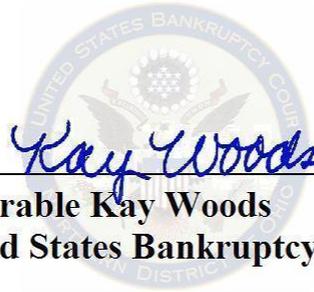


IT IS SO ORDERED.



Dated: February 16, 2007
10:37:33 AM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

PHILLIP W. COURTNEY
AND JANICE E. COURTNEY

Debtors.

LABATE CHRYSLER, JEEP, DODGE,
INC., et al.,

Plaintiffs,

vs.

PHILLIP W. COURTNEY, et al.,

Defendants.

CASE NUMBER 05-45085

ADVERSARY NUMBER 05-4268

THE HONORABLE KAY WOODS

MEMORANDUM OPINION
(NOT INTENDED FOR NATIONAL PUBLICATION)

The following opinion is not intended for national publication and carries limited precedential value. The availability of this opinion by any source other than www.ohnb.uscourts.gov is not the result of direct submission by this Court. The opinion is

available for electronic citation at www.ohnb.uscourts.gov pursuant to the E-Government Act of 2002 (Pub. L. No. 107-347).

This matter is before the Court upon the Motion to Dismiss filed on behalf of Debtors/Defendants, Phillip W. Courtney and Janice E. Courtney ("Debtors") on December 9, 2006. Plaintiffs failed to respond to the Motion to Dismiss.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. 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). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

In their Complaint, Plaintiffs Labate Chrysler, Jeep, Dodge, Inc. ("Labate Chrysler"), Labate Real Estate, Ltd. ("Labate Real Estate"), Steven E. Labate, and Rebecca Labate ("Mr. and Mrs. Labate") allege that Debtors made material misrepresentations regarding the financial condition of a corporation operating an automobile dealership (Count I), as well as misrepresentations regarding the condition of certain real property upon which the dealership was situated (Count II) with the intent of misleading Mr. and Mrs. Labate during sale negotiations.

As a consequence, Plaintiffs assert that the debts which resulted from the alleged fraud are nondischargeable pursuant to the exceptions to discharge enumerated in 11 U.S.C. §§ 523(a)(2)(debts for fraud), (a)(4)(debts for fraud or defalcation by a fiduciary, larceny, or embezzlement), and/or (a)(6)(debts for willful and malicious injury).

In their Motion to Dismiss, Debtors argue that Plaintiffs' Complaint fails to state a cause of action upon which relief may be granted because it is devoid of several essential elements necessary to establish that their claims are nondischargeable. Specifically, Plaintiffs fail to allege any injury or damage, let alone the existence of a "debt," as that term is defined by the Bankruptcy Code.

I. Standard for Review

A party may bring a motion to dismiss for failure to state a claim pursuant to FED. R. CIV. P. 12(b)(6) to test whether a cognizable claim has been pled in the complaint. If a plaintiff fails to state a cognizable claim, the court can dismiss the complaint.

In determining whether to grant a motion to dismiss, the court must analyze the complaint. To withstand dismissal, the complaint must provide: (i) a plain and clear statement of the claim that shows the plaintiff is entitled to relief; (ii) the defendant with notice of the claim; and (iii) the grounds upon which the claim rests. See FED. R. CIV. P. 8(a); *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

"The complaint need not specify all the particularities of the claim, and if the complaint is merely vague or ambiguous, a motion under FED. R. CIV. P. 12(e) for a more definite statement is the proper avenue rather than under FED. R. CIV. P. 12(b)(6)." *Aldridge v. United States*, 282 F. Supp. 2d 802, 803 (W.D. Tenn. 2003) (citing 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1356 (2d ed. 1990)).

FED. R. CIV. P. 12(b)(6), applicable to this case through FED. R. BANKR. P. 7012, requires that a complaint be dismissed for failure to state a claim if it appears beyond doubt that the plaintiff cannot prove a set of facts to support a claim that would entitle the plaintiff to relief. *Conley*, 355 U.S. at 45-46. In determining the sufficiency of a complaint, the court must construe the complaint in the light most favorable to the plaintiff, accept the allegations set forth as true, and resolve any ambiguities in favor of the plaintiff. *Jackson v. Richards Med. Co.*, 961 F.2d 575, 577-78 (6th Cir. 1992); *Aldridge*, 282 F. Supp. 2d. at 803.

Thus, in evaluating a 12(b)(6) motion, the court should construe the complaint very liberally. *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976). However, the court is not required to accept "sweeping unwarranted averments of fact," *Official Committee of Unsecured Creditors v. Austin Financial Services, Inc. (In re KDI Holdings, Inc.)*, 277 B.R. 493, 502 (Bankr. S.D. N.Y. 1999) (quoting *Haynesworth v. Miller*, 820 F.2d 1245, 1254 (D.C. Cir. 1987)), or "conclusions of law or unwarranted deduction." *KDI Holdings Inc.*, 277 B.R. at 502 (quoting *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 771 (2d Cir. 1994)); see also *Lewis v. ABC Bus. Servs., Inc.*, 135 F.3d 389, 405-06 (6th Cir. 1998).

"[A] complaint . . . must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Lewis v. ABC Bus. Servs., Inc.*, 135 F.3d 389, 405-06 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984), cert. denied,

470 U.S. 1054, 105 S.Ct. 1758, 84 L.Ed.2d 821 (1985)). “[W]hen a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist.” *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 437 (6th Cir. 1988).

II. Law

Section 523(a) provides several exceptions to the general rule that pre-petition debts are dischargeable under the Code. Plaintiffs bear the burden of proving by a preponderance of the evidence that a debt is excepted from discharge. See *Meyers v. Internal Revenue Service (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. See *id.* (citing *Grogan*, 498 U.S. at 286-87, 111 S.Ct. at 654). Without specifying any particular actions or pointing to any debt, damages, or injury, Plaintiffs rely on “11 U.S.C. § 523(a)(2), (4), and (6)” to support their Complaint. The Court will analyze the elements of each of these § 523 exceptions below.

A. § 523(a)(2)(A) and (B)

Sections 523(a)(2)(A) and 523(a)(2)(B) of the Bankruptcy Code implement the long standing Congressional policy that a debtor who incurs a debt through fraudulent means is not, with respect to that particular debt, entitled to the benefits of a bankruptcy discharge. *Bernard Lumber Co. v. Patrick (In re Patrick)*, 265 B.R. 913, 916 (Bankr. N.D. Ohio 2001). Section 523(a)(2) provides in pertinent part:

(a) A discharge under section 727. . .of this title does not discharge an individual debtor from any debt-

(2) for money, property, services, or an extension, renewal, or refinancing of credit, 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;

(B) use of a statement in writing-

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive. . . ."

11 U.S.C. § 523 (West 2006).

To satisfy § 523(a)(2)(A), Plaintiffs must prove that: (i) Debtors obtained something of value through material misrepresentations that Debtors knew were false or that Debtors made with gross recklessness; (ii) Debtors intended to deceive Plaintiffs; (iii) Plaintiffs justifiably relied on Debtors' false representations; and (iv) Plaintiffs' reliance was the proximate cause of their losses. *Rembert v. AT&T Universal Card Servs., Inc.*, 141 F.3d 277, 280 (6th Cir. 1998).

A determination of nondischargeability under § 523(a)(2)(B) requires proof that Plaintiffs reasonably relied upon a false

written statement concerning Debtors' or an insider's financial condition that Debtors caused to be made or published with the intent to deceive Plaintiffs. *Haney v. Copeland (In re Copeland)*, 291 B.R. 740, 780-81 (Bankr. E.D. Tenn. 2003).¹

Subsections (a)(2)(A) and (a)(2)(B) are mutually exclusive. *Nissan Motor Acceptance Corp. v. Ferrell (In re Ferrell)*, 213 B.R. 680, 684-685 (Bankr. N.D. Ohio 1996). As a consequence, even an egregiously fraudulent utterance about Debtors' financial condition is not a ground for nondischargeability of a debt if it is not in writing. *Soderland v. Zimmerman (In re Soderland)*, 197 B.R. 742 (Bankr. D. Mass. 1996).

However, subsection(a)(2)(B) is sufficiently broad to include any written statement made by Debtors and not only formal financial statements and documents used in a commercial or bank setting. *Huntington National Bank v. Schwartzman (Matter of Schwartzman)*, 63 B.R. 348 (Bankr. S.D. Ohio 1986); *Engler v. Van Steinburg (In re Steinburg)*, 744 F.2d 1060 (4th Cir. 1984); *United Virginia Bank v. Cook (In re Cook)*, 46 B.R. 545 (Bankr. E.D. Va. 1985).

Finally, where fraud is alleged, the concept of notice pleading is heightened by a requirement of specificity. FED. R.

¹The distinction between justifiable reliance and reasonable reliance was articulated by the Supreme Court in *Field v. Mans*, 516 U.S. 59, 116 S.Ct. 437 (1995). Relying upon Congress' historical interpretation and statutory incorporation of the Restatement (Second) of Torts (1976), the Court wrote:

Although the plaintiff's reliance on the misrepresentation must be justifiable. . .this does not mean that his conduct must conform to the standard of the reasonable man. Justification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than of the application of a community standard of conduct to all cases.

Mans 516 U.S. at 71, 116 S.Ct. at 444 (citing Restatement (Second) of Torts, § 545A, Comment b (1976)).

CIV. P. 9(b), made applicable to adversary proceedings pursuant to FED. R. BANKR. P. 7009(b), provides: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

"To satisfy FED. R. CIV. P. 9(b), Plaintiffs must at a minimum allege the time, place and contents of the misrepresentations upon which he relied." *Vild v. Visconsi*, 956 F.2d 560, 567 (6th Cir. 1992); *Equal Justice Foundation v. Deutsche Bank Trust Co. Americas*, 412 F.Supp.2d 790 (S.D. Ohio 2005). Plaintiffs must state with particularity the specific circumstances giving rise to the complaint. *Trell v. Dunleavy (Matter of Dunlevy)*, 75 B.R. 914, 916 (Bankr. S.D. Ohio 1987); *Matter of Schwartzman*, 63 B.R. at 355.

B. § 523(a)(4)

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. . .fraud and defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4)(West 2006).²

Bankruptcy courts have determined that the fraud required under § 523(a)(4) "refers to positive fraud, involving moral turpitude. . . ." *S.J. Groves & Sons Co. v. Peters (In re Peters)*, 90 B.R. 588, 605 (Bankr. N.D. N.Y. 1988)(*cited with favor in Abdel-Hak v. Saad (In re Saad)*, 319 B.R. 147, 156 (Bankr. E.D. Mich. 2004)). In addition to proving positive fraud, Plaintiff must also

²Plaintiffs do not state whether their § 523(a)(4) claim is premised upon fiduciary fraud or defalcation, embezzlement or larceny.

prove that a fiduciary relationship existed between the parties. *Brady v. McAllister (In re Brady)*, 101 F.3d 1165, 1173 (6th Cir. 1996). Like fraud alleged under §523(a)(2), fiduciary fraud must be pled with particularity.

The 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)).

Unlike fraud, 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 both the fraud and defalcation prongs 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.").

To satisfy section 523(a)(4) in the context of fraud or 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 in Ohio: (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)(citing *Ternasky v. Rabatin (In re Ternasky's Estate)*, 141 N.E.2d 189, 191, 76 Ohio Law Abs. 203 (1957)). Proof of an express trust in Ohio requires clear and convincing evidence. *Ohio Farmers Insurance Co. v. Hughes-Bechtol, Inc. (In re Hughes-Bechtol, Inc.)* 2000 WL 1091509, *10 (6th Cir. (Ohio) 2000)(citing *Gertz v. Doria*, 63 Ohio App.3d 235, 237, 578 N.E.2d 534 (1989)).

Unlike fiduciary fraud and defalcation, neither embezzlement or larceny are conditioned upon the existence of an express or technical trust. Embezzlement is defined 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 distinguishable in that the original taking must have been unlawful, and 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.

C. § 523(a)(6)

Section 523(a)(6) of the Bankruptcy Code provides that "a discharge under [the Bankruptcy Code] does not discharge an

individual debtor from any debt. . .for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523 (West 2006).

The Supreme Court has held that only acts done with intent to cause injury, and not merely acts done intentionally, rise to the level of willful injury for the purposes of satisfying section 523(a)(6). *Kawaauhau v. Geiger*, 523 U.S. 57, 57-58, 118 S.Ct. 974, 975 (1998). In *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455 (6th Cir. 1999), the Sixth Circuit expanded the definition of "willfulness" to include the debtor's subjective belief that the injury is "substantially certain to result" from his actions. *Id.* at 464.

A person acts maliciously when that person acts in conscious disregard of his or her duties or without just cause or excuse. See *Heyne v. Heyne (In re Heyne)*, 277 B.R. 364, 368 (Bankr. N.D. Ohio 2002)(citing *Murray v. Wilcox (In re Wilcox)*, 229 B.R. 411, 419 (Bankr. N.D. Ohio 1998)); see also *In re Saad*, 319 B.R. at 156 (citing *Tinker v. Colwell*, 193 U.S. 473, 485-86, 24 S.Ct 505 (1904)(defining "malice" under § 17(a)(2) of the former Bankruptcy Act [now § 523(a)(6)] as "a wrongful act, done without just cause or excuse")(internal quotation marks and citations omitted)).

As the requirements of the statute are set forth in the conjunctive, a creditor must establish both willfulness and malice in order to prevail in a section 523(a)(6) action. However, two bankruptcy courts in this district have recognized that, in the great majority of cases, the same factual events giving rise to a finding of willfulness will likewise be indicative of malice.

Superior Metal Products v. Martin (In re Martin), 321 B.R. 437, 442 (Bankr. N.D. Ohio 2004); *CMEA Title Agency v. Little (In re Little)*, 335 B.R. 376, 383 (Bankr. N.D. Ohio 2005) (“Although the ‘willful’ and ‘malicious’ requirements will be found concurrently in most cases, the terms are distinct, and both requirements must be met under § 523(a)(6).”) Both courts, however, acknowledge that the “malice” element requires “a heightened level of culpability transcending mere willfulness.” *In re Martin*, 321 B.R. at 442, *In re Little*, 335 B.R. at 384.

Finally, several courts that have been confronted with the dischargeability of false oral statements of financial condition have unanimously concluded that § 523(a)(6) cannot be used to circumvent § 523(a)(2)(B)’s requirement of a written statement. See *Berkson v. Guvelesky (In re Gulevsky)* 362 F.3d 961, 964 (7th Cir. 2004); *Spencer v. Bogdanovich (In re Bogdanovich)*, 292 F.3d 104, 114-15 (2d Cir. 2002); *McCrary v. Barrack (In re Barrack)*, 217 B.R. 598, 606 (9th Cir. (BAP) 1998); *Jefferey M. Goldberg & Assoc. v. Holstein (In re Holstein)*, 272 B.R. 463, 482 (Bankr. N.D. Ill. 2001); *Weiss v. Alicea (In re Alicea)*, 230 B.R. 492, 508 (Bankr. S.D.N.Y. 1999).

III. Facts

Tony Pesce Chrysler-Dodge-Jeep, Inc. (“Pesce Chrysler”) is an Ohio corporation that formerly operated a car dealership in East Palestine, Ohio. (Compl. ¶ 1.) At all times relevant to the Complaint, Janice E. Courtney was the Secretary and Treasurer of Pesce Chrysler, as well as a shareholder, and Debtors were both

employed by Pesce Chrysler in management and executive positions. (*Id.* ¶¶ 4-5.)

At some point, which is not identified in the Complaint, Pesce Chrysler entered into a Purchase and Sale Agreement ("Agreement") with Mr. and Mrs. Labate or their nominee for the purchase of essentially all of Pesce Chrysler's assets, both tangible and intangible, including the dealership. (*Id.* ¶¶ 6-8.) In the Agreement, the nominee of Mr. and Mrs. Labate was described as a business corporation now owned, or to be formed, by Mr. and Mrs. Labate. (*Id.* ¶ 6.) Mr. and Mrs. Labate formed Labate Chrysler, an Ohio Corporation, to operate the dealership following the sale. (*Id.* ¶ 7.)

According to the Complaint, Debtors made certain representations and/or provided certain financial documents regarding Pesce Chrysler and/or its assets that were material to the sale and were false. (*Id.* ¶¶ 9-10.) The Complaint further alleges that Debtors made the false representations with knowledge of their falsity and with the intent of misleading Mr. and Mrs. Labate and Labate Chrysler into relying upon them. (*Id.* ¶ 11.) Finally, the Complaint alleges that Mr. and Mrs. Labate and Labate Chrysler justifiably relied upon the representations made and the financial documents provided by Debtors when they entered into the Agreement. (*Id.* ¶ 12.)

Punxsutawney Land Company ("PLC") is an Ohio limited liability company that owns the real property at issue in this case. (*Id.* ¶ 14.) At all times relevant to the Complaint, Janice E. Courtney was a member of PLC. (*Id.* ¶ 15.)

Labate Real Estate, an Ohio limited liability company, was created by Mr. and Mrs. Labate to own and/or hold any real estate used in connection with the operation of Labate Chrysler. (*Id.* ¶ 16.) Pursuant to the Agreement, PLC and Labate Real Estate entered into a lease agreement with respect to the real property. (*Id.* ¶ 17.)

According to the Complaint, Debtors falsely represented that the real property was in good condition and repair, specifically that the real property did not have any water problems and that previous drainage problems had been repaired. (*Id.* ¶¶ 18-19.) The Complaint further alleges that Debtors made the false representations with knowledge of their falsity and with the intent of misleading Labate Real Estate into relying upon them. (*Id.* ¶ 20.) Finally, the Complaint alleges that Labate Real Estate justifiably relied upon the representations made by Debtors when entering into a lease for the real property. (*Id.* ¶ 21.)

In the Complaint, Plaintiffs conclude, "As a result of [Debtors'] conduct, Plaintiffs have a claim against them," and that "[t]he debt due and owing from [Debtors] to Plaintiffs is nondischargeable. (*Id.* ¶¶ 22-23.)

IV. Analysis

Plaintiffs' § 523(a)(2)(A) claims (Count II) are premised upon the allegation that Debtors misrepresented the condition of certain real property that is the subject of a commercial lease between PLC³ and Labate Real Estate. Section 523(a)(2) governs "debts for

³PLC is not a debtor herein. To the extent Labate Real Estate believes it has a breach of contract action against PLC, that action is not subject to the automatic stay in § 362.

money, property, services, or an extension, renewal, or refinancing of credit" to the extent those debts are obtained by fraud. However, Plaintiffs have failed to allege any debt for money, property, services, or an extension, renewal, or refinancing of credit. As a matter of fact, Plaintiffs have not alleged any injury which resulted from their reliance upon Debtors' alleged misrepresentations.

The Bankruptcy Code defines a "debt" as "liability on a claim." 11 U.S.C. § 101 (12) (West 2006). A "claim" is defined as "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured." 11 U.S.C. § 101 (5) (West 2006). The Supreme Court has recognized that the foregoing definitions reveals the intent of Congress that the meanings of "debt" and "claim" be coextensive. *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 558, 110 S.Ct. 2126, 2130 (1990)(citing H.R. Rep. No. 95-595 at 310 (1977); S.Rep. No. 95-989 at 23 (1978), 1978 U.S.C.C.A.N. 5787.)

Although a number of bankruptcy courts have recognized that a legal obligation need not be reduced to a civil judgment to be nondischargeable under § 523, see *Grange Mutual Cas. Co. V. Chapman (In re Chapman)*, 228 B.R. 899, 903, n. 1 (Bankr. N.D. Ohio 1998), *Continental Assurance Co. C. American Bankshares Corp.*, 46 B.R. 206, 209 (citing 3 *Collier on Bankruptcy* § 523.02 (15th Ed. 1984)), Plaintiffs in the case *sub judice* do not allege any legal obligation owed to them by Debtors.

Furthermore, despite the heightened pleading standard for fraud, Plaintiffs only generally state that Debtors made misrepresentations concerning a drainage problem on the real property. (Compl. ¶ 18.) Plaintiffs have not alleged the time, place, or contents of the misrepresentations or identified which one of the debtors made the representations. See *Vild*, 956 F.2d at 567, *Trell*, 75 B.R. at 916.

Moreover, there is no allegation that Mr. Courtney has any relationship to PLC. As such, Mr. and Mrs. Labate and Labate Real Estate could not have reasonably relied on any representations made by Mr. Courtney with respect to the real property. Similarly, although Mrs. Courtney is a member of PLC, R.C. § 1705.48 states that the debts of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts of the company, and neither the members nor the managers of the company are personally liable for those debts. OHIO REV. CODE ANN. § 1705.48 (West 2006). While Mrs. Courtney is personally liable for her own actions or omissions, pursuant to subsection (C) of the statute, the Complaint does not identify any actions or omissions on the part of Mrs. Courtney that would expose her to personal liability.

Because Plaintiffs have failed to allege: (i) any injury caused or "debt" owed by Debtors; (ii) any relationship between Mr. Courtney and PLC; or (iii) any actions or omissions by Mrs. Courtney which give rise to personal liability pursuant to R.C. § 1705.48(C), Count II must be dismissed as a matter of law for failure to state a claim against Debtors upon which relief may be granted.

Plaintiffs' § 523(a)(2)(B) claim (Count I) is premised upon the allegation that they relied upon false "financial documents provided by Debtors regarding Pesce Chrysler and/or its assets." (Compl. ¶¶ 9-10.) While Debtors concede that, because Mrs. Courtney was an officer of Pesce Chrysler, Pesce Chrysler is an "insider" as that term is defined in 11 U.S.C. § 101 (31)⁴ with respect to Mrs. Courtney, Debtors correctly argue that § 523(a)(2)(B) cannot be used to except any debt of Mr. Courtney from discharge. According to the Complaint, Mr. Courtney was "employed by Pesce Chrysler in [a] management and executive position[]." (Compl. ¶ 5.) Because the Complaint does not allege that Mr. Courtney was a director, officer, or person in control of Pesce Chrysler, his debt is dischargeable under § 523(a)(2)(B).

Turning to Mrs. Courtney, § 523(a)(2)(B) requires that the financial documents be "caused to be made or published with intent to deceive" by Debtors. Although Plaintiffs allege that Debtors "produced" the financial documents, they have not alleged that Debtors, or, more specifically, Mrs. Courtney prepared or drafted the financial documents. Furthermore, Plaintiffs, in their Complaint, assert that they justifiably relied upon Debtor's alleged false representations, however, § 523(A)(2)(B) requires reasonable reliance. See *Field*, 516 U.S. at 67 (reasonable reliance is higher standard than actual reliance). Therefore, as Plaintiffs

⁴The term "insider" includes-

(A) if the debtor is an individual-. . .

(iv) corporation of which the debtor is a director, officer, or person in control;

11 U.S.C. § 101 (31) (West 2006).

have failed to allege certain essential elements of their § 523(a)(2)(B) claim against Mrs. Courtney, her debt is dischargeable under § 523(a)(2)(B).

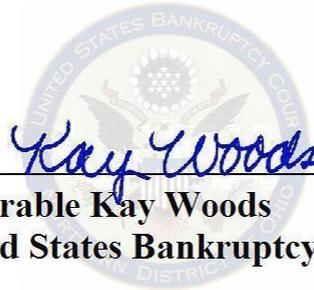
Plaintiffs' § 523(a)(4) claims against both Debtors are defective because Plaintiffs do not allege the essential elements of any of the four causes of action listed in that section of the Bankruptcy Code. Plaintiffs' fiduciary fraud and defalcation claims fail as a matter of law because Plaintiffs have not alleged the existence of an express or technical trust between Plaintiffs and Debtors. See *In re Blaszak*, 397 F.3d at 391. Plaintiffs' embezzlement and larceny claims, to the extent they have been alleged, also fail as a matter of law because Plaintiffs have not alleged a "taking" of property, either with or without Plaintiffs' authorization. See *In re Brady*, 101 F.3d 1172-73.

Finally, Plaintiffs' § 523(a)(6) claim is premised upon Debtors' "intent to mislead" Plaintiffs into relying on the false financial documents and verbal misrepresentations. (Compl. ¶¶ 11, 20.) Section 523(a)(6) requires injury to "another entity or to the property of another entity." Here, Plaintiffs allege no personal injury or property damage. Moreover, a § 523(a)(6) action requires that Debtors intend to injure Plaintiffs or know that there is a substantial certainty that their actions will cause injury. Here, Plaintiffs have not only failed to allege any injury to person or property, but also failed to allege that Debtors intended the injury to occur or were substantially certain that such an injury would occur. As a consequence, Debtors are entitled to judgment as a matter of law on Plaintiff's § 523(a)(6) claim.

An appropriate order will follow.

#

IT IS SO ORDERED.



Dated: February 16, 2007
10:37:33 AM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
PHILLIP W. COURTNEY	*	
AND JANICE E. COURTNEY	*	
	*	CASE NUMBER 05-45085
Debtors.	*	
	*	
*****	*	
	*	
LABATE CHRYSLER, JEEP, DODGE,	*	
INC., et al.,	*	
	*	ADVERSARY NUMBER 05-4268
Plaintiffs,	*	
	*	
vs.	*	
	*	
PHILLIP W. COURTNEY, et al.,	*	
	*	THE HONORABLE KAY WOODS
Defendants.	*	
	*	

O R D E R

For the reasons set forth in this Court's Memorandum Opinion, the Motion to Dismiss filed on behalf of Debtors/Defendants, Phillip W. Courtney and Janice E. Courtney is granted.