

*****NOT INTENDED FOR PUBLICATION*****

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:)	CASE NO. 05-55294
)	
Robert C. Walkerow,)	CHAPTER 7
)	
Debtor.)	JUDGE MARILYN SHEA-STONUM
_____)	
)	
Integrity Technical Services, Inc.,)	Adversary No. 05-5162
)	
Plaintiff,)	
)	MEMORANDUM OPINION
v.)	
)	
Robert C. Walkerow,)	
)	
Defendant.)	

This matter comes before the Court on the Complaint of Integrity Technical Services, Inc. (“Plaintiff” or “Integrity Technical”) to determine dischargeability of certain debts,

which were reduced to Judgment in the Summit County, Ohio Court of Common Pleas, pursuant to 11 U.S.C. §§ 523(a)(4) and (6).¹ In its Complaint, Plaintiff alleges that “Defendant made fraudulent misrepresentations to induce Plaintiff to contract and extend credit [to Alpha Packaging and Distribution, Inc.], upon which Plaintiff relied, and Defendant intentionally interfered with Plaintiff’s contractual rights.” Complaint ¶ 7. The Court conducted a trial in this matter on September 18, 2006. Appearing at trial were Mark Weisman, counsel for Plaintiff, and David Mucklow, counsel for Robert C. Walkerow (“Debtor” or “Defendant”). During the trial, the Court received evidence in the form of stipulated exhibits and the testimony of Debtor and John O’Neil, President of Plaintiff. At the conclusion of the trial, the Court granted leave to file post-trial briefs and directed that the matter would be taken under advisement following the submission of the post-trial briefs. Plaintiff and Debtor each filed post-trial briefs [docket ## 22 and 25].

JURISDICTION

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. *See* General Order No. 84. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (I) over which this Court has jurisdiction pursuant to 28 U.S.C. § 1334.

In reaching its determination and whether or not specifically referenced in this Memorandum Opinion, the Court considered the demeanor and credibility of the testifying witnesses. In addition, prior to the trial, Plaintiff and Defendant entered into certain stipulations (the “Stipulations”) [docket # 21]. Based upon such Stipulations, the testimony

¹ The Court previously determined that the Judgment is not entitled to preclusive effect with respect to the dischargeability of the underlying debt. *See* Memorandum Opinion dated June 5, 2006.

and documentary evidence presented at the trial, the arguments of counsel, the pleadings in this adversary proceeding and pursuant to Fed. R. Bankr. P. 7052, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Defendant filed a voluntary petition for relief under chapter 7 of the Bankruptcy Code on August 22, 2005.
2. Prior to the Petition Date, Defendant operated Walcreek, Inc. Walcreek, Inc. is a plastic extrusion molding company that filed a voluntary petition for relief under chapter 11 in June 2002. Walcreek, Inc. was continuing to operate in the summer of 2003. The Defendant was the Chief Executive Officer of Walcreek, Inc.
3. The Defendant is married to Carla Walkerow and is the father of Jason Walkerow.
4. Jason Walkerow was an employee of Walcreek until the end of the first quarter of 2003.
5. Carla and Jason Walkerow are the owners/shareholders of Alpha Packaging & Distribution, Inc. (“Alpha”). The Initial Articles of Incorporation for Alpha were filed with the Ohio Secretary of State on June 30, 2003. Alpha is a recycling company. Alpha leased office space from Walcreek during the months of June and July 2003. Defendant said he was not an officer of Alpha and that he did not have check signing authority for Alpha.²

² Plaintiff’s Exhibit I is a check drawn on the account of Alpha and made payable to Intergrity Technical. The check bears two signatures. Eventually, the Defendant testified that one of the two signature’s appeared to be his signature, but he said he did not recall signing the check nor did he believe that he had

6. Integrity Technical is an Ohio company that provides temporary laborers to businesses.
7. Integrity Technical did not do business with Walcreek or the Defendant.
8. Integrity Technical provided laborers to Alpha. At the commencement of their relationship, Alpha completed a credit application at Integrity Technical's request. The credit application is dated June 27, 2003. *See Plaintiff's Exhibit E.* Alpha provided three trade references, including one from Walcreek. *Id.*
9. Integrity Technical checked the credit references. The credit reference from Walcreek indicated that Alpha had been a customer for less than 1 month and had a credit limit up to \$10,000. *See Plaintiff's Exhibit D.* The credit reference from Pak Rite indicates that Alpha was a brand new customer who had been given a \$10,000 credit limit and that no payment history had been established yet. *See Plaintiff's Exhibit C.*
10. On July 22, 2003, Steve Wartko of Integrity Technical sent Jason Walkerow a letter confirming the agreement between Alpha and Integrity Technical for temporary laborers beginning as of July 14, 2003. *See Plaintiff's Exhibit O.*
11. The relationship between Alpha and Integrity Technical quickly soured.
12. On July 28, 2003, Jason Walkerow sent a letter to Integrity Technical indicating that Alpha had "uptained" (sic) services of Ameritemps to handle Alpha's needs. *See Plaintiff's Exhibit F.*
13. On July 30, 2003, Nancy Grim, counsel for Integrity Technical, sent a letter

signed the check.

to Jason Walkerow regarding the alleged termination of the agreement between Alpha and Integrity Technical and the outstanding balance due under the agreement. *See Defendant's Exhibit 6.*

14. Despite Alpha's failure to pay its invoices in full, Integrity Technical continued to provide laborers to Alpha after July 30, 2003. *See Plaintiff's Exhibit P.*
15. At some point in late July, 2003 or early August, 2003, Defendant met with Mr. O'Neil. Neither witness testified with any clarity about the number or dates of the meetings between them. Mr. O'Neil requested that the Defendant meet with him to discuss payment terms. According to Mr. O'Neil, Jason Walkerow told Mr. O'Neill that his father handled all financial matters for Alpha. Defendant testified that, in an attempt to help his wife and son, he met with Mr. O'Neil regarding the relationship between Integrity Technical and Alpha to see if he could assist Alpha and Integrity Technical in reaching acceptable payment terms that would allow the relationship to continue. Mr. O'Neil agreed that at their meetings, Defendant identified himself as President of Walcreek, not as an officer of Alpha and that they discussed payment terms for Alpha's account.
16. On August 4, 2003, Mr. O'Neill sent a letter to Defendant referencing an in person meeting and the payment terms for the outstanding balance discussed at that meeting.³ *See Plaintiff's Exhibit H.*

³ Mr. O'Neill's letter of August 4, 2003 references an outstanding balance of \$19,888.67, as does Ms. Grim's July 30, 2003 letter. According to Ms. Grim's letter the total balance outstanding consists of invoices for the weeks ending 7/13/03, 7/20/03 and 7/27/03. Neither Plaintiff nor Defendant provided the Court

17. On August 8, 2003, Mr. O'Neil sent a letter to Defendant at Alpha indicating that he had received a check. *See Plaintiff's Exhibit K.*⁴ According to Plaintiff's Exhibit M, Plaintiff received payments on this account on July 30, 2003 in the amount of \$1,902.29; on August 12, 2003 in the amount of \$5,000; and on August 19, 2003 in the amount of \$4,000.
19. Alpha provided a check dated August 25, 2003 (a Monday) made payable to Integrity Technical in the amount of \$5,000. *See Plaintiff's Exhibit I.* Mr. O'Neill testified that he personally picked up that check. That check appears not to have been deposited until Friday August 29, 2003. The following Friday, September 5, 2006, a stop pay order was placed on the check. *See Plaintiff's Exhibit I and Plaintiff's Exhibit J.*
20. Integrity Technical did not provide any laborers to Alpha after the week ending September 7, 2003.

DISCUSSION

In actions opposing dischargeability, the plaintiff has the burden to prove, by a preponderance of the evidence, that the debt is nondischargeable. *Grogan v. Garner*, 498 U.S. 279 (1991); *Spilman v. Harley*, 656 F.2d 224 (6th Cir. 1981). Plaintiff has alleged that the debt owed by Defendant is not dischargeable pursuant to sections 523(a)4) and (a)(6).

with the copy of an invoice prior to the week of July 20, 2003 and such an invoice would be seemingly inconsistent with the July 22, 2003 letter from Wartko to Walkerow indicating that the agreement to provide laborers was to begin July 14, 2003.

⁴ Plaintiff's Exhibit L is another letter from Mr. O'Neill addressed to Mr. Walkerow dated August 8, 2003 that suggests Integrity Technical had not received any payment from Alpha as the result of a delay in the delivery of funds by a customer of Alpha. The record is unclear whether only one or both of these letters was actually sent.

11 U.S.C. 523(a)(4)

Section 523(a)(4) prohibits the discharge of debts “for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.” Under §523(a)(4), the term “fiduciary capacity” is construed very narrowly to apply only to an express or technical trust that was imposed before and without reference to the wrongdoing that caused the debt. *R.E. America, Inc. v. Garver (In re Garver)*, 116 F.3d 176, 179 (6th Cir. 1997); *Brady v. McAllister (In re Brady)*, 101 F.3d 1165, 1173 (6th Cir. 1996); *Carlisle Cashway, Inc. v. Johnson (In re Johnson)*, 691 F.2d 249, 251 (6th Cir. 1982).

The traditional definition of a “fiduciary” is not applicable in bankruptcy law; the general meaning (a relationship involving confidence, trust, and good faith) is far too broad.[FN7] It is not enough that the debtor and creditor share a relationship of trust and confidence; rather, a debtor must stand in a position equivalent to that which is occupied by a trustee of an express trust.[FN8] A distinction is made between a true fiduciary relationship and a relationship that is in reality a debtor-creditor arrangement, and the definition of “fiduciary” is narrowly construed so that the relationship does not reach the commercial debtor-creditor transactions[FN9] in which the debtor merely violated the terms of an agreement with the creditor.[FN10] A debt created while someone is acting in a fiduciary capacity is a special debt, created by a breach of trust obligations defined by law, and is separate and distinct from any underlying contractual debt which arises out of a debtor's agreement with respect to goods or services.[FN11]

9D Am. Jur. 2d. Bankruptcy § 3628 [footnotes omitted].

During the trial and in its proposed findings of fact and conclusions of law, Plaintiff did not present any evidence to establish the existence of a fiduciary relationship. In its own post-trial brief, Plaintiff concedes that “it did not attempt to present evidence to support its claims under § 536(a)(4) (sic).” The remainder of Plaintiff’s argument is nothing more than wishful thinking. The Defendant was not a fiduciary of Plaintiff. Therefore, Plaintiff failed to prove its claim under § 523(a)(4).

11 U.S.C. 523(a)(6)

The Plaintiff also contests the Debtor’s attempt to discharge the debt owed to Integrity Technical based on 11 U.S.C. § 523(a)(6), which provides in relevant part that:

- (a) A discharge under section 727, . . . of this section does not discharge an individual debtor from any debt –
 - (6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

Pursuant to § 523(a)(6), the Plaintiff must prove, by a preponderance of the evidence, that Defendant’s conduct was both “willful and malicious”. *Grogan c. Garner*, 498 U.S. 279 (1991), *Spilman v. Harley*, 656 F.2d 224 (6th Cir. 1981). In *Geiger v. Kuwaaauhau*, 523 U.S. 57 (1998) the Supreme Court specifically addressed the scope of conduct considered nondischargeable under § 523(a)(6). The Supreme Court held that “[t]he word ‘willful’ in (a)(6) modifies the word ‘injury,’ indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury.” 523 U.S. at 61 (emphasis in original).⁵ The Supreme Court explicitly rejected a broader interpretation that would have included “a ‘knowing’ breach of contract.” 523 U.S. at 62.

The Plaintiff did not prove that the conduct of the Plaintiff in his dealings with Integrity Technical was intended to cause deliberate injury to Integrity Technical. The crux of Plaintiff’s argument seems to be that the Defendant is indistinguishable from Walcreek and Alpha. As a result Plaintiff’s argument continues, Defendant was the alter ego of Alpha, and he engaged in a scheme of conduct meant to defraud Integrity Technical. Plaintiff again failed to prove its allegations. Nothing in the record before the Court supports such a position

⁵ The *Geiger* decision expressly overruled the then existing Sixth Circuit standard from *Perkins v. Scharffe*, 817 F.2d 392, (6th Cir. 1987). The *Perkins* standard was much broader in that it recognized that willful and malicious injury could occur when a person intended the act, regardless of whether he intended the consequences. This Circuit has since overruled *Perkins* and adopted the Supreme Court’s *Geiger* standard, holding that “unless the actor desires to cause consequences of his act, or . . . believes that the consequences are substantially certain to result from it, he has not committed a ‘willful and malicious injury’ as defined under § 523(a)(6).” *In re Markowitz*, 190 F.3d 455 (6th Cir. 1999); *In re Moffitt*, 252 B.R. 916 (6th Cir. BAP 2000).

with respect to the Defendant and Alpha. Having failed to prove that Defendant was the alter ego of Alpha, Plaintiff cannot show that the Defendant did anything other than negotiate payment terms with Integrity Technical on behalf of Alpha. This conduct is not within the scope of § 523(a)(6). The testimony of the Defendant was that he was not an officer of Alpha and that he was not engaged in the business operations of that entity. Plaintiff offered nothing to dispute the Defendant's testimony, except for the repeated assertions by counsel in his briefs.

Therefore, the Court finds that Plaintiff failed to prove its claim under § 523(a)(6)

CONCLUSION

The Court finds the Plaintiff failed to prove, by a preponderance of the evidence, that the Defendant owes a debt to Integrity Technical that is nondischargeable under § 523(a)(4) or (a)(6). Therefore, judgment is hereby entered in favor of Robert C. Walkerow.

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