

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In Re:

Case No. 04-30813

Chapter 7

Livan Calzadilla,

Debtor.

Jack M. Vilett,

Adv. Proc. No. 04-_____

Plaintiff,

vs.

Livan Calzadilla,

Defendant.

**COMPLAINT TO DETERMINE THE DISCHARGEABILITY
OF A PARTICULAR DEBT OR, ALTERNATIVELY, TO
DETERMINE WHETHER A DISCHARGE SHOULD BE GRANTED**

Plaintiff, Jack M. Vilett ("Vilett") for his complaint against Defendant Livan Calzadilla (the "Debtor"), states and alleges as follows:

1. This is an action brought by Vilett as a creditor of the Debtor to determine whether the claim held by Vilett against the Debtor in the above-captioned bankruptcy case is, under the provisions of 11 U.S.C. §§523(a)(4) & (6), excepted from discharge or, alternatively, whether the Debtor should be denied a discharge pursuant to 11 U.S.C. §727(a)(7).

2. Vilett is a Minnesota resident residing at 7201 Walker Street, Suite 428, St. Louis Park, MN 55426.

3. Debtor is an individual and a resident of the State of Minnesota, residing at 200 West 96th Street, Apt. 3H, Bloomington, MN 55420.

4. Debtor is subject to the jurisdiction of this Court in his pending Chapter 7 case captioned above.

5. This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §§1334(a) and 157(b)(2)(I).

6. Venue is properly before this Court pursuant to 28 U.S.C. §§1408 and 1409.

7. The Debtor filed a voluntary Chapter 7 Petition on February 13, 2004 thereby commencing the above-captioned case.

8. This adversary proceeding arises under 11 U.S.C. §§523(a)(4), 523(a)(6), and 727(a)(7) and it is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I & J).

9. The Debtor is the CEO and a shareholder of Empire Concepts, LLC (the "Company").

10. The Company filed a voluntary Chapter 7 Petition in the District of Minnesota on January 14, 2004 which is now pending.

11. In late 2002 and early 2003, Vilett made a series of loans to the Debtor to enable the Debtor to acquire assets for the Company.

12. In connection with and as evidence of these loans, the Company executed a series of eight Promissory Notes in the total amount of \$415,000.00 (the "Notes").

13. As additional security, on December 30, 2002, the Debtor, as an individual, entered into a Personal Guaranty (the "Guaranty") for the Promissory Notes under which the Debtor guaranteed the Company's obligations to Vilett.

14. To further secure repayment of the Notes, the Debtor, as CEO of the Company, executed and delivered to Vilett a Security Agreement (the "Security Agreement") pursuant to which the Company granted to Vilett a security interest in, among other things, all of the assets owned by Company and all assets to be acquired by the Company in the future, including proceeds of the assets and accounts receivable (collectively, the "Collateral").

15. On March 17, 2003, Vilett sent a letter advising Debtor that payments under two of the Notes were overdue and that if the late payments were not received by April 16, 2003 the Company would be in default under the Security Agreement. Debtor failed to make any payment by the stated deadline.

16. Between April and July, Vilett sent monthly demand letters that notified the Debtor of his default. By the last letter in July, all eight Notes were in default.

17. On July 17, 2003, Vilett commenced an action against the Company and the Debtor in Hennepin County District Court for breach of contract, claim and delivery, personal guaranty and fraud. Soon thereafter, Vilett moved for claim and delivery and the Court issued an order awarding Vilett immediate possession of all assets listed as Collateral in the Security Agreement.

18. The Debtor, took money and property from the Company and made certain non-ordinary course disbursements into his personal bank account. These disbursements include, but are not limited to, the following:

- (i) On August 4, 2003, Debtor deposited "bar/restaurant sales" from the Company into his US Bank personal account in the amount of \$3,210.00;
- (ii) On August 11, 2003, Debtor deposited "bar/restaurant sales" from the Company into his personal account in the amount of \$6,475.00;

- (iii) On August 11, 2003, Debtor deposited "Dad's loan" to the Company to "cover payroll, three week delay by City" into his personal account to in the amount of \$10,000.00;
- (iv) On August 19, 2003, Debtor deposited a "transfer from business account" into his US Bank personal account in the amount of \$600.00;
- (v) On August 21, 2003, Debtor deposited a "transfer from business account" into his US Bank personal account in the amount of \$1,800.00;
- (vi) In August 2003, Debtor's deposits into his US Bank personal bank account totaled \$20,785.00.
- (vii) On September 4, 2003, Debtor deposited a "transfer from business account" into his US Bank personal account in the amount of \$800.00.

19. On Debtor's Schedule B, Debtor lists a 2001 Cadillac Eldorado ETC as his personal property. The Debtor, took money from the Company and made certain non-ordinary course disbursements to US Bank towards an automobile loan for a 2001 Cadillac Eldorado ETC. These checks include: (i) Company Check No. 1248 dated May 23, 2003 in the amount of \$617.68 paid to US Bank for the Cadillac loan; (ii) Company Check No. 1300 dated June 30 in the amount of \$617.68 paid to US Bank for the Cadillac loan; (iii) Company Check No. 1043 dated September 2003 in the amount of \$617.68 paid to US Bank for the Cadillac loan; and (iv) Company Check No. 1448 dated November 27, 2003 in the amount of \$625.18 paid to US Bank for the Cadillac loan.

20. Periodic Deposits of cash bar sales into the Company account diminished drastically from the start of the business until mid-December, 2003. After mid-December, 2003 and up until the close of the Company, there were no cash bar sales deposits into the Company account.

21. The non-ordinary course disbursements made from the Company and deposited into the Debtor's personal account all occurred: (a) after the Company's first default under the

Notes on April 16, 2003, (b) after the Debtor received notice of each Note's default and demands for payment every month between March and July 2003, and (c) after Vilett commenced litigation on July 17, 2003 to recover the Collateral securing the Notes.

22. Many of the assets listed in the Security Agreement are now missing. On information and belief, some, if not all, of the missing assets were taken by Debtor for Debtor's personal use. At the meeting of Creditors in the Company's bankruptcy case, Debtor appeared as the CEO and President of the Company and admitted that certain assets and equipment owned by the Company, identified as Collateral under the Security Agreement, were currently located at his personal residence, including: the Company's entire liquor inventory, an HP/Pavillon laptop computer, three 14" LCD flat screen monitors, 2 computer hard drives, sound and lighting equipment, a liquor dispensing system, and a Royal cash register. Upon review of the Debtor's bankruptcy schedules, not one of these items is listed as personal property, yet every one of these items is admittedly in the Debtor's possession at his personal residence.

23. At no time did the Company nor the Debtor request, nor did Vilett approve, any non-ordinary course sale, assignment, or transfer of Vilett's Collateral.

24. Before, after and during both bankruptcy cases, the Debtor willfully and deliberately transferred, concealed, disposed and converted Vilett's Collateral with intent to hinder, delay or defraud Vilett and with substantial certainty that his conduct would cause harm to Vilett's financial interest.

25. Vilett actually, reasonably and detrimentally relied upon the Debtor's promises pursuant to the Guaranty and Security Agreement in extending credit to the Company.

COUNT ONE
11 U.S.C. §523(a)(6)
Determine Dischargability of the Debt to Vilett

26. Plaintiff realleges paragraphs 1 through 25 herein by this reference.

27. The Debtor was at all times aware of his obligations under the Promissory Notes, the Security Agreement and the Personal Guaranty with Vilett.

28. The Debtor, acting as an officer of the Company and signatory to the Company's bank accounts, disposed of and converted property and money from the Company, in which Vilett had a security interest, and converted said property and money for his personal use, without Vilett's knowledge or consent.

29. The Debtor willfully and deliberately transferred, concealed, disposed and converted Vilett's property with the intent to defraud Vilett.

30. The Debtor voluntarily, willfully and deliberately transferred, concealed and disposed of Vilett's property, knowing with substantial certainty that it would cause harm to Vilett.

31. Debtor's tortious conversion of the proceeds of the Company's accounts receivable in which Vilett had a perfected security interest constitutes willful and malicious injury by the Debtor to Vilett or to the property of Vilett.

COUNT TWO
11 U.S.C. §523(a)(4)
Embezzlement

32. Vilett realleges paragraphs 1 through 31 herein by this reference.

33. The Debtor, as CEO and a shareholder of the Company, was entrusted with control over the Company's property, substantially all of which, including the Company's accounts receivable, constituted Vilett's Collateral.

34. The Debtor fraudulently appropriated Vilett's property for the Debtor's own benefit by fraudulent intent or deceit.

35. The Debtor deposited the resulting funds from the appropriation of Vilett's property in an account accessible only to the Debtor, used the resulting funds for his personal use and to pay off other creditors of the Debtor, and concealed assets of the Company at the Debtor's private residence.

36. The Debtor used the funds and assets of such appropriation without explanation, reason or purpose to Vilett.

37. The Debtor's actions described above constitute embezzlement of the Company's property.

COUNT THREE
11 U.S.C. §727(a)(7)
Denial of Discharge

38. Vilett realleges paragraphs 1 through 37 herein by this reference.

39. The Debtor, as CEO and a shareholder of the Company, is an insider of the Company.

40. The Debtor caused property of the Company, within one year before the date of the filing of the Petition, to be transferred, removed, destroyed, mutilated or concealed with the intent to hinder, delay or defraud Vilett.

41. The above actions constitute grounds for denial of discharge pursuant to 11 U.S.C. §727(a)(7).

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Enter an Order determining and adjudging that the claims of the Plaintiff are excepted from the Debtor's discharge pursuant to the provisions of 11 U.S.C. §523(a)(6) or (a)(4), or, in the alternative, denying Defendant's discharge under 11 U.S.C. §727(a)(7);
2. Award judgment for Plaintiff and against the Defendant for the following sums:
 - a. \$415,000.00, the amount currently due under the Promissory Notes and Personal Guaranty, plus interest at the contract rate from the date of default, plus the attorneys fees and costs recoverable pursuant to the Promissory Notes and Personal Guaranty, or in the alternative the amount due Plaintiff as a result of Debtor's fraudulent, willful and malicious conduct as may be established by Plaintiff at trial;
 - b. The cost and expenses associated with collecting amounts due, and pursuing litigation, including attorneys' fees as will be provided by affidavit at the end of the trial.
3. Grant such other relief as this Court may deem just and equitable.

GREGERSON, ROSOW, JOHNSON & NILAN, LTD.

Dated: May 24, 2004

By /e/Mark J. Johnson
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Minneapolis, MN 55402-4337
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Attorneys for Plaintiff Jack M. Vilett

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In Re:

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Livan Calzadilla,

Debtor.

Jack M. Vilett,

Adv. Proc. No. 04-_____

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vs.

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SUMMONS IN AN ADVERSARY PROCEEDING

YOU ARE SUMMONED and required to file a motion or answer to the complaint which is attached to this summons with the clerk of the bankruptcy court within 30 days after the date of issuance of this summons, except that the United States and its offices and agencies shall file a motion or answer to the complaint within 35 days.

Clerk of Bankruptcy Court 200 Warren E. Burger Federal Building 316 North Robert Street St. Paul, MN 55101

At the same time, you must also serve a copy of the motion or answer upon the plaintiff's attorney.

Mark J. Johnson, Esq. Gregerson, Rosow, Johnson & Nilan, Ltd. 1600 Park Building 650 Third Avenue South Minneapolis, MN 55402-4337
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If you make a motion, your time to answer is governed by Fed. R. Bankr. P. 7012.

IF YOU FAIL TO RESPOND TO THIS SUMMONS, YOUR FAILURE WILL BE DEEMED TO BE YOUR CONSENT TO ENTRY OF A JUDGMENT BY THE BANKRUPTCY COURT AND JUDGMENT BY DEFAULT MAY BE TAKEN AGAINST YOU FOR THE RELIEF DEMANDED IN THE COMPLAINT.

Clerk of the Bankruptcy Court

Date

By: _____
Deputy Clerk

B 104 (Rev. 2/92)	ADVERSARY PROCEEDING COVER SHEET (Instructions on Reverse)	ADVERSARY PROCEEDING NUMBER (Court Use Only)
PLAINTIFFS Jack M. Vilett 7201 Walker Street Suite 428 St. Louis Park, MN 55426		DEFENDANTS Livan Calzadilla 200 West 96th Street Apt. 3H Bloomington, MN 55420
ATTORNEYS (Firm Name, Address, and Telephone No.) Mark J. Johnson, Esq. 612.338.0755 Gregerson, Rosow, Johnson & Nilan, Ltd. 1600 Park Building, 650 Third Avenue S. Minneapolis, MN 55402		ATTORNEYS (If Known) Pro Se
PARTY (Check one box only) <input type="checkbox"/> 1 U.S. PLAINTIFF <input type="checkbox"/> 2 U.S. DEFENDANT <input checked="" type="checkbox"/> 3 U.S. NOT A PARTY		
CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED) This is an action brought by Vilett as a creditor of the Debtor to determine whether the claim held by Vilett against the Debtor in the above-captioned bankruptcy case is, under the provisions of 11 U.S.C. Sections 523(a)(4) & (6), excepted from discharge or, alternatively, whether the Debtor should be denied a discharge pursuant to 11 U.S.C. Section 723(a)(7).		
NATURE OF SUIT (Check the one most appropriate box only.)		
<input type="checkbox"/> 454 To Recover Money or Property <input type="checkbox"/> 455 To revoke an order of confirmation of a Chap. 11, Chap. 12, or Chap. 13 Plan <input type="checkbox"/> 456 To obtain a declaratory judgment relating to any of foregoing causes of action <input type="checkbox"/> 435 To Determine Validity, Priority, or Extent of a Lien or Other Interest in Property <input checked="" type="checkbox"/> 426 To determine the dischargeability of a debt 11 U.S.C. § 523 <input type="checkbox"/> 459 To determine a claim or cause of action removed to a bankruptcy court <input type="checkbox"/> 458 To obtain approval for the sale of both the interest of the estate and of a co-owner in property <input type="checkbox"/> 434 To obtain an injunction or other equitable relief <input type="checkbox"/> 498 Other (specify) <input checked="" type="checkbox"/> 424 To object or to revoke a discharge 11 U.S.C. § 727 <input type="checkbox"/> 457 To subordinate any allowed claim or interest except where such subordination is provided in a plan		
ORIGIN OF PROCEEDINGS (Check one box only.) <input checked="" type="checkbox"/> 1 Original Proceeding <input type="checkbox"/> 2 Removed Proceeding <input type="checkbox"/> 4 Reinstated or Reopened <input type="checkbox"/> 5 Transferred from Another Bankruptcy Court		<input type="checkbox"/> CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23
DEMAND \$	OTHER RELIEF SOUGHT	<input type="checkbox"/> JURY DEMAND Check only if demanded in complaint
BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES		
NAME OF DEBTOR Livan Calzadilla		BANKRUPTCY CASE NO. 04-30813
DISTRICT IN WHICH CASE IS PENDING Minnesota	DIVISIONAL OFFICE Third	NAME OF JUDGE Dennis D. O'Brien
RELATED ADVERSARY PROCEEDING (IF ANY)		
PLAINTIFF Jack M. Vilett	DEFENDANT Livan Calzadilla	ADVERSARY PROCEEDING NO.
DISTRICT	DIVISIONAL OFFICE	NAME OF JUDGE
FILING FEE (Check one box only.) <input checked="" type="checkbox"/> FEE ATTACHED <input type="checkbox"/> FEE NOT REQUIRED <input type="checkbox"/> FEE IS DEFERRED		
DATE 5.24.04	PRINT NAME Mark J. Johnson	SIGNATURE OF ATTORNEY (OR PLAINTIFF) 