

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Steven Eric Ness,

ADV 03-4197(NCD)

Debtor.

BKY 03-43322(NCD)

Lisa M. Ingalls,

Plaintiff,

v.

Steven Eric Ness,

Defendant.

**NOTICE OF HEARING AND MOTION FOR
LEAVE TO MOVE FOR SUMMARY JUDGMENT**

To: The Plaintiff above-named, and her counsel of record:

1. Defendant Steven E. Ness moves the Court for the relief requested below and gives notice of hearing.

2. The Court will hold a hearing on this Motion at 10:30 o'clock A.M. on November 3, 2004, in Courtroom Number 7 West, at the United States Courthouse in Minneapolis, Minnesota.

3. Any response to this Motion must be filed and delivered not later than October 29, 2004, which is three business days before the hearing date, or filed and served by mail not less than October 25, 2004, which is seven business days before the hearing. **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, Fed.R.Bankr.P. 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The petition commencing the Defendant's chapter 7 case was filed on May 6, 2003. The case is now pending in this Court.

5. This motion arises under 11 U.S.C. § 523 and § 105, and Fed.R.Bankr.P. 7056. This motion is filed under Fed.R.Bankr.P. 9014 and Local Rules. Movant requests relief with respect to allowing him to move the court for summary judgment, notwithstanding the expiration of the Courts' deadline for such motion.

6. On February 23, 2004, prior to the expiration of the Court's first deadline for dispositive motions, Plaintiff's undersigned counsel attempted to upload to the Court's web site the attached motion for summary judgment. The web site was not functional. In order to document that an upload had been attempted, the motion was sent by email attachment to Ms. Kristin Neff of the Court's staff, see exhibit A. The motion for summary judgment was served upon Defendant's counsel at that time.

7. Due to oversight, the motion was not uploaded properly thereafter, and the time for making motions expired. Trial is now set for November 23.

8. There would be a great efficiency achieved if the Court were to rule on the Plaintiff's summary judgment motion prior to trial. Settlement discussions are stalled because of the parties' divergence of views. Furthermore, the motion could serve as a motion *in limine*, defining the issues to be tried and the parameters of admissible evidence.

9. In addition, there have been developments in the law relative to this adversary proceeding that would bear upon such a motion. Plaintiff's Complaint asserts nondischargeability under 11 U.S.C. § 523(a)(6) for damages relating to allegations of sexual harassment and similar workplace issues. The recent decision in *In re Busch*, 311 B.R. 657 (Bankr. N.D.N.Y., June 21, 2004) is on point and instructive. As here, the debtor in *Busch* had been a control person of the plaintiff's former employer. Prior to the bankruptcy filing, a federal jury awarded compensatory and punitive damages totaling \$400,00, relating to direct personal and intentional acts by the debtor against the plaintiff that were egregious in the extreme. 311 B.R. at 660. Notwithstanding the jury findings and punitive damage award, and the obvious fact that the debtor's acts were intentional, the bankruptcy court nevertheless dismissed the nondischargeability complaint. It held as a matter of law that the conduct did not establish the requirement of § 523(a)(6), as interpreted by the Supreme Court in *Grogan v. Garner*, 498 U.S. 279 (1991), that the debtor intend not only the act, but the injury.

10. As against the state of the case law under § 523(a)(6) – and this is the only basis for relief alleged in the instant complaint – the allegations against Mr. Ness are weak at best. He is not charged with causing any personal physical or emotional injury, or with any improper conduct, as against Plaintiff as a tort victim. The only allegation against Mr. Ness is that he did not act to stop the improper actions of others, and that the value of Plaintiff's shares in the law corporation was thereby diminished. This connection to the wrongful activities of others is tenuous at best, especially in a bankruptcy dischargeability context.

11. The deficiencies in the Complaint and its legal theories are well set out in the motion for summary judgement, which was served almost eight months ago. The Defendant can thus not possibly claim surprise or prejudice, and there is every good reason that the Court should consider the viability of the Complaint prior to trial.

WHEREFORE, Defendant Steven E. Ness moves the Court for its Order allowing him to move for summary judgment, and for such other relief as may be just and equitable.

Dated: October 20, 2004

THOMAS F. MILLER, P.A.

BY /E/ THOMAS F. MILLER
Thomas F. Miller, Lic. No. 73477
130 Lake Street West
Wayzata, MN 55391
Tel.: (952) 404-3896
Fax: (952) 404-3893
Email: Thomas@Millerlaw.com
Attorney for Defendant

VERIFICATION

Thomas F. Miller states under penalty of perjury that the facts set forth in the within Motion are true and correct to the best of his knowledge, information, and belief.

Dated: October 20, 2004

/e/ Thomas F. Miller
Thomas F. Miller

Unsworn Declaration for Proof of Service

I, the undersigned Thomas F. Miller, hereby declare under penalty of perjury that on I October 20, 2004, I served the within Notice of Hearing and motion upon the following, by sending copies thereof by first class mail, postage prepaid, to them at the following addresses:

Andrea F. Rubenstein, Esq.
2100 Stevens Avenue So.
Minneapolis, MN 55404
And by email attachment to: arubenstein@isd.net

James A. Rubenstein, Esq.
MOSS & BARNETT
4800 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-4129
And by email attachment to: Rubenstein@moss-barnett.com

Dated: October 20, 2004

/e/ Thomas F. Miller
Thomas F. Miller

Thomas F. Miller

From: Thomas F. Miller
Sent: Monday, February 23, 2004 11:40 PM
To: 'kristin_neff@mn.uscourts.gov'
Subject: RE: Hearing date

Kristin, I have been trying to upload my motion for quite some time. The web site is not accepting searches or uploads. I will keep trying tomorrow but I am going home now.

I am attaching the motion upload as a matter of record, to show that I tried to file it today.

Thanks.

Thomas F. Miller
Attorney at Law

Thomas F. Miller, P.A.
715 Florida Avenue South
Suite 305
Minneapolis, MN 55426
Tel.: (763) 543-9902
Fax: (763) 543-9907
Cell:(612) 991-5992

thomas@millerlaw.com
www.millerlaw.com

-----Original Message-----

From: kristin_neff@mn.uscourts.gov [mailto:kristin_neff@mn.uscourts.gov]
Sent: Friday, February 20, 2004 12:26 PM
To: Thomas F. Miller
Subject: Hearing date

Tom-

Ingalls vs. Ness 03-4197

I can schedule the motion for summary judgment on March 17, 2004 @ 11:00. I have to reschedule the trial to May 4th at 10:00. We have a conflict. Is this date okay?

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Steven Eric Ness,

ADV 03-4197(NCD)

Debtor.

BKY 03-43322(NCD)

Lisa M. Ingalls,

Plaintiff,

v.

Steven Eric Ness,

Defendant.

NOTICE OF HEARING AND MOTION FOR SUMMARY JUDGMENT

To: The Plaintiff above-named:

1. Defendant Steven E. Ness moves the Court for the relief requested below and gives notice of hearing.
2. The Court will hold a hearing on this Motion at 11:00 o'clock A.M. on March 17, 2004, in Courtroom Number 7 West, at the United States Courthouse in Minneapolis, Minnesota.
3. Any response to this Motion must be filed and delivered not later than March 12, 2004, which is three business days before the hearing date, or filed and served by mail not less than March 8, 2004, which is seven business days before the hearing. **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**
4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, Fed.R.Bankr.P. 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The petition commencing the Defendant's chapter 7 case was filed on May 6, 2003. The case is now pending in this Court.
5. This motion arises under 11 U.S.C. § 523 and Fed.R.Bankr.P. 7056. This motion is filed under Fed.R.Bankr.P. 9014 and Local Rules. Movant requests relief with respect to summary judgment dismissing the complaint with prejudice.

6. This Motion is supported by the Unsworn Declaration of Steven E. Ness and the Memorandum in Support of Defendant's Motion for Summary Judgment submitted herewith.

WHEREFORE, Defendant Steven E. Ness moves the Court for its Order dismissing the Complaint with prejudice, and such other relief as may be just and equitable.

Dated: February 23, 2004

THOMAS F. MILLER, P.A.

BY /S/ THOMAS F. MILLER
Thomas F. Miller, Lic. No. 73477
715 Florida Ave. So., Suite 305
Minneapolis, MN 55426
Tel.: (763) 543-9902
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Email: Thomas@Millerlaw.com
Attorney for Defendant

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Steven Eric Ness,

ADV 03-4197(NCD)

Debtor.

BKY 03-43322(NCD)

Lisa M. Ingalls,

Plaintiff,

v.

Steven Eric Ness,

Defendant.

UNSWORN DECLARATION OF STEVEN E. NESS

Steven E. Ness, under penalties of perjury, deposes and says:

1. I am the defendant in this adversary proceeding. I make this declaration in support of my motion for summary judgment. My testimony in this declaration concerns both the alleged bases of nondischargeability of the Plaintiff's claim against me, and also certain economic matters related to her claims for damages.

2. I am an attorney at law. I was first licensed in Minnesota in 1986 and have been engaged in the private practice of law without interruption since that time. From February 15, 1987 to March 31, 2003 I was associated with the former law firm of Henretta, Cross, Ness, and Dolan, P.A. ("HCND"). In 1990, I became a partner/shareholder in HCND and served as President of the firm from 1991 through December 31, 2002.

3. I was never a majority shareholder of HCND. In 1991, I owned approximately ten percent of the HCND stock. From 1993, I owned between thirty-five and forty-five percent of the HCND stock. I left the firm on March 31, 2003 to practice as a sole practitioner, which continues to this day.

4. The history of the Plaintiff's employment by HCND is set out in the pleadings. Essentially, she was hired by the firm as a law clerk in 1993. She passed the bar in 1995 and from that time was employed as an associate attorney. In January of 1999 she became the first female shareholder in the firm's history. She was granted ten percent of the shares of the corporation, without cost to her, and remained a ten percent shareholder until she sold her shares to me for one dollar when she left the firm in March of 2001.

5. The Plaintiff's claims against me in the adversary complaint arise under the "willful and malicious injury" exceptions to discharge in the Bankruptcy Code. The allegations in the underlying state court action, which is incorporated into the adversary complaint, mention only breach of fiduciary duty as a shareholder, at Count Three, paragraphs 42 – 44.

6. The Plaintiff has never asserted that I, in my individual capacity, violated the Minnesota Human Rights Act with respect to her, or that I aided and abetted NCND in any such violations.

7. I totally and categorically deny that I personally created a hostile work environment at HCND, or that I used computers at HCND to view or print improper materials.

8. I further deny that, in my capacity as officer of HCND, I ever permitted any other employee to do so.

9. In all of my capacities at HCND – individually, and as officer, director, and shareholder – I was acutely aware of the liabilities that could arise if such a work environment as described by the Plaintiff were to exist. As the Plaintiff herself points out, part of my practice has been to counsel employer clients as to these very matters. There was no reason whatsoever that I would allow this to occur. If there were instances of improper computer usage, they were without my knowledge or approval and contrary to the firm’s policy.

10. If there were instances of improper conduct by other HCND employees, they were certainly not “willful” or “malicious” on my part. At most, and I do not admit it, I could be accused in retrospect of not enforcing corporate policy vigorously in this regard.

11. Plaintiff’s claims of damages as against me in Count Three of the state court complaint seem to center around her status as shareholder. She seems to be saying that my actions diminished the value of the firm, and the ability of the firm to pay her more money.

12. It is my personal and professional opinion that the shares of HCND had no monetary value whatsoever during the Plaintiff’s tenure. During the entire period, the corporation had negative net worth, and never made a profit or declared a dividend. For these reasons, as well as the practical and legal complications of selling a minority interest in a closely held professional corporation, it would never have been possible for Plaintiff to sell her shares. Therefore, I do not believe that she can establish that she was damaged as a shareholder.

13. Plaintiff also alleges that my “willful and malicious” breach of fiduciary duty caused her to suffer lost wages and benefits. It is true that she was paid less than the older male shareholders. It is also true that Mr. Cross and I had many more years of experience than did

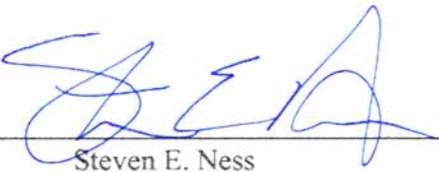
she. We also had a larger and more substantial client base than she did, again all consistent with our longer experience in practice. Plaintiff was compensated consistent with her value to the firm, in the context of the firm's ability to pay salaries, which was always marginal.

14. To amplify this point, while it is true that the two male shareholders had a higher salary than did the Plaintiff, the two of us personally guaranteed the significant HCND corporate debt, whereas Plaintiff guaranteed nothing. The firm's debt grew over the period time that Plaintiff was a shareholder. In a very literal sense, the two of us older shareholders were funding our higher salaries by the incurring of personally guaranteed debt, as much as by firm revenue. These guaranteed obligations ultimately forced my personal bankruptcy.

15. HCND is now defunct. Mr. Cross, the final shareholder and attorney, left the firm to enter private industry as of December 31, 2003. The only remaining assets are miscellaneous office furniture and equipment, and delinquent accounts receivable. I estimate that the deficiency of assets to pay liabilities is on the order of \$500,000.

16. An irony of the matter is that when the Plaintiff left HCND she immediately assumed employment with what had until then been a major HCND client, which from that point no longer hired us. This loss of business was a direct factor in the ongoing insolvency and ultimate demise of the firm.

Dated: February 23, 2004



Steven E. Ness

**UNITED STATES BANKRUPTCY COURT
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Steven Eric Ness,

ADV 03-4197(NCD)

Debtor.

BKY 03-43322(NCD)

Lisa M. Ingalls,

Plaintiff,

v.

Steven Eric Ness,

Defendant.

**MEMORANDUM IN SUPPORT OF
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

Defendant moves for summary judgment as to the Complaint in this adversary proceeding under Rule 56, Federal Rules of Civil Procedure, made applicable here by Bankruptcy Rule 7056. Defendant argues that the Complaint, even when construed most liberally in favor of the Plaintiff as the nonmoving party, does not state a claim for nondischargeability under 11 U.S.C. § 523(a)(6) and must be dismissed.

The adversary complaint incorporates the allegations made in the Plaintiff’s pending Hennepin County District Court action against Defendant and others. The Plaintiff asserts that the causes of action there asserted meet the “willful and malicious” criteria of § 523(a)(6). A careful but fair reading of the state court complaint shows that the actions or omissions ascribed to Mr. Ness do not come close to this standard.

The state court complaint is very verbose and graphic, unnecessarily so. On close inspection however there are very few allegations that relate to any claimed liability of Mr. Ness individually. They are:

Paragraph 1, final sentence:

This action is also against individual defendants Ness and Cross for breach of their fiduciary duties as officers and majority shareholders of the defendant professional corporation to the plaintiff as a minority shareholder.

Paragraph 6:

During all relevant times herein, the plaintiff was an employee of defendant HCND within the meaning of Minn. Stat. § 363.01, subd. 16. It was her “employer”, as well, as defined in Minn. Stat. § 363.01, subd. 17. [the point being that references in the state court complaint to “employer” do not include Mr. Ness]

Paragraph 42:

As majority shareholders of HCND, defendants Ness and Cross had a fiduciary duty to the plaintiff as a majority shareholder employee [sic] to deal with her fairly and in good faith, and not to mismanage and waste corporate property.

Paragraph 43:

Ness and Cross breached such fiduciary duties by the actions described above, including but not limited to causing constructive discharge of the plaintiff.

Paragraph 44:

As a direct and proximate result of the breach by Ness and Cross of their respective fiduciary duties, the plaintiff has suffered loss [of] wages and benefits, loss of corporate profits, and other damages in amounts to be determined at trial.

It is thus clear that the cause of action against Mr. Ness is not under the Human Rights Act at all, but is something in the nature of minority shareholder abuse or oppression. No legal authority for the allegations against Mr. Ness is cited in the complaint, but it is clear that there are none

that encompass these allegations. Clearly a shareholder does not have a duty of any kind, fiduciary or otherwise, to another shareholder. The only conceivable touchstone of liability under the allegations against Mr. Ness would be to take the language in the introductory paragraph, concerning claims against the individuals “. . .for breach of their fiduciary duties as officers . . .” and gloss that on to the later substantive paragraphs talking about fiduciary duty. Officers of a corporation can, of course, have fiduciary duties to shareholders. Where the officer files bankruptcy, the nondischargeability claim is usually made under the stricter standard of § 523(a)(4).

Even under a § 523(a)(4) analysis, however, Plaintiff’s claim would fail. First, our research has disclosed no cases under Minnesota law that designate a corporate officer, director, or shareholder as a fiduciary for bankruptcy dischargeability purposes. The trend of the case law is to hold that such a capacity is not fiduciary, regardless of state decisions using the word. See, e.g., *In re Cantrell* 329 F.3d 1119 (9th Cir. 2003), citing *Lewis v. Scott (In re Lewis)*, 97 F.3d 1182, 1185 (9th Cir.1996), 329 F.3d at 1125; *In re Sullivan* 19 Fed.Appx. 180 C.A.6 (Ohio), 2001. (“In this case, [creditor] showed only that Sullivan violated his common law fiduciary duty as a corporate officer by failing to perform a function of his office. No trust property was misappropriated by Sullivan for his own benefit. Therefore, the bankruptcy court and the Bankruptcy Appellate Panel properly concluded that this debt did not fall within the exception to dischargeability in § 523(a)(4).”); See also *In re Wheatley* 158 B.R. 140 Bkrcty.W.D.Mo., 1993.

In the only reported dischargeability decision discussing Minnesota corporate law that our research has disclosed, it was said:

Corporate officers and directors have been viewed as fiduciaries under section 523(a)(4). See *In re Decker*, 36 B.R. 452, 458 (D.N .D.1983); *In re Cowley*, 35 B.R. at 528-529. The fiduciary capacity of an officer or director of a corporation does not arise from a formal express trust but is imposed by courts in

equity. See *Westgor v. Grimm*, 318 N.W.2d 56 (Minn. 1982). Those decisions which hold a corporate officer responsible under section 523(a)(4) depart from the narrow application of that section which generally only recognizes fiduciary capacity arising from formal express trusts. Nevertheless, in those decisions which have expanded the application of section 523(a)(4) to corporate officers and directors, the courts also impose a stricter view of "defalcation" which looks to whether the debtor personally benefited from his action.

In re Sweere, 1985 WL 660786 (Bankr.D.N.D.), 6

It is beyond question that Mr. Ness did not benefit from the alleged wrongdoings. If Plaintiff suffered, he suffered more.

We have not discovered any dischargeability decisions under § 523(a)(6) which specifically address the question of negligence or breach of duty by a corporate officer, in the context of liability to a minority shareholder. Reverting to the general law of this paragraph, the starting point is *Kawaauhau v. Geiger*, 523 U.S. 57 (1998). The question presented was whether a judgment for medical malpractice was nondischargeable under this paragraph. The debtor, according to the creditor, had "intentionally rendered inadequate medical care" in order to hold down costs, i.e. for his own personal gain. In holding that debts incurred negligently or recklessly did not come within the scope of § 523(A)(6), the Court reasoned:

The word "willful" in (a)(6) modifies the word "injury," indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury. Had Congress meant to exempt debts resulting from unintentionally inflicted injuries, it might have described instead "willful acts that cause injury." Or, Congress might have selected an additional word or words, *i.e.*, "reckless" or "negligent," to modify "injury." Moreover, as the Eighth Circuit observed, the (a)(6) formulation triggers in the lawyer's mind the category "intentional torts," as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend "the consequences *62 of an act," not simply "the act itself." *Restatement (Second) of Torts § 8A, Comment a, p. 15 (1964) (emphasis added)*.

The [creditors'] more encompassing interpretation could place

within the excepted category a wide range of situations in which an act is intentional, but injury is unintended, *i.e.*, neither desired nor in fact anticipated by the debtor. Every traffic accident stemming from an initial intentional act--for example, intentionally rotating the wheel of an automobile to make a left-hand turn without first checking oncoming traffic--could fit the description. A "knowing breach of contract" could also qualify.

523 U.S. at 61

This discussion has direct application to the case at bar. Essentially, and to put it plainly, the Plaintiff's claim is that Mr. Ness and Mr. Cross undermined their own law practices, and the solvency of their firm, by sitting in the office all day looking at naughty pictures on the Internet. In the case of Mr. Ness, apparently this happened in the full view of everyone else in the office, through his open door and the window next to his computer. Absurd as this claim is on its face, we must take it as given in this procedural posture. But even if true, this comes nowhere close to meeting the Geiger standard. If the gentlemen did engage in these practices, it was for their own amusement, and it had nothing to do with the practice of law. Indeed this is the whole point, that the firm suffered because essential corporate duties were neglected. There is no connection whatsoever between the alleged act that was intended – the said use of the Internet – and the alleged damage to the firm, which at most would be an unintended consequence of a wholly unrelated activity. Even if Plaintiff were to prove that the men knew, or should have know, that such conduct was detrimental to the firm, this would only come within the “knowing breach of contract” example which the Supreme Court specifically rejected. This conclusion is only amplified by the fact that if Plaintiff suffered from these acts – and there is no proof that she did suffer, per the Declaration of Mr. Ness – then he and Mr. Cross suffered much more than she.

CONCLUSION

Under Rule 56(c), summary judgment is appropriate when the evidence, viewed in the light most favorable to the nonmoving party, reveals no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)

In re May, 251 B.R. 714 (8th Cir. BAP 2000)

There are no conceivable facts which would fairly be implied by the adversary complaint, or the underlying state court complaint, which would justify a finding of nondischargeability under § 523(a)(6). The adversary complaint must therefore be dismissed.

Dated: February 23, 2004

THOMAS F. MILLER, P.A.

BY /s/ THOMAS F. MILLER
Thomas F. Miller, Lic. No. 73477
715 Florida Ave. So., Suite 305
Minneapolis, MN 55426
Tel.: (763) 543-9902
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Email: Thomas@Millerlaw.com
Attorney for Defendant

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Steven Eric Ness,

ADV 03-4197(NCD)

Debtor.

BKY 03-43322(NCD)

Lisa M. Ingalls,

Plaintiff,

v.

Steven Eric Ness,

Defendant.

At Minneapolis, Minnesota, this ____ day of November, 2004.

This matter came on for hearing before the undersigned Judge of the above Court on November 3, 2004, upon the Defendant's Motion for Leave to Move for Summary Judgment. Appearances were as noted in the record of the Court.

Upon the advice and arguments of counsel, and upon all of the files, records, and proceedings herein,

IT IS HEREBY ORDERED:

1. That Defendant's said Motion is granted.
2. Defendant shall forthwith serve and file his Motion for Summary Judgment as set out in the instant Motion.
3. That Plaintiff shall file and serve her response to Defendant's Motion for Summary Judgment within fourteen days of service of the Motion.

BY THE COURT:

Nancy C. Dreher
United States Bankruptcy Judge