IT IS ORDERED as set forth below:

Date: April 06, 2011

Paul W. Bonapfel
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

IN THE MATTER OF:	:	CASE NUMBER: 10-42735-PWB
GREEN HOBSON RIDDLE,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 11 OF THE
Debtor.	:	BANKRUPTCY CODE
DOT BURKE,	:	
Plaintiff	:	
v.	:	ADVERSARY PROCEEDING
	:	NO. 10-4088
GREEN HOBSON RIDDLE a/k/a G.H. RIDDLE,	:	
Defendant.	:	

ORDER GRANTING MOTION TO DISMISS

The Debtor, Green Hobson Riddle, seeks dismissal of the Plaintiff's complaint to determine dischargeability of a debt. The Plaintiff has not filed a response. Because the Court

concludes that the Plaintiff's complaint fails to state a claim for relief under 11 U.S.C. §§ 523(a)(2), (a)(3), (a)(4), or (a)(6), the motion to dismiss is granted.

The Plaintiff alleges that on July 25, 2007, she purchased a 2007 Blue Ribbon XT307 horse trailer from the Debtor. In conjunction with the purchase, she traded in a 2005 Silver Star trailer that served as collateral for a debt owed to GE Money Bank. The Plaintiff contends that as part of this transaction the Debtor agreed to pay off the existing encumbrance to GE Money Bank. The Plaintiff also executed a retail installment contract and security agreement in favor of GE Money Bank for an additional $18,118 to finance the purchase of the 2007 trailer. In total, the Plaintiff was indebted to GE Money Bank in excess of $30,750.79, secured by liens on the 2007 trailer she purchased and the 2005 trailer she traded in.

The Plaintiff alleges that the Debtor subsequently sold the 2005 trailer, but did not use the funds to pay off the lien and instead converted them to his own use and benefit. In addition, at some point the Plaintiff returned the 2007 trailer at the Debtor's request on the representation it had been sold to another customer. The Plaintiff alleges that the Debtor agreed to replace it with a 2008 trailer, but that she remained liable on the debt to GE Money Bank secured by the 2007 trailer. The Plaintiff alleges that the Debtor then conveyed the 2007 trailer to another customer, but did not apply proceeds to the debt owed to GE Money Bank for which it was collateral, instead using the funds for his own use and benefit. The Plaintiff contends that "[t]his series of conveyances was done by [the Debtor] with the actual intent to deceive and defraud the Plaintiff." (Doc. 1, Complaint, ¶ 20).

The Debtor contends that the transaction was between the Plaintiff and Rome Leasing, Inc. ("RLI"), a corporation of which the Debtor is the majority owner, chief executive officer, and

president. (Doc. 7, Debtor's Brief, ¶ 2). The Debtor alleges that in executing the retail sale contract and security agreement and the bill of sale for the 2007 trailer he acted solely in his role as corporate officer and agent and that he has no personal liability on the debt.[1]

The Plaintiff seeks a determination that the debt owed by the Debtor is excepted from discharge pursuant to §§ 523(a)(2), (a)(3), (a)(4), and (a)(6). The Debtor contends that dismissal of the Plaintiff's complaint is warranted because it fails to state a claim upon which relief may be granted. Specifically, the Debtor contends that any contractual relationship or indebtedness is between the Plaintiff and RLI, not the Debtor, and that because he has no personal liability to the Plaintiff, there is no "debt" to be excepted from discharge. Alternatively, the Debtor contends that the complaint fails to state facts to support a claim for relief under §§ 523(a)(2), (a)(3), (a)(4), and (a)(6). The Plaintiff has not filed a response to the Debtor's motion. The Court will examine each claim in turn.

The Debtor's liability to the Plaintiff

The Debtor contends that because the transactions were between the Plaintiff and RLI and he acted only in his capacity as RLI's officer and agent without personally guaranteeing or otherwise incurring any personal liability to the Plaintiff, there is no "debt" to be excepted from discharge. Viewed strictly as a matter of contract, this is correct. However, a "debt" is "liability on a claim." 11 U.S.C. § 101(12). A claim is broadly defined as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." § 101(5)(A). To the

[1]To the extent the Debtor relies on matters outside the pleadings, this motion to dismiss is more properly characterized as a motion for summary judgment. FED. R. CIV. P. 12(d).

extent the Debtor made an intentional fraudulent statement calculated to cause the Plaintiff to enter the transactions at issue or to the extent the Debtor personally converted funds or collateral belonging to the Plaintiff as contemplated by § 523(a)(6), the Plaintiff has a claim in tort, not contract, against the Debtor. Thus, the fact that the contractual relationship is between the Debtor and RLI is not solely determinative and does not serve as a basis for dismissal of the complaint.

11 U.S.C. § 523(a)(2)

Section 523(a)(2)(A) provides that a discharge under chapter 7 does not discharge a debtor from a 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. . . ."[2]

A "false pretense" is an "implied misrepresentation or conduct which creates and fosters a false impression." *In re Antonious*, 358 B.R. 172, 182 (Bankr. E.D. Pa. 2006) (citations omitted). Events that "create a contrived and misleading understanding of a transaction in which a creditor is wrongly induced to extend money or property to the debtor" may constitute false pretenses. *Id*. Conversely, a false representation is one in which there is an *express* misrepresentation of fact. *E.g., Carlan v. Dover (In re Dover)*, 185 B.R. 85, 88 n.3 (Bankr. N.D. Ga. 1995). Finally, "actual fraud" is a much broader term than false pretenses or false representation and may encompass "deceit, artifice, trick, or design involving direct and active operation of the mind, used to circumvent and cheat another." *McClellan v. Cantrell*, 217 F.3d 890, 893 (7th Cir. 2000) (citation omitted).

To survive a motion to dismiss under Rule 12(b)(6), a complaint "does not need detailed

[2]The Court presumes that the reference to § 523(a)(A) in ¶ 21 of the Complaint is § 523(a)(2)(A).

factual allegations," but those allegations "must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A claim must have "facial plausibility," which is met "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*, 129 S.Ct. 1937, 1949 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*.

The common element to false pretenses, false representation, and actual fraud is an intent to deceive by the debtor. The only allegation in support of § 523(a)(2)(A) is the conclusory contention that "[t]his series of conveyances was done by [the Debtor] with the actual intent to deceive and defraud the Plaintiff." (Complaint, ¶ 20). Here, the complaint fails to set forth sufficient facts so that the Court can draw an inference of the Debtor's actual, subjective fraudulent intent. *FDS National Bank v. Alam (In re Alam)*, 314 B.R. 834, 843 (Bankr. N.D. Ga. 2004). As a result, the Court concludes that the Complaint fails to state a claim for relief under § 523(a)(2)(A).

11 U.S.C. § 523(a)(3)

> Section 523(a)(3) provides that a debt is excepted from discharge if it is
>
> > 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.

The Plaintiff was duly scheduled as an unsecured creditor in the Debtor's schedules filed July 30, 2010; she was listed on the certificate of service of the notice of the claims bar date filed August 3, 2010; and she timely filed this complaint on October 18, 2010. As a result, § 523(a)(3) is inapplicable to the facts of this case and this count is dismissed.

11 U.S.C. § 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." For a debt to be nondischargeable based upon defalcation while acting in a fiduciary capacity, the debtor must have stood in a fiduciary relationship with the creditor alleging nondischargeability of the debt; the fiduciary relationship must have existed prior to the creation of the debt; and the debt must have resulted from some act of fraud or defalcation by the debtor. *Quaif v. Johnson (In re Quaif)*, 4 F.3d 950, 953-955 (11th Cir. 1993).

The Plaintiff has not explicitly alleged any facts to support a § 523(a)(4) claim. To the extent the Plaintiff contends that the Debtor, as an officer of RLI, was a "fiduciary" for purposes of § 523(a)(4), this argument fails. For purposes of the exception to discharge in § 523(a)(4), "the term 'fiduciary' is not to be construed expansively, but instead is intended to refer to 'technical' trusts." *Quaif v. Johnson (In re Quaif)*, 4 F.3d 950, 953 (11th Cir. 1993). The general fiduciary duty that Georgia corporate law imposes on a corporate officer does not establish the type of technical trust that is necessary to except a debt from discharge based on fraud or defalcation in a fiduciary capacity. *Lou Robustelli Marketing Services, Inc. v. James Robert Robustelli (In re Robustelli)*, Case No. 08-6513-PWB, slip op. at 10-11 (Bankr. N.D. Ga. Apr. 8, 2009). *See Mid*

America Distribution Centers, Inc. v. Cato (In re Cato), 218 B.R. 987 (Bankr. M.D. Fla. 1998); *Clark v. Allen (In re Allen)*, 206 B.R. 602 (Bankr. M.D. Fla. 1997) (applying West Virginia law); *cf. Tarpon Point, LLC v. Wheelus (In re Wheelus),* 2008 WL 372470 (Bankr. M.D. Ga. Feb. 11, 2008) (applying Georgia limited liability company law). *Contra, e.g., Minuteman Incorporated v. Alexander (In re Alexander)*, 166 B.R. 729 (Bankr. D. N.M. 1993).

As stated in *Wheelus,* 2008 WL 372470 at *2 (quoting *Hosey v. Hosey (In re Hosey),* 355 B.R. 311, 322 (Bankr. N.D. Ala. 2006) and citing *Fowler Bros. v. Young (In re Young),* 91 F.3d 1367, 1372 (10th Cir. 1996)) (internal punctuation omitted):

> The traditional meaning of fiduciary under state law – loyalty, good faith, and fair dealing – is too broad for the purposes of [§523(a)(4)]. Only a subset of fiduciary obligations is encompassed in the word "fiduciary" for purposes of § 523(a)(4).

The general fiduciary duties of a corporate officer do not establish the existence of a fiduciary capacity that is necessary to establish an exception to discharge for "fraud or defalcation" under § 523(a)(4).

The Plaintiff's complaint also fails to state a claim for embezzlement or larceny. Embezzlement is the "fraudulent conversion of another's property by one who was lawfully in possession of the property," whereas larceny is "a felonious taking of property with the intent to convert it or to permanently deprive the owner of it." *Bennett v. Wright (In re Wright)*, 282 B.R. 510, 516 (Bankr. M.D. Ga. 2002). Both embezzlement and larceny require fraudulent intent. *Id.* The Plaintiff has alleged no facts to demonstrate the necessary fraudulent intent by the Debtor in order to prevail on an embezzlement or larceny claim. Based on the foregoing, the complaint fails to state a claim for relief under § 523(a)(4).

11 U.S.C. § 523(a)(6)

Section 523(a)(6) excepts from discharge any debt "for willful and malicious injury by the debtor to another entity or the property of another entity." The Supreme Court has held that because the word "willful" modifies the word "injury," a finding of nondischargeability requires "a 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). Thus, negligent or reckless conduct does not fall within the "willful and malicious injury" exception to discharge. Under § 523(a)(6), the debtor must intend the consequences of an act and not simply the act itself. *Id.*, 523 U.S. at 61-62 (*citing* RESTATEMENT (SECOND) OF TORTS § 8A cmt. *a* (1964)). A "malicious" injury is one which is "wrongful and without just cause or excessive even in the absence of personal hatred, spite or ill- will." *Hope v. Walker (In re Walker)*, 48 F.3d 1161, 1164 (11th Cir. 1995) (citations omitted). Malice may be implied or constructive. *Id.*

The court in *Britt's Home Furnishing, Inc. v. Hollowell (In re Hollowell)*, 242 B.R. 541, 546 (Bankr. N.D. Ga. 1999), explained the relationship between the "willful" and "malicious" elements of the § 523(a)(6) exception this way:

> The consensus among courts addressing the issue since the entry of the *Geiger* opinion appears to be that a willful injury under § 523(a)(6) may be shown by proof of the debtor's subjective motive to cause injury or by an objective substantial certainty that the conduct would cause injury. Whether or not the term "malicious" has been subsumed in the *Geiger* standard or retains meaning separate from "willful," the concept that justification or excuse could negate a debtor's intent to injure appears to have been integrated into § 523(a)(6).

Conversion of property may fall within the § 523(a)(6) exception to discharge. *See Adler v. Hertling*, 215 Ga.App. 769, 772, 451 S.E.2d 91, 96 (1994) (under Georgia law, conversion "consists of an unauthorized assumption and exercise of the right of ownership over personal

property belonging to another, in hostility to his rights; an act of dominion over the personal property of another inconsistent with his rights; or an unauthorized appropriation.").

The Plaintiff has alleged insufficient facts to support a claim of willful and malicious injury. The complaint alleges the Debtor "sold the 2005 Silver Star trailer but did not apply the proceeds to the payoff of the existing encumbrance and instead converted the funds to his own use and benefit" and that the Debtor "conveyed the 2007 model vehicle to another purchaser and did not apply the proceeds of that sale to the existing encumbrance, but instead converted those funds to his own use and benefit." (Complaint, ¶¶ 11, 15). In sum, the Plaintiff alleges that the Debtor (or RLI) breached the promise to pay off the lien on the collateral and, instead, used the money for personal use. Without deciding the issue of whether such facts constitute a "conversion" for purpose of Georgia law, the Court concludes that the complaint does not state a claim for relief under § 523(a)(6) because the Plaintiff has failed to state facts which demonstrate "the debtor's subjective motive to cause injury" or facts showing "an objective substantial certainty that the conduct would cause injury." *Britt's Home Furnishing, Inc. v. Hollowell (In re Hollowell)*, 242 B.R. 541, 546 (Bankr. N.D. Ga. 1999). While this claim is a closer call than the others, the Plaintiff has not controverted the Debtor's arguments for dismissal. As a result, the § 523(a)(6) claim is dismissed.

For the foregoing reasons, the Court concludes that the Plaintiff's complaint fails to state a claim for relief under 11 U.S.C. §§ 523(a)(2), (a)(3), (a)(4), or (a)(6). Accordingly, it is

ORDERED that the motion to dismiss is granted.

End of Order

NOT INTENDED FOR PUBLICATION

Distribution List

Leslie M. Pineyro
Jones and Walden, LLC
21 Eighth Street, NE
Atlanta, GA 30309

James A Meaney, III
Perrotta, Cahn & Prieto, P.C.
319 North Selvidge Street
Dalton, GA 30720

Brian R. Cahn
Perrotta Cahn & Prieto, P.C.
5 S. Public Square
Cartersville, GA 30120