IT IS SO ORDERED.

Dated: 04:32 PM October 4 2013

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 13-50004
	)	
Cheri A. Lee,	)	CHAPTER 7
	)	
DEBTOR(S).	)	
	)	
----------	)	ADVERSARY NO. 13-5050
	)	
c/o Neil J. Gregorio I.U.P.A.T. District Council #57 Combined Funds, *et al.*,	)	JUDGE MARILYN SHEA-STONUM
	)	
PLAINTIFFS,	)	**OPINION RE: DEFENDANT'S MOTION TO DISMISS**
	)	
v.	)	
	)	
Cheri A. Lee.	)	
	)	
DEFENDANT.	)	

This cause is before the Court on Defendant Cheri A. Lee's ("Defendant")

Motion for Dismiss [Dkt. #11]. For the reasons set forth herein, this Motion to Dismiss is granted.

Statement of Case

Defendant filed a voluntary chapter 7 on January 2, 2013. Plaintiffs, I.U.P.A.T. District Council #57 Combined Funds, et al, ("Plaintiffs") filed a Complaint [Dkt. #1, hereafter "Complaint"] initiating this adversary proceeding on April 19, 2013. Plaintiffs' Complaint alleges that Defendant's company Cherokee Glass, Inc. ("Cherokee") entered into a collective bargaining agreement with Plaintiffs, Complaint ¶9; that Cherokee was required to make monthly payments to Plaintiffs, including "Fringe Benefit Contributions" and "Wage Withholdings," *Id*. at ¶10; that the "Fringe Benefit Contributions" were alleged contractual obligations requiring Cherokee to make payments to Plaintiffs monthly. *Id*.

In Count I of the Complaint, Plaintiffs allege that Defendant was principal of the Company and responsible for Cherokee's failure to pay. *Id.* at ¶13-14. Plaintiffs then state that "at the time such Fringe Benefit Contributions became due and payable by [Cherokee] to the [Plaintiffs], such monies became the assets of [Plaintiffs]." *Id.* at ¶16. Plaintiffs then claim that Defendant was a "fiduciary" under ERISA. *Id.* at ¶17. Finally, Plaintiffs claim that by failing to pay the Fringe Benefit Contributions when they became due and payable, Defendant violated a fiduciary duty. *Id.* at ¶18. Plaintiffs then asked this court to declare the debt non-dischargeable pursuant to 11 U.S. C. § 523(a)(4).

Defendant responded with a Motion to Dismiss Count I. [Dkt. #11, hereafter "the Motion to Dismiss"]. Plaintiff subsequently responded with a Memorandum in

Opposition to Defendant's Motion to Dismiss Count I of the Complaint. [Dkt. #13]. Defendant responded further with a Reply to the Memorandum of Law in Opposition to Defendants Motion to Dismiss. [Dkt. #16]. Then Plaintiffs filed a Supplemental Brief to their Response to Defendant's Motion to Dismiss Count 1. [Dkt. #22]. And Finally, Defendant's filed a Supplemental Reply to the Supplemental Brief. [Dkt. #24].

Standard For Review

Defendant brings his motion under Federal Rule of Civil Procedure 12(b)(6) made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7012(b). A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2); Fed.R.Bank.P. 7008(a)(2). Although this standard does not require "detailed factual allegations," it does require more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

Thus to survive a motion to dismiss, the plaintiff must allege facts that, if accepted as true, are sufficient "to raise a right to relief above the speculative level," and to "state a claim to relief that is plausible on its face," *Id*. at 555, 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949–50, 173 L.Ed.2d 868 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "Where a complaint pleads facts that are 'merely consistent with' a

defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id* at 678 *quoting Twombly*, 550 U.S. at 557.

Analysis

A. Plaintiff's Pleading Is Insufficient to Defeat a Motion to Dismiss

The Bankruptcy Code "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). This exception is narrowly construed so as to further the fresh-start policy of the Bankruptcy Code. *Weeber v. Boyd (In re Boyd)*, 322 B.R. 318, 324 (Bankr. N.D. Ohio 2004) *citing Griffith, Strickler, Lerman, Solymos & Calkins v. Taylor (In re Taylor)*, 195 B.R. 624, 627 (Bankr, M.D.Pa 1996).

A debt is nondischargeable as a defalcation when the preponderance of the evidence establishes: "(1) a preexisting fiduciary relationship; (2) breach of that fiduciary relationship; and (3) a resulting loss." *Commonwealth Land Title Co. v. Blaszak (In re Blaszak)*, 397 F.3d 386, 390 (6th Cir. 2005).

Plaintiffs must prove that a trust relationship existed that would make Defendant a fiduciary for the purposes of § 523(a)(4). *Id. at* 391. Defendant's Motion to Dismiss alleges that Plaintiffs have not sufficiently shown the creation of a fiduciary relationship, and therefore Count I should be dismissed. This Court agrees.

The Sixth Circuit construes the term fiduciary capacity in the defalcation provision of § 523(a)(4) more narrowly than the term is used in other circumstances. *Bd. of Trs. v. Bucci (In re Bucci)*, 493 F.3d 635, 639 (6th Cir. 2007) *citing Blaszak*, 397 F.3d at 391.

The defalcation provision applies only to situations involving an express or technical trust relationship arising from placement of a specific res in the hands of the debtor. *Bucci*, 493 F.3d at 639–640 *citing In re Garver*, 116 F.3d 176, 180 (6th Cir. 1997). To establish the existence of an express or technical trust, a creditor must demonstrate: (1) an intent to create a trust, (2) a trustee, (3) a trust res, and (4) a definite beneficiary. *Bucci*, 493 F.3d at 639-40.

Thus, Plaintiff's complaint to survive the motion to dismiss must allege the creation of an express or technical trust with "facial plausibility." *Iqbal*, 556 U.S. at 678. Plaintiff has failed to do so. Instead, Plaintiff's complaint merely alleges that Defendant was a fiduciary under the terms of ERISA. [Dkt. #1 at ¶17]. Defendant has correctly pointed out that status as "an ERISA fiduciary [alone is insufficient] to create an express or technical trust for purposes of § 523(a)(4)." [Dkt. #13 at ¶ *citing Bucci*, 493 F.3d at 643. Rather there "must be an explicit declaration of trust or circumstances which show beyond reasonable doubt that a trust was intended to be created, accompanied with an intention to create a trust…" *In re Walls*, 375 B.R. 399, 405 (Bankr. S.D. Ohio 2007) *citing Dayton Title Agency, Inc. v. The White Family Cos. (In re Dayton Title Agency, Inc.)*, 292 B.R. 857, 869 (Bankr.S.D.Ohio 2003).

Plaintiffs, in response to the Motion to Dismiss, correctly point out that the Sixth Circuit requires the court to examine the substance of the alleged fiduciary relationship to determine if it meets the requirements of defalcation. *Bucci*, 493 F.3d at 642 *citing Cash America Fin. Serv., Inc. v. Fox (In re Fox)*, 370 B.R. 104 at 115, 2007 WL 1693063, at *7 (6th Cir.BAP2007). However, to have facial plausibility, the Plaintiffs claim must have

"factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. The Complaint provides no support beyond Defendant having a contractual obligation to make payments and constituting a fiduciary under ERISA law, both of which *Bucci* rejects as insufficient to meet the defalcation requirement of §523(a)(4). *Bucci*, 493 F.3d at 643. Thus the complaint does not contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). These statements are no more than "labels and conclusions," *Twombly*, 550 U.S. at 555. Therefore, Plaintiff's claim as pleaded should be dismissed.

B. Plaintiffs Argument for Use of Third Circuit Law is Unsupported.

Plaintiffs claim that this court should look to Third Circuit law to establish if a Defendants' actions constituted a defalcation. [Dkt. #13]. Plaintiff argues that because a court should look to state law to determine the existence of a trust, it should apply the federal precedent of circuit. [Dkt. #13 at 4-5].

First, Plaintiffs' arguments are convoluted and non-persuasive. The Defendant aptly questions "how the physical location of the activities alleged changes the binding nature of a holding by the United States Court of Appeals for the Sixth Circuit concerning the application of a federal statute to the exceptions to discharge under the United States Bankruptcy Court." [Dkt. #16 at 4]. Plaintiffs do not answer this question, but instead focus on the application of state law and examining choice of law rules. [Dkt. #13 at 4-5]. Plaintiffs' assertion that Third Circuit law applies in this case is simply wrong.

Having disposed of Plaintiffs' argument for adoption of Third Circuit precedent

that is inconsistent with controlling Sixth Circuit precedent, the next issue is whether this Court should apply Pennsylvania law to determine the existence of a trust. It is well established that Federal law controls who is a fiduciary for purposes of § 523(a)(4). *Commonwealth Land Title Co. v. Blaszak (In re Blaszak)*, 397 F.3d 386, 390 (6th Cir.2005); *In re Smithey*, 474 B.R. 830, 842 (Bankr. N.D. Ohio 2012); *In re Davis*, 476 B.R. 191, 195 (Bankr. W.D. Pa. 2012). *See also In re Dombroski*, 478 B.R. 198, 202 (Bankr. M.D. Pa. 2012) *citing Estate of Harris v. Dawley (In re Dawley)*, 312 B.R. 765, 777 (Bankr.E.D.Pa.2004).

State law determines whether a trust exists. As mentioned above, the defalcation provision requires an express or technical trust relationship arising from placement of a specific *res* in the hands of the debtor. *Bucci*, 493 F.3d at 639–640 *citing In re Garver*, 116 F.3d at 180. Courts have recognized the importance of looking to state law to determine the existence of a trust. *See In re Smithey*, 474 B.R. 830, 842 (Bankr. N.D. Ohio 2012) *citing In re Johnson*, 691 F.2d at 251; *In re Dombroski*, 478 B.R. 198, 202 (Bankr. M.D. Pa. 2012) *citing* Dawley, 312 B.R. at 777; *United States v. Bagel (In re Bagel)*, No. 92–11440, 1992 WL 477052, at *13 (Bankr.E.D.Pa. Dec. 17, 1992) ("Although federal law defines "fiduciary capacity," state law is crucial in determining whether an express or technical trust exists.").

Plaintiffs, however, do not provide any Pennsylvania state law showing that an ERISA fund would constitute an express or technical trust under Pennsylvania law. Plaintiffs cite numerous cases, claiming they show ERISA fiduciaries are held to the highest standards of care under Pennsylvania law. [Dkt. #13 at 6]. Upon examination,

however, these cases show only what is required for an ERISA fiduciary to breach his duties under 29 U.S.C. §1104.[1] Thus, these cases fail to show that an express or technical trust was created under state law. In fact, Plaintiffs did not even cite the standard for establishing a trust under Pennsylvania law in their brief. Rather, Plaintiffs appear to be using the state choice of law rules in an attempt to "bootstrap" the federal law and avoid *Bucci*. As mentioned above this argument is unsupported and thus has no effect on the Motion to Dismiss.

Finally, when the "the laws of the states do not conflict, no choice-of-law analysis is necessary." *Hitachi Med. Sys. Am., Inc. v. Branch*, 5:09-CV-01575, 2010 WL 816344 (N.D. Ohio Mar. 4, 2010) *citing Mumblow v. Monroe Broad., Inc.*, 401 F.3d 616, 620 (5th Cir.2005). As observed by a bankruptcy court in Pennsylvania, far more familiar with its own state's interpretation of defalcation, "violation of ERISA is not *per se* defalcation, although it may constitute defalcation depending on its attributes." *Chao v. Rizzi*, 2007 U.S. Dist. LEXIS 57773, 9-10 (W.D. Pa. Aug. 8, 2007) *citing Silver Care Ctr. v. Parks*, NO. 05-37154, 2007 Bankr. LEXIS 2372 (Bankr. D.N.J. July 10, 2007).

In summary, Plaintiffs' arguments for the use of Pennsylvania law leading to a different legal conclusion as to the existence of a trust on this set of facts viewed most favorably to the Plaintiff and for the application of Third Circuit precedent being required

[1] *See Laborers' Combined Funds of W. Pa. v. Cioppa*, 346 F. Supp. 2d 765, 770, 773 (W.D. Pa. 2004) (holding that a party met the ERISA requirements to be considered a fiduciary under the statute and breached his statutory obligations); *Laborers' Combined Funds of Western Pa. v. Parkins*, 2002 U.S. Dist.LEXIS 20035; 28 Employee Benefits Cas. (BNA) 2391*10 (W.D. Pa. 2002) (holding that Defendant breached the fiduciary duties imposed by ERISA); *See also PMTA-ILA Containerization Fund v. Rose*, 1995 U.S. Dist. LEXIS 10877 (E.D. Pa. 1995); *Galgay v. Gangloff*, 677 F. Supp. 295 (M.D. Pa. 1987), *aff'd*, 932 F.2d 959 (3d Cir. 1991).

in this case are incorrect.

C. *Bullock* is inapplicable to this case.

Plaintiffs direct the Court's attention to a recent Supreme Court case, *Bullock v. Bank Champaign, N.A.*, ___U.S.___ ,133 S. Ct. 1754, 185 L. Ed. 2d 922 (2013). Plaintiffs allege that *Bullock* overrules *Bucci*, and that this court should instead follow *In re Fahey*, No. 11-10505, 2013 Bankr. LEXIS 2373 (Bankr. D.Mass. June 11, 2013). [Dkt. # 22 at 4-5]. Plaintiffs' reading of *Bullock* goes far beyond what that opinion holds.

Bullock addressed a circuit split as to whether there was a scienter requirement for defalcation. *Id.* at 1758. The Supreme Court decided that "[t]he term 'defalcation' in the Bankruptcy Code includes a culpable state of mind requirement involving knowledge of, or gross recklessness in respect to, the improper nature of the fiduciary behavior." 133 S. Ct. at 1756. The court followed the Model Penal Codes' definition of recklessness, requiring a fiduciary to "consciously disregard a substantial and unjustifiable risk" *Id.* at 1759 *citing* MPC § 2.02(2)(c) (1985).

Plaintiffs contend that *Bullock* holds that "any fiduciary (regardless of whether the fiduciary relationship was created by an express, constructive, or implied trust) can qualify for the Section 523(a)(4) exception to discharge if he/she acted with the requisite state of mind." [Dkt.#22 at 5 *citing Bullock*, 133 S. Ct. at1759]. This argument is unsupported by the text of that opinion. The opinion holds merely that defalcation "includes a culpable state of mind requirement," not that it is decided entirely by such a mental state. *Bullock*, at 1756.

Bucci addressed the question of whether a mere contractual obligation to pay funds

would be sufficient to establish a fiduciary relationship under § 523(a)(4). *Bucci*, 493 F.3d at 644. The Court answered no, without reference to a mental state. *Id*. The Supreme Court in *Bullock* did not address how courts should define a fiduciary capacity or *Bucci's* conclusion that having the status of an ERISA fiduciary is not alone sufficient for § 523(a)(4).

Furthermore, Plaintiffs' reliance on *Fahey* is misplaced. First, *Fahey* is the decision of a Bankruptcy Court in Massachusetts, and not binding on this Court. Furthermore, *Fahey* held that an ERISA fiduciary that did not make plan payments breached a duty of loyalty to the plan participants based on First Circuit precedent, not on the Supreme Court's decision in *Bullock*. *See Fahey*, 2013 Bankr. LEXIS 2373 *14-15, *citing Pension Benefit Guar. Corp. v. Solmsen*, 671 F. Supp 938 (E.D.N.Y. 1987) and *In re Baylis*, 313 F.3d 9 (1st Cir. 2002). Also, the court in *Fahey* noted that the Bankruptcy Appellate Panel had held earlier that being "an ERISA fiduciary does not *perse* satisfy the § 523(a)(4) requirement for fiduciary capacity." *Fahey*, 2013 Bankr. LEXIS 2373 *7 *citing In re Fahey*, 482 B.R. 678, 695 (B.A.P. 1st Cir. 2012). Thus, rather than stand adverse to *Bucci*, *Fahey* supports its holding. Finally, in *Fahey* an express or technical trust had already been found to exist, and the only issue to be decided was if the "debt arises from a defalcation as the term is used in 11 U.S.C. § 523(a)(4)". *Fahey*, 2013 Bankr. LEXIS 2373 *10.

Thus, the Court does not find *Fahey* persuasive on this Motion to Dismiss and certainly not sufficient to overrule the Sixth Circuit's decision in *Bucci*. Therefore, Defendant's Motion to Dismiss Count I is granted.

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cc: (via electronic mail)

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