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**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA**

In re)	Case No. RS 08-14177 MJ
RICHARD THOMAS LENZO &	)	Adv. No. RS 08-01222 MJ
SUSAN LYN LENZO,)	
	)	Chapter 13
Debtors.)	
	)	FINDINGS OF FACT AND
CHRIS PETERS,	)	CONCLUSIONS OF LAW IN
Plaintiff.	)	SUPPORT OF JUDGMENT
	)	AFTER TRIAL AND RULING
v.	)	ON OBJECTION TO CLAIM
	)	DATE: January 5 - 6, 2009
RICHARD THOMAS LENZO &	)	TIME: 10:00 A.M.
SUSAN LYN LENZO,	)	CTRM: 302
)	
Defendant.)	

The trial of the complaint to determine nondischargeability of debt filed by plaintiff Chris Peters (Peters) against defendants/debtors Susan Lenzo and Richard Lenzo (collectively, the Lenzos) was consolidated with the Lenzo's objection to claim filed by Peters in the Lenzo's chapter 13 proceeding and came on regularly for hearing on January 5 and 6, 2009 in Courtroom 302 of above-entitled court, the Honorable Meredith Jury presiding. Peters was represented by the Law office of William E. O'Neil by William O'Neil and the Lenzos were represented by the Law Offices of Brian

1 Pedigo by Brian T. Pedigo. At the conclusion of the trial, the matters were submitted for further
2 briefing, which was concluded on January 13, 2009, at which time the matters were submitted for
3 decision. The court, having considered the oral and documentary evidence submitted by the parties,
4 the argument of counsel, and the pre and post trial briefs, makes the following Findings of Fact and
5 Conclusions of Law in support of the concurrently issued Judgment and Order.

6
7 FINDINGS OF FACT

8 1. Susan Lenzo is the mother of Chris Peters and is married to Richard Lenzo, the step-father
9 of Peters.

10 2. In November, 1990 the Lenzos opened a coffee shop in Temecula, California, known as
11 the Sweet Bean, a sole proprietorship. The Lenzos invested \$200,000 cash and took out a \$50,000
12 line of credit on their house to finance the business, for a total investment of \$250,000.

13 3. Between 1990 and 1992 Peters worked part time at the Sweet Bean at the request of the
14 Lenzos. In January 1992 he began work there full time, which employment continued until April 15,
15 2004.

16 4. Peters was compensated for his employment at a livable wage. From 1992 until
17 approximately 2000 he was also indirectly compensated with room and board as result of living
18 with his mother and step-father.

19 5. As time passed, Peters took on more management responsibilities for the business,
20 becoming a manager in 1995. He and Susan provided most of the daily management of the business
21 and Richard participated in other ways.

22 6. Beginning in approximately 2001 the Lenzos began to explore plans which would allow
23 them to retire in about 5 years, would provide an opportunity for Peters to become an owner of the
24 business, and would give Peters an incentive to increase the profitability of the business.

25 7. In early 2001 Richard and Peters had a meeting at a Carl's, Jr. where Richard described
26 his plans to Peters. He promised to Peters that he would increase his compensation by giving him a

1 1/3 profit share in the business and would give him a 1/3 ownership interest in the business if he
2 stayed for another 5 years. He also offered him a right to purchase the business at the conclusion of
3 that 5 years at a discount which took into account his 1/3 ownership interest.

4 8. The testimony of Peters corroborated that he knew he had to work another 5 years to
5 realize the ownership benefits of the offer made to him by Richard.

6 9. To facilitate the plans, the Lenzos sought the advice of their accountant, Robert Golledge,
7 who had provided bookkeeping services and tax preparation services since the formation of the
8 business. Golledge recommended that they form an S corporation and sent them to attorney Shaun
9 Hanson to accomplish the incorporation.

10 10. Peters and Richard met with Hanson to discuss incorporating. Hanson in testimony at
11 trial had little recollection of that meeting. However, he did have notes in his file which reflected a
12 conversation, the gist of which was Peters' 1/3 share of the corporation would vest after 5 years and
13 that he would be given a buy sell agreement and a right of first refusal. His notes corroborated
14 Richard's testimony on those issues. Hanson never prepared a shareholder agreement and it is not
15 clear he was ever asked to do so.

16 11. Hanson prepared the corporate documents, including the minutes of the first meeting.
17 There was no testimony that any such meeting actually took place, nor that the terms which appear
18 in those documents were ever discussed by the parties. The minutes of the first meeting call for the
19 issuance of shares to Richard, Susan and Chris upon the receipt of consideration. There is no
20 evidence that consideration was ever given to the corporation by any party. It is undisputed that the
21 shares were never issued.

22 12. By mistake, the initial tax documents for the corporation were filed as a C corporation.
23 This mistake was fixed by the filing of a Form 2553, which was prepared by Mr. Golledge in March
24 2002 and signed by both Lenzos and Peters. The Form 2553 showed each of the three as 33.33%
25 owners of the corporation. There was no evidence that any of them noticed that designation at the
26 time the form was signed.

1 13. Golledge prepared the tax returns for the corporation for 2001-2004. Each of the K-1's
2 issued to the Lenzos and Peters for those years reflected that each was a 33.33% owner of the
3 corporation. This was consistent with the intent of the parties as to how the profits of the
4 corporation would be shared - 1/3 each. This was not consistent with Richard's intent that Peters'
5 ownership interest not vest for 5 years. This mistake had no impact on the amount of taxes paid by
6 Peters. He received the compensation reflected on the K-1 as profit share and his taxes would have
7 been the same whether he was receiving profit share or was an owner.

8 14. There was no evidence that any of the parties ever noticed or communicated with anyone
9 about the designation of ownership interests on the K-1's until their disputes arose after April 15,
10 2004.

11 15. In 2003, the Lenzos received a substantial offer for purchase of the Sweet Bean. When
12 they learned that Peters was serious about buying the business from them, they backed out of the
13 purchase agreement so that he would have an opportunity to buy the business. Their agreement with
14 Peters did not require this gesture as his shares had not vested. They wanted to keep the business in
15 the family and Susan wanted the best for her son.

16 16. Between the time of that early purchase offer and April 15, 2004, Peters had access to
17 any financial records of the business that would enable him to do due diligence in formulating an
18 offer to buy. During that time, he did not request access to the corporate books.

19 17. On April 15, 2004 Peters had a meeting with Richard at the store during which he gave
20 him an offer to buy the Sweet Bean for \$249,000, take it or leave it (or "I'm out of here."). This
21 offer infuriated Richard, both because it only covered his and Susan's initial investment in the
22 business and because of the "take it or leave" ultimatum by which it was presented. As a result,
23 Richard lost his cool and told Peters to leave. Susan became aware of the confrontation and, in an
24 attempt to be a peacekeeper, she asked Peters to stay and keep working for the business.
25 Nevertheless, Peters left. He told Susan then and later told other employees, including Jim Tabor,
26 who testified at trial, that he quit and was not fired. The court finds that he quit.

1 18. After the April 15 meeting, the Lenzos made overtures to Peters to repair their
2 relationship and have him return to work. They requested that he return in person - at the meeting at
3 Pat & Oscar's - and during telephone conversations. During at least one of those conversations, not
4 only did the Lenzos offer him his job back, but offered to sell him the business at his offered price,
5 \$250,000.

6 19. Peters refused all these gestures. Instead of returning to work, which he could have
7 done, or moving forward to buy the business at his price, he instead became fixated on getting
8 access to the corporate books. The court finds that these books were not necessary to the due
9 diligence which he may have needed to perform to finalize his purchase offer. The testimony of
10 Richard was unrefuted that Peters had ample opportunity to review any financial documents
11 necessary to make a purchase decision. Although Richard's refusal to share with Peters the
12 corporate books might have been equally irrational, he had no legal obligation to do so. Peters' right
13 to ownership had not vested because he had not worked for the required 5 years.

14 20. Susan made one last attempt to patch up the family feud in June, 2004, but Peters still
15 refused to return to work, having taken a job with his wife's family's business in San Diego.

16 21. Eventually the Lenzos put the business back on the market and sold it in August, 2005 to
17 Deron and Debbie Johnson for the total sum of \$530,000, later reduced to \$520,000 when the
18 Lenzos discounted the carry-back note from \$30,000 to \$20,000.

19 22. The evidence did not show any attempt by Peters to claim an ownership interest in the
20 business until a letter from an attorney in August, 2005, more than 15 months after he walked out of
21 the business. In addition, the evidence did not show any attempt by Peters to contend that he was
22 fired or terminated without receiving the full pay due to him. There was no evidence of any
23 complaint made to the Labor Board nor any application for unemployment. All evidence pointed to
24 the fact that when Peters left on April 15, 2004, he left voluntarily and could have returned to his job
25 to complete the 5 years of employment in order for the shares to vest.

26 23. To the extent that any of the following conclusions of law might be deemed to be

1 findings of fact, they are incorporated herein by reference.

2
3 CONCLUSIONS OF LAW

4 1. This court has been asked to make two determinations as a result of these consolidated
5 proceedings:

6 A. Is any debt owed by the Lenzos to Peters nondischargeable under §523(a)(2)(A),
7 fraud or false pretenses, and/or §523(a)(4), breach of express or statutory trust , embezzlement or
8 larceny?

9 B. Are the Lenzos indebted to Peters under any legal theory which will support a
10 proof of claim in their chapter 13 proceeding?

11 2. The answer to 1.B is “no” and therefore the answer to 1.A is also “no”. The Lenzos are
12 not indebted to Peters under any legal theory supported by evidence at trial.

13 3. In 2001 Richard and Peters entered into an oral contract, the terms of which were as
14 follows: if Peters worked another 5 years in the Sweet Bean business, the Lenzos would compensate
15 him for that commitment by giving him a 1/3 ownership interest in the business and a right to
16 purchase their 2/3's share of the business at a 1/3 discounted rate. In the meantime, in addition to
17 other salaried compensation, he would receive a 1/3 profit share.

18 4. The 5 year vesting clause was a condition precedent to Peters receiving the benefit of the
19 contract. California civil code §1436 provides that “[a] condition precedent is one which is to be
20 performed before some right dependent thereon accrues, or some act dependent thereon is
21 performed. “As articulated by the California Supreme Court in Platt Pac., Inc.v Andersen 6 Cal 4th
22 307, 313 (1993) “a condition precedent is either an act of a party that must be performed or an
23 uncertain event that must happen before the contractual right accrues or the contractual duty arises.”
24 Whether a condition precedent exists depends on the parties’ intent as expressed in the words they
25 have used in the contract. Realmutov Gagnard, 110 Cal App. 4th 193, 198 (2003).

26 5. California Civil Code §1439 provides that

1 “[b]efore any party to an obligation can require another party to perform any act
2 under it, he must fulfill all conditions precedent thereto imposed upon himself...”

3 This statute reflects the common law rule that the failure of a material condition precedent
4 may excuse the other party from performance.

5 6. Peters in this case failed to perform a material condition precedent to the oral contract
6 with the Lenzos: he did not work the 5 years required for the ownership shares to vest in him.
7 Instead, he quit. As a result, he was not entitled to the benefit of the contract which performing that
8 condition precedent would have earned him, the vesting of the shares. In other words, his prior
9 breach of a material condition excused further performance of the contract by the Lenzos. See, Wiz
10 Technol., Inc. V. Coopers & Lybrand LLP 106 Cal. App. 4th 1, 12 (2003).

11 7. Although the law abhors a forfeiture, one did not occur here. First, during the period
12 when Peters worked, he was amply compensated for his efforts through his salary and profit share.
13 The taxes on his profit share were no different than they would be on any other income earned from
14 the corporation. Second, Peters had every opportunity to mitigate his damages and return to work.
15 Susan made an immediate offer. The Lenzos made repeated offers, both in person and by telephone.
16 Yet, Peters refused to return to work to complete the condition precedent while at the same time
17 proclaiming that he was not fired.

18 8. As a result of the foregoing, Peters does not have a claim for breach of contract against
19 the Lenzos. Based on a similar failure, all of his claims for nondischargeability also fall.

20 9. Peters does not state a claim for nondischargeability under §523 (a)(2)(A), which makes
21 nondischargeable a claim arising from false pretenses, a false representation, or actual fraud. The
22 first element of fraud is a false misrepresentation, an element which Peters admitted at trial did not
23 exist. His admission that he knew he had to work for the Sweet Bean for 5 more years from 2001 in
24 order to receive an ownership interest in the business makes proof of fraud impossible. Discussion
25 of the other elements is unnecessary. There is no claim based on fraud.

26 10. Peters does not state a claim for nondischargeability under §523(a)(4), either based on

1 defalcation while acting in a fiduciary capacity or based on embezzlement or larceny. Peters' theory
2 for the existence of the necessary express or technical trust relationship required by In re Stanifer,
3 236 B.R. 709, 713 (9th Cir. BAP 1999) arises under Cal Corp Code §2001, which requires dissolving
4 directors of a corporation to properly account for and distribute the proceeds from the sale of the
5 business. Peters theorizes here that since he was a minority shareholder, the Lenzos, as dissolving
6 directors, had the requisite trust duty to distribute to him his 1/3 share of the profits from the sale of
7 the business and dissolution of the corporation. Since the court finds the failure of the condition
8 precedent meant the shares never did vest in Peters, the Lenzos owed no duty to him. Therefore,
9 there is no debt arising from defalcation of a fiduciary duty. Similarly, since Peters was owed no
10 funds upon sale of the business and dissolution of the corporation, neither embezzlement - which
11 requires fraudulent appropriation of property of another - nor larceny - which requires fraudulent
12 taking of another's property - can be shown. As a consequence, Peters did not establish
13 nondischargeability under §523(a)(4).

14 11. If any of the foregoing findings of fact are deemed to be conclusions of law, they are
15 incorporated herein by reference.

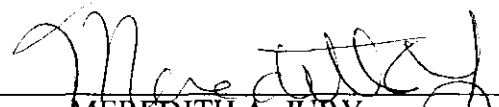
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17 Based on the above-stated findings of fact and conclusion of law, the court rules as follows:

18 1. On the complaint for nondischargeability, judgment shall enter for defendants Richard
19 and Susan Lenzo. Plaintiff Chris Peters shall take nothing by way of his complaint.

20 2. On the objection to the claim filed by Chris Peters in the Lenzo chapter 13 case, the
21 objection to the claim is sustained under the provisions of §502(b)(1).

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Dated: 3-4-09


MEREDITH A. JURY
United States Bankruptcy Judge

1 NOTICE OF ENTRY OF JUDGEMENT OR ORDER
2 AND CERTIFICATE OF MAILING


3 TO ALL PARTIES IN INTEREST LISTED BELOW:

4 1. You are hereby notified that a judgement or order entitled: FINDINGS OF FACT AND
5 CONCLUSIONS OF LAW IN SUPPORT OF JUDGMENT AFTER TRIAL AND RULING
6 ON OBJECTION TO CLAIM

7 was entered on MAR - 9 2009.

8 2. I hereby certify that I mailed a true copy of the order or judgement to the persons and entities
9 listed below on MAR - 9 2009.

10 Dated: MAR - 9 2009

11 
12 _____, Deputy Clerk

13 Office of the U.S. Trustee
14 3420 Twelfth Street Rm 200
15 Riverside, CA 92501

16 **William E O'Neill**
17 101 W Broadway Ste 810
18 San Diego, CA 92101

19 **Brian Pedigo**
20 7545 Irvine Center Dr Ste 200
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22 **Richard Thomas & Susan Lynn Lenzo**
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