IT IS ORDERED as set forth below:

Date: December 16, 2011

James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	CASE NO. 11-62794
Michael Veatell Williams,	CHAPTER 7
Debtor.	JUDGE MASSEY
Beris Davis,	
Plaintiff,	
v.	ADVERSARY NO. 11-5403
Michael Veatell Williams,	
Defendant.	

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

In this adversary proceeding, Plaintiff Beris Davis seeks a judgment determining that a debt owed to her by Defendant and Debtor Michael Veatell Williams embodied in a state court

judgment is not dischargeable under 11 U.S.C. § 523(a)(2), (4) and (6). The complaint incorporates by reference the state court complaint.

Defendant moves to dismiss the complaint pursuant to Civil Rule 12, made applicable by Bankruptcy Rule 7012, on the ground that it fails to state a claim upon which relief can be granted.

With respect to the fraud claim under section 523(a)(2) of the Bankruptcy Code, Defendant argues that the complaint does not allege facts that satisfy the "traditional elements of common law fraud," which he asserts are the same elements of a claim under section 523(a)(2)(A) - a representation with the purpose and intent of deceiving the creditor that the defendant/debtor knew were false at the time they were made, justifiable reliance on the false representation, and damages resulting therefrom. Indeed, the complaint never asserts that Defendant made any representation to Plaintiff; rather it was Merrick, another defendant in the state court case, who is alleged to have made false representations to Plaintiff.

If the complaint were limited to a claim based on a false representation, Defendant would prevail. But section 523(a)(2)(A) is not limited to debts arising from false representations. It also applies to debts arising from "actual fraud."

> Plenty of cases, it is true, assume that fraud equals misrepresentation, but like [*Field v. Mans*, 516 U.S. 59, 116 S.Ct. 437, 133 L.Ed.2d 351 (1995)] they are cases in which the only fraud charged was misrepresentation. . . . *In re Johannessen*, 76 F.3d 347, 350 (11th Cir.1996); *In re Vann*, 67 F.3d 277, 280 (11th Cir.1995). Most frauds do involve misrepresentation . . . . But section 523(a)(2)(A) is not limited to "fraudulent misrepresentation." Although *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 472-74, 97 S.Ct. 1292, 51 L.Ed.2d 480 (1977), held that the concept of fraud in the SEC's Rule 10b-5 is limited to misrepresentation and therefore did not reach the nonrepresentational breach of fiduciary duty-a squeeze out of minority shareholders-charged in that case, there are no such holdings with regard to the concept of "actual fraud" in 11 U.S.C. § 523(a)(2)(A). There could not be; for by distinguishing between "a false representation" and "actual fraud," the statute makes clear that actual fraud is broader than

> misrepresentation. Collier's treatise, while assuming along with the cases that we have cited that "actual fraud" involves a misrepresentation, defines the term much more broadly-as "any deceit, artifice, trick, or design involving direct and active operation of the mind, used to circumvent and cheat another," 4 COLLIER ON BANKRUPTCY ¶ 523.08[1][e], p. 523-45 (15th ed., Lawrence P. King ed., 2000)-which is a good description of what the debtor is alleged to have done here.

McClellan v. Cantrell, 217 F.3d 890, 892 -893 (7th Cir. 2000) (Posner, C.J.)

In the *McClellan* case, the debtor's brother secured a debt to the creditor with machinery. After a default and after the creditor began to try to recover the collateral, the brother sold the machinery, deliberately violating the security agreement. "The sister [debtor] knew about the suit and in accepting the transfer of the machinery was colluding with her brother to thwart McClellan's collection of the debt that her brother owed him. She turned around and sold the machinery for $160,000-and she's not telling anyone what has happened to that money." *Id*. at 892. Her conduct, the 7th Circuit ruled, constituted actual fraud, giving rise to a non-dischargeable debt.

In the present case, Defendant is alleged to have participated in a scheme to defraud Plaintiff in which Plaintiff was allegedly induced to make investments that were non-existent and to permit access to Plaintiff's brokerage account from which the participants converted money. The state court complaint asserts that Merrick was the ringleader of the alleged conspiracy, but Defendant Williams' conduct in furtherance of the alleged fraudulent conspiracy is alleged in paragraphs 22, 24, 25, 33, 34, 42, 43, 45, 58, and 81 of the state court complaint, which refer to all "defendants" or to the "Jagle Defendants," one of which was Williams. These allegations are therefore sufficient to withstand the motion to dismiss claims under section 523(a)(2)(A) alleging a debt arising from actual fraud.

To prove a claim under section 523(a)(4) of the Bankruptcy Code, a plaintiff must show the existence of fiduciary duty arising under an actual agreement or imposed by law; a fiduciary duty for purposes of section 523(a)(4) cannot be implied as a result of fraudulent conduct. *Quaif v. Johnson,* 4 F.3d 950 (11th Cir. 1993). Defendant points out that the complaint does not allege that Defendant owed any fiduciary duty to Plaintiff. The state court complaint alleges that Merrick, another defendant in that case, was a fiduciary, but there is no allegation in the complaint here, including the state court complaint, that Defendant was a party to an agreement imposing a fiduciary duty on him or that a statute imposed a fiduciary duty on him. Defendant could not have acted in a fiduciary capacity merely by associating with Merrick. Accordingly, the motion to dismiss the portion of the complaint grounded on section 523(a)(4) must be granted.

Section 523(a)(6) of the Bankruptcy Code bars the discharge of a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." Defendant contends that the complaint contains no reference to "any specific acts committed personally by Defendant for willful and malicious injury." Defendant's Brief, Doc. No. 6, p. 7. Defendant is mistaken. The state court complaint, which is incorporated in the complaint here, alleges, for example, that Defendant and others took money from an account belonging to Plaintiffs ostensibly for use in an investment in which Plaintiff had an interest but instead took those funds for their own use. Complaint, Exhibit A, pp. 11-12. The essence of these allegations is that Defendant participated in conversion of money belonging to Plaintiff.

"[A] debtor is responsible for a 'willful' injury when he or she commits an intentional act the purpose of which is to cause injury or which is substantially certain to cause injury." *In re Walker,* 48 F.3d 1161, 1165 (11th Cir. 1995).

> As to the "malicious" prong, [the Eleventh Circuit has] defined that term as used in section 523 as "wrongful and without just cause or excessive even in the absence of personal hatred, spite or ill-will." *In re Latch*, 820 F.2d at 1166 n. 4 (citation omitted). We further refined that definition in *[Chrysler Credit Corp. v Rebhan* , 842 F.2d 1257 (11th Cir. 1988)]. As we held there, "malice for purposes of section 523(a)(6) can be established by a finding of implied or constructive malice." 842 F.2d at 1263. Special malice need not be proved, i.e., a showing of specific intent to harm another is not necessary. Id. Constructive or implied malice can be found if the nature of the act itself implies a sufficient degree of malice. *See United Bank of Southgate v. Nelson*, 35 B.R. 766, 769 (N.D.Ill.1983) (quoting *Tinker v. Colwell*, 193 U.S. 473, 24 S.Ct. 505, 48 L.Ed. 754 (1904)).

In re Ikner, 883 F.2d 986, 991 (11th Cir. 1989).

Paragraphs 18-25 of the state court complaint describe a willful act involving misdirection of funds belonging to Plaintiff from an investment to the defendants' pockets – an act certain to result in injury to that property. Those allegations (assuming their truth) show that there was no just cause or excuse for the alleged misdirection of funds. At this state of the litigation, the Court must assume the allegations in the complaint are true. Hence, the complaint states a claim for relief under section 523(a)(6), and the motion to dismiss that claim must be denied.

For these reasons, the motion to dismiss is GRANTED as to the count asserted under 11 U.S.C. § 523(a)(4) and is DENIED as the counts asserted under 11 U.S.C. § 523(a)(2)(A) and (a)(6). Defendant shall have 17 days after service of this order to serve and file an answer to the complaint. The answer should respond to the allegations not only in the first five pages of the

complaint but also to all allegations in the state court complaint that is incorporated into the complaint.

END OF ORDER