Dated: October 25 2006

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 05-74843
	)	
John A. DeMuth,	)	Chapter 7
	)	
Debtor.	)	Adv. Pro. No. 06-3119
	)	
John Moon and Susan Moon,	)	Hon. Mary Ann Whipple
	)	
Plaintiffs,	)	
v.	)	
	)	
John A. DeMuth,	)	
	)	
Defendant.	)	

MEMORANDUM OF DECISION AND ORDER RE CROSS MOTIONS FOR SUMMARY JUDGMENT

At all times relevant to this adversary proceeding, Defendant John A. DeMuth ("Defendant" or "DeMuth") was an attorney licensed to practice law in the State of Ohio. He represented Plaintiffs John Moon and Susan Moon (collectively "Plaintiffs" or the "Moons") in a personal injury action he commenced on their behalf in the Franklin County, Ohio Court of Common Pleas. Judgment was entered against the Moons on their claims in that action after Defendant failed to oppose a summary judgment motion within

the time required by the local rules of court. There is no dispute that the Moons are blameless victims of Defendant's legal malpractice. The question is whether they are also victims of fraud. Plaintiffs allege in their complaint that a debt owed to them by Defendant should be excepted from his discharge under 11 U.S.C. § 523(a)(2)(A) and (a)(4). This adversary proceeding is now before the court on the parties' cross motions for summary judgment. [Plaintiffs' Motion for Summary Judgment [Doc. #17]; Defendant's Motion for Summary Judgment [Doc. # 16]].

The court has jurisdiction over this adversary proceeding under 28 U.S.C. §1334(b) and the general order of reference entered in this district. Proceedings to determine dischargeability are core proceedings that the court may hear and decide. 28 U.S.C. § 157(b)(1) and (b)(2)(I). Having considered the motions and supporting materials, for the reasons that follow, Plaintiffs' motion will be denied and Defendant's motion will be granted in part and denied in part.

I. Summary Judgment Standard

This case is before the court upon the parties' cross-motions for summary judgment. Under Fed. R. Civ. P. 56, made applicable to this proceeding by Fed. R. Bankr. P. 7056, a party will prevail on a motion for summary judgment when "[t]he 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 judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c). In order to prevail, the movant must prove all elements of the cause of action or defense. *Taft Broadcasting Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991). Once that burden is met, however, the opposing party must set forth specific facts showing there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249-51 (1986); *60 Ivy St. Corp. v. Alexander,* 822 F.2d 1432*,* 1435 (6th Cir. 1987). Inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586-88 (1986).

In cases such as this, where the parties have filed cross-motions for summary judgment, the court must consider each motion separately on its merits, since each party, as a movant for summary judgment, bears the burden to establish both the nonexistence of genuine issues of material fact and that party's entitlement to judgment as a matter of law. *Lansing Dairy v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994); *Markowitz v. Campbell* (*In re Markowitz*), 190 F.3d 455, 463 n.6 (6th Cir. 1999). The fact that both parties simultaneously argue that there are no genuine factual issues does not in itself establish that a trial is unnecessary, and the fact that one party has failed to sustain its burden under Fed. R. Civ. P. 56 does not automatically entitle the opposing

party to summary judgment. *See* 10A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure: Civil 3d* § 2720 (1998).

Plaintiffs' Motion for Summary Judgment is supported by a copy of the state court personal injury complaint; a copy of the state court Judgement Entry Granting Summary Judgment in favor of the state court defendants; an affidavit of DeMuth filed in the state court action; a copy of Plaintiffs' Motion to Enforce Settlement Agreement and Request for Hearing filed in Plaintiffs' subsequent state court legal malpractice action against DeMuth, including the parties' written memorandum of understanding attached thereto; and DeMuth's deposition taken in this adversary proceeding. All of these documents are exhibits to Plaintiffs' Motion for Summary Judgment. [Doc. #17]. Defendant filed his opposition to Plaintiffs' motion [Doc. #20] and his own summary judgment motion [Doc. #16]. The parties' settlement agreement of the ensuing state court malpractice action is also attached to his motion as an exhibit. This document does not look the same as the document attached to Plaintiffs' motion as an exhibit. Apart from some handwritten numbers of no apparent significance in the lower right hand corner and some facsimile transmission information on Defendant's copy, the only difference is that a caption titled "Memorandum of Understanding Regarding Settlement" appears on the copy attached to Plaintiffs' motion; no such caption is on the copy attached to DeMuth's motion. The content of the two documents is otherwise the same. DeMuth separately submitted a copy of five pages of his deposition testimony from this adversary proceeding. [Doc. #21]. Although virtually none of the documents submitted in connection with the parties' motions were properly authenticated, *see*, *e.g.*, *United States v. Billheimer*, 197 F. Supp. 2d 1051, 1058 n.7 (S.D. Ohio 2002); *see also* Fed. R. Evid. 901-903, neither party has objected to the documents submitted by the other party, so the court will consider all such documents. *See Investors Credit Corp. v. Batie (In re Batie)*, 995 F.2d 85, 89 (6th Cir. 1993).

The foregoing documents are the only proper source of the facts in the record. Plaintiffs' unsigned, unsworn responses to DeMuth's written discovery requests have also been filed and are part of the record. [Doc. #14]. But because they are unsigned and unsworn, the court is disregarding them. Both lawyers also assert facts in their memoranda of law that are not properly supported as required by Rule 56. Examples of such facts include: (1) Plaintiffs filed a motion for partial summary judgment in the legal malpractice action on March 14, 2002 [Doc. #17, unnumbered p.3]; (2) Defendant failed to inform Plaintiffs at any time during his representation that he did not carry malpractice insurance [*Id.*, unnumbered pp. 4-5, 8]; (3) Defendant failed to disclose to Plaintiffs that he was unfamiliar with the Franklin County Common Pleas

Court local rules of practice [*Id.*, unnumbered p. 8]; (4) Defendant failed to disclose to Plaintiffs that personal injury only comprised a small percentage of his practice [*Id.*]; (5) on November 12, 2003, a state court entered judgment deciding Plaintiffs' motion to enforce the settlement agreement, on terms that purport to be partially set forth [Doc. #20, unnumbered p. 3]; and (6) DeMuth acquired no additional life insurance [*Id.*, unnumbered p. 4, n.2]. The court is disregarding these unsupported averments.

II. U.S.C. § 523(a)(2)(A)

Under § 523(a)(2)(A), a debt is excepted from discharge to the extent it was obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." In order to except a debt from discharge under this section due to false pretense or false representation, a plaintiff must prove the following elements by a preponderance of the evidence: (1) the debtor obtained money or services through a material misrepresentation, either express or implied, 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). A debtor's intent to defraud a creditor is measured by a subjective standard and must be ascertained by the totality of the circumstances of the case at hand. *Id.* at 281-82. "If there is room for an inference of honest intent, the question of nondischargeability must be resolved in favor of the debtor." *ITT Fin'l Servs. v. Szczepanski (In re Szczepanski),* 139 B.R. 842, 844 (Bankr. N.D.Ohio 1991).

For purposes of § 523(a)(2)(A), "false representations and false pretenses encompass statements that falsely purport to depict current or past facts." *Peoples Sec. Fin. Co., Inc. v. Todd (In re Todd)*, 34 B.R. 633, 635 (Bankr. W.D. Ky. 1983). "'False pretense' involves implied misrepresentation or conduct intended to create and foster a false impression, as distinguished from a 'false representation' which is an express misrepresentation." *Ozburn v. Moore (In re Moore)*, 277 B.R. 141, 148 (Bankr. M.D. Ga. 2002)(quoting *Sears Roebuck & Co. v. Faulk (In re Faulk)*, 69 B.R. 743, 750 (Bankr. N.D. Ind. 1986)).

In addition, § 523(a)(2)(A) also addresses "actual fraud" as a concept broader than misrepresentation. *See McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000); *Mellon Bank, N.A. v. Vitanovich (In re Vitanovich)*, 259 B.R. 873 (B.A.P. 6th Cir. 2001). "Actual fraud has been defined as intentional fraud, consisting in deception intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed. It requires intent to deceive or defraud." *Vitanovich*,

259 B.R. at 877 (quoting *Gerad v.Cole (In re Cole)*, 164 B.R. 951, 953 (Bankr. N.D. Ohio 1993)). A debtor's intent to defraud a creditor under § 523(a)(2)(A) is measured by a subjective standard and must be ascertained by the totality of the circumstances of the case at hand. *Id*.; *Rembert*, 141 F.3d at 281-82.

A finding of fraudulent intent may be made on the basis of circumstantial evidence or from the debtor's "course of conduct," as direct proof of intent will rarely be available. *Hamo v. Wilson (In re Hamo),* 233 B.R. 718, 724 (B.A.P. 6th Cir. 1999). However, where a debtor's subjective intent is at issue, summary judgment is generally inappropriate unless all reasonable inferences defeat the claims of the opposing party. *Sicherman v. Rivera (In re Rivera)*, 338 B.R. 318, 327 (Bankr. N.D. Ohio 2006) (citing *Hoover v. Radabaugh*, 307 F.3d 460, 467 (6th Cir.2002) ("When the defendants' intent is at issue, summary judgment is particularly inappropriate") and *Gertsch v. Johnson & Johnson Finance Corp. (In re Gertsch)*, 237 B.R. 160, 165 (B.A.P. 9th Cir. 1999) ("Where intent is at issue, summary judgment is seldom granted, however, summary judgment is appropriate if all reasonable inferences defeat the claims of one side")).

A. Plaintiffs' Motion for Summary Judgment

There are two points in time at which Plaintiffs' averments must be analyzed, as the parties entered into two separate contracts, one for DeMuth to represent Plaintiffs in the Franklin County Common Pleas Court personal injury action and one to settle the state court malpractice action. While a mere breach of contract will not support a finding of fraud, "any debtor who does not intend to perform a contract from its inception has knowingly made a false representation." *Stifter v. Orsine (In re Orsine)*, 254 B.R. 184, 188 (Bankr. N.D. Ohio 2000). Moreover, a failure to disclose material facts, where there is a duty to disclose, may also constitute a misrepresentation under § 523(a)(2)(A). *See Citibank (South Dakota), N.A. v. Eashai (In re Eashai),* 87 F.3d 1082, 1089 (9th Cir.1996)*; Rowe v. Steinberg (In re Steinberg)*, 270 B.R. 831, 835 (Bankr. W.D. Mich 2001).

As to the first transaction between the parties, Plaintiffs argue that DeMuth failed to disclose material facts to them. These facts are that he did not carry malpractice insurance, that he was not familiar with the Franklin County Rules of Practice and that personal injury was a small percentage of his practice. All of these facts are established in the record, through DeMuth's affidavit filed in the state court personal injury action and his deposition. But assuming that DeMuth had a duty to disclose them, which has not been argued, the summary judgment record does not actually demonstrate that he omitted disclosing these facts to Plaintiffs. Moreover, there is no evidence of justifiable reliance by Plaintiffs or evidence relevant to that time period from which fraudulent intent could be discerned. The record contains nothing from Plaintiffs' perspective as to how or why they came to engage DeMuth in 1997. DeMuth's deposition

contains uncontradicted testimony showing that the parties had prior professional contact, from which it could be reasonably inferred that was the basis for Plaintiffs' decision to engage him. That contact is relevant to both materiality of the alleged omissions and justifiable reliance. Nor is there any evidence as to the terms of the engagement. The court can only assume it was not pro bono, as there is nothing to actually demonstrate what money or property DeMuth obtained or sought to obtain through his allegedly fraudulent omissions. Lastly, there is insufficient evidence in the record from which the court could find that DeMuth intended to deceive Plaintiffs into hiring him to represent them. Plaintiffs point to DeMuth's failure to perform the malpractice settlement five years later and his actions in borrowing money against the equity in his home in March 2002 to buy additional property during the parties' settlement negotiations on the malpractice claim. This is insufficient evidence from which the court could find that DeMuth intended to defraud them in 1997, nor is there any evidence from which the court can connect the facts surrounding Plaintiffs' engagement of DeMuth to later events as part of a larger scheme of actual fraud, beyond misrepresentations, as contemplated by *Vitanovich.* Plaintiffs are not entitled to summary judgment in their favor as to their § 523(a)(2)(A) claim regarding the inception of the attorney client relationship.

As to the parties' settlement agreement, which was reduced to writing in May 2002, there are three possible theories of recovery under § 523(a)(2)(A) by which Plaintiffs were induced to give up their state court malpractice claims against DeMuth: first, that DeMuth did not intend in March 2002, when he orally agreed to the settlement, and May 2002, when he agreed in writing to the settlement, to perform the agreement; second, that DeMuth omitted disclosing material facts about his property in connection with the settlement negotiations; and third that DeMuth's actions in connection with the settlement constitute a larger scheme of actual fraud apart from any misrepresentations or omissions of material facts. At a minimum, as to all three of these theories there is a genuine issue of material fact as to DeMuth's intent. Viewing the evidence in a light most favorable to DeMuth, as the court must on summary judgment, the court could infer from the undisputed fact that he paid Plaintiffs $50,000 of the $250,000 settlement amount, the timing and circumstances of which is somewhat unclear, that he intended to perform that contract at the time he entered into it and that his acquisition of additional vacant land surrounding his home using the equity therein did not hurt Plaintiffs because he eventually used that additional property as a source of funds to pay them in part. On the other hand, DeMuth admits that he never gave Plaintiffs a mortgage on any of the property he owned to secure the settlement obligation as provided in the settlement agreement. That fact tends to show that he did not intend to perform the settlement agreement at the time he entered into it and is one from which fraudulent intent might be inferred under the circumstances.

Because of genuine issues of material fact as to DeMuth's intent in acting and omitting to act as he did, Plaintiffs are not entitled to summary judgment in their favor on their § 523(a)(2)(A) claim regarding the settlement agreement.

B. Defendant's Motion for Summary Judgment

Defendant has also moved for summary judgment. Since Plaintiffs have the burden of proof on their claims, Defendant's obligation on summary judgment is to point out the absence of evidence in the record to support any element of Plaintiffs' claim or to demonstrate that there are no genuine issues of material fact and that he is entitled to judgment in his favor as a matter of law. Plaintiffs must then respond showing the existence of evidence to support the identified elements of their claim and genuine issues of material fact thereon. *Celotex Corp*., 477 U.S. at 323-25 (summary judgment appropriate against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial).

As to Plaintiffs' claim under § 523(a)(2)(A) respecting their engagement of DeMuth to represent them in the personal injury action, Defendant points to his own testimony acknowledging his indisputable negligence in the handling of the Moons' significant personal injury claims and the lack of evidence of fraud on his part. He has met his burden of production for purposes of moving for summary judgment. The burden is therefore upon Plaintiffs to present evidence as to each element of their claim. *Id.* For the reasons explained above in addressing Plaintiffs' motion for summary judgment, Plaintiffs have not demonstrated evidentiary support for each element of their claim under § 523(a)(2)(A) respecting their engagement of DeMuth to represent them. DeMuth is entitled to partial summary judgment in his favor on the § 523(a)(2)(A) claim.

As to Plaintiffs' claim under § 523(a)(2)(A) respecting the settlement agreement, Defendant asserts that issue preclusion prevents them from arguing that he was obligated to mortgage his real property to secure his obligation to pay under the agreement. In addition to language of issue preclusion, Defendant loosely uses language of estoppel as to both the mortgage issue and DeMuth's use of the equity in his home to acquire unimproved real estate around his residence instead of to pay Plaintiffs. The nature of this legal theory as a defense as a matter of law is unclear: some form of equitable estoppel (person cannot change positions after detrimental reliance by an opponent on a prior inconsistent position) or some form of judicial estoppel (party who has gained an advantage from a court by taking one position cannot gain advantage by taking an inconsistent position in circumstances that might cast doubt on the integrity of the judicial process). Issue preclusion, on the other hand, stems from the mere existence of a valid and final judgment

and ordinarily is not concerned with individual conduct. Restatement (Second) of Judgments, ch.1, introduction, d (1982); *see also K-Mart Corp. v. Intercraft Co. (In re K-Mart Corp.)*, 310 B.R. 107 (Bankr. N. D. Ill. 2004). However, while the lack of clarity of DeMuth's legal theory is a problem, the court need not delve into it further. There is no factual record to support such a theory, whether it is ultimately viable or not. Plaintiffs have provided a copy of their motion to enforce the settlement agreement. [Doc. #17, Ex. E]. Defendant has not provided the court a copy of the judgment in issue; the portion that purports to be quoted in Defendant's motion papers is incomplete; there is no docket sheet from the state court malpractice action; and the nature of the proceedings on the motion to enforce the settlement agreement in the state court are wholly unknown from the standpoint of determining what was actually litigated as a predicate to application of issue preclusion.[1] DeMuth has failed to demonstrate an entitlement to summary judgment as a matter of law on Plaintiffs' fraud claim based on the settlement agreement.

III. 11 U.S.C. § 523(a)(4)

Section 523(a)(4) provides as follows:

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

11 U.S.C. § 523(a)(4). Plaintiffs have the burden of proof on their § 523(a)(4) claim by a preponderance of the evidence. *R.E. America, Inc. v. Garver (In re Garver)*, 116 F.3d 176, 178 (6th Cir. 1997).

The term "fiduciary capacity" for purposes of § 523(a)(4) is determined by federal, not state, law. *Commonwealth Land Title Co. v. Blaszak (In re Blaszak)*, 397 F.3d 386, 390 (6th Cir. 2005). The Sixth Circuit has adopted a narrow interpretation of "fiduciary" as used in § 523(a)(4). *Garver,* 116 F.3d at 178. In order to trigger the fraud or defalcation provision in that statute, a debtor must hold funds in a trust for the benefit of a third party. *Id.* at 179. Furthermore, the types of trusts that will trigger the fraud or defalcation provision of § 523(a)(4) are "limited to only those situations involving an express or technical trust relationship arising from placement of a specific res in the hands of the debtor." *Id.* at 180.

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[1]Even the date of the alleged judgment is unclear from the record. Plaintiffs' motion to enforce the agreement was served on October 10, 2002. [Doc. # 17, Ex. E]. Defendant's lawyer asserts in his memorandum in response to Plaintiffs' motion for summary judgment that the Judgment Entry was entered on November 12, 2003. [Doc. # 20, unnumbered p 3]. The timing could be relevant to DeMuth's intent to perform the agreement at its inception.

Plaintiffs also argue that the debts at issue are nondischargeable under the embezzlement and larceny provisions of § 523(a)(4) for which there is no requirement to prove fiduciary capacity. *See Peavey Electronics Corp. v. Sinchak (In re Sinchak)*, 109 B.R. 273, 276 (Bankr. N.D. Ohio 1990) (stating the element of "fiduciary capacity" in § 523(a)(4) refers only to "fraud or defalcations" and need not be present where embezzlement is the exception relied upon). Embezzlement and larceny are also defined and determined according to federal law. *Graffice v. Grim (In re Grim)*, 293 B.R. 156, 165-66 (Bankr. N.D. Ohio 2003). The Sixth Circuit defines embezzlement for purposes of § 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." *Brady v. McAllister (In re Brady)*, 101 F.3d 1165, 1172-73 (6th Cir. 1996). Proof of embezzlement requires the establishment of three elements: (1) the property was rightfully in the possession of a nonowner; (2) the nonowner appropriated the property to a use other than that for which it was entrusted; and (3) circumstances indicating fraud." *Jones v. Hall (In re Hall*), 295 B.R. 877, 882 (Bankr. W.D. Ark. 2003); *TransAmerica Comm. Fin. Corp. v. Littleton (In re Littleton)*, 942 F.2d 551, 555 (9th Cir.1991); *see also Brady*, 101 F.3d at 1173. Larceny is defined as "the fraudulent and wrongful taking and carrying away of the property of another with intent to convert such property to the taker's use without the consent of the owner." *Schreibman v. Zanetti-Gierke (In re Zanetti-Gierke),* 212 B.R. 375, 381 (Bankr. D. Kan. 1997). Larceny differs from embezzlement in that it requires the original taking of the property to be unlawful. *Id.*

A. Plaintiffs' Motion for Summary Judgment

Plaintiffs' motion for summary judgment under § 523(a)(4) is based on two facts: that Demuth was their lawyer and thus a fiduciary and that he committed embezzlement or larceny, whether a fiduciary or not, by using the equity in his home to buy the land surrounding it instead of paying Plaintiffs.

The first argument is precluded by the Sixth Circuit's decision in *Garver.* The mere fact that DeMuth represented the Moons in the state court personal injury action is insufficient to make him a fiduciary within the meaning of § 523(a)(4) under the Sixth Circuit's narrow interpretation. The debtor and defendant in *Garver* was also a lawyer. While representing the plaintiff, the debtor entered into a business contract with it, which he breached. A state court jury found that he both breached a contract and committed legal malpractice. That was nevertheless insufficient to create the sort of fiduciary relationship required by the Sixth Circuit because there was no express or technical trust relationship involving property. Plaintiffs have likewise failed to point to any facts showing the creation of a technical or express trust relationship incident to DeMuth's representation of them in the state court personal injury action. "Absent

an express or technical trust, an attorney's legal malpractice, like all other types of professional malpractice, remains dischargeable under the Code." *Garver*, 116 F.3d at 179. Plaintiffs are not entitled to summary judgment on their § 523(a)(4) claim that DeMuth was acting as a fiduciary.

Plaintiffs' motion as to DeMuth's real estate transaction in 2002 is premised on these acts amounting to embezzlement or larceny. Viewing these facts in a light most favorable to DeMuth, there is no basis in fact upon which to find that he committed non-dischargeable embezzlement or larceny. Both arguments fail because DeMuth had an ownership interest in the residence that he mortgaged to buy the additional property. Plaintiffs do not and cannot make any showing that it was ever their property that was either initially misappropriated for an improper purpose (larceny) or entrusted to him and later misappropriated for an improper purpose (embezzlement). Plaintiffs' argument that it was "theirs" is premised entirely upon the theory that "he took funds that *should* rightly have belonged to plaintiffs for purposes of purchasing land." [Doc. #17, unnumbered p.6 (emphasis added)]. The problem is the qualifying word "should." While what DeMuth did with the equity in his residence is a relevant fact under Plaintiffs' § 523(a)(2)(A) claim on the settlement agreement, what he "should" have done with it does not make the home or the funds borrowed on it "Plaintiffs" property for purposes of § 523(a)(4) at the time he did it. As a general rule, "one cannot be convicted of stealing or embezzling one's own property." *Zanetti-Gierke,* 212 B.R. at 381 (finding that for purposes of § 523(a)(4), a partner and, thus, an owner, cannot steal or embezzle partnership property); *see Sides v. Futch (In re Futch)*, 265 B.R. 283, 288 (Bankr. M.D. Fla. 2001) (finding that as co-owner of the subject funds, the defendant could not be held to have embezzled her own property). Plaintiffs are not entitled to summary judgment on their § 523(a)(4) embezzlement or larceny claim.

B. Defendant's Motion for Summary Judgment

Defendant has also moved for summary judgment on Plaintiffs' § 523(a)(4) claim, pointing out the lack of evidence in the record to support any aspect of it. There is no dispute that DeMuth acted as Plaintiffs' lawyer in the state court personal injury action or that he borrowed money on the equity of his home in 2002 to buy unimproved land around it instead of to pay Plaintiffs under their settlement agreement. On the basis of the legal authorities and for the reasons discussed above, even viewing these undisputed facts in the light most beneficial to Plaintiffs and affording them all reasonable inferences from these undisputed facts , there is no basis upon which the court can conclude that Defendant either committed defalcation in a fiduciary capacity or committed larceny or embezzlement as to Plaintiffs' property. Defendant is entitled to summary judgment in his favor on Plaintiffs' claim under § 523(a)(4).

IV. Conclusion

Plaintiffs have not demonstrated their entitlement to summary judgment on their complaint under either § 523(a)(2)(A) or § 523(a)(4). Defendant is entitled to partial summary judgment in his favor, as to Plaintiffs' claim under § 523(a)(4) and as to Plaintiffs' claim under § 523(a)(2)(A) with respect to his engagement as Plaintiffs' lawyer in their state court personal injury action. Defendant's motion will be denied as to Plaintiff's claim under § 523(a)(2)(A) as to the settlement agreement for the state court malpractice action against him because there are genuine issues of material fact. The case will proceed to trial on that claim only.

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Summary Judgment [Doc. #17] be, and hereby is, **DENIED;** and

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment [Doc. #16] be, and hereby is, **GRANTED** in part and **DENIED** in part, with summary judgment to be entered in connection with final judgment in Defendant's favor on Plaintiffs' claim under § 523(a)(4) and on Plaintiffs' claim under § 523(a)(2)(A) as to his engagement as their lawyer, with the balance of the § 523(a)(2)(A) claim to proceed to trial.