

**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 DEFENDANT’S MOTION FOR PARTIAL SUMMARY JUDGMENT
AS TO PLAINTIFF’S COUNTS II AND III**

THIS CASE came before the Court for hearing to consider the Motion of the Debtor/Defendant, Jon Philip Monson, II, for Partial Summary Judgment as to Plaintiff’s Counts II and III. (Doc. 188).

Count II of the Plaintiff’s Complaint is an action to determine the dischargeability of a debt under §523(a)(4) of the Bankruptcy Code, and Count III of the Complaint is an action to determine the dischargeability of a debt under §523(a)(6) of the Bankruptcy Code.

For a debt to be nondischargeable under §523(a)(4) for “fraud or defalcation while acting in a fiduciary capacity,” a plaintiff must show that the debtor violated a fiduciary duty under an express or

technical trust. In this case, the Plaintiff has not shown the required element of an express or technical trust within the meaning of §523(a)(4), and a partial summary judgment should therefore be entered in favor of the Debtor on the claim for fraud or defalcation while acting in a fiduciary capacity.

For a debt to be nondischargeable under §523(a)(4) for embezzlement, a plaintiff must show that the debtor fraudulently appropriated property of the plaintiff that had been entrusted to the debtor. No express trust is required for embezzlement. Issues of fact exist in this case regarding whether the Debtor fraudulently appropriated property of the Plaintiff within the meaning of §523(a)(4) of the Bankruptcy Code, and the Debtor's Motion for Partial Summary Judgment should therefore be denied as to the embezzlement claim.

Finally, for a debt to be nondischargeable under §523(a)(6) for "willful and malicious injury," a plaintiff must show that the debtor committed some type of intentional tort directed to the plaintiff or the plaintiff's property. The section is not limited to claims based on the conversion of a secured creditor's collateral. Issues of fact exist in this case regarding whether the Debtor willfully and maliciously injured the Plaintiff or the Plaintiff's property within the meaning of §523(a)(6) of the Bankruptcy Code, and the Debtor's Motion for Partial Summary Judgment should therefore be denied as to Count III of the Plaintiff's Complaint.

Background

On October 11, 2007, the Debtor and a Texas limited liability company known as Segundo Suenos, LLC (Segundo), 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.” (Doc. 56, Exhibit A). The Agreement was signed by the Debtor, individually, and by the Plaintiff on behalf of Segundo, 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). . . .

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 of 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. In connection therewith, and in order to protect Segundo Suenos’ investment from potential creditors of you or Internet Depot LLC, 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’ priority of claim thereon. In connection therewith, you agree that all significant equipment or fixtures of the Center shall bear a label (placed in a discrete position) reading words to the affect [sic] of “Equipment owned by Segundo Suenos, LLC, on lease to Internet Depot, LLC.”

. . .

Segundo Suenos will be entitled free access to all books, records, and operations of the Center, on terms no less favorable than are afforded to a co-manager and co-member of a limited liability company. . . .

You will endeavor to make expenditures only according to the budgets previously approved by the parties. Any material decisions relating to the Center, i.e., any decision that could significantly affect either the revenues, expenses, or profitability of the Center, including but not limited to the selection of vendors or hiring of employees, shall be discussed between the parties in advance, and jointly agreed upon before being implemented. In connection therewith, you agree that Internet Depot LLC will not enter into any agreements without the consent of Segundo Suenos.

. . . 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.

...

At some time in the future, a more extensive agreement will be executed, negotiated in good faith, reflecting this arrangement and additional matters to be clarified.

(Doc. 56, Exhibit A).

On October 18, 2007, Segundo transferred the sum of \$130,000.00 pursuant to the Agreement, 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.

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.

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

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.

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

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

Discussion

In this adversary proceeding, the Plaintiff seeks a determination that the debt owed by the Debtor under the parties' Agreement is nondischargeable in the Debtor's Chapter 7 case. Count II of the Plaintiff's Second Amended Complaint is an action for a determination that the debt is nondischargeable under §523(a)(4) of the Bankruptcy Code, and Count III is an action for a determination that the debt is nondischargeable under §523(a)(6) of the Bankruptcy Code.

The Debtor has filed a Motion for Partial Summary Judgment, and asserts that he is entitled to a judgment in his favor on Count II and Count III because "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a).

A. Count II – Fraud or defalcation while acting in a fiduciary capacity

In Count II, the Plaintiff alleges that "Monson'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).

Section 523(a)(4) of the Bankruptcy Code provides that a discharge in a Chapter 7 case does not discharge an individual debtor from any debt for fraud or defalcation while acting in a fiduciary capacity. 11 U.S.C. §523(a)(4). 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 (11th Cir. 1993).

For purposes of this section, the court must find “an express or technical trust” giving rise to the fiduciary duty. (Citations omitted). “The express or technical trust aspect of Section 523(a)(4) requires that there be ‘a segregated trust res, an identifiable beneficiary, and affirmative trust duties established by contract or by statute.’” (Citations omitted).

Hemenway v. Bartoletta, 2012 WL 4513073, at 4 (M.D. Fla.). The “broad concept of ‘fiduciary duty’ under state law is not equivalent to the narrower bankruptcy meaning of ‘fiduciary capacity’ for purposes of §523(a)(4).” In re Guerrero, 2010 WL 2926534, at 2 (Bankr. S.D. Fla.). A fiduciary relationship in its broad sense, as one that involves confidence, trust, and good faith, is insufficient to prove a claim for fraud or defalcation while acting in a fiduciary capacity under §523(a)(4). In re Grosman, 2007 WL 1526701, at 14 (Bankr. M.D. Fla.).

In this case, the Letter Agreement signed by the Debtor and the Plaintiff did not create an express or technical trust within the meaning of §523(a)(4). The Agreement provided for Segundo to loan money for the startup of a new business that was to be owned and managed by the Debtor. In “consideration for” the loan, Segundo was to receive the return of its principal, plus forty percent of the profits from the operation of the business. Although the Agreement includes a number of measures to protect Segundo’s investment, such as access to the business bank accounts, it did not require the Debtor to serve as a trustee for the benefit of Segundo. Instead, the Debtor and Segundo were business

associates in a startup venture, which the Debtor was to own and manage in exchange for sixty percent of the profits after repayment of the loan from Segundo.

The case is unlike other cases in which a “fiduciary capacity” has been found. See Quaif v. Johnson, 4 F.3d 950, 954 (11th Cir. 1993)(The debtor warranted that he was a licensed insurance agent, and state law required insurance agents to promptly account for the insured’s funds and to segregate the funds from other operating accounts.); In re Nassbridges, 434 B.R. 573, 587-88 (Bankr. C.D. Cal. 2010), *aff’d*, 464 B.R. 494 (9th Cir. BAP 2011)(The debtor was an investment broker who traded with the funds of his less-sophisticated clients.); and In re Caples, 454 B.R. 191, 201-02 (Bankr. N.D. Ala. 2011)(The debtor acted as both broker and financial advisor to the plaintiff and made essentially all investment decisions regarding the plaintiff’s investment account.).

The record in this case does not indicate that the Debtor had any superior expertise in the management of internet centers, or that he was to operate the Center for the sole benefit of the Plaintiff. Instead, the Debtor was to manage the business with a view to dividing the profits between the parties as allocated in the Agreement.

Further, the Internet Depot account was not a segregated account as asserted by the Plaintiff. (Doc. 203, Exhibit P). On the contrary, the Agreement provided that the loan proceeds would be wire transferred to a bank account in the name of the new business, that the new business would operate an internet center, that the Debtor was permitted to make expenditures from the business account, and that “revenues” would be “received” by the business and used for the determination of profits.

The Agreement contemplates a business arrangement for the operation of the Center, and does not create an express or technical trust within the meaning of §523(a)(4) of the Bankruptcy Code. See In re

Guerrero, 2010 WL 2926534, at 2-3 (Bankr. S.D. Fla.). Since the Plaintiff has not shown a required element of §523(a)(4), a partial summary judgment should be entered in favor of the Debtor on the claim for fraud or defalcation while acting in a fiduciary capacity.

B. Count II – Embezzlement

In Count II of the Second Amended Complaint, the Plaintiff also alleges that the Debtor “embezzled the Internet Center Assets after SEGUNDO terminated the agreement, and again after the Texas Court ordered their return to SEGUNDO.” (Doc. 56, ¶ 40).

Section 523(a)(4) of the Bankruptcy Code provides that a discharge in a Chapter 7 case does not discharge an individual debtor from any debt for embezzlement. 11 U.S.C. §523(a)(4). “Embezzlement is 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 Hopkins, 469 B.R. 319, 323 (Bankr. W.D. Mo. 2012).

To establish a debt for embezzlement, a plaintiff is not required to prove that the debtor was acting in a “fiduciary capacity.” The term “embezzlement” as it appears in §523(a)(4) applies “outside of the fiduciary context.” Bullock v. Bankchampaign, 133 S.Ct. 1754, 1760 (2013). A debt for embezzlement “need not occur within a fiduciary capacity in order to be nondischargeable under §523(a)(4).” In re Esfahani, 2010 WL 3959607, at 4 (Bankr. M.D. Fla.)(quoting In re Martinez, 410 B.R. 847, 852 (Bankr. W.D. Mo. 2008)).

To prevail on a claim of embezzlement, however, a plaintiff is required to prove that the debtor appropriated the property with fraudulent intent. In re Britt, 200 B.R. 409, 411 (Bankr. M.D. Fla. 1996). Fraudulent intent is an element of a cause of action for embezzlement under §523(a)(4). In re

Esfahani, 2010 WL 3959607, at 4. Additionally, a plaintiff is required to establish that the property embezzled was the plaintiff's property. "A key element of . . . embezzlement is that the plaintiff must establish ownership of the property taken." In re Cuenant, 339 B.R. 262, 277 (Bankr. M.D. Fla. 2006).

In this case, the Plaintiff asserts that the Debtor "embezzled the Internet Center Assets" after the Plaintiff terminated the Agreement. (Doc. 56, ¶ 40). The cause of action apparently stems from the allegation that the Debtor failed to liquidate the assets upon demand, that the Debtor absconded with the Center's assets after the Agreement was terminated, and that the Debtor "provided such assets" to Southern Investments for use in the Debtor's new business. (Doc. 45, ¶ 21(vii)).

In his Answer to the Complaint, the Debtor admits that certain "computer equipment was leased from [the Debtor] to Southern Investments." (Doc. 69, ¶ 20). The Debtor asserts, however, 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).

The Motion for Partial Summary Judgment currently under consideration does not directly address the Plaintiff's claim for embezzlement. Based on the record, however, it appears that issues of fact exist in this case regarding whether the computer equipment was property of the Plaintiff, and whether the Debtor had the required fraudulent intent when he allegedly appropriated the equipment. For these reasons, the Debtor's Motion for Partial Summary Judgment as to Count II of the Plaintiff's Second

Amended Complaint should be denied as to the embezzlement claim under §523(a)(4) of the Bankruptcy Code.

C. Count III – Willful and Malicious Injury

Section 523(a)(6) of the Bankruptcy Code provides that a discharge in a Chapter 7 case does not discharge an individual debtor from any debt 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).

In Count III of the Complaint, the Plaintiff alleges that the Debtor “willfully and maliciously injured SEGUNDO by depriving SEGUNDO of the sum of One Hundred Thirty Thousand Dollars (\$130,000), converting the Internet Center Assets for his own personal advantage, and failing to comply with the Letter Agreement.” (Doc. 56, ¶ 43).

Previously in this case, the Plaintiff asserted that the Debtor’s unauthorized removal of the Center’s equipment to Duval County violated a Florida law prohibiting the removal of a creditor’s collateral to a different county, and was therefore a willful and malicious injury within the meaning of §523(a)(6). In response to the Plaintiff’s assertion, the Debtor claimed that his removal of the equipment was not prohibited, because the Plaintiff never acquired a valid security interest in the equipment pursuant to the Agreement. (Doc. 179, pp. 10-11). The Court addressed the parties’ contentions, and determined that genuine disputes of fact existed regarding whether the Plaintiff acquired a security interest in the equipment, and whether the Debtor willfully and maliciously misappropriated the equipment. (Doc. 179, pp. 11-12).

In the Motion for Partial Summary Judgment currently under consideration, therefore, the Debtor focuses on the issue of whether the documents submitted in this case created a valid security interest in

favor of the Plaintiff. The Debtor alleges, for example, that the Plaintiff failed to state a claim under §523(a)(6) because he “did not establish a signed or authenticated ‘Security Agreement’ required under Florida law.” (Doc. 188, pp. 4-5).

The Debtor’s Motion should be denied as to Count III of the Plaintiff’s Complaint. Section 523(a)(6) of the Bankruptcy Code provides for the nondischargeability of debts for willful and malicious injuries “to another entity or to the property of another entity.” 11 U.S.C. §523(a)(6). Although the section may apply to the conversion of a secured creditor’s collateral, the language of the statute is “considerably more broad” than the common applications. See In re Leist, 398 B.R. 595, 605 (Bankr. S.D. Ohio 2008)(The term “injury to an entity” is not limited to the “obvious examples.”).

Under §523(a)(6), the “established law is clear that a debtor must commit some type of intentional tort directed against the claimant or his property” in order for the court to find that the resulting damages are nondischargeable. In re Al-Suleiman, 461 B.R. 893, 897 n.22 (Bankr. M.D. Fla. 2011)(quoting In re Nofziger, 361 B.R. 236, 243 (Bankr. M.D. Fla. 2006)). Although the statute requires an intentional tort, it is not limited to claims based on an injury to a secured creditor’s collateral. See In re Jennings, 670 F.3d 1329, 1333-34 (11th Cir. 2012)(The plaintiff established a cause of action under §523(a)(6), since the debtor had allegedly damaged the plaintiff’s right to collect on a personal injury judgment)(citing In re Bammer, 131 F.3d 788 (9th Cir. 1997), in which the plaintiff showed an injury to his right to restitution for purposes of a claim under §523(a)(6)).

In this case, the record does not establish that the Debtor is entitled to a judgment in his favor on Count III as a matter of law. Section 523(a)(6) of the Bankruptcy Code is not limited to claims based on injury to a creditor’s security interest, and genuine disputes exist in this case as to whether the

Debtor committed an intentional tort or caused a willful and malicious injury to the Plaintiff or to the Plaintiff's property within the meaning of §523(a)(6).

Conclusion

The Debtor filed a Motion for Partial Summary Judgment as to Count II and Count III of the Plaintiff's Second Amended Complaint. Count II of the Complaint is an action to determine the dischargeability of a debt under §523(a)(4) of the Bankruptcy Code, and Count III is an action to determine the dischargeability of a debt under §523(a)(6) of the Bankruptcy Code.

For a debt to be nondischargeable under §523(a)(4) for "fraud or defalcation while acting in a fiduciary capacity," a plaintiff must show that the debtor violated a fiduciary duty under an express or technical trust. In this case, the Plaintiff has not shown the required element of an express or technical trust within the meaning of §523(a)(4), and a partial summary judgment should therefore be entered in favor of the Debtor on the claim for fraud or defalcation while acting in a fiduciary capacity.

For a debt to be nondischargeable under §523(a)(4) for embezzlement, a plaintiff must show that the debtor fraudulently appropriated property of the plaintiff that had been entrusted to the debtor. No express trust is required for embezzlement. Issues of fact exist in this case regarding whether the Debtor fraudulently appropriated property of the Plaintiff within the meaning of §523(a)(4) of the Bankruptcy Code, and the Debtor's Motion for Partial Summary Judgment should therefore be denied on the embezzlement claim.

Finally, for a debt to be nondischargeable under §523(a)(6) for "willful and malicious injury," a plaintiff must show that the debtor committed some type of intentional tort directed to the plaintiff or the plaintiff's property. The section is not limited to claims based on the conversion of a secured

creditor's collateral. Issues of fact exist in this case regarding whether the Debtor willfully and maliciously injured the Plaintiff or the Plaintiff's property within the meaning of §523(a)(6) of the Bankruptcy Code, and the Debtor's Motion for Partial Summary Judgment should be denied as to Count III of the Complaint.

Accordingly:

IT IS ORDERED that:

1. The Motion for Partial Summary Judgment filed by the Debtor, Jon Philip Monson, II, is granted as to the claim in Count II of the Second Amended Complaint based on "fraud or defalcation while acting in a fiduciary capacity" under §523(a)(4) of the Bankruptcy Code.

2. A partial summary judgment will be entered determining that the debt owed by the Debtor to the Plaintiff, Alfred Galaz, is not excepted from the Debtor's discharge as a debt for "fraud or defalcation while acting in a fiduciary capacity" under §523(a)(4).

3. The Motion for Partial Summary Judgment filed by the Debtor is denied as to the claim in Count II of the Second Amended Complaint based on embezzlement under §523(a)(4) of the Bankruptcy Code

4. The Motion for Partial Summary Judgment filed by the Debtor is denied as to the claim in Count III of the Second Amended Complaint based on "willful and malicious injury" under §523(a)(6) of the Bankruptcy Code.

DATED this 31 day of July, 2013.

BY THE COURT

Paul M. Glenn

PAUL M. GLENN
United States Bankruptcy Judge