

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
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In re: Case No. 8:15-bk-04440-CPM
Chapter 13

Robert E. Taylor, Jr. and
Sonja R. Taylor,

Debtors.

Eileen Julian,

Plaintiff,

v. Adv. Pro. No. 8:15-ap-684-CED

Robert E. Taylor and
Sonja R. Taylor,

Defendants.

**ORDER GRANTING
DEFENDANT'S MOTION TO
DISMISS AMENDED COMPLAINT**

THIS PROCEEDING came on for hearing on January 11, 2016, of Defendant Robert Taylor's¹ *Motion to Dismiss Creditor Eileen Julian's Amended Complaint Objecting to Dischargeability of Debt* (Doc. No. 15) ("Motion to Dismiss"). Plaintiff's Amended Complaint (Doc. No. 14) states that it is an action to have her state court judgment against Defendant declared non-dischargeable under 11 U.S.C. §§ 523(a)(2) and 523(a)(4). To survive a motion to dismiss, a plaintiff must plead sufficient factual allegations to support the essential elements of the claim being asserted.

Under § 523(a)(2)(A), a debt is not discharged if it was obtained by (i) false pretenses; (ii) a false

¹ Plaintiff's Complaint against co-defendant Sonja Taylor was previously dismissed with prejudice (Doc. No. 17).

representation; or (iii) actual fraud. For all three theories under § 523(a)(2)(A), a plaintiff must plead facts that establish the traditional elements of common law fraud.² Those elements are: (i) that the defendant made a false representation with the purpose and intention of deceiving plaintiff; (ii) that plaintiff relied on the misrepresentation; (iii) that the reliance was justified; and (iv) that plaintiff sustained a loss as a result of the misrepresentation.³

Plaintiff's Amended Complaint does not allege facts that support a claim under § 523(a)(2)(A). Although Plaintiff alleges that Defendant did not perform the legal services for which he was retained, she has not alleged that Defendant made any false representations to her. Nor has Plaintiff alleged that Defendant made the alleged false representations with the intent to deceive her or that her reliance upon the false representations was justifiable.

Under § 523(a)(4), a debt is not discharged if the debt was for (i) fraud or defalcation while acting in a fiduciary capacity; (ii) embezzlement; or (iii) larceny.

To state a claim under § 523(a)(4) to except a debt from discharge for fraud or defalcation while acting in a fiduciary capacity, a plaintiff must allege the existence of a fiduciary relationship between the defendant and herself and also that the defendant committed fraud or defalcation while acting in his capacity as a fiduciary.⁴ Here, Plaintiff has not alleged the existence of a fiduciary relationship between herself and Defendant; nor has she alleged that Defendant committed fraud or defalcation while acting in a fiduciary capacity.

With respect to a claim for embezzlement under § 523(a)(4), a plaintiff must plead (i) that the defendant appropriated funds; (ii) that the

² *In re Wood*, 245 F. App'x 916, 917 (11th Cir. 2007); *In re Vermilio*, 457 B.R. 854, 860-61 (Bankr. M.D. Fla. 2011).

³ *In re Wood* at 917-18; *In re Johannessen*, 76 F.3d 347, 350 (11th Cir. 1996).

⁴ *McDowell v. Stein*, 415 B.R. 584, 594 (S.D. Fla. 2009).

defendant appropriated the funds for his own use or benefit; and (iii) that the defendant appropriated the funds with fraudulent intent.⁵ Although Plaintiff's allegations that Defendant did not do the work for which he was retained and that he has not paid the judgment that Plaintiff obtained against him satisfy the first two elements, Plaintiff has not alleged that Defendant appropriated the funds with fraudulent intent.

Finally, a claim for larceny requires a plaintiff to plead that the defendant committed an unlawful taking and carrying away of the plaintiff's personal property with the intent to permanently deprive the plaintiff of her property.⁶ Claims for embezzlement and larceny are similar; the primary difference is that with embezzlement, the defendant initially acquires the property lawfully, while larceny requires that the funds originally come into the defendant's hands unlawfully.⁷ Because Plaintiff has alleged that she hired Defendant and paid him the retainer, the Court finds, as a matter of law, that Plaintiff cannot state a claim that the debt is excepted from discharge under § 523(a)(4) as a being a larceny.

Accordingly, for the foregoing reasons, it is

ORDERED

1. The Motion to Dismiss is GRANTED without prejudice as to Plaintiff's claims under § 523(a)(2)(A) and under § 523(a)(4) for fraud or defalcation while acting in a fiduciary capacity or for embezzlement.

2. The Motion to Dismiss is GRANTED with prejudice as to Plaintiff's larceny claim under § 523(a)(4).

3. Plaintiff shall file an amended complaint within 21 days of the date of this Order.

DATED: January 11, 2016.

/s/ Caryl E. Delano

Caryl E. Delano
United States Bankruptcy Judge

The Clerk's Office is directed to serve a copy of this order on interested parties via CM/ECF and on Plaintiff via U.S. Mail.

⁵ *In re Bercu*, 293 B.R. 806, 811 (Bankr. M.D. Fla. 2003).

⁶ *In re Ghaemi*, 492 B.R. 321, 325 (Bankr. D. Colo. 2013).

⁷ *Id.*