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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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CLEVELAND

In re:	)	Case No. 97-18679
	)	
RONALD WALTER GUS,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	
GLORIA PARSONS,	)	Adversary Proceeding No. 98-1094
	)	
Plaintiff,	)	
	)	
v.	)	**MEMORANDUM OF OPINION**
	)	
RONALD WALTER GUS, aka SPIFFY CAR aka SPIFFY MOBILE PRESSURE CLEANING,	)	
	)	
Defendant.	)	

Plaintiff Gloria Parsons[1] filed this Adversary Proceeding asking that a debt allegedly owed to her by Debtor-Defendant Ronald Gus be declared non-dischargeable under 11 U.S.C. § 523(a)(2) and (a)(4). Mr. Gus filed a counterclaim seeking attorney's fees under 11 U.S.C. § 523(d). The case was tried on February 16 and 17, 1999. Post-trial, the parties filed proposed Findings of Fact and Conclusions of Law, and Plaintiff filed a Post-Trial Brief. (Docket 44, 45, and 46).

[1] Plaintiff now uses the last name "Spanfellner" following her remarriage. For ease of reference, she will be referred to in this Opinion by her former last name.

JURISDICTION

The Court has jurisdiction to determine this matter under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

FACTS[2]

Ronald Gus sold life insurance to Gloria Parsons and her husband Scott for 16 years. They visited about twice a year to discuss issues relating to keeping the insurance current. Scott Parsons committed suicide in December 1992. At that time, Ms. Parsons was 37 years old, with a son in the Marines and a daughter who was a senior in high school. (T.; Joint Exh. 5 at 4; see Joint Exh. 3 at 29).[3] Mr. Gus met with Ms. Parsons to help her obtain the life insurance proceeds, which ultimately totaled about $197,000 from all sources. Ms. Parsons used some of the money in this fashion:

$11,000 to Ford Motor Credit;

$9,000 in burial-related expenses;

$29,000 to pay off home mortgages;

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[2] While the evidence was far-ranging, much of it was not relevant to the dischargeability issues. These findings focus on the facts relevant to the 11 U.S.C. § 523 issues. There were also different versions given of the relevant facts. This statement of facts reflects the version that the Court believed after reviewing all of the evidence, including assessing the credibility of the witnesses. Without limiting the preceding sentence, the Court believed some of what each party said and did not believe other parts. There was no party whose testimony the Court found credible in its entirety.

[3] Where the Court finds that a fact exists based solely on a document, that document is identified. Where a fact is based on a document together with trial testimony, the exhibit number and the notation "T." appear. Where a fact is found based solely on trial testimony, there is no notation.

$6-8,000 to Mastercard/Visa;

$2,700 in roof repairs; and

$5,500 for a wedding for Melissa Jean Parsons (the Parsons' daughter).

(Def. Exh. L, Interr. 9).

Ms. Parsons and Mr. Gus met several more times to discuss various issues, including Ms. Parsons' desire to put some of the insurance money where family and friends would not have access to it. And so, in the five or six months following the death of Scott Parsons, Ms. Parsons also entered into these four transactions connected to Mr. Gus:

1. the purchase through Mr. Gus of an annuity coupled with a life insurance policy at a cost of $45,000 (T.; Def. Exh. L, Interr. 9);

2. the purchase of computer equipment and office machines for $10,000 (T.; Joint Exh. 37);

3. the purchase of gold coins for a total of $30,000 (T.; Joint Exhs. 33, 40); and

4. the formation of a partnership with Mr. Gus, his then-wife Terry Gus, and non-party Thomas Balog in which Ms. Parsons invested a total of $18,000 (T.; Joint Exhs. 31, 36).

Ms. Parsons does not challenge any aspect of the annuity purchase. It is the last three transactions that are the basis of this Complaint. Each disputed transaction is discussed below.

1. The Computer and Office Equipment

Mr. Gus operated his insurance business out of a home office using computer and office equipment. He had suggested to Ms. Parsons before her husband's death that she consider going into insurance sales because she had an outgoing personality and had done some sales work in another field. Ms. Parsons decided to give this a try following her husband's death. As Mr. Gus

intended to upgrade his equipment, he sold these items to Ms. Parsons on December 22, 1992 for $10,000: an Eteq 486 computer, monitor, and printer that were about 10 months old, a fax machine, a telephone computer system, a Sharp 750 copy machine that was about 10 years old, and about 26 software programs, some of which were customized for the insurance business.[4] (T.; Joint Exhs. 27, 37). Mr. Gus told her he would give her a good deal on the equipment and it would cost her more to buy it somewhere else.

Mr. Gus had himself paid $2,496 for the computer, monitor, and printer, $2,200 for the copy machine, $500 for the fax machine, and about $6,150 for the software, for a total of about $11,346. (T.; Joint Exh. 27, invoice dated 4/22/93). In setting the price he charged Ms. Parsons, Mr. Gus considered the amount he paid for all of the items and then factored in the time he had spent customizing the software so that it would be a "turnkey" system for the insurance business. The custom work included an insurance client data base, templates for tracking business, and a DOS batch file system. He also gave her the original non-customized software separately.

Ms. Parsons paid for these goods, but did not pick them up until April 1994 as she was occupied with various issues relating to her husband's death. (T.; Stipulation of Facts ¶ 6). (Docket 26). By that time, she had other employment and had abandoned any plans to go into the insurance business. Ms. Parsons did not present any credible evidence as to the value of the

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[4] The parties agree that the purchase of these goods relates to a plan by Ms. Parsons to go into the insurance business following her husband's death. The testimony conflicts on the details of that plan, including who initiated it and whether it was realistic. At trial, however, Ms. Parsons stated on cross-examination that she was not making a claim about the business and that this is strictly a claim about the value of the goods sold. It is not necessary, therefore, to make detailed findings about the events leading up to the purchase.

goods at the time of purchase or at the time she picked them up. While she gave her opinion as to the value of the computer hardware and software, she based it on a conversation she had several years later with a non-witness and she does not have any independent knowledge of such prices. She also seemed to dispute whether all of the promised software was on the computer when she took delivery, but she did not testify that she examined the software at that time or had any other knowledgeable person do so. Ms. Parsons questioned whether an older copy and fax machine were worth what she paid, but she did not present any concrete testimony on this issue either.

Mr. Gus' testimony about the value of the computer equipment was supported by that of William Klein, who is the head of the MIS department at First Union. Mr. Klein oversees a computer system with 300-500 personal computers; since 1991, his responsibilities have included purchasing computers. In his opinion, the computer, monitor, and printer sold to Ms. Parsons were worth $2,600-2,650 in 1993. He was familiar with about 9 of the software programs at issue; of those, he believes the prices listed by Mr. Gus are accurate. (T.; Joint Exh. 27). In sum, there was no credible evidence that the goods were worth less than Ms. Parsons paid and there was independent corroboration that at least some of them were worth in the range of what she paid.

2. The Gold Coins

Mr. Gus had for a number of years collected coins and also appraised them. He had one or two casual conversations with the Parsons about coin collecting. During a visit to Mr. Gus' office after Scott Parsons' death, Mr. Gus showed Ms. Parsons some coins, said that they would go up in value, and talked about them as a good investment. Ms. Parsons decided to invest in

coins. To start the process, on January 7, 1993 she gave Mr. Gus $30,000 and he in turn gave her two receipts that read:

> Received of Gloria Parsons-$25,000.00
> For American Double Eagle Coins--(approx. 20)
> St. Gaudens or Lib. Head or a mix.
> To be delivered to her within 4 wks.
> /s/ Ronald Gus
> 1-7-93

(Joint Exh. 32); and

> Received of Gloria Parsons, $5,000.00
> for asset portfolio. To be delivered
> in January of 1993.
> /s/ Ronald Gus

(Joint Exh. 33). An American Double Eagle coin is a $20 gold piece minted from the early 1800's to 1933.

On February 9, 1993, Mr. Gus went to Ms. Parsons' home, bringing with him these coins:

A. The Asset Portfolio

Mr. Gus purchased these 11 coins from Kagin's, the leading numismatic business in the United States, for $3,300 in 1982 to sell to a third-party. (T.; Joint Exh. 25, invoice no. 1431). He bought them back from that individual in 1985 for $4,490. He sold the coins to Ms. Parsons for $5,000. There was no testimony that the coins were worth less than this amount at the time of the transaction.

B. The Gold Coins

The receipt given to Ms. Parsons in January stated that she would receive "approximately 20" American Double Eagle coins for her $25,000 investment. The wording said "approximately" because Mr. Gus was not entirely sure what coins would be available and how

many the money would buy. When he went to make the purchase, he decided that there was nothing available worth buying in a price range that would equal that number of coins. He also considered that if Ms. Parsons had a larger number of coins, it would be easier to redeem them if necessary. Based on these concerns, he decided instead to sell Ms. Parsons 60 coins, all of which came from International Collectors Association. Some of them he had originally purchased for his own collection and others were purchased directly from International Collectors Associates specifically for Ms. Parsons. This company is a recognized leader in coin sales, as attested to by Daryl Hemminger, an expert who testified on behalf of Mr. Gus.

The parties agree that the coins brought to Ms. Parsons' house by Mr. Gus were in three boxes. They looked at the coins together. Ms. Parsons acknowledged on cross-examination that she saw about 60 coins at that time. There was no testimony that the 60 coins were worth less than $25,000. Mr. Gus suggested that she store them in a safe deposit box and so they drove together to a bank that appears to have been selected by Ms. Parsons. (On one earlier occasion, Mr. Gus had similarly kept her company when she went to meet with her lawyers). Ms. Parsons drove, Mr. Gus sat in the passenger seat, and the coins were on the seat between them.

When they arrived at the bank, Ms. Parsons filled out the paperwork to open a safe deposit box while Mr. Gus waited for her. Ms. Parsons had the coins while she did the paperwork. Mr. Gus, Ms. Parsons, and a bank employee went into the safe deposit box area, where Ms. Parsons opened her new box with the bank employee. The bank employee left the area, Ms. Parsons placed the three boxes in the safe deposit box, perhaps with an assist from

Mr.Gus, and the bank employee returned to lock the box with Ms. Parsons. Ms. Parsons and Mr. Gus then left the bank.

Ms. Parsons did not return to the safe deposit box until October 14, 1995, at which time she testified that the safe deposit box held only one box with 21 coins. She did not identify the 21 coins that were allegedly in the box and she did not offer an explanation as to why the box contained this number of coins. There was no testimony that Mr. Gus was carrying anything when he left the bank in February 1993 or that he had left anything in the car before they entered the bank on that date. There was no testimony that the parties were outside of each other's presence for any significant amount of time during this process. Mr. Gus did not have independent access to the safe deposit box. The Court does not find credible the suggestion that Mr.Gus, through a sleight of hand, placed only one box of coins in the safe deposit box and somehow kept the remaining coins for himself. The Court finds, therefore, that Ms. Parsons placed into the safe deposit box all 60 coins that Mr. Gus brought to her house and to the extent that fewer than 60 are now in Ms. Parsons' possession, that discrepancy is unrelated to any act on the part of Mr. Gus.

This conclusion is supported by testimony about a receipt dated February 9, 1993, which is the same date that the safe deposit box was opened. (Joint Exh. 2). The receipt reads:

> I have received all 60 Gold coins I ordered from Ron Gus this date, February 9, 1993. I have also received the coin portfolio which was ordered.
>
> /s/ Gloria J. Parsons
> Gloria J. Parsons
> Date: 2-9-93

(Joint Exh. 8).

Ms. Parsons, in earlier sworn testimony, stated that she did not sign this receipt and that the number "60" had been altered. (Joint Exh. 6 at pp. 31-34). On first glance, the number "60" does look as if it might have been changed. Mr. Gus, however, presented testimony at trial from Vickie Willard, a forensic document examiner with 25 years of experience in both civil and criminal matters at the state and federal level. She opined as to two points: the signature is that of Ms. Parsons and the number "60" is as it was written originally and was not altered to appear to be that number. Ms. Willard's credentials were not challenged and the Court finds her testimony to be both credible and convincing. In fact, in the course of Ms. Willard's testimony, Ms. Parsons' counsel stipulated that the receipt did bear the signature of Ms. Parsons. The Court also notes that the coins were not exhibited at trial and, to the extent that Ms. Parsons contended there were only 21 coins in the safety deposit box, she did not identify which specific coins they were.

3. Spiffy Car Partnership

Turning back to the events of February 9, 1993, Mr. Gus and Ms. Parsons stopped for lunch after they left the bank. In the course of that meal, Mr. Gus explained that he would be less available to Ms. Parsons because he was going to be involved with a new business called Spiffy Car that would clean and detail cars for dealerships. The idea for starting Spiffy Car came from Thomas Balog, a client of Mr. Gus' who approached him with a request to borrow money to start the business. Mr. Balog had experience with this type of enterprise and he, Mr. Gus, and Terry Gus were going to be in the business together. Ms. Parsons seemed interested in the new venture as they discussed it at lunch and Mr. Gus said he would speak to the other potential

partners to see if she could participate. Ms. Parsons testified that Mr. Gus told her that first year businesses "hardly ever even break even," but after the first year "it should get off the ground real good" and "there would be money to be made off the business."

The other participants agreed to include Ms. Parsons, they all met to discuss the new venture, and Mr. Gus drew up a partnership agreement that reflected their arrangements. The agreement created an Ohio general partnership and stated that each partner would make these contributions in exchange for their interests in the partnership:

Partner	Contribution	Partnership Interest
Gloria Parsons	$8,000, plus promotional services as needed during the first year of operations	29%
Ronald Gus	Management, promotional, bookkeeping, computer, and tax services for one year	21%
Terry Gus	Labor and management services for three months; to learn the business to insure continuity in event of death/departure of Mr. Balog	30%
Thomas Balog	Shop management and labor for at least one year with compensation	20%

Ms. Parsons negotiated one change to the proposed agreement to the effect that in the event of her death her son would have the option to purchase her partnership interest. (T.; Joint

Exh. 1 ¶ XXXI). Ms. Parsons had the agreement about one week before she signed it; she was the first of the partners to do so.

Spiffy Car started to do business at some time after mid-March 1993. Mr. and Mrs. Gus and Mr. Balog spent quite a bit of time running the business, including doing the actual cleaning of the cars. Ms. Parsons made some effort to promote the business, but the number of hours she devoted were minimal compared to the other partners. Although Ms. Parsons could have been employed at the business, she chose not to do so because she needed a steady job with benefits to supplement her $450 a month pension. Ms. Parsons admitted at trial that all of the partners were honestly trying to make the business "go."

Spiffy Car ran into a problem in May 1993 when the building inspector advised them that the building they occupied was not in compliance with EPA regulations and their business could not operate there after May 31st. Mr. Gus told Ms. Parsons they would have to relocate the business if they wanted to keep it going and that if the business folded she would not get anything back.

Mr. Gus looked into the real estate situation and found a building for sale that would meet the business' needs. The partners agreed to pay $145,000, with a $10,000 down payment. Due to a delayed real estate closing, the parties agreed that the partnership would pay rent of $1,000 a month for five months until the transaction could close. Ms. Parsons contributed $10,000 to the partnership at this time and these funds were the main source of the down payment. The partnership had its own checking account with money in it beyond the $10,000 because the partnership was able to pay additional expenses incurred in connection with the move, such as increased utilities and one month's rent.

At the time of the purchase, Ms. Parsons acknowledged in writing that the building would be in the name of Mr. Gus. (T.; Gus Exh. I; Joint Exh. 5 at 26). She agreed to this because she did not want the financial obligation of being "tied into the loan" to the seller. The building actually ended up titled in the names of both Ronald and Terry Gus. There was no testimony about how this happened or why. The building mortgage payments and real estate taxes were paid by the partnership.

Spiffy Car continued to operate over the next several months, but the relationship among the partners deteriorated as the business limped along. At a meeting held in March 1994, Mr. and Mrs. Gus and Mr. Balog asked Ms. Parsons either to contribute more labor or to contribute more money. She declined, feeling that she was not in a position to do either. Ms. Parsons then withdrew from the partnership and signed a statement that said:

> I Gloria I. Parsons request to be totally out of the Spiffy Car Partnership. I understand that my original investment will be totally lost.
> I further request this under the following conditions:
> 1.-That I will be under no further monetary obligations. That is to say I will not be responsible for any of Spiffy Car's Debt. Either past or present or future.
> 2.-That my leaving the partnership will not be discussed with anyone.
> /s/ Gloria A. Parsons
> Dated: March 17, 1994.

(Joint Exh. 7).

Spiffy Car operated until 1995. (T.; Gus Exh. DD). Ultimately, the business collapsed when Tom Balog stealthily moved the assets and customer base to a new location without telling Mr. Gus. After operations ceased, Mr. Gus took responsibility for the building and sold it. The proceeds from that sale are currently being held in escrow by the title company.

Some additional facts are set forth below.

THE POSITIONS OF THE PARTIES

A Chapter 7 debtor is discharged from all debts which arose before the date of the order for bankruptcy relief, with certain exceptions that are set out in § 523 of the Bankruptcy Code. 11 U.S.C. § 727(b). Ms. Parsons argues that Mr. Gus' behavior comes within two of those exceptions: § 523(a)(2)(fraud) and § 523(a)(4) (fraud or defalcation by a fiduciary). The specific allegations are set forth below. Mr. Gus denies that his acts fall within these exceptions.

DISCUSSION

A discharge under Chapter 7 of the Bankruptcy Code does not discharge the debtor from any debt :

> . . . for money . . . to the extent obtained by --
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition; [or]
>
> . . . for fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny[.]

11 U.S.C. § 523 (a)(2) and (a)(4).

11 U.S.C. § 523(a)(2)

A false pretense is "an implied misrepresentation or conduct intended to create or foster a false impression." *Blascak v. Sprague (In re Sprague)*, 205 B.R. 851, 859 (Bankr. N.D. Ohio 1997). "By comparison a 'false representation' involves an expressed misrepresentation by a debtor." *Id.* Finally, fraud has been defined as "deception intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed." *Gerad v. Cole (In re Cole)*, 164 B.R. 951, 953 (Bankr. N.D. Ohio 1993). A debtor's intentional failure to disclose material facts can constitute a misrepresentation under

§ 523(a)(2)(A). *Semaan v. Allied Supermarkets, Inc. (In re Allied Supermarkets, Inc.)*, 951 F.2d 718 (6th Cir. 1991). In order to have a debt declared non-dischargeable under this section, a creditor must prove that the debtor obtained property through a material misrepresentation known to the debtor to be false when made or made with gross recklessness as to its truth; the debtor intended to deceive the creditor; the creditor justifiably relied on the misrepresentation; and the reliance was the proximate cause of the loss. *Rembert v. AT & T Universal Card Servs., Inc. (In re Rembert)*, 141 F.3d 277 (6th Cir. 1998), *cert. denied*, 119 S.Ct. 438 (1998).

The creditor has the burden of proving her case by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279 (1991). Exceptions to discharge are to be narrowly construed against the creditor and in favor of the debtor based on the Bankruptcy Code's policy to give honest debtors a fresh start. *Mfrs. Hanover Trust Co. v. Ward (In re Ward)*, 857 F.2d 1082 (6th Cir. 1988).

1. The Computer and Office Equipment

Ms. Parsons alleges that Mr. Gus "falsely represented to plaintiff that the equipment and software was worth $10,000 and that plaintiff could go out and sell insurance just as he did, even though defendant knew that plaintiff had a 9th grade education and had no license to sell insurance." (Plaintiff's Post-Trial Brief; Plaintiff's Proposed Findings of Fact and Conclusions of Law ¶¶ 11-14). (Docket 44, 45). As found above, Ms. Parsons did not prove that Mr. Gus made any material misrepresentation of fact in connection with the purchase price. She also stated at trial that she was not making any claim with respect to the insurance business. To the extent that such a claim is still viable, however, Ms. Parsons did not prove that Mr. Gus made any false statement to her in connection with encouraging her to sell insurance. There was no

testimony as to any discussion about license requirements or Ms. Parsons' ability to obtain such a license. While Ms. Parsons only attended school through the 9th grade, she later obtained a GED. There was no testimony that a person with a high school education could not obtain a license and, in fact, Mr. Gus' own formal education essentially ended with high school. Ms. Parsons testified that she was looking for a job with steady income and benefits. Apparently the insurance business did not fill this need and so she did not pursue becoming an insurance agent. There was no link proven between that decision and any action on the part of Mr. Gus. Ms. Parsons has not, therefore, proven her case.

2. The Gold Coins

Ms. Parsons claims that Mr. Gus defrauded her by delivering 21 coins instead of the 60 coins indicated on the receipt that she signed. The Court has found that Mr. Gus did deliver 60 coins to Ms. Parsons. Ms. Parsons did not, therefore, prove her claim about the coins.

3. Spiffy Car Partnership

Ms. Parsons alleges that Mr. Gus "convinced plaintiff to initially invest $8,000 in the Spiffy Car partnership by misrepresenting both the nature of the business entity she was investing in and by misrepresenting the income that the business would provide to plaintiff for her investment." (Plaintiff's Post-Trial Brief at 5; Plaintiff's Proposed Findings of Fact and Conclusions of Law ¶¶ 16 and 17). Ms. Parsons further argues that Mr. Gus falsely represented to her that if she did not invest additional money to purchase the building, she would lose her $8,000 investment in Spiffy Car because it was being evicted from its original location. (Plaintiff's Proposed Findings of Fact and Conclusions of Law ¶ 17). Finally, Ms. Parsons suggests that Mr. Gus took title to the building in his name and that of Terry Gus, contrary to his

representations to Ms. Parsons, and that she was damaged by his failure to make it a partnership asset. (Plaintiff's Proposed Findings of Fact and Conclusions of Law ¶ 27).

The evidence does not support any of these positions. Ms. Parsons' own testimony was that Mr. Gus made only general statements about how he anticipated the business progressing at the time that she invested the $8,000. She also admitted that all of the partners were trying to make the business succeed. With respect to the second claim, there was no evidence that the statement was a misrepresentation: the parties agree that Spiffy Car was forced to move from its first location. A car wash has to operate from a building and if it could not relocate, it could not operate. From that, it is a logical inference that if the business could not operate, the parties would lose whatever they had invested, be it time or money. The third alleged misrepresentation is with respect to the building purchase. At the time of the purchase, Ms. Parsons acknowledged in writing that the building would be in the name of Mr. Gus. (T.; Gus Exh. I; Joint Exh. 5 at 26). She agreed to this because she did not want the financial obligation of being "tied into the loan" to the seller. Id. While the building actually ended up being titled in the name of both Ronald and Terry Gus, this was still consistent with Ms. Parsons' understanding that the building would not be in the name of the partnership but would instead be in an individual name. And finally, Ms. Parsons does not explain how she is damaged by this title situation since she resigned from the partnership and acknowledged that she would lose all of her money. Since Ms. Parsons had no continuing interest in the partnership, the manner in which the building was titled was not material and could not have caused her any damage.

While Ms. Parsons argues other issues relating to the partnership, she does not identify any other misrepresentations that Mr. Gus allegedly made. It is not necessary, therefore, to

address those other points. (See, for example, Plaintiff's Proposed Findings of Fact and Conclusions of Law ¶ 21).

11 U.S.C. § 523(a)(4)

Ms. Parsons' remaining cause of action is brought under § 523 (a)(4), which provides that a Chapter 7 discharge does not discharge a debtor from any debt "for fraud or defalcation while acting in a fiduciary capacity." 11 U.S.C. § 523(a)(4).[5] She contends that "Spiffy Car was a general partnership and [Mr. Gus] controlled the partnership including its bank account and its financial records. As a managing general partner, [Mr. Gus] was in and [sic] actual fiduciary position to [Ms. Parsons] and the other partners." (Plaintiff's Post-Trial Brief at 7). (Plaintiff's Proposed Findings of Fact and Conclusions of Law ¶ 28).

In support of her argument, Ms. Parsons states:

> The defendant and his wife, Terry, controlled 51% of the partnership and failed to provide plaintiff with any accounting whatsoever. They permitted Tom Balog to take control of the partnership assets without paying the partnership any money. In addition, defendant overpaid himself and his wife for rental of the real estate which they had put into their own name. The rent overpayments alone were $40,000.00 over the three year period, 1993, 1994, and 1995. Plaintiff's share of the $40,000 of misspent funds is approximately $12,000 (29% x $40,000.00). This overpayment was testified by defendant's own expert, James Jaksic. In addition, defendant had a fiduciary obligation to plaintiff to protect her partnership interest in the building. He totally failed to do so and then signed a divorce decree giving one-half of this building's proceeds to he [sic] ex-wife.

(Plaintiff's Post-Trial Brief at 7).

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[5] Ms. Parsons has limited her arguments to Mr. Gus' actions as a fiduciary; however, § 523(a)(4) also provides that a Chapter 7 discharge does not discharge a debt for embezzlement or larceny. She also limits her argument here to the Spiffy Car investment. (See Plaintiff's Post-Trial Brief at 5).

Defalcation encompasses "embezzlement, the 'misappropriation of trust funds held in any fiduciary capacity' and the 'failure to properly account for such funds'." *Capitol Indem. Corp. v. Interstate Agency, Inc. (In re Interstate Agency Inc.)*, 760 F.2d 121, 125 (6th Cir. 1985). "[T]he debtor must hold funds in trust for a third party to satisfy the fiduciary element of the defalcation provision of § 523(a)(4)." *R.E. America, Inc. v. Garver (In re Garver)*, 116 F.3d 176, 179 (6th Cir. 1997). "The mere failure to meet an obligation while acting in a fiduciary capacity simply does not rise to the level of defalcation; an express or technical trust must also be present." *Id.* at 179. The same is true with respect to a claim of fiduciary fraud. *Brady v. McAllister (In re Brady)*, 101 F.3d 1165 (6th Cir. 1996). These four factors are appropriately considered in determining whether an express or technical trust is present: (1) the trust relationship is imposed by an applicable state statute; (2) the trust res is clearly defined; (3) the trustee is charged with specific affirmative duties; and (4) the trust exists prior to the act out of which the contested debt arose. *Carlisle Cashway, Inc. v. Johnson (In re Johnson)*, 691 F.2d 249 at 252-53 (6th Cir. 1982).

Ms. Parsons contends that Mr. Gus was "acting in a fiduciary capacity" because he was the "managing general partner" of the partnership; the implication seems to be that Mr. Gus had a different legal status than did the other three partners. The evidence does not support this as the partnership agreement created an Ohio general partnership with four partners, two of whom were Ms. Parsons and Mr. Gus. The allocation to Mr. Gus of certain management responsibilities in the partnership agreement does not change his status as one of the general partners.

Nevertheless, partners do have certain fiduciary obligations to each other under Ohio law. See, for example, Ohio Rev. Code § 1775.20(A). The Sixth Circuit has not yet decided whether the existence of those duties is sufficient to establish that each partner acts in a "fiduciary

capacity" to the other within the meaning of § 523(a)(4) and the bankruptcy courts are divided on this issue. *Hynes v. Needleman (In re Needleman)*, 204 B.R. 524 (Bankr. S.D. Ohio 1997) (the fiduciary relationship between partners under Ohio law comes within the scope of § 523(a)(4)). *Sulphur Partnership v. Piscioneri (In re Piscioneri)*, 108 B.R. 595 (Bankr. N.D. Ohio 1989) (Ohio partnership law does not create a fiduciary relationship within the meaning of § 523(a)(4)). Even if Mr. Gus did act in such a capacity, however, Ms. Parsons does not make any argument that there was an express or technical trust. Beyond that, Ms. Parsons still did not prove that Mr. Gus committed fraud or defalcation with respect to her partnership contributions. Ms. Parsons invested $18,000 in the partnership. She does not dispute that her initial $8,000 contribution was used in the operation of the partnership's business. It is also clear that her additional $10,000 contribution was used to purchase the new building and that building was put in Mr. Gus' name at Ms. Parsons' request. She then resigned from the partnership, acknowledging that she would receive no return on her investment. While she may now regret having done so, that does not establish fraud or defalcation in the transactions. There also was no evidence to support the post-trial argument that Mr. Gus failed to provide Ms. Parsons with an accounting of the partnership assets. The record, therefore, does not support Ms. Parsons' position.

Ms. Parsons argues further that Mr. Gus: (1) improperly permitted Thomas Balog to take control of partnership assets; and (2) misspent partnership funds when he made excessive rent payments on the building. Again, it is not necessary to determine whether Mr. Gus was acting in a fiduciary capacity within the meaning of § 523(a)(4) because Ms. Parsons did not prove that there is a debt based on these allegations. There was little evidence about the circumstances under which Mr. Balog took partnership property; there was no evidence that identified the assets

taken or their value. What is clear is that Mr. Balog took these actions in 1995, long after Ms. Parsons had resigned from the partnership. Her final claim is that Mr. Gus committed fraud or defalcation when the partnership paid excessive amounts of rent, although she does not explain how this establishes fraud or defalcation. The evidence shows that the partnership made only a few rent payments, after which time the purchase of the building went through and all remaining payments were made under the mortgage. Both the rent and the mortgage payments were made to a third party, so the suggestion that rent was paid to Mr. Gus is totally outside of the evidence. There was some testimony that the partnership had financial troubles because of the amounts committed to the mortgage, but the testimony did not begin to rise to the level of establishing fraud or defalcation.

In essence, Ms. Parsons contributed money to a partnership in the hope--shared by the other partners--that it would be a good investment. Unfortunately, the business floundered, Ms. Parsons withdrew from the partnership, and the business ultimately failed. These facts do not establish a fraud or defalcation claim under § 523(a)(4) of the Bankruptcy Code.

The Counterclaim

Mr. Gus asserts a counterclaim under 11 U.S.C. § 523 for the fees and expenses incurred in his defense of this action. That section permits a debtor to recover costs and fees in these circumstances:

> If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

Mr. Gus is not entitled to an award under this section because this action involves business rather than consumer debt. As Mr. Gus' request is based exclusively on § 523, his counterclaim must be denied. *Martin v. Bank of Germantown (In re Martin)*, 761 F.2d 1163 (6th Cir. 1985).

CONCLUSION

For the reasons stated, Plaintiff Gloria Parsons did not meet her burden of proving that any debt owed to her by Defendant-Debtor Ronald Gus is not dischargeable under 11 U.S.C. § 523 (a)(2) or (a)(4) and judgment will, therefore, be entered in favor of the Defendant on the Complaint. Judgment will be entered in favor of the Plaintiff on the Counterclaim. A separate judgment will be entered in accordance with this Memorandum of Opinion.

Date: 19 March 1999

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Anthony Giardini, Esq.
Susan Gray, Esq.
Bruce Wick, Esq.
Richard Baumgart, Trustee

By: Joyce L. Gordon, Secretary

Date: 3/19/99

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:	)	Case No. 97-18679
	)	
RONALD WALTER GUS,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
GLORIA PARSONS,	)	Adv. Pro. 98-1094
	)	
Plaintiff,	)	
	)	
v.	)	**JUDGMENT**
	)	
RONALD WALTER GUS, aka SPIFFY CAR aka SPIFFY MOBILE PRESSURE CLEANING,	)	
	)	
Defendant.	)	

For the reasons stated in the Memorandum of Opinion filed this same date,

IT IS, THEREFORE, ORDERED that Judgment is entered in favor of the Defendant on the Complaint to determine the dischargeability of debt under 11 U.S.C. §§ 523(a)(2)(A) and (a)(4). IT IS FURTHER ORDERED that Judgment is entered in favor of the Plaintiff on the Counterclaim for fees and costs under 11 U.S.C. § 523.

Date: 19 Mar 1999

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Anthony Giardini, Esq.
Susan Gray, Esq.
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Richard Baumgart, Trustee

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