UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

In re:	)	Case No. 05-93394
	)	
DENISON D. WILLIAMSON,	)	Chapter 7
Debtor.	)	
	)	
MERCHANTS EXPRESS MONEY ORDER COMPANY,	)	Adversary Proceeding No. 05-1656
Plaintiff,	)	Judge Arthur I. Harris
	)	
v.	)	
	)	
DENISON D. WILLIAMSON,	)	
Defendant.	)	

MEMORANDUM OF OPINION

Before the Court is plaintiff Merchants Express Money Order Company's ("MEMO") unopposed motion for summary judgment. MEMO has an approximately $13,000 judgment against the debtor-defendant that arises from a business arrangement wherein debtor, through his grocery store, sold money orders for MEMO but then failed to remit the proceeds and other fees as required. MEMO asks this Court for additional monetary relief and a determination that the entire debt is nondischargeable under 11 U.S.C. § 523(a)(4). For the reasons that follow, MEMO's motion for summary judgment is granted in part and denied in part. The Court finds that the existing money judgment is nondischargeable from "defalcation while acting in a fiduciary capacity," but MEMO's request for

additional monetary relief is denied on summary judgment and will be the subject of further proceedings only if the plaintiff notifies the Court in writing within the next twenty days that it wishes to pursue such proceedings.

JURISDICTION

Dischargeability determinations are core proceedings pursuant to 28 U.S.C. § 157(b)(2)(I). This Court has jurisdiction over core proceedings under 28 U.S.C. §§ 1334 and 157(a) and Local General Order No. 84, entered on July 16, 1984, by the United States District Court for the Northern District of Ohio.

FACTUAL AND PROCEDURAL BACKGROUND

On October 14, 2005, Denison Williamson filed a chapter 7 bankruptcy petition. On December 1, 2005, MEMO commenced this adversary proceeding. The adversary complaint alleges that Williamson, through his business C & O Grocery, sold money orders for MEMO but then did not remit the proceeds and other fees to MEMO as required. The complaint further states that MEMO obtained a state court judgment against Williamson for more than $13,000. MEMO's complaint asks for a determination that the debt arising from its arrangement with Williamson is nondischargeable under 11 U.S.C. § 523(a)(2) (fraud), (a)(4) (fiduciary defalcation or embezzlement), and/or (a)(6) (conversion).

MEMO submitted two documents in support of its complaint: a document entitled "Personal Money Order Trust Agreement" (money order agreement) and a document entitled "Personal Indemnity and Guaranty" (indemnity and guaranty agreement). Both documents are dated January 2, 2002. The money order agreement is signed by a representative of MEMO and by three trustees – C & O Grocery with Williamson signing as the owner, Williamson individually, and another individual not relevant to this proceeding. Pursuant to the money order agreement, the trustees were appointed as special agents of MEMO "for the sale of money orders issued by MEMO," and the trustees were to "receive and hold in trust for MEMO all blank money orders delivered . . . by MEMO and all money received . . . from the sale of money orders, including . . . the money order fees established by MEMO." The trustees were further required to "hold the trust funds separate and apart from other funds," and the money orders or proceeds were not to be used for the trustees' own purposes. In addition to his individual signature on the money order agreement, Williamson signed the indemnity and guarantee agreement, guaranteeing full performance of the money order agreement and "prompt and punctual payment of all amounts becoming due."

MEMO's complaint alleges that Williamson failed to pay the monies due under either the money order agreement or his indemnity and guarantee agreement.

MEMO also submitted a judgment entry from the Common Pleas Court of Cuyahoga County, Ohio, dated March 30, 2005. The Common Pleas Court entered judgment for MEMO and against Williamson for "$13,282.29 and interest at 18% from the 5th day of December, 2004, and $87.00 costs of suit."

On April 19, 2006, MEMO filed its motion for summary judgment and attached an affidavit from its credit coordinator, David Bush. The affidavit states that Williamson had been in default of the terms of both the money order agreement and the indemnity and guarantee agreement since on or before December 5, 2004. The affidavit also states that Williamson now owes $19,655.82, including more than $3,000 in interest since December 2004 and more than $3,000 in legal fees and costs of collection. MEMO's motion for summary judgment asks for a judgment in the amount of "$19,655.82 plus interest due at the contractual rate of 18% from April 18, 2006" and for a determination that this debt is nondischargeable under § 523(a)(4) as debt arising out of fiduciary defalcation and/or embezzlement.

Williamson filed an Answer generally denying all the allegations in the complaint, but he did not file an opposition to MEMO's motion for summary judgment. Nor did he submit evidence in opposition. The Court is ready to rule.

SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c), as made applicable to bankruptcy proceedings by Bankruptcy Rule 7056, provides that a court shall render summary judgment:

> [I]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The party moving the court for summary judgment bears the burden of showing that "there is no genuine issue as to any material fact and that [the moving party] is entitled to judgment as a matter of law." *Jones v. Union County*, 296 F.3d 417, 423 (6th Cir. 2002). *See generally Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party meets that burden, the nonmoving party "must identify specific facts supported by affidavits, or by depositions, answers to interrogatories, and admissions on file that show there is a genuine issue for trial." *Hall v. Tollett*, 128 F.3d 418, 422 (6th Cir. 1997); *see, e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) ("The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff."). In determining the existence or nonexistence of a material fact, a court will view the

evidence in a light most favorable to the nonmoving party. *Tennessee Dep't of Mental Health & Mental Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996).

Absent such evidence from the nonmoving party in a motion for summary judgment, the Court need not excavate the entire record to determine if any of the available evidence could be construed in such a light. *See In re Morris*, 260 F.3d 654, 665 (6th Cir. 2001) (holding that the "trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact"); *Barnhart v. Pickrel, Schaeffer & Ebeling Co.*, 12 F.3d 1382, 1389 (6th Cir. 1993). "[S]ummary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Civ. P. 56.

DISCUSSION

Section 523 of the Bankruptcy Code provides in pertinent part:

> (a) A discharge under section 727 . . . of this title does not discharge an individual from any debt–
>
> . . . .
>
> (4) for . . . defalcation while acting in a fiduciary capacity, embezzlement . . . .

A defalcation under § 523(a)(4) requires proof by a preponderance of the evidence of the following: "(1) a pre-existing fiduciary relationship; (2) breach of that fiduciary relationship; and (3) a resulting loss." *In re Blaszak*, 397 F.3d 386, 390

(6th Cir. 2005) (citing *In re Garver*, 116 F.3d 176, 178-79 (6th Cir. 1997)). "[T]he term 'fiduciary relationship,' for purposes of § 523(a)(4), is determined by federal, not state, law" and is construed "more narrowly than the term is used in other circumstances" such that "an agent-principal relationship standing alone is insufficient to establish the type of fiduciary duty contemplated by § 523." *Id.* at 390-91. The fiduciary relationship element of defalcation in § 523 is only met where the Court finds "an express or technical trust relationship arising from placement of a specific res in the hands of the debtor. Defalcation then occurs through the misappropriation or failure to properly account for those trust funds." *In re Garver*, 116 F.3d at 180. In order to establish the existence of an express or technical trust, the creditor must show: "(1) an intent to create a trust; (2) a trustee; (3) a trust *res*; and (4) a definite beneficiary." *In re Blaszak*, 397 F.3d at 391.

Here, the money order agreement between MEMO and Williamson is an express trust agreement. The terms of the agreement require Williamson to hold the money orders, the money order proceeds, and the money order fees "in trust," to hold these "trust funds" separate and apart from any other funds, to promptly pay over these funds to MEMO, and to refrain from using the "trust funds" for Williamson's own purposes. The money order agreement is evidence of the parties' requisite intent to create a trust, Williamson was the trustee, the money

orders, their proceeds, and the fees were the *res*, and MEMO was the beneficiary. *See In re Davis*, 262 B.R. 673, 682-85 (Bankr. E.D. Va. 2001) (finding express trust agreement regarding sale of money orders was breached and debt is therefore nondischargeable); *In re Niven*, 32 B.R. 354 (Bankr. Okl. 1983) (same). *Cf. In re Washington*, 105 B.R. 947 (Bankr. E.D. Cal. 1989) (finding no express trust relationship regarding proceeds of money orders because owner of the money orders allowed seller to commingle and use the proceeds in their business). The express trust or fiduciary relationship was breached when Williamson failed to remit the proceeds from the money orders he sold on behalf of MEMO. The resulting loss from the breach includes any unreturned money orders, any unpaid money order proceeds or fees, contractual interest, and costs of collection. Those damages were presumably liquidated with the state court judgment entered on March 30, 2005. Therefore, the Court finds that the state court judgment arising from Williamson's money order arrangement with MEMO is nondischargeable under 11 U.S.C. § 523(a)(4) as debt from "defalcation while acting in a fiduciary capacity." The Court does not reach the embezzlement issue.

MEMO also asks the Court to enter a money judgment for the amount of debt that is nondischargeable. MEMO already has a state court judgment for "$13,282.29 and interest at 18% from the 5th day of December, 2004, and $87.00

costs of suit," but now MEMO is asking for a money judgment for "$19,655.82 plus interest due at the contractual rate of 18% from April 18, 2006." This new request includes more than $3,000 in additional interest and more than $3,000 in legal fees and costs of collection.

Under the doctrine of claim preclusion, MEMO's request for attorney fees and additional costs may have merged into the state court judgment, at least to the extent these fees "were or could have been litigated" in the state court. *See In re Fordu*, 201 F.3d 693, 703-04 (6th Cir. 1999) (listing four elements of claim preclusion in Ohio including requirement that claims "were or could have been litigated in the first action"); *see also Brown v. Felsen*, 442 U.S. 127, 131 (1979) (finding that claim preclusion applies in bankruptcy to bar claims that should have been brought in state court action but does not bar litigation of issues related to dischargeability); *Grava v. Parkman Twp.*, 73 Ohio St. 3d 379, 382, 653 N.E. 226, 229 (1995). Accordingly, MEMO's request for additional monetary relief beyond the existing state court judgment is denied on summary judgment and will be the subject of further proceedings only if the plaintiff notifies the Court in writing within the next twenty days that it wishes to pursue such proceedings.

CONCLUSION

For the foregoing reasons, plaintiff's motion for summary judgment is granted in part and denied in part. The debt arising from debtor-defendant's money order arrangement with plaintiff, as liquidated by a prior state court judgment, is nondischargeable under 11 U.S.C. § 523(a)(4) as debt from a "defalcation while acting in a fiduciary capacity." MEMO's request for additional monetary relief is denied on summary judgment and will be the subject of further proceedings only if the plaintiff notifies the Court in writing within the next twenty days that it wishes to pursue such proceedings.

IT IS SO ORDERED.

/s/ Arthur I. Harris 8/11/2006
Arthur I. Harris
United States Bankruptcy Judge