UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA

IN RE:

JOHNNY SADLER, SR. Case No. 07-11333

Debtor

GREG FISH Case No. 07-01053

v.

JOHNNY SADLER, SR.

MEMORANDUM OPINION

Before the Court is Plaintiff's Motion for Summary Judgment. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I), and the Court has authority to enter a final order. For the reasons indicated below, the Court denies Plaintiff's Motion for Summary Judgment.

FACTUAL BACKGROUND

Plaintiff, Mr. Fish, and Debtor, Mr. Sadler, were shareholders of a corporation (Sunco Maintenance Supply Co.). Mr. Sadler was the President of the corporation. On November 1, 2004, Plaintiff sued Mr. Sadler in state court to dissolve the corporation and amended his complaint to allege a breach of fiduciary duty. The case proceeded to trial and a judgment in the amount of $135,145.13 was entered by the state court against Mr. Sadler. The state court held on July 24, 2006, that Mr. Sadler "intentionally breached his fiduciary duty to Greg Fish by self-dealing through sales of inventory to a company affiliated with Mr. Sadler at substantially less than cost and by failing to make payments on loans and other obligations upon which Fish is

personally liable as a guarantor." The court also awarded the Plaintiff $16,460.00 for attorney's fees.

Debtor, Mr. Sadler, filed a Chapter 7 bankruptcy petition on May 18, 2007. Debtor listed the state court judgments on his bankruptcy schedules. Plaintiff filed an adversary petition on August 10, 2007 to determine the dischargeability of the state court judgments.

ARGUMENTS

Plaintiff contends that the state court judgments are not dischargeable pursuant to 11 U.S.C. § 523(a)(4) due to the findings of the state court that the Debtor intentionally breached his fiduciary duty. The Debtor argues that the state court judgment does not specifically use the term "fraud" as § 523(a)(4) does; therefore, the nondischargeability statute does not apply. The Plaintiff analogizes the term "intentional" to the term "fraud" due to the state law distinction between intentional and negligent breaches of duty. Given the Florida state court's usage of the term "intentional" in its judgment, the Plaintiff asserts that § 523(a)(4) applicable. On this theory, the Plaintiff moves for summary judgment.

DISCUSSION

A motion for summary judgment is controlled by Rule 56 of the Federal Rules of Civil Procedure, which is applicable to bankruptcy proceedings pursuant to Fed. R. Bankr. P. 7056. A court shall grant summary judgment to a party when the movant shows that "there is no genuine issue as to any material facts and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Bankr. P. 7056(c). In *Anderson v. Liberty Lobby, Inc.*, 477 U. S. 242, 106 S. Ct. 2502, 91 L. Ed. 2d 2020 (1986), the Supreme Court found that a judge's function is not to determine the truth of the matter asserted or weight of the evidence presented, but to determine whether or not the factual disputes raise genuine issues for trial. *Anderson*, 106 S. Ct. at 2510-11. In making

this determination, the facts are to be looked upon in the light most favorable to the nonmoving party. *Id.*; *Celotex Corp. v. Catrett*, 477 U. S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Allen v. Bd. of Public Educ. for Bibb County*, 495 F.3d 1306 (11th Cir. 2007).

There is not a genuine issue as to any material facts in this case; however, there is a legal element not satisfied by the Plaintiff. The statute at issue states that a Debtor's bankruptcy will not discharge a debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4).

I.

The parties presented and argued the question of whether or not the state court's judgment falls within the scope of the exception to discharge for fraudulent debts listed within §523(a)(4). This is not the key question, because even if "intentional" does not equal "fraud" for purposes of the exceptions to dischargeability statute, the facts found by the state court would satisfy the burden of proving "defalcation." Defalcation is the fiduciary's failure to account for funds due to any breach of duty whether it was intentional, willful, reckless, or negligent. Proof of fraud is not even needed. *See In re Moreno*, 892 F.2d 417 (5th Cir. 1990); *In re Wang,* 247 B.R. 211 (Bankr. E.D. Tex. 2000); *In re Storie*, 216 B.R. 283 (10th Cir. 1997). What the Court is most concerned with is the whether or not the Debtor was acting in a "fiduciary capacity" as required by the statute.

II.

There are two lines of cases that have arisen from case law regarding the interpretation of the term "fiduciary" under the Bankruptcy Code. See *In re Frick*, 207 B.R. 731 (Bankr. N.D. Fla. 1997) for a thorough explanation of these two interpretations. This Court has, however, previously ruled on this matter and has held with the majority of cases interpreting the word

"fiduciary" more narrowly for bankruptcy purposes than typical state law or common usage would normally define it. The term's general definition of good faith, care, and loyalty has been deemed too broad a definition for bankruptcy law, and courts have held that the fiduciary relationship must involve an express or technical trust. *Davis v. Aetna Acceptance Co.*, 293 U.S. 328 (1934); *In re Cato*, 218 B.R. 987 (Bankr. M.D. Fla. 1998); *In re Codia*, 78 B.R. 344 (Bankr. S.D. Fla. 1987); *McCain v. Elliot* (*In re Elliot*), 66 B.R. 466, 467 (Bankr. S.D. Fla. 1986); *In re Campbell*, 97 B.R. 496, 498 (Bankr. M.D. Fla. 1986). A trust must have segregated *res*, an identifiable benefit, and established trust duties. *In re Shultz*, 208 B.R. 723, 278 (Bankr. M.D. Fla. 1997) *citing American Surety & Casualty Co. v. Hutchinson* (*In re Hutchinson*), 193 B.R. 61, 65 (Bankr. M.D. Fla. 1996).

State statutes may impose a technical trust that would establish a fiduciary relationship for dischargeability purposes. *T&D Moravits & Co. v. Munton* (*In re Munton*), 352 B.R. 707 (9th Cir. B.A.P. 2006) (Texas statute established a technical trust under § 523(a)(4) where it provided that construction funds were trust funds and the contractor who controls the funds is a trustee); *Quaif v. Johnson (In re Quaif)*, 4 F.3d 950, 954 (11th Cir. 1993) (The statutory duty of an insurance agent to segregate premiums in a separate account from the agent's funds created a technical trust)*; Hearn, et al. v. Goodwin* (*In re Goodwin*), 355 B.R. 337 (Bankr. M.D. Fla. 2006) (A company's profit sharing plan was established as an express trust) *In re Haversen*, 330 B.R. 291 (Bankr. M.D. Fla. 2005) (Violation of Maryland Construction Trust statute did not constitute the debt owed as nondischargeable because the statute did not create a technical trust under §523(a)(4)); *In re Jones*, 306 B.R. 352, 354-55 (Bankr. N.D. Ala. 2004) (There was no express trust or technical trust established merely because the parties' ran a closely held corporation and debtor was an officer and controlling shareholder); *In re Donald Hanft*, 315 B.R. 617 (Bankr.

S.D. Fla. 2002) (A statute requiring doctors to establish an escrow account for patient funds did not give rise to the trust required by §523(a)(4) because it did not maintain that the patients' funds be held in trust). However, there is no Florida statute that establishes a trust to meet the bankruptcy's standard of fiduciary capacity for a corporate director or officer,[1] and there is no express trust between the parties that is evidenced in the record.

CONCLUSION

Although the state court judgment states that the Debtor intentionally breached his fiduciary duty to Plaintiff, this general usage is not enough to satisfy the bankruptcy standard for "fiduciary capacity." While Debtor's conduct may have been careless, disloyal, and possibly even fraudulent, it does not take away the necessity that for application of the exceptions to discharge statute the Debtor must have been acting in a fiduciary capacity as defined by bankruptcy law.

This Court and the Eleventh Circuit Court of Appeals have traditionally followed the narrow interpretation of "fiduciary" requiring an express or technical trust. *See Guerra v. Fernandez-Rocha (In re Fernandez-Rocha)*, 451 F.3d 813 (11th Cir. 2006); *Quaif*, 4 F.3d at 953; *In re Frick*, 207 B.R. at 737; *Rishell v. Davis*, 115 B.R. 346 (Bankr. N.D. Fla. 1990); *Savonarola v. Beran*, 79 B.R. 493 (Bankr. N.D. Fla. 1987). The Court continues to follow its precedent and that of the Eleventh Circuit Court of Appeals. The Court finds that an express or technical trust

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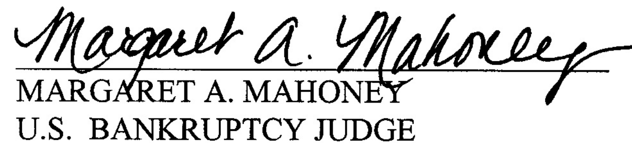
[1]The old Florida statute that dealt with the transfer of property after dissolution has been held to establish a technical trust by at least one court. The court in *Wright v. Menendez (In re Wright*), 107 B.R. 789 (Bankr. S.D. Fla. 1989) found that the debtor's position as an officer and director of a corporation did not meet the requirement of fiduciary under § 523(a)(4), but that Florida Statute § 607.301 established a trust. F.S.A. § 607.301 provided that the directors of a corporation at the time of dissolution constituted a board of trustees for the property then owed by the corporation. The court found this was sufficient to establish a trust under § 523(a)(4). However, F.S.A. § 607.301 was repealed and new corporation laws took effect in 1990.

must be established before the fiduciary capacity of §523(a)(4) is met, and Plaintiff has failed to prove the existence of any such trust.

For this reason, the Court is denying Plaintiff's Motion for Summary Judgement. Given this ruling, the only issue that remains for trial is whether the defendant's actions may constitute embezzlement or larceny.

Dated: November 26, 2007



MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE