



SO ORDERED.

SIGNED this 07 day of February, 2008.

**THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.**

**John C. Cook
UNITED STATES BANKRUPTCY JUDGE**

**IN THE UNITED STATES BANKRUPTCY COURT FOR
THE EASTERN DISTRICT OF TENNESSEE**

In re:

**Cary Marshall Dotson
Gigi Maria Dotson**

Debtors

K.K.I., LLC

Plaintiff

v.

Cary Marshall Dotson

Defendant

**No. 03-10116
Chapter 7**

Adv. No. 03-1022

MEMORANDUM

This proceeding is before the court upon the plaintiff's complaint seeking a judgment declaring nondischargeable a debt for certain monies that the defendant allegedly embezzled from the plaintiff during the time the defendant worked as an employee at plaintiff's business.

The plaintiff seeks to have the obligation declared nondischargeable under the provisions of 11 U.S.C. § 523(a)(4). Having considered the proof presented at the trial, the court now enters this memorandum, which constitutes its findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

The defendant, Cary Marshall Dotson, pled guilty in the Circuit Court of Rhea County, Tennessee, to a criminal charge of larceny of money in excess of \$60,000 from the plaintiff. That criminal charge related to the embezzlement of funds that is the subject of this adversary proceeding. Hence, the defendant's guilty plea establishes that the defendant embezzled funds from the plaintiff in excess of \$60,000.

Accountant Michael Costello reviewed records from the plaintiff that covered the period when the defendant worked for the plaintiff, and he prepared a report of his findings, which was introduced as an exhibit at trial. It appears from a review of Mr. Costello's report that the defendant stole or embezzled at least \$227,610.10 from the plaintiff during the course of his employment in that he converted cash in the sum of \$ 28,010.00, converted checks in the sum of \$129,045.00, and overpaid himself by \$70, 555.10.

With respect to other amounts mentioned in the report, it stated: "there were some questionable activities by Mr. Dotson regarding which we were not able to reach the same definitive conclusion due to the unavailability of data." These questionable activities related to \$341,995.83 in checks made payable to "Cash," signed by Mr. Dotson, and endorsed by Mr. Dotson. The report stated that, "[b]ecause Mr. Dotson did not keep accurate records of the cash balance on hand at the Dayton location, we were unable to determine how much of that cash actually was used to replenish the cash register at the Dayton office." Also, there was uncertainty about whether missing title pawn payments in 2001 (\$47,509.00) were attributable to theft or

embezzlement because, according to the report, "daily cash drawer detail reports were not available for 2001." Despite this uncertainty and lack of documentary evidence, the report stated that "it is highly likely that Mr. Dotson misappropriated some, if not all" of these additional amounts (\$341,995.83 and \$47,509.00) "based upon the results of our procedures on transactions in other periods" No other proof of damages was offered.

Guessing about Mr. Dotson's culpability with respect to the 2001 cash payments (\$47,509.00) and the checks made payable to cash (\$341,995.83) is not permitted. "Speculative damages may not be recovered where the fact of damage is uncertain, contingent or speculative." *Hannan v. Alltel Pub. Co.*, No. E2006-01353-COA-R3-CV, 2007 WL 208430 (Tenn. Ct. App. Jan. 26, 2007), *application for permission to appeal granted*, No. E2006-01353-SC-R11-CV (Tenn. June 18, 2007); *accord, Pinson & Assocs. Ins. Agency, Inc. v. Kreal*, 800 S.W.2d 486, 488 (Tenn. Ct. App. 1990); *Maple Manor Hotel, Inc. v. Metro. Gov't of Nashville*, 543 S.W.2d 593 (Tenn. Ct. App. 1975).

The court concludes that the debt for the larceny and embezzlement of \$227,610.10 is nondischargeable pursuant to 11 U.S.C. § 523(a)(4). An appropriate judgment will enter.*

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* The plaintiff has filed two post-trial papers. The first is a motion to conform the pleadings to the proof. The motion will be granted but is moot in light of this ruling. The plaintiff also attempts to offer evidence after the conclusion of the trial by filing what purports to be a guilty plea agreement signed by the defendant. The exhibit is not properly authenticated, was never introduced into evidence at trial, and will not be considered by the court. During the course of the trial, however, the defendant did admit to pleading guilty to the criminal charge regarding the embezzlement of money in excess of \$60,000 from the plaintiff.