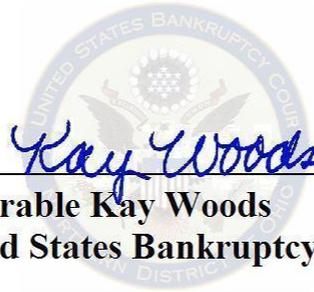


IT IS SO ORDERED.



Dated: October 26, 2006
02:25:34 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
PAUL AND MILLIE DOURM,	*	
	*	CASE NUMBER 04-40094
Debtors.	*	
	*	
*****	*	
	*	
ROBERT CASSIDY, III, Executor	*	ADVERSARY NUMBER 06-4103
of the Estate of Robert A.	*	
Cassidy,	*	
	*	
Plaintiff,	*	
	*	
vs.	*	
	*	
PAUL AND MILLIE DOURM,	*	
	*	THE HONORABLE KAY WOODS
Defendants.	*	
	*	

M E M O R A N D U M O P I N I O N

This matter is before the Court upon the Motion for Summary Judgment filed on behalf of Plaintiff Robert Cassidy III, Executor for the Estate of Robert A. Cassidy ("Plaintiff"), on August 15, 2006. Debtors/Defendants Paul and Millie Dourm ("Defendants") did not file a response brief or otherwise oppose the Motion for Summary Judgment.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

In his Complaint to Determine Dischargeability of Debts ("Adversary Complaint"), Plaintiff contends that a debt in the amount of \$47,000.00 in favor of Plaintiff and against Defendants ("Debt") resulting from a consent judgment ("Consent Judgment") entered by the Probate Division of the Court of Common Pleas, Mahoning County, Ohio ("Probate Court") for violation of R.C. § 2109.50 is nondischargeable pursuant to 11 U.S.C. §§ 523(a)(2)(A) (debts for actual fraud), 523(a)(4) (debts for fiduciary fraud or defalcation, embezzlement or larceny), and 523(a)(6) (debts for willful and malicious injury).

I. Facts

On October 23, 2002, Plaintiff, who was the sole heir at law of the Estate of Robert A. Cassidy, filed a Complaint for concealment of Assets pursuant to Ohio Revised Code § 2109.50 against Defendant Millie Dourm ("Ms. Dourm") in the Probate Court, Case No. 2002 CI 54. Plaintiff alleged that Ms. Dourm, who was at all times relevant to the Complaint the duly appointed Executrix of the Estate of Robert A. Cassidy, had "removed or concealed certain tangible and intangible personal property belonging to the Estate of said Decedent in fraud of the rights of the undersigned and creditors interested in said Estate." (Complaint in 02-CI-54 filled on October 23, 2002.)

On March 4, 2003, Plaintiff, who in the interim had been appointed as Administrator of the Estate of Robert A. Cassidy, filed a motion to amend his Complaint to include a claim against Defendant Paul Dourm ("Mr. Dourm") as well as additional John/Jane Doe

defendants, each of whom had allegedly "participated in the concealment of estate assets in concert and/or participation with [Ms. Dourm]." (Motion to Amend Complaint *Instanter* at p. 1-2.)

On January 13, 2004, Defendants filed their Chapter 13 petition in this Court. (See Case No. 04-40094.) On May 24, 2004, Defendants amended Schedule F of their Chapter 13 petition to list Plaintiff as the holder of an unsecured nonpriority claim in the amount of \$50,000.00 for a "probate claim for alleged conversion." On June 28, 2004, Plaintiff filed a Motion for Relief from Stay in order to proceed with the Probate Court matter. The Court entered an Agreed Order lifting the automatic stay on July 8, 2004.

On March 4, 2005, the Probate Court entered the Consent Judgment at issue in this case, which reads, in pertinent part:

[T]he parties agree and the Court finds, as follows:

1. Defendants are guilty of having concealed moneys and chattels of the estate.¹ Accordingly, pursuant to Ohio Revised Code § 2109.52, Judgment in favor of the Plaintiff and against the Defendant [sic] is hereby granted in the amount of \$47,000.00. Said Judgment includes all amounts which the court could order Defendants to pay Plaintiff pursuant to Ohio Revised Code § 2109.52, including but not limited to any penalties and costs of this proceeding.
2. This Judgment arises from "fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny," as defined in United States Bankruptcy Code § 523(a)(4). Accordingly, the Defendants stipulate that the Judgment will not be dischargeable in the event that either or both

¹Ohio Revised Code § 2109.50 reads, in pertinent part:

Upon complaint made to the probate court of the county having jurisdiction of the administration of a trust estate or of the county wherein a person resides against whom the complaint is made, by a person interested in such trust estate or by the creditor of a person interested in such trust estate against any person suspected of having concealed, embezzled, or conveyed away or of being or having been in the possession of any moneys, chattels, or choses in action of such estate, said court shall by citation, attachment or warrant, or, if circumstances require it, by warrant or attachment in the first instance, compel the person or persons so suspected to forthwith appear before it to be examined, on oath, touching the matter of the complaint.

Ohio Rev. Code Ann. § 2109.50 (West 2006)(emphasis added).

of them file a Chapter 7 proceeding under said Bankruptcy Code.

3. Defendants are presently the Debtors in a Chapter 13 Proceeding in the U.S. Bankruptcy Court, Northern District of Ohio, entitled *In re Paul Dourm and Millie Dourm, Debtors* (Case No. 04-40094). A certified copy of this Judgment Entry shall be filed in said bankruptcy case and shall be furnished to the Chapter 13 Trustee, Michael A. Gallo. Defendants agree forthwith to amend their Bankruptcy Schedules to add Plaintiff as an unsecured creditor with a liquidated debt of \$47,000.00.

(Consent Judgment at p. 1-2.)

On December 15, 2005, Defendants filed their Notice of Voluntary Conversion to Chapter 7 in Case No. 04-40094. This adversary proceeding, which was filed with leave of court on May 23, 2006, seeks a determination that the Debt of \$47,000.00, as set forth in the Consent Judgment, is not dischargeable.

II. STANDARD OF REVIEW

The procedure for granting summary judgment is found in FED. R. CIV. P. 56(c), made applicable to this proceeding through FED. R. BANKR. P. 7056, which provides in part that:

The judgment sought shall be rendered forthwith if 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.

FED. R. BANKR. P. 7056(c). Summary judgment is proper if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it could affect the determination of the underlying action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Tennessee Department of Mental Health & Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996). An issue of material fact is genuine if a rational fact-finder could find in favor of either party on the

issue. *Anderson*, 477 U.S. at 248-49; *SPC Plastics Corp. v. Griffith (In re Structurlite Plastics Corp.)*, 224 B.R. 27 (B.A.P. 6th Cir. 1998). Thus, summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

In a motion for summary judgment, the movant bears the initial burden to establish an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 322; *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195, 198 (B.A.P. 6th Cir. 1998). The burden then shifts to the nonmoving party to demonstrate the existence of a genuine dispute. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992). The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970).

However, in responding to a proper motion for summary judgment, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1999) (quoting *Anderson*, 477 U.S. at 257). That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *Street*, 886 F.2d at 1479.

In other words, there is no duty imposed upon the trial court to "search the entire record to establish that it is bereft of a genuine issue of material fact." *Id.* at 1480. The same is true even when - as is the case here - a motion for summary judgment is unopposed. *Cacevic v. City of Hazel Park*, 226 F.3d 483, 491 (6th Cir. 2000); see also *Guarino v. Brookfield Township Trustees*, 980

F.2d 399, 404 (6th Cir. 1992) ("Dozens of other panels, many speaking in unpublished prisoner appeals, have dealt with the circumstances of a dispositive motion in want of a response and have consistently assumed without specific comment that a court's reliance on the facts advanced by the movant is proper and sufficient.")

III. LAW

Section 523(a) provides several exceptions to the general rule that pre-petition debts are dischargeable under the Bankruptcy Code. Plaintiff bears the burden of proving by a preponderance of the evidence that a debt is excepted from discharge under section 523(a) of the Bankruptcy Code. *Meyers v. I.R.S. (In re Meyers)*, 196 F.3d 622, 624 (6th Cir. 1999) (citing *Grogan v. Garner*, 498 U.S. 279, 290-91, 111 S.Ct. 654, 661 (1991)). Exceptions to discharge are narrowly construed "to promote the central purpose of discharge: relief for the 'honest but unfortunate debtor.'" *Id.* (quoting *Grogan*, 498 U.S. at 286-87, 111 S.Ct. at 654).

Section 523(a)(4) of the Bankruptcy Code provides that "a discharge under [the Bankruptcy Code] does not discharge an individual debtor from any debt . . . for . . . defalcation while acting in a fiduciary capacity, embezzlement. . . ." 11 U.S.C. § 523(a)(4).

IV. ANALYSIS

Defendants conceded, and the Probate Court found, that the Consent Judgment was based on "'fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny,' as defined in United States Bankruptcy Code § 523(a)(4)." (Consent Judgment at p. 2.) As a consequence, Defendants have agreed that the Consent Judgment

establishes the elements of a cause of action under § 523(a)(4).² Defendants further stipulated that the Debt in the Consent Judgment would not be dischargeable "in the event that either or both of them file a Chapter 7 proceeding under said Bankruptcy Code." (*Id.*) The Probate Court adopted the agreement of the parties and the findings by the Court as Orders of the Probate Court. (Consent Judgment at p. 3.)

Defendants were debtors in a pending Chapter 13 case at the time that they entered into the Consent Judgment. Furthermore, Defendants were represented by counsel in the Probate Court and the

²The elements of a § 523(a)(4) claim based upon defalcation are: (1) a pre-existing fiduciary relationship; (2) breach of that fiduciary relationship; and (3) a resulting loss. *Commonwealth Land Title Co. V. Blaszak (In re Blaszak)*, 397 F.3d 386, 390 (6th Cir. 2005) (citing *R.E. America, Inc. v. Garver (In re Garver)*, 116 F.3d 176, 178-79 (6th Cir. 1997)). Defalcation need not be intentional. *Capitol Indemnity Corp. v. Interstate Agency Inc. (In re Interstate)*, 760 F.2d 121, 125 (6th Cir. 1985).

For purposes of section 523(a)(4), the term "fiduciary relationship," is defined by federal, not state, law. *Carlisle Cashway, Inc. v. Johnson (In re Johnson)*, 691 F.2d 249, 251 (6th Cir. 1982) ("The question of who is a fiduciary for purposes of section 17(a)(4) [the predecessor section to § 523(a)(4)] is one of federal law, although state law is important in determining when a trust relationship exists.").

The term "fiduciary capacity" in the defalcation provision is defined more narrowly than the term is used in other circumstances. *In re Blaszak*, 397 F.3d at 391. The Sixth Circuit Court of Appeals has declined to apply § 523(a)(4) to trustees who simply fail to meet an obligation under a common law fiduciary relationship. *Id.* at 178-79. To satisfy § 523(a)(4) in the context of a defalcation, the debtor must hold funds in trust for a third party pursuant to an express or technical trust. *In re Blaszak*, 397 F.3d at 391 (citing *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 333, 55 S.Ct. 151, 79 L.Ed. 393 (1934)). Four requirements are necessary to establish the existence of an express or technical trust: (1) an intent to create a trust; (2) a trustee; (3) a trust res; and (4) a definite beneficiary. *Graffice v. Grim (In re Grim)*, 293 B.R. 156, 166 (Bankr. N.D. Ohio 2003).

A fiduciary relationship, however, is not required to prove embezzlement or larceny in 11 U.S.C. 523(a)(4). *Goodmar, Inc. v. Hamilton (In re Hamilton)*, 306 B.R. 575, 582 (Bankr. W.D. Ky. 2004). "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.'" *Brady v. McAllister (In re Brady)*, 101 F.3d 1165, 1172-73 (6th Cir. 1996). "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 indicate fraud." *Id.* at 1173.

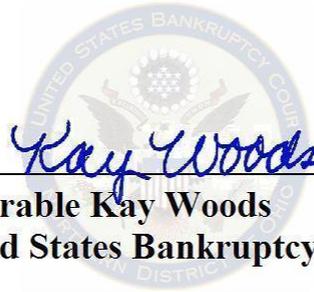
Larceny is defined as "the fraudulent and wrongful taking and carrying away of the property of another with intent to convert such property to the taker's use without the consent of the owner." *In re Grim*, 293 B.R. at 166 n. 3. "Larceny differs from embezzlement in that larceny requires that the original taking of the property be unlawful, whereas with embezzlement the initial taking of the property is lawful but the subsequent possession becomes unlawful." 9D Am. Jur.2d *Bankruptcy* § 3634 (West 2006).

Bankruptcy Court. As a consequence, Defendants are presumed to have been fully informed as to the effect of their stipulations. Defendants' decision to convert their Chapter 13 case to a Chapter 7 case on December 15, 2005 caused the provision in the Consent Judgment concerning the nondischargeable nature of the Debt to become operable. Therefore, based upon the agreement of the parties in the Consent Judgment, and as ordered by the Probate Court, the Debt is nondischargeable pursuant to 11 U.S.C. § 523(a)(4).

An appropriate order will follow.

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IT IS SO ORDERED.



Dated: October 26, 2006
02:25:34 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
PAUL AND MILLIE DOURM,	*	
	*	CASE NUMBER 04-40094
Debtors.	*	
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ROBERT CASSIDY, III, Executor	*	ADVERSARY NUMBER 06-4103
of the Estate of Robert A.	*	
Cassidy,	*	
	*	
Plaintiff,	*	
	*	
vs.	*	
	*	
PAUL AND MILLIE DOURM,	*	
	*	THE HONORABLE KAY WOODS
Defendants.	*	
	*	

ORDER

For the reasons set forth in this Court's Memorandum Opinion entered this date, Plaintiff's Motion for Summary Judgment is granted. The Debt of \$47,000.00 memorialized in the Consent Judgment is nondischargeable pursuant to 11 U.S.C. §§ 523(a)(4).

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