

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION**

In re:

Case No. 3:09-bk-7291-PMG

Jon Philip Monson, II,

\_\_\_\_\_  
Debtor.

Chapter 7

Alfred Galaz,

Plaintiff,

vs.

Adv. No. 3:09-ap-614-PMG

Jon Philip Monson, II,

\_\_\_\_\_  
Defendant.

**ORDER ON ALFRED GALAZ'S MOTION FOR SUMMARY JUDGMENT**

**THIS CASE** came before the Court for hearing to consider the Motion of the Plaintiff, Alfred Galaz, for Summary Judgment. (Doc. 116).

In this adversary proceeding, the Plaintiff seeks a determination that a debt owed by the Debtor, Jon Philip Monson, II, is nondischargeable pursuant to §523(a)(2), §523(a)(4), and §523(a)(6) of the Bankruptcy Code. The action arises from a Letter Agreement signed by the parties in 2007. In his Motion for Summary Judgment, the Plaintiff asserts that the elements of the dischargeability claims are established primarily by the Debtor's own factual admissions in this case.

Under Rule 56 (a) of the Federal Rules of Civil Procedure, a motion for summary should be granted if “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” In this case, the record shows that genuine disputes of material fact include whether the Debtor made any false statements at the time that he signed the Letter Agreement, whether the Agreement created a fiduciary obligation on the Debtor that the Debtor later breached, whether the Plaintiff acquired a security interest in certain equipment purchased pursuant to the Agreement, and whether the Debtor willfully and maliciously misappropriated the equipment. In view of these factual disputes, the Plaintiff’s Motion for Summary Judgment should be denied.

### **Background**

In 2007, the Debtor was an individual who resided in Safety Harbor, Florida, and the Plaintiff was an individual who resided in Texas.

On October 11, 2007, the Debtor and a Texas limited liability company known as Segundo Suenos, LLC, entered into a Letter Agreement (the Agreement) regarding “the funding, creation and management of an internet center (the ‘Center’), which Center will be substantially relying on the use of sweepstakes participation in order to market its business.” (Exhibit 2). The Agreement was signed by the Debtor, individually, and by the Plaintiff on behalf of Segundo Suenos, LLC, and provided in part:

Your [the Debtor’s] intent is to form a limited liability company, under the name “Internet Depot, LLC”, in which you are the sole member (i.e., owner). A lease will be secured for the Center’s location, under the LLC’s name. An agreement will be entered into between Internet Depot LLC and World Touch Gaming, which will secure the software necessary to run World Touch Gaming’s sweepstakes software at the Center, as well as the purchase of computer equipment and related materials for the operation of the Center. You will personally manage all aspects of the Center, and do so on a full-time basis at the Center’s location, unless and until we agree otherwise.

Segundo Suenos, LLC will loan you the startup costs for the Center. To this end, Segundo Suenos will wire transfer to a bank account held in the name of Internet Depot LLC the sum of \$130,000. . . .

In consideration for this loan, Segundo Suenos will receive forty-percent (40%) of the profit from operation of the Center, and you will receive sixty-percent (60%) of the profit from the Center, following recoupment by Segundo Suenos of the loan made by Segundo Suenos in connection herein. . . .

In the event that the Center is not profitable, or the parties otherwise agree to terminate its functioning, all material assets will be liquidated and first used to pay back any unrecouped portion of the loan made herein. . . . Segundo Suenos will be entitled to file with appropriate governmental agencies any documents necessary to preserve a lien upon all equipment, fixtures, and assets of the Center, and you shall agree to execute all documents presented to you in order to establish a lien upon such equipment, fixtures, and assets of the Center, and preserve Segundo Suenos's priority of claim thereon.

(Exhibit 2). Pursuant to the Agreement, Segundo Suenos transferred the sum of \$130,000.00 to the Debtor on or about October 18, 2007, and the Debtor "promptly utilized the proceeds for the purchase of materials necessary for the Internet Center, including formation of a Florida limited liability company under the moniker 'Internet Depot, LLC', securing a lease, the purchase of more than fifty computers, a computer server, telephones, etc." (Complaint, Doc. 56, ¶14; Answer, Doc. 69, ¶14).

The Center opened for business in Hillsborough County, Florida on February 18, 2008, and remained open for approximately two months. (Doc. 116, ¶10; Doc. 134, Exhibit A, ¶12).

On April 21, 2008, the Center was raided by the Hillsborough County Sheriff's Department, and virtually all of the Center's equipment and cash were seized by the Sheriff. The equipment remained in the possession of the Sheriff's Department for approximately five months. (Complaint, Doc. 56, ¶16; Answer, Doc. 69, ¶16).

On September 2, 2008, while the equipment was in the Sheriff's possession, the Debtor received a notice from Segundo Suenos which stated that Segundo Suenos terminated its interest in the Center, and demanded the liquidation of the Center's assets in order to repay the \$130,000.00 loan. (Exhibit 6).

On September 12, 2008, the Debtor entered into an Agreement with the Hillsborough County Sheriff's Office in which the Sheriff discharged its claims against the Debtor, and the Debtor was permitted to retrieve the seized equipment under the conditions contained in the settlement. (Doc. 82, Exhibit D to Debtor's Affidavit).

In late 2008, the Debtor leased the Center's equipment to a newly-formed entity known as Southern Investments of Jacksonville, LLC. (Doc. 82, Exhibit F to Debtor's Affidavit). Southern Investments was a limited liability company that the Debtor had formed with a third party, and which had its principal office in Jacksonville, Florida. (Exhibit 8).

On February 18, 2009, Segundo Suenos filed a state court action against the Debtor in Texas, and asserted claims for breach of the Agreement, breach of the covenant of good faith and fair dealing, and breach of fiduciary duty and fraud. (Doc. 116, ¶23).

On August 31, 2009, the Debtor filed a petition under Chapter 7 of the Bankruptcy Code.

Segundo Suenos filed this adversary proceeding against the Debtor on December 4, 2009. The Plaintiff's Second Amended Complaint contains three Counts. Count I is an action to determine the dischargeability of a debt under §523(a)(2) of the Bankruptcy Code, based on the Debtor's false pretenses, false representations, or actual fraud. Count II is an action to determine the dischargeability of the debt under §523(a)(4), based on the Debtor's fraud or defalcation while acting in a fiduciary

capacity or embezzlement. And Count III is an action to determine the dischargeability of the debt under §523(a)(6), based on the Debtor's willful and malicious injury to the Plaintiff's property.

## **Discussion**

The Plaintiff has filed a Motion for Summary Judgment pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure and Rule 56 of the Federal Rules of Civil Procedure. Rule 56(a) provides that the “court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” F.R.Civ.P. 56(a).

The party requesting a summary judgment bears the initial burden of showing that no genuine dispute of material fact exists. In re Bacelli, 729 F.Supp.2d 1328, 1340 (M.D. Fla. 2010)(citing Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986)). In evaluating the request, the Court “must view the facts and make all reasonable inferences in favor of the nonmoving party.” In re Harwell, 628 F.3d 1312, 1316-17 (11<sup>th</sup> Cir. 2010).

The Court has applied the Rule 56 standard in this case, and finds that the Plaintiff’s Motion for Summary Judgment should be denied. In this case, the record shows that genuine disputes of material fact include whether the Debtor made any false statements at the time that he signed the Agreement, whether the Agreement created a fiduciary obligation on the Debtor that the Debtor later breached, whether the Plaintiff obtained a security interest in the equipment purchased pursuant to the Agreement, and whether the Debtor willfully and maliciously misappropriated the equipment.

### **A. Count I**

Count I of the Second Amended Complaint is based on §523(a)(2) of the Bankruptcy Code. To establish a claim under §523(a)(2), the Plaintiff must show that the Debtor made a false representation with the intent to deceive, that the Plaintiff relied on the representation, that the reliance was justified, and that the Plaintiff suffered a loss as a result of the misrepresentation. The “cornerstone” element of

the claim is a misrepresentation made with the intent to deceive a creditor. In re Vermilio, 457 B.R. 863, 870 (Bankr. M.D. Fla. 2011).

In Count I, the Plaintiff alleges that the Debtor “obtained monies (\$130,000) and properties (the Internet Center Assets) by false pretenses, false representation and/or actual fraud.” (Doc. 56, ¶36). According to the Plaintiff, the Debtor had “no intention of complying with the terms of the Letter Agreement, at all, from its inception,” as evidenced by his failure to account to the Plaintiff for the Center’s operations and expenditures, by his use of the Center’s funds for personal expenses, and by his failure to liquidate the Center’s assets upon the Plaintiff’s demand. (Doc. 56, ¶¶21, 22; Exhibit to Doc. 116, Plaintiff’s Affidavit, ¶5).

In response, the Debtor contends that the Plaintiff had access to the Center’s bank records at Wachovia Bank from the time that the Center’s bank account was opened, and that the records were available for his review at any time. (Exhibit to Doc. 134, Debtor’s Affidavit, ¶7, and Debtor’s Supplemental Affidavit, ¶5). Additionally, the Debtor contends that his personal expenditures were authorized by the Agreement, and that the Plaintiff’s son, Raul Galaz, “specifically authorized me to pull necessary funds as needed to pay for my personal living expenses.” According to the Debtor, he was authorized to make disbursements to himself for living expenses for an indefinite period pursuant to a verbal agreement with Raul Galaz. (Exhibit to Doc. 134, Debtor’s Affidavit, ¶¶5 and 7). Finally, the Debtor contends that his failure to liquidate the Center’s assets upon the Plaintiff’s demand is justified because the equipment was initially in the possession of the Sheriff’s Department, because he believed that he owned the equipment and was therefore entitled to lease it to Southern Investments,

and because his bankruptcy attorney later advised him not to dispose of the assets. (Exhibits to Doc. 134, Debtor's Affidavit, ¶¶12-15 and Debtor's Supplemental Affidavit, ¶8).

Based on the record, the Court cannot find that the Debtor intended to deceive the Plaintiff from the inception of the Agreement. The parties agree, for example, that the Debtor initially complied with certain key provisions of the Agreement. He formed a limited liability company, leased the premises for the Center's operations, and purchased computer equipment and other assets for the Center. (Complaint, Doc. 56, ¶14; Answer, Doc. 69, ¶14). Additionally, the Debtor managed the Center's operations for approximately two months before it was closed by the Sheriff's Department. Under these circumstances, the Court finds that a genuine dispute exists regarding whether the Debtor made a false statement with the intent to deceive the Plaintiff at the time that he entered the Agreement, and the Plaintiff's Motion for Summary Judgment should be denied as to Count I of the Second Amended Complaint.

#### **B. Count II**

Count II of the Second Amended Complaint is based on §523(a)(4) of the Bankruptcy Code. To establish a claim under §523(a)(4), the Plaintiff must show that (1) the Debtor was acting in a fiduciary capacity, and that (2) while acting in the fiduciary capacity, the Debtor committed a fraud or defalcation. In re Kohr, 399 B.R. 284, 287 (Bankr. M.D. Fla. 2008).

In Count II, the Plaintiff alleges that the Debtor's "actions in obtaining monies from Segundo, failing to comply with the material terms of the Letter Agreement, and absconding with the Internet Center Assets, constitute fraud or defalcation while acting in a fiduciary capacity." (Doc. 56, ¶39).

The Plaintiff contends that the “fiduciary capacity” required by §523(a)(4) is created in the parties’ Agreement. Generally, the Agreement provides for Segundo Suenos to “loan” the Debtor \$130,000.00 to start the Center, and for the parties to divide the Center’s profits after the loan is repaid. The Agreement also provides that the Debtor will be the sole signatory on the Center’s bank account, that both parties must agree on any distributions made to either party, and that Segundo Suenos will have access to the Center’s books and records. Finally, the Agreement provides that the parties “further acknowledge that because of the special relationship of trust that is required herein, they maintain a fiduciary relationship to each other, and any breach thereof will be compensable by direct, indirect, consequential and punitive damages.” (Exhibit 2, p. 2).

Despite the Agreement’s language regarding the parties’ fiduciary relationship, the Plaintiff has not shown as a matter of law that the Agreement created a “fiduciary capacity” within the meaning of §523(a)(4). It is well-established that the term “fiduciary capacity” in §523(a)(4) is not construed expansively, but instead refers only to technical trusts. Quaif v. Johnson, 4 F.3d 950, 953 (11<sup>th</sup> Cir. 1993).

The existence of an express or technical trust is required for a fiduciary relationship pursuant to Section 523(a)(4). *In re Cuenant*, 339 B.R. 262, 274 (Bankr. M.D. Fla. 2006). An express or technical trust exists when “there is: (1) a segregated trust res; (2) an identifiable beneficiary, (3) and affirmative trust duties established by contract or statute.” *Id.*

In re Lorenzo, 434 B.R. 695, 709 (Bankr. M.D. Fla. 2010). In In re Grosman, 2007 WL 1526701 (Bankr. M.D. Fla.), for example, the Court stated that a fiduciary relationship does not exist under §523(a)(4) without proof of an express or technical trust. According to the Court, a fiduciary relationship in its broad sense, as one that involves confidence, trust, and good faith, is simply

insufficient to prove a claim under §523(a)(4). Since there was no segregated or defined trust res in Grosman, therefore, the Court found that the plaintiff in that case had failed to establish a claim for fraud or defalcation while acting in a fiduciary capacity. In re Grosman, 2007 WL 1526701, at 14-16.

In this case, the Agreement provides for Segundo Suenos to “loan” the Debtor \$130,000.00 for the “startup costs” of the Center. The Agreement clearly includes certain controls on the loan proceeds, such as Segundo Suenos’ right of access to the Center’s records, and the limitation on disbursements to insiders. Nevertheless, the Agreement does not clearly require the Debtor to segregate the loan proceeds, create an identifiable trust res in the bank account, or provide that the funds are entrusted to the Debtor for the benefit of the Plaintiff. Instead, the Agreement permits the Debtor to make expenditures from the proceeds, “endeavor” to comply with a pre-approved budget, and manage the Center’s operations with a view to dividing the profits between the parties after the loan is repaid. In other words, the Agreement appears to contemplate a business arrangement for the operation of the Center, and does not impose trust-like obligations on the Debtor. See In re Guerrero, 2010 WL 2926534, at 2-3 (Bankr. S.D. Fla.).

Finally, the Plaintiff emphasizes that Count II of his Second Amended Complaint is based on the Debtor’s “defalcation,” rather than his “fraud,” under §523(a)(4). (Transcript, p. 44). A “defalcation” differs from fraud, in that it only requires a debtor’s failure to account for entrusted property, regardless of whether the failure was the result of intentional, willful, reckless, or negligent behavior. In order to establish a claim under §523(a)(4), however, the plaintiff must show that the “failure to account” arose from a fiduciary capacity, even if it alleges only a defalcation and not fraudulent conduct. In re

Gonzales, 483 B.R. 1, 11 (Bankr. N.Mex. 2012)(A “threshold requirement for defalcation under §523(a)(4) is fiduciary capacity.”).

For the reasons shown above, the Plaintiff has not established as a matter of law that the Agreement created a fiduciary obligation on the Debtor within the meaning of §523(a)(4) of the Bankruptcy Code, and the Plaintiff’s Motion for Summary Judgment should therefore be denied as to Count II of the Second Amended Complaint.

### **C. Count III**

Count III of the Second Amended Complaint is based on §523(a)(6) of the Bankruptcy Code. To establish a claim under §523(a)(6), the Plaintiff must show that the debt at issue resulted from a “willful and malicious injury by the debtor to another entity or to the property of another entity.” 11 U.S.C. §523(a)(6). Proof of “willfulness” requires “a showing of an intentional or deliberate act, which is not done merely in reckless disregard of the rights of another,” and proof of “malice” requires a showing that the harm was “wrongful and without just cause or excessive even in the absence of personal hatred, spite or will-will.” In re Jennings, 670 F.3d 1329, 1334 (11<sup>th</sup> Cir. 2012)(citations omitted).

In Count III, the Plaintiff alleges that the Debtor willfully and maliciously injured the Plaintiff by depriving him of the sum of \$130,000.00, by converting the Center’s assets for his own personal advantage, and by failing to comply with the Agreement. (Doc. 56, ¶43). In particular, the Plaintiff asserts that the Debtor’s removal of the equipment from Hillsborough County, Florida to Duval County, Florida, without notifying the Plaintiff, is a willful and malicious injury to the Plaintiff’s property. (Transcript, pp. 31-32, 43). According to the Plaintiff, the removal of a creditor’s collateral to a different county is a violation of Florida law, and therefore evidences the willful and malicious nature of the conversion. (Transcript, pp. 25-26, 31).

In response, the Debtor contends that the Plaintiff never acquired a valid security interest in the equipment, because the Agreement constitutes only a tentative business proposal that was never finalized by the appropriate security documents. According to the Debtor, Raul Galaz advised him when the Agreement was executed that additional “collateral documents” would be necessary to formalize their arrangement, but that he was never provided, and did not sign, a promissory note,

security agreement, or UCC-1 financing statement. (Exhibit to Doc. 134, Debtor's Affidavit, ¶¶9, 14, 19-20).

Under Florida law, “[o]ne of the requirements of creating a security interest enforceable against a debtor and third parties with respect to given collateral is that ‘[t]he debtor has authenticated a security agreement that provides a description of the collateral.’” Charlotte Development Partners, LLC v. Tricom Pictures & Productions, Inc., 33 So.3d 690, 693 (Fla. 4<sup>th</sup> DCA 2009)(quoting Fla. Stat. §679.2031(2)(c)1.(2008)). In this case, the Agreement signed by the Debtor provides that “Segundo Suenos will be entitled to file with appropriate governmental agencies any documents necessary to preserve a lien upon all equipment, fixtures, and assets of the Center, and you shall agree to execute all documents presented to you in order to establish a lien upon such equipment, fixtures, and assets of the Center, and preserve Segundo Suenos’s priority of claim thereon.” (Exhibit 2, pp. 1-2). Although the Debtor signed the Agreement, his signature does not appear on the UCC-1 Financing Statement that was filed by Segundo Suenos with the Florida Secured Transaction Registry and admitted into the record. (Exhibit 4).

Under these circumstances, the Court cannot find as a matter of law that the Plaintiff acquired a valid security interest in the Center’s equipment. The language of the Agreement signed by the Debtor does not clearly establish the creation of a security interest. Since the record does not show that the Debtor signed any subsequent documents, the Court cannot determine whether the debtor “authenticated a security agreement” under Florida law.

Additionally, the Debtor contends that he relocated to Duval County with the equipment pursuant to his settlement with the Hillsborough County Sheriff’s Department, in order to absolve himself from

criminal charges and obtain the release of the equipment. (Exhibit to Doc. 134, Debtor's Affidavit, ¶12.) The Settlement Agreement with the Sheriff's Office, for example, provides for the Debtor to remove the previously-seized equipment from Hillsborough County and not to return it to the County's jurisdiction, and prohibits the Debtor from engaging in computer-based games in Hillsborough County. (Doc. 82, Exhibit D to Debtor's Affidavit). The Debtor further asserts that, after the equipment had been retrieved from the Sheriff's Department, he informed Raul Galaz of his potential plan to open a new internet sweepstakes center in Duval County. (Exhibit to Doc. 134, Debtor's Supplemental Affidavit, ¶6).

Even if the Plaintiff had acquired a security interest in the equipment, therefore, the Court cannot find at this time that the Debtor's conduct in removing the assets to Duval County was "willful" and "malicious" within the meaning of §523(a)(6) of the Bankruptcy Code. In other words, in view of the Debtor's reasons for entering into a settlement agreement with the Hillsborough County Sheriff's Department, the Court cannot determine whether the Debtor's removal of the equipment was deliberate, wrongful, and without just cause.

For the reasons shown above, the Plaintiff has not established as a matter of law that the debt at issue resulted from a willful and malicious injury by the Debtor. Genuine disputes of fact exist regarding whether the Plaintiff acquired a security interest in the equipment, and whether the Debtor willfully and maliciously misappropriated the equipment. In view of the factual disputes, the Plaintiff's Motion for Summary Judgment should be denied as to Count III of the Second Amended Complaint.

### **Conclusion**

In this adversary proceeding, the Plaintiff seeks a determination that a debt owed by the Debtor is nondischargeable pursuant to §523(a)(2), §523(a)(4), and §523(a)(6) of the Bankruptcy Code. The action arises from a Letter Agreement signed by the parties in 2007. In his Motion for Summary Judgment, the Plaintiff asserts that the elements of the dischargeability claims are established in the record.

The Court has considered the record, and finds that the Motion for Summary Judgment should be denied. Genuine disputes of material fact include whether the Debtor made any false statements at the time that he signed the Letter Agreement, whether the Agreement created a fiduciary obligation on the Debtor that the Debtor later breached, whether the Plaintiff acquired a security interest in the equipment purchased pursuant to the Agreement, and whether the Debtor willfully and maliciously misappropriated the equipment. The existence of the factual disputes precludes the entry of a summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

Accordingly:

**IT IS ORDERED** that the Motion of the Plaintiff, Alfred Galaz, for Summary Judgment is denied.

**DATED** this 29 day of January, 2013.

**BY THE COURT**

Paul M. Glenn

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PAUL M. GLENN

United States Bankruptcy Judge