UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:	Case No. 3:09-bk-10598-PMG
NABIL K. ESFAHANI,	
Debtor.	Chapter 7
NAHID VENUS, as Trustee of the Living Trust of Nahid Venus, NAHID VENUS and SIMAC MASHOD, as Co-Trustees of the Living Trust of Bahman Venus, and SAND DOLLAR PLAZA, LLC, a Florida limited liability company,	
Plaintiffs,	
vs.	Adv. No. 3:10-ap-168-PMG
NABIL K. ESFAHANI,	
Defendant.	

ORDER ON DEFENDANT'S MOTION TO DISMISS

THIS CASE came before the Court for hearing to consider the Motion to Dismiss filed by the Debtor/Defendant, Nabil K. Esfahani.

The Plaintiffs, Nahid Venus as Trustee of the Living Trust of Nahid Venus, Nahid Venus and Simac Mashod as Co-Trustees of the Living Trust of Bahman Venus, and Sand Dollar Plaza, LLC,

commenced this adversary proceeding by filing a Complaint to Determine Non-Dischargeability of Debt against the Debtor. Generally, the Complaint arises from the Debtor's alleged misuse of property belonging to Sand Dollar Plaza, LLC, a Florida limited liability company. As a result of the alleged misconduct, the Plaintiffs assert that the Debtor is indebted to them for unliquidated damages, and that the debt is nondischargeable under §523(a)(4) and §523(a)(6) of the Bankruptcy Code.

In response, the Debtor contends that the allegations contained in the Complaint do not satisfy the requirements for nondischargeability set forth in §523(a)(4) and §523(a)(6), and that the Complaint should be dismissed.

Background

On December 17, 2009, the Debtor filed a petition under Chapter 7 of the Bankruptcy Code.

On April 12, 2010, the Plaintiffs filed a Complaint to Determine Non-Dischargeability of Debt against the Debtor.

In the Complaint, the Plaintiffs allege that Sand Dollar Plaza, LLC (the LLC) was formed as a Florida limited liability company on March 26, 2007. (Complaint, ¶10). Membership interests in the LLC were initially held by the Living Trust of the Debtor, the Living Trust of Bahman Venus, and the Living Trust of Nahid Venus. (Complaint, ¶13).

The LLC acquired a shopping center in Duval County, Florida, known as the Sand Dollar Plaza. (Complaint, ¶¶11, 12, 14).

The Debtor operated the LLC. (Complaint, ¶15).

The Plaintiffs allege that the Debtor committed wrongdoing with respect to the LLC's property by (1) failing to pay rent for office space that he used in the shopping center, and failing to promptly lease

space in the shopping center to other tenants (¶17); (2) including his office expenses in the LLC's operating expenses (¶18); (3) converting the rent that he collected from other tenants to his own use instead of making the mortgage payments on the shopping center (¶19); and (4) withdrawing the sum of $42,000.00 from the LLC's bank account for his own use, instead of paying the property taxes on the shopping center (¶21).

Based on the alleged wrongdoing by the Debtor, the Plaintiffs seek a determination that the debt owed to them by the Debtor is nondischargeable pursuant to §523(a)(4) and §523(a)(6) of the Bankruptcy Code.

The Debtor contends that the allegations contained in the Complaint are not sufficient to state a cause of action under either §523(a)(4) or §523(a)(6), and that the Complaint should therefore be dismissed.

Discussion

In evaluating whether to dismiss a complaint for failure to state a cause of action, the Court should accept the plaintiff's factual allegations as true, and construe them in the light most favorable to the plaintiff. In re Bill Heard Enterprises, Inc., 406 B.R. 98, 102 (Bankr. N.D. Ala. 2009).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009)(quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 129 S.Ct. at 1949(citing Bell Atlantic Corp. v. Twombly, 550 U.S. at 556). In other words, the relevant question for

purposes of a motion to dismiss for failure to state a claim is "whether, assuming the factual allegations are true, the plaintiff has stated a ground for relief that is plausible." Ashcroft v. Iqbal, 129 S.Ct. at 1959(quoted in In re Bill Heard Enterprises, Inc., 406 B.R. at 102).

In this case, the Court has considered the Plaintiffs' allegations, and finds that the Debtor's Motion to Dismiss should be granted, without prejudice, as to Count I of the Complaint, and denied as to Count II and Count III of the Complaint.

I. Count I

In Count I of the Complaint, the Plaintiffs allege that the Debtor "committed defalcation while acting in his fiduciary capacity to the LLC by taking the LLC's money for his own use." (Complaint, p. 5). According to the Plaintiffs, therefore, the debt owed by the Debtor is nondischargeable pursuant to §523(a)(4) of the Bankruptcy Code.

Section 523(a)(4) provides:

> **11 USC § 523. Exceptions to discharge**
>
> (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.

11 U.S.C. §523(a)(4)(Emphasis supplied). For a debt to be nondischargeable under the "fraud or defalcation" clause of §523(a)(4), it is well-established that the debtor must have violated a fiduciary duty under an express or technical trust.

> The existence of a fiduciary capacity under 11 U.S.C. §523(a)(4) is determined by federal law, but state law is relevant to the inquiry. Federal law narrowly defines the

> concept of a "fiduciary relationship" under §523(a)(4) to include only relationships involving an express or technical trust. *Quaif v. Johnson*, 4 F.3d 950, 953 (11th Cir. 1993); *In re Regan*, 477 F.3d 1209, 1211 (10th Cir. 2007). Under applicable federal principles, an express or technical trust must be present for a fiduciary relationship to exist under 11 U.S.C. §523(a)(4).

In re Guerrero, 2010 WL 2926534, at 2 (Bankr. S.D. Fla.). In other words, "to qualify under 11 U.S.C. §523(a)(4), there must be an express or technical trust imposing trustee-like obligations upon Defendant." In re Guerrero, 2010 WL 2926534, at 2.

In this case, the Plaintiffs assert that the alleged debt is not dischargeable under §523(a)(4) because the Debtor took the LLC's money for his own use. (Complaint, p. 5). The Plaintiffs have not alleged, however, that the Debtor violated any duties under an express trust by removing funds from the LLC.

First, Florida law does not provide that the managing members of a limited liability company hold any fiduciary duties involving an express or technical trust.

> Federal bankruptcy law, not state law, governs whether a fiduciary relationship exists in a Section 523(a)(4) nondischargeability action. *In re Magpusao*, 265 B.R. 492, 497 (Bankr. M.D. Fla. 2001). An extraordinary level of fiduciary duty must be present for a debt to be nondischargeable pursuant to Section 523(a)(4). *Bar-Am v. Grosman, (In re Grosman)*, No. 6:05-ap-328-KSJ, 2007 WL 1526701, at 16 (Bankr. M.D. Fla. May 22, 2007). The statutory fiduciary duties of loyalty and care a managing member owes to a limited liability company and its members pursuant to Fla. Stat. Section 608.4225(1) do not meet the level of fiduciary duty required for Section 523(a)(4) purposes. *Id*. at 15.

In re Lawrence, 2009 WL 3486063, at 4 (Bankr. M.D. Fla.)(Emphasis supplied). "Although Florida Statute Section 608.4225 does supply certain fiduciary duties, for example, holding limited liability company property as trustee and refraining from intentional misconduct, the statute does not establish any type of express or technical trust, as required by Section 523(a)(4)." In re Grosman, 2007 WL 1526701, at 16 (Bankr. M.D. Fla.). Since a member's duties under the Florida statute are limited, and

do "not involve the administration of a technical/express trust or the control of a segregated res," the statute does not create the "fiduciary capacity" required by §523(a)(4) of the Bankruptcy Code. In re Grosman, 2007 WL 1526701, at 16.

Second, the Plaintiffs did not allege that the organizational documents for the LLC required its members to hold the LLC's assets in an express trust. See In re Grosman, 2007 WL 1526701, at 16("Nor does the Bargo operating agreement create an express or technical trust."). Consequently, the Plaintiffs did not allege that the parties had contractually agreed to the formation of an express trust that satisfied the requirements of §523(a)(4).

In sum, for a debt to be nondischargeable under the fraud or defalcation clause of §523(a)(4), the debtor must have violated a fiduciary duty under an express or technical trust. In this case, the Plaintiffs did not allege that an express trust was created under either state law or by agreement of the parties. The Court concludes, therefore, that Count I of the Complaint should be dismissed, without prejudice.

II. Count II

In Count II of the Complaint, the Plaintiffs allege that the Debtor "committed embezzlement and/or larceny by taking LLC's money for his own use." (Complaint, p. 6). According to the Plaintiffs, therefore, the debt owed by the Debtor is nondischargeable pursuant to §523(a)(4).

As set forth above, §523(a)(4) provides:

> **11 USC § 523. Exceptions to discharge**
>
> (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.

11 U.S.C. §523(a)(4)(Emphasis supplied). "In contrast to fraud and defalcation, embezzlement and larceny need not occur within a fiduciary capacity in order to be nondischargeable under §523(a)(4)." In re Martinez, 410 B.R. 847, 852 (Bankr. W.D. Mo. 2008).

Generally, embezzlement is defined as "the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come." In re Lorenzo, 2010 WL 2899053, at 10 (Bankr. M.D. Fla.)(quoting In re Kelley, 84 B.R. 225, 231 (Bankr. M.D. Fla. 1988)). Larceny is generally defined as "the fraudulent taking of another's property with the intent to convert it without the other's consent." In re Lorenzo, 2010 WL 2899053, at 11(citing In re Pupello, 281 B.R. 763, 768 (Bankr. M.D. Fla. 2002)). For larceny, unlike embezzlement, the original taking of the property must be unlawful. In re Lorenzo, 2010 WL 2899053, at 11. Fraudulent intent is an element of both causes of action. In re Lorenzo, 2010 WL 2899053, at 10-11; In re Martinez, 410 B.R. at 852.

In this case, the Plaintiffs allege that the LLC was formed as a Florida limited liability company in 2007, and that the members of the LLC were the Living Trust of the Debtor, the Living Trust of Bahman Venus, and the Living Trust of Nahid Venus. (Complaint, ¶¶10, 13). The Plaintiffs in this adversary proceeding are the LLC and the two members of the LLC other than the Debtor's Trust.

The Plaintiffs allege that the sole purpose of the LLC was the ownership and management of a shopping center, and that the Debtor operated the LLC and managed its income and expenses. (Complaint, ¶¶11, 14, 15, 16, 19, 21). Finally, the Plaintiffs allege that the Debtor (1) collected rent from the shopping center's tenants on behalf of the LLC and "converted all of these rental payments for

his own use," and that the Debtor (2) "withdrew the $42,000 from the LLC's bank account for his own use." (Complaint, ¶¶16, 19, 21).

The Debtor contends that Count II is insufficient because the Plaintiffs do not clearly allege which of the three Plaintiffs suffered any damage, because they do not allege fraud or fraudulent intent with specificity, and because the Debtor's Trust held a 50% membership interest in the LLC. (Transcript, pp. 8-10).

Despite the absence of specificity regarding certain factual matters, the Court finds that the Plaintiffs' allegations are sufficient to state a claim for embezzlement or larceny that is plausible on its face. Ashcroft v. Iqbal, 129 S.Ct. at 1949, 1959. The allegations allow the Court to draw the reasonable inference that the Debtor received possession of property in which the Plaintiffs held an interest, and that he knowingly appropriated the property for his own use to the detriment of the Plaintiffs. For purposes of surviving a Motion to Dismiss, the Plaintiffs adequately stated the elements of a cause of action for embezzlement or larceny.

The Debtor's Motion to Dismiss should be denied as to Count II of the Complaint.

III. Count III

In Count III of the Complaint, the Plaintiffs allege that the Debtor "committed willful and malicious injury to the LLC by converting monies from the LLC for his own use." (Complaint, p. 6). According to the Plaintiffs, therefore, the debt owed by the Debtor is nondischargeable pursuant to §523(a)(6) of the Bankruptcy Code.

Section 523(a)(6) provides:

11 USC § 523. Exceptions to discharge

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(a) of this title does not discharge an individual debtor from any debt—
>
> . . .
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

11 U.S.C. §523(a)(6). Actions under §523(a)(6) include claims based upon the conversion of property. Under Florida law, a conversion is "an unauthorized act which deprives another of his property permanently or for an indefinite time." In re Grosman, 2007 WL at 16-17(citations omitted). For a debt based on conversion to be nondischargeable under §523(a)(6), the injury must be both willful and malicious.

With respect to the "willful" requirement, it is now well-established that a plaintiff must show that the debtor intended the injury, not merely that he intended the act which resulted in the injury. In other words, a deliberate or intentional *injury* is required under §523(a)(6). In re Luca, 422 B.R. 772, 775 (Bankr. M.D. Fla. 2010)(citing Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998)).

With respect to the "malicious" requirement, a plaintiff must show that the injury was "wrongful and without just cause or excessive even in the absence of personal hatred, spite or will-will." In re Luca, 422 B.R. at 775-76(quoting In re Walker, 48 F.3d 1161, 1164 (11th Cir. 1995)). It is the knowledge or consciousness of wrongdoing that is critical for purposes of determining nondischargeability under §523(a)(6). In re Luca, 442 B.R. at 776(citing In re McClung, 335 B.R. 466, 475 (Bankr. M.D. Fla. 2005)).

In this case, the Court finds that the Plaintiffs have stated a claim for relief under §523(a)(6) that is plausible on its face. The Complaint alleges that (1) the Debtor operated the LLC, (2) that the LLC's

shopping center was encumbered by two mortgages in an amount exceeding $3,350,000.00, (3) that the Debtor collected rent from the shopping center's tenants, but used the rent for his own purposes instead of making the mortgage payments, and (4) that the sum of $42,000.00 had been deposited into the LLC's bank account to pay its property taxes, but that the Debtor withdrew the funds and used them for his own purposes. (Complaint, ¶¶12, 15, 19, 21). The allegations allow the Court to draw the reasonable inference that the Debtor deprived the Plaintiffs of their property, and that he knew that his acts would result in injury to the Plaintiffs. For purposes of surviving a Motion to Dismiss, the Plaintiffs sufficiently stated a cause of action for willful and malicious injury under §523(a)(6) of the Bankruptcy Code.

The Debtor's Motion to Dismiss should be denied as to Count III of the Complaint.

Conclusion

The matter before the Court is the Debtor's Motion to Dismiss the Plaintiffs' Complaint to Determine Non-Dischargeability of Debt.

The Court finds that the Motion should be granted, without prejudice, as to the claim based on fraud or defalcation while acting in a fiduciary capacity (Count I). The Plaintiffs did not allege that an express or technical trust was created under either state law or by agreement of the parties, as required by §523(a)(4) of the Bankruptcy Code. The Debtor's Motion should be denied, however, as to the claims based on embezzlement or larceny (Count II) and willful and malicious injury (Count III). For purposes of a motion to dismiss, the Court finds that the Plaintiffs sufficiently alleged the required elements of those claims under §523(a)(4) and §523(a)(6).

Accordingly:

IT IS ORDERED that:

1. The Motion to Dismiss filed by the Debtor/Defendant, Nabil K. Esfahani, is granted in part and denied in part as set forth in this Order.

2. The Motion is granted as to Count I of the Complaint to Determine Non-Dischargeability of Debt, and Count I of the Complaint is dismissed, without prejudice to the Plaintiffs' right to file an Amended Complaint within fourteen (14) days of the date of this Order.

3. The Motion is denied as to Count II and Count III of the Complaint to Determine Non-Dischargeability of Debt.

DATED this 22 day of September, 2010.

BY THE COURT

/s/ Paul M. Glenn

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PAUL M. GLENN
Chief Bankruptcy Judge