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].	)	
	)	
JAY C. CARY,	)	
	)	
Plaintiff[s],	)	Adversary No. 6:10-ap-00298-KSJ
vs.	)	
	)	
ROBERT J. VEGA,	)	
	)	
Defendant[s].	)	
	)	

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

Plaintiff was a friend of Robert J. Vega, the Debtor and Defendant, and loaned Defendant money to pursue several construction and development projects. Plaintiff's Amended Complaint[1] alleges Defendant engaged in a fraudulent scheme to induce Plaintiff and others to invest with Defendant in several land development projects from which Defendant misappropriated the monies, converting them to his personal benefit. The alleged loss is $904,987.79.[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.[4] After the motion

[1] Doc. No. 11. 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. 12-2.
[3] Doc. No. 22.

to strike and dismiss was filed, the *pro se* Plaintiff filed a motion to strike the answer and for default judgment.[5]

Defendant's Motion to Strike

"The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."[6]

> [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."[7]

Defendant moves to strike paragraph 8 of the Amended Complaint arguing that the paragraph "seeks leave of the Court to demand a Jury Trial" and that jury trials are not authorized in nondischargeability actions. Defendant also moves to strike most of the remainder of the Amended Complaint, including paragraphs alleging the parties' relationship, history of loans from Plaintiff to Defendant, false statements made by Defendant to Plaintiff, forged documents created by Defendant, and false statements made by Defendant to third parties as irrelevant to the Plaintiff's § 523 causes of action.[8]

Paragraph 8 does not demand a jury trial but merely requests leave of the Court to do so. This innocuous request does not justify striking the paragraph. The other paragraphs identified by Plaintiff also are not so irrelevant or scandalous as to justify striking them. Although the allegations are not core elements of each of Plaintiff's causes of action, the allegations directly relate to the general scheme to defraud Plaintiff and other investors. They provide context for

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[4] *Id.*
[5] Doc. No. 23.
[6] Fed. R. Civ. P. 12(f).
[7] In *Bonner v. City of Pritchard*, 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. *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)).
[8] Doc. No. 22.

the debt the Defendant allegedly owes the Plaintiff and add an appropriate background for the Plaintiff's nondischargeability action. The Court denies the motion to strike.

Defendant's Motion to Dismiss

In reviewing a motion to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6),[9] courts must accept the factual allegations of the complaint as true and construe them in the light most favorable to the plaintiff.[10] 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."[11]

Count I alleges Defendant's debt to Plaintiff is nondischargeable under § 523(a)(2)(A) because the debt represents monies Plaintiff loaned Defendant based upon Defendant's false representations and actual fraud.[12] 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 loan Defendant money by making knowingly false statements that the money would be used for construction and development projects and that money contributed by Plaintiff would be repaid. These are not simply breach of contract allegations. If these allegations are proven, Defendant's debt to Plaintiff would be nondischargeable pursuant to § 523(a)(2)(A). 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"[13] are not discharged. Plaintiff relies on the embezzlement prong of this section, alleging Defendant used monies invested by Plaintiff and others for business construction and

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[9] Made applicable to bankruptcy proceedings by Bankruptcy Rule 7012(b)(6).
[10] *Financial Security Assur., Inc. v. Stephens, Inc.*, 450 F.3d 1257, 1262 (11th Cir. 2006).
[11] *Davila v. Delta Air Lines, Inc.,* 326 F.3d 1183, 1185 (11th Cir.2003).
[12] Doc. No. 11, ¶¶ 232-46.

development projects for Defendant's own personal purposes. 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. Thus, only creditors to whom a debt is owed may assert that a debt is nondischargeable under this section. [14]

Plaintiff bases his § 523(a)(4) claim on allegations that Defendant misused monies belonging to his businesses and that the misuse amounts to embezzlement. Taking these allegations as true, the Court could infer that *the businesses* (including Winter Park Partners Development (WPPD)) were damaged by Defendant's diversion of their funds. The alleged facts, however, do not support a conclusion that Plaintiff, *an individual separate from any such business*, 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.[15] 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 on the ground it "alleges only loans and do[es] not allege facts to support a claim for willful and malicious injury."[16]

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[13] 11 U.S.C. § 523(a)(4).
[14] *In re Whittle*, 449 B.R. 427, 429 (Bankr. M.D. Fla. 2011).
[15] *Id.* at 430.
[16] Doc. No. 22, at 3.

Count III alleges Defendant willfully and maliciously converted Plaintiff's funds to his own use.[17] Taking these facts as true, as the Court must at this stage of the proceedings, Count III property 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."[18] Plaintiff has appropriately pled a cause of action, and the Court will deny Defendant's Motion to Dismiss Count III.

Plaintiff's Motion to Strike

Plaintiff moves the Court to strike the Defendant's motion to dismiss because it was untimely and to enter a default judgment against the Debtor because no answer was filed.[19] The Court will deny the motion without prejudice finding a default is not proper at this time. Any untimeliness is irrelevant in light of the Defendant's motion to dismiss and this order directing the Defendant to file an answer by January 4, 2013. If Mr. Vega now fails to timely file an answer, the Plaintiff may then appropriately seek the entry of a default.

Accordingly, it is

ORDERED:

1. The Defendant's Motion to Strike (Doc. No. 22) 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. Defendant is directed to file an answer to Counts I and III of the Amended Complaint no later than **January 4, 2013**.

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[17] Doc. No. 11, ¶¶ 257-263.

[18] *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)).

[19] Doc. No. 23

5. Plaintiff's Motion to Strike Answer and Motion for Default Judgment (Doc. No. 23) is denied without prejudice.

6. A further 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 4, 2012.

KAREN S. JENNEMANN
Chief United States Bankruptcy Judge