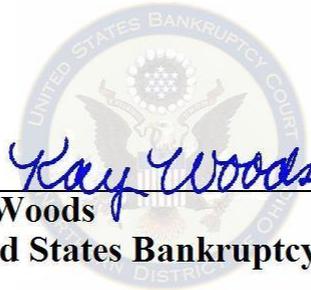


IT IS SO ORDERED.



Dated: June 17, 2010  
01:55:44 PM

Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
ANTHONY LEONARD LeBARON and	*	
ROSE MARIE LeBARON,	*	
	*	CASE NUMBER 09-40023
Debtors.	*	
	*	
* * * * *	*	
	*	
KATHY ELGIN,	*	
	*	ADVERSARY NUMBER 09-04093
Plaintiff,	*	
	*	
v.	*	
	*	
ROSE MARIE LeBARON,	*	
	*	HONORABLE KAY WOODS
Defendant.	*	

\*\*\*\*\*  
ORDER (i) FINDING DEBT IS DISCHARGEABLE; AND  
(ii) GRANTING DEFENDANT'S MOTION FOR DIRECTED VERDICT  
\*\*\*\*\*

This cause is before the Court on Defendant Rose Marie LeBaron's oral motion for a directed verdict, which was brought following Plaintiff Kathy Elgin's case-in-chief at the June 7, 2010,

trial to determine the dischargeability of Defendant's debt to Plaintiff ("Trial"). The Court granted the motion for directed verdict on the record and enters this Order to formalize that ruling.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). 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 Rule 7052 of the Federal Rules of Bankruptcy Procedure.

#### **I. PROCEDURAL BACKGROUND**

On January 6, 2009, Debtors Anthony Leonard LeBaron and Rose Marie LeBaron filed a voluntary petition for relief pursuant to chapter 7 of Title 11. On May 1, 2009, Plaintiff filed Complaint Objecting to Dischargeability of Indebtedness under 11 U.S.C. Section 523 (Doc. # 1), which commenced the instant adversary proceeding against Rose Marie LeBaron only. Plaintiff prays for the Court to enter (i) judgment against Defendant in the amount of \$26,000.00, and (ii) an order determining said judgment is nondischargeable pursuant to 11 U.S.C. § 523(a)(2), (a)(4), and (a)(6). On June 2, 2009, Defendant filed Answer (Doc. # 7).

On June 7, 2010, the Court held the Trial, at which Plaintiff was represented by Glenn E. Forbes, Esq. and Defendant was

represented by Robert L. Herman, Esq. and Philip D. Zuzolo, Esq. Both parties presented openings statements. Following opening statements, Plaintiff testified on behalf of herself. Defendant cross-examined Plaintiff and Plaintiff testified on redirect. Upon the oral motion of Plaintiff, to which Defendant did not object, the Court admitted into the record Plaintiff's Exhibits A, B, C, and D and Defendant's Exhibit 2. Plaintiff presented no further witnesses and rested her case-in-chief. After Plaintiff rested, Defendant orally moved for a directed verdict. For the reasons set forth on the record at the Trial, the Court (i) found Plaintiff failed to meet her burden of proof under § 523(a)(2), (a)(4), and (a)(6),<sup>1</sup> and (ii) granted Defendant's motion for directed verdict. The findings set forth on the record at the Trial are incorporated by reference herein. To the extent such findings conflict with this Order, this Order controls.

## **II. FACTUAL BACKGROUND**

The only testimony before the Court is that of Plaintiff, which the Court will set forth below.<sup>2</sup>

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<sup>1</sup>Plaintiff obtained a default judgment jointly and severally against Defendant and LeBaron's Florist & Gift Shop, LLC in the amount of \$38,295.00 from the Court of Common Pleas, Ashtabula County, Ohio, concerning the same cause of action. (See Pl.'s Ex. D.) Accordingly, it is not necessary for the Court to rule on Plaintiff's monetary damages claim.

<sup>2</sup>Because the instant matter is before the Court on a motion for a directed verdict, the Court "may not weigh the evidence or make credibility determinations[.]" *Hall v. Consol. Freightways Corp. of Del.*, 337 F.3d 669, 672 (6th Cir. 2003) (citing *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 545-55 (1990)). Accordingly, the Court makes no findings as to the accuracy or truthfulness of Plaintiff's testimony. However, the Court will "consider the evidence in the light most favorable to [Plaintiff], giving [Plaintiff] the benefit of all reasonable inferences." *Id.* (citing *Tuck v. HCA Health Servs. of Tenn.*, 7 F.3d 465, 469 (6th Cir. 1993)).

Defendant was the sole member of LeBaron's Florist & Gift Shop, LLC ("Florist Shop"). Plaintiff learned from Irene Manavis, a floral designer at the Florist Shop, that Defendant was interested in obtaining a "partner" to invest in the Florist Shop. Defendant later informed Plaintiff she was, in fact, interested in obtaining either (i) a partner to invest in the Florist Shop, or (ii) a purchaser for the Florist Shop and/or the real estate upon which the Florist Shop operated ("Real Estate").<sup>3</sup> Defendant disclosed to Plaintiff the Florist Shop was "struggling" (Trial Tr. at 10:23:57) and made no promises regarding the future success or profitability of the Florist Shop. (*Id.* at 10:43:26.)

On or about May 16, 2007, Plaintiff and Defendant orally agreed Defendant would sell to Plaintiff a forty-nine percent (49%) "partnership interest" in the Florist Shop,<sup>4</sup> but no interest in the Real Estate, for the sum of \$50,000.00 ("Partnership Agreement"). Pursuant to the Partnership Agreement, Plaintiff was to make monthly installment payments to Defendant in the amount of \$3,000.00 until the \$50,000.00 balance was paid in full. (See Def.'s Ex. 2.) At an unspecified time in the future, Defendant was to (i) have her attorney formalize the Partnership Agreement in writing, and

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<sup>3</sup>Plaintiff did not identify who owned the Real Estate, but Defendant's proposal to Plaintiff (see Pl.'s Ex. A) suggests the real estate was not owned by the Florist Shop.

<sup>4</sup>The parties failed to explain how Plaintiff was to obtain a "partnership interest" in the Florist Shop, a limited liability company, rather than a membership interest. Therefore, it is not clear if the parties mischaracterized Plaintiff's proposed membership interest as a partnership interest or if a partnership was to be formed between Plaintiff and the limited liability company.

(ii) grant Plaintiff access to the Florist Shop's books and ledgers. Prior to entering into the Partnership Agreement, Plaintiff did not consult with an attorney or review the Florist Shop's books and ledgers.

Plaintiff and Defendant orally agreed they would both work at the Florist Shop without compensation to reduce business expenses. Plaintiff began working at the Florist Shop, without compensation, in mid-May 2007, but voluntarily ceased working there in September 2007. Plaintiff intended to retain her partnership interest in the Florist Shop even after she ceased her employment.

On or about July 2, 2007, Plaintiff paid Defendant<sup>5</sup> the sum of \$12,000.00.<sup>6</sup> (See Pl.'s Ex. C1.) Plaintiff also paid: (i) \$850.00 to purchase a shed for the Florist Shop during June or July 2007; (ii) four \$500.00 cash advances, totaling \$2,000.00, during June and July 2007; (iii) an additional \$1,000.00 on July 2, 2007; (iv) \$10,000.00 on or about July 26, 2007 (see Pl.'s Ex. C2);<sup>7</sup> and (v) \$700.00 to pay the Florist Shop's "rent" during July 2007. All moneys Plaintiff paid to Defendant were to be credited to Plaintiff's Partnership Agreement balance. Plaintiff's payments to

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<sup>5</sup>It is not apparent from Plaintiff's testimony whether payments were made to Defendant and/or the Florist Shop.

<sup>6</sup>Plaintiff testified the \$12,000.00 payment represented Plaintiff's first \$3,000.00 monthly installment payment, as well as three additional monthly installment payments in advance.

<sup>7</sup>Plaintiff's Exhibit C2 is a check written to Plaintiff in the amount of \$10,000.00, which Plaintiff then tendered to Defendant.

Defendant totaled \$26,550.00<sup>8</sup> during June and July 2007, but thereafter Plaintiff ceased making payments on her Partnership Agreement balance.<sup>9</sup>

After the parties entered into the Partnership Agreement, Plaintiff asked Defendant “[a]t least once a week” when their agreement would be formalized in writing. (Trial Tr. at 10:10:55.) Defendant replied that she would contact her attorney to “have the paperwork drawn right away after the payments were made.” (*Id.* at 10:44:31 (emphasis added).) Plaintiff “felt that [Defendant] should have gave [sic] documentation as soon as any moneys were received . . . after the very first check of \$12,000.00” (*id.* at 10:41:10) and “expected” the Partnership Agreement would be formalized “some time” before her \$50,000.00 Partnership Agreement balance was paid in full. (*Id.* at 10:44:14.) Despite the lack of a written partnership agreement, Plaintiff continued to make additional payments to Defendant (after making the first \$12,000.00 payment) because she “felt” the parties had an “understanding” that executing a written partnership agreement “would be the next step after [Defendant] received moneys.” (*Id.* at 10:41:48 (emphasis added).)

During June and July 2007, Plaintiff asked Defendant for permission to review the Florist Shop’s books and ledgers on

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<sup>8</sup>Plaintiff’s testimony deviated slightly from her Complaint, which states, “Plaintiff delivered to Defendant and/or paid at Defendant’s direction, the sum of \$26,000.00.” (Comp. ¶ 10.)

<sup>9</sup>Although Plaintiff was to make monthly installment payments of \$3,000.00 pursuant to the Partnership Agreement, no payments were ever made in this amount.

"[s]everal occasions." (*Id.* at 10:11:56.) Defendant replied that Plaintiff could review the books and ledgers only if Karen Ranolla, the Florist Shop's accountant, was present. Despite her requests, Plaintiff was never given access to the books and ledgers.

In August 2007, Plaintiff became "uncomfortable" because she had paid Defendant more than \$22,000.00, but the parties had not executed a written partnership agreement. (*Id.* at 10:14:22.) As a result, Plaintiff ceased working at the Florist Shop in September 2007. Plaintiff informed Defendant that Plaintiff "was still in the partnership, [she] just wasn't going to be working [at the Florist Shop]." (*Id.* at 10:16:10.)

In January 2008, Plaintiff obtained legal counsel to pursue her remedies against Defendant. On November 20, 2008, Plaintiff obtained a default judgment jointly and severally against Defendant and the Florist Shop in the amount of \$38,295.00 from the Court of Common Pleas, Ashtabula County, Ohio. (*See* Pl.'s Ex. D.)

### **III. STANDARDS FOR REVIEW AND ANALYSES**

#### **A. Debts Excepted from Discharge Pursuant to § 523(a).**

Plaintiff requests the Court to determine Defendant's debt to Plaintiff is nondischargeable pursuant to § 523 (a) (2), (a) (4), and (a) (6). Section 523(a) states, in pertinent part:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) 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[.]

\* \* \*

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

\* \* \*

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity[.]

11 U.S.C. § 523 (LexisNexis 2010).

**i. Section 523(a)(2)(A).**

A creditor must prove four elements by a preponderance of the evidence to except a debt from discharge under § 523(a)(2)(A):

(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 Servs., Inc. (In re Rembert)*, 141 F.3d 277, 280-81 (6th Cir. 1998).

In the instant case, Plaintiff asserts Defendant made two misrepresentations that except Defendant's debt to Plaintiff from discharge under § 523(a)(2)(A): (i) Defendant would formalize the Partnership Agreement in writing; and (ii) Defendant would give Plaintiff access to the Florist Shop's books and ledgers. Plaintiff testified the Partnership Agreement was to be formalized after the

"moneys" were paid and/or "payments" were received, but never specified what amount of money or number of payments were due before the Partnership Agreement was to be formalized. (See Trial Tr. at 10:44:31 (emphasis added)) ("[Defendant] was gonna [sic] have the paperwork drawn right after the payments were made.") Plaintiff also testified she never paid the entire \$50,000.00 Partnership Agreement balance. As a consequence, Plaintiff failed to establish that Defendant was ever required to formalize the Partnership Agreement and, therefore, that Defendant misrepresented she would do so. Because the record is devoid of evidence concerning (i) a time certain when Defendant was to formalize the Partnership Agreement, and/or (ii) completion of the condition(s) precedent to formalizing the Partnership Agreement, the Court cannot conclude Defendant made any misrepresentation that she would formalize the Partnership Agreement. Plaintiff also presented no evidence suggesting Defendant acted with at least gross negligence when Defendant represented that Plaintiff could review the Florist Shop's books and ledgers. The only testimony Plaintiff presented was that (i) a written partnership agreement was never executed, and (ii) she was never given access to the Florist Shop's books and ledgers. However, such testimony, alone, does not establish by a preponderance of the evidence that Defendant's representations were knowingly false or grossly negligent as to their truth when made, as required under § 523(a)(2)(A).

Plaintiff also presented insufficient evidence that either of

Defendant's representations induced Plaintiff to pay moneys to Defendant. Plaintiff testified she "felt" the parties would execute a written partnership agreement after she made her first \$12,000.00 payment. (See *id.* at 10:41:10.) However, despite the failure of the parties to execute a written partnership agreement after Plaintiff made the \$12,000.00 payment, Plaintiff continued to tender payments to Defendant. Plaintiff further failed to establish that Defendant made any representation about access to the Florist Shop's books and ledgers prior to Plaintiff making payments to Defendant. As a consequence, Plaintiff failed to demonstrate that any representation concerning access to the books and ledgers induced her to pay moneys to Defendant. Accordingly, Plaintiff failed to demonstrate by a preponderance of the evidence that she tendered payments to Defendant as a result of Defendant's representations, as required under § 523(a)(2)(A).

Finally, Plaintiff did not present any evidence that her reliance on Defendant's representations was the proximate cause of her loss. The sole cause of Plaintiff's loss was the business failure of the Florist Shop. Plaintiff presented no evidence that a written partnership agreement or access to the Florist Shop's books and legers could have or would have prevented the business failure of the Florist Shop. Furthermore, prior to making a single payment to Defendant, Plaintiff (i) was aware the Florist Shop was "struggling" (*id.* at 10:23:57) and (ii) received no promises the Florist Shop would be "successful." (*Id.* at 10:43:26.)

Accordingly, Plaintiff failed to demonstrate by a preponderance of the evidence that Defendant's representations caused Plaintiff loss, as required under § 523(a)(2)(A).

**ii. Section 523(a)(4).**

Plaintiff asserts Defendant's debt to Plaintiff should be excepted from discharge under § 523(a)(4) because the debt is the result of larceny. However, the record is totally devoid of any evidence that Defendant committed larceny or used the moneys paid to her by Plaintiff for any purpose other than to pay the Florist Shop's business expenses. Furthermore, Plaintiff presented absolutely no evidence that the moneys she paid to Defendant were to be used for any specified purpose. Accordingly, Plaintiff failed to meet her burden of proof with respect to § 523(a)(4).

**iii. Section 523(a)(6).**

Plaintiff asserts Defendant's debt to Plaintiff should be excepted from discharge under § 523(a)(6) because Defendant's actions constituted malicious breach of contract. Section 523(a)(6) excepts from discharge only debts resulting from acts that are both willful and malicious, that is, "acts done with the intent to cause injury – and not merely acts done intentionally." *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 464 (6th Cir. 1999); see *Kawaauhau v. Geiger*, 523 U.S. 57 (1998). Plaintiff presented absolutely no evidence that Defendant intended to cause Plaintiff injury. In fact, Plaintiff presented no evidence that Defendant's actions caused Plaintiff injury. Accordingly, Plaintiff failed to

meet her burden of proof with respect to § 523(a)(6).

**B. Motion for Directed Verdict.**

The Court may enter judgment as a matter of law "whenever there is a complete absence of pleading or proof on an issue material to the cause of action or when no disputed issues of fact exist such that reasonable minds would differ." *Hall v. Consol. Freightways Corp. of Del.*, 337 F.3d 669, 672 (6th Cir. 2003) (internal quotation omitted). Judgment as a matter of law is appropriate only after the party against whom judgment is entered has been fully heard and there is no legally sufficient evidentiary basis to find in favor of that party. *Id.*

For the reasons set forth above, the Court finds Defendant is entitled to judgment as a matter of law with respect to § 523(a)(2), (a)(4), and (a)(6). Plaintiff was fully heard and failed to present any evidence of at least one material element of § 523(a)(2), (a)(4), and (a)(6). Thus, there is no legally sufficient basis for the Court to rule in Plaintiff's favor.

Accordingly, this Court grants Defendant's motion for directed verdict; Defendant's debt to Plaintiff is not excepted from discharge pursuant to § 523(a)(2), (a)(4), or (a)(6).

**IT IS SO ORDERED.**

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