NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In Re: Stephen C. Thayer and Nicole Thayer	Case No.: Chapter:	13-19815-ABA 7
Financial Casualty & Surety Company, Inc., Plaintiff v. Stephen C. Thayer and Nicole Thayer, Defendants.	Adv. No.: Judge:	14-1584 Andrew B. Altenburg, Jr.

OPINION ON SUMMARY JUDGMENT

This matter before the court is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I), and the court has jurisdiction pursuant to 28 U.S.C. § 1334, 28 U.S.C. § 157(a) and the Standing Order of Reference issued by the United States District Court for the District of New Jersey on July 23, 1984, as amended on September 18, 2012, referring all bankruptcy cases to the bankruptcy court. The following constitutes this court's findings of fact and conclusions of law as required by Federal Rule of Bankruptcy Procedure 7052.

PROCEDURAL HISTORY

Debtors Stephen C. Thayer (hereinafter, "Debtor") and Nicole Thayer ("Mrs. Thayer", collectively with the Debtor, the "Debtors") filed a no asset chapter 7 case on May 4, 2013. They failed to disclose the claims of Financial Casualty & Surety Company, Inc. ("FCS") on their bankruptcy petition and schedules and on August 23, 2013, they received their discharge and the case was closed. On April 10, 2014, Debtors moved to reopen their bankruptcy case to schedule the FCS claims and to avoid its prepetition judgment lien. The court granted the relief (including the lien avoidance) but also gave FCS (30) thirty days to file an adversary complaint objecting to dischargeability, which it did on June 24, 2014. The Debtors timely filed an answer to the adversary complaint.

Thereafter, FCS filed a Motion for Summary Judgment ("Motion") (Doc. 12), seeking judgment on its claims against the Debtors based on a judgment it obtained arising from a Sub-Producer Bail Bond Agreement entered into by the parties. In its complaint (Doc. 1, "Complaint"), FCS alleges that $165,000 of its total claim, attributable to bail bond forfeitures ("Forfeiture Debt"), is nondischargeable pursuant to section 523(a)(7), as a debt "for fine, penalty, or forfeiture payable to and for the benefit of a government unit, and is not compensation for actual pecuniary loss, other than a tax penalty." (Compl. ¶ 28). FCS also alleges that the Debtors' failure to remit $11,299.30 in premium payments for reported bail bond powers to FCS, and failure to return $6,399.00 in unreported bail bond powers of attorney to FCS, for a total of $17,698.30 ("Premium Debt"), is nondischargeable pursuant to section 523(a)(4), excepting from discharge a debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." (Compl. ¶¶ 25-27). FCS later argued section 523(a)(4) as an additional ground to deny discharge as to the Forfeiture Debt. (Doc. 35 ¶¶ 9-12).

At a hearing held January 13, 2015, and followed by an order dated January 30, 2015 (Doc. 24), this court denied the Motion as to FCS's claim under section 523(a)(4), without prejudice to develop the claim at trial. However, the court adjourned the portion of the Motion as to FCS's claim under section 523(a)(7) in order to allow FCS to submit a copy of the judgment it relied on in support of its claim and to file any further supplemental memorandum in support of its motion. The parties sought several adjournments and filed supplementary pleadings, and in their latest pleadings, both parties asked the court to decide the claims under this Motion based on documents filed[1], including a transcript of a deposition, (Doc 35, pp. 10-34) (the "Transcript"),[2] taken during this time.

Also, by letter dated May 21, 2015 (Doc. 39), FCS stated that it decided to dismiss Mrs. Thayer from the Adversary Proceeding, attaching a motion and proposed order for that purpose (Doc. 40). A hearing was scheduled for July 14, 2015 but the Order was not processed until it recently came to the attention of the court. As a result, Mrs. Thayer was dismissed as a Defendant in the Adversary Proceeding on August 17, 2015.

FINDINGS OF FACT[3]

The undisputed facts are as follows: FCS's claims stem from a prepetition judgment obtained by default against Debtors in the United States District Court for the District of New Jersey in the amount of $192,985.41[4] (the "Judgment") (Doc. 39, pp. 3-4), arising from breach of

[1] *See* Docs. 38 and 39.

[2] The court notes that none of the exhibits to the Transcript were introduced.

[3] As the parties have requested the court to decide the matter on the papers without the need for a trial on the merits, and since "FCS has no additional evidence it can present to support either the premium claim or the bond forfeiture judgment claim", (Doc. 39, p. 2), the court is confined to the Transcript and other submissions of the parties in making its findings of fact.

[4] Consisting of the Premium Debt ($17,698.30), Forfeiture Debt ($165,000.00), $3,172.70 in costs and fees associated with bond judgments, and $6,614.41 in reasonable and necessary attorney's fees and expenses.

a sub-producer bail bond agreement (the "Contract"). (Compl. ¶¶ 8, 11). The parties to the contract were:

- FCS as "Company";
- James V. Mascola, Genevieve A. Steward and Bail Group Management, LLC as General Agent (collectively, "BGM");
- Mr. Thayer and/or Shamrock Bail Bonds as Sub-Producer[5]; and
- Mrs. Thayer as Sub-Producer Indemnitor.

(*Id.* at ¶ 19, Ex. A).

The Contract, dated June 7, 2008, provided that the General Agent would supply bail bond powers of attorney to the Debtor. (*Id.* at Ex. A ¶ 2). FCS acted as surety. (Doc. 12-1, ¶ 3). The Contract further provided that the Debtor "occupies a fiduciary relationship with Company and General Agent in relation to the conduct of its business." (Compl. at Ex. A ¶ 3). As is the nature of the business, the Contract contemplated the possibility of bail bond forfeitures. Bail bonds are forfeited when a defendant fails to appear for a court date. (Doc. 12-1, ¶ 9). Regarding bail bond forfeitures, the Contract provided that the Debtor:

> shall be solely responsible for satisfying bail bond forfeitures; for investigation of bail bond principals and prospective bail bond principals; for negotiation, settlement, and/or satisfaction of claims against Company and/or General Agent/Sub-Producer by bail bond principals, courts, and/or others; and/or for any and all other matters of bail bond administration hereunder. Sub-Producer will make or cause to be made any and all necessary and warranted legal motions to preserve, reinstate, and exonerate bonds at Sub-Producer's sole expense.

(Compl. at Ex. A ¶ 9). Thus, after a forfeiture, the Debtor could mitigate a loss by ensuring that a defendant later appears or is delivered to the court. If a defendant is not delivered, a bail bond judgment is entered. (Doc. 12-1, ¶ 10). The Debtor and FCS are equally obligated to pay the state for the bond forfeiture judgments. (Doc. 17, ¶ 5; Transcript 23:7-24:2). If the Debtor does not pay the debt, FCS must pay the debt if it wants to continue to do business in New Jersey. (Doc. 12-1, ¶ 12). Thereafter, its remedy is to seek indemnification from the Debtor. (Compl. at Ex. A ¶¶ 2, 17, 18, and 20).

As security for indemnification under paragraphs 17 and 18, the Contract provided for contribution by the Debtor to an indemnity fund. (*Id.* at Ex. A, ¶ 19). The use of the indemnity fund was in FCS's discretion, and the balance of the fund would be returned to the Debtor upon termination of the Contract, subject to all other expenses being paid. (*Id.* at Ex. A ¶ 19). The indemnity fund could be used by FCS to reimburse itself (offset) for any forfeitures and unpaid bail bond premiums. (*Id.* at Ex A. ¶¶ 19(f) and (h)). FCS has invoked this right of setoff under the Contract. (Doc. 29, Ex. I, ¶19). The parties sometimes refer to this indemnity fund as a Build-Up Fund, or BUF. (Transcript 26:8-27:25; Doc. 29, Ex. I, ¶16, p. 30). The Debtor submitted a document titled "Trust Account Details" for Thayer/Shamrock Bail Bonds. (Doc. 37,

[5] Since this Adversary Proceeding involves only the Debtor, "Sub-Producer" will be referred to as Debtor hereinafter when applicable.

Ex. 3). This document reflects a continued build-up of the Debtor's BUF account with FCS during the tenure of the parties' relationship. (*Id.*)

The Contract had a specific provision regarding bail bond forfeitures, as follows:

> As a courtesy, Company and/or General Agent shall make an effort to notify Sub-Producer of receipt of any bail bond forfeitures, whether threatened or declared, that Company receives from the Courts in relation to Sub-Producer's forfeitures. However, in all instances it shall be Sub-Producer's sole responsibility and duty to monitor properly the status and forfeitures of all bonds posted with bail bond Powers of Attorney entrusted to Sub-Producer by Company and/or General Agent . . . Sub-Producer shall take any and all necessary and lawful steps to terminate forfeiture liability within the applicable statutory time frame. When or if it is deemed necessary that such forfeiture or resulting judgment be paid, then, in addition to any other rights and remedies it may have under this Agreement, at law and/or equity, Company shall have the right to do any one or more of the following:
>
> > (a) Direct any party hereto indemnifying Company from forfeiture to pay any part or all thereof;
> > (b) Pay part or all of the forfeiture judgment from the indemnity Fund(s);
> > (c) Pay and/or direct payment of part of all of the forfeiture judgment from any forfeiture collateral held for such bond;
> > (d) Direct the bond principal and/or anyone guaranteeing, assuring, or indemnifying Company and/or any other party hereto against loss by reason of the bond principal's noncompliance to pay part or all of the forfeiture judgment; and/or
> > (e) Company may pay part or all of the forfeiture judgment and reimburse itself in accordance with (a), (b), (c) and/or (d) of paragraph 20. All such rights of Company to reimbursement shall be primary to any such rights of any other party hereto, any holder of interest in and to collateral described in (c), and/or anyone described in (d).

(Compl. at Ex. A ¶ 24). Paragraph 20, referenced in paragraph 24(e), essentially repeats subparagraphs (a)-(c), plus provides in 20(d) that the Company retains discretion to direct the Debtor to defend and protect, or to refrain from defending, the Company and/or General Agent in any legal action.

The Forfeiture Debt

As to the Forfeiture Debt, FCS alleges that the Debtor wrote seventeen FCS bail bonds that ultimately forfeited, (Doc. 29, ¶ 3, p.2), resulting in judgments in the total amount of $165,500. (Doc. 29, Ex. I, ¶ 17 and Doc. 29, pp. 53-54). FCS alleges that the Debtor failed to mitigate the forfeited bond judgments, either by locating the defendants and surrendering them to the New Jersey courts, or otherwise negotiating the bond obligations. (Doc. 12, ¶ 16). FCS stated that as a result of the forfeited bail bonds the Superior Court of New Jersey precluded FCS from

writing bail bonds in New Jersey. To regain its right to do business in New Jersey, FCS was obligated to pay the bond forfeiture liability. (*Id.* at ¶ 17). Thereafter, FCS withdrew $15,500 from the BUF account to offset the $165,500 liability. (Doc. 29, Ex. I, ¶19).

In support of the Forfeiture Debt, FCS submitted documentation concerning only one defendant bonded by the Debtor, Weston Smith. (Doc. 29). FCS supplied no documentation for the remaining sixteen bail bond forfeitures and in fact, has waived its claim of nondischargeability for these sixteen claims.[6] (Doc. 29, ¶8; Transcript 52:2-53:5). Consequently, FCS's demands for recovery on the remaining sixteen bail bond forfeitures are denied.

As to the Weston Smith bond, in the amount of $150,000, there can be no dispute it had forfeited and FCS initially satisfied the judgment in full. FCS has submitted sufficient evidence to establish this fact. (*See* Doc. 29, Exs. E – H). What is troubling however is that the Debtor has submitted a *Consent Order to Remit Funds Pursuant to N.J.S.A. 2A:162-8*, dated July 10, 2012, in *State of New Jersey vs. Weston Smith, et al.*, wherein the court ordered a total of $78,000 to be returned to FCS. (Doc. 36, Ex A[7]). The Debtor also submitted a report from the NJ Central Automated Bail System that shows 52% of the bond amount ($150,000 x 52% = $78,000) was remitted to FCS. (*Id.* at Ex. B). FCS has not challenged this information and in fact, on March 23, 2015 conceded it received a remission. (*Id.* at Ex. C). Finally, "Trust Account Details" for the Debtor's BUF account with FCS, (Doc. 37, Ex. 3) shows a withdrawal of $32,584.14 on December 5, 2012, with the comment "Reimburse FCS – FFT Weston Smith," and a withdrawal of $0.18 on December 10, 2012, with the same comment. (*Id.*).

In support of its claim, FCS avers that the Debtor consciously disregarded his duties regarding the Weston Smith forfeiture by failing to properly monitor the case and mitigate the loss. It is interesting to note that the *Notice of Bail Forfeiture for Surety* dated June 16, 2011 in the amount of $150,000, (*Id.* at Ex. E), on its face reveals that it was sent to FCS at its office in Texas and not to the Debtor. The Debtor points this fact out during his deposition and points out that "I know it's my responsibility, however if I don't know the bond forfeited, how am I supposed to produce a defendant if I don't have a valid forfeiture notice or arrest warrant?" (Transcript 54:6-16). The Contract provides that FCS, as a courtesy, shall make an effort to notify the Debtor of receipt of any bail bond forfeitures. (Compl. at Ex. A ¶ 24). The Debtor testified that he never received notice from FCS and that he had incentive to recover Weston Smith through a $50,000 return to him personally. (Transcript 68:12-24). Finally, the Debtor testified that FCS's failure to notify him hampered his ability to mitigate FCS's damages and his history reflects that, except for Weston Smith, he captured all defendants on behalf of FCS. (Transcript 72:1-73:2).

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[6] FCS claims "the burden of locating and producing the underlying documents is too burdensome for the amount of money involved." (Doc. 29 ¶ 8). Nevertheless, the court is at a loss as to why FCS pursued its claim for the remaining 16 bail bond forfeitures and in addition has claimed the full amount of $165,500 is due when, by its own admission, FCS withdrew $15,500 from the BUF account to offset the $165,500 liability. (Doc. 29, Ex. I, ¶19). As FCS previously noted, a judicial admission binds a party. (*See* Doc. 12, fn.4, citing *Elec. Mobility Corp. v. Bourns Sensors/Controls, Inc.*, 87 F. Supp. 2d 394, 405 (D.N.J. 2000)).

[7] This is a document originally prepared by counsel to FCS.

The Debtor's testimony reflects a pattern of recovering forfeitures (Transcript 49:15-51:10), and he provided documents to support his position that allegations made by FCS concerning the forfeitures are incorrect. (Doc. 36, Ex. D). As to the Weston Smith forfeiture, the Debtor testified that once FCS took him of the bail registry, he could not recapture the defendant because it would be illegal. (Transcript 51:10-16; 64:14-66:11). More importantly, the Debtor did not know Weston Smith missed his court appearance, had no ability to confirm a court date other than through the defendant's own word, and during the three year period between the issuance of the bond and the forfeiture, took steps to mitigate damages and was monitoring the defendant through GPS and eventually phone calls and personal visits. (Transcript 54:25-56:25; 73:15-74:10). The Debtor testified that he was told by Michael Padilla of FCS that his contract was cancelled and he could no longer post any bonds around the same time of the Weston Smith forfeiture. (Transcript 57:9-58:18).

The Premium Debt

Under the Contract the Debtor was to remit premiums and/or ensure remittance for each bail bond power of attorney issues. (Doc. 12-1, ¶4). The Debtor failed to remit some premiums to FCS. (Doc. 37, ¶5). In addition, once FCS terminated the Contract, the Debtor was to return all unused bail bond powers to FCS and remit premiums based on the amount of those bonds. (Doc. 12-1, ¶6). The Debtor failed to deliver any unused bail bond powers and remit premiums to FCS in the amount of $6,399.00. (Compl. at ¶26). The Debtor's failure to comply with the Contract resulted in the Judgment (by default), a portion of which included the Premium Debt. (Doc. 39, pp. 3-4 and Compl. at ¶27).

For his part, the Debtor admits that he was required to collect premiums. (Transcript 25:22-25). The Debtor admits to owing premiums in the approximate amount of $11,000.00 to FCS because he cannot prove that he paid the premiums. (Transcript 40:22-41:10; 45:23-25). He also stated that that at the end of the Contract, he stopped paying premiums because the Contract terminated and he was using the funds to pay forfeitures and business expenses - in effect, playing "catch up". (Transcript 45:1-21). The Debtor testified that he believed that there was sufficient funds contained in the BUF account to satisfy any outstanding premiums and that the premiums would be paid from the BUF account. (Transcript 47:5-10; 69:14-18). This is a reasonable understanding of, and is consistent with, the terms of the Contract, as FCS could reimburse itself for any unpaid bail bond premiums. (Compl. at Ex A. ¶19(f) and (h)) and in fact, did (for forfeitures). (Doc. 29, Ex. I, ¶19). As of December 30, 2011, there was $40,566.86 in the BUF account. (Doc.37-1, Ex.3). FCS did not offset the BUF account to pay the Premium Debt.

Finally, the Debtor consistently testified that he believed he returned the unused bond powers to BGM. (Transcript 28:24-25:2; 48:18-49:13).

CONCLUSIONS OF LAW

As noted above, the parties have requested that the court rule on the submissions presented to it without the need for a trial. (Doc. 38 and Doc. 39). Indeed, "FCS has no additional evidence it can present to support either the premium claim or the bond forfeiture claim." (Doc. 39, p. 2). Parties can stipulate that the court decide a case based on the written record. *See Cont'l Grain Co. v. Puerto Rico Mar. Shipping Auth.*, 972 F.2d 426, 430 n.7 (1st Cir. 1992); *Cook Inc. v. Boston Scientific Corp.*, 333 F.3d 737, 741-42 (7th Cir. 2003); *Sawyer v. United States*, 76 F. Supp. 3d 353 (D. Mass. 2015). Resolution of this entire proceeding at this stage is consistent with the Supreme Court's recognition of the purposes of the summary judgment rule: "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986) (footnote omitted).

The Debtor filed multiple responses to FCS's Motion, but did not file an official cross-motion with the court (the Debtor acknowledged that although titled his initial pleading a "cross-motion", in reality it was just a response to the Motion). Nevertheless, a motion for summary judgment may be granted in favor of opposing party even though no formal cross-motion has been made. *See In re Melon Produce, Inc.*, 162 B.R. 386 (Bankr. D. Mass. 1993); *In re Calder*, 94 B.R. 200, 203 (Bankr. D. Utah 1988), *subsequently aff'd*, 912 F.2d 454 (10th Cir. 1990); *In re Roehrich*, 107 B.R. 675, 676 (Bankr. D.N.D. 1989). Also, federal courts have long recognized that if there is no genuine issue as to any material fact the court may enter summary judgment, *sua sponte.* There is no requirement that there be a cross-motion or other pending motion seeking such summary judgment. *See Celotex Corp.*, 477 U.S. at 326; *Buckel v. Prentice,* 410 F.Supp. 1243, 1247 (S.D. Ohio 1976), *aff'd per curiam*, 572 F.2d 141 (6th Cir.1978). *Accord In re O'Malley,* 90 B.R. 417, 422 (Bankr. D. Minn. 1988); *In re Marvin Properties, Inc.*, 76 B.R. 150, 152 (B.A.P. 9th Cir. 1987) *aff'd*, 854 F.2d 1183 (9th Cir. 1988). Where appropriate, the bankruptcy court may grant summary judgment to a nonmovant so long as the other party had a reasonable opportunity to respond. *In re DiMare*, 462 B.R. 283, 289 (Bankr. D. Mass. 2011). Here, FCS had proper notice of the Debtor's response filings and ample opportunity to respond, and in fact has submitted supplemental pleadings to the Debtor's filings and has no additional evidence it can present.

Federal Rule of Bankruptcy Procedure 7056 incorporates Federal Rule of Civil Procedure 56, the summary judgment rule, into bankruptcy adversary proceedings. Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment avoids the expense and delay of an unnecessary trial when no material facts are in dispute and one of the parties is entitled to prevail on the merits. *See, e.g., Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

The moving party bears the burden of proving that no genuine issue of material fact is in dispute. *Celotex Corp.*, 477 U.S. at 323. Once the movant has carried its initial burden, the nonmoving party "must come forward with 'specific facts showing that there is a genuine issue

for trial.'" Fed. R. Civ. P. 56(e)(2). The nonmoving party must present actual evidence, not mere allegations. *Anderson v. Liberty Lobby*, 477 U.S. 242, 259 (1986). The court must then only determine whether there is a genuine issue for trial, not weigh the evidence or determine the truth of the matter. *Id.* at 249. Material facts are those that might affect the action's outcome under the law; fact issues must be genuine, not merely some alleged factual dispute. *Born v. Monmouth Cnty. Corr. Inst.*, No. 07-3771 (MLC), 2009 WL 2058837, at *3 (D.N.J. July 9, 2009).

Discharge of Forfeiture Debt Under 523(a)(7)

In *City of Philadelphia v Nam (In re Gi Nam)*, 273 F.3d 281 (3d Cir. 2001), *as amended* (Dec. 6, 2001), the Third Circuit noted:

> 11 U.S.C. § 523(a)(7), [ ] states in pertinent part:
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> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt—
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> . . .
>
> (7) to the extent such debt is for a [1] fine, penalty, or forfeiture [2] payable to and for the benefit of a governmental unit, and [3] is not compensation for actual pecuniary loss, other than a tax penalty . . .
>
> 11 U.S.C. § 523(a)(7). (emendations added). In order to "determine whether [a debt] is dischargeable under § 523(a)(7), we must determine whether [such] debt meets the three requirements of this section."

Id. at 285 (citation omitted). Interestingly, FCS has stated that because the Contract contains a choice of law provision, "Texas law applies to interpret the relationship between the parties." (Doc. 12, ¶28). If the court were to apply Texas law, or more appropriately Fifth Circuit law, then FCS's argument under section 523(a)(7) fails immediately. In *Hickman v. Texas (In re Hickman),* 260 F.3d 400 (5th Cir. 2001), the Fifth Circuit concluded that the debtor's debt arising from her contractual relationship on a bail bond to the state does not represent the type of punitive or penal forfeiture rendered nondischargeable by section 523(a)(7). *See also, Texas v. Davis (In re Davis)*, 340 B.R. 767, 772-73 (Bankr. E.D. Tex. 2006) (". . . *Hickman* is binding upon this Court. More importantly, it is also correct. In the present case, the Debtor [a bondsman] is not a criminal. The State of Texas offers no evidence to suggest otherwise. The Debtor simply breached a contractual relationship with the State from which a debt arose."); *In re Soileau*, 488 F.3d 302 (5th Cir. 2007). Since the relationship between the Debtor and the state cannot give rise to a claim under section 523(a)(7) under the law as applied in Texas, FCS's claim under Texas law fails because FCS cannot even satisfy the fine, penalty, or forfeiture element.

However, under Third Circuit law, it appears that FCS's claim would survive the initial challenge under the first prong of section 523(a)(7) because the Third Circuit has held bail bond forfeitures owed by an agent or surety directly to the government fall within the exception to discharge provided for under section 523(a)(7). *Gi Nam*, 273 F.3d at 285. *See also Dobrek v. Phelan*, 419 F.3d 259, 267 (3d Cir. 2005) ("Because we read the text of § 523(a)(7) to encompass the type of bail bond debts at issue here, and because we are persuaded by the reasoning in *Gi Nam,* we hold that § 523(a)(7) excepts from discharge bail bond forfeitures entered against a commercial bail bondsman"). The question becomes however, whether private corporations such as FCS, which are engaged in the business of insuring bail bonds and other suretyship obligations for profit, can step into the shoes of a governmental entity[8] to recover on an otherwise contractual liability for damages[9] to that private corporation as if it were a forfeiture to a governmental entity. This court thinks they cannot.

As the Third Circuit noted in *Gi Nam*,"[f]ollowing the teaching of the Supreme Court, we have held that the 'starting point of any statutory analysis is the language of the statute itself.'" *In re Gi Nam*, 273 F.3d at 286 (citing *Commonwealth of Pa. Dept. of Environmental Resources v. Tri–State Clinical Laboratories, Inc.,* 178 F.3d 685, 688 (3d Cir.1999) (citing *Pa. Dept. of Pub. Welfare v. Davenport,* 495 U.S. 552, 557-58 (1990); *Kelly v. Robinson,* 479 U.S. 36, 43 (1986))). "Consequently, our analysis of . . . [any] prong of § 523(a)(7) must begin with the plain language of the statute." *In re Gi Nam*, 273 F.3d at 286. When interpreting statutes or regulations, "the first step is to determine whether the language at issue has a plain and unambiguous meaning . . . ." *Barnhart v. Sigmon Coal Co.,* 534 U.S. 438, 450 (2002) (citing *Robinson v. Shell Oil Co.,* 519 U.S. 337, 340 (1997)). The inquiry ends if the statutory language is unambiguous and the statutory scheme is coherent and consistent. *Id.* (citing *Robinson,* 519 U.S. at 340); *Dobrek,* 419 F.3d at 263. The plain language of the statute is unambiguous, and *Gi Nam* instructs us that the statutory scheme is coherent and consistent with public policy and purpose. The debt owed must be to a governmental unit.

Under 11 U.S.C. §101(27):

> (27) The term "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

Id. This definition plainly does not extend to private corporations. Since:

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[8] Indeed, the debtors in both *Gi Nam* and *Dobrek* owed debts directly to a governmental entity unlike here where the debt is owed to FCS as a result of a contractual obligation of the Debtor to indemnify FCS on payments it makes to the governmental entity.

[9] There is a strong argument that since the actual debt owed by the Debtor to FCS is in reality contractual in nature and not a fine, penalty, or forfeiture and/or would be compensation for actual pecuniary loss, it is dischargeable. *See, In re Lopes*, 339 B.R. 82, 87 (Bankr. S.D.N.Y. 2006) (discussing *Virginia v. Collins (In re Collins),* 173 F.3d 924 (4th Cir. 1999) and *Hickman v. Texas (In re Hickman),* 260 F.3d 400 (5th Cir. 2001)).

> Statutes are to be construed and applied in accordance with the plain meaning of the words used by Congress. It is not for the court to ignore what the statute actually says, or to employ strained or imaginative interpretations not consistent with the plain and ordinary usage and meaning of the statutory language. The intent of Congress must be presumed to comport with the plain and ordinary meaning of the words in the statute as Congress wrote it, and it is not for the court to substitute its judgment in the guise of divining Congressional intent through creative "construction."

In re Delta Air Lines, 341 B.R. 439, 445 (Bankr. S.D.N.Y. 2006) (citing *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 10 (2000)). FCS cannot be a governmental entity as defined by the statute. If Congress had intended to extend non-dischargeability under section 523(a)(7) to FCS, a privately-owned business, it could easily have done so, but it did not.

What is more, courts have repeatedly stressed that the statutory exceptions to discharge set forth in section 523(a) must be viewed in light of the underlying policy of the Bankruptcy Code to provide a "fresh start," and are to be "narrowly construed" against the creditor and in favor of the debtor. *See In re Bocchino*, No. 14-4299, 2015 WL 4478124 (3d Cir. July 23, 2015); *In re Sosso*, 516 B.R. 303, 311 (Bankr. W.D. Pa. 2014). To that end, exceptions to discharge "should be confined to those plainly expressed." *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754, 1760 (2013). The Debtor's debt to FCS does not meet the second of the three statutory requirements set forth above as the debt is not "payable to or for the benefit of a governmental unit." It is payable to FCS, a privately-owned, for-profit business as a result of a contractual indemnification agreement between the parties. Thus, on the face of the statute as it is unambiguously written, FCS's section 523(a)(7) nondischargeability claim must be denied.[10]

Despite the statute's plain and unambiguous language, FCS implores the court to invoke the doctrine of equitable subrogation to argue that it stands in the shoes of the State of New Jersey and as such, the debt is nondischargeable. This argument fails. FCS is not a governmental entity and at its core, the obligation of the Debtor to FCS is only contractual in nature. A finding of the right to equitably subrogate[11] the claim does not raise the claim of FCS to the level required under section 523(a)(7). As best stated in *In re Sanchez,* 365 B.R. 414 (Bankr. S.D.N.Y. 2007):

> Even assuming *arguendo* that plaintiff had a valid claim of liability against the debtor based upon subrogation, rather than indemnification, that would not

[10] It is important to note that BGM Financial, LLC ("BGM"), a company in the business of providing bail bond powers of attorney to subagents, had likewise filed an adversary proceeding (Adv. Pro. No. 13-1835) against the Debtors based on facts analogous to this case. BGM had sought to hold its claim nondischargeable pursuant to, *inter alia*, section 523(a)(7). Judge Wizmur, the predecessor judge on this case (who retired on May 12, 2014), subsequently issued a letter opinion (Doc. 8) and similarly concluded that *Dobrek v. Phelan*, 419 F.3d 259 (3rd Cir. 2005), as offered by BGM, did not apply as the debt was not payable to and for the benefit of a governmental unit, but was a contractual obligation between private parties. "Neither the statute cited nor the case presented interpreting the statute is applicable here." (Doc. 8, p.2).

[11] The court is not convinced that equitable subrogation would apply here but since FCS cannot satisfy the statutory elements under section 523(a)(7), the court need not go any further into an equitable subrogation analysis.

> change the basic facts here which disqualify this plaintiff from relief under section 523(a)(7). The fact remains that plaintiff is a private corporation, not a governmental entity. It is for Congress to determine the factual circumstances under which a debtor will be entitled to a discharge and those facts which will disqualify a debtor from his discharge. The existence of a valid subrogation claim held by a bonding company against an individual debtor might be effective to establish the debt allowable in bankruptcy, but it would not be ground to indulge the fiction of deeming a bonding company to be a governmental entity for purposes of denying dischargeability under section 523(a)(7). It is not for the courts to simply ignore what the statute says under the guise of an equitable doctrine which was not designed to undermine a statute of Congress.

Id. at 420; *see also In re Lopes*, 339 B.R. 82, 88 (Bankr. S.D.N.Y. 2006) ("The Court need not weigh in on the disagreement among the circuit courts on the nuances of penal sanctions versus forfeitures generally as it is unnecessary to the ultimate resolution of this issue, in that Plaintiff is not a governmental agency . . . .").[12] This court agrees with the *Sanchez* and *Lopes* courts.

Here, the Debtor simply breached a contractual relationship with FCS to which FCS is entitled to indemnification. The risk of flight is a cost of doing business for private bail bonds agencies, and they are permitted to charge accordingly. *In re Lopes*, 339 B.R. at 91. Corporations like FCS are engaged in the business of insuring bail bonds and other suretyship obligations for profit. FCS has the experience, professional counsel, and capacity to protect itself by the premiums it charges, the collateral it takes to secure any potential liability, and its ability to decline any particular bonding opportunity. *In re Sanchez*, 365 B.R. at 421. Likewise, the Third Circuit in *Gi Nam* was careful to note that the public policy concerns addressed in the *Gi Nam* case were not implicated in circumstances where professional bail bond agencies acted as sureties, as the professional bondsperson was compensated in advance through fees for the risk that a defendant will flee, and this risk is an anticipated cost of doing business. *See In re Gi Nam*, 273 F.3d at 294 n.9. Although Congress intended, by enacting section 523(a)(7), to codify the longstanding exception to a bankruptcy discharge for criminal sentences, and to preserve for the states the right to formulate and enforce penal sanctions, Congress did not have the same interest in providing heightened protections to private bail bond agencies. *In re Lopes*, 339 B.R. at 90. No considerations of equity or public policy exist here that would justify the court in ignoring the express provisions of section 523(a)(7) by treating the Debtor's contractual liability for damages

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[12] By analogy, courts have repeatedly recognized the distinction between governmental entities and private entities when addressing priorities under 11 U.S.C. § 507(a)(8) and as a result of that distinction, have concluded that such private entities are not subrogated to the priority status of the governmental entity and are prevented from asserting the governmental entity's priority. Indeed 11 U.S.C. § 507(d) itself recognizes the distinction in specifically stating that "[a]n entity that is subrogated to the rights of a holder of a claim of a kind specified in subsection . . . (a)(8) of this section is not subrogated to the right of the holder of such claim to priority under such subsection." *Id. See also In re Chateaugay Corp.* 89 F.3d 942 (2d Cir. 1996); *In re Johnson*, No. BK09–42643–TLS, 2010 WL 4115373, at *3 (Bankr. D. Neb. Oct. 19, 2010) ("While the plaintiffs may be able to assert the debt in bankruptcy through subrogation, they cannot adopt the priority status that the taxing entity would have in the first instance. Therefore, the plaintiffs cannot establish the elements necessary to succeed on a § 523(a)(1)(A) cause of action.") (citation omitted); *In re Frankum*, 399 B.R. 498, 504 (Bankr. E.D. Ark. 2009). In like manner, FCS cannot establish elements necessary to succeed on a section 523(a)(7) cause of action.

to a private corporation as if it were a forfeiture to a governmental entity. *See In re Sanchez*, 365 B.R. at 421. In the end, FCS's claim against the Debtor under section 523(a)(7) must be denied.

FCS's Motion pertaining to the nondischargeability of the Forfeiture Debt under section 523(a)(7) is DENIED. Summary judgment is entered in favor of the Debtor and as such, the Forfeiture Debt is discharged under section 523(a)(7).

FCS's Claims Under 523(a)(4)

Section 523(a)(4) provides that a discharge under section 727 does not discharge an individual from any debt "for fraud or defalcation while acting in a fiduciary capacity[.]" 11 U.S.C. § 523(a)(4). To prevail under section 523(a)(4), a creditor must establish by a preponderance of the evidence that the debtor was in a fiduciary relationship with the creditor, and that the debtor committed a fraud or defalcation while acting in his role as a fiduciary. *See, e.g., In re Schlessinger*, 208 Fed. Appx. 131, 133 (3d Cir. 2006); *In re Baylis*, 313 F.3d 9, 17 (1st Cir. 2002); *In re Siegfried*, 5 Fed. Appx. 856, 859 (10th Cir. 2001); *In re Roemmele*, No. ADV 01-1252, 2011 WL 4804833, at *4 (Bankr. E.D. Pa. Oct. 11, 2011).

Within bankruptcy jurisprudence the notion of a fiduciary relationship under section 523(a)(4) has been limited to situations where an express or technical trust has been established. See, e.g., *Parisi v. D'Urso (In re D'Urso)*, No. 05–22274, 2013 WL 3286222, at *6 (Bankr. D.N.J. June 27, 2013); *In re Marques, 358* B.R. 188, 194 (Bankr. E.D. Pa. 2006); *In re Masdea*, 307 B.R. 466, 472 (Bankr. W.D. Pa. 2004); *In re Scott*, 294 B.R. 620, 630 (Bankr. W.D. Pa. 2003); *In re Kaplan*, 162 B.R. 684, 704 (Bankr. E.D. Pa. 1993) ("[T]o give rise to § 523(a)(4) liability, it is not sufficient for the plaintiff to prove only that there was a fiduciary relationship between the parties, but also to prove that there is an express trust held by the fiduciary (debtor) on behalf of the beneficiary (creditor), which did not arise out of the action that created the fiduciary relationship."), *aff'd*, 189 B.R. 882 (E.D. Pa. 1995); *In re Shervin*, 112 B.R. 724, 730-31 (Bankr. E.D. Pa. 1990). *See In re Midkiff*, 86 B.R. 239, 241 (Bankr. D. Colo. 1988) ("[D]ebts alleged to be non-dischargeable must arise from breach of trust obligations imposed by law, separate and distinct from any breach of contract.").

Fortunately, the Supreme Court in 2013 resolved a split in the circuits regarding the level of scienter required to commit a defalcation for nondischargeability purposes under section 523(a)(4). In *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754 (2013), the Court explained that:

> where the conduct at issue does not involve bad faith, moral turpitude, or other immoral conduct, the term requires an intentional wrong. We include as intentional not only conduct that the fiduciary knows is improper but also reckless conduct of the kind that the criminal law often treats as the equivalent. Thus, we include reckless conduct of the kind set forth in the Model Penal Code. Where actual knowledge of wrongdoing is lacking, we consider conduct as equivalent if the fiduciary "consciously disregards" (or is willfully blind to) "a substantial and unjustifiable risk" that his conduct will turn out to violate a fiduciary duty. That risk "must be of such a nature and degree that, considering the nature and purpose

> of the actor's conduct and the circumstances known to him, its disregard involves a *gross* deviation from the standard of conduct that a lawabiding person would observe in the actor's situation.

Id. at 1757 (emphasis in original). This heightened standard applies in all cases determined under section 523(a)(4). *See Whitaker v. Moroney Farms Homeowners' Association,* No. 4-14-cv-700, 2015 WL 3610306, at *5 (E.D. Tex. June 5, 2015) (applying *Bullock* standard); *In re Colson,* No. 10–05007–NPO, 2013 WL 5352638, at *28-29 (Bankr. S.D. Miss. Sept. 23, 2013) ("*Bullock* abrogated the Fifth Circuit cases holding that objective-recklessness could constitute a defalcation").

Elaborating upon this standard is *Fogg v. Pearl (In re Pearl)*, 502 B.R. 429 (Bankr. E.D. Pa. 2013):

> I read *Bullock* to create two (2) scienter levels that may constitute a nondischargeable defalcation under § 523(a)(4). In one (1) category is a defalcation involving "bad faith, moral turpitude, or other immoral conduct," (such as self dealing). In a second category is a defalcation requiring something less: "recklessness," which the Court described as a conscious disregard of, or a willful blindness to, a substantial and unjustifiable risk.
>
> The second type of nondischargeable defalcation set out in *Bullock*, is tailored for conduct that falls between "mere" negligence and a specific intent to injure. Delineating the boundaries of this thin territory between negligent conduct and intentionally wrongful conduct requires a somewhat nuanced analysis, involving both qualitative and quantitative considerations.
>
> Qualitatively speaking, *Bullock* makes clear that the "recklessness" required to constitute defalcation under § 523(a)(4) is not merely a heightened form of negligence, at least insofar as negligence involves a standard of conduct that is measured objectively, i.e., based on the behavioral norms of a "reasonable person." Rather, the recklessness required for defalcation under § 523(a)(4) requires consideration of the debtor's subjective state of mind.
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> * * *
>
> *Bullock's* reference to § 2.02 of the Model Penal Code suggests that the § 523(a)(4) recklessness determination is a hybrid of the subjective and objective. The court must consider the debtor's actual knowledge and circumstances (i.e., the subjective) and then decide whether the related conduct constituted a gross deviation from legal standards of conduct (i.e., the objective).

Id. at 440-41.

The Forfeiture Debt

As to the Forfeiture Debt, on the facts available, the court cannot conclude that the Debtor perpetrated a fraud or had knowledge of, or acted with gross recklessness in respect to, conduct that resulted in a breach of his fiduciary duties[13]. In the context of section 523(a)(4), the term "fraud" means "positive fraud, or fraud in fact, involving moral turpitude or intentional wrong . . . and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality." *Bullock*, 133 S.Ct. at 1759. Nothing in the evidence before the court demonstrates that the Debtor committed an intentional fraud with regard to the Forfeiture Debt. Nor does the evidence support a finding that the Debtor's related conduct constituted a gross deviation from the legal standards of conduct as related to the Forfeiture Debt. FCS, not the Debtor, received the *Notice of Bail Forfeiture for Surety* and there is no evidence to support that FCS, consistent with the Contract, made an effort to notify the Debtor of receipt of the forfeiture. Since the Debtor had an incentive to recapture Weston Smith and the testimony reflects that history between the parties reveals that the Debtor was vigilant in capturing defendants on behalf of FCS, it is improbable that the Debtor would have intentionally and fraudulently ignored the notice of the forfeiture. Certainly, nothing in the evidence shows any fraudulent or wrongful intent in this regard. The court concludes therefore, that the Debtor could not have acted with the requisite fraudulent intention.

Likewise, the evidence does not support a finding that Debtor's related conduct constituted a gross deviation from the legal standards of conduct. The Debtor demonstrated through documents he submitted regarding other defendants, that he was prudent in recovering forfeitures. He maintained the BUF account. He did not know of the Weston Smith forfeiture and even if he did, he consistently testified that he believed FCS had fired him and/or had taken him off the bail registry. Once he was taken off the bail registry, he could not recapture the defendant because it would be illegal under New Jersey law.[14] In effect, he was prevented from mitigating the loss. It is also reasonable to conclude that if he was fired or off the registry, he was not expected to mitigate the loss. The unrefuted testimony also reflects that during the (3) three year period between the issuance of the bond and the forfeiture, the Debtor took steps to mitigate damages by constantly monitoring the defendant through GPS, phone calls and personal visits. The monitoring of the defendant in this case was consistent with his other cases. FCS presumably would have this court rule that a failure to mitigate is *per se* an intentional wrong but it has not produced any evidence beyond this to support the Debtor's conduct constituted a gross deviation from legal standards of conduct. There simply is not enough.

In the end, nothing produced in the evidence can lead this court to conclude that the Debtor's conduct constituted an intentional fraud or a gross deviation from the legal standards of conduct necessary to satisfy the level of scienter required by *Bullock,* 133 S. Ct. 1754. Since FCS has not met its burden of proof with regard to level of scienter required to commit a fraud or defalcation for nondischargeability purposes under section 523(a)(4) as it relates to the Forfeiture

[13] Because the court finds that FCS has not satisfied the necessary level of scienter, it need not determine whether a fiduciary duty actually exists.

[14] N.J. Court Rule 1:13-3(e)(2).

Debt, summary judgment is denied against FCS and granted in favor of the Debtor, and the court finds that the Forfeiture Debt is discharged.

The Premium Debt

As to the Premium Debt, in light of *Bullock,* 133 S. Ct. 1754, it is clear that FCS's position, that any breach of the Contract or related fiduciary duty is *per se* defalcation for purposes of section 523(a)(4), is incorrect. While it is clear that there was a breach of contract, which contract contained a fiduciary duty element, it is not clear that the Debtor's conduct vis-a-vis this breach satisfies the *Bullock* standard. Certainly, no evidence of fraud has been shown. Likewise, FCS has not produced any evidence beyond a *per se* breach that support its claim that the Debtor's conduct constituted a gross deviation from legal standards of conduct to satisfy the recklessness element of section 524(a)(4).

Instead, while the Debtor admits to owing premiums, he testified that at the end of the Contract he was unable to pay the premiums because he was using funds to pay forfeitures and business (not personal) expenses. The Debtor steadily built up the BUF account and believed that there were sufficient funds contained in the BUF account to satisfy any outstanding premiums. He believed that the premiums would be paid from the BUF account, which is something directly contemplated by the terms of the Contract. Certainly there were enough funds in the BUF account to satisfy the Premium Debt at the end of the Contract. This conduct does not evidence a gross deviation from legal standards of conduct, but rather reflects attempts by the Debtor to comply with his duty under the Contract at the time the Debtor believed his relationship with FCS was terminated. There was no substantial and unjustifiable risk of violating a fiduciary duty here. He paid forfeitures and business expenses from funds on hand in order to keep compliant with the duty he had under the Contract. Once he was terminated, he could not generate any further funds to address the forfeitures. He also believed that, consistent with the specific terms of the Contract, the premiums could be paid from the BUF account. Nothing produced evidences anything but a reasonable conclusion that the Debtor did what he believed he could do to comply with his understanding of his duty under the Contract. The court is not convinced that a *per se* breach of his duty is enough to objectively satisfy the *Bullock* standard. Therefore, FCS has not met its burden of proof with regard to the level of scienter required to commit a defalcation for nondischargeability purposes under section 523(a)(4) as to the Premium Debt and summary judgment is denied against FCS and granted in favor of the Debtor, and the court finds that the Premium Debt is discharged.

Request for Attorneys Fees and Related Costs

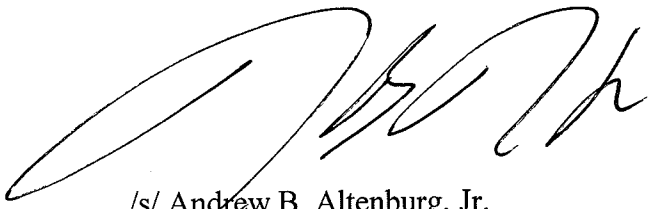
As FCS has not satisfied its burdens of proof with regard to nondischargeability of the Forfeiture Debt and the Premium Debt, the court need not make a determination as to its request for attorneys' fees and related costs because even if allowed, said fees and costs would be discharged as a result of the court's Opinion.

CONCLUSION

Accordingly, FCS's Motion for Summary Judgment is DENIED in its entirety. Summary judgment is GRANTED in favor of the Debtor as to all claims, and all debts owed to FCS are DISCHARGED.

The court reserves the right to revise its findings of fact and conclusions of law.

An appropriate judgment will be entered which is consistent with this opinion.



/s/ Andrew B. Altenburg, Jr.
United States Bankruptcy Judge

Dated: August 24, 2015