

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:

Chapter 7

DYLAN BROWN,

Debtor.

Case No. 05-60220 (ALG)

HEARST MAGAZINES, A Division
Of HEARST COMMUNICATIONS, INC.,

Plaintiff,

Adversary Proceeding
No.

-against-

DYLAN BROWN,

Defendant.

**COMPLAINT FOR DETERMINATION OF DISCHARGEABILITY
AND OBJECTING TO DEBTOR'S DISCHARGE PURSUANT TO
SECTIONS 523 AND 727 OF THE BANKRUPTCY CODE**

Plaintiff-Creditor Hearst Magazines, A Division of Hearst Communications, Inc., as and for its Complaint against Defendant-Debtor Dylan Brown (the "Debtor"), respectfully alleges:

JURISDICTION

1. On December 21, 2005, the Debtor filed a voluntary petition (the "Petition") for relief under chapter 7 of Title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of New York.

2. On January 26, 2006, the Debtor's duly-noticed meeting of creditors

was held pursuant to Section 341(a) of the Bankruptcy Code (the "Section 341 Meeting").

3. As of the date of this Complaint the Debtor has not been granted a discharge.

4. This Complaint is timely because the date by which a Complaint objecting to the Debtor's discharge or to determine dischargeability of a debt expires on March 27, 2006.

5. This is an adversary proceeding in which the plaintiff-creditor is objecting to the Debtor's discharge under Bankruptcy Code § § 727(a)(3) and 727(a)(4)(A) and is seeking a determination as to the dischargeability of the debt owed by the Debtor to plaintiff under Bankruptcy Code § § 523(a)(2)(A), 523(a)(4), 523(a)(6).

6. The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334 and Bankruptcy Code § § 523 and 727.

7. This case is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I) and 157(b)(2)(J).

PARTIES

8. Plaintiff is a business corporation organized under the laws of the State of Delaware, is authorized to do business in the State of New York, and maintains its principal office at 959 Eighth Avenue, New York, New York 10019.

9. Plaintiff is a judgment creditor of the Debtor.

10. Defendant is the Debtor in the above-captioned case and at all relevant times has resided at 1065 Park Avenue, Apt. 29D, New York, New York 10128.

11. Plaintiff is the owner and publisher of numerous magazines, including Town & Country.

ADMIX MEDIA LLC

12. The Debtor in 1998 began working in the advertising business by selling ads for Meigher Communications, the publisher of several magazines.

13. In 1999, the Debtor's employment terminated and he went into business for himself as an unincorporated sole proprietor, placing advertising for clients in magazines.

14. On May 1, 2001, the Debtor incorporated his business as Admix Media LLC, a New York limited liability company.

15. The Debtor was Admix Media's sole employee, member, and he was in control of and responsible for the management of this business.

16. In April and May 2001, the Debtor placed insertion orders for magazine ads for Clive Christians Cabinets, a custom kitchen cabinet maker, in Traditional Home magazine for charges totaling \$53,000.00.

17. The ads appeared in the magazine, but Admix Media failed to pay for the charges incurred.

18. On June 26, 2002, Admix Media and Clive Christian Cabinets were sued in the Supreme Court of the State of New York by Meredith Media, the publisher of Traditional Home magazine, for \$53,000.00 in unpaid advertising charges for the two ads.

19. The Debtor ceased doing business under the Admix Media name almost immediately thereafter.

20. Admix Media did not respond to the Meredith Media/Traditional Home

suit, resulting in an order directing entry of a default judgment.

21. This case proceeded to trial against the advertiser, Clive Christian Cabinets.

22. Clive Christian Cabinets denied authorizing the Debtor or Admix Media to place the ads.

23. The Court after trial ruled in favor of Clive Christian Cabinets and dismissed the claims of Meredith Media/Traditional Home.

24. The \$53,000.00 debt owed to Meredith Media/Traditional Home for the ads placed by the Debtor was never paid.

BCLD MEDIA GROUP/MAGBRANDS

25. On September 13, 2002, shortly after Admix Media was served with the Summons and Complaint in the Meredith Media/Traditional Home case, the Debtor formed a new entity, BCLD Media Group LLC, another New York limited liability company, which began doing business as Magbrands.

26. The Debtor was BCLD's sole employee, member, and he was in control of and responsible for the management of this business.

27. In late 2002 or early 2003, the Debtor, operating under the BCLD/Magbrands name, placed advertising for Gelmart Industries, Inc., a large direct manufacturer of intimate apparel, in magazines owned and operated by Advance Magazines Publishers.

28. BCLD received payment from Gelmart Industries, Inc., for the cost of those ads plus its commissions.

29. BCLD failed to remit any payments to Advance Magazine Publishers for the Gelmart Industries advertisements.

30. Advance Magazine Publishers commenced an action against BCLD in the Supreme Court of the State of New York for failure to pay the charges for the ads placed by the Debtor.

31. BCLD failed to respond, thereby defaulting in that action.

32. A Judgment for \$32,723.86 was entered against BCLD in June 2004, but by that time the Debtor had ceased doing business under the BCLD/Magbrands name.

33. The Judgment entered against BCLD was never satisfied.

34. The debt owed to Advance Magazine Publishers for the ads placed by the Debtor was never paid.

35. In March 2003 the Debtor, operating under the BCLD name, was retained by National Audubon Society, Inc., to sell advertising in and manage a special multi-page promotional section to run in the August 2003 issue of plaintiff's Town & Country magazine.

36. On June 14, 2003, the Debtor signed and sent plaintiff an insertion order for this project for a charge of \$120,000.00.

37. On June 24, 2003, Audubon remitted \$120,000.00 to BCLD for the cost of the August 2003 Town & Country insertion order.

38. On July 22, 2003, plaintiff sent BCLD an invoice for \$120,000.00, which was payable in full within 30 days.

39. The August 2003 issue of Town & Country magazine was published with the Audubon insertion.

40. BCLD did not remit payment in full to plaintiff for the cost of this insertion; in fact, BCLD failed to remit any payment to plaintiff until October 2003,

when it paid just \$20,000.00.

41. BCLD made no further payments until March and April 2004, when it paid a total \$15,000.00, leaving a balance of \$85,000.00 due on the \$120,000.00 invoice.

42. The Debtor in late 2003 began working on a second promotional insertion planned by Audubon for the March 2004 issue of Town & Country.

43. BCLD had between June 2003 and January 2004 collected monies from advertisers on behalf of Audubon for the ads that appeared in the August 2003 promotional insertion.

44. By February 2004, BCLD had failed to remit any of these advertising revenues to Audubon, which amounted to \$39,825.00, despite repeated demands for same by Audubon.

45. Because of the large debt still owed by BCLD for the August 2003 Audubon project, plaintiff refused to accept an insertion order for the March 2004 project that was prepared and signed by the Debtor, which called for the cost to be billed to BCLD, as was the case for the August 2003 project.

46. The Debtor prepared another insertion order for the March 2004 project, which Kevin Smith, a Vice President of Audubon, signed and which provided that Audubon would pay plaintiff directly the stated cost of \$73,800.00,.

47. However, at the Debtor's request, Audubon nonetheless remitted payment for this project to BCLD in connection with the Debtor's agreement that Audubon could deduct from this amount BCLD's outstanding liability to Audubon of \$39,825.00 for the advertising revenues collected from the August 2003 project.

48. The March 2004 issue of Town & Country magazine was published with

the Audubon insertion.

49. BCLD failed to remit any payment to plaintiff for the \$73,800.00 cost for the March 2004 insertion.

50. BCLD ceased active operations shortly after receiving payment from Audubon for the March 2004 project, leaving behind numerous unpaid creditors who are owed more than a quarter of a million dollars.

**PLAINTIFF'S STATE COURT SUIT
AGAINST THE DEBTOR AND BCLD/MAGBRANDS**

51. On February 15, 2005, plaintiff commenced an action in the Supreme Court of the State of New York seeking damages for the balance due on the two Audubon projects.

52. In addition to contract claims against BCLD, plaintiff asserted claims against the Debtor personally, including a claim to pierce the corporate veil of BCLD and impose alter ego liability upon the Debtor based on his use of BCLD to commit a fraud that resulted in injury to plaintiff.

53. Plaintiff claimed that the Debtor received monies intended to be remitted for the advertising insertions he had placed but instead of paying he rapidly and improperly dissipated those funds and other corporate monies on personal expenses; made other improper payments to himself, friends, relatives, other company insiders; and failed to operate the company as a legitimate business.

54. BCLD was duly served but failed to appear, thereby defaulting, resulting in entry of a Judgment on August 1, 2005, for plaintiff against BCLD for \$172,167.06, which has not been satisfied.

55. Plaintiff's claims against the Debtor, who was represented by counsel,

went to trial on November 3, 2005.

56. The Court at the conclusion of the trial rendered a decision for plaintiff, holding that the Debtor had abused the corporate form by operating BCLD for his personal benefit by, among other things, improperly expending hundreds of thousands of corporate dollars and failing to keep proper records.

57. The Court in its decision held that:

This is a case in which the issue really is whether or not the corporate veil should be pierced and the simple answer is yes. This was really a device that Mr. Brown employed to avoid personal liability, in my opinion. This is a company that kept no records, had no meetings, had no formal structure. Mr. Brown used the company and indeed, maybe other people, to pay substantial personal expenses, not expenses necessarily that were only limited to the company use. The company was really run for the benefit solely of Mr. Brown and maybe Mr. [Jack] Lynch [a company insider], to a lesser extent, but seems to me it was designed primarily to avoid personal liability and certainly, at the very end, Mr. Brown and Mr. Smith, who I take it were not unfriendly, worked out arrangement under which Mr. Brown got some additional funds. The expenses that are reflected in the various documents received in evidence relate, seems to me, to a very substantial degree of personal expenses, very substantial restaurant bills, transportation well in excess of what this company could possibly use legitimately. So that the conclusion that I reach from the evidence is that clearly, the company was being used to finance the personal expenses of certainly Mr. Brown and to a very substantial, perhaps a lesser extent, to Mr. Lynch. Under the circumstances, it seems to me the Plaintiff is entitled to a judgement against Mr. Brown for the same amount that the judgement against his company was entered

* * *

This is my decision based on the fact that it is not really a corporation. This is not a limited liability company. This is a personal enterprise of a single individual, who used the personal enterprise to shield himself from personal liability and used this limited liability company to finance his personal life.

58. The Court's decision was based upon extensive evidence submitted at trial that established that the Debtor had engaged in improper and fraudulent conduct, including:

- A. Expending funds remitted by Audubon for payment of ads placed in plaintiff's publication on personal charges and for other improper purposes
- B. Spending vast amounts of company funds on personal expenses of the Debtor and other insiders, through use of company credit cards (more than \$170,000.00 in company funds was used to pay American Express card charges)
- C. Withdrawing monies for personal use even though BCLD was insolvent at all relevant times
- D. Operating the company with insufficient capitalization (the Debtor did not invest any capital in the business)
- E. Authorizing payments to himself (more than \$70,000.00) and other insiders without adequate funds remaining to meet the current obligations of the company
- F. Making numerous undocumented withdrawals of cash (approximately \$18,000.00) from the company's accounts via use of an ATM card
- G. Using a debit card on company's bank account for personal expenses (more than \$16,000.00)
- H. Failing to maintain even the most rudimentary corporate records, including a bank account register, an accounts payable ledger, records of invoices and payments, a balance sheet, or a profit and loss statement
- I. Failing to file any returns or pay any taxes for BCLD
- J. Failing to file any returns or pay any taxes personally since at least 2000
- K. Failing to file any returns pay any taxes for the Debtor's prior company, Admix Media LLC
- L. Authorizing payments to friends and relatives on undocumented loans
- M. Failing to observe even the most basic corporate formalities
- N. Operating the company solely to advance the personal interests of the Debtor
- O. Siphoning of corporate assets to pay personal expenses while failing to pay the company's justly due debts
- P. Use of company funds to repay personal loans made to the Debtor
- Q. Continuing a pattern of improper business practices begun at the Debtor's prior company, Admix Media

51. On November 9, 2005, Judgment for \$176,528.45 was entered against the Debtor pursuant to the Court's decision, no part of which was ever paid.

59. The Judgment against the Debtor has not been appealed, vacated, or modified, and now is final.

**COUNT I -- NON-DISCHARGEABILITY OF PLAINTIFF'S JUDGMENT UNDER
SECTION 523(a)(2)(A) OF THE BANKRUPTCY CODE**

60. Plaintiff repeats and re-alleges the allegations set forth in paragraphs 1 through 59 of this Complaint as if set forth at length herein.

61. Bankruptcy Code § 523(a)(2)(A) provides, in relevant part, that:

(a) A discharge under section 727, 1141, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debt--

(2) 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 or an insider's financial condition

62. All or part of the debt owed to plaintiff, as evidenced by the Judgment entered against the Debtor, is non-dischargeable as it is a debt for money, property, services, or an extension, renewal, or refinancing of credit, that was obtained by false pretenses, a false representation, or actual fraud within the meaning of Bankruptcy Code § 523(a)(2)(A).

**COUNT II -- NON-DISCHARGEABILITY OF PLAINTIFF'S JUDGMENT UNDER
SECTION 523(a)(4) OF THE BANKRUPTCY CODE**

63. Plaintiff repeats and re-alleges the allegations set forth in paragraphs 1 through 62 of this Complaint as if set forth at length herein.

64. Bankruptcy Code § 523(a)(4) provides, in relevant part, that:

(a) A discharge under section 727, 1141, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debt—

. . . .

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny

65. All or part of the debt owed to plaintiff, as evidenced by the Judgment

entered against the Debtor, is non-dischargeable as it is a debt for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny within the meaning of Bankruptcy Code § 523(a)(6).

COUNT III -- NON-DISCHARGEABILITY OF PLAINTIFF'S JUDGMENT UNDER SECTION 523(a)(6) OF THE BANKRUPTCY CODE

66. Plaintiff repeats and re-alleges the allegations set forth in paragraphs 1 through 65 of this Complaint as if set forth at length herein.

67. Bankruptcy Code § 523(a)(6) provides, in relevant part, that:

(b) A discharge under section 727, 1141, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debt—

. . .

(6) or willful and malicious injury by the debtor to another entity or to the property of another entity . . .

.

68. All or part of the debt owed to plaintiff, as evidenced by the Judgment entered against the Debtor, is non-dischargeable as it is a debt for willful and malicious injury caused by the Debtor within the meaning of Bankruptcy Code § 523(a)(6).

COUNT IV -- OBJECTION TO DEBTOR'S DISCHARGE UNDER SECTION 727(a)(3) OF THE BANKRUPTCY CODE

69. Plaintiff repeats and re-alleges the allegations set forth in paragraphs 1 through 68 of this Complaint as if set forth at length herein.

70. Bankruptcy Code § § 727(a)(3) provides that:

(a) The court shall grant the debtor a discharge, unless

. . .

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and

papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

71. The Debtor, in his operation of his various businesses, including Admix Media LLC and BCLD Media Group LLC d/b/a Magbrands, operated these businesses as his alter egos, seeking to shield himself from personal liability while at the same time using funds of these businesses for personal purposes.

72. The Debtor, in his operation of his various businesses, including Admix Media LLC and BCLD Media Group LLC d/b/a Magbrands, concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the Debtor's financial condition or business transactions might be ascertained.

73. By virtue of the foregoing, the Debtor's discharge should be denied under Bankruptcy Code § 727(a)(3).

**COUNT V -- OBJECTION TO DEBTOR'S DISCHARGE UNDER
SECTION 727(a)(4)(A) OF THE BANKRUPTCY CODE**

74. Plaintiff repeats and re-alleges the allegations set forth in paragraphs 1 through 73 of this Complaint as if set forth at length herein.

75. Bankruptcy Code § 727(a)(4)(A) provides that:

- (a) The court shall grant the debtor a discharge, unless

(4) the debtor knowingly and fraudulently, in or in connection with the case --
(A) made a false oath or account

76. The debtor knowingly and fraudulently, in or in connection with the case, made a false oath or account, in that he represented in the Statement of Financial Affairs attached to his Petition that his income from employment or

operation of business in 2003 was \$66,000.00 when in fact his actual income was much greater.

77. The debtor knowingly and fraudulently, in or in connection with the case, made a false oath or account, in that he represented in the Statement of Financial Affairs attached to his Petition that his income from employment or operation of business in 2004 was \$34,000.00 when in fact his actual income was much greater.

78. The debtor knowingly and fraudulently, in or in connection with the case, made a false oath or account, in that he failed in the Statement of Financial Affairs attached to his Petition to provide required information about the nature, names, taxpayer identification numbers, locations, and beginning and end dates of all businesses in which the Debtor was an officer, director, partner or managing executive of a corporation, partner in a partnership, sole proprietor, or was self-employed in a trade, profession or other activity either full or part-time within six years immediately preceding the commencement of the case.

79. By virtue of the Debtor's false representations and omissions, and the oath he took concerning the veracity of his submissions, the Debtor's discharge should be denied under Bankruptcy Code § 727(a)(4)(A).

WHEREFORE, plaintiff respectfully requests that this Court enter a Judgment determining that the debt reflected in the Judgment entered in favor of plaintiff against the Debtor on November 9, 2005, is non-dischargeable under Bankruptcy Code § § 523(a)(2)(A), 523(a)(4), and 523(a)6) or, in the alternative, denying the Debtor's discharge under Bankruptcy Code § § 727(a)(3) and 727(a)(4)(A), and granting plaintiff such other and further relief as this Court may deem just and proper.

Dated: New York, New York
March 20, 2006

s/ Bernard D'Orazio

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