UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 04-33968
George E. Kuehnl III and Martha Kuehnl,	)	Chapter 7
Debtors.	)	Adv. Pro. No. 04-3265
Trustees of the Ohio Carpenters Health and Welfare Fund, Trustees of the Ohio Carpenters Pension Fund, Trustees of the Northwest Ohio Carpenters Joint Apprenticeship Fund, Trustees of the Northwest Ohio Carpenters Supplemental Pension Fund, Trustees of the Contractors' Administrative Fund, and the Northwest Ohio Carpenters District Council,	)	Hon. Mary Ann Whipple
Plaintiffs,	)	
v.	)	
George E. Kuehnl III,	)	
Defendant.	)	

MEMORANDUM OF DECISION AND ORDER REGARDING MOTION FOR SUMMARY JUDGMENT

The Plaintiffs' Motion for Summary Judgment was filed in this proceeding on January 31, 2005 (the "Motion"). After reviewing the Motion, the documents submitted in support of the Motion, the opposing memorandum, and the documents submitted in opposition to the Motion by George E. Kuehnl III ("Defendant"), the court will deny the Motion.

FACTUAL AND PROCEDURAL BACKGROUND

COMPETENCY OF EVIDENCE

At the outset, the court notes that neither party submitted any affidavits in support of or in opposition to the Motion. All documents submitted in connection with a motion for summary judgment must be property authenticated. *E.g.*, *United States v. Billheimer*, 197 F. Supp. 2d 1051, 1058 n.7 (S.D. Ohio 2002); *see* Fed. R. Evid. 901-903. Deposition transcripts may be authenticated by submission of the court reporter's certification, *see, e.g.*, *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 774 (9th Cir. 2002); Fed. R. Bankr. P. 7030; Fed. R. Civ. P. 30(f)(1), or by an attorney's affidavit or declaration that the excerpts are true and complete, *see, e.g.*, *Commercial Data Servers, Inc. v. Int'l Bus. Mach. Corp.*, 262 F. Supp. 2d 50, 59 (S.D.N.Y. 2003). *Salter v. Wash. Township Health Care Dist.*, 260 F. Supp. 2d 919, 924 (N.D. Cal. 2003), *aff'd in part and rev'd in part on other grounds*, 112 Fed. Appx. 5575 (9th Cir. 2004). Discovery responses may be authenticated by the respondent's verification, *see, e.g.*, *Roberts v. Gen. Elec. Co.*, 1 F.3d 1234 (4th Cir. 1993) (unpublished table disposition), *available at* 1993 WL 303308, at **3 n.3; Fed. R. Bankr. P. 7033; Fed. R. Civ. P. 33(b)(1), or by an attorney's affidavit, *see, e.g.*, *Commercial Data Servers, Inc.*, 262 F. Supp. 2d at 58-59; *Republic W. Ins. Co. v. Fireman's Fund Ins. Co.*, 241 F. Supp. 2d 1090, 1095 (N.D. Cal. 2003). Likewise, documents produced in response to a Rule 34 request or admissions made in response to a Rule 36 request may be authenticated by an attorney's affidavit. *See, e.g.*, *Commercial Data Servers, Inc.*, 262 F. Supp. 2d at 58-59; *Republic W. Ins. Co.*, 241 F. Supp. 2d at 1095. Certified copies of public records are self-authenticating, Fed. R. Evid. 902(4), and are also excepted from the rule against hearsay, *id.* R. 803(8).

The only exhibits offered by Plaintiffs that are properly authenticated are Exhibit 2 (admitted in Defendant's answer), Exhibit 3 (a self-authenticating certified copy of Plaintiffs' judgment against Defendant's corporation), and Exhibits 17 and 18 (which are self-authenticating certified copies of documents filed with the Ohio Secretary of State). None of the other documents submitted by Plaintiffs and neither of the documents submitted by Defendant are properly authenticated and may not, therefore, be considered in ruling on the Motion. Moreover, at least one of Plaintiffs' documents (Exhibit 4 – a set of documents reflecting the audit of the corporation's books) constitutes inadmissible hearsay, at least absent

a proper foundation. *See* Fed. R. Evid. 803(6). Accordingly, the court will consider "undisputed" only those facts upon which the parties' memoranda agree, those admitted in Defendant's answer, and those evidenced by Plaintiffs' Exhibits 2, 3, 17, and 18.

UNDISPUTED MATERIAL FACTS

Defendant was the principal officer, director, and shareholder of a corporation known as Kuehnl Contractors, Inc. (the "Corporation"). (Compl. to Determine Dischargeability of Debts ¶ 10; Answer of Def. ¶ 9.) The Corporation entered into a collective bargaining agreement with the Northwest Ohio Carpenters District Council (the "Union") to employ Union labor and to make contributions to various employee benefit funds (the "Funds"). The amounts of the contribution to each Fund was a specified amount per hour of wages paid to or worked by Union members. The Corporation was required to submit regular periodic reports, but Defendant acknowledges that those reports were not always submitted. Defendant claims that the reports that were submitted were accurate, and that the contributions reflected on those reports were timely remitted. Thus, Defendant takes the position that the underpayments to the Funds resulted exclusively from the Corporation's failure to submit reports, rather than the submission of reports that underreported hours.

In 2002, Plaintiffs filed a complaint against the Corporation in the United States District Court for the Northern District of Ohio. On April 1, 2003, the court entered judgment for Plaintiffs for unpaid fringe benefit contributions and liquidated damages for 1999-2001 in the aggregate amount of $237,896.19 plus additional liquidated damages after February 28, 2003, at the rate of $396.80 per month. The court also awarded attorney's fees and collection costs of $1,952.43.

Plaintiffs allege that they then filed a complaint against Defendant in the District Court in 2003 and that trial was scheduled to commence on August 10, 2004. On May 12, 2004, Defendant filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. On August 10, 2004, Plaintiffs filed a motion for relief from the automatic stay, seeking leave to proceed with the District Court litigation. By an order entered on October 20, 2004, the court denied that motion.

Also on August 10, 2004, Plaintiffs filed the complaint initiating this adversary proceeding. The complaint alleges that Defendant is indebted to Plaintiffs for the underfunded employee benefit contributions

and that the debts are nondischargeable. More specifically, Plaintiffs claim, first, that the submission of false audit reports, underreporting the hours worked by Union employees (and, therefore, the Corporation's liability for fringe benefit contributions) gave rise to a debt for credit obtained by false pretenses, a false representation, or actual fraud within the meaning of 11 U.S.C. § 523(a)(2)(A). Second, Plaintiffs assert that Defendant causing the Corporation to remit sums to him during the years that employee benefits were underfunded gave rise to a debt for fraud or defalcation while acting in a fiduciary capacity or embezzlement within the meaning of 11 U.S.C. § 523(a)(4). Finally,[1] Plaintiffs claim that Defendant attempting to dissolve the Corporation in contravention of Ohio corporate statutes constitutes a defalcation while acting in a fiduciary capacity within the meaning of § 523(a)(4).

LAW AND ANALYSIS

UNDERREPORTING OF HOURS AND CONTRIBUTIONS

The Sixth Circuit has enumerated the elements of nondischargeability under 11 U.S.C. § 523(a)(2)-(A) as follows:

> In order to except a debt from discharge under § 523(a)(2)(A), a creditor must prove the following elements: (1) the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss.

Rembert v. AT & T Universal Card Services, Inc. (In re Rembert), 141 F.3d 277, 280-81 (6th Cir. 1998). The party seeking the exception to discharge bears the burden of proof on each element of its claim by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991).

The Sixth Circuit also held in *Rembert* that "[w]hether a debtor possessed an intent to defraud a creditor within the scope of § 523(a)(2)(A) is measured by a subjective standard." *Rembert*, 141 F.3d at 281. However, "gross recklessness is sufficient to establish an intent to deceive." *Bank One, Lexington, N.A. v. Woolum (In re Woolum),* 979 F.2d 71, 73 (6th Cir. 1992). "Because direct proof of intent, the

[1] The complaint also sought relief from the automatic stay to proceed with the U.S. District Court litigation against Defendant, but that claim has been denied by an order entered in Defendant's Chapter 7 case.

Debtor's state of mind, is nearly impossible to obtain, the creditor may present evidence of the surrounding circumstances from which intent may be inferred." *ITT Fin. Serv. v. Long (In re Long)*, 124 B.R. 54, 56 (Bankr. N.D. Ohio 1991); *accord, e.g., Palmacci v. Umpierrez*, 121 F.3d 781, 789 (1st Cir. 1997) (quoting *Anastas v. Am. Sav. Bank (In re Anastas)*, 94 F.3d 1280, 1286 n.3 (9th Cir. 1996)); *Equitable Bank v. Miller (In re Miller)*, 39 F.3d 301, 305 (11th Cir. 1994); *First Nat'l Bank v. Kimzey (In re Kimzey)*, 761 F.2d 421, 424 (7th Cir. 1985); *Crawford v. Monfort (In re Monfort)*, 276 B.R. 793, 796 (Bankr. N.D. Ohio 2001); *Citibank v. Weaver (In re Weaver)*, 139 B.R. 677, 679 (Bankr. N.D. Ohio 1992); *see Alport v. Ritter (In re Alport)*, 144 F.3d 1163, 1167 (8th Cir. 1998). As for the creditor's reliance, the Supreme Court has made clear that the reliance must be justified, but need not be reasonable. *Field v. Mans*, 516 U.S. 59, 74-75 (1995). The test is a subjective one rather than an objective one. *Id.* at 70-71. The pertinent question is thus whether the creditor was justified in relying on the representation, rather than whether a reasonable person would have done so. A creditor is not required to conduct an investigation as to the truth or falsity of the statement. *Id.* at 70.

The District Court judgment against the Corporation establishes that it underfunded its employee benefit contributions as the result of underreporting of hours worked by Union employees. However, it is unclear whether the Corporation submitted reports that did not report all hours or only failed to submit reports to certain Funds and/or for certain reporting periods. In the former event, there would be no question that the Corporation would have made false representations and, as the controlling officer, director, and shareholder of the Corporation, Defendant may be charged with misrepresentations he made on the Corporation's behalf and for its benefit. *See, e.g., Warthog, Inc. v. Zaffron (In re Zaffron)*, 303 B.R. 563, 569 (Bankr. E.D.N.Y. 2004); *S. Concrete Constr. Co. v. Lennard (In re Lennard)*, 245 B.R. 428, 431 (Bankr. M.D. Ga. 1999); *Bell v. Smith (In re Smith)*, 232 B.R. 461, 465 (Bankr. D. Idaho 1998); *Weinreich v. Langworthy (In re Langworthy)*, 121 B.R. 903, 907 (Bankr. M.D. Fla. 1990). If, however, the underreporting consisted of the failure to submit reports to certain Funds or for certain reporting periods, there would be no affirmative misrepresentations (unless the reports that were submitted, which have not been provided to the court, included certifications that all required reports had been submitted).

Nevertheless, "material omissions can form the basis of misrepresentation under § 523(a)(2)(A)." *In re Ward*, 115 B.R. 532, 539 (W.D. Mich. 1990) (citations omitted); *accord, e.g., Busch, Inc.*

v. Grilliot (In re Grilliot), 293 B.R. 725, 729 (Bankr. N.D. Ohio 2002) (citing *AT&T Universal Card Servs. v. Mercer (In re Mercer)*, 246 F.3d 391, 404 (5th Cir. 2001)); *Baker v. Smith (In re Smith)*, 270 B.R. 696, 700 (Bankr. N.D. Ohio 2001). However, "when an obligation of fraud is based on nondis

closure, there can be no fraud absent a duty to speak. The duty to disclose arises when one party has information that the other party is entitled to know because of a fiduciary or other similar relation of trust and confidence between them." *Steinfels v. Ohio Dep't of Commerce, Div. of Sec.*, 129 Ohio App. 3d 800, 807 (1998) (citing *State v. Warner*, 55 Ohio St. 3d 31, 54 (1990)), *appeal denied*, 84 Ohio St. 3d 1488 (1999). "The term 'fiduciary relationship' has been defined as a relationship in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust." *Id.* at 807 (citing *Ed Schory & Sons, Inc. v. Soc'y Nat'l Bank*, 75 Ohio St. 3d 433, 442 (1996)). Although it is unclear that the collective bargaining, trust, and related agreements rendered the Corporation a fiduciary to Plaintiffs or the Union members, *see Operating Engineers' Local 324 Fringe Benefit Funds v. Nicholas Equip., L.L.C.*, 353 F. Supp. 2d 851, 854 (E.D. Mich. 2004) (employer's principal's admissions established that he constituted "plan fiduciary"), it appears that the CBA's reporting requirements did create at least a "similar relation of trust and confidence" giving rise to a duty to speak. Moreover, there appears to be no question that Defendant acted knowingly in submitting false reports and/or withholding reports. Accordingly, Plaintiffs can establish the first element of nondischargeability under § 523(a)(2)(A) upon their authentication of the collective bargaining agreement and the false reports and the presentation of testimony establishing Defendant's role in submitting and/or withholding the reports.

As for the second element, Plaintiffs will likely have little difficulty proving that Defendant's actions were intended to deceive them but, at least absent the authentication of the transcript of Defendant's deposition, the court cannot conclude that Plaintiffs have shown a lack of a genuine issue in that regard. With respect to the third element, Plaintiffs have offered no affidavits or other evidence that they did, in fact, rely on the reports or the omission of reports. Moreover, while their reliance on the reports that Defendant did submit on behalf of the Corporation would be justified, *Board of Trustees, Sheet Metal Workers' Nat'l*

Pension Fund v. D'Elia Erectors, Inc., 17 F. Supp. 2d 511, 516-17 (E.D. Va. 1998), there is a genuine issue as to whether Plaintiffs' reliance would be justified insofar as withheld reports are concerned. Although Plaintiffs apparently did nothing for three years when they did not receive reports from the Corporation, the evidence at trial could show that they

were justified in such inaction. Plaintiffs must also, of course, show that their reliance was the proximate cause of their loss.

DIVERSION OF CORPORATE ASSETS AND DISSOLUTION

Plaintiffs allege that Defendant took funds and other assets from the Corporation during the three years in which employee benefit contributions were underfunded, and that his resulting debt to Plaintiffs is excepted from discharge under § 523(a)(4) of the Bankruptcy Code. That provision makes nondischargeable "any debt . . . for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." To establish "fraud or defalcation while acting in a fiduciary capacity" under § 523(a)(4), a creditor must prove the existence of an express or technical trust. *R.E. America, Inc. v. Garver (In re Garver)*, 116 F.3d 176, 180 (6th Cir. 1997). Plaintiffs argue that there was a fiduciary relationship between Defendant and the Corporation, but such a fiduciary relationship does not inure to the benefit of Plaintiffs or Union members.[2] While there is at least one decision holding that ERISA benefit plan documents may constitute unpaid employee benefit contributions as plan assets with respect to which the employer owes fiduciary duties, *e.g.*, *Hunter v. Philpott (In re Philpott)*, 281 B.R. 271 (Bankr. W.D. Ark. 2002), this

[2] Plaintiffs cite O.R.C. § 1701.95(A)(1)(b) in support of their claim that the attempted dissolution of the Corporation constituted a defalcation while acting in a fiduciary capacity. While that statute does impose personal liability (to the corporation) on directors who "vote for or assent to . . . a distribution of assets to shareholders during the winding up of the affairs of the corporation, on dissolution or otherwise, without the payment of all known obligations of the corporation or without making adequate provision for their payment," it does not establish an express or technical trust relationship explicitly and there appear to be no court decisions holding that the statute does establish such a trust implicitly.

court is not prepared to so hold at this time, particularly since the court does not have the benefit of seeing the plan and trust documentation.

"Federal law defines 'embezzlement' under section 523(a)(4) as 'the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come.' A creditor proves embezzlement by showing that he entrusted his property to the debtor, the debtor appropriated the property for a use other than that for which it was entrusted, and the circumstances indicated fraud." *Brady v. McAllister (In re Brady)*, 101 F.3d 1165, 1172-73 (6th Cir. 1997) (citing *Gribble v. Carlton (In re Carlton)*, 26 B.R. 202, 205 (Bankr. M.D. Tenn. 1982); *Ball v. McDowell (In re McDowell)*, 162 B.R. 136, 140 (Bankr. N.D. Ohio 1993)). Here, Plaintiffs may

be able to prevail if they can prove that the employee benefit contributions were held in trust for the Funds and the Union members, which the court (as indicated above) cannot find on the basis of the evidence in the record. If the assets allegedly diverted by Defendant belonged to the Corporation, Plaintiffs would lack standing to assert an embezzlement claim. *See Brady*, 101 F.3d at 1173. The same is true of larceny. "Larceny is proven for § 523(a)(4) purposes if the debtor has wrongfully and with fraudulent intent taken property from its owner," *Kaye v. Rose (In re Rose)*, 934 F.2d 901, 903 (7th Cir. 1991), so, if Plaintiffs were not the owners of the funds and other assets allegedly taken from the Corporation, Defendant could not be guilty of taking the assets from them.

PIERCING OF CORPORATE VEIL

Plaintiffs also allege that they are entitled to pierce the corporate veil, to make Defendant liable for the Corporation's indebtedness to Plaintiffs. In Ohio, "the corporate form may be disregarded and individual shareholders held liable for corporate misdeeds when (1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong." *Belvedere Condominium Unit Owners' Ass'n v. R.E. Roark Cos.*, 67 Ohio St. 3d 274, 287-89 (1993) (adopting *Bucyrus-Erie Co. v. Gen. Prods. Corp.*, 643 F.2d

413 (6th Cir. 1981)). "Some appellate courts have also endorsed the use of factors to aid in their determination of whether or not to disregard the corporate form, including undercapitalization, failure to observe corporate formalities, absence of corporate records, and unjust or inequitable results." *Wiencek v. Atcole Co.*, 109 Ohio App. 3d 240, 245 (1996) (citations omitted). Plaintiffs' brief includes *allegations* of facts pertinent to such factors, but they have not offered any competent evidence of any such facts.

Accordingly, there is a genuine issue of fact material to whether the corporate veil should be pierced.[3] Moreover, even if Plaintiffs can prove such facts, piercing the veil would merely establish a debt owed by Defendant to Plaintiffs and permit them to enforce against the Defendant their judgment against the Corporation. They may assert such a right outside the underlying Chapter 7 case only if and to the extent the court determines that Defendant is indebted to Plaintiffs[4] and that the debt is nondischargeable under 11 U.S.C. § 523(a)(2)(A) or (4). Piercing the corporate veil is not itself an alternative basis for a determination of nondischargeability.

SUMMARY AND CONCLUSION

The court concludes that there remain genuine issues as to several facts pertinent to Plaintiffs' claim under 11 U.S.C. § 523(a)(2)(A), including (i) whether Defendant made the misrepresentations set forth in reports submitted by the Corporation to the Funds and made the decision not to submit additional reports,

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[3] Plaintiffs assert that they may also recover from Defendant because he is the Corporation's *alter ego*. However, piercing the corporate veil is merely the other side of the *alter ego* coin: if the veil may be pierced, the corporation and the other entity are *alter ego*s of each other. *See Belvedere Condominium Unit Homeowner's Ass'n*, 67 Ohio St. 3d at 288 (required showing that corporation is "so dominated by the shareholder that it has no separate mind, will, or existence of its own" "is a concise statement of the alter ego doctrine; to succeed [in piercing the corporate veil] a plaintiff must show that the individual and the corporation are fundamentally indistinguishable"). Accordingly, the *alter ego* theory is not a separate ground for holding Defendant liable for the Corporation's debt.

[4] An alternative basis for Defendant's individual liability for the corporate debt may be established under Ohio law if Plaintiffs prove he personally committed fraud while acting within the scope of his employment. *Yo-Can, Inc. v. Yogurt Exch., Inc.*, 149 Ohio App.3d 513, 525-27 (2002).

(ii) whether Plaintiffs relied on the reports or lack of reports and whether such reliance is justifiable, and (iii) the extent of the damage suffered by Plaintiffs as a result of any such reliance. While certain of these facts appear to be evidenced by Defendant's deposition testimony, the transcript of the deposition is not properly before the court; while evidence of other facts (such as the reports that the Corporation submitted to Plaintiffs) is probably readily available, it has not been submitted in support of the Motion.

The court further concludes that there are genuine issues of material fact with respect to Plaintiffs' claim under 11 U.S.C. § 523(a)(4), including whether the unpaid employee benefit contributions constitute property held in trust for the Funds or the Union members so that Defendant

causing the Corporation not to remit the funds may constitute the defalcation of trust funds or the embezzlement or larceny of Plaintiffs' property.

THEREFORE, for the foregoing reasons,

IT IS ORDERED that Plaintiff's Motion for Summary Judgment [Doc. #27] is denied.

Mary Ann Whipple
United States Bankruptcy Judge