

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
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In re)
)
ROBERT J. VEGA,) Case No. 6:10-bk-06873-KSJ
) Chapter 7
 Debtor[s].)
_____)
SCOTT A. BROWN,)
)
 Plaintiff[s],) Adversary No. 6:10-ap-00299-KSJ
vs.)
)
ROBERT J. VEGA,)
)
 Defendant[s].)
_____)

**ORDER DENYING DEFENDANT’S MOTION TO STRIKE AND
PARTIALLY GRANTING DEFENDANT’S MOTION TO DISMISS THE COMPLAINT**

Scott Brown was the Debtor and Defendant Robert J. Vega’s business partner in Winter Park Partners Development, LLC (“WPPD” or the “LLC”) and a member of the LLC. In his three-count complaint, Plaintiff alleges Defendant engaged in a fraudulent scheme to induce Plaintiff and others to invest in WPPD and its land development projects from which Defendant misappropriated the monies converting them to his personal benefit.¹ The alleged loss is \$529,136.21.²

Defendant now moves this Court to strike portions of the Complaint as irrelevant and scandalous.³ Defendant also seeks dismissal of each count of the Complaint.

¹ Doc. No. 1. Plaintiff seeks a nondischargeability determination from this Court pursuant to 11 U.S.C. §§ 523(a)(2)(A), (a)(4), and (a)(6).

² Claim No. 15-1.

³ Doc. No. 12.

Motion to Strike

Under the Federal Rules of Civil Procedure, “[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.”⁴

[Striking a portion of a pleading] “is a drastic remedy to be resorted to only when required for the purposes of justice. . . . The motion to strike should be granted only when the pleading to be stricken has no possible relation to the controversy.”

Augustus v. Board of Public Instruction, 306 F.2d 862, 868 (5th Cir. 1962) (quoting *Brown & Williamson Tobacco Corp. v. United States*, 201 F.2d 819, 822 (6th Cir. 1953)).⁵

Defendant moves to strike specific paragraphs of the Complaint discussing the “investments” in WPPD, writing checks on insufficient funds, and making false statements to third parties as scandalous, immaterial, and impertinent to Plaintiff’s § 523 causes of action.⁶

The paragraphs identified by Defendant are not so irrelevant or scandalous as to justify striking them. Although the allegations are not core elements of each of the causes of action, they are allegations directly relating to the general scheme to defraud WPPD investors, including Plaintiff. They provide context for the debt Defendant allegedly owes Plaintiff and add an appropriate background for Plaintiff’s nondischargeability action. The Court denies the motion to strike.

Motion to Dismiss

In reviewing a motion to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6),⁷ courts must accept the factual allegations of the complaint as true and construe them in

⁴ Fed. R. Civ. P. 12(f).

⁵ In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc), the United States Court of Appeals for the Eleventh Circuit adopted as precedent all decisions of the former Fifth Circuit Court of Appeals decided prior to October 1, 1981.

⁶ Doc. No. 12.

⁷ Made applicable to bankruptcy proceedings by Bankruptcy Rule 7012(b)(6).

the light most favorable to the plaintiff.⁸ Dismissal is appropriate under Rule 12(b)(6) if the plaintiff “can prove no set of facts that would support the claims in the complaint.”⁹

Count I alleges Defendant’s debt to Plaintiff is nondischargeable under § 523(a)(2)(A) because the debt represents monies Plaintiff invested in WPPD based upon Defendant’s false representations and actual fraud.¹⁰ Defendant argues Count I should be dismissed because it alleges only a breach of contract and is insufficient to state a claim pursuant to § 523(a)(2)(A).

The Court finds Count I adequately alleges intentional false representations and fraud. It alleges Defendant fraudulently induced Plaintiff to invest in WPPD by making knowingly false statements that the money would be used for WPPD projects, that Defendant was himself contributing funds to WPPD, and that money contributed by Plaintiff would be repaid. These are not simply breach of contract allegations. The Court denies Defendant’s Motion to Dismiss as to Count I.

Count II alleges Defendant’s debt to Plaintiff is nondischargeable under § 523(a)(4) which states debts “for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny”¹¹ are not discharged. Plaintiff relies on the embezzlement prong of this section, alleging Defendant used monies invested for WPPD projects for his own personal use. Defendant moves to dismiss Count II on the ground Plaintiff lacks standing to pursue an embezzlement claim.

The Court agrees. Plaintiff does not have standing to pursue a § 523(a)(4) cause of action against Defendant based upon embezzlement. Section 523(c)(1) states that a debtor will be discharged from a debt of the kind specified in § 523(a)(4), unless “on request of the creditor to whom such debt is owed,” the bankruptcy court determines the debt is not to be discharged.

⁸ *Financial Security Assur., Inc. v. Stephens, Inc.*, 450 F.3d 1257, 1262 (11th Cir. 2006).

⁹ *Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir.2003).

¹⁰ Doc. No. 1 ¶¶ 87-95.

¹¹ 11 U.S.C. § 523(a)(4).

Thus, only creditors to whom a debt is owed may assert that a debt is nondischargeable under this section.¹²

Plaintiff bases his § 523(a)(4) claim on allegations that Defendant misused the LLC's monies and that the misuse constitutes embezzlement. Taking these allegations as true, the Court could infer that *WPPD* was damaged by Defendant's diversion of the LLC's funds. The alleged facts, however, do not support a conclusion that Plaintiff, *only a member* of the LLC, is owed a debt arising out of embezzlement by Defendant. Thus, Plaintiff is not a creditor to whom a debt arising out of embezzlement is owed, and he does not have standing to pursue the § 523(a)(4) claim.¹³ The Court will grant Defendant's Motion to Dismiss as to Count II.

Count III alleges Defendant's debt to Plaintiff is nondischargeable under § 523(a)(6) which states debts "for willful and malicious injury by the debtor to another entity or to the property of another entity" are not discharged. Defendant moves to dismiss Count III "because the allegations do not show anything more than a breach of contract or embezzlement of the funds of the legal entity *WPPD*."¹⁴

Count III alleges Defendant willfully and maliciously converted Plaintiff's funds to his own use.¹⁵ Taking these facts as true, as the Court must at this stage of the proceedings, Count III properly alleges a cause of action pursuant to § 523(a)(6). "Willful and malicious injury includes willful and malicious conversion, which is the unauthorized exercise of ownership over goods belonging to another to the exclusion of the owner's rights."¹⁶ Plaintiff has appropriately pled a cause of action, and the Court will deny Defendant's Motion to Dismiss Count III.

Accordingly, it is **ORDERED**:

¹² *In re Whittle*, 449 B.R. 427, 429 (Bankr. M.D. Fla. 2011).

¹³ *Id.* at 430.

¹⁴ Doc. No. 12, ¶3.

¹⁵ Doc. No. 1, ¶¶ 105-110.

¹⁶ *In re Wolfson*, 56 F.3d 52, 54 (11th Cir. 1995); *see also In re Grosman*, 2007 WL 1526701 at *16-17 (Bankr. M.D. Fla. 2007) (finding debt for conversion was nondischargeable pursuant to § 523(a)(6)).

1. The Defendant's Motion to Strike (Doc. No. 12) is denied.
2. The Defendant's Motion to Dismiss Counts I and III is denied.
3. The Defendant's Motion to Dismiss Count II is granted. Count II is dismissed with prejudice.
4. The Defendant is directed to file an answer to Counts I and III of the complaint no later than **January 4, 2013**, or a Clerk's Default may issue.
5. A pretrial conference is scheduled for **March 13, 2013, at 10:00 a.m.**, in Courtroom A, Sixth Floor, 400 West Washington Street, Orlando, Florida 32801.

DONE AND ORDERED in Orlando, Florida, on December 3, 2012.



KAREN S. JENNEMANN
Chief United States Bankruptcy Judge