SO ORDERED.

SIGNED this 14 day of April, 2005.

Dale L. Somers
Dale L. Somers
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In Re:	
LORI LYNN BAIR,	**CASE NO. 02-10076-7**
	CHAPTER 7
DEBTOR.	
B & F CATTLE, INC.,	
PLAINTIFF,	
v.	**ADV. NO. 02-5129**
LORI LYNN BAIR,	
DEFENDANT.	

MEMORANDUM OF DECISION

This proceeding is before the Court for decision following a trial on the merits on a nondischargeability complaint and an objection to a homestead exemption. Plaintiff B & F Cattle, Inc. ("B & F"), appears by counsel Gary H. Hanson. Debtor Lori Lynn Bair

("Debtor") appears by counsel Todd M. Allison. The Court has considered the evidence presented, and is now ready to rule.

The Debtor and her husband, Dwight Bair ("Bair") were tenants on a cattle ranch they leased from B & F, a corporation of which Bair owned one-half. Bair installed various improvements on the ranch during their tenancy. After B & F and Bair personally ran into financial difficulties and Bair had some disputes with the other owner of B & F, Bair began to remove some of the improvements from the ranch and continued to do so after he filed a Chapter 12 bankruptcy. He took some fencing and two waterers from the ranch and installed them on the Debtor's newly-purchased twenty-acre homestead. After the Debtor filed for bankruptcy and her case was converted to Chapter 7, B & F objected to her homestead exemption to the extent its property was used to increase the value of her homestead. B & F also sued her, claiming that (1) she should be liable to it for the reduction in the value of the ranch caused by the removal of improvements, and (2) her liability should be nondischargeable under 11 U.S.C.A. § 523(a)(2), (4), and (6). The homestead objection and the dischargeability complaint were tried together. As explained below, the Court concludes that (1) the Debtor is not liable to B & F for the reduced value of its ranch, but only for the value of the fencing materials Bair moved to her homestead, (2) that liability is not excepted from her Chapter 7 discharge, but (3) B & F is entitled to a constructive trust against the Debtor's interest in her homestead to the extent of that liability.

FACTS

In 1996, Dwight Bair and Don Fulton formed B & F Cattle, Inc., a corporation through which they would engage in the cattle business. The men had known each other for many years, and appear to have run B & F rather informally. Both men also conducted separate cattle businesses on their own or with others. Fulton testified that the Debtor was not a participant in B & F. B & F bought a 48.5 acre ranch at Kingman County, Kansas, known as the Messenger Ranch ("Ranch"), that had a house and various cattle facilities on it. The Ranch was to serve as the headquarters for B & F's operations. The corporation used some cattle commissions it had earned and a loan from the Roxbury Bank ("Bank") to pay for the Ranch, giving the Bank a mortgage as security. Fulton explained that both he and Bair had authority to handle B & F's business, including to sign notes with the Bank and to sign checks. B & F also borrowed money from the Bank to finance its operations. Both Fulton and Bair personally guaranteed B & F's debt to the Bank. The Bank also financed Bair's farm and cattle operations that were separate from B & F, and the Debtor was liable with Bair for at least some of that debt.

The Debtor married Bair in 1996, and they had two children together. Bair also had two older children from a previous marriage. The Debtor has bachelor's and master's degrees from Kansas State University. She has worked at the junior college in Hutchinson for a number of years, and since at least 1995, if not earlier, has been the Director of Admissions there; she still had that job when this proceeding was tried in February 2004.

In November 1996, B & F leased the "House and Yard" of the Ranch under a lease that specifically identified Bair as the tenant, but was signed by both Bair and the Debtor on lines provided for tenant signatures. The lease included a provision stating, "TENANT agrees to only make any modifications to the property after obtaining LANDLORD[']S permission." The lease called for the tenant to make a "monthly contribution" of $500 per month. Fulton explained that this contribution was intended to be rent. Bair and the Debtor paid the first month's rent, but never paid any more even though they occupied the Ranch until December 2001. Neither B & F nor Fulton ever sought any more rent from them. Fulton explained that he had had prior dealings with Bair, and he trusted Bair to pay the obligations he incurred in B & F's business whenever they settled matters at the end of the deal, as Bair had always done before.

While Bair and the Debtor were living at the Ranch, Bair installed a number of improvements that Fulton claims B & F paid for. Bair put up continuous steel fencing and at least two automatic waterers which, in conjunction with other improvements, were necessary to make the property a working cattle facility. The fencing was welded to posts that were set in concrete. The waterers were attached to water pipes so they would automatically refill and to electricity to run heaters to keep them from freezing, but the evidence did not indicate whether they were otherwise attached to the land. Fulton testified that he asked Bair once how the improvements were being paid for, and Bair told him, "Don't worry about it, we can handle it." Fulton indicated they never actually discussed who would own the improvements if Bair were to leave the Ranch. Fulton believed the

improvements were paid for with money B & F had made before buying the Ranch but that Bair had never deposited in B & F's account. Fulton thought that the Bank's mortgage covered the improvements, but Bair claimed the improvements were all obtained with his and the Debtor's personal money, and belonged to them. The Bank's president, Lowell Peachey, said the Bank's mortgage on the Ranch contained standard language to cover improvements and fixtures as well as the land. The Court concludes that Bair probably knew — and certainly he should have known — that Fulton and the Bank would believe that the improvements he attached to the Ranch belonged to B & F, but failed to advise them of his claim that he and the Debtor owned the improvements until they had already taken actions relying on their belief B & F owned them. Indeed, with respect to the fence, which probably would take nearly as much labor to remove as it did to install, the Court refuses to believe that when Bair put it up, he intended to take it with him if he ever left the Ranch. But for the anger and spite he clearly felt toward Fulton and the Bank, Bair would simply have purchased all new fencing materials to install at his new location, and avoided the extra effort required to remove them from the Ranch.

In 1998 or 1999, B & F lost quite a bit of money on some feeder cattle and began to get into financial trouble. Peachey said efforts were made during this time to restructure B & F's debt to the Bank. In connection with those efforts, the Bank had an appraisal of the Ranch done that included all the improvements located there. Peachey said he believed Bair would have told the appraiser what property should be included in the appraisal. Bair denied that he had ever met the appraiser or had anything to do with the appraisal.

In the summer of 1999, Fulton moved to Colorado and his relationship with Bair deteriorated, because of both B & F's financial difficulties and Bair's personal financial difficulties. Fulton and Bair discussed how to resolve B & F's problems, and at least considered that Fulton might buy its cattle while Bair might buy the Ranch. They ultimately decided, however, to list the Ranch for sale.

In March 2000, a man named Don Terhune, who owned some neighboring land, offered $225,000 for the Ranch. Fulton, Bair, the Debtor, and Peachey met to discuss B & F's finances and consider Terhune's offer. Although the Debtor admitted she signed the 1997 lease, she testified that this was the first time she realized that B & F, and not Bair, owned the Ranch. Fulton conceded that the Debtor was upset about the possible sale and objected to it. Fulton said Bair also opposed it, but Peachey suggested Bair seemed somewhat willing to consider selling the Ranch. The meeting concluded with the understanding that Bair and the Debtor would have some time to try to arrange to buy the Ranch themselves.

According to Fulton, in the summer of 2001, neighbors of the Messenger Ranch contacted him and told him things were being removed from the Ranch. He had not given Bair permission to remove any of B & F's property from the Ranch. Fulton contacted Peachey, who went to look at the Ranch and thought that some fixtures or attachments to the property were being removed. On June 6, he sent a letter to Bair and the Debtor, telling them that although he was aware they claimed certain improvements at the Ranch were their personal property, the Bank's position was that: (1) in obtaining a loan for B & F, Bair had

participated in representing to the Bank that the improvements belonged to B & F, so Bair could not claim they belonged to him and the Debtor; and (2) even if the improvements did not belong to B & F, they were subject to a separate security interest Bair and the Debtor had given the Bank in connection with Bair's loans that did not involve B & F. Peachey told them to leave all stationary collateral, including feed bunks, fencing, and cattle-working facilities at the Ranch, advising that the Bank would pursue available legal remedies if that instruction was violated. The Debtor admitted she read Peachey's letter. Items continued to be removed, and sometime later that summer, the Bank sued Bair and the Debtor in state court to collect on the obligations they owed it as part of Bair's non-B-&-F operation. The Bank also obtained a restraining order directing Bair and the Debtor not to remove any of the Bank's collateral from the Ranch.

In September 2001, the Debtor bought a tract of land in Reno County in her name alone, making a down payment with money provided by Bair's parents. The tract was about twenty acres of bare wheat ground. About the same time, she and Bair together bought a manufactured home, using more money supplied by Bair's parents for a down payment. The home was installed on the Debtor's newly-purchased land. In her bankruptcy case, she has claimed the tract and home are exempt under Kansas law as her homestead ("Homestead").

The Debtor conceded that Bair moved two waterers from the Ranch to the Homestead, although she claimed she and Bair had bought them at the state fair for about $150 to $250 each, with their own money, not B & F's. The Debtor also conceded that Bair installed a lot of continuous steel fencing on the Homestead, although she claimed

they bought some of it after buying the new land and some of it had never been installed at the Ranch but only stacked up by a building there. The Debtor testified that she knew Bair was involved in removing installed fencing from the Ranch, but said he never talked to her about it, and she herself did not participate in removing it or installing it at the Homestead. While they were living at the Ranch, her job required her to be gone from about seven in the morning until seven in the evening, and at times she also had to travel around the state to try to recruit students for the junior college. When she was at home, she had two young children to care for. The Debtor testified that Bair told her to take care of the house, and that he would take care of his ranching business and she should stay out of it. Bair similarly said he took care of the cattle and farm, and the Debtor took care of the kids. At some point, after an accounting firm had stopped working for him, the Debtor did help him do accounting work that was necessary to prepare their tax returns.

The Debtor did not have her own idea about how much fencing Bair had installed on the Homestead, but assumed Fulton's and Peachey's estimates of 500 to 800 feet were accurate. She indicated she wanted a privacy fence that had been installed around the house at the Ranch and that it was removed and installed at the Homestead. Fulton indicated he did not doubt the Debtor paid for this fence, and B & F does not contest her claim to own it. The Debtor denied that any of the other improvements removed from the Ranch were moved to the Homestead except for the two waterers and the 500 to 800 feet of fence. Bair said that in the summer of 2001, as the result of a lawsuit, he had to take down a rectangular arena fence at the Ranch because he had built it on the neighbor's land. He said

the arena was 250 feet by 150 feet, and that he reinstalled this 800 feet of fence to make an arena at the Homestead. He said he also removed another 500 feet or so of fence from the Ranch and put it up at the Homestead. While Bair's testimony was not convincing on some other points, the Court concludes that his estimate that he took 1,300 feet of fence from the Ranch and reinstalled it at the Homestead is the most accurate figure presented on that point. As might be expected with a husband and wife, neither the Debtor nor Bair suggested she paid Bair anything for the fencing materials and waterers he installed at the Homestead.

A week after the Debtor bought the Homestead land, Bair filed a Chapter 12 bankruptcy case. Bair continued to remove improvements from the Ranch after this filing, a fact that contributed to Chief Judge Nugent's decision in February 2002 to grant the Bank's motion to convert Bair's case to a Chapter 7 liquidation.[1] Bair's discharge was later denied, based on all the wrongdoing detailed in the conversion ruling.[2] In November 2001, on behalf of B & F, Fulton filed a motion for stay relief in Bair's case, seeking, among other things, to file a state court action to dissolve B & F, and a December 2001 order allowed B & F to file suit to recover the Ranch from Bair. The Debtor reported on the statement of financial affairs she filed in January 2002 that by then, a proceeding to dissolve B & F was pending.

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[1]*See In re Dwight Dale Bair*, Case No. 01-14458, Order Granting Roxbury Bank's Motion to Convert Case to Chapter 7, dkt. no. 77 (Bankr.D.Kan. Feb. 1, 2002), *slip op*. at 13-14.

[2]See Roxbury Bank v. Bair (In re Bair), Adv. No. 02-5122, Order Granting Summary Judgment to the Roxbury Bank, dkt. no. 40 (Bankr.D.Kan. July 31, 2003); *see also* Memorandum in Support of Summary Judgment, dkt. no. 30 in same case, filed by Roxbury Bank Apr. 17, 2003 (basing motion on findings made in conversion order in *Bair*, Case No. 01-14458).

Sometime around February 2002, B & F sold the Ranch through an auction. The neighbor who had offered to buy it almost two years earlier, Don Terhune, won the auction with a bid of $185,000. He testified that the Ranch was not worth as much as it had been earlier because a variety of improvements that had been there were missing, not because property values in the area had declined. He indicated the most important missing item was the fencing because a great deal of labor would be required to replace it. He said he had replaced about fifteen hundred to two thousand feet of fence, and estimated that was only one-quarter of the fence that had been there when he tried to buy the Ranch in 2000. He said the fence could be bought in twenty-foot panels that would then be attached to posts set in concrete. The cheapest replacement panels he could find were about $65 each. Fulton gave a similar cost for the fencing, expressing it as $3 to $3.25 per foot. No one ever mentioned the cost of the posts and concrete the panels would be attached to. Everyone agreed the labor required to install this kind of fence would be far and away the main cost of the fence. For this reason, Terhune and Bair both said they did most of the installation work themselves.

The Debtor filed a Chapter 13 bankruptcy on January 8, 2002, but on the Bank's motion, the case was converted to Chapter 7 because her debts exceeded the Chapter 13 eligibility limits. In the Debtor's main case, B & F objected to her homestead exemption. It also filed this adversary proceeding, seeking a denial of her discharge under 11 U.S.C.A. § 727(a), and to establish that she owed it a debt that would be excepted from her discharge by § 523(a)(2), (4), and (6). B & F later abandoned its claim under § 727(a). Its objection

to her claimed homestead and its § 523(a) claims were tried together. During the trial, the Court asked whether B & F would be interested in recovering from the Debtor's Homestead the property it claimed to own, rather than receiving an award of damages. B & F indicated it would not because, having already sold the Ranch, it no longer had anywhere to take the property.

The Debtor made the Court's decision in this case more difficult than it might have been by her demeanor while testifying. She was often evasive, giving answers that did not respond to the questions she was asked. However, her husband, a large, intimidating man, was present in the courtroom for the entire trial. Chief Judge Nugent wrote in the order converting Bair's case from Chapter 12 that Bair's "tone of voice, body language, and choice of words when responding to the questions of each lawyer who examined him, as well as to the questions of the Court, exuded rudeness, contempt and defiance."[3] In other words, even after he chose to file for bankruptcy, Bair was unwilling to follow the strictures imposed on a debtor in bankruptcy, or to allow anyone to tell him what to do. This Court easily believed the Debtor's assertions that Bair told her to stay out of his cattle business, that he alone removed the fencing, waterers, and other improvements from the Ranch, and that she could not have stopped him from doing so. It appeared to the Court that much of the Debtor's reticence resulted from her husband's presence in the courtroom.

DISCUSSION

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[3] *In re Bair*, Case No. 01-14458, Order Granting Roxbury Bank's Motion to Convert Case to Chapter 7, *slip op.* at 11.

1. Does the Debtor owe B & F any debt?

A creditor that wants to have a debt excepted from discharge under § 523(a) of the Bankruptcy Code has the burden of proving,[4] by a preponderance of the evidence,[5] that a debt exists and is covered by one of the discharge exceptions. A party objecting to a debtor's exemption of some property also has the burden of proving that the exemption is not properly claimed.[6] B & F contends the Debtor is liable to it for the reduction in the value of the Ranch caused by the removal of improvements, and should not be able to exempt her Homestead from B & F's claim to the extent that those removed improvements were used to improve the Homestead and increase its value. Although the evidence established that a number of improvements were removed from the Ranch, B & F's evidence failed to convince the Court that the Debtor participated in removing them. Consequently, the Debtor is not liable to B & F for the reduction in the value of the Ranch.

On the other hand, the evidence did establish that some of the improvements removed from the Ranch, 1,300 feet of fence and two waterers, were reinstalled on the Debtor's Homestead. If these items were B & F's property, the Debtor might have some kind of obligation to B & F as a result of possessing what would amount to embezzled or converted property. So the Court must first determine whether the fence and waterers belonged to B & F.

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[4]*In re Black*, 787 F.2d 503, 505 (10th Cir. 1986).

[5]*Grogan v. Garner*, 498 U.S. 279, 283-91 (1991).

[6]Fed. R. Bankr. P. 4003(c).

Through Fulton, B & F contends that the fence and the waterers were bought with its money and so were its property, while the Debtor and Bair claim they paid for and own them. Under the circumstances, the Court believes who paid for these items may be irrelevant, and their ownership might instead be determined by considering whether they became fixtures on the Ranch when Bair installed them there. Under Kansas law, personal property that is attached to real property can be considered to have become a part of the real property depending on: (1) how firmly the personalty is attached or how easily it can be removed and the extent of harm caused by its removal; (2) the intent of the parties involved; (3) how the personalty is adapted to the use of the land; and (4) whether a buyer of the land whose seller has said nothing about the personalty but who knows about the interests of others of record or in possession of the real property would reasonably consider himself or herself to have bought the personalty with the land.[7]

B & F bought the Ranch to serve as the headquarters of its cattle operations, and Bair installed the fence and waterers to make the Ranch more suitable for working cattle. Bair was not only a tenant of B & F when he installed the improvements, but also a fifty-percent owner of B & F. The Court is convinced that no matter who installs it on a cattle ranch, fencing made of panels welded to posts set in concrete in the ground to form an enclosure that will contain cattle would ordinarily be considered to become a part of the land and belong to the landowner. The fence was a type commonly installed at cattle-

[7]*See In re Sand & Sage Farm & Ranch, Inc.*, 266 B.R. 507, 509-13 (Bankr.D.Kan. 2001).

working facilities, and everyone agreed the labor was the biggest investment in putting it up. Removing the fence would have taken considerable effort, too. Any mere tenant who wanted to put up such a fence but retain the right to remove the panels and pull the posts and concrete back out of the ground when the tenancy ended would have to make express arrangements with the landowner to prevent the fence from becoming a fixture. The need for such pre-installation arrangements is even more compelling for a tenant who is also a part-owner of the landowner, someone much more likely to install improvements on the landowner's behalf. Fulton and the Bank obviously thought the fence was B & F's property, and the Court is convinced that when he put it up, Bair intended to make it a permanent addition to the Ranch. Anyone who bought the Ranch from B & F would reasonably think that the fence was included in the sale. The Court concludes that the fence became a fixture when Bair installed it, and therefore that the fence belonged to B & F.

The waterers present a closer question. With the fence, the Ranch was set up to house and work cattle, and cattle need a water supply. Removing the waterers must have left at least a water pipe and some electric wires exposed and needing to be dealt with in some way. However, there was insufficient evidence for the Court to determine whether Bair intended to make the waterers a permanent addition to the Ranch, or whether a buyer of the Ranch as a working cattle facility would reasonably think the waterers were included in the sale. Considering all the evidence, the Court has not been convinced that the waterers became fixtures at the Ranch. B & F's only other effort to prove it owned the waterers consisted of Fulton's statement that he assumed Bair used B & F's money to pay

for all the improvements. This assumption, contradicted by the Debtor's assertion she and Bair had bought the waterers with their own money, was not enough to convince the Court that the waterers more likely than not belonged to B & F. In short, B & F failed to satisfy its burden to prove that it owned the waterers.

Having concluded the fencing materials had become fixtures at the Ranch, the Court further concludes that Bair's actions in removing and taking them to the Homestead constituted both embezzlement and a conversion of B & F's property. Even a completely innocent possessor of converted property cannot retain it free of any claim by the true owner of the property. As the Kansas Court of Appeals recently said:

> Conversion is "the unauthorized assumption or exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the other's rights. [Citation omitted.]" *Gillespie v. Seymour*, 14 Kan. App. 2d 563, 572, 796 P.2d 1060 (1990). Under Kansas law, "[c]onversion is a strict liability tort. [Citation omitted.] The required intent is shown by the use or disposition of property belonging to another, and knowledge or ignorance as to ownership of the property is irrelevant. [Citations omitted.]" *Commerce Bank, N.A., v. Chrysler Realty Corp.*, 76 F. Supp. 2d 1113, 1118 (D. Kan. 1999), *rev'd on other grounds* 244 F.3d 777 (10th Cir. 2001).[8]

This description of conversion makes clear that because the Court has found the fencing materials belonged to B & F and not to Bair, the Debtor can be liable to B & F for the conversion, even if she had no idea the materials did not belong to her and Bair, and had no intent to deprive B & F of its property. Of course, because she read Peachey's June 6, 2001, letter, she actually knew the ownership of the improvements was in dispute before

[8]*Millenium Financial Servs., LLC, v. Thole*, 31 Kan. App. 2d 798, 808 (2003).

Bair removed some or all of them from the Ranch, so she has no grounds to argue there is anything unfair about making her liable to B & F for the conversion of the fencing materials.

Under Kansas law, the normal measure of damages for conversion is "the fair and reasonable market value of the property converted at the time of the conversion."[9] Under this rule, B & F is not entitled to a claim against the Debtor for the increase in the value of her Homestead caused by Bair's installation of the fencing there, only for the value of the fencing materials themselves. This is not surprising since much of the increased value would have been caused by Bair's labor in installing the fencing. Based on the conclusions reached to this point, B & F has a valid claim against the Debtor to recover the market value of the 1,300 feet of fencing materials. Terhune testified that replacing the removed fencing materials would cost $65 per 20-foot section of fence, not counting the cost of the posts and concrete to which the sections would be attached. Fulton gave a similar cost estimate. No one suggested the fencing materials would have lost any value during the time they were used at the Ranch or that the cost of replacing them had changed between the time Bair removed the materials and Terhune began to replace them. No evidence indicated what the posts and concrete would cost, so any amount the Court might attribute to them would be speculative. It would take sixty-five 20-foot sections to make 1,300 feet of fence, so B & F's claim for the materials is $4,225, and the Court concludes that is the

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[9] *Werdann v. Mel Hambelton Ford, Inc.*, 32 Kan. App. 2d 118, 124 (2003) (citing *Mohr v. State Bank of Stanley*, 241 Kan. 42, 55 (1987)).

amount the Debtor owes B & F. Two questions remain, however: (1) whether that claim is nondischargeable and (2) whether it is enforceable against the Debtor's Homestead.

2. Objection to Dischargeability under § 523(a)

B & F contends the Debtor's obligation to it should be excepted from discharge under § 523(a)(2), (4), and (6). According to the final pretrial order entered in this proceeding, B & F alleges the Debtor defrauded it within the meaning of § 523(a)(2)(A), incurred a debt to it through larceny covered by § 523(a)(4), and caused willful and malicious injury to its property as condemned by § 523(a)(6). The Court will address each of these theories in turn.

a. §523(a)(2)(A)

Section 523(a)(2)(A) of the Bankruptcy Code excepts from discharge any debt "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by — (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's . . . financial condition." The Court sees nothing in the evidence suggesting the Debtor took any action with respect to the fencing materials that might have constituted false pretenses, a false representation, or actual fraud. In order to succeed under § 523(a)(2)(A), B & F had to

> prove the following elements by a preponderance of the evidence: 1) the debtor knowingly committed actual fraud or false pretenses, or made a false representation or willful misrepresentation; 2) the debtor had the intent to deceive the creditor; and 3) the creditor relied on the debtor's representation. *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1373 (10th Cir.1996). The creditor's reliance must have been

justifiable, *Field v. Mans*, 516 U.S. 59, 74-75 (1995), and the creditor must have been damaged as a result, *Young*, 91 F.3d at 1373.[10]

None of the evidence suggested that with respect to the fencing materials, the Debtor did anything fraudulent, made any misrepresentation, or otherwise acted by trickery or deceit, or that she took any action intending to deceive B & F. Nothing suggested that B & F relied on anything the Debtor might have done in connection with those materials.[11] In effect, she merely stood silently by and watched Bair remove them from the Ranch and reinstall them at the Homestead. The Debtor's obligation to B & F is not excepted from her discharge by § 523(a)(2)(A).

b. Larceny under § 523(a)(4)

Section 523(a)(4) excepts from discharge any debt "for . . . embezzlement, or larceny." For purposes of this provision, the Tenth Circuit has said, "[E]mbezzlement is defined under federal common law as 'the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come.'"[12] The Court understands "fraudulent appropriation" to mean that the person used the property

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[10]*State of Missouri ex rel. Nixon v. Audley (In re Audley)*, 275 B.R. 383, 388 (10th Cir. BAP 2002).

[11]*See* 4 *Collier on Bankruptcy*, ¶ 523.08[1][e] at 523-45 ("Actual fraud . . . consists of any deceit, artifice, trick, or design involving direct and active operation of the mind, used to circumvent and cheat another — something said, done or omitted with the design of perpetrating what is known to be a cheat or deception").

[12]*Klemens v. Wallace (In re Wallace)*, 840 F.2d 762, 765 (10th Cir. 1988) (quoting *Great American Ins. Co. v. Graziano (In re Graziano)*, 35 B.R. 589, 594 (Bankr.E.D.N.Y. 1983), which was quoting *Gribble v. Carlton (In re Carlton)*, 26 B.R. 202, 205 (Bankr.M.D.Tenn. 1982)).

for purposes other than those for which it was placed in his or her control or possession.[13] Larceny is the same as embezzlement except that the thief never had permission to take possession of the property involved, or otherwise obtained it unlawfully.[14] Since B & F had clearly authorized Bair to possess its property at the Ranch, Bair essentially admitted that he took the actions necessary to constitute embezzlement by taking improvements from the Ranch. While B & F alleged the Debtor in some way helped Bair remove the property, the evidence convinced the Court that she did not. Consequently, although as explained earlier, she is liable to B & F for conversion, her liability did not arise from larceny because she did not participate in Bair's removal of B & F's property from the Ranch. Her debt to B & F is not excepted from discharge by § 523(a)(4).

c. Willful and malicious injury under § 523(a)(6)

Section 523(a)(6) of the Bankruptcy Code excepts from discharge any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." In *Kawaauhau v. Geiger*, the Supreme Court ruled that this provision applies only to a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury,[15] explaining that this means the debtor must have intended the consequences of the act he or she performed, not simply the act itself.[16] This Court's conclusion that the Debtor

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[13]*See* 4 *Collier on Bankruptcy*, ¶ 523.10[2].

[14]*See* 4 *Collier on Bankruptcy*, ¶ 523.10[2].

[15]523 U.S. 57, 60-64 (1998).

[16]523 U.S. at 61-62.

did not participate in Bair's actions in removing property from the Ranch defeats B & F's claim under this provision. The Debtor took no action with respect to the fencing materials, and so caused no injury to B & F's interest in them. Her debt to B & F is not excepted from discharge by § 523(a)(6).

3. B & F's claim against the Debtor's Homestead

B & F contends it should have rights superior to the Debtor's homestead claim to the extent improvements were removed from the Ranch and installed on the Homestead. Under Kansas law, one theory that allows a creditor to enforce a claim against property despite the owner's homestead claim is available when the owner used assets in which the creditor had a "peculiar equity" to obtain or improve the homestead, or to reduce a mortgage against it.[17] Recently, this Court reviewed the case law concerning the Kansas peculiar equity doctrine, and concluded that it required the objecting creditor to show that its debtor had acted with fraudulent intent.[18] Because the Court has already concluded the evidence did not establish that the Debtor acted with any fraudulent intent, B & F cannot qualify for the peculiar equity remedy.

Nevertheless, some of B & F's property wound up on the Debtor's Homestead. Because B & F owned the property, B & F has a stronger claim to an equitable remedy against the Debtor than a creditor with only a "peculiar equity" in an asset, an interest more

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[17]*See Bankwest of Kansas v. Sager (In re Sager)*, Case No. 03-13626-7, Adv. No. 03-5308, Memorandum Denying Motion of Bankwest of Kansas for Summary Judgment (Bankr.D.Kan. Feb. 25, 2005), *slip op.* at 12-20 (discussing Kansas peculiar equities doctrine).

[18]*Id, slip op.* at 20.

limited than ownership. The Court concludes that Kansas law does provide a remedy in this situation. Several federal courts applying Kansas law have concluded that a bankruptcy court can properly impose a constructive trust against property in Kansas (or at least against otherwise exempt property in Kansas) that a debtor obtained through fraud or other improper actions.[19] And the Kansas Court of Appeals has ruled that such relief can also be granted against a party who received property from the wrongdoer without giving any value for it, even though the recipient did not participate in the wrongdoing.[20] This portion of the remedy Kansas provides is apparently sometimes called the "trust pursuit rule," and is available when the recipient of the property either acted in bad faith, had notice of the wrongdoing, or gave no consideration for the property.[21] Bair's actions justify imposing a constructive trust against the property he removed from the Ranch and converted to his own benefit. To the extent he took the property to the Debtor's Homestead and installed it there, B & F is entitled to enforce a constructive trust against the Debtor's interest in the Homestead because she gave no value or consideration for the property and had notice that Bair's actions at least might be wrongful. Although the Debtor's personal obligation to B &

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[19]*See In re Petroleum Prods., Inc.*, 150 B.R. 270, 272-74 (D.Kan. 1993) (bankruptcy court properly recognized equitable lien, analogous to constructive trust, against property to prevent unjust enrichment); *Clark v. Wetherill (In re Leitner)*, 236 B.R. 420, 423-25 (Bankr.D.Kan. 1999) (bankruptcy court imposed constructive trust against homestead purchased with money embezzled from corporation); *First American Title Ins. Co. v. Lett (In re Lett)*, 238 B.R. 167, 197-99 (Bankr. W.D. Mo. 1999) (at least to the extent of exempt property obtained with proceeds of fraud, bankruptcy court could impose constructive trust to return property to its proper owner).

[20]*Kampschroeder v. Kampschroeder* 20 Kan. App. 2d 361, 368-69 (1995).

[21]*See Geer v. Cox*, 242 F.Supp.2d 1009, 1024 (D.Kan. 2003).

F will be extinguished by her bankruptcy discharge, B & F's constructive trust against her Homestead will remain effective.

CONCLUSION

The Court concludes that the Debtor is not liable to B & F for the reduction in the value of its Ranch caused by Bair's removal of improvements. The fencing materials Bair took from the Ranch and installed at the Homestead had become fixtures to the Ranch, and so belonged to B & F as the owner of that real property. Because those materials were B & F's property, Bair converted them when he took them from the Ranch and used them for his own purposes. The evidence failed to establish that B & F owned the waterers Bair took from the Ranch and placed on the Homestead. As the owner of the Homestead where Bair reinstalled the converted fencing materials, the Debtor possesses them and is liable to B & F for their reasonable market value, a total of $4,225. This debt is not excepted from the Debtor's discharge by § 523(a)(2)(A), (4), or (6). The Court will, however, impose a constructive trust against the Debtor's Homestead that B & F can enforce to the extent of the $4,225 the Debtor owes it.

The foregoing constitutes Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A judgment based on this ruling will be entered on a separate document as required by FRBP 9021 and FRCP 58.

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