

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Edward Lyle Gross and
Nellie Daune Roberts,

Bky. No. 02-94367 GFK
Chapter 7 Case

Debtors.

The Great-West Life Assurance Company,

Adv. No. 03-_____

Plaintiff,

v.

Edward Lyle Gross and
Nellie Daune Roberts,

**COMPLAINT TO DETERMINE
DISCHARGEABILITY UNDER 11 U.S.C.
§ 523 AND TO DENY DISCHARGE
UNDER 11 U.S.C. § 727**

Defendants.

Plaintiff, The Great-West Life Assurance Company (hereinafter "Plaintiff"), hereby complains and alleges against Edward Lyle Gross and Nellie Daune Roberts (hereinafter "Defendants"), as follows:

JURISDICTION AND VENUE

1. This adversary proceeding is brought pursuant to Federal Rule of Bankruptcy Procedure 7001 et. seq. and 11 U.S.C. §§ 523 and 727.

2. Jurisdiction of this Court is based upon 28 U.S.C. §§ 157 and 1334. Venue is based upon 28 U.S.C. § 1409(a). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I) and (J).

3. This adversary proceeding relates to the Chapter 7 bankruptcy case of Edward Lyle Gross and Nellie Daune Roberts, Debtors, Case No. 02-94367-GFK, presently pending in the United States Bankruptcy Court for the District of Minnesota.

4. Plaintiff is a creditor of Defendants in the Chapter 7 bankruptcy case.

5. Defendants filed a voluntary Chapter 7 Bankruptcy Petition on December 20, 2002. At that time, Defendants owed Plaintiff \$300,780.71 (USD) plus interest and costs.

6. The purpose of this Complaint is to object to the dischargeability of a portion of the Defendants' debt to the Plaintiff and to obtain a denial of discharge of Defendants in this Chapter 7 bankruptcy proceeding.

BACKGROUND FACTS

7. On August 8, 1995, Defendant Edward Lyle Gross ("Defendant Gross") commenced a lawsuit against Plaintiff in the Court of Queen's Bench of Alberta, Judicial District of Edmonton, Canada, for negligent misrepresentation and breach of contract.

8. On May 2, 2000, the Court of Queen's Bench of Alberta rendered a decision in favor of Defendant Gross. On May 24, 2000, the judgment was entered. On September 20, 2000, the Court of Queen's Bench of Alberta entered a Consent Order stating that Plaintiff must pay Defendant Gross, *inter alia*, the costs awarded by the Court of Queen's Bench of Alberta in the amount of \$190,000 (CAD).

9. On or about June 26, 2000, Plaintiff paid Defendant Gross \$190,000 (CAD), representing the amount due under the Consent Order for costs awarded to Defendant Gross by the Court of Queen's Bench of Alberta.

10. Defendant Gross was aware that Plaintiff was going to appeal the judgment by the Court of Queen's Bench of Alberta, including the award of \$190,000 (CAD). Defendant Gross agreed that, in the event that Plaintiff was successful in its appeal or that some other Order with respect to costs such that the \$190,000 (CAD) were no longer rightly belonging to Defendant Gross, he would repay the Plaintiff the \$190,000 (CAD) on demand.

11. Defendant Gross misrepresented his intention to repay the Plaintiff the \$190,000 (CAD) on demand.

12. Subsequently, despite knowing that Plaintiff was going to appeal the judgment by the Court of Queen's Bench of Alberta, and despite knowing that his interest in the \$190,000 was contingent on a successful appeal, Defendant Gross deliberately and intentionally spent the \$190,000 (CAD).

13. On February 20, 2002, the Court of Appeal of Alberta reversed the trial judgment and ordered that Defendant Gross pay Plaintiff costs for the trial, costs of the appeal, and that Defendant Gross return the \$190,000 (CAD) paid by Plaintiff.

14. Plaintiff demanded that Defendant Gross return the \$190,000 (CAD). Upon demand, Defendant Gross did not return the \$190,000 (CAD) to Plaintiff. To date, Defendant Gross has not returned the \$190,000 (CAD) to Plaintiff.

15. On November 21, 2002, the judgment of the Court of Appeal of Alberta was duly registered with the Third Judicial District Court, Olmsted County, Minnesota, in the amount of \$300,780.71 (USD). Included in this registered judgment is the \$190,000 (CAD) that Defendant Gross did not return to Plaintiff.

16. Plaintiff is informed and believes that Defendant Gross was in lawful possession of the \$190,000 (CAD) on or about June 26, 2000.

DISCHARGEABILITY OF DEBT TO PLAINTIFF

FIRST CLAIM FOR RELIEF

**11 U.S.C. § 523(a)(4)
Debt For Fraud Or Defalcation While Acting In
A Fiduciary Capacity, Embezzlement, Or Larceny**

17. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 16 inclusive of this Complaint and incorporates the same by this reference as though fully set forth herein.

18. Plaintiff is informed and believes that Defendant Gross was under a restraint as to the use of the \$190,000 (CAD); the terms of the restraint were violated by Defendant Gross when he deliberately and intentionally spent the \$190,000 (CAD) and/or did not return the \$190,000 (CAD) on demand of the Plaintiff; and Defendant Gross' actions were misleading and done with wrongful intent.

19. By virtue of the aforementioned acts or failure to act, Defendant Gross misappropriated the \$190,000 (CAD) without complying with his obligations to Plaintiff and, therefore, this portion of the debt owed by Defendants to Plaintiff in the amount of \$190,000 (CAD) or \$128,595.60 (USD), is non-dischargeable pursuant to 11 U.S.C. § 523(a)(4).

SECOND CLAIM FOR RELIEF

11 U.S.C. § 523(a)(6)

Debt For Willful And Malicious Injury To Plaintiff's Property

20. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 19 inclusive of this Complaint and incorporates the same by this reference as though fully set forth herein.

21. Plaintiff is informed and believes that Plaintiff retained a property interest in the \$190,000 (CAD) that was paid to Defendant Gross.

22. Plaintiff is informed and believes that Defendant Gross' diversion of the \$190,000 (CAD) and failure to return the \$190,000 (CAD) after Plaintiff's successful appeal of the judgment, which was contrary to the agreed upon conditions of Defendant Gross' possession of the money, was headstrong and knowing and intended to cause injury to the Plaintiff.

23. Plaintiff is informed and believes that Defendant Gross' diversion of the \$190,000 (CAD) and failure to return the \$190,000 (CAD) after Plaintiff's successful appeal of the judgment, which was contrary to the agreed upon conditions of Defendant Gross' possession of the money, was targeted at the Plaintiff because it was certain or almost certain to cause financial harm to the Plaintiff.

24. By virtue of the aforementioned acts or failure to act, the \$190,000 (CAD) or \$128,595.60 (USD), is non-dischargeable pursuant to 11 U.S.C. § 523(a)(6) because Plaintiff retained a property interest in the \$190,000 (CAD) and Defendant Gross willfully and maliciously caused injury to Plaintiff's property interest by converting the \$190,000 (CAD).

DENIAL OF DISCHARGE

THIRD CLAIM FOR RELIEF

**11 U.S.C. § 727(a)(2)(A)
Transfer, Removal Or Concealment Of Property Of
The Estate Within One Year Prior To Filing**

25. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 24 inclusive of this Complaint and incorporates the same by this reference as though fully set forth herein.

26. Plaintiff is informed and believes that Defendants, in at least October and November 2002, transferred, removed and/or concealed certain property of the estate, including, but not limited to, money from Defendants' bank account in Rochester, Minnesota.

27. Plaintiff is informed and believes that Defendants' transfer, removal and/or concealment of certain property of the estate in at least October and November 2002, including, but not limited to, money from a bank account in Rochester, Minnesota, was done intentionally and deliberately by Defendants, who were intending to file bankruptcy and were being pursued by creditors.

28. Defendants' transfer, removal and/or concealment of certain property of the estate was done with intent to hinder, delay or defraud creditors of the estate (including Plaintiff) and the Chapter 7 bankruptcy trustee

29. By virtue of the aforementioned acts or failure to act, Defendants' discharge should be denied pursuant to 11 U.S.C. § 727(a)(2)(A).

FOURTH CLAIM FOR RELIEF

11 U.S.C. § 727(a)(2)(B) Transfer, Removal Or Concealment Of Property Of The Estate After Filing Petition

30. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 29 inclusive of this Complaint and incorporates the same by this reference as though fully set forth herein.

31. Defendants were required to provide certain information on their petition, schedules, and statement of financial affairs, regarding their financial condition and assets, including, but not limited to, information regarding real and personal property, income, and other property of the estate.

32. Plaintiff is informed and believes that Defendants did not disclose property of the estate on their petition and schedules, including, but not limited to, jewelry, and certain items of personal property located at the premises commonly known as 2345 Transit Court S.W., Rochester, MN 55902.

33. Plaintiff is informed and believes that Defendants have concealed property of the estate after the date of filing their petition by knowingly and intentionally making numerous material false oaths or accounts at the first meeting of creditors and at depositions on March 6, 2003 and March 20, 2003, including, but not limited to, false oaths or accounts regarding the existence of jewelry, and certain items of personal property located at the premises commonly known as 2345 Transit Court S.W., Rochester, MN 55902.

34. Plaintiff is informed and believes that, under the aforementioned facts, Defendants' concealment of property of the estate after the date of filing their petition has been done with intent

to hinder, delay or defraud creditors of this estate (including Plaintiff) and the Chapter 7 bankruptcy trustee.

35. By virtue of the aforementioned acts or failure to act, Defendants' discharge should be denied pursuant to 11 U.S.C. § 727(a)(2)(B).

FIFTH CLAIM FOR RELIEF

11 U.S.C. § 727(a)(3)

Unjustifiable Concealment Or Failure To Preserve Documents Critical To Ascertain Financial Condition And Business Affairs

36. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 35 inclusive of this Complaint and incorporates the same by this reference as though fully set forth herein.

37. Defendants have provided certain information and testimony at the first meeting of creditors and depositions on March 6, 2003 and March 20, 2003 regarding their financial condition and business affairs, including, but not limited to, information regarding the sale of real property in Canada, the sale of a business in Canada known as ELG Holdings Ltd., and the purchase and financing of their home located at the premises commonly known as 2345 Transit Court S.W., Rochester, MN 55902.

38. Plaintiff is informed and believes that Defendants have unjustifiably concealed, destroyed, mutilated, falsified or failed to keep or preserve recorded information critical to ascertaining Defendants' financial condition and business affairs, including, but not limited to, documentation regarding proceeds from the sale of real property in Canada, documentation regarding the sale of a business in Canada known as ELG Holdings Ltd., and documentation regarding an

appraisal ascertaining the value of their home located at the premises commonly known as 2345 Transit Court S.W., Rochester, MN 55902.

39. Plaintiff is informed and believes that such acts or failure to act were not justified under the circumstances of the case. Such acts or failure to act makes it impossible to ascertain Defendants' financial condition and material business transactions.

40. By virtue of the aforementioned acts or failure to act, Defendants' discharge should be denied pursuant to 11 U.S.C. § 727(a)(3).

SIXTH CLAIM FOR RELIEF

11 U.S.C. § 727(a)(4)(A) False Oath Or Account

41. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 40 inclusive of this Complaint and incorporates the same by this reference as though fully set forth herein.

42. Plaintiff is informed and believes that Defendants have knowingly made numerous material false oaths or accounts on their petition and schedules, at the first meeting of creditors and at depositions on March 6, 2003 and March 20, 2003, relating to their property or financial affairs in connection with this bankruptcy case including, but not limited to, false oaths or accounts regarding the existence of rental income, the existence of personal property such as jewelry and other assets of the estate, and false oaths or accounts regarding Plaintiff's payment of proceeds to Defendant Gross in connection with Defendant Gross' lawsuit against Plaintiff in Canada.

43. Defendants' false oaths or accounts on their schedules and statement of financial affairs, at the first meeting of creditors and at depositions on March 6, 2003 and March 20, 2003,

relating to their property or financial affairs and proceeds from Defendant Gross' lawsuit against Plaintiff in Canada, all bear a relationship to the Defendants' business transactions or estate, or concern the discovery of assets, business dealings, or the existence and disposition of Defendants' property.

44. By virtue of the aforementioned acts or failure to act, Defendants' discharge should be denied pursuant to 11 U.S.C. § 727(a)(4)(A).

SEVENTH CLAIM FOR RELIEF

11 U.S.C. § 727(a)(5)

Failure To Explain Satisfactorily Loss Of Assets Or Deficiencies Of Assets

45. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 44 inclusive of this Complaint and incorporates the same by this reference as though fully set forth herein.

46. Defendants have claimed certain losses or deficiencies of assets, including, but not limited to, a \$106,000 (CAD) loss in 2000 listed on their petition, deficiency of proceeds from the sale of a home commonly known as the "Douglas home" in Canada, and deficiency of proceeds from the sale of a business known as ELG Holdings Ltd. in Canada.

47. Plaintiff is informed and believes that Defendants have failed to explain satisfactorily the loss of assets or deficiency of assets to meet the Defendants' liabilities, including, but not limited to the \$106,000 (CAD) loss in 2000 listed on their petition, proceeds from the sale of a home commonly known as the "Douglas home" in Canada, and proceeds from the sale of a business known as ELG Holdings Ltd.

48. By virtue of the aforementioned acts or failure to act, Defendants' discharge should be denied pursuant to 11 U.S.C. § 727(a)(5).

WHEREFORE, Plaintiff prays for judgment as follows:

1. For an Order which determines that the debt in the amount set forth above owed by Defendant Gross to Plaintiff is non-dischargeable and that the Court enter judgment in the amount of \$190,000 (CAD) or \$128,595.60 (USD) plus interest.
2. For an Order which denies the Defendants, Edward Lyle Gross and Nellie Daune Roberts, their discharge in bankruptcy;
3. For costs of suit incurred herein;
4. For reasonable attorneys' fees incurred herein; and
5. For such other and further relief as this Court deems just and equitable.

Dated: March 25, 2003.

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

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