2002 WL 34591432
(Bkrtcy.E.D.Va.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

In re:	)	
	)	
HAN SWYTER	)	Case No. 00-12759-SSM
	)	Chapter 11
Debtor	)	
	)	
ARTHUR C. HERRINGTON *et al.*	)	
	)	
Plaintiffs	)	
	)	
vs.	)	Adversary Proceeding No. 00-1177
	)	
HAN SWYTER	)	
	)	
Defendant	)	

MEMORANDUM OPINION

This is an action seeking to determine that the debtor's liability for charging excessive management fees to five limited partnerships of which he was the general partner should be excepted from discharge; that the debtor should not be allowed to assume, or should be removed from, his position as general partner; and that certain unilateral changes made by the debtor to the partnership agreements shortly before he filed his chapter 11 petition should be voided. Following discovery, both sides moved for summary judgment on key issues, including the dischargeability of an arbitration award.

Prior to a ruling on the summary judgment motions, however, a modified plan of reorganization was confirmed (over the plaintiffs' objection) on August 9, 2001. Confirmation of the plan resolved all claims that had been asserted derivatively on behalf of the limited partnerships, thereby leaving only the nondischargeability claims asserted by the plaintiffs in their own behalf. The plaintiffs then appealed the confirmation order. On December 7, 2001, the United States District Court for the Eastern District of Virginia affirmed the confirmation order. That decision has not been further appealed. Since confirmation did not dispose of the nondischargeability claims asserted by the plaintiffs in their own behalf, a ruling on the summary judgment motion is appropriate as it relates to those claims.

Background

The present action was commenced on August 15, 2000. The defendant, Han Swyter ("Swyter" or "the debtor"), had filed a voluntary chapter 11 petition in this court on June 23, 2000. At the time the chapter 11 petition was filed, he was the sole general partner of 5 Virginia limited partnerships: Heathrow Business Center ("Heathrow"), Red Branch Partners ("Red Branch"), Lockport Business Center ("Lockport"), Guilford Partners ("Guilford"), and Eastport Business Center ("Eastport"). The plaintiffs, Arthur C. Herrington and the Arthur C. Herrington Revocable Trust ("Herrington" and "the Herrington trust") are limited partners in those partnerships. After becoming convinced that the debtor was charging excessive management fees to the partnerships, Herrington and the Herrington Trust instituted an arbitration proceeding against the debtor on or about June 30, 1995. In the arbitration, Herrington alleged (a) that the debtor had taken excessive management fees and improperly allocated costs among the partnerships; and (b) that the debtor had violated his fiduciary duties to the limited partners of the partnerships. The debtor managed the partnerships through a separate corporation, Van Ess Associates, Inc. ("Van Ess"), that he and his wife owned, and that paid him a salary.

On June 18, 1998, the arbitrator issued an award, which was amended on August 5, 1998. The arbitrator ruled that the debtor, beginning in 1983, began charging the partnerships for management services in a manner different from that authorized by the partnership documents. The partnership documents had provided for Van Ess to receive a management fee based on a percentage of the rents collected. The new "cost reimbursement method" imposed by the debtor (without the consent of the limited partners) simply passed through to the partnerships all of Van Ess's overhead, including Swyter's unilaterally-determined salary. In effect, the partnerships were charged whatever amount was needed to pay Swyter the salary that he wanted to earn. The arbitrator found that the failure to follow the partnership documents was "willful";[1] that any claims by the partnerships for money collected more than 5 years prior to the demand for arbitration were barred by the applicable 5-year statute of limitations; and that there was insufficient evidence to establish the amount, if any, of damages from the failure to follow the contract documents. The arbitrator did rule, however, that $158,928.00 collected by Van Ess from the partnerships as management fees as a result of "recalculations" performed after the close of the respective partnership years were improperly collected and had to be refunded. The arbitrator also ruled that Van Ess could not deduct, as an additional fee, a percentage of the interest earned on partnership funds held in a money-market account and that the debtor could not commingle partnership funds.

The arbitration award directed as follows:

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[1] The issue of willfulness arose because the partnership agreements contained language insulating the debtor from liability for "errors in judgment or for any other acts or omissions not constituted [*sic*] willful misconduct."

> Swyter may not authorize further compensation to [Van Ess] until the methodology is approved according to the partnership documents, or there is a basis for showing that the charges are competitive under the third party test … of the partnership agreements.

The award also directed the debtor to pay $158,928.00 to the limited partnerships on account of the unauthorized "recalculations;" to pay the Herrington Trust $21,614.65 in reimbursement of administrative fees and arbitrator compensation that it advanced; to reimburse the limited partnerships for $150.62 they had advanced in arbitration fees; to pay the American Arbitration Association $1,275.00 in remaining arbitration fees owed; and to pay $100,000.00 of Herrington's attorneys fees.

The arbitration award was subsequently confirmed by the Superior Court of the District of Columbia and was reduced to judgment on December 7, 1998. Rather than attempt to get approval from the limited partners for payment of compensation to Van Ess, Swyter simply formed a new corporation, WD99, Inc. ("WD99"), that performed the same services as Van Ess, from the same offices as Van Ess, and with the same employees as Van Ess. He also increased his salary – now paid by WD99 – to $240,000 per year, which was simply charged back to the limited partnerships. He also unilaterally modified the partnership agreements to impose additional burdens on limited partners who might bring arbitration proceedings challenging his management.

Herrington's efforts to enforce the money judgment by garnishment precipitated the debtor's chapter 11 filing. The confirmed plan resolved the derivative claims asserted by Herrington on behalf of the limited partnerships, and it is only the dischargeability of the

$121,614.65 award in favor of Herrington and the Herrington Trust for attorneys fees and arbitration costs that remains at issue in this adversary proceeding.

Discussion

I.

Herrington contends that the damages in his favor under the arbitration award are nondischargeable either because they constitute a debt for defalcation by a fiduciary or a debt for a willful and malicious injury to property.[2] This court has subject-matter jurisdiction under 28 U.S.C. §§ 1334(a) and 157(a) and the general order of reference from the United States District Court for the Eastern District of Virginia dated August 15, 1984. An action to determine the dischargeability of a debt is a core proceeding in which a final judgment or order may be entered by a bankruptcy judge. 28 U.S.C. § 157(b)(2). Venue is proper in this district under 28 U.S.C. § 1409(a). The defendant has been properly served and has appeared generally.

A.

Under Rule 56(c), Federal Rules of Civil Procedure, as incorporated by Federal Rule of Bankruptcy Procedure 7056, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In ruling on a motion for summary judgment, a court should believe the evidence of the non-movant, and all justifiable inferences must be

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[2] Both grounds of nondischargeability are pleaded in a single count (Count VIII).

drawn in his or her favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 530 (1986). At the same time, the Supreme Court has instructed that summary judgment "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett,* 477 U.S. 317, 327, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986). Additionally, not every dispute as to the facts will preclude the entry of summary judgment, but only those disputes over facts that might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248, 106 S.Ct. at 2510.

B. Fiduciary Defalcation

A chapter 11 discharge does not discharge an individual debtor from debts, among others, for "fraud or defalcation while acting in a fiduciary capacity." §§ 523(a)(4) and 1141(d)(2), Bankruptcy Code. Thus, in order for Herrington to prevail he must demonstrate that the debt at issue arose (a) while Swyter acted in a fiduciary capacity, and (b) from Swyter's fraud or defalcation. *Global Express Money Orders, Inc. v. Davis (In re Davis)*, 262 B.R. 673, 682 (Bankr. E.D. Va. 2001). Additionally, while the court is required to apply federal law to determine the existence of a § 523(a)(4) fiduciary relationship, state law is relevant to the inquiry. *KMK Factoring, L.L.C., et al. v. McKnew (In re McKnew)*, 270 B.R. 593, 628 (Bankr. E.D. Va. 2001).

In this connection, Herrington argues that Virginia law imposes duties on partners sufficient to implicate § 523(a)(4). Specifically, Herrington relies on Va. Code Ann. § 50-

73.102 for support.[3] However, that statutory provision was enacted subsequent to the creation of the limited partnerships at issue and is therefore inapplicable. Rather, the applicable standard is set forth in Va. Code Ann. § 50-21, which, although it has now been repealed, was in effect at the time of the events complained of and therefore controls. *See* Va. Code. Ann. § 50-73.75 (providing that the provisions of the Virginia Uniform Partnership Act, Va. Code Ann. § 50-1 *et seq.* shall govern cases not provided for in Virginia's Revised Uniform Limited Partnership Act involving limited partnerships formed prior to July 1, 1997).

Along these lines, Va. Code. Ann. § 50-21 states:

> (1) Every partner must account to the partnership for any benefit, and *hold as trustee for it* any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct or liquidation of the partnership or from any use by him of its property.

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[3] Va. Code Ann. § 50-73.102 provides in relevant part:

> A. The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections B and C.
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> B. A partner's duty of loyalty to the partnership and the other partners is limited to the following:
> 1. To account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity.
> 2. To refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership.
> 3. To refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.
>
> C. A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

(Emphasis added). *See Klotz v. Klotz*, 202 Va. 393, 400, 117 S.E.2d 650, 656 (1961) ("The relationship of partners is of a fiduciary character and imposes upon them the obligation to exercise good faith and integrity in their dealings with one another in the partnership affairs."). *See also Allen Realty Corp. v. Holbert*, 227 Va. 441, 446, 318 SE.2d 592, 595 (1984) (a "fiduciary relationship [exists] when special confidence has been reposed in one who in equity and good conscience is bound to act in good faith and with due regard for the interests of the one reposing the confidence.").

However, the existence of a fiduciary relationship under state law, while relevant, is not by itself determinative. As stated in *Sager v. Lewis (In re Lewis)*, 94 B.R. 406, 409 (Bankr. E.D. Va. 1988):

> The fact that Virginia has adopted the Uniform Partnership Act making a partner accountable to the partnership does not create a technical or express trust and does not require the Court to find this debtor to be a fiduciary for the purposes of this federal statutory provision.

Rather, it is well settled that the term "fiduciary" as used in § 523(a)(4) is narrowly construed and is restricted to

> the class of fiduciaries including trustees of specific written declarations of trust, guardians, administrators, executors or public officers and, *absent special considerations*, does not extend to the more general class of fiduciaries such as agents, bailees, brokers, factors, and *partners*.

In re Lewis, 94 B.R. at 410 (emphasis added); *Clark v. Taylor (In re Taylor)*, 58 B.R. 849, 852 (Bankr. E.D. Va. 1986); *Harmon v. Scott (In re Scott)*, 203 B.R. 590, 597 (Bankr. E.D. Va. Jun 25, 1996); *In re McKnew*, 270 B.R. at 624; *Matter of Marchiando*, 13 F.3d 1111 (7th Cir. 1994), cert. denied *sub nom Illinois Dept. of the Lottery v. Marchiando*, 512 U.S.

1205, 114 S.Ct. 2675, 129 L.Ed.2d 810 (constructive, resulting, or implied trusts do not come within reach of § 523(a)(4); hence, lottery ticket seller not "fiduciary" within meaning of § 523(a)(4) so as to make debt from failure to turn over proceeds from ticket sales nondischargeable); *Davis v. Aetna Acceptance Corp.*, 293 U.S. 328, 55 S.Ct. 151, 79 L.Ed. 393 (1934) (automobile dealer's failure to remit proceeds of sale from floorplanned automobile to lender did not constitute "defalcation while acting … in any fiduciary capacity" under former Bankruptcy Act of 1898 even though dealer had executed "trust receipt" for vehicle in favor of secured lender); *but see Republic of Rwanda v. Uwimana (In re Uwimana)*, 274 F.3d 806 (4th Cir. 2000) (chapter 7 debtor, in his capacity as ambassador for Republic of Rwanda, was a "fiduciary" for purposes of § 523(a)(4)). Thus, "absent special considerations," *In re Lewis*, 94 B.R. at 410, Swyter's position as the general partner of the five partnerships did not constitute him a "fiduciary" for the purposes of § 523(a)(4).

Herrington, however, submits that because Swyter was the *managing general partner* of *limited* partnerships, he exercised such unique control and authority over the limited partnerships as to constitute him a fiduciary even in the narrow sense of § 523(a)(4). Accordingly, the question becomes whether a relationship between a managing general partner and the limited partners of a limited partnership is sufficiently different from the relationship among general partners as to distinguish this case from *Lewis*. In this connection, Herrington urges this court to apply the line of cases following *Matter of Bennett*, 989 F.2d 779 (5th Cir. 1993), which hold that a general (or managing) partner owes a fiduciary duty to his or her limited partners for the purposes of § 523(a)(4). *See e.g.*, *Schwager v. Fallas (In Re Schwager)*, 121 F.3d 177 (5th Cir. 1997) (applying Texas law); *Lewis v. Short (In re Short)*, 818 F.2d 693 (9th Cir. 1987) (applying Washington law); *Lewis v. Scott (In re Lewis)*, 97 F.3d 1182 (9th Cir. 1996) (applying Arizona law); *Arnett et al v. Weiner (In re Weiner)*, 95 B.R. 204 (Bank. D. Kan. 1989) (applying Kansas law); *Zohlman v. Zoldan (In re Zoldan)*, 221 B.R. 79 (Bankr. S.D. N.Y. 1999) (applying New York law); *Leeb v. Guy (In re Guy)*, 101 B.R. 961 (Bankr. N.D. Ind. 1988) (applying Indiana law). *See also* Norton Bankruptcy Law and Practice § 47:28 (2nd ed. 2001).

In *Bennett*, the Fifth Circuit held that, although Texas courts have not extended the partnership relationship generally to encompass the type of fiduciary duty envisioned by § 523(a)(4), an exception exists for the managing partner of a partnership, who owes to his co-partners "one of the highest fiduciary duties recognized by law." *Matter of Bennett*, 989 F.2d at 783. In coming to this conclusion, the *Bennett* court, like other courts reaching similar conclusions, primarily relied on state law holding that a general (or managing) partner, acting in complete control, stands in the same fiduciary capacity to his partners as a trustee stands to the beneficiaries of a trust. *See e.g., Crenshaw v. Swenson*, 611 S.W.2d 886, 890 (Tex. Civ. App. 1980). Therefore, in order to determine whether a managing general partner exception to the long-standing rule espoused in *Lewis* should apply, this court must look to Virginia law.

The parties have not cited – nor has the court's own research discovered – any reported decisions of the Virginia courts, or of Federal courts construing Virginia law, specifically holding that a general (or managing) partner, acting in complete control, stands in the same fiduciary capacity to his partners as a trustee stands to the beneficiaries of a trust. A sister bankruptcy court has held that a Maryland statute identical in wording to Va. Code Ann. § 50-21, as construed by the highest court of that state, "creates a trust duty upon a partner that is expressed and arises before any wrongful act" and therefore constitutes a "technical" trust for the purpose of § 523(a)(4). *McLean et al. v. Hildebrand (In re Hildebrand)*, 230 B.R. 72, 77 (Bankr. D. Md. 1999). However, the court in that case found that the specific conduct at issue – soliciting the partnership's clients *after* the debtor had left the partnership – did not constitute a defalcation, but was simply a breach of the partnership agreement.

Here, by contrast, the debtor's conduct as found by the arbitrator – the deliberate overcharging of the partnership for management services – occurred while the debtor was not only a partner, but in sole control. Those management fees, to the extent they exceeded what the limited partners had consented to in the limited partnership agreement, would plainly seem to constitute "profits derived by [Swyter] without the consent of the other partners from any transaction in connection with the ... conduct of the partnership." Thus, Swyter was under a statutory duty "to account to the partnership *and to hold as trustee for it*" those profits.

The issue is admittedly close. Nevertheless, given the consistently narrow construction that has been applied to the term "fiduciary" in the context of § 523(a)(4), the court is unable to find that Virginia law imposes on the general (or managing) partner of a limited partnership a fiduciary duty equivalent to that of a trustee of an express or technical trust.[4] "For over a century the Supreme Court has narrowly and strictly construed the exception to discharge for fraud while acting in a fiduciary capacity." *Borg-Warner Acceptance Corp. v. Miles (In re*

[4] "An express trust is based on the declared intention of the trustor." *Leonard v. Counts*, 221 Va. 582, 272 S.E.2d. 190 (1980). A "technical trust" includes relationships in which trust-type obligations are imposed pursuant to a statute or common law. *Matter of Bennett*, 989 F.2d at 785.

Miles), 5 B.R. 458, 460 (Bankr. E.D. Va. 1980) (*citing Chapman v. Forsyth*, 43 U.S. (2 How.) 202, 11 L.Ed. 236 (1844); *Neal v. Clark*, 95 U.S. (5 Otto) 704, 24 L.Ed. 586 (1877); *Hennequin v. Clews*, 111 U.S. 676, 4 S.Ct. 576, 28 L.Ed. 565 (1884); and *Upshur v. Briscoe*, 138 U.S. 365, 11 S.Ct. 313, 34 L.Ed. 931 (1891)). In *Chapman,* for example, the Supreme Court considered the issue of whether a factor who retained his principal's money was a fiduciary within the meaning of the Bankruptcy Act of 1841, which allowed discharge of all debts except those "created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, *or while acting in any other fiduciary capacity.*" *Chapman*, 43 U.S. at 207 (*emphasis added)*. In finding that the factor' s debt was dischargeable, the Court wrote:

> If the [A]ct embrace such a debt, it will be difficult to limit its application. It must include all debts arising from agencies; and indeed all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country, confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of a trust. But this *is not* the relation spoken of in the first section of the [A]ct.

Chapman v. Forsyth, 43 U.S. (2 How.) at 208. Thus, *Chapman* (and the cases which follow it) clearly expressed the concern that the term "fiduciary" for the purposes of bankruptcy law be narrowly construed so as "not [to] reach commercial debtor-creditor transactions in which [a] debtor merely violate[s] the terms of his agreement with [a] creditor." *In re Levitan*, 46 B.R. 380, 385 (Bankr. E.D. N.Y. 1985). Accordingly, the court is compelled to conclude that Swyter was not, simply by virtue of being a partner in control of the limited partnerships, a "fiduciary" in the narrow sense of §523(a)(4). For that reason, Swyter's motion for summary judgment on this issue will be granted, and Herrington's motion denied.

C. Willful and Malicious Injury

That leaves Herrington's alternate theory of nondischargeability. A chapter 11 discharge does not discharge an individual debtor from a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." §§ 523(a)(6) and 1141(d)(2), Bankruptcy Code. "Willful," the Supreme Court has explained, requires an act intended to cause injury and not merely an intentional act that results in injury. *Kawaauhau v. Geiger*, 523 U.S. 57, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998) (medical malpractice claim arising from reckless or negligent conduct did not constitute a "willful" injury for dischargeability purposes). The requirement that the conduct be "malicious," however, does not require spite or personal ill-will; it is sufficient, rather, that "[the] injurious act [was] done 'deliberately and intentionally in knowing disregard of the rights of another.'" *St. Paul Fire & Marine Ins. Co. v. Vaughn*, 779 F.2d 1003, 1008 (4th Cir. 1985). The burden of proof is on the objecting creditor, and the standard of proof is preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991).

Here, Herrington argues that he is entitled to summary judgment because the debtor is collaterally estopped from arguing that his conduct was not willful and malicious. In response, Swyter contends that because he has filed affidavits that he had no intention of causing injury to the limited partners, summary judgment is inappropriate. Accordingly, because resolution of the collateral estoppel issue would resolve this issue in its entirety, the court will first address that argument.

As a general rule, it has been held that the Full Faith and Credit statute "obliges federal courts to give the same preclusive effect to … state-court judgment[s] as would the courts of the State rendering the judgment[s]." *McDonald v. City of West Branch, Mich.*, 466 U.S. 284, 287-288, 104 S.Ct. 1799, 1801-1802, 80 L.Ed. 2d 302 (1984). *See also* 28 U.S.C. § 1738. Along these lines, while Congress had the power within it to provide for exceptions to § 1738, it has not done so with respect to unreviewed arbitration awards. *McDonald*, 466 U.S. at 287-288, 104 S.Ct. at 1801-1802; *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 742-45, 101 S.Ct. 1437, 1445-47, 67 L.Ed.2d 641 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56-60, 94 S.Ct. 1011, 1023-25, 39 L.Ed.2d 147 (1974). Thus the question becomes, does the arbitration award, which was subsequently reduced to judgment, collaterally estop Swyter from arguing that his misconduct was not willful or malicious. The court concludes that it does. While an unreviewed arbitration award itself is not subject to the principles of collateral estoppel, a court's confirmation of that award, and its reduction of that award to judgment, is. *Jalil v. Avdel Corp.*, 873 F.2d 701, 704 (3rd Cir. 1989), *cert. denied*, 493 U.S. 1023, 110 S.Ct. 725, 107 L.Ed.2d 745 (1990); *Caldeira v. County of Kauai*, 866 F.2d 1175, 1178 (9th Cir. 1989), *cert. denied*, 493 U.S. 817, 110 S.Ct. 69, 107 L.Ed.2d 36 (1989); *Molina v. Gutierrez (In re Molina*), 228 B.R. 248, 250 (9th Cir. BAP 1998). Therefore, in order for this court to determine the preclusive effect of the Superior Court's judgment, this court must look to the law of the District of Columbia. *Pahlavi v. Ansari (In re Ansari)*, 113 F.3d 17, 19 (4th Cir. 1997) (*citing Hagan v. McNallen (In re McNallen)*, 62 F.3d 619, 624 (4th Cir. 1995)).

In the District of Columbia, collateral estoppel applies where the issue to be decided in the present action (a) is the same as the issue that was involved in the prior action; (b) was litigated, and actually adjudged in the prior action; (c) was material and relevant to the disposition of the prior action; and (d) was necessary and essential to the resulting prior judgment. *Goldkind v. Snider Brothers, Inc.*, 467 A.2d 468, 473 (D.C. 1983). Here, the Superior Court expressly stated in its order confirming the arbitration award:

> [T]here is *no dispute* regarding that part of the arbitrator's award finding that defendant improperly calculated his compensation and directing him to make various repayments to the partnerships.

Aff. of Swyter, at Ex. D (Emphasis added). Thus, the Superior Court, in essence, adopted the arbitrator's findings as its own in considering the question of whether to confirm the arbitration award.[5] One of the issues determined was whether the debtor acted willfully in overcharging the partnerships. Although it is true that the arbitrator's opinion did not expressly refer to "malicious" conduct on the part of Swyter, the arbitrator did necessarily find "willful misconduct" when he rejected Swyter's argument that, because Swyter had not acted surreptitiously, his actions did not constitute "willful misconduct," which was the only basis under the partnership agreements upon which he could be held liable. Aff. of Swyter, at Ex. A; Pl.'s Ex.'s D; J; O; P; R. "Misconduct," in turn, has been defined by Webster's

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[5] Indeed, there was not much else for the Superior Court to consider absent a timely motion filed by either party to vacate, correct, or amend the arbitrator's award. D.C. Superior Court Rule 70-1 (2001). In this regard, the arbitrator's determination as to the amount Swyter was required to return to the partnerships in reimbursement for the costs of defending the arbitration was remanded by the Superior Court to the arbitrator. However, the balance of the arbitrator's award was confirmed by the Superior Court in full.

Third New International Dictionary as "*intentional* wrongdoing: *deliberate* violation of a rule of law or standard of behavior esp. by a government official: MALFEASANCE...." Webster's Third New International Dictionary, 1443 (1993) (emphasis added). Thus, a finding of "willful misconduct" fully satisfies the requirement that the injury to the limited partners be "malicious," as that term is explained in *St. Paul Fire & Marine*. Further, this issue was actually litigated within the arbitration proceeding, and was material to that proceeding. Aff. of Swyter, at Ex. A; Pl.'s Ex. D. Finally, the arbitration award was eventually reduced to judgment by the Superior Court. Aff. of Swyter, at Ex. D. This court therefore concludes that collateral estoppel applies and bars the debtor from relitigating the issues of willfulness and malice. As a result, Herrington is entitled to summary judgment determining that the judgment in his favor for the arbitration costs and attorneys fees is nondischargeable.

II.

A separate judgment will be entered determining that the $121,614.65 arbitration award in favor of Herrington and the Herrington Trust for attorneys fees and arbitration costs is nondischargeable under § 523(a)(6), Bankruptcy Code. Because confirmation of the debtor's plan of reorganization resolved all of the derivative claims that form the basis of the remaining counts, those claims will be dismissed.

Date: March 14, 2002

Alexandria, Virginia

/s/ Stephen S. Mitchell
Stephen S. Mitchell
United States Bankruptcy Judge

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