The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document was signed electronically on July 8, 2016, which may be different from its entry on the record.

IT IS SO ORDERED.

Dated: July 8, 2016

ARTHUR I. HARRIS
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

In re:	)	Case No. 15-14678
	)	
KRISTOPHER M. McCRONE,	)	
Debtor.	)	Chapter 7 Proceedings
_____	)	
	)	
SCOTT FRIEDMAN,	)	Adversary Proceeding
Plaintiff,	)	No. 15-01199
	)	
v.	)	
	)	Judge Arthur I. Harris
KRISTOPHER M. McCRONE,	)	
Defendant.	)	
	)	

MEMORANDUM OF OPINION[1]

On November 17, 2015, the plaintiff-creditor, Scott Friedman, filed this adversary proceeding seeking a determination that debts allegedly incurred by the

[1] This Opinion is not intended for official publication.

defendant-debtor, Kristopher M. McCrone, are nondischargeable pursuant to 11 U.S.C. § 523(a)(2), (a)(4), and (a)(6). Mr. Friedman also objects to Mr. McCrone's discharge pursuant to 11 U.S.C. § 727 and requests an award of costs and attorney's fees. On April 29, 2016, Mr. Friedman filed a motion for partial summary judgment on the nondischargeability claims and seeks judgment in the amount of $96,928.45.

For the reasons that follow, the Court grants in part Mr. Friedman's motion for partial summary judgment. The Court: (1) enters a non-final, partial judgment in favor of Mr. Friedman and against Mr. McCrone in the amount of $33,451.89, plus interest from the date of final judgment at the rate provided under 28 U.S.C. § 1961; (2) holds that this judgment is nondischargeable under 11 U.S.C. § 523(a)(6); and (3) holds that Mr. Friedman is not entitled to an award of punitive damages, costs, or attorney's fees.

This partial judgment is not final. On or before July 18, 2016, Mr. Friedman shall file a written notice with the Court indicating whether he would like to pursue his remaining unresolved claims at trial. If Mr. Friedman chooses not to pursue his remaining unresolved claims at trial or fails to notify the Court of his intentions by July 18, 2016, then the Court will enter a final, nondischargeable judgment in favor of Mr. Friedman in the amount of $33,451.89

consistent with this Memorandum of Opinion. If Mr. Friedman opts to pursue his remaining unresolved claims at trial, then this non-final, partial judgment will be subject to revision under Bankruptcy Rule 7054 and Fed. R. Civ. P. 54(b), and the Court will proceed with a trial on August 4, 2016.

PROCEDURAL HISTORY

This adversary proceeding was preceded by a state court case originally filed by Mr. Friedman against Kristopher McCrone, Mary McCrone, and Interdependent Coaching, LLC on February 10, 2015. (*Scott Friedman v. Kristopher McCrone, et al.*, Cuyahoga C.P. No. CV-15-840273 (filed Feb. 10, 2015)). Mr. McCrone filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on August 17, 2015 (Case No. 15-14678), and the state court case was stayed pursuant to 11 U.S.C. § 362. During the pendency of the debtor's main bankruptcy case, the United States Trustee filed four separate motions to extend the time in which to file a motion to dismiss or a complaint objecting to discharge. (Case No. 15-14678, Docket Nos. 15, 26, 38, and 41). All four motions to extend time were unopposed and were granted by the Court.

On November 17, 2015, Mr. Friedman initiated the above-captioned adversary proceeding by filing a complaint alleging that Mr. McCrone: (1) incurred his debt to Mr. Friedman by false pretenses, a false representation, or

actual fraud; (2) incurred his debt to Mr. Friedman by fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny; (3) wilfully and maliciously injured Mr. Friedman; (4) failed to disclose all of his assets on his petition or to the trustee; (5) without justification and with intent to hinder, delay, or defraud Mr. Friedman or an officer of the estate, concealed, destroyed, mutilated, falsified, or failed to keep or preserve recorded information from which Mr. McCrone's financial condition or business transactions might be ascertained; (6) knowingly and fraudulently made a false oath, withheld from an officer of the estate recorded information relating to Mr. McCrone's property or financial affairs, or failed to explain satisfactorily any loss of assets or deficiency of assets to meet Mr. McCrone's liabilities.

On December 22, 2015, Mr. McCrone answered the complaint, denying the substantive allegations. A pretrial hearing was held on January 12, 2016, a pretrial minutes and briefing and trial scheduling order was issued, and a trial was scheduled for August 4, 2016. (Docket No. 6). On April 29, 2016, Mr. Friedman filed a motion for partial summary judgment seeking a nondischargeable judgment in the amount of $96,928.45. Mr. McCrone did not file a brief in opposition to Mr. Friedman's motion for partial summary judgment.

JURISDICTION

The Court has jurisdiction over this matter. A determination as to the dischargeability of a particular debt is a core proceeding under 28 U.S.C. § 157(b)(2)(I). Objections to discharges are core proceedings under 28 U.S.C. § 157(b)(2)(J). This Court has jurisdiction over core proceedings pursuant to 28 U.S.C. §§ 157(a) and 1334 and Local General Order No. 2012-7, entered by the United States District Court for the Northern District of Ohio.

All of Mr. Friedman's claims against the debtor are unliquidated, *i.e.*, no court has yet fixed an amount of damages, costs, or attorney's fees. Nor has any court found that the elements entitling Mr. Friedman to damages, costs, or attorney's fees have been established by any burden of proof. Nevertheless, the absence of a prior judgment does not prevent a bankruptcy court from entering a final judgment that fixes the amount, if any, of unliquidated claims in the context of determining the dischargeability of the underlying debt. *See* 28 U.S.C. § 157(b)(2)(B); *Hart v. S. Heritage Bank (In re Hart)*, 564 F. App'x 773 (6th Cir. 2014). Bankruptcy courts retain "jurisdiction to adjudge the validity and amount of a claim" when determining dischargeability, *Longo v. McLaren (In re McLaren)*, 3 F.3d 958, 965 (6th Cir. 1993), even after the Supreme Court's decision in *Stern v. Marshall*, 564 U.S. 462, 131 S. Ct. 2594 (2011). *See Hart*,

564 Fed. App'x 773.

SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56, made applicable to bankruptcy proceedings by Bankruptcy Rule 7056, provides that a 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." Fed. R. Civ. P. 56(a). Although Rule 56 was amended in 2010, the amendments did not substantively change the summary judgment standard. *Newell Rubbermaid, Inc. v. Raymond Corp.*, 676 F.3d 521, 533 (6th Cir. 2012). "A court reviewing a motion for summary judgment cannot weigh the evidence or make credibility determinations." *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 569 (6th Cir. 2012). "Instead, the evidence must be viewed, and all reasonable inferences drawn, in the light most favorable to the non-moving party." *Id.* at 570. "A genuine issue of material fact exists 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Yeschick v. Mineta*, 675 F.3d 622, 632 (6th Cir. 2012) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Furthermore, "[s]ummary judgment motions do not embrace default judgment principles." *Old Trail Ltd, Inc. v. Graham (In re Weldon Stump & Co., Inc.)*, 383 B.R. 435, 437 (Bankr. N.D. Ohio 2008) (citing

Vermont Teddy Bear Co., Inc. v. 1-800 Beargram Co., 373 F.3d 241, 242 (2d Cir. 2004)). The Court is required to review the record and determine whether the movant is entitled to summary judgment, even when the motion is unopposed. *Id.*

The party seeking summary judgment carries the initial burden of demonstrating the absence of a genuine issue of material fact. The movant may carry this initial burden by showing "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the moving party carries this initial burden, "the nonmoving party may not rest upon its allegations and denials, but rather must set forth specific facts showing that there is a genuine issue for trial." *Snow v. Nelson*, 634 Fed. App'x 151, 154 (6th Cir. 2015). "[W]hen, as here, the motion for summary judgment is unopposed," the Court "may properly rely on the facts provided by the moving party." *Weldon Stump & Co., Inc.*, 383 B.R. at 437-38 (citing *Guarino v. Brookfield Twp. Trs.*, 980 F.2d 399, 404-05 (6th Cir. 1992)).

Here, the Court is left with only the facts as presented by Mr. Friedman that are supported by the record of this case. In addition to Mr. McCrone's bankruptcy petition, schedules, and the facts admitted by Mr. McCrone in his answer to the complaint, the record consists of a single affidavit of Mr. Friedman, a Bank of America account statement for Interdependent Coaching LLC, a 1099-C sent to

Mr. Friedman from Bank of America, a demand letter sent from Mr. Friedman's attorney to Mr. McCrone, and a letter from Chase Bank to Interdependent Coaching. Drawing all reasonable inferences in favor of Mr. McCrone, the facts of this case are set forth below.

FACTS FOR SUMMARY JUDGMENT

Unless otherwise indicated, the following facts are undisputed. Mr. McCrone and Mr. Friedman have known each other for some period of time and, in the past, Mr. McCrone mentored Mr. Friedman by giving Mr. Friedman advice on possible business ventures. In 2012, Mr. McCrone persuaded Mr. Friedman that they should start a business that would provide motivational speaking and business consulting services in Northeast Ohio. To that end, Mr. McCrone and Mr. Friedman formed "Interdependent Coaching" as an Ohio limited liability corporation. Mr. McCrone and Mr. Friedman were the only officers and members of Interdependent Coaching, a closely-held LLC. Mr. McCrone owned 51% of the corporation, and Mr. Friedman owned 49% of the corporation.

In discussions with Mr. Friedman, Mr. McCrone represented that he had poor credit as a result of an unsuccessful business venture and a previous bankruptcy. Consequently, Mr. Friedman funded Interdependent Coaching with a

$15,100 loan that Mr. Friedman gave to Mr. McCrone (the "initial loan"). In order to make this loan, Mr. Friedman borrowed $14,892 from a Barclay's line of credit. Mr. McCrone also opened a number of credit cards in the name of Interdependent Coaching. Although Mr. McCrone was the primary user of these credit cards, Mr. Friedman was personally liable for any debt incurred on them. On or about August 1, 2012, Mr. McCrone received an $18,351.89 cash advance from Bank of America (the "Bank of America cash advance").

Mr. McCrone did not inform Mr. Friedman of the amounts or purposes for which the credit was being used. Mr. Friedman avers – and no contradicting evidence was presented – that Mr. McCrone used all $15,100 of the initial investment for personal use and not for the company. Similarly, Mr. Friedman swears that Mr. McCrone used the entirety of the $18,351.89 Bank of America cash advance for Mr. McCrone's personal use and to benefit Mr. McCrone's wife, Mary McCrone.

In contrast to the initial investment and Bank of America cash advance, the record concerning the various credit cards is less clear. Mr. Friedman swears that, at some later point, the following credit card companies began pursuing him for unpaid charges: (1) Bank of America, in the amount of $41,777.52; (2) Cardmember Services/US Bank/Elan Financial Services, in the amount of

$18,083.15; (3) Chase Bank, in the amount of $14,823.15; (4) Citibank, NA, in the amount of $28,666.57; and (5) AMEX, in the amount of $7,222.16. However, there are no specific allegations in Mr. Friedman's affidavit or elsewhere in the record that detail which specific charges were for Mr. McCrone's "own purposes, completely unrelated to any business ventures." (Docket No. 8, Attach. 1, ¶ 8). Mr. Friedman believes certain charges on the Bank of America credit card were for "furniture purchases, and from retailers such as J.Crew, Target, Macy's, Pottery Barn, World Market, and Crate & Barrel." (Docket No. 8, Attach. 1, ¶ 10). Presumably, Mr. Friedman is alleging that at least some of the purchases for furniture and from the retailers he listed were unrelated to the business. To support this claim, Mr. Friedman submitted a Bank of America account statement that reflects purchases from the retailers he listed in the following total amounts:

J.Crew	**= $3,134.48**
Target	**= $907.86**
Macy's	**= $161.61**
Pottery Barn	**= $1,367.89**
World Market	**= $642.37**
Crate & Barrel	**= $329.61**
TOTAL	**= $6,543.82**

(Docket No. 8, Attach. 2). Additionally, the Bank of America account statement lists charges from "Arhaus Furniture 00013" totaling $9,000 and "Levin Furniture

Co #12" totaling $1,541.35. Although Mr. McCrone admitted that he used the credit cards to buy an unspecified amount of furniture for personal use (Docket No. 5, ¶ 16), drawing every reasonable inference in favor of Mr. McCrone, it is not clear what portions of these credit card debts were solely for Mr. McCrone's personal benefit. Absent further specific testimony, it is perfectly reasonable to draw the inference that charges to retailers such as "Target" or "Office Max" were for business purposes. Similarly, the demand letter sent from the plaintiff's attorney to the debtor (Docket No. 1, Attach. 1), the 1099-C sent from Bank of America to Mr. Friedman (Docket No. 8, Attach. 3), and the letter sent from Chase Bank to Mr. Friedman (Docket No. 8, Attach. 4) do not shed any light on what portions of the credit card debts were not for business purposes. Therefore, the Court finds that Mr. Friedman has failed to meet his initial burden on this issue, and there is a genuine dispute as to the portions of the debt on the Bank of America, Cardmember Services/US Bank/Elan Financial Services, Chase Bank, Citibank, NA, and AMEX credit cards which were solely for Mr. McCrone's personal benefit.

After the credit card companies began pursuing Mr. Friedman to collect the debts, Mr. Friedman discovered that he had no credit and a declining credit score because Mr. McCrone was not making monthly payments on the credit cards.

Mr. Friedman paid the Barclays credit card in full because it was tied to an emergency line of credit.

In conversations with Mr. Friedman, Mr. McCrone promised that he would resolve the matters with the credit card companies and make monthly restitution payments to Mr. Friedman. However, Mr. McCrone did not resolve the creditor matters and made only small, sporadic restitution payments.

Mr. Friedman then hired legal counsel and began negotiating resolutions with the creditors. Mr. Friedman paid $7,341 to Cardmember Services/Elan, $2,000 to Nationwide/AMEX, and $7,042 to Ltd. Financial/Citi. Chase Bank would not settle its account but stopped attempting to collect from Mr. Friedman and issued him a 1099-C in the amount of $14,823.15. However, the Chase Bank debt is still reported on Mr. Friedman's credit report. Mr. Friedman states that he has been denied a loan on two occasions because of this negative information on his credit report. Mr. Friedman paid $31,483 to resolve these credit issues and still owes $54,985.45. Additionally, Mr. Friedman incurred $10,460 in attorney's fees attempting to resolve his creditor issues and collect repayment from Mr. McCrone.

DISCUSSION

In his motion for partial summary judgment, Mr. Friedman asks the Court to determine that the money allegedly owed to him by Mr. McCrone is

nondischargeable under 11 U.S.C. § 523(a)(2), (a)(4), and (a)(6) and seeks judgment in the amount of $96,928.45.

Validity of State Law Claims

Before determining whether Mr. Friedman's unliquidated claims are dischargeable under the Bankruptcy Code, the Court must first look to state law to determine the validity and fix the amount of Mr. Friedman's claims against the debtor. *See Grogan v. Garner*, 498 U.S. 279, 283 (1991) (distinguishing between creditor's burden to prove validity of a claim and nondischargeability). Here, the appropriate state law is that of Ohio.

Mr. Friedman framed neither his complaint nor his motion for partial summary judgment in the form of specific, Ohio causes of action which would entitle him to monetary relief. However, the Court must construe his pleadings so as to secure a just, speedy, and inexpensive determination of this proceeding. Fed. R. Bankr. P. 1001. Mr. Friedman asserts that his claims are nondischargeable under 11 U.S.C. § 523(a)(2)(A) ("false pretenses, a false representation, or actual fraud"), (a)(4) ("fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny"), and (a)(6) ("willful and malicious injury"). Therefore, the Court will construe Mr. Friedman's complaint as having raised Ohio state law claims of fraud and conversion.

Ohio Fraud

> Under Ohio law, to prove fraud, a plaintiff must show:
>
> (a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance.

Burr v. Bd. of Cnty. Comm'rs of Stark Cnty., 23 Ohio St.3d 69, 73, 491 N.E.2d 1101 (1986). Similar to the "actual fraud" provision of 11 U.S.C. § 523(a)(2)(A), Ohio recognizes that, in a cause of action sounding in fraud or deception, "the means of accomplishing the deception [may] be complex or simple–a deep-laid scheme of swindling or a direct falsehood." *Burr*, 23 Ohio St.3d at 75, 491 N.E.2d 1101 (quoting *Bartholomew v. Bentley*, 15 Ohio 659, 666-67 (1846)); *see Mellon Bank v. Vitanovich (In re Vitanovich)*, 259 B.R. 873, 877 (B.A.P. 6th Cir. 2001) ("actual fraud is broader than misrepresentation"). In an Ohio fraud case, the speaker's intent when making the representation must be considered at the time the statement is made. *Link v. Leadworks Corp.*, 79 Ohio App.3d 735, 742-43, 607 N.E.2d 1145 (8th Dist. 1992) ("[A] promise made with a present intention not to perform it is a misrepresentation of an existing fact–the speaker's present state of mind.").

However, "[t]he general rule is that fraud cannot be predicated upon a representation concerning a future event." *Id.*

Mr. Friedman appears to be asserting both a broad theory of a scheme of actual fraud and a separate theory of fraud by false misrepresentation. Mr. Friedman has not met his initial burden of showing that he is entitled to judgment as a matter of law under either theory.

Mr. Friedman's fraud claim is difficult to decide on summary judgment. Although the record has been promulgated almost entirely by Mr. Friedman, it is inappropriate for the Court to weigh the evidence or make credibility determinations on summary judgment. In the case of fraud, it is axiomatic that the subjective intent to defraud is rarely proven by direct evidence, but is measured objectively under the totality of the circumstances. *Hodell-Natco Industries, Inc. v. SAP America, Inc.*, 13 F. Supp. 3d 786, 809 (N.D. Ohio 2014) (collecting cases). After a trial, "of utmost importance in any fraudulent intent analysis is the credibility the Court attaches to the testimony of the debtor and any other witnesses called to testify." *In re Mills*, 345 B.R. 598, 604 (Bankr. N.D. Ohio 2006). But here the Court is bound to view the facts and draw all reasonable inferences in the light most favorable to the nonmoving party.

Mr. Friedman suggests that Mr. McCrone engaged in a broad, fraudulent

course of conduct in which he induced Mr. Friedman to invest in, and extend his personal credit to, Interdependent Coaching, and then spent large sums of money for entirely personal purposes, all the while never intending to use either the funds or credit to advance Interdependent Coaching. However, there is no direct evidence to suggest that Mr. McCrone did not intend to use the initial investment or credit for the business at the time they were extended. Even though the plaintiff avers that Mr. McCrone "did absolutely nothing with the company," (Docket No. 8, Attach. 1, ¶ 6), the Court could also reasonably infer that Mr. McCrone subjectively intended to use the money and credit to further the interests of Interdependent Coaching at the time they were given.

Similarly, Mr. Friedman alleges that Mr. McCrone falsely represented that he would resolve the matters with the credit card companies and that he would make monthly restitution payments. As with Mr. Friedman's actual fraud claim, there is not direct evidence which proves that Mr. McCrone did not subjectively intend to perform these promises at the time the representations were made. Furthermore, Mr. Friedman produced no direct evidence that Mr. McCrone did not attempt to resolve the debt issues directly with the credit card companies. That Mr. McCrone failed to resolve these issues only proves that he was unsuccessful, not that his intent was fraudulent at the time the representation was made.

Additionally, Mr. McCrone made some restitution payments to Mr. Freidman, a fact that suggests Mr. McCrone intended to follow through with this promise. Although Mr. Friedman states that the payments were "sporadic" and that "promises were certainly much more abundant than the actual payments made," (Docket No. 8, Attach. 1, ¶ 13), the Court can reasonably infer that Mr. McCrone intended to resolve the credit issues and make restitution payments at the time Mr. McCrone promised to do so.

Accordingly, the Court declines to enter summary judgment in favor of Mr. Friedman on Mr. Friedman's state law fraud claims.

Conversion

Mr. Friedman also asserts that Mr. McCrone committed conversion, specifically by using the initial investment of $15,100, lines of credit, and credit cards to make purchases that were entirely for personal use.

In Ohio, conversion is "any exercise of dominion or control wrongfully exerted over the personal property of another in denial of or under a claim inconsistent with the owner's rights." *Wuliger v. Cannella Response Television, Inc.*, 865 F. Supp. 2d 836, 843 (N.D. Ohio 2011) (citing *Allan Nott Enters., Inc. v. Nicholas Starr Auto, L.L.C*, 110 Ohio St.3d 112, 120, 851 N.E.2d 479 (2006)). Traditionally, conversion extended only to tangible chattels, but the concept has

been applied to intangible rights in Ohio, such as drafts and bank passbooks. *See Zacchini v. Scripps-Howard Broadcasting Co.*, 47 Ohio St.2d 224, 226-27, 351 N.E.2d 454 (1976), *rev'd on other grounds*, 433 U.S. 562 (1977). "[T]he correct approach is to analyze the particular type of intangible asset, to see if allowing a conversion claim makes sense." *Elias v. Gammel*, 8th Dist. Cuyahoga No. 83365, 2004-Ohio-3464, ¶ 17 (quoting *Schafer v. RMS Realty*, 138 Ohio App.3d 244, 285, 741 N.E.2d 155 (2d Dist. 2000)). In making this determination, a primary concern is "the difficulty in deciding exactly what had been taken, as a basis for assessing damages." *Schafer*, 138 Ohio App.3d at 283, 741 N.E.2d 155. "[W]hile it is the general rule in Ohio that money is intangible property that cannot be subject to conversion, there is an exception when specifically identified monies are at issue." *Gascho v. Global Fitness Holdings, LLC*, 863 F. Supp. 2d 677, 700 (S.D. Ohio 2012).

Mr. Friedman has met his burden of showing that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law in the amount of $33,451.89 for the conversion of the $15,100 initial investment and the $18,351.89 Bank of America cash advance. To make out a claim of conversion under Ohio law, Mr. Friedman must prove: (1) his ownership or right to possession of the initial investment and Bank of America cash advance;

(2) Mr. McCrone's conversion by a wrongful act or disposition of Mr. Friedman's property rights; and (3) damages. *Gascho*, 863 F. Supp. 2d at 700 (citing *Dice v. White Family Cos.*, 173 Ohio App. 3d 472, 2007-Ohio-5755, 878 N.E.2d 1105, ¶ 17 (2d Dist.)). Although Mr. McCrone had access to both the initial investment and the Bank of America cash advance, the Court finds that there is no genuine dispute that the value of the $15,100 initial investment was Mr. Freidman's property and that Mr. Friedman was the sole responsible party on the Bank of America cash advance. Additionally, the Court finds that there is no genuine dispute that the scope of Mr. McCrone's authority to access these funds was for the business purposes of Interdependent Coaching. By spending all of these funds for personal use, Mr. McCrone wrongfully exercised dominion and control over these funds, beyond the scope of his authority to do so. Indeed, it would be unreasonable to infer that Mr. McCrone was permitted to spend on personal expenses the $15,100 initial investment and $18,351.89 that were "needed credit and start-up funds to get the business started." (Docket No. 8, Attach. 1, ¶ 4). Nor is there difficulty in finding an accurate approximation of Mr. Friedman's injury. Mr. Friedman authorized Mr. McCrone to use the $15,100 initial investment and his credit "to get the business started" and "to make the initial purchases for Interdependent." *Id.* Mr. McCrone spent $33,451.89 of these funds for personal

expenses, causing Mr. Friedman injury in that amount.

This situation is distinguishable from cases where the alleged conversion is premised on the unlawful retention of money or the claim is for an obligation to deliver a sum certain. *See, e.g., Gascho*, 863 F. Supp. 2d at 700 (dismissing conversion claim where conduct was based on express contract absent allegations that plaintiffs were entitled to a "particular, segregated, and an identifiable collection of money"). In such cases, it is often stated that:

> [a]n action alleging conversion of cash lies only where the money involved is "earmarked" or is specific money capable of identification, e.g., money in a bag, coins or notes that have been entrusted to the defendant's care, or funds that have otherwise been sequestered, and where there is an obligation to keep intact and deliver this specific money rather than to merely deliver a certain sum.

Id. (quoting *Haul Transport of VA, Inc. v. Morgan*, 2d Dist. Montgomery Case No. CA 14859, 1995 WL 328995, *4 (June 2, 1995)). In this case, the conversion was not premised on the unlawful retention of money, breach of contract, or failure to fulfill a fiduciary obligation. Here, the conversion was the unlawful use of the initial investment and Mr. Friedman's line of credit which resulted in clearly identifiable damage to Mr. Friedman in the amount of $33,451.89. *Cf. Digital Camera Int'l Ltd. v. Antebi*, No. 11-CV-1823, 2014 WL 940723, *4 n.3 (N.D.N.Y. 2014 (discussing controversy surrounding

credit card transactions as the basis for conversion action); *Pfeiffer v. Wulster*, Adversary No. 09-02015, 2011 WL 1045355, *5 (Bankr. D. N.J. 2011) (finding conversion of funds from plaintiff's credit line because of the proprietary nature of credit cards), *aff'd* 2012 WL 589564. For the above reasons, Mr. Friedman makes out a claim for conversion against Mr. McCrone under Ohio law and has proved actual damages in the amount of $33,451.89.

Prejudgment Interest

In his complaint, Mr. Friedman asks for prejudgment interest from August 6, 2015. However, Mr. Friedman did not present any proof as to the appropriate amount of interest on the $15,100 initial investment. The only proof Mr. Friedman presented which could inform the appropriate amount of interest on the cash advance was a Bank of America account statement (Docket No. 8, Attach. 2). However, it is not clear how this statement relates to that cash advance or if it even relates to the cash advance at all. Although this document shows a $18,351.89 amount under the heading "Payment and Other Credits," nothing in the record suggests who paid this amount or that this payment is even related to the cash advance in the same amount. In Ohio, the general rule is against prejudgment interest in civil actions. Although there is an exception in actions for conversion, an award of prejudgment interest in a conversion action is within the discretion of

the trial court. Based on the record before the Court, there is no basis for awarding the plaintiff prejudgment interest, and the Court declines to do so. *Cf. Persky, Shapiro, Salim, Esper, Arnoff & Nolfi Co. v. Guyuron*, 8th Dist. Cuyahoga Case No. 77249, 2000 WL 1867407, *10 (Dec. 14, 2000) (upholding trial court's decision to not award prejudgment interest).

Punitive Damages

In Ohio, "[p]unitive damages may be recovered in a conversion action when the conversion involves elements of fraud, malice, or insult." *Parrish v. Machlan*, 131 Ohio App.3d 291, 296-97, 722 N.E.2d 529 (1st Dist. 1997) (citing *Villella v. Waikem Motors, Inc.*, 45 Ohio St.3d 36, 543 N.E.2d 464 (1989)). Under Ohio law, malice is: (1) a state of mind "characterized by hatred, ill will, or a spirit of revenge; or (2) a conscious disregard for the rights and safety of other persons that has a great possibility of causing substantial harm." *Villella*, 45 Ohio St.3d at 37, 543 N.E.2d 464. The decision to award punitive damages is within the trial court's discretion. *Cabe v. Lunich*, 70 Ohio St.3d 598, 602-03, 640 N.E.2d 159 (1994).

The Court finds that Mr. Friedman has failed to establish that he is entitled to punitive damages as a matter of law. Drawing every reasonable inference in favor of Mr. McCrone, the facts in the record simply do not show that

Mr. McCrone acted with "hatred, ill will, or a spirit of revenge." Given Mr. McCrone's promises to make restitution payments – and the fact that he actually made some of these payments – the Court could also reasonably infer that Mr. McCrone's disregard for Mr. Friedman's rights did not have a "great possibility of causing substantial harm" at the time of the conversion, but instead that Mr. McCrone was only later unable to make full restitution as he intended.

Attorney's Fees and Costs

The prevailing litigant in a bankruptcy proceeding typically is not entitled to attorney's fees. *See Ewing v. Bissonnette (In re Bissonnette)*, 398 B.R. 189, 196 (Bankr. N.D. Ohio 2008) (citing *Travelers Casualty & Surety Co. of Am. v. Pacific Gas & Electric Co.*, 549 U.S. 443 (2007)). This general rule may be trumped by statute, contract, or rule of law authorizing the award of attorney's fees. *Id.* The Court does not find any grounds for an award of attorney's fees in this case. Such fees are not authorized under the Bankruptcy Code for this proceeding, and there is no contractual right to attorney's fees in this case. Attorney's fees may be awarded under Ohio law, but are limited to cases in which punitive damages are proper. *Villella*, 45 Ohio St.3d at 41, 543 N.E.2d 464. As explained above, Mr. Friedman is not entitled to punitive damages in this case and, therefore, is not entitled to attorney's fees.

Under Bankruptcy Rule 7054(b), "the court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides." Unlike Civil Rule 54(d), where the default rule is to award costs to the prevailing party, in bankruptcy cases, the award of the costs under Bankruptcy Rule 7054(b) is within the sound discretion of the bankruptcy court. *Stuebben v. Gioioso (In re Gioioso)*, 979 F.2d 956, 962 (3d Cir. 1992). Based on the totality of the circumstances, including the relative size of the judgment compared to the amount sought, the Court declines to award costs to Mr. Friedman in this proceeding.

Nondischargeability

Having found that the only state law claim Mr. Friedman proved against Mr. McCrone at the summary judgment phase was a conversion claim, the Court turns now to the issue of whether this claim is nondischargeable. Discharge exceptions are to be strictly construed in favor of the debtor. *See Rembert v. AT&T Universal Card Servs. (In re Rembert)*, 141 F.3d 277, 280-81 (6th Cir. 1998). Because Mr. Friedman failed to establish any state law fraud claims at the summary judgment phase, the Court need only concern itself with the nondischargeability of the claim for conversion under 11 U.S.C. § 523(a)(6).

Section 523 of Title 11 of the United States Code provides in pertinent part:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title 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.

The Sixth Circuit has held that to prevail under § 523(a)(6) the plaintiff must prove that the debtor acted both willfully and maliciously. *See Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 463 (6th Cir. 1999). To be willful, the Supreme Court stated that the injury must be deliberate or intentional, and "not merely a deliberate or intentional *act* that leads to injury." *Kawaauhua v. Geiger*, 523 U.S. 57, 61 (1998) (emphasis in the original). "In this sense, § 523(a)(6) requires a debtor to commit an act akin to an intentional, rather than negligent or reckless tort." *Cash Am. Fin. Servs. v. Fox (In re Fox)*, 370 B.R. 104, 119 (B.A.P. 6th Cir. 2007) (citing to *Geiger*, 523 U.S. at 57). Under federal law, one acts maliciously when he consciously disregards his duties or acts without just cause or excuse, but there is no requirement of ill-will or specific intent to harm. *Id.* (quoting *Wheeler v. Laudani*, 783 F.2d 610, 615 (6th Cir. 1986)).

Mr. McCrone's use of the initial investment and Bank of America cash advance was both willful and malicious within the meaning of § 523(a)(6). Mr. McCrone knew the initial investment and the Bank of America cash advance

were to fund Interdependent Coaching. The injury suffered by Mr. Friedman was that these funds became unavailable to him and the business; this was accomplished at the moment Mr. McCrone intentionally spent the funds for personal use. Without a doubt, Mr. McCrone knew at the time he spent the funds that it would have this harmful consequence, and the Court is unable to infer a reasonable cause or excuse for such misappropriation. *Cf. Musilli v. Droomers (In re Musilli)*, 379 Fed. App'x 494, 498 (6th Cir. 2010) (quoting *Steier v. Best (In re Best)*, 109 F. App'x 1, 4 (6th Cir. 2004)) (debts arising out of conversion satisfy willful and malicious standard); *Pfeiffer*, Adversary No. 09-02015, 2011 WL 1045355, at *6 (citing *Kenna v. Lee (In re Lee)*, 304 B.R. 344, 349 (Bankr. N.D. Illinois 2004)). Therefore, Mr. Friedman's conversion claim against Mr. McCrone is nondischargeable pursuant to 11 U.S.C. § 523(a)(6).

CONCLUSION

For the reasons stated above, the Court grants in part Mr. Friedman's motion for partial summary judgment. The Court: (1) enters a non-final, partial summary judgment in favor of Mr. Friedman and against Mr. McCrone in the amount of $33,451.89, plus interest from the date of final judgment at the rate provided under 28 U.S.C. § 1961; (2) holds that this judgment is nondischargeable under 11 U.S.C. § 523(a)(6); and (3) holds that Mr. Friedman is not entitled to an

award of punitive damages, costs, or attorney's fees.

This partial judgment is not final. On or before July 18, 2016, Mr. Friedman shall file a written notice with the Court indicating whether he would like to pursue his remaining unresolved claims at trial. If Mr. Friedman chooses not to pursue his remaining unresolved claims at trial or fails to notify the Court of his intentions by July 18, 2016, then the Court will enter a final, nondischargeable judgment in favor of Mr. Friedman in the amount of $33,451.89 consistent with this Memorandum of Opinion. If Mr. Friedman opts to pursue his remaining unresolved claims at trial, then this non-final, partial judgment will be subject to revision under Bankruptcy Rule 7054 and Fed. R. Civ. P. 54(b), and the Court will proceed with a trial on August 4, 2016.

IT IS SO ORDERED.