



**IT IS ORDERED as set forth below:**

**Date: July 29, 2016**

A handwritten signature in black ink, appearing to read "Barbara Ellis-Monro".

---

**Barbara Ellis-Monro  
U.S. Bankruptcy Court Judge**

---

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

IN RE:

JOSEPH ANTHONY BURLEY,

Debtor.

---

WAVERLY PARK COMMUNITY  
ASSOCIATION, INC.,

Plaintiff,

v.

JOSEPH ANTHONY BURLEY,

Defendant.

CASE NO. 15-70685-BEM

CHAPTER 7

ADVERSARY PROCEEDING NO.  
16-5025-BEM

**ORDER**

This matter comes before the Court on Plaintiff Waverly Park Community Association, Inc.'s Motion for Default Judgment (the "Motion"). [Doc. 7]. Plaintiff filed a

Complaint to Request Non-Dischargeability of Debt Under 11 U.S.C. § 523(a)(4) (the “Complaint”). [Doc. 1]. Through the Complaint, Plaintiff seeks a determination that Defendant Joseph Anthony Burley’s indebtedness to Plaintiff in the amount of \$17,451.13 and attorney’s fees and costs in the amount of \$8,949.21 are nondischargeable pursuant to 11 U.S.C. § 523(a)(4). The Complaint and summons were properly served on February 2, 2016, and Defendant failed to respond. The Clerk entered default on June 7, 2016.

**I. STANDARD**

Default judgments are governed by Fed. R. Civ. P. 55(b), made applicable to adversary proceedings by Fed. R. Bankr. P. 7055. Whether to enter default judgment is within the discretion of the Court. *Hays v. Wellborn Forest Prods., Inc. (In re Spejcher)*, No. 06-62501, Adv. No. 06-6347, 2006 WL 6592065, \*1 (Bankr. N.D. Ga. Oct. 30, 2006) (Massey, J.) (citing *Hamm v. DeKalb County*, 774 F.2d 1567, 1576 (11th Cir. 1985)). To warrant entry of a default judgment, “[t]here must be a sufficient basis in the pleadings for the judgment entered.” *Nishimatsu Constr. Co., Ltd. v. Houston Nat’l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975). Under the pleading standard of Fed. R. Civ. P. 8(a)(2), a pleading for a claim for relief must contain a “short and plain statement of the claim showing that the pleader is entitled to relief[.]” When there is an allegation of fraud, Fed. R. Civ. P. 9(b) imposes a heightened pleading standard that requires the circumstances constituting fraud to be stated with particularity. When the defendant fails to answer, the plaintiff’s well-pleaded factual allegations are deemed admitted. *Nishimatsu Const.*, 515 F.2d at 1206. Facts that are not well pleaded and conclusions of law are not deemed admitted. *Id.* Therefore, the Court must determine whether Plaintiff’s well-pleaded factual allegations are sufficient to justify entry of default judgment.

## II. FACTUAL ALLEGATIONS

In the Complaint, Plaintiff alleges the following facts: Defendant is the Debtor in Bankruptcy Case No. 15-70685-bem. [Doc. 1 ¶ 3]. Plaintiff, a Georgia corporation, is a creditor in the bankruptcy case. *Id.* ¶ 2. Defendant is a former officer and director of Plaintiff. *Id.* ¶ 4. While acting in his capacity as an officer and director of Plaintiff, Defendant stole, misappropriated, converted, and embezzled \$17,451.13 of Plaintiff's funds. *Id.* ¶ 5, 12. These funds were used for Defendant's own personal use. *Id.* ¶ 5, 12. Prior to the filing of the bankruptcy petition, Plaintiff filed a complaint against Defendant in the Superior Court of Fulton County. *Id.* ¶ 6. A final judgment in favor of the Plaintiff was entered in the state court<sup>1</sup> after Defendant's answer was struck due to his "willful failure to participate in discovery."<sup>2</sup> *Id.* ¶ 7. In the state court action, the court found that Defendant "defrauded [Plaintiff] by stealing, misappropriating, converting, and embezzling \$17,451.13 in Association funds for his own personal use, in violation of his fiduciary duties to the Association."<sup>3</sup> *Id.* ¶ 8. Plaintiff further alleges that the state court then awarded Plaintiff a judgment in the amount of \$17,451.13 plus attorney fees and costs in the amount of \$8,949.21. *Id.* Plaintiff asks that the judgment and attorney fees totaling \$26,400.34 plus post-judgment interest and costs be declared nondischargeable. *Id.* ¶ 15.<sup>4</sup> This Court has jurisdiction in this proceeding and authority to enter a final judgment pursuant to 28 U.S.C. § 157(b)(2)(I).

---

<sup>1</sup> The Complaint stated the judgment was attached as Exhibit A. But no attachments were filed with the Complaint.

<sup>2</sup> This is apparently a quote from the state court judgment.

<sup>3</sup> This is another apparent quote from the state court judgment.

<sup>4</sup> The Complaint also requests attorney fees in an amount to be determined at trial. [Doc. 1 pg. 4]. However, the request for attorney fees incurred in prosecuting the adversary proceeding was not included in the Motion for Default Judgment.

### III. ANALYSIS

Under 11 U.S.C. § 523(a)(4), a debt is excepted from discharge if it arose due to “fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny[.]” Plaintiff has asserted claims for fiduciary fraud and embezzlement.

To establish a claim for fraud in a fiduciary capacity, Plaintiff must allege Defendant was acting in a fiduciary capacity and that he engaged in acts constituting fraud or defalcation. *Nevels v. Caples (In re Caples)*, 454 B.R. 191, 197 (Bankr. N.D. Ala. 2011). For purposes of § 523(a)(4), the term “fiduciary” is narrowly defined, “and excludes many common law applications of that term.” *Morgan v. Musgrove (In re Musgrove)*, 187 B.R. 808, 813 (Bankr. N.D. Ga. 1995) (Drake, J.). Fiduciary for purposes of § 523(a)(4) is limited to relationships that create a technical or express trust. *Quaif v. Johnson*, 4 F.3d 950, 953 (11th Cir. 1993). The technical trust relationship must have existed prior to the creation of the debt and without reference to the act the created said debt. *Id.* The fiduciary duty must be specifically stated so that a trust relationship is clearly in place. *Eavenson v. Ramey*, 243 B.R. 160, 165 (N.D. Ga. 1999) (citations omitted). Serving as an officer or director of a corporation is not sufficient by itself to establish a fiduciary relationship for purposes of § 523(a)(4). *Hot Shot Kids Inc. v. Pervis (In re Pervis)*, 497 B.R. 612, 640 (Bankr. N.D. Ga. 2013) (Hagenau, J.) (collecting cases).

Embezzlement is defined as “the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come.” *Hot Shot Kids Inc. v. Pervis (In re Pervis)*, 512 B.R. 348, 366 (Bankr. N.D. Ga. 2014) (Hagenau, J.). The elements of embezzlement are: “(1) property owned by another which is rightfully in the

possession of the debtor; (2) the debtor appropriates the property for personal use; (3) the appropriation occurred with fraudulent intent or by deceit.” *Id.* (citations omitted).

The doctrine of collateral estoppel can be used to bar the relitigation of issues previously determined in a state court. *Grogan v. Garner*, 498 U.S. 279, 284, 111 S. Ct. 654, 658 (1991). The court applies the collateral estoppel law of the state in which the prior judgment was rendered. *Lusk v. Williams (In re Williams)*, 282 B.R. 267, 271-72 (Bankr. N.D. Ga. 2002) (Mullins, J.) (citing *In re Brownlee*, 83 B.R. 836, 838 (Bankr. N.D. Ga. 1988)). The five elements for the application of collateral estoppel under Georgia law are “(1) identity of parties or their privies; (2) identity of issues; (3) actual and final litigation of the issue in question; (4) essentiality of the adjudication to the earlier action; and (5) full and fair opportunity to litigate the issues in question.” *Id.* at 272.

With respect to fiduciary defalcation, Plaintiff’s allegations do not illustrate that Defendant owed a fiduciary duty to Plaintiff, in the context of § 523(a)(4). Plaintiff alleges that as an officer and director of Plaintiff, Defendant had a state law fiduciary duty to the Plaintiff and a duty to act in good faith. That allegation alone is not sufficient to meet the technical trust requirement of a fiduciary duty under § 523(a)(4). Plaintiff has failed to allege facts regarding any specific trust-like duties imposed on Plaintiff or any other facts showing a technical trust arose prior to the debt being incurred. Thus, Plaintiff has not shown it is entitled to a default judgment based on fraud or defalcation in a fiduciary capacity.

Plaintiff also alleges the debt arose out of embezzlement. Plaintiff makes bare allegations that while serving as an officer of Plaintiff, Defendant took Plaintiff’s funds for Defendant’s own use and quotes similar language from a state court judgment. Such conclusory

statements are insufficient without supporting facts regarding the use of the funds or Defendant's intent to show that Plaintiff is entitled to default judgment on the claim of embezzlement.

Plaintiff argues it is entitled to default judgment based on collateral estoppel due to the prior state court judgment. However, the Complaint refers only to quotes from the state court judgment, which are not sufficient to establish the elements of collateral estoppel. Without the actual judgment the Court cannot determine that the state court found Defendant liable for the same wrongdoing as alleged by Plaintiff in this proceeding, that the issues in common were essential to the adjudication in the state court, and that the judgment was final and would be considered fully and completely litigated. Therefore, the Court cannot grant default judgment on the basis of collateral estoppel.

#### **IV. CONCLUSION**

Plaintiff seeks a finding of nondischargeability based on a state court judgment. Because Plaintiff failed to attach the state court judgment to its Complaint, the Court can only analyze the facts alleged in the Complaint. Plaintiff's Complaint fails to allege sufficient facts to show Plaintiff is entitled to a determination of nondischargeability based on either defalcation in a fiduciary capacity or embezzlement. Accordingly, it is

ORDERED that the Plaintiff's Motion for Default Judgment is DENIED without prejudice to filing appropriate supplemental pleadings.

**END OF ORDER**

**Distribution List**

Wesley C. Dunlap  
Dunlap Gardiner, LLP  
Suite 923  
5604 Wendy Bagwell Parkway  
Hiram, GA 30141

Karen King  
King & King  
215 Pryor St  
Atlanta, GA 30303

Joseph Anthony Burley  
4117 Alveston Drive  
College Park, GA 30349