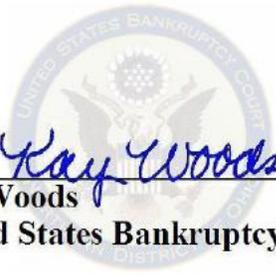


IT IS SO ORDERED.

Dated: July 24, 2014  
01:47:29 PM

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

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

WILLIAM O. FLOWERS, JR. and  
KELLY M. FLOWERS,

Debtors.

\* \* \* \* \*

DEBRA RAE KRONER,

Plaintiff,

v.

WILLIAM O. FLOWERS, JR.,

Defendant.

CASE NUMBER 14-40243

ADVERSARY NUMBER 14-04034

HONORABLE KAY WOODS

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

This cause is before the Court on Motion to Dismiss Complaint  
for Failure to State a Claim Upon Which Relief Can Be Granted

(Doc. 5) filed by Debtor/Defendant William O. Flowers, Jr. on June 25, 2014. Mr. Flowers asserts that this proceeding should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) because Plaintiff Debra Rae Kroner failed to allege facts sufficient to state a claim for relief. Ms. Kroner did not file a substantive response to the Motion to Dismiss. For the reasons set forth herein, the Court will grant the Motion to Dismiss.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and General Order No. 2012-7 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 Federal Rule of Bankruptcy Procedure 7052.

## **I. BACKGROUND**

### **A. Bankruptcy Case**

On February 14, 2014, Debtors William O. Flowers, Jr. and Kelly M. Flowers filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code, which was denominated Case No. 14-40243 ("Main Case"). The Debtors list an interest in a carpentry business, Flowers Corporation, which ceased its operations in 2012. (Main Case, Doc. 1, SOFA ¶ 18.) The Debtors disclose that Ms. Kroner is the holder of a default judgment against Flowers Corporation in a breach of contract case in the Trumbull County,

Ohio, Court of Common Pleas, Case No. 2011 CV 2708. (*Id.* ¶ 4.) In Schedule F – Creditors Holding Unsecured Nonpriority Claims, the Debtors schedule Ms. Kroner as the holder of a breach of contract claim against the Debtors in the amount of \$13,701.00. (Main Case, Doc. 1, Sched. F at 4.) The Debtors list Ms. Kroner in the Creditor Matrix at the address 320 E. Liberty Street, Hubbard, OH 44425 (Main Case, Doc. 1, Creditor Matrix at 4), which is the same address Ms. Kroner listed when she filed this adversary proceeding (Compl. at 1).<sup>1</sup> The Debtors received a discharge on June 6, 2014 (Main Case, Doc. 20).

## **B. Adversary Proceeding**

On June 2, 2014, Ms. Kroner filed Complaint to Determine Dischargeability of Debt and to Obtain Relief (Doc. 1), which commenced this adversary proceeding. Mr. Flowers filed his Motion to Dismiss on June 25, 2015.

### **1. Motion for Leave and Memorandum Motion**

On July 9, 2014 – *i.e.*, the last date on which a response to the Motion to Dismiss was due, see LBR 9013-1(b) (2014) – Ms. Kroner filed (i) Motion for Leave to Amend (“Motion for Leave”) (Doc. 6), in which she requested leave to file an amended complaint; and (ii) Motion for Leave to File Memorandum (“Memorandum Motion”) (Doc. 7), in which she requested the Court

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<sup>1</sup> In the Statement of Financial Affairs, Schedule F and the Creditor Matrix, the Debtors spell Ms. Kroner’s name as “Deborah,” rather than Debra.

to deny the Motion to Dismiss or, alternatively, grant her leave to file a memorandum in response to the Motion to Dismiss. Attached to the Motion for Leave was "a comparison copy of the section of the Amended Complaint that shows the changes to the original Complaint." (Mot. for Leave at 2.) Ms. Kroner did not request a specific amount of time in which to file either an amended complaint or a memorandum.

On July 11, 2014, the Court entered Order Granting Motion for Leave to Amend ("Leave Order") (Doc. 8), in which the Court granted Ms. Kroner leave to file an amended complaint on or before July 16, 2014. The Court noted that Federal Rule of Civil Procedure 15(a)(1)(B), incorporated by Federal Rule of Bankruptcy Procedure 7015, grants a party the right to amend once within 21 days after service of a motion under Rule 12(b). Thus, the Court found that Ms. Kroner did not need leave to file an amended complaint so long as she did so on or before July 16, 2014 - *i.e.*, 21 days after the Motion to Dismiss was served. The Court held, "[A]lthough the Court finds that the Motion for Leave requests relief that is not necessary, to the extent that there is any question about [Ms. Kroner]'s right to file an amended complaint, the Court hereby grants the Motion for Leave." (Leave Order at 3 (n.2 omitted).) In footnote 2 to the preceding quotation, the Court stated:

An amended complaint must be filed as a separate docket entry and served. Presently, an amended complaint is merely attached to the Motion for Leave. If it is not filed and served by July 16, 2014, [Ms. Kroner] will be required to file a new motion for leave to amend.

(*Id.* at 3 n.2.) The Court concluded the Leave Order by stating:

If [Ms. Kroner] files and serves an amended complaint by July 16, 2014, the Motion to Dismiss, which is based on the original Complaint, will be moot and will not be addressed by the Court. The Court will address the Motion to Dismiss if an amended complaint is not so filed.

(*Id.* at 4.)

On that same date, the Court entered Order Denying Motion for Leave to File Memorandum ("Memorandum Order") (Doc. 9), in which the Court denied Ms. Kroner's requests (i) to deny the Motion to Dismiss; and (ii) for leave to file a response to the Motion to Dismiss. First, the Court found that Ms. Kroner provided absolutely no support for her request to deny the Motion to Dismiss. Second, the Court denied Ms. Kroner's request for leave to respond because it was "disingenuous for [Ms. Kroner] to request the Court to deny the Motion to Dismiss without providing any support whatsoever for such request while requesting alternative relief in the form of leave to respond to the Motion to Dismiss." (Memo. Order at 3.) The Court noted that Ms. Kroner had fourteen days to formulate a response to the Motion to Dismiss, yet she took no action prior to filing (i) the Motion for Leave; and (ii) the Memorandum Motion, hours before the responsive deadline.

Finally, the Court reiterated: "If [Ms. Kroner] fails to file an amended complaint on or before July 16, 2014, the Court will address the Motion to Dismiss on its merits. If [Ms. Kroner] timely files an amended complaint, the Motion to Dismiss will be moot." (*Id.* at 4.)

Ms. Kroner failed to file an amended complaint or a second motion for leave to file an amended complaint. As a consequence, the Motion to Dismiss will be addressed on its merits.

## **2. Complaint**

The Complaint contains the following material allegations:

1. In July 2010, Mr. Flowers assessed storm damage to Ms. Kroner's residence. In August 2010, Ms. Kroner hired Mr. Flowers to repair the storm damage and submitted a claim for the storm damage to her insurance provider based upon the estimate Mr. Flowers provided. By December 2010, Mr. Flowers had been paid \$13,700.75 to complete the work.<sup>2</sup> (Compl. ¶¶ 4-5.)

2. In response to Ms. Kroner's April 2011 inquiry regarding the status of the repair work, Mr. Flowers stated that the work would commence in May 2011. Ms. Kroner asked that the insurance proceeds be returned, but Mr. Flowers apologized for the delay and promised to begin the work as soon as possible. (*Id.* ¶ 6.)

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<sup>2</sup> Ms. Kroner states that her insurance provider "issued checks" to Mr. Flowers, but she also states, "In several separate checks, [Ms. Kroner] paid [Mr. Flowers] for the contracted repairs." (Compl. ¶ 5.) Although it is not clear whether Ms. Kroner or her insurance provider tendered payment to Mr. Flowers, that fact is not material to resolution of the Motion to Dismiss.

3. Mr. Flowers "continued to offer excuses for the delay for commencing work until October, [sic] 2011 when [Ms. Kroner] again demanded a return [sic] the insurance funds." Mr. Flowers responded that the insurance proceeds "were no longer available because an employee had stolen the money. No police report of the theft was ever made and no proof of the alleged theft was ever presented." (*Id.* ¶ 7.)

4. In December 2011, Ms. Kroner filed suit against Mr. Flowers and Flowers Corporation.<sup>3</sup> In December 2012, Ms. Kroner obtained a default judgment against Mr. Flowers in the amount of \$16,075.52, which included punitive damages.<sup>4</sup> (*Id.* ¶¶ 3, 10.)

Ms. Kroner argues that the default judgment is nondischargeable pursuant 11 U.S.C. § 523(a)(2)(A), (a)(3)(A) and (a)(4).<sup>5</sup> The Complaint asserts a single count, which contains two statements regarding the conduct of Mr. Flowers. First, "At the time [Mr. Flowers] requested said \$13,700.75 payment from Creditors [sic], [Mr. Flowers] had full and complete knowledge of

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<sup>3</sup> Ms. Kroner never specifies whether she hired Mr. Flowers, personally, or Flowers Corporation to perform the repair work.

<sup>4</sup> Several unidentified documents are attached to the Complaint, which are not (i) labeled as exhibits; or (ii) described, referenced or incorporated into the Complaint. One of these documents appears to be a copy of a default judgment entry.

<sup>5</sup> In the prayer for relief, Ms. Kroner also requests the Court to enter "[a]n order disallowing the Trustee to Grant [sic] [Mr. Flowers]'s Discharge." (Compl. at 3.) Assuming Ms. Kroner intended to request the Court to deny Mr. Flowers a discharge, Ms. Kroner provides no factual or statutory basis for the Court to do so. See, e.g., 11 U.S.C. § 727(a) (West 2014).

the pending actions filed against him. The Flowers Corporation and him individually.” (*Id.* ¶ 9.) Second, “Debtors [sic] individual collection of monies from [Ms. Kroner] with the knowledge of the pending actions against him constitutes fraud.” (*Id.* ¶ 11.) The Complaint does not describe or otherwise provide facts or background about the “pending actions.”

### **3. Motion to Dismiss**

The Motion to Dismiss seeks dismissal of this adversary proceeding for failure to state a claim upon which relief can be granted. Mr. Flowers argues that Ms. Kroner’s fraud claim fails pursuant to § 523(a)(2)(A) because Ms. Kroner failed to allege that (i) he made any material misrepresentations; (ii) he intended to deceive Ms. Kroner; (iii) Ms. Kroner relied upon the alleged misrepresentations; and (iv) Ms. Kroner’s reliance resulted in damages. Ms. Kroner also failed to “specify the pending actions or why this issue is relevant.” (Mot. to Dismiss at 2.) Mr. Flowers next asserts that § 523(a)(3)(A) is not applicable because Ms. Kroner was scheduled as a creditor at the same address she provided when she filed this proceeding. Finally, Mr. Flowers states that Ms. Kroner failed to state a claim pursuant to § 523(a)(4) because there is “no allegation in the complaint involving defalcation, embezzlement or larceny.” (*Id.* at 3.)

Ms. Kroner’s only response to the Motion to Dismiss was to request leave to file an amended complaint, which was granted.

The Court denied the Memorandum Motion, which requested the Court to "grant[] a deadline to the parties for their respective Memorandum to be filed." (Memo. Mot. ¶ 4.) In the Memorandum Motion, Ms. Kroner made a single statement that could be construed as an argument for denying the Motion to Dismiss: "Defendants [sic] state the facts included in Plaintiffs' [sic] Complaint are deficient, thereby creating questions of fact where none may have existed prior to [Mr. Flowers]'s paper being filed." (*Id.* ¶ 2.)

## **II. STANDARD OF REVIEW**

Federal Rule of Civil Procedure 8(a)(2), incorporated by Federal Rule of Bankruptcy Procedure 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 2014). 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).

When a complaint alleges fraud, Federal Rule of Civil Procedure 9(b), incorporated by Federal Rule of Bankruptcy Procedure 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).

Federal Rule of Civil Procedure 12(b)(6), incorporated by Federal Rule of Bankruptcy Procedure 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). 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). 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).

### **III. ANALYSIS**

Ms. Kroner asserts that the default judgment against Mr. Flowers is nondischargeable pursuant to § 523(a)(2)(A), (a)(3)(A) and (a)(4). The Court will address each of these subsections in succession.

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

Section 523(a)(2)(A) excepts from discharge any debt “for money . . . to the extent obtained by . . . false pretenses, a false representation, or actual fraud . . . .” 11 U.S.C. § 523(a)(2)(A). The creditor must prove the following:

- (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) (n.2 omitted) (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)*,

Case No. 11-32001, Adv. No. 11-03146, 2012 Bankr. LEXIS 651, at \*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)).

Regarding fraud and misrepresentation, Ms. Kroner's lone allegation is that, when Mr. Flowers agreed to perform the repair work and accepted payment, Mr. Flowers had knowledge of the "pending actions" filed against him and Flowers Corporation. Simply put, the Complaint is wholly devoid of the factual allegations necessary to state a claim for fraud and misrepresentation. First, Ms. Kroner provides absolutely no background information concerning the pending actions against Mr. Flowers and Flowers Corporation. Moreover, Ms. Kroner's contention that Mr. Flowers committed fraud solely because he accepted payment while lawsuits were pending against him and Flowers Corporation is incorrect as a matter of law.<sup>6</sup> Otherwise, any person who failed to perform under a prepaid services contract, which was entered into while a lawsuit was pending against that person, would be deemed to commit fraud. This is not the case. Second, Ms. Kroner wholly fails to (i) allege that Mr. Flowers misrepresented his intention to perform the repair work; or (ii) provide other circumstantial evidence that Mr. Flowers did

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<sup>6</sup> The Court assumes that the references to "pending actions" mean pending legal actions - *i.e.*, lawsuits.

not intend to perform the repair work.<sup>7</sup> Rather, Ms. Kroner alleges an ordinary breach of contract claim. If the allegations in the Complaint were sufficient to except the judgment from discharge, each and every breach of contract claim based upon a prepaid services contract would be nondischargeable pursuant to § 523(a)(2)(A); however, this is not what the Bankruptcy Code provides. Finally, because Mr. Flowers had received all payments by December 2010, the alleged misrepresentations by Mr. Flowers in 2011 regarding commencement of the repair work and theft of the insurance proceeds could not have been the proximate cause of Ms. Kroner's damages. For these reasons, the Court finds that Ms. Kroner has failed to state a plausible claim for relief pursuant to § 523(a)(2)(A).<sup>8</sup>

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<sup>7</sup> The Complaint contains no information concerning (i) the nature of the repair work Mr. Flowers agreed to perform; (ii) the timeframe, if any, in which Mr. Flowers agreed to complete the repair work; (iii) the total amount Ms. Kroner agreed to pay Mr. Flowers for the repair work; and (iv) whether a written contract existed.

<sup>8</sup> In the "comparison copy" of the proposed amended complaint that was attached to the Motion to Amend ("Proposed Amended Complaint"), Ms. Kroner did not allege any material facts that were not included in the Complaint. Rather, Ms. Kroner made new allegations, such as the following: (i) "Fraud was perpetuated by [Mr. Flowers] upon [Ms. Kroner] through [Mr. Flowers]'s misrepresentation that he intending [sic] on performing the work that he contracted to perform" (Proposed Am. Compl. ¶ 17); (ii) "At the time [Mr. Flowers] made these representations they [sic] knew them to be false and made the representations fraudulently and in an effort to induce [Ms. Kroner] to execute the contract to repair the siding" (*id.* ¶ 19); and (iii) "[Mr. Flowers] intentionally and/or negligently made the above-referenced promises and representations to [Ms. Kroner]" (*id.* ¶ 22). Even if Ms. Kroner had filed and served the Proposed Amended Complaint, these allegations fail to state a plausible claim for relief pursuant to § 523(a)(2)(A) because they are merely a "formulaic recitation of the elements of a cause of action."

**B. Section 523(a) (3)**

Section 523(a) (3) excepts from discharge any debt:

(3) neither listed nor scheduled under section 521 (a) (1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit—

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request[.]

11 U.S.C. § 523(a) (3). Section 521(a) (1) (A) requires the debtor to file a list of creditors. See 11 U.S.C. § 521(a) (1) (A).

Nowhere in the Complaint does Ms. Kroner assert that she was not scheduled as a creditor in Mr. Flowers's bankruptcy. Furthermore, a review of the documents filed in this case conclusively establishes that (i) Ms. Kroner was listed as a creditor in Schedule F and the Creditor Matrix; and (ii) Ms. Kroner's lawsuit against the Debtors and Flowers Corporation was disclosed in the Statement of Financial Affairs.<sup>9</sup> Although Ms.

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<sup>9</sup> In the Proposed Amended Complaint, Ms. Kroner stated, "Plaintiffs [sic] were not listed as creditors in [Mr. Flowers]'s Chapter 7 petition." (Proposed Am. Compl. ¶ 2.) Although the Court must accept as true Ms. Kroner's factual allegations when evaluating the Motion to Dismiss, the Court need not accept as true statements that are patently false upon a review of the record before the Court.

Kroner's first name was misspelled in Schedule F and the Creditor Matrix, the address included in those documents is the same address that Ms. Kroner provided when she filed the Complaint. Thus, the misspelling is immaterial. Furthermore, Ms. Kroner filed the Complaint on June 2, 2014, which establishes that she had actual knowledge of the bankruptcy in time to file this adversary proceeding or a proof of claim.<sup>10</sup> As a consequence, Ms. Kroner has failed to state a claim for relief pursuant to § 523(a)(3).<sup>11</sup>

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

Section 523(a)(4) excepts from discharge any debt for "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. Blaszak (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,

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<sup>10</sup> The first date set for the meeting of creditors under § 341(a) was April 1, 2014. Thus, the last date to file a complaint objecting to the discharge of a debt pursuant to § 523(a)(2), (a)(4) or (a)(6) was June 2, 2014 and the last date to file a proof of claim was June 30, 2014. See FED. R. BANKR. P. 4007(c) (West 2014); *Id.* 3002(c).

<sup>11</sup> Ms. Kroner requests the Court to except the judgment from discharge pursuant to § 523(a)(3)(A), but also asserts that the judgment is nondischargeable pursuant to § 523(a)(2) and (a)(4), which debts fall within the purview of § 523(a)(3)(B). The Court's analysis remains unchanged regardless if subsection (a)(3)(A) or (a)(3)(B) is utilized.

178-79 (6th Cir. 1997)). "[T]he term 'fiduciary relationship,' for purposes of § 523(a)(4), is determined by federal, not state, law." *Blaszak*, 397 F.3d at 390 (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 creditor must hold funds in trust for a third party pursuant to an express or technical trust. *Blaszak*, 397 F.3d 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).

"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)).

Ms. Kroner fails to allege that a fiduciary relationship existed between the parties or allege facts that allow the Court to infer a fiduciary relationship.<sup>12</sup> Ms. Kroner also fails to allege that a pre-existing express or technical trust existed between the parties. Rather, Mr. Flowers accepted prepayment for a services contract. Even if this payment could be construed as creating a fiduciary relationship, defalcation requires more than simple failure to meet an obligation. Thus, Ms. Kroner has failed to plead facts sufficient to support a claim for fraud or defalcation while acting in a fiduciary capacity.

Similarly, Ms. Kroner fails to allege facts sufficient to state a claim for embezzlement or larceny. As stated above in the Court's analysis of § 523(a)(2)(A), Ms. Kroner has not pled facts sufficient to support a finding that Mr. Flowers fraudulently obtained the insurance proceeds or that he made any misrepresentations to Ms. Kroner. It is also undisputed that Mr. Flowers obtained the insurance proceeds with the consent of Ms. Kroner. Accordingly, Ms. Kroner has failed to state a claim for

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<sup>12</sup> In the Proposed Amended Complaint, Ms. Kroner stated, "At all times relevant, [Mr. Flowers] acted in a fiduciary capacity in his relationship with [Ms. Kroner]." (Proposed Am. Compl. ¶ 16.) However, Ms. Kroner provided absolutely no facts to support this conclusory statement.

embezzlement or larceny. The Complaint does not state a claim for relief pursuant to § 523(a)(4).

#### **IV. CONCLUSION**

Ms. Kroner's Complaint is wholly deficient of the facts necessary to state a plausible claim pursuant to § 523(a)(2)(A), (a)(3) or (a)(4).<sup>13</sup> Ms. Kroner provides no support for her assertion that Mr. Flowers's knowledge of the "pending actions" when he accepted the insurance proceeds somehow constitutes fraud. Moreover, Ms. Kroner provides no explanation concerning what the pending actions were. Rather, Ms. Kroner has pled an ordinary breach of contract claim for a prepaid services contract. As a matter of law, such claim is not excepted from discharge pursuant to any subsection of § 523(a). Ms. Kroner has also failed to allege that a fiduciary relationship existed between the parties or state a claim for embezzlement or larceny. Finally, the record establishes that Ms. Kroner was listed as a creditor in Mr.

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<sup>13</sup> In the introductory paragraph of Proposed Amended Complaint, Ms. Kroner stated that the judgment is nondischargeable pursuant to § 523(a)(6). However, in the conclusory paragraph to the only count of the Proposed Amended Complaint, Ms. Kroner stated that the judgment is nondischargeable pursuant to subsections (a)(2)(A), (a)(3)(A) and (a)(4). Even if Ms. Kroner had filed and served the Proposed Amended Complaint and requested relief pursuant to § 523(a)(6), the Court's analysis would remain unchanged. In the Proposed Amended Complaint, Ms. Kroner failed to allege any facts to support a finding that Mr. Flowers willfully or maliciously caused injury to her or her property.

Flowers's bankruptcy case. As a consequence, the Court will grant the Motion to Dismiss. An appropriate order will follow.

# # #

IT IS SO ORDERED.

Dated: July 24, 2014  
01:47:29 PM

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

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

WILLIAM O. FLOWERS, JR. and  
KELLY M. FLOWERS,

Debtors.

\* \* \* \* \*

DEBRA RAE KRONER,

Plaintiff,

v.

WILLIAM O. FLOWERS, JR.,

Defendant.

CASE NUMBER 14-40243

ADVERSARY NUMBER 14-04034

HONORABLE KAY WOODS

\*\*\*\*\*  
ORDER GRANTING MOTION TO DISMISS  
\*\*\*\*\*

This cause is before the Court on Motion to Dismiss Complaint  
for Failure to State a Claim Upon Which Relief Can Be Granted

(Doc. 5) filed by Debtor/Defendant William O. Flowers, Jr. on June 25, 2014. Mr. Flowers asserts that this proceeding should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) because Plaintiff Debra Rae Kroner failed to allege facts sufficient to state a claim for relief. Ms. Kroner did not file a substantive response to the Motion to Dismiss.

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

1. Finds that Ms. Kroner has failed to state a plausible claim for relief pursuant to 11 U.S.C. § 523(a)(2)(A);
2. Finds that Ms. Kroner has failed to state a plausible claim for relief pursuant to 11 U.S.C. § 523(a)(3);
3. Finds that Ms. Kroner has failed to state a plausible claim for relief pursuant to 11 U.S.C. § 523(a)(4); and
4. Grants the Motion to Dismiss.

# # #