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11/9/07

In the United States Bankruptcy Court
for the Northern District of Georgia
Atlanta Division

In re)	Case No. 06-68805-MGD
)	
Catherine Lam,)	Chapter 7
)	
Debtor.)	Judge Diehl
)	
Smithkline Beecham Corp. d/b/a)	
Glaxosmithkline,)	
)	
Plaintiff,)	
)	Adversary Proceeding
v.)	
)	No. 06-09096
Catherine Lam,)	
)	
Defendant.)	

ORDER GRANTING IN PART AND DENYING IN PART
PLAINTIFF'S MOTION TO DISMISS

Plaintiff SmithKline Beecham Corp. d/b/a Glaxosmithkline ("Plaintiff") filed this action on October 30, 2006 seeking to have its claim against Debtor Catherine Lam ("Debtor") declared non-dischargeable pursuant to 11 U.S.C. §§ 523(a)(4) and 523(a)(6). Debtor has moved to dismiss Count I of the Complaint which seeks relief under section 523(a)(4) on the grounds that the complaint fails to state a claim for either larceny or embezzlement. The Court agrees with Debtor with respect to any cause of action for larceny but disagrees with Debtor with respect to the embezzlement claim. Debtor's Motion to Dismiss is, therefore, granted in part and denied in part.

This is a core matter under 28 U.S.C. § 157(b)(2) and jurisdiction and venue are proper in this Court.

The function of a Rule 12(b) motion to dismiss is to test the legal sufficiency of the claim

for relief. Such motion should only be granted if “it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claims which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Jackam v. Hospital Corp. of America Mideast, Ltd.*, 800 F.2d 1577, 1579 (11th Cir. 1986). The burden of proof that the Complaint fails to state a claim is on the moving party. *Johnsrud v. Carter*, 620 F.2d 29, 33 (3d Cir. 1980). In deciding such a motion, the Court should construe the Complaint in the light most favorable to the Plaintiff, and its allegations taken as true. *Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969), *reh’g denied*, 396 U.S. 869 (1969). The real issue before the Court is “not whether plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.” *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

Thus the Court must determine whether the allegations of Plaintiff’s Complaint, which are presumed to be true for purposes of the motion, could support a claim for non-dischargeability for a debt that resulted from larceny or embezzlement. The controlling statute is 11 U.S.C. § 523(a)(4) which provides that a discharge under section 727 does not discharge an individual debtor from any debt “for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.”

Plaintiff’s Complaint alleges that Debtor was an employee of Plaintiff and that she agreed to a severance package with Plaintiff which included a payment to Debtor of \$5,113.00 less applicable withholdings and a general release by Debtor of any claims she had against Plaintiff. (Complaint ¶¶ 9, 10). Plaintiff erroneously sent Debtor a check for \$85,113.00, less applicable withholdings, for a net amount of \$53,932.29. (Complaint ¶ 11). Plaintiff alleges that Plaintiff brought the error to Debtor’s attention and that Debtor acknowledged the error and

agreed to return the funds. (Complaint ¶ 14). Debtor failed to return the funds despite numerous demands from Plaintiff. (Complaint ¶¶ 15-19). A judgment was entered against Debtor in favor of Plaintiff in the amount of the overpayment (\$47,480.00) by the State Court of Fulton County. (Complaint ¶ 20).

These allegations must be compared to the legal requirements for larceny and embezzlement to determine the sufficiency of Plaintiff's pleadings. It is clear that the phrase "while acting in a fiduciary capacity" does not qualify the words "embezzlement" or "larceny" and thus any debt which results from embezzlement or larceny falls within the exception of section 523 (a)(4). *John J. O'Connor, CPO, Inc. v. Booker (In re Booker)*, 165 B.R. 164 (Bankr. M.D.N.C. 1994).

Embezzlement is the fraudulent appropriation of property by a person to whom such property had been lawfully entrusted or into whose hands it has lawfully come. *Moore v. United States*, 160 U.S. 268, 16 S. Ct. 294, 40 L. Ed. 422 (1895); *In re Phillips*, 882 F.2d 302, 304 (8th Cir. 1989); *In re Belfry*, 862 F.2d 661, 662 (8th Cir. 1988). In contrast, larceny involves the fraudulent taking of the property of another with intent to convert the property to the taker's use. Thus, the original taking must be unlawful. *In re Heath*, 114 B.R. 310 (Bankr. N.D. Ga. 1990); *Werner v. Hoffmann*, 144 B.R. 459 (Bankr. D.N.D. 1992).

The Complaint alleges that Debtor came into possession of the funds at issue by virtue of an error on the part of Plaintiff. Thus, there is no allegation that there was an unlawful taking of the funds by Debtor. As such, no claim is stated for larceny.

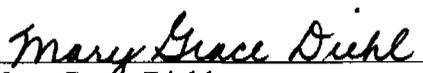
With respect to embezzlement, the Court cannot say that the allegations of the Complaint could not, under any circumstances, make out a claim for embezzlement. Construed in a light

most favorable to Plaintiff, it is alleged that Debtor, with knowledge that the funds received were not authorized to be used for her own personal purposes, failed to return the overpayment to Plaintiff and she no longer has possession of the funds, raising an inference that they were used for personal purposes. Proof of such a factual pattern could lead to a determination that embezzlement occurred.

Actual proof of embezzlement would need to include not only breach of contract to return the funds, but an actual intent to deprive Plaintiff of the funds known to belong to it. The allegations of the Complaint are sufficient to withstand the Motion to Dismiss with respect to embezzlement.

Debtor's Motion is **GRANTED** as to the dischargeability claim based upon larceny and **DENIED** as to the claim based upon embezzlement.

SO ORDERED, this 8th day of January, 2007.



Mary Grace Diehl
United States Bankruptcy Judge