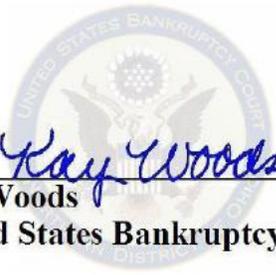


IT IS SO ORDERED.

Dated: August 12, 2014  
08:57:40 AM

  
*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.

\* \* \* \* \*

RATHERBFARMS, LTD., et al.,

Plaintiffs,

v.

WILLIAM O. FLOWERS, JR.,

Defendant.

CASE NUMBER 14-40243

ADVERSARY NUMBER 14-4035

HONORABLE KAY WOODS

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

This cause is before the Court on Motion to Dismiss Amended Complaint for Failure to State a Claim Upon Which Relief Can Be Granted ("Motion to Dismiss") (Doc. 7) filed by Debtor William O. Flowers, Jr. on July 7, 2014.<sup>1</sup> Plaintiffs RATHERBFARMS, LTD., Terri A. McCoy and Bruce Haddle (collectively, "Plaintiffs") filed Plaintiffs' Memorandum in Opposition to Motion to Dismiss ("Memo in Opposition") (Doc. 8) on July 21, 2014. For the reasons set forth herein, the Court will grant the Motion to Dismiss, as applicable to Counts I and II of the Amended Complaint.

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**

Debtor/Defendant William O. Flowers, Jr., together with his spouse, Kelly M. Flowers,<sup>2</sup> filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code on February 14, 2014 ("Petition

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<sup>1</sup> The Motion to Dismiss addresses only two of the three counts identified in the Amended Complaint, rather than the Amended Complaint in its entirety.

<sup>2</sup> Kelly Flowers is not a defendant in this adversary proceeding.

Date”), which was denominated Case No. 14-40243 (“Main Case”). An Order of Discharge (Main Case, Doc. 20.) was entered by this Court on June 6, 2014.

## **B. Adversary Proceeding**

The Plaintiffs filed the Complaint (Doc. 1) on June 2, 2014 seeking a determination of non-dischargeability of debt pursuant to 11 U.S.C. § 523(a) for claims that arose during Mr. Flowers’s former employment<sup>3</sup> as a zoning inspector for the Coitsville Township Zoning Office. On June 5, 2014, the Plaintiffs filed the Amended Complaint (Doc. 2).

### **1. Amended Complaint**

Plaintiffs Terri McCoy and RATHERBFARMS, LTD (“Owners”) own real property in Coitsville Township, located at 4256 McGuffey Road, Lowellville, Ohio 44436 (“Property”). (Am. Compl. ¶ 7.) In 2012, the Owners contracted with Plaintiff Bruce Haddle, a contractor, to create a pond on the Property for \$50,000.00. (*Id.* ¶ 11.) This pond was intended to be used “for an agricultural purpose to irrigate crops [the Owners] were growing and other agricultural purposes.” (*Id.* ¶ 20.) As the project’s contractor, Mr. Haddle hired Thomas Doyle, a sub-contractor, to begin the construction and paid him \$10,000.00. (*Id.* ¶ 12-13.)

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<sup>3</sup> The Debtors’ Schedule I describes Mr. Flowers as unemployed on the Petition Date. (Main Case, Doc. 1, Sch. I.) Additionally, Mr. Flowers filed a statement indicating that he did not receive any pay advices during the 60 days prior to the Petition Date. (Main Case, Doc. 5.)

Mr. Doyle worked on this project for approximately one month before Mr. Flowers issued a stop work order.<sup>4</sup> (*Id.* ¶ 14.) The Plaintiffs allege that Mr. Flowers entered the Property without permission "driving behind a moving bulldozer in his pickup truck, bearing a firearm."<sup>5</sup> (*Id.*) Mr. Flowers allegedly threatened Mr. Doyle with arrest and behaved in an "intimidating fashion." (*Id.*)

The Plaintiffs claim that an unidentified Coitsville Township Trustee approached the Plaintiffs<sup>6</sup> about selling the Property, and when they declined, she "threatened zoning violations against them." (*Id.* ¶ 15.) The Plaintiffs contend that, because a zoning permit was not required to construct the pond,<sup>7</sup> Mr. Flowers was acting in his official capacity to intimidate and harass the Plaintiffs into selling the Property to the nephew of the unidentified Township Trustee. The Plaintiffs allege that such intimidation occurred and the stop work order was issued as a

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<sup>4</sup> A copy of the stop work order is attached to the Amended Complaint as Exhibit 1.

<sup>5</sup> Schedule B - Line 8 "Firearms and sports, photographic and other hobby equipment" is checked "None" and the alleged firearm is not listed or described in any other personal property category. (Main Case, Doc. 1, Sch. B.)

<sup>6</sup> Paragraphs 15, 17 and 18 of the Amended Complaint refer to the Plaintiffs collectively and do not differentiate between the Owners and their contractor.

<sup>7</sup> For the proposition that a zoning permit was not required for the pond's construction, the Plaintiffs generally refer to, but do not quote, Ohio Revised Code § 519.21 and state that "no township zoning commission or board of township trustees may prohibit the use of any land for agricultural purposes of the land on which such buildings or structures are located and no zoning permit or any permit is required to construct the pond." (Am. Compl. ¶ 19.)

consequence of the Plaintiffs' declination to sell the Property. (*Id.* ¶¶ 15, 18-19.)

Additionally, Mr. Flowers allegedly "gesture[ed] to Plaintiff Haddle that he was going to shoot him and [made] it known to Plaintiff Haddle that he carried with him a firearm while on his personal time as well as while working in the capacity of zoning inspector for Coitsville Township." (*Id.* ¶ 24.) The Amended Complaint also includes allegations of post-petition harassment of Mr. Haddle when Mr. Flowers "pointed a finger gun at him." (*Id.* ¶ 16.)

The Plaintiffs state they incurred damages as a result of Mr. Flowers's conduct. After Mr. Flowers intimidated Mr. Doyle into leaving the project, (i) the Plaintiffs lost the money paid to Mr. Doyle; (ii) Mr. Haddle lost anticipated revenue from the Owners for completion of the pond; and (iii) the Property was damaged "as a result of the property sitting without having the pond completed." (*Id.* ¶¶ 27, 43, 49.) Collectively, the Plaintiffs also assert additional unspecified damages and entitlement to attorney fees and punitive damages. (*Id.*)

The Plaintiffs state they have a pending state court action against Mr. Flowers concerning their claims. "[The] Plaintiffs have duly commenced suit against Defendant and the Coitsville Township Board of Trustees in the Mahoning County Common Pleas Court, which case is styled as: RATHERBFARMS, LTC, et al. v.

William O. Flowers, Jr., et al., Case No. 2014 CV 432.” (*Id.* ¶ 3.) The state court action was not pending pre-petition, but was commenced on the Petition Date.<sup>8</sup> This adversary proceeding, which was timely commenced four months later, seeks a determination that the Plaintiffs’ unliquidated, disputed claims against Mr. Flowers are non-dischargeable.<sup>9</sup>

The Amended Complaint outlines three causes of action:

1. In Count I, the Plaintiffs allege that the damages they suffered as a result of Mr. Flowers’s “willful and malicious injury of another entity or property of another entity” are non-dischargeable, pursuant to § 523(a)(6).

2. In Count II, the Plaintiffs allege that such damages were incurred as a result of Mr. Flowers’s “fraud while acting in a fiduciary capacity,” due to his position as a zoning inspector, making the resulting debt non-dischargeable pursuant to § 523(a)(4).

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<sup>8</sup> The commencement date of the state court action was not disclosed in the pleadings. This Court takes judicial notice of the docket report of Case No. 2014 CV 432 in the Mahoning County Court of Common Pleas, which indicates that the Plaintiffs’ state court complaint was filed 15 minutes after the Debtors filed their bankruptcy petition. See Federal Rule of Evidence 201 (West 2014) (“[a] judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”).

<sup>9</sup> The Plaintiffs’ state court action was not disclosed in the Debtors’ Statement of Financial Affairs, the related claim was not itemized in the Debtors’ schedules and the Plaintiffs were not included on the Creditor Matrix.

3. In Count III,<sup>10</sup> the Plaintiffs allege that Mr. Flowers's alleged misconduct took place "while acting under color of state law, deprived Plaintiffs of the rights, privileges, or immunities secured by the 5th and 14th Amendments of the United States Constitution." As a result, the Plaintiffs claim entitlement to damages pursuant to 42 U.S.C. § 1983. (Am. Compl. ¶¶ 47-48, 51.)

## **2. Motion to Dismiss**

The Motion to Dismiss seeks dismissal of Counts I and II for failure to state a claim upon which relief can be granted. Mr. Flowers argues that Count I (i) does not allege the requisite malice for an action pursuant to § 523(a)(6); and (ii) is based on alleged tortious business interference, damages from which are not exempt from discharge. (Mot. to Dismiss at 2.) Mr. Flowers argues that Count II does not include a legal basis for the alleged fiduciary relationship for an action pursuant to § 523(a)(4). (*Id.* at 2-3.)

In their Memo in Opposition, the Plaintiffs contend that (i) Paragraphs 11-29 of the Amended Complaint include sufficient allegations of malicious conduct; (ii) "[a]s a matter of law, pleading the tort of tortious [interference] with a contractual or business relationship states a claim for an exception to discharge under 11 U.S.C. § 523(a)(6)" (Memo in Opp. at 5); and (iii) the

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<sup>10</sup> Because the Defendant seeks dismissal of Counts I and II only, the sufficiency of Count III is not addressed by the Court in this Opinion.

alleged fiduciary relationship is established by Mr. Flowers's employment as a "public official" (*id.* at 8), or in the alternative, by the "difference in knowledge or power" between Mr. Flowers and the Plaintiffs (*id.* at 7).

## **II. STANDARD**

Federal Rule of Civil Procedure 12(b)(6), made applicable to this proceeding 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) (2014). 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." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "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 a complaint alleges fraud, Federal Rule of Civil Procedure 9(b), made applicable to the instant adversary proceeding 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).

"[C]laims involving fraud must be pled with particularity in order to: place the defendants on notice of the precise misconduct of which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior." *Official Comm. of Admin. Claimants ex rel. LTV Steel Comp., Inc. v. Bricker*, No. 105 CV 2158, 2010 WL 3781662, at \*15-16 (N.D. Ohio Sept. 22, 2010). The threshold test is whether the pleading provides "fair notice to the defendants, such that the defendants may prepare a pleading in response to the allegations based upon fraud." *Advocacy Org. for Patients and Providers v. Auto Club Ins. Ass'n*, 176 F.3d 315, 322 (6th Cir. 1999).

"It is certainly true that allegations of date, place and time fulfill these functions, but nothing in the rule requires them. Plaintiffs are free to use alternative means of injecting precision and some measure of substantiation into their allegations of fraud." *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir. 1984) (citation omitted). "[P]laintiffs are not required to provide evidence, only to allege facts establishing fraud with particularity." *Michaels Bldg. Co. v. Ameritrust Co., N.A.*, 848 F.2d 674, 680 (6th Cir. 1988).

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) (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) (citations omitted).

Accordingly, for purposes of determining this Motion to Dismiss, the Court accepts all facts pled in the Amended Complaint as true.

### **III. ANALYSIS**

The Plaintiffs assert that their unliquidated, disputed claims against Mr. Flowers are non-dischargeable pursuant to § 523(a)(6) (Count I) and § 523(a)(4) (Count II), as well as 42 U.S.C. § 1983 (Count III). Section 523 identifies certain types of debt that are not dischargeable, even if an individual debtor is otherwise eligible for discharge. Exceptions to discharge under § 523 are narrowly construed against the creditor and in favor of the debtor. See *Rembert v. AT&T Universal Card Servs., Inc. (In re Rembert)*, 141 F.3d 277, 281 (6th Cir. 1998). The creditor bears the burden to prove that an exception to

discharge applies. See *Castle Nursing Home v. Sullivan (In re Sullivan)*, 19 F. App'x 180, 181 (6th Cir. 2001) (citing *Grogan v. Garner*, 498 U.S. 279, 291 (1991)).

**A. Tortious Interference with Business Relationships**

Since the Plaintiffs do not have a liquidated claim against Mr. Flowers, the first issue is whether the Plaintiffs have alleged sufficient facts to state a cause of action for tortious interference with a business relationship.

To have a valid claim for tortious interference, the Plaintiffs must prove: (i) the existence of a contract; (ii) the wrongdoer's knowledge of the contract; (iii) the wrongdoer's intentional procurement of the contract's breach; (iv) a lack of justification; and (v) resulting damages. *Kenty v. Transamerica Premium Ins. Co.*, 650 N.E.2d 863, 866 (Ohio 1995). However, the Court need not accept as true "a legal conclusion couched as a factual allegation." *Hensley Mfg., Inc. v. ProPride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009).

The first element of tortious interference with a business relationship is satisfied because the Plaintiffs allege the existence of a contract between the Owners and Mr. Haddle for the construction of a pond. (Am. Compl. ¶¶ 11-12.)

The Plaintiffs make the conclusory statement that Mr. Flowers had knowledge of the contractual relationships. (*Id.* ¶ 23.) The Amended Complaint establishes that Mr. Flowers must have known the

pond was being constructed in order to issue the stop work order. Viewing the facts in a light most favorable to the Plaintiffs, the stop work order attached to the Amended Complaint as Exhibit 1 provides the inference that Mr. Flowers had knowledge of some business relationships or contracts because it names the "person/persons in violation" as "Bruce Haddle & Contractor." (*Id.*, Ex. 1.)

The third element of tortious interference requires that the wrongdoer intentionally procured breach of the contract. The Plaintiffs state sufficient facts to establish that Mr. Flowers intended the work on the pond construction to be stopped by alleging that he delivered the stop work order to Mr. Doyle while "brandishing a firearm" and told Mr. Doyle "to cease and desist construction of the pond or potentially face arrest." (*Id.* ¶ 24.) However, there are no facts to demonstrate that Mr. Flowers intended to procure a breach of the contract for construction of the pond or even a permanent cessation of such construction work. Hand printed on the stop work order in the space for Remarks/Comments is the statement: "You must get in contact [with] Shawn McGuire of Mahoning County Soil & Water 330-440-7524[.]" This statement shows that, rather than the stop work order being a permanent bar to further work, the Plaintiffs were directed to contact the Mahoning County Soil and Water Department for further information. Although, the Amended Complaint states facts to show

Mr. Flowers's actions caused work on the pond to stop, it fails to state facts to establish that Mr. Flowers procured breach of the contract for construction of the pond, which is the third element of this tort.

The fourth element of tortious interference requires that the actions were taken without justification. Here, the Amended Complaint also falls short. The Plaintiffs assert the legal conclusion: "Defendant had no legal basis for serving a stop work order . . . since no zoning permit was required pursuant to Ohio Revised Code [§] 519.21." (*Id.* ¶ 25.) However, immediately following that conclusory statement, the Plaintiffs allege that the actions of Mr. Flowers occurred while he "was working as the agent, servant, employee and representative of the Coitsville Township [T]rustees which condoned him acting outside the course and scope of his employment . . . ." (*Id.* ¶ 26.) Accepting as true the allegation that Mr. Flowers was working as the "agent, servant, employee and representative of the Coitsville Township [T]rustees," who "condoned" his actions, it cannot be said that Mr. Flowers acted without justification. Although the Plaintiffs generally allege that Mr. Flowers acted outside the course and scope of his employment, they specifically allege that his actions were in his capacity as zoning inspector and that such actions were condoned by the government entity for which he worked. Based on the allegations in Paragraph 26 of the Amended Complaint, the

Plaintiffs establish that Mr. Flowers was justified in delivering the stop work order because he was authorized to do so (even in the manner in which it was done).

The last element required for this cause of action is damages, which the Plaintiffs argue generally in Paragraph 49 of the Amended Complaint.

The Plaintiffs have failed to alleged sufficient facts to state a claim for tortious interference with a business relationship, because they fail to allege facts to show that (i) Mr. Flowers intentionally procured a breach of contract; and (ii) that Mr. Flowers's actions in delivering the stop work order were not justified. Thus, the cause of action for tortious interference with a business relationship fails. As a consequence, the Plaintiffs cannot establish a claim in any amount against Mr. Flowers for tortious interference with a business relationship or contract.

**B. Count I: Willful and Malicious Injury § 523(a)(6)**

Although the Plaintiffs fail to state a cause of action against Mr. Flowers for tortious interference with a business relationship, the Court will assume, *arguendo*, for purposes of this section, that the Plaintiffs can assert a monetary claim against Mr. Flowers. 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). This subsection codifies the long-standing bankruptcy policy that any debt which is shown to have arisen from a dishonest or otherwise wrongful act committed by a debtor is not entitled to the benefits of a bankruptcy discharge." *Hoffman v. Anstead (In re Anstead)*, 436 B.R. 497, 500 (Bankr. N.D. Ohio 2010) (citing *Cohen v. De La Cruz*, 523 U.S. 213 (1998)). 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). The Sixth Circuit 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, at 15 (1964)). "Negligent or reckless acts do not suffice to establish that a resulting injury is 'wilful and malicious.'" *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 332 (1934).

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)). “[T]he definition of malice requires a heightened level of culpability transcending mere willfulness.” *Id.* at 442 (citing *Sateren v. Sateren (In re Sateren)*, 183 B.R. 576, 583 (Bankr. D.N.D. 1995)).

To prevail in a § 523(a)(6) action, the plaintiff must establish by a preponderance of the evidence: (i) the debtor caused injury to the plaintiff or the plaintiff’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).

The basis for the Plaintiffs’ § 523(a)(6) claim is Mr. Flowers’s alleged tortious interference with the contractual/business relationships amongst the Plaintiffs. Mr. Flowers contends that intentional interference is not actionable under § 523(a)(6). However, Mr. Flowers’s response that “such a tort is not an exception to discharge” goes too far. The Plaintiffs correctly note that this tort was recognized as a non-dischargeable action in *Crider v. Dobbs (In re Crider)*, 205 F.3d 1339 (6th Cir. 2000) and *King’s Welding & Fabricating, Inc. v. King (In re King)*, Case No. 10-63468, Adv. No. 10-6099, 2011 WL 2837915 (Bankr. N.D. Ohio July 14, 2011).

However, tortious interference with a business relationship is not a *per se* exception to discharge. “The Supreme Court never categorically stated that all intentional torts were exempt from discharge under § 523(a)(6). Rather, it did the contrary. It emphasized that those intentional torts within the contemplation of (a)(6) were where the actor intends the consequences of his act, *i.e.*, intentional injury, and not simply the act itself.” *In re Cantu*, 400 B.R. 104, 109 (Bankr. S.D. Tex. 2008) subsequently *aff’d*, 389 F. App’x 342 (5th Cir. 2010). “[T]he fact that tortious interference with contract is an intentional tort is not dispositive of [the] § 523(a)(6) analysis.” *In re Cantu*, 389 F. App’x 342, 345 (5th Cir. 2010); *see Williams*, 337 F.3d at 509 (“Despite similarities in the language used to describe an injury under Section 523(a)(6) and intentional torts, Section 523(a)(6) creates a narrower category of tortious conduct.”).

Whether tortious interference is an exception to discharge is a question of fact and turns on whether Mr. Flowers intended an injury. Intending the act of interference is not synonymous with intending the injury, as is required under § 523(a)(6).

Even though the Plaintiffs have failed to state a cause of action for tortious interference with a business relationship against Mr. Flowers, the Court finds that the elements of a § 523(a)(6) action are also lacking. As set forth above, in order for the Plaintiffs to establish that a debt is non-dischargeable,

pursuant to § 523(a)(6), they must show that Mr. Flowers intended injury or that the actions of Mr. Flowers were substantially certain to result in injury. The Plaintiffs must assert facts that demonstrate both willfulness and malice on the part of Mr. Flowers.

The Plaintiffs allege that (i) Mr. Flowers's actions "demonstrate[d] malice or egregious fraud or were done with knowledge that damage and injury to [the] Plaintiffs were certain to occur" (*id.* ¶ 28); and (ii) that Mr. Flowers "procured the breach" of the contracts between the Plaintiffs (*id.* ¶ 24).

For the willfulness element, the Plaintiffs allege that Mr. Flowers intended to interfere with their contractual relationships. As set forth above, the Plaintiffs offer no support to prove that Mr. Flowers intended to permanently or unlawfully obstruct their contractual and business relationships simply by delivering the stop work order. Even the inferential evidence that Mr. Flowers's actions were intentional does not establish that Mr. Flowers must have actually known his actions would produce injury. See *S. Atlanta Neurology and Pain Clinic, P.C. v. Lupo (In re Lupo)*, 353 B.R. 534, 550 (Bankr. N.D. Ohio 2006) (citing *Geiger*, 523 U.S. at 61 ("The word 'willful' modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury.")).

For the malice element, the Plaintiffs assert that Mr. Flowers issued a baseless stop work order in a threatening manner.<sup>11</sup> However, they fail to prove that this action was "taken in conscious disregard of [his] duties or without just cause or excuse" because delivering stop work orders appears to be within a zoning inspector's scope of employment and entering applicable property to do so is necessary to carry out this function. Indeed, as set forth above, contrary to malicious conduct, the Plaintiffs allege that Mr. Flowers was acting in his official capacity with the approval of the Township Trustees when he delivered the stop work order. The Plaintiffs have not asserted any facts to support a finding that Mr. Flowers's conduct reaches the heightened level of culpability required under § 523(a)(6). See *In re Lupo*, 353 B.R. at 550. The Plaintiffs appear to put a great deal of emphasis on the fact that Mr. Flowers "brandished a firearm" and made threatening statements when he delivered the stop work order; however, they acknowledge that this specific conduct was "condoned" by the Township Trustees, which places such actions within the scope of his duties as zoning inspector.

The Plaintiffs allege that Mr. Flowers had "no legal basis for serving a stop work order on [the Plaintiffs] since no zoning

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<sup>11</sup> The Amended Complaint also includes an allegation that Mr. Flowers "threatened or intimidated Plaintiff Haddle on two occasions." (Am. Compl. ¶ 16.) However, these alleged events were post-petition and are, therefore, irrelevant to this analysis.

permit was required pursuant to Ohio Revised Code [§] 519.21.”  
(Am. Compl. ¶ 25.) However, this is merely a legal conclusion.<sup>12</sup>  
The Amended Complaint references Ohio Revised Code § 519.21, which  
states:

[These sections] confer no power on any township zoning  
commission . . . to prohibit the use of any land for  
agricultural purposes or the construction or use of  
buildings or structures incident to the use for  
agricultural purposes of the land on which such  
buildings or structures are located . . . and no zoning  
certificate shall be required for any such building or  
structure.

OHIO REV. CODE ANN. § 519.21(A) (West 2014).

Because the stop work order instructed the Plaintiffs to  
contact the Mahoning County Soil and Water Department, there may  
have been other statutory justification for issuance of the stop  
work order. Even if the stop work order was issued in error, there  
are no facts that Mr. Flowers was personally responsible for its  
issuance. Any irregularity in the issuance of the stop work order  
is not conclusive of any malice in its delivery by Mr. Flowers.

The Plaintiffs have the burden to prove that Mr. Flowers’s  
action lacked justification; to the contrary, they state that Mr.  
Flowers’s alleged misconduct – issuing a baseless stop work order  
while brandishing a firearm – was condoned by his employer. These

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<sup>12</sup> There is no indication that the Owners’ pond would be treated as a “structure”  
under the statute. Additionally, several exceptions are enumerated in subpart  
B of Ohio Revised Code § 519.21 that, based on the acreage of the lot at issue,  
would enable the Zoning Office to regulate agriculture-related construction.  
The Plaintiffs failed to provide the size of the Owners’ lot where the pond  
construction was intended.

facts defeat, rather than support, the element of malice because, by condoning Mr. Flowers's actions, his actions are presumed to be within the scope of his employment.

The Plaintiffs also fail to sufficiently link their alleged damages to Mr. Flowers's actions. "For a debt to fall within this exception to discharge the creditor has the burden of proving that it sustained an injury as a result of a willful and malicious act by the debtor. Thus, a debtor's actions must be determined to be the cause of the creditor's injury." *In re Lupo*, 353 B.R. at 551. The stop work order included an explicit instruction for the recipient to contact either the Mahoning County Soil and Water Department or the Coitsville Township Zoning Office concerning the stop work order. (Am. Compl., Ex. 1.) The Amended Complaint is devoid of any facts concerning whether the Plaintiffs contacted one or both of these departments and, if so, what they were told. Although the Plaintiffs allege that, after issuance of the stop work order, no further work was done on the pond, there are no facts to explain why issuance of the stop work order operated as a permanent ban on further work. As a consequence, the Plaintiffs have failed to link their damages to Mr. Flowers's actions in issuing the stop work order.

The Plaintiffs have not established the elements required to find a debt non-dischargeable pursuant to § 523(a)(6). They have failed to provide any facts to establish that (i) Mr. Flowers

intended to cause injury to the Plaintiffs; ii) Mr. Flowers's actions were without justification; (iii) Mr. Flowers's actions were the cause of the Plaintiffs' damages; and (iv) each Plaintiff suffered a willful and malicious injury. As a consequence, the Plaintiffs fail to allege facts sufficient to establish that any claim for tortious interference is non-dischargeable pursuant to § 523(a)(6).

**C. Count II: Fraud in a Fiduciary Capacity § 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). In Count II, the Plaintiffs' allegations are only based on fraud.

The Plaintiffs make the following conclusory statements, which are merely a formulaic recitation of the elements:

32. At all times relevant, [Mr. Flowers] acted in a fiduciary capacity in his relationship with [the] Plaintiffs.

33. At all times relevant, [Mr. Flowers] acted fraudulently.

\* \* \*

38. Plaintiffs were justified in relying upon the false representations and malicious actions of [Mr. Flowers] all to the injury and detriment of the Plaintiffs.

(Am. Compl. ¶¶ 32, 33, 38 (emphasis added).)

**1. Fiduciary Relationship**

"[T]he term 'fiduciary relationship,' for purposes of § 523(a)(4), is determined by federal, not state, law."

*Commonwealth Land Title Co. v. Blaszak (In re Blaszak)*, 397 F.3d 386, 390 (6th Cir. 2005) (citing *Carlisle Cashway, Inc. v. Johnson (In re Johnson)*, 691 F.2d 249, 251 (6th Cir. 1982)).

The Plaintiffs assert that Mr. Flowers enjoyed the “trust and confidence” that resulted in a “position of superiority or influence over [the] Plaintiffs.” (Am. Compl. ¶ 10.) They rely on *In re Frain*, 230 F.3d 1014 (7th Cir. 2000) for their argument that a fiduciary relationship exists under § 523(a)(4) due to the fact that the power Mr. Flowers held was “substantially one-sided.” (Memo in Opp. at 7.) However, this reliance is misplaced. The *Frain* court explained that “superior knowledge . . . was not sufficient in itself to establish a position of ascendancy.” *In re Frain*, 230 F.3d at 1017. Instead, the court reasoned that the shareholders’ agreement governing the parties’ arrangement was written to give the defendant ultimate power and control with nearly nonexistent limits or checks on his power. *Id.* It was his “ascendant position” in which he acted with unchecked dominance that created the defendant’s fiduciary duty, and it was of such heightened status as to qualify for the § 523(a)(4) requirement. *Id.* at 1018-19.

The situation in *Frain* is unlike the one before this Court. Here, the zoning inspector did not enjoy ultimate and limitless

power over the residents and contractors in Coitsville Township.<sup>13</sup> The stop work order indicated that Mr. Flowers was the "Zoning Inspector" and listed contact information for the Coitsville Township Zoning Office. However, pursuant to the balances on his "power," the stop work order also included the name and direct contact information for someone other than Mr. Flowers - *i.e.*, a representative of the Mahoning County Soil and Water Department - to whom the Plaintiffs were directed for additional information regarding the stop work order and the alleged violation. The Plaintiffs had the opportunity (i) to confirm the authenticity and legality of the zoning inspector's directive; and (ii) to inquire about enforcement procedures, any appeal process and/or the process or procedures to obtain any required permit. Based on the facts set forth in the Amended Complaint, Mr. Flowers's actions in delivering the stop work order appear to be in accordance with his status as an agent of his employer, carrying out a segment of the Zoning Office's functions.

The Plaintiffs have not provided any basis for finding that Mr. Flowers was more than a general fiduciary or agent of his employer. By their reasoning, every government employee,

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<sup>13</sup> There are no facts regarding whether Mr. Flowers was an elected official or merely a Township employee. There are no facts regarding the mechanism for enforcement of the stop work order and who exercised enforcement authority once the stop work order was delivered. The stop work order references possible fines and imprisonment, implying criminal action, which would necessarily involve a prosecutor and the courts - not something that could be carried out by Mr. Flowers alone (if he had any part at all in the process).

regardless of the capacity in which they serve, would be a "public officer" and would be held to a heightened fiduciary standard, which is contrary to the spirit of § 523(a)(4). "The term 'fiduciary' as used in the statute is limited to the class of fiduciaries including trustees of specific written declarations of trusts, guardians, administrators, executors or public officers and, absent special consideration, does not extent (sic) to the more general class of fiduciaries such as agents, bailees, brokers, factors and partners." *Simpson v. Palma (In re Palma)*, 341 B.R. 194, 197-98 (Bankr. W.D. Ky. 2006) (citing *Auto Owners Ins. Comp. v. Littell (In re Littell)*, 109 B.R. 874, 880 (Bankr. N.D. Ind. 1989)).

There is no case law to support the legal argument that Mr. Flowers, as a zoning inspector, had a fiduciary duty to the Owners or Mr. Haddle. "Case law makes clear that the broad, general definition of fiduciary – a relationship involving confidence, trust and good faith – is inapplicable in the context of exception to a bankruptcy discharge." *Utnehmer v. Crull (In re Utnehmer)*, 499 B.R. 705 (B.A.P. 9th Cir. 2013). The traditional definition of "fiduciary," involving a relationship of confidence, trust and good faith, is too broad for the purposes of bankruptcy law. *New Jersey v. Kaczynski (In re Kaczynski)*, 188 B.R. 770, 773 (Bankr. D. N.J. 1995) (citing *Matter of Rausch*, 49 B.R. at 564; *Chapman v.*

*Forsyth*, 43 U.S. 202 (1844); *Upshur v. Briscoe*, 138 U.S. 365 (1891); *Davis v. Aetna Acceptance Co.*, 293 U.S. 328 (1934)).

The Sixth Circuit has adopted a narrow interpretation of “fiduciary” as used in § 523(a)(4). *R.E. America, Inc. v. Garver (In re Garver)*, 116 F.3d 176, 179 (6th Cir. 1997) (citing *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1372 (10th Cir. 1996) (holding that general fiduciary duties of confidence, trust, loyalty, and good faith are insufficient to establish the necessary fiduciary relationship for purposes of § 523(a)(4))). “Although an ordinary agency-principal relationship can involve fiduciary duties, such a relationship standing alone is insufficient to establish the type of fiduciary duty contemplated by § 523(a)(4).” *Transp. Equip. Sales Corp. v. Hahn (In re Hahn)*, No. 09-37597, 2011 WL 3293626, at \*10 (Bankr. N.D. Ohio July 29, 2011) (citing *Commonwealth Land Title Co. v. Blaszak (In re Blaszak)*, 397 F.3d 386, 391 (6th Cir. 2005) (stating that “the mere failure to meet an obligation while acting in a fiduciary capacity does not rise to the level of defalcation” under § 523(a)(4).)).

The Court finds that the Plaintiffs have failed to establish that Mr. Flowers had a fiduciary relationship with each of the individual Plaintiffs and such relationships existed prior to the alleged fraud.

## 2. Actual Fraud

“‘Fraud’ under § 523(a)(4) means actual fraud.” *Honkanen v. Hopper (In re Honkanen)*, 446 B.R. 373, 382 (B.A.P. 9th Cir. 2011). The Supreme Court of Ohio recognizes the following elements in an action on actual fraud:

(a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance.

*Gaines v. Preterm-Cleveland, Inc.*, 514 N.E.2d 709, 712 (Ohio 1987).

To support their non-dischargeability action based on fraud, the Plaintiffs rely on a formulaic recitation of the elements based entirely on their own legal conclusions:

34. At all times [Mr. Flowers] knew the falsehood of his stop work order[.]

\* \* \*

37. The false representation and actions of [Mr. Flowers] were made with intent of misleading the Plaintiffs[.]

38. Plaintiffs were justified in relying upon the false representations and malicious actions of [Mr. Flowers] all to the injury and detriment of Plaintiffs.

\* \* \*

43. As a direct and proximate result of the foregoing fraud as pled in this Count, Plaintiffs have sustained general and special damages[.]

(Am. Compl. ¶¶ 34, 37-38, 43.)

Prominently lacking from the Plaintiffs’ allegations is any support for the element of “justifiable reliance.” Based on the

facts as pled, the Plaintiffs received a stop work order, abandoned construction of the pond and then – 18 months later – commenced the state court action against Mr. Flowers and his employer. The Plaintiffs fail to assert that they took any action or made any inquiry regarding Coitsville Township's permit procedures or appeal process. The Plaintiffs provide no basis to find that, in permanently abandoning work on the pond project, they justifiably relied on Mr. Flowers's issuance of the stop work order and the statements he made. The stop work order provided the Plaintiffs with specific avenues to determine the legality and enforceability of the stop work order. The Plaintiffs offer no justification for their failure to contact the authorities listed on the stop work order to determine what they needed to do to have Mr. Doyle resume work on the pond. Because the Plaintiffs took no action and made no inquiries with Mahoning County or Coitsville Township – despite the express language of the stop work order – they were not justified in relying on Mr. Flowers's issuance of the stop work order as a permanent bar to work on the pond project.

The Plaintiffs fail to plead sufficient facts that support their claim that (i) a fiduciary relationship existed between themselves and Mr. Flowers; (ii) Mr. Flowers's issuance of the stop work order constituted actual fraud; and (iii) the Plaintiffs were justified in relying on the stop work order. Thus, the Plaintiffs do not state facts sufficient to establish a claim for

non-dischargeability under § 523(a)(4). Accordingly, Count II fails.

#### **IV. CONCLUSION**

For the reasons set forth above, the Court finds that the Amended Complaint fails to state a claim for the non-dischargeability of a debt under § 523(a)(4) or (a)(6). The Plaintiffs' Count I fails to sufficiently allege a willful and malicious injury. The Plaintiffs' Count II fails to sufficiently allege (i) the existence of a fiduciary relationship; and (ii) that actual fraud was perpetrated. As a consequence, the Court will grant the Motion to Dismiss, as applicable to Counts I and II. An appropriate order will follow.

# # #

IT IS SO ORDERED.

Dated: August 12, 2014  
08:57:40 AM

  
*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.

\* \* \* \* \*

RATHERBFARMS, LTD., et al.,

Plaintiffs,

v.

WILLIAM O. FLOWERS, JR.,

Defendant.

CASE NUMBER 14-40243

ADVERSARY NUMBER 14-4035

HONORABLE KAY WOODS

\*\*\*\*\*  
ORDER GRANTING MOTION TO DISMISS COUNTS I AND II  
OF THE AMENDED COMPLAINT  
\*\*\*\*\*

This cause is before the Court on Motion to Dismiss Amended Complaint for Failure to State a Claim Upon Which Relief Can Be Granted ("Motion to Dismiss") (Doc. 7) filed by Debtor William O. Flowers, Jr. on July 7, 2014.<sup>1</sup> The Motion to Dismiss seeks dismissal of Counts I and II of the Amended Complaint (Doc. 2) on the basis that (i) Count I does not allege the requisite malice for an action pursuant to 11 U.S.C. § 523(a)(6) and is based on alleged tortious interference with business relationships, damages from which are not exempt from discharge; and (ii) Count II does not include a legal basis for the alleged fiduciary relationship for an action pursuant to § 523(a)(4). (Mot. to Dismiss at 2-3.) Plaintiffs RATHERBFARMS, LTD., Terri A. McCoy and Bruce Haddle (collectively, "Plaintiffs") filed Plaintiffs' Memorandum in Opposition to Motion to Dismiss (Doc. 8) on July 21, 2014.

For the reasons set forth in the Court's Memorandum Opinion Regarding Motion to Dismiss entered on this date, the Court hereby finds that the Plaintiffs failed to state a claim for (i) tortious interference with business relationships; (ii) the non-dischargeability of the alleged debt for tortious interference pursuant to § 523(a)(6); and/or (iii) the non-dischargeability of the alleged debt for fraud pursuant to § 523(a)(4). As a

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<sup>1</sup> The Motion to Dismiss addresses only two of the three counts identified in the Amended Complaint, rather than the Amended Complaint in its entirety.

consequence, the Court grants the Motion to Dismiss, as applicable to Counts I and II of the Amended Complaint.

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