allegations.

Along the same lines, the fact that AFDENT mustered three additional affidavits from employees in support of its Motion and reply, does not tip the credibility scale because, as noted, there is no such scale at this stage of the proceedings. *See Cacevic v. City of Hazel Park*, 226 F.3d 483 (6th Cir. 2000) (the court must "draw all reasonable inferences in favor of the moving party." and not "'weigh the evidence . . . but . . . determine whether there is a genuine issue for trial'") (quoting *Anderson v. Liberty Lobby*).

Similarly, Mr. Coleman now swears that he is not aware of "ever having an Afdent company provided credit card issued in my name and [has] no knowledge of ever having the possibility of spending company funds" at his discretion. Coleman Aff. at ¶ 4. His affidavit contradicts the assumption that he misused the AFDENT credit card that Mr. Nordan reportedly opened in his name. Drawing inferences in Defendant's favor, the court could find at trial that Mr. Nordan misappropriated Mr. Coleman's identity, just as Plaintiff alleges he misappropriated so much of its property. Having reviewed the summary judgment record, the court is not convinced that "it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 252.

Plaintiff's *Bartenwerfer* argument fares no better. The Supreme Court held that § 523(a)(2) is "agnostic" as to the identity of the fraudster but did not hold that spouses must answer for each other's fraud. Rather, as a careful reading of the majority opinion makes clear, the court saddled Mrs. Bartenwerfer with a non-dischargeable debt because California law made business partners

vicariously liable for partnership debts, even another partner's fraud debt. As the Supreme Court observed, "[s]ection 523(a)(2)(A) takes the debt as it finds it, so if California did not extend liability to honest partners, § 523(a)(2)(A) would have no role to play." *Bartenwerfer*, 598 U.S. at 82, 143 S. Ct. at 675. In other words, the state court imputed the husband's fraudulent intent to the wife "because the two had formed a legal partnership to execute the renovation and resale project." *Id.*, 598 U.S. at 73, 143 S. Ct. at 671. AFDENT has made no showing of any state law basis for charging the Defendant with his ex-husband's fraud, which takes *Bartenwerfer* off the table.

In short, although the Plaintiff has definitely compiled an impressive record of Mr. Nordan's pilfering of his former employer, it has failed to correlate the fruits of that scheme with the Agreed Judgment in a way that warrants depriving the Defendant of his day in court, when the court can evaluate the documents with the benefit of witness testimony and evaluate the witnesses with the benefit of in-courtroom examination. It will not suffice simply to amass documents of one person's fraud and ask the court to infer that another must have known. Perhaps if Rule 56 required the court to predict winners and losers at trial, today's decision might be different, but summary judgment only asks the court to identify genuine and material factual disputes. The court has done so and finds that it cannot resolve this controversy without a trial on the merits of the nature of the Agreed Judgment.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Motion (ECF No. 22) is DENIED.

IT IS FURTHER ORDERED that the Clerk confer with the parties to schedule a final pretrial conference to take place by telephone, preferably before the end of the calendar year, at

which time the court will reschedule the trial it previously adjourned in view of extended proceedings on the Motion.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Memorandum of Decision and Order pursuant to Fed. R. Bankr. P. 9022 and LBR 5005−4 upon Mr. Dustin D. Coleman, Sara E.D. Fazio, Esq., and Nicholas J. Spigiel, Esq.

END OF ORDER

IT IS SO ORDERED.

Dated December 9, 2024

Scott W. Dales
United States Bankruptcy Judge