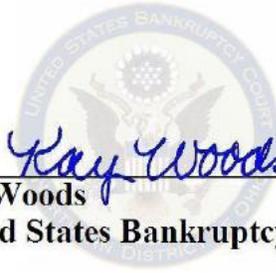


IT IS SO ORDERED.

Dated: July 18, 2012  
03:53:16 PM

  
*Kay Woods*  
\_\_\_\_\_  
Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

GREGORY ZINNI,  
  
Debtor.

\* \* \* \* \*

JOHN J. CLENDENIN,  
  
Plaintiff,

v.

GREGORY ZINNI,  
  
Defendant.

CASE NUMBER 10-44095

ADVERSARY NUMBER 11-4047

HONORABLE KAY WOODS

\*\*\*\*\*  
MEMORANDUM OPINION REGARDING MOTION TO DISMISS  
\*\*\*\*\*

On October 29, 2010, Debtor Gregory Zinni ("Debtor" or "Defendant") filed a voluntary petition pursuant to chapter 7 of Title 11, which case was denominated Case No. 10-44095 ("Main

Case"). The Debtor scheduled John J. Clendenin ("Plaintiff") as a general unsecured creditor in an unknown amount based upon a "pending lawsuit." (Main Case, Doc. # 13, Sched. F at 2.) Scott Essad, Esq. was also scheduled for noticing purposes only. (*Id.*) In addition, the Debtor listed the Plaintiff as a co-debtor with the Debtor on a debt owing to Key Bank Commercial Loan Department. (Main Case, Doc. # 13, Sched. H.)

On February 25, 2011, the Plaintiff, by and through Scott Essad, Esq., filed Complaint to Determine Dischargeability of Debt and to Obtain Relief ("Complaint") (Doc. # 1).<sup>1</sup> The Plaintiff requested the Court to determine the amount of an alleged debt owed to him by the Debtor and to deem the debt nondischargeable pursuant to 11 U.S.C. § 523. The Debtor filed Answer of Defendant Gregory S. Zinni ("Answer") (Doc. # 11) on May 31, 2011. On April 24, 2012, the Defendant filed Motion to Dismiss (Doc. # 39) and requested the Court to dismiss the Complaint for failure to state a claim upon which relief can be granted.

On May 10, 2012, the Court entered Order for Plaintiff to Amend Complaint Within Seven (7) Days ("7-Day Order") (Doc. # 43), which granted the Plaintiff leave to file an amended complaint. In the 7-Day Order, the Court stated that it found the Complaint "to be deficient" and noted that "Mr. Essad was expressly told [at a pre-trial status conference on April 5, 2012,] that the Complaint failed

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<sup>1</sup>All docket references are to this adversary proceeding unless the Main Case is indicated.

to allege a cause of action to determine the dischargeability of a debt under § 523." (7-Day Order at 4-5.) Despite the Plaintiff's failure to seek leave to amend the Complaint, the Court, *sua sponte*, granted the Plaintiff leave to amend in the interest of justice.

On May 17, 2012, the Plaintiff filed Amended Complaint to Determine Dischargeability and Amount of Debt and to Obtain Relief ("Amended Complaint") (Doc. # 46), which made negligible changes to the Complaint. The Court held a hearing on the Amended Complaint on May 23, 2012, at which appeared (i) Mr. Essad on behalf of the Plaintiff; (ii) the Plaintiff; and (iii) Richard G. Zellers, Esq. on behalf of the Defendant. At the hearing, the Plaintiff and Mr. Zellers, on behalf of the Defendant, consented to this Court entering a final order with respect to the amount of the alleged debt owed to the Plaintiff by the Defendant, as well as determining all dischargeability issues. At the conclusion of the hearing, the Court granted the Defendant fourteen days to answer or otherwise respond to the Amended Complaint.

On June 6, 2012, the Defendant filed a second Motion to Dismiss (Doc. # 48),<sup>2</sup> which is presently before the Court. The Plaintiff filed Response to Debtor's-Defendant's Motion to Dismiss ("Response") (Doc. # 49) on June 20, 2012.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general orders of reference (General Order Nos. 84 and 2012-7)

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<sup>2</sup>The Defendant withdrew the first Motion to Dismiss following the filing of the Amended Complaint. (See Doc. # 47.) All further references to the Motion to Dismiss in this Memorandum Opinion pertain to the second Motion to Dismiss filed on June 6, 2012.

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). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

## I. THE PLEADINGS IN THIS ADVERSARY PROCEEDING

### A. Amended Complaint

The Plaintiff's Amended Complaint alleges that this is a proceeding "to determine the dischargeability and amount of a debt" (Am. Compl. ¶ 4) and references a lawsuit styled *Clendenin v. Zinni, et al.*, Case No. 2007-CV-2560, Court of Common Pleas, Mahoning County, Ohio ("State Court Action"). The Plaintiff commenced the State Court Action on July 13, 2007. (*Id.* ¶ 5.) The Amended Complaint "reallege[s]" various causes of action that were set forth in the State Court Action (*id.* ¶ 6), as follows: Count 1, Breach of Contract; Count 2, For Injunctive Relief; Count 3, Breach of Implied Covenant of Good Faith and Fair Dealing; Count 4, Breach of Fiduciary Duty; Count 5, Tortious Interference with Contract; Count 6, Tortious Interference with Business Relationships; Count 7, Conversion; Count 8, Unjust Enrichment; Count 9, Fraud; and Count 10, Spoliation of Evidence. The Amended Complaint does not identify any alleged debt that the Debtor owes to the Plaintiff; the Plaintiff states merely that he has been damaged in "excess of \$25,000." (*See, e.g., id.* ¶ 46.) However, the Plaintiff has included in the Amended Complaint an allegation that he is "entitled

to a determination of the alleged debt.”<sup>3</sup> (*Id.* ¶ 74.)

One of the additions the Plaintiff makes in the Amended Complaint is to insert a more specific reference to 11 U.S.C. § 523. In the Complaint, the Plaintiff had merely stated that the alleged debt he is owed is “nondischargeable pursuant to several sections of 11 U.S.C. § 523.” (Compl. ¶ 73.) In the Amended Complaint, the Plaintiff now states in paragraph 73 that the debt is “nondischargeable pursuant to 11 U.S.C. § 523(2), (4), and (6) [sic], in that they are [sic] actions constituting use of false pretenses; fraud; false statements made in writing; fraud or defalcation while acting in a fiduciary capacity; embezzlement; and willful and malicious acts.” (Am. Compl. ¶ 73.)

The Amended Complaint includes the following prayer for relief:

WHEREFORE, Plaintiff/Creditor John J. Clendenin prays for judgment against Defendant/Debtor Gregory S. Zinni for:

- a. a determination that the debt owed by Debtor to Creditor is non-dischargeable;
- b. relief from any stay so that the Creditor can continue its collection actions;
- c. reasonable attorney’s fees, costs, prejudgment interest, and such other and such further relief as this Court deems equitable and just;
- d. an order disallowing the Trustee to Grant Debtor’s Discharge;

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<sup>3</sup>The Debtor denies that the Plaintiff is a creditor in this case. “Regarding paragraph 4 [of the Complaint], Defendant denies that Plaintiff is a creditor.” (Ans. ¶ 5.) Despite the absence of any specific debt in the Complaint or the Amended Complaint, the Plaintiff filed a proof of claim denominated Claim No. 6-2 (“Claim 6”), which, as amended, alleges a debt in the amount of \$563,000.00 based on “breach of contract; fraud.” (Claim 6 at 1.) The Debtor has not objected to Claim 6.

- e. an order dismissing the Debtor's Bankruptcy.

Further, if the automatic stay is not lifted and the matter between the parties is litigated in this Court, then Plaintiff John J. Clendenin, D.C. also prays for:

- f. A full accounting of Canfield Physicians, LLC;
- g. A temporary restraining order and a preliminary and permanent injunction pursuant to Fed. R. Bankr. Pro. [sic] 7001(7) compelling Defendant Gregory S. Zinni to make restitution in the amount of at least \$185,939 (the amount that the Mahoning County Court's receiver has indicated is due and owing to Clendenin), with interest at the legal rate from the date such sums were received through the date of restitution;
- h. An order requiring Defendant to provide a written accounting of all receipts and disbursements of funds of Canfield Physicians, LLC and any and all capital contributions and withdrawals from July 1, 2005 to the present;
- i. A temporary restraining order and a preliminary and permanent injunction enjoining Defendant Gregory S. Zinni from making any further distributions from Canfield Physicians, LLC, either on his own behalf or on behalf of Canfield Physicians, LLC, until further order of the Court;
- j. A temporary restraining order and a preliminary and permanent injunction enjoining Defendant Dr. Zinni from taking any further action on behalf of Canfield Physicians, LLC until further order of the Court;
- k. Compensatory damages in excess of \$25,000 for all counts in this amended complaint;
- l. Punitive damages in excess of \$25,000 for Counts 3, 4, 5, 6, 7, 9, and 10 of this complaint due to Defendant's intentional, wanton, reckless, and total disregard of Dr. Clendenin's rights;
- m. Interest (including prejudgment interest), costs, attorneys [sic] fees, and other relief

that this Court deems just and equitable.

(*Id.* at 14-15).<sup>4</sup>

**B. Motion to Dismiss**

The Defendant moves to dismiss the Amended Complaint for failure to state a claim upon which relief can be granted and failure to plead fraud with particularity. The Defendant states that the Amended Complaint does not contain "allegations sufficiently plead [sic] that would invoke non-dischargeability under Section 523," but, rather, "is actually only for breach of contract, which does not serve as a basis for non-dischargeability of debt under 11 U.S.C. Section 523." (Mot. to Dismiss at 1-2.) The Defendant addresses the alleged deficiencies of each Count of the Amended Complaint, which arguments will be set forth in further detail below.

**C. Response**

In the Response, the Plaintiff argues that the Amended Complaint sufficiently sets forth the Plaintiff's claims and requested relief to satisfy the pleading requirements of FED. R. CIV. P. 8. The Plaintiff then explains why several Counts of the Amended Complaint, including breach of contract, can serve as the basis for a nondischargeability claim pursuant to § 523(a). Each of the Plaintiff's arguments will be addressed more fully below.

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<sup>4</sup>In light of the Plaintiff's specific consent to this Court entering a final judgment on all aspects of the Amended Complaint, the Plaintiff is no longer seeking relief from the automatic stay.

## II. STANDARD OF REVIEW

FED. R. CIV. P. 8(a)(2), made applicable to this proceeding by FED. R. BANKR. P. 7008(a), requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2) (West 2012). The complaint "does not need detailed factual allegations," but it must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted).

FED. R. CIV. P. 12(b)(6), made applicable to this proceeding by FED. R. BANKR. P. 7012(b), allows a defendant to move for dismissal of a complaint that fails "to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6) (West 2012). The motion to dismiss will be denied if the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). "According to the Supreme Court, 'plausibility' occupies that wide space between 'possibility' and 'probability.'" *Keys v. Humana, Inc.*, 2012 U.S. App. LEXIS 13427, \*12 (6th Cir. July 2, 2012) (citing *Iqbal*, 556 U.S. at 678). "If a reasonable court can draw the necessary inference from the factual material stated in the complaint, the plausibility standard has been satisfied." *Id.*

Thus, "to survive a motion to dismiss, the complaint must contain either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory." *Eidson v. Tenn. Dep't of Children's Servs.*, 510 F.3d 631, 634 (6th Cir. 2007) (citation omitted).

When evaluating a motion to dismiss, the court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Tam Travel, Inc. v. Delta Airlines, Inc. (In re Travel Agent Comm'n Antitrust Litig.)*, 583 F.3d 896, 903 (6th Cir. 2009) (quotation marks and citation omitted). However, "conclusory allegations or legal conclusions masquerading as factual allegations will not suffice." *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 457 (6th Cir. 2011) (quotation marks and citation omitted).

When a complaint alleges fraud, FED. R. CIV. P. 9(b), made applicable to this proceeding by FED. R. BANKR. P. 7009, provides that the plaintiff "must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." FED. R. CIV. P. 9(b) (West 2012). "This rule requires a plaintiff: (1) to specify the allegedly fraudulent statements; (2) to identify the speaker; (3) to plead when and where the statements were made; and (4) to explain what made the statements fraudulent." *Republic Bank & Trust Co. v. Bear Stearns & Co.*, 2012 U.S. App. LEXIS 12513, \*11

(6th Cir. June 20, 2012) (citing *Ind. State Dist. Council of Laborers v. Omnicare, Inc.*, 583 F.3d 935, 942-43 (6th Cir. 2009)).

### III. LEGAL STANDARD

Section 523(a), which excepts various categories of debt from discharge, states, 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; or

\* \* \*

(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(a) (West 2012).

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

To except a debt from discharge pursuant to § 523(a)(2)(A), the creditor must prove:

- (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) (citing *Longo v. McLaren (In re McLaren)*, 3 F.3d 958, 961 (6th Cir. 1993)). Actual fraud, as that term is used in § 523(a)(2)(A), "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." *Ash v. Hahn (In re Hahn)*, 2012 Bankr. LEXIS 651, \*\*6-7 (Bankr. N.D. Ohio Feb. 6, 2012) (quoting *Mellon Bank, N.A. v. Vitanovich (In re Vitanovich)*, 259 B.R. 873, 877 (B.A.P. 6th Cir. 2001)).

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

Section 523(a)(4) excepts from discharge any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny[.]" 11 U.S.C. § 523(a)(4). 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. Blaszk*

(*In re Blaszak*), 397 F.3d 386, 390 (6th Cir. 2005) (citing *R.E. Am., Inc. v. Garver (In re Garver)*, 116 F.3d 176, 178-79 (6th Cir. 1997)). “[T]he term ‘fiduciary relationship,’ for purposes of § 523(a)(4), is determined by federal, not state, law.” *Id.* (citing *Carlisle Cashway, Inc. v. Johnson (In re Johnson)*, 691 F.2d 249, 251 (6th Cir. 1982)). To satisfy § 523(a)(4) in the context of defalcation, the debtor must hold funds in trust for a third party pursuant to an express or technical trust. See *id.* at 391 (citing *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 333 (1934)). “The mere failure to meet an obligation while acting in a fiduciary capacity simply does not rise to the level of defalcation; an express or technical trust must also be present.” *Garver*, 116 F.3d at 179 (n.6 omitted); see also *Castle Nursing Home v. Sullivan (In re Sullivan)*, 19 Fed. Appx. 180 (6th Cir. 2001) (unpublished) (finding that a corporate officer’s breach of his common law fiduciary duties, absent misappropriation of trust property, was not sufficient to except a debt from discharge pursuant to § 523(a)(4)).

“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.’” *Whitmore Lake Pub. Schs. v. CMC Telecom, Inc. (In re CMC Telecom, Inc.)*, 383 B.R. 52, 65-66 (Bankr. E.D. Mich. 2008) (quoting *Gribble v. Carlton (In re Carlton)*, 26 B.R. 202, 205 (Bankr. M.D. Tenn. 1982)). Larceny is the “actual or constructive taking away of property of another without the consent and against the will of the owner or possessor

with the intent to convert to the use the property . . . of someone other than the owner." *Rowe Oil, Inc. v. McCoy*, 189 B.R. 129, 135 (Bankr. N.D. Ohio 1995). "'As distinguished from embezzlement, the original taking of the property must be unlawful.'" *CMC Telecom*, 383 B.R. at 66 (quoting *Davis v. Kindrick (In re Kindrick)*, 213 B.R. 504, 509 (Bankr. N.D. Ohio 1997)).

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

Section 523(a)(6) precludes from discharge 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(a)(6) (West 2012). The plain language of § 523(a)(6) requires the creditor to establish that the injury is both willful and malicious. *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 463 (6th Cir. 1999). The Supreme Court has held that the inclusion of the term "willful" in § 523(a)(6) requires "deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998) (emphasis in original). The Sixth Circuit Court of Appeals expanded the definition of willfulness to include the debtor's belief that injury is "'substantially certain to result'" from the debtor's actions. *Markowitz*, 190 F.3d at 464 (quoting Restatement (Second) of Torts § 8A, 15 (1964)). The element of "malicious injury" in § 523(a)(6) requires action "taken in conscious disregard of the debtor's duties or without just cause or excuse." *Superior Metal Prods. v. Martin (In re Martin)*, 321 B.R. 437, 441-42 (Bankr. N.D. Ohio 2004) (citing *Wheeler v. Laudani*,

783 F.2d 610, 615 (6th Cir. 1986)).

As a result, to prevail in a § 523(a)(6) action, the creditor must establish by a preponderance of the evidence: (i) the debtor caused injury to the creditor or the creditor's property; (ii) the debtor intended to cause such injury or the debtor's actions were substantially certain to cause such injury; and (iii) the debtor acted in conscious disregard of the debtor's duties or without just cause or excuse. *Palik v. Sexton (In re Sexton)*, 342 B.R. 522, 530 (Bankr. N.D. Ohio 2006).

#### **IV. ANALYSIS**

Do the allegations stated in the Amended Complaint, taken as true for purposes of the Motion to Dismiss, state a plausible cause of action to (i) establish that the Defendant owes a debt to the Plaintiff and, if so, determine the amount of such debt; and (ii) except from discharge the debt owed by the Defendant to the Plaintiff pursuant to 11 U.S.C. § 523(a)(2), (a)(4) and/or (a)(6)?

##### **A. Denial of Discharge and/or Dismissal of Debtor's Case**

At the pre-trial status conference on April 5, 2012, this Court told Mr. Essad that, although the prayer for relief in the Complaint sought to "disallow[]" the Debtor's discharge, there were no allegations in the Complaint to support a denial of the Debtor's discharge pursuant to 11 U.S.C. § 727.<sup>5</sup>

Despite being on notice that he had alleged no facts whatsoever in the Complaint to warrant denial or revocation of the Debtor's

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<sup>5</sup>The Court entered Order of Discharge (Doc. # 106) on December 22, 2011.

discharge, the Plaintiff's prayer for relief in the Amended Complaint remains unchanged. The Plaintiff continues to assert, "The nature of Defendant Gregory S. Zinni's actions set forth in this complaint constitute a prohibition from him receiving his discharge." (Am. Compl. ¶ 73.) Despite this bald assertion, the Plaintiff fails to mention § 727 or to identify any facts that support denial of the Debtor's discharge. Section 727 specifically provides that a court *shall* grant a debtor a discharge unless one of the causes set forth therein have been established. The Plaintiff has wholly failed to allege any facts that fall within the purview of § 727.

The Plaintiff continues to seek denial of a discharge to the Debtor, even after the Court expressly told Mr. Essad that there was an abject lack of facts to support such relief. The Court might have taken the Plaintiff's failure to remove such request from the prayer for relief as a mere oversight if the Plaintiff had not referred to § 727 - twice - in his Response to the Motion to Dismiss. (See Resp. at 2, 19.) As a consequence, it appears that the Plaintiff refused - rather than failed - to remove the request for denial of discharge from his Amended Complaint. For the reasons set forth above, all references to denial of the Debtor's discharge in paragraph 73 and the prayer for relief of the Amended Complaint will be stricken.

The grounds for dismissal of a case are found in 11 U.S.C.

§ 707(b)(1).<sup>6</sup> The Plaintiff alleges no facts to warrant dismissal of the Debtor's bankruptcy case. The Amended Complaint was amended to delete from paragraph 73 the allegation that the Debtor's actions "constitute the dismissal of his Bankruptcy." (*Cf.* Compl. ¶ 73 with Am. Compl. ¶ 73.) Despite this amendment, however, the Plaintiff continues to request dismissal of the Debtor's bankruptcy in the prayer for relief. (See Am. Compl. at 14 (requesting "an order dismissing the Debtor's Bankruptcy").) This element of the prayer for relief will be stricken since it is not supported by any factual allegations.<sup>7</sup>

#### **B. Causes of Action**

The Plaintiff incorporates three contracts into the Amended Complaint, which were attached to the Complaint as Exhibits A, B and C. (Am. Compl. ¶¶ 17-18.) Exhibit A, which is styled "Canfield Physicians, LLC Operating Agreement" ("Operating Agreement"), is dated July 1, 2005. The Operating Agreement is by and between the Plaintiff and the Defendant "with respect to the operation of Canfield Physicians, L.L.C." (Operating Agreement at 1.) Exhibit B

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<sup>6</sup>A motion to dismiss for abuse of the provisions of chapter 7, pursuant to § 707(b)(1), may be brought by "any party in interest." 11 U.S.C. § 707(b)(1) (West 2012). Although the Plaintiff could have moved to dismiss the Debtor's bankruptcy case, the Amended Complaint contains no grounds to support dismissal.

<sup>7</sup>The Adversary Proceeding Cover Sheet ("Cover Sheet") (Doc. # 1-4), filed on February 25, 2011, is consistent with the lack of allegations in the Amended Complaint concerning objection to the Debtor's discharge or dismissal of the Debtor's case. In the Cover Sheet, the Plaintiff states, "This is an action to determine the dischargeability of a debt, 11 USC Sec. 523. The complaint alleges breach of contract, fraud, breach of fiduciary duty, conversion, tortious interference with contract and with business relations, among others." (Cover Sheet at 1.) In the box entitled "Other Relief Sought," the Plaintiff wrote, "for an accounting and injunctive relief." (*Id.*)

is styled "Reimbursement Agreement" ("Clendenin Reimbursement Agreement") and is between the Plaintiff and Canfield Physicians, L.L.C. ("Canfield Physicians"). The Clendenin Reimbursement Agreement, which is signed only by the Plaintiff, is also dated July 1, 2005. Exhibit C is similar, if not identical, to Exhibit B ("Zinni Reimbursement Agreement") (collectively, with the Operating Agreement and the Clendenin Reimbursement Agreement, the "Agreements"), except it is between the Defendant and Canfield Physicians. The Zinni Reimbursement Agreement, which is also dated July 1, 2005, is signed by the Defendant and an authorized representative of Canfield Physicians. The Plaintiff alleges that all three of the Agreements underlie the causes of action in the Amended Complaint.

The Defendant has moved to dismiss the Amended Complaint in its entirety. In his Response, the Plaintiff addresses the Defendant's arguments concerning Counts 4 through 10, but he does not address the Motion to Dismiss as to Counts 1, 2 and 3.

**1. Count 1: Breach of Contract**

The Plaintiff alleges Breach of Contract in Count 1. The Defendant argues that "the entire Amended Complaint is actually only for breach of contract, which does not serve as a basis for non-dischargeability of debt under 11 U.S.C. Section 523." (Mot. to Dismiss at 2.) As set forth above, the Plaintiff failed to address the Defendant's argument concerning Count 1. However, in discussing the totality of the Amended Complaint, the Plaintiff cites to

*Stifter v. Orsine (In re Orsine)*, 254 B.R. 184 (Bankr. N.D. Ohio 2000), and argues, "An act that on its face appears to be a breach of contract can also be a fraudulent act subject to nondischargeability." (Resp. at 8.) Taking the allegations in the Amended Complaint in their totality as true, there are no allegations that the Defendant fraudulently induced the Plaintiff to enter into any of the Agreements or that the Defendant did not intend to fulfill his obligations under the Agreements when they were executed. (See *infra* at 27-29.) Thus, the Plaintiff has failed to state a plausible cause of action under § 523(a)(2)(A) in Count 1.<sup>8</sup>

A debt based solely on a debtor's breach of contract will not be excepted from discharge unless such breach also constitutes a willful and malicious injury to the debtor or the debtor's property, as required by § 523(a)(6). *Orsine*, 254 B.R. at 189 (citation omitted) ("[A] mere promise to be carried out in the future is not sufficient to bar the discharge of a debt, even though there is no excuse for the subsequent breach.") Paragraph 22 in Count 1 alleges that the Defendant, "with the assistance of an accountant predisposed to him and several companies that he controls," committed a litany of acts set forth in that paragraph. (Am. Compl. ¶ 22.) The allegations in paragraph 22 are couched in words that

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<sup>8</sup>The Plaintiff never addresses the two subparts of § 523(a)(2). Subpart (A) is the only portion of § 523(a)(2) that could be applicable because the Plaintiff's Amended Complaint is wholly devoid of any facts regarding the "use of a statement in writing . . . respecting the debtor's or an insider's financial condition" as required by § 523(a)(2)(B). 11 U.S.C. § 523(a)(2)(B) (West 2012).

can be construed to constitute malice - e.g., "falsified" and "wrongfully." (*Id.*) In addition, Count 1 refers to intent twice. (See *id.* ¶¶ 24, 27.) Accordingly, the Plaintiff has alleged sufficient facts in Count 1 of the Amended Complaint to state a plausible cause of action regarding the nondischargeability of a debt pursuant to § 523(a)(6).

## 2. Count 2: Injunctive Relief

Count 2 of the Amended Complaint is for Injunctive Relief; however, the purported injunction is, in reality, a request for an order "compelling the Defendant to make restitution of the improper payments set forth above." (*Id.* ¶ 29.) The Plaintiff's alleged cause of action in Count 2 is, at best, disingenuous.<sup>9</sup> Count 2 does not state any facts regarding the dischargeability of a debt, but, instead, requests a remedy of collection. Notwithstanding the reference to injunctive relief in FED. R. BANKR. P. 7001(7),<sup>10</sup> this

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<sup>9</sup>The Plaintiff states that the Amended Complaint essentially "reallege[s]" the allegations in the State Court Action. (Am. Compl. ¶ 6.) To the extent the Plaintiff believed he was entitled to "a temporary restraining order and a preliminary and permanent injunction [sic]" (*id.* at 15), he could have and should have sought such relief in the State Court Action, where such request might have had some vitality. The State Court Action was pending for more than three years prior to the Petition Date (July 2007 through October 2010). If the Plaintiff requested a temporary restraining order and/or a preliminary injunction in the State Court Action, such request almost certainly would have been addressed by that court prior to the filing of the Complaint. If the state court denied the request for injunctive relief, the Plaintiff should have brought that information to the attention of this Court. In the event an injunction has previously been denied, there would be no basis for the Plaintiff to seek injunctive relief in this Court. The Plaintiff fails to address whether (i) he asked the state court for injunctive relief; and/or (ii) the state court previously denied or otherwise addressed any request for injunctive relief.

<sup>10</sup>In the Amended Complaint, the Plaintiff requests "[a] temporary restraining order and a preliminary and permanent injunction [sic] pursuant to Fed. R. Bankr. Pro. [sic] 7001(7)." (Am. Compl. at 15.) Rule 7001 does not provide any substantive basis for this Court to issue an injunction. Rather, Rule 7001 is procedural only. Rule 7001 provides that the rules of Part VII of the Federal Rules of Bankruptcy Procedure apply to adversary proceedings and, in

Court does not believe any court can "enjoin" a party to make restitution. To "enjoin" generally prohibits or restrains a party from taking some action rather than compelling an affirmative action. See BLACK'S LAW DICTIONARY 570 (8th ed. 2004) ("1. To legally prohibit or restrain by injunction.") In addition, the debt for which the Plaintiff seeks the "injunction" of collection appears to encompass a debt for which the Plaintiff himself is, at least in part, jointly and severally liable. (See Am. Compl. ¶¶ 22, 57.)

Moreover, as the Defendant correctly points out, Count 2 calls for injunctive relief against both the Defendant and Canfield Physicians. (See *id.* ¶ 31 (requesting the Court to enjoin the Defendant from "taking or making any further distributions from Canfield Physicians, LLC, or on the company's line of credit, either on his own behalf or on behalf of the other Defendants [sic]").) Canfield Physicians is not a defendant in this proceeding or otherwise before this Court. The Debtor's 50% ownership of Canfield Physicians (a limited liability company) constitutes an asset of the Debtor's bankruptcy estate, which has not been abandoned by the Chapter 7 Trustee. Because Canfield Physicians is a separate (non-debtor) entity and is not a defendant in this adversary proceeding, this Court is without authority to enjoin its operations. As a consequence, Count 2 presents no facts that can state a plausible cause of action (i) under any subsection of § 523, or (ii) to

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order to obtain injunctive relief, a party must commence an adversary proceeding (as opposed to filing a motion or application).

establish liability on a debt from the Defendant to the Plaintiff. Accordingly, Count 2 will be dismissed.

**3. Count 3: Breach of Covenant of Good Faith and Fair Dealing**

The Defendant argues that Count 3, which is for Breach of Implied Covenant of Good Faith and Fair Dealing, is "redundant to the breach of contract action and is not a cause for nondischargeability of a debt." (Mot. to Dismiss at 3.) This Court agrees. There is no separate cause of action for breach of the implied covenant of good faith and fair dealing, as alleged in Count 3, because such breach, if established, is part of the breach of contract claim in Count 1. See *Gates v. Ohio Sav. Ass'n*, 2009 Ohio 6230, ¶ 54 (Ohio Ct. App. Nov. 25, 2009) ("[T]he covenant of good faith is part of a contract claim and, thus, it cannot stand alone as a separate cause of action.") As a consequence, because the allegations in Count 3 cannot plausibly state a cause of action apart from Count 1, the Court will dismiss Count 3.

**4. Count 4: Breach of Fiduciary Duty**

Count 4 asserts Breach of Fiduciary Duty based on an alleged violation of unidentified "applicable law."<sup>11</sup> (Am. Compl. ¶ 38.) Although the Plaintiff relies on Ohio law to argue that the Defendant breached a fiduciary duty to him (Resp. at 11), pursuant

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<sup>11</sup>The only "law" specified in Count 4 appears in paragraph 42, which references alleged actions of the Debtor that were "a clear violation of the Health Insurance Portability and Accountability Act (HIPAA) of 1996." (Am. Compl. ¶ 42.) The Plaintiff fails to allege what fiduciary duty the Defendant owed to the Plaintiff under HIPAA and how such duty was breached. Even when treating the allegations in paragraph 42 as true, HIPAA does not provide a cause of action in favor of the Plaintiff.

to § 523(a)(4), the Court must look to federal law, not state law, to define a "fiduciary relationship." *Commonwealth Land Title Co. v. Blaszak (In re Blaszak)*, 397 F.3d 386, 390 (6th Cir. 2005) (citation omitted) ("[T]he term 'fiduciary relationship,' for purposes of § 523(a)(4), is determined by federal, not state, law.")

In support of Count 4, the Plaintiff argues, "The Amended Complaint alleges that Zinni and Clendenin were equal members in an LLC (¶ 10, 38), that Zinni took over the LLC, kicked Clendenin out of the building, and kept the company's profits and equipment for himself (¶s 16, 22-25, 39, 40, 43, 54), as well as committing [sic] several acts of deception regarding the company's finances (¶ 22)." (Resp. at 12.) However, the Amended Complaint is devoid of any allegation of an express trust relationship, which is required for a cause of action under § 523(a)(4). To satisfy § 524(a)(4) in the context of defalcation, the debtor must hold funds in trust for a third party pursuant to an express or technical trust. See *R.E. Am., Inc. v. Garver (In re Garver)*, 116 F.3d 176, 179 (6th Cir. 1997) (n.6 omitted) ("The mere failure to meet an obligation while acting in a fiduciary capacity simply does not rise to the level of defalcation; an express or technical trust must also be present.") The Plaintiff fails to allege the existence of a trust relationship between the Defendant and the Plaintiff. As a consequence, Count 4 fails to state a plausible cause of action under § 523(a)(4). As the Defendant notes, Count 4 pleads no facts regarding larceny or embezzlement, which are also encompassed in § 523(a)(4). (Mot. to

Dismiss at 7.) Accordingly, although the Plaintiff may use any facts included in Count 4 to attempt to prove that the debt alleged to be owing from the Defendant to him is nondischargeable under § 523(a)(6), Count 4, as a cause of action, will be dismissed.

**5. Count 5: Tortious Interference with Contract**

Count 5 (Tortious Interference with Contract) alleges that the Defendant caused Canfield Physicians to "breach its Operating Agreement, the Clendenin Reimbursement Agreement, and the Zinni Reimbursement Agreement." (Am. Compl. ¶ 45.) The Plaintiff and the Defendant are parties to the Operating Agreement, but Canfield Physicians is not. (See Operating Agreement at 1.) Based on the facts alleged in the Amended Complaint, the Defendant could not have "caused or induced" Canfield Physicians to breach the Operating Agreement because it is not a party to that agreement. To the extent the Defendant caused or induced Canfield Physicians to breach the Zinni Reimbursement Agreement, only the Defendant could have been injured thereby. (See Zinni Reimbursement Agreement § 6.12) ("None of the obligations and duties of any Party under this Agreement shall in any way or in any manner be deemed to create any obligation to, or any rights in, any person or entity not a party to this Agreement.")

Canfield Physicians and the Plaintiff are parties to the Clendenin Reimbursement Agreement. Because the Defendant is not a party to the Clendenin Reimbursement Agreement, it is possible for the Defendant to have tortiously interfered with such agreement.

The Plaintiff alleges that the Defendant's actions were taken "purposely and wrongfully." (Am. Compl. ¶ 45.) As a consequence, there are sufficient facts alleged in the Amended Complaint to state a plausible cause of action regarding the Defendant's tortious interference with the Clendenin Reimbursement Agreement under § 523(a)(6).

**6. Count 6: Tortious Interference with Business Relationships**

Count 6 alleges Tortious Interference with Business Relationships. Some of the allegations in Count 6 appear redundant of the allegations in Count 1. Count 6 alleges that the Defendant "intentionally and maliciously interfered with" the Plaintiff's business relationships with his patients. (*Id.* ¶¶ 48-49.) The allegations in Count 6 are sufficient to plausibly state a cause of action under § 523(a)(6).

**7. Count 7: Conversion**

Count 7 (Conversion) alleges that the Defendant "wrongfully exerted control over Clendenin's personal property in denial of . . . his rights." (*Id.* ¶ 60.) Specifically, the Plaintiff alleges that he owns 50% of an IDD machine, which the Defendant and Canfield Family Healthcare, Inc.<sup>12</sup> "arrogated" for the Defendant's personal use. (*Id.* ¶ 16.) The Defendant argues that Count 7 should be dismissed because (i) the only reference to conversion of personal property occurs in paragraph 16 concerning the IDD machine; and

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<sup>12</sup>The Plaintiff states that the Defendant "owns or controls Canfield Family Healthcare." (Am. Compl. ¶ 11.)

(ii) the IDD machine is not owned by the Plaintiff or the Defendant, but, instead, "was owned and purchased by Canfield Physicians, LLC." (Mot. to Dismiss at 4.) However, in evaluating the Defendant's Motion to Dismiss, the Court must accept as true the Plaintiff's assertion that he owns 50% of the IDD machine. In the Response, the Plaintiff further states that the claim for conversion covers not only the IDD machine, but also "money, profits, records, telephone numbers, and credit (¶s 16, 22, 23, 24, 35, 39, 40, 42, 53, 54, 60), all of which Dr. Clendenin had/has an interest in."<sup>13</sup> (Resp. at 13.)

The Plaintiff rhetorically asks, "[W]hat is 11 U.S.C. § 523(a)(2) if not a synonym for conversion?" (*Id.*) The Plaintiff follows by stating that "'any debt—for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—false pretenses, a false representation, or actual fraud' is nondischargeable. Under Ohio law, committing those acts also constitutes a conversion." (*Id.*)

The Plaintiff is wrong in his analysis about what constitutes conversion. First, conversion must involve personal property. The necessary elements to state a cause of action for conversion are "(1) an ownership or right to possession of the personal property at the time of conversion; (2) a wrongful act or disposition of those property rights; and (3) damages." *Gracotech Inc. v. Perez*,

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<sup>13</sup>An allegation that the Plaintiff has a 100% interest in the personal property is not required. See *Estate of Alkhaldi v. Khatib*, 2005 Ohio 6168, ¶ 23 (Ohio Ct. App. Nov. 18, 2005) ("[E]ven a joint owner can convert property by appropriating it for his exclusive use.")

2012 Ohio 700, ¶ 25 (Ohio Ct. App. Feb. 23, 2012) (citations omitted). Section 523(a)(2) may encompass conversion, but this section clearly is not "synonymous" with the tort of conversion. In fact, § 523(a)(6) is utilized in the great majority of cases to exclude from discharge a debt for conversion. See *Burdick v. Bryant* (*In re Bryant*), 2012 Bankr. LEXIS 2650, \*11 (Bankr. C.D. Ill. June 12, 2012) ("[S]imple conversion, unaccompanied by fraudulent inducement, fits most cleanly under section 523(a)(6)."); *Stahl v. Lang* (*In re Lang*), 108 B.R. 586, 590 (Bankr. N.D. Ohio 1989) (citations omitted) ("Conversion of another's property will give rise to a nondischargeable debt under § 523(a)(6) if the conversion is willful and malicious."); *Moreno v. Schwartz* (*In re Schwartz*), 36 B.R. 355, 358 (Bankr. E.D.N.Y. 1984) (citation omitted) ("[Section 523(a)(6)] would subsume a claim for willful and malicious conversion.")

The Plaintiff has not stated that the Defendant converted his personal property by means of misrepresentation or fraud. Thus, any debt owed to the Plaintiff due to the Defendant's alleged conversion cannot be excepted from discharge under § 523(a)(2)(A). However, the Plaintiff has pled sufficient facts to state a plausible claim for willful and malicious conversion pursuant to § 523(a)(6).

#### **8. Count 8: Unjust Enrichment**

Count 8, Unjust Enrichment, is inconsistent with Count 1, Breach of Contract. If a contract has been breached, the Plaintiff cannot sustain a cause of action for unjust enrichment for the same

alleged facts.

"A party seeking a remedy under a contract cannot also seek equitable relief under a theory of unjust enrichment or quantum meruit, because the terms of the agreement define the parties' relationship in the absence of fraud, bad faith or illegality." *Wolfer Enters. v. Overbrook Dev. Corp.*, 132 Ohio App. 3d 353, 357, 724 N.E.2d 1251, 1253 (1999). See also *Corbin v. Dailey*, No. 08AP-802, 2009 Ohio 881, 2009 WL 491739, at \*4 (Ohio App. 10 Dist. 2009) ("However, the doctrine of unjust enrichment does not apply when a contract actually exists; it is an equitable remedy applicable only when the court finds there is no contract.").

*Jones v. Petland, Inc.*, 2010 U.S. Dist. LEXIS 12538, \*\*16-17 (S.D. Ohio Feb. 11, 2010).

The Plaintiff argues that he has pled Counts 1 and 8 in the alternative, which he is entitled to do. The Plaintiff cannot maintain both causes of action at the same time and/or receive damages as a result of both causes of action. However, in the event the Plaintiff fails to establish the existence of a contract, Count 8 plausibly states a cause of action under § 523(a)(6).

#### **9. Count 9: Fraud**

The allegations in Count 9, Fraud, all relate to alleged representations concerning Canfield Physicians. As set forth *supra* at 9-10, a plaintiff must plead fraud with particularity. See FED. R. Civ. P. 9(b) (West 2012). Both the Plaintiff and the Defendant agree that Rule 9(b) requires a plaintiff to plead the time, place and content of the alleged misrepresentation on which the plaintiff relies. (Mot. to Dismiss at 4; Resp. at 15.) "[Rule 9(b)] requires a plaintiff: (1) to specify the allegedly fraudulent statements; (2) to identify the speaker; (3) to plead when and where the

statements were made; and (4) to explain what made the statements fraudulent." *Republic Bank & Trust Co. v. Bear Stearns & Co.*, 2012 U.S. App. LEXIS 12513, \*11 (6th Cir. June 20, 2012) (citing *Ind. State Dist. Council of Laborers v. Omnicare, Inc.*, 583 F.3d 935, 942-43 (6th Cir. 2009)).

Although the Plaintiff argues that he has met this standard (Resp. at 16), he does not state when or where any of the alleged fraudulent statements were made. In the Response, the Plaintiff states that the "timeframe [sic] for the Defendant's fraud is also pleaded. (¶s 18, 21, 40.)" (*Id.*) An examination of these paragraphs reveals the following times: (i) the three Agreements were each signed "[o]n or about July 1, 2005" (Am. Compl. ¶ 18); (ii) "[f]rom July 1, 2005 and continuing to the present," the Defendant breached the three Agreements<sup>14</sup> (*id.* ¶ 21); and (iii) the Plaintiff "was locked out of his office on December 15, 2006" (*id.* ¶ 40). Taking these allegations as true, the Plaintiff does not allege that the Defendant made any statements before the Plaintiff executed any of the Agreements. Nor does the Plaintiff contend that the Defendant's alleged representations were made for the purpose of inducing the Plaintiff to enter into any of the Agreements. As a consequence, the Plaintiff fails to allege any facts to support the inference that the Defendant fraudulently induced the Plaintiff to enter into any of the Agreements.

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<sup>14</sup>As stated *supra* at 16-17, the Defendant is not a party to the Clendenin Reimbursement Agreement. (See also Clendenin Reimbursement Agreement at 1.)

The Plaintiff also fails to state where any of the alleged representations were made, as required by Rule 9(b). In addition, the Plaintiff fails to state how his reliance on any of the alleged representations caused him injury or damage; instead, he merely makes a conclusory statement of such.

Moreover, some of the alleged representations are so vague that they cannot constitute representations of fact – *i.e.*, “Clendenin’s voice . . . would be as strong as Zinni’s” and “Canfield Physicians would be an honorable business enterprise that would benefit both parties.” (*Id.* ¶ 66.) Despite a bare bones recitation of the correct buzz words for fraud, Count 9 fails to allege facts sufficient to support a cause of action for fraud. As a consequence, although the facts alleged in Count 9 may be used by the Plaintiff to prove a debt that is not dischargeable under § 523(a)(6), such allegations fail to state with specificity a plausible cause of action under § 523(a)(2).

**10. Count 10: Spoliation of Evidence**

Count 10 alleges Spoliation of Evidence, which requires evidence to be destroyed or altered when the acting party is aware of litigation or has been put on notice that litigation will commence. “[T]o show spoliation of evidence, the ‘proponent must first establish that (1) the evidence is relevant, (2) the offending party’s expert had an opportunity to examine the unaltered evidence, and (3) even though the offending party was put on notice of impending litigation, this evidence was intentionally or negligently

destroyed or altered without providing an opportunity for inspection by the proponent.'" *State v. Rivas*, 905 N.E.2d 618, 622 (Ohio 2009) (quoting *Simeone v. Girard City Bd. of Educ.*, 872 N.E.2d 344, 354 (Ohio Ct. App. 2007)). Despite the fact that the Amended Complaint was filed after the close of an extended discovery period, the Plaintiff fails to allege the destruction or alteration of any specific evidence. In addition, the Plaintiff alleges no damages arising from the alleged destruction of evidence. These allegations mirror the allegations contained in Count 1, Breach of Contract, and add nothing new to the Amended Complaint. Count 10 fails to allege facts sufficient to state a plausible cause of action. As a consequence, the Court will dismiss Count 10.

### **C. Dischargeability of Alleged Debt**

In the Amended Complaint, the Plaintiff states that the alleged debt owed to him by the Defendant is "nondischargeable pursuant to 11 U.S.C. § 523(2), (4), and (6) [sic]." (Am. Compl. ¶ 73.) The Plaintiff makes no attempt in the Amended Complaint to tie any of the allegations to any specific subsection of § 523. In his Response, the Plaintiff does a little better, but often still argues that certain actions "fall under 11 U.S.C. § 523(a)." (See, e.g., Resp. at 16) (emphasis removed) ("G. The Amended Complaint alleges spoliation of evidence, and that act falls under 11 U.S.C. § 523(a).")

As explained in greater detail above, the Amended Complaint fails to state a claim pursuant to § 523(a)(2) and/or (a)(4). The

Amended Complaint contains no allegations regarding the use of a written statement respecting the Defendant's financial condition and, thus, § 523(a)(2)(B) is not applicable to this proceeding. The Plaintiff also fails to plead sufficient facts to support a plausible inference that the Debtor fraudulently induced the Plaintiff to enter into the Operating Agreement or the Clendenin Reimbursement Agreement. Moreover, the Plaintiff has failed to plead fraud with particularity and, specifically, has not stated when or where the purported fraudulent statements occurred or how he was damaged by his reliance on such statements. As a consequence, the Plaintiff has not stated sufficient facts to except the alleged debt from discharge due to misrepresentation or fraud, as required by § 523(a)(2)(A). Finally, the Plaintiff did not allege the elements of embezzlement or larceny or assert the existence of a fiduciary relationship, as that term is used in § 523(a)(4). Accordingly, the alleged debt owed to the Plaintiff by the Debtor cannot be excepted from discharge pursuant to § 523(a)(4).

As a consequence, the Motion to Dismiss will be granted, in part, regarding 11 U.S.C. § 523(a)(2) and (a)(4).

The Court, however, finds that the Plaintiff has alleged facts sufficient to state a cause of action for nondischargeability under § 523(a)(6). The Defendant's Motion to Dismiss will be denied with respect to the Plaintiff's 11 U.S.C. § 523(a)(6) claim.

**V. CONCLUSION**

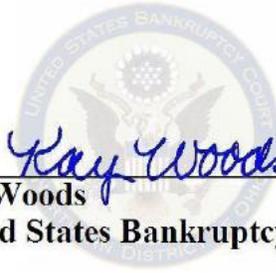
The Motion to Dismiss will be granted, in part, and denied, in part. The Amended Complaint states enough facts to state a cause of action in Counts 1 (or 8), 5, 6 and 7 and for nondischargeability pursuant to 11 U.S.C. § 523(a)(6). The court finds that Counts 2, 3, 4, 9 and 10 ("Dismissed Counts") fail to allege facts sufficient to state any plausible cause of action. Despite dismissal of the Dismissed Counts as separate causes of action, the Plaintiff may use factual allegations in any of the Dismissed Counts to support any of the other remaining causes of action. The relief requested in the prayer is limited to (i) determination of the amount of the debt, if any, owed to the Plaintiff by the Defendant based on Counts 1 (or 8), 5, 6 and 7; and (ii) determination of whether such debt is excluded from discharge in the Debtor's bankruptcy case pursuant to 11 U.S.C. § 523(a)(6).

An appropriate order will follow.

# # #

IT IS SO ORDERED.

Dated: July 18, 2012  
03:53:16 PM

  
*Kay Woods*  
\_\_\_\_\_  
Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

GREGORY ZINNI,  
  
Debtor.

\* \* \* \* \*

JOHN J. CLENDENIN,  
  
Plaintiff,

v.

GREGORY ZINNI,  
  
Defendant.

CASE NUMBER 10-44095

ADVERSARY NUMBER 11-4047

HONORABLE KAY WOODS

\*\*\*\*\*  
ORDER GRANTING, IN PART, AND DENYING, IN PART, MOTION TO DISMISS  
\*\*\*\*\*

On May 17, 2012, Plaintiff John J. Clendenin filed Amended Complaint to Determine Dischargeability and Amount of Debt and to Obtain Relief ("Amended Complaint") (Doc. # 46). Debtor/Defendant

Gregory Zinni filed Motion to Dismiss (Doc. # 48) on June 6, 2012, which is presently before the Court. The Defendant moves to dismiss the Amended Complaint in its entirety for failure to state a claim upon which relief can be granted and failure to plead fraud with particularity. The Plaintiff filed Response to Debtor's-Defendant's Motion to Dismiss (Doc. # 49) on June 20, 2012.

For the reasons set forth in this Court's Memorandum Opinion Regarding Motion to Dismiss entered on this date, the Court hereby:

1. Strikes from the Amended Complaint the Plaintiff's requests to deny the Debtor's discharge and to dismiss the Debtor's bankruptcy case;
2. Finds that Counts 1, 5, 6, 7 and 8 of the Amended Complaint state a claim upon which relief can be granted;
3. Denies the Motion to Dismiss with respect to Counts 1, 5, 6, 7 and 8 of the Amended Complaint;
4. Finds that Counts 2, 3, 4, 9 and 10 of the Amended Complaint fail to state a claim upon which relief can be granted;
5. Grants the Motion to Dismiss with respect to Counts 2, 3, 4, 9 and 10 of the Amended Complaint;
6. Finds that the Plaintiff has stated a claim upon which relief can be granted pursuant to 11 U.S.C. § 523(a)(6);
7. Denies the Motion to Dismiss with respect to the Plaintiff's claims brought pursuant to 11 U.S.C. § 523(a)(6);

8. Finds that the Plaintiff has failed to state a claim upon which relief can be granted pursuant to 11 U.S.C. § 523(a)(2) and/or (a)(4); and
9. Grants the Motion to Dismiss with respect to the Plaintiff's claims brought pursuant to 11 U.S.C. § 523(a)(2) and/or (a)(4).

# # #