IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION

In re: TIMOTHY B. DANIELS and RACHEL B. DANIELS, Debtors	**No. 4:14-bk-11173 Ch. 7**
SANDLOT SPORT OF ARKANSAS, LLC	**PLAINTIFF**
v. **No. 4:14-ap-01048**	
TIMOTHY B. DANIELS and RACHEL B. DANIELS	**DEFENDANTS**

ORDER

Before the Court are the debtors' *Motion to Dismiss* filed on July 30, 2014, and *Motion to Dismiss Amended Complaint* filed on September 19, 2014. The Court held a hearing on October 9, 2014, at the conclusion of which the Court took the matter under advisement. For the reasons stated below, the Court grants in part the debtors' motion. The Court has jurisdiction over this matter under 28 U.S.C. § 1334 and 28 U.S.C. § 157, and it is a core proceeding under 28 U.S.C. § 157(b)(2)(I). The following order constitutes findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052, made applicable to this proceeding under Federal Rule of Bankruptcy Procedure 9014.

BACKGROUND

On January 14, 2014, the Circuit Court of Faulkner County, Arkansas, entered a default judgment in favor of Sandlot Sports of Arkansas, LLC [Sandlot] in the amount of $192,780.58 with post-judgment interest accruing at 10% per annum. The default judgment found against the debtors for breach of contract, unjust enrichment, and conversion on the basis of the debtors' default on several oral agreements between the parties and related promissory notes.

Entered On Docket: 12/11/2014

On February 28, 2014, the debtors filed bankruptcy. On May 21, 2014, Sandlot filed an adversary proceeding complaint to determine the dischargeability of the debt awarded against the debtors in the default judgment. The body of Sandlot's complaint, which consisted of one page, asserted that the circuit court judgment was based on breach of contract, conversion, and fraud;[1] that the debtors' actions were in bad faith; and that the debt is nondischargeable under 11 U.S.C. § 523(a)(2), (a)(4), (a)(6), and (a)(11). Sandlot's complaint incorporated all allegations contained within the circuit court complaint, which consisted of a recital of the facts surrounding the oral agreements between the parties and the subsequent breach of those agreements and the default on the related promissory notes by the debtors. Both the circuit court complaint and default judgment were attached to the adversary proceeding complaint filed by Sandlot.

On July 30, 2014, the debtors filed a motion to dismiss the complaint, alleging the following grounds for dismissal: (1) Sandlot's lack of standing based on a difference in its stated name in the circuit court case and the present adversary proceeding; (2) the Court's lack of subject matter jurisdiction related to Sandlot's failure to assert in its complaint that the Court has jurisdiction and that the matter is core or non-core, in addition to Sandlot's failure to file a statement of corporate ownership; (3) Sandlot's failure to adequately plead grounds for relief under Federal Rule of Bankruptcy Procedure 7008; and (4) Sandlot's failure to state a claim upon which relief can be granted under Rule 7012 and failure to plead fraud with particularity under Rule 7009. On August 15, 2014, Sandlot filed an amended complaint and a statement of corporate ownership. In its amended complaint, Sandlot included a jurisdictional statement and asserted that the relief requested was a core proceeding. The amended complaint also stated a different recital of facts and allegations which was, for the most part, taken directly from the circuit court complaint that Sandlot previously incorporated into its first

[1] The circuit court default judgment did not specifically find against the debtors for breach of contract, conversion, and fraud, but it did state that "[t]he Court finds that the allegations and statements from the Plaintiff's Complaint to be true and correct."

adversary proceeding complaint. Those facts can be condensed to the following allegations:

- In September 2011, Sandlot and Timothy Daniels entered into an oral agreement to develop an artificial turf field on real property owned by Sandlot. At some point, Sandlot provided $150,457.51 to Timothy Daniels with the understanding that Daniels would pay a company named Morningstar Turf to manufacture artificial turf and rubber for the project. On May 22, 2012, Sandlot learned that Morningstar Turf had only received $63,000 from Daniels and that the order could not be completed as a result of insufficient payment. Sandlot incurred additional expenses by paying the difference still owed to Morningstar Turf.

- On February 27, 2012, Sandlot and Timothy Daniels entered into an agreement by which Sandlot loaned $9,800 to Timothy Daniels to purchase fitness equipment for resale to a third party. The parties agreed that Timothy Daniels would repay the $9,800 and also pay Sandlot fifty percent of the gross profits received from the resale of the fitness equipment. On May 9, 2012, Sandlot received a check from Timothy Daniels for fifty percent of the gross profits from three out of the five pieces of fitness equipment that Timothy Daniels sold. Timothy Daniels failed to repay the $9,800 to Sandlot and also failed to pay fifty percent of the gross profits from two additional pieces of fitness equipment.

- On May 17, 2012, Sandlot agreed to lend Timothy Daniels $74,080 for the purpose of purchasing more fitness equipment. In return, Timothy Daniels agreed to pay Sandlot $90,000 by May 31, 2012. Timothy Daniels only paid Sandlot $37,850 of the promised $90,000.

- In recognition of the debt owed to Sandlot from their various agreements, on July 20, 2012, both debtors executed a promissory note to Sandlot in the amount of $159,339.51 with interest accruing. The debtors defaulted on the promissory

note, and a principal balance of $151,282.51 remains.[2]

In both adversary proceeding complaints, Sandlot alleged that the debtors wrongfully took property from Sandlot's possession and converted the property to their own use by exercising control of the property in contradiction to Sandlot's own rights and that the debtors' acts were "willful, wanton, malicious, and oppressive, were [sic] undertaken with the intent to defraud" Sandlot. In addition, Sandlot included the following statements in the amended complaint that did not appear in the initial complaint:

- That the Daniels, each one of them, were business associates in Arkansas Commercial Fitness, LLC. (Paragraph 4)
- "At all times herein, Defendant Daniels [sic] representations to Plaintiff were false and Daniels knew at the time of the assertions of their falsity." (Paragraph 22)
- "That the Plaintiff's [sic] materially relied on the representations of Defendant Daniels' [sic] in making the above transactions with Defendant Daniels'[sic]." (Paragraph 23)
- "That Plaintiff's reliance on Defendant Daniels' false representations were the proximate cause of the damages alleged herein." (Paragraph 24)
- "The fraud of Defendant Timothy Daniels is imputed upon Defendant Rachel Daniels." (Paragraph 22)

On September 19, 2014, the debtors filed a motion to dismiss Sandlot's amended complaint and argued that Sandlot had again failed to state a claim under Federal Rules of Civil Procedure 12(b)(6) and 9(b). In addition, the debtors argued that the new allegations contained within Sandlot's amended complaint do not relate back to the original complaint and, accordingly, are untimely under Federal Rule of Bankruptcy Procedure 4007. The Court will address each of the debtors' arguments, below.

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[2] The complaint states in paragraph 17 that the principal and interest on the note as of September 15, 2012, was $151,282.51. The complaint states later, in paragraph 21, that the current principal balance due is also $151,282.51.

ANALYSIS

1. Relation back under Federal Rule of Civil Procedure 15(c)

In the debtors' motion to dismiss Sandlot's amended complaint, the debtors allege that Sandlot's amended complaint does not relate back to its original complaint under Federal Rule of Civil Procedure 15(c), made applicable by Federal Rule of Bankruptcy Procedure 7015, because the amended complaint includes new allegations. As a result of the complaint not relating back, the debtors argue that all new statements of fact included in the amended complaint are untimely pursuant to Federal Rule of Bankruptcy Procedure 4007. Rule 4007, which governs the filing of complaints to determine the dischargeability of a debt, states that a complaint must be filed no later than 60 days after the first date set for the meeting of creditors. While Sandlot filed its original complaint within those 60 days, it did not file its amended complaint until more than 130 days after the first date set for the meeting of creditors.

Relation back is allowed when "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out–or attempted to be set out–in the original pleadings. Fed. R. Civ. P. 15(c). The general rule is to allow relation back only if there is no unfair surprise or prejudice. *KBHS Broadcasting Co., Inc. v. Bozeman et al.* (*In re Bozeman*), 226 B.R. 627, 630 (B.A.P. 8th Cir. 1998).

The new allegations included in Sandlot's amended complaint, as stated in full above and condensed here, are that "Defendant Daniels" knowingly made false representations to Sandlot, that Sandlot relied on those false representations and was proximately damaged, that the debtors were business associates of Arkansas Commercial Fitness, LLC, and that all fraud of Timothy Daniels is imputed to Rachel Daniels. The content of the initial complaint (through incorporation of the circuit court complaint) and the amended complaint is otherwise substantially the same. Each of the new statements allegedly arose from the same conduct, transaction, or occurrence previously set out in Sandlot's initial complaint. As discussed later in this opinion, these new statements are also inherently defective for the purpose of pleading fraud under Rule 9(b) and do not cure

deficiencies of the initial complaint. Therefore, the debtors will suffer no prejudice as a result of the Court considering the amended complaint.

2. Dismissal under Federal Rules of Civil Procedure 12(b)(6) and 9(b)

The debtors' motions to dismiss are largely based on the interplay between multiple federal rules of civil procedure that govern the pleading process and are made applicable to this proceeding by related federal rules of bankruptcy procedure. At the heart of the debtors' arguments is their allegation that Sandlot failed in both its initial complaint and its amended complaint to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), and, separately, failed to plead fraud with particularity under Federal Rule of Civil Procedure Rule 9(b).

Under Rule 8(a)(2), which provides general rules of pleading, a complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." To determine whether a party failed to plead facts to show that it is entitled to relief, and, thus, that dismissal under Rule 12(b)(6) is proper, a court must assume that the facts alleged in the complaint are true and then decide whether those facts plausibly give rise to a right to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)). The Supreme Court has provided additional parameters for this two-step approach:

> Two working principles underlie our decision in [*Bell Atlantic Corp. v.*] *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged–but it has not "show[n]"–"that the pleader is entitled to relief."

Iqbal, 556 U.S. at 679-80 (internal citations omitted).

Although the general pleading standard of Rule 8(a)(2)–and the corresponding defensive remedy under Rule 12(b)(6)–applies to most matters, allegations of fraud or mistake require a heightened pleading standard. Federal Rule of Civil Procedure 9(b), made applicable by Federal Rule of Bankruptcy Procedure 7009, states that "a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." To satisfy this requirement of pleading with particularity, "the complaint must allege 'such matters as the time, place, and contents of false representations, as well as the identity of the person making the misrepresentation and what was obtained or given up thereby.' " *Drobnak v. Andersen Corp.*, 561 F.3d 778, 783 (8th Cir. 2009) (quoting *Schaller Tel. Co. v. Golden Sky Sys., Inc.*, 298 F.3d 736, 746 (8th Cir. 2002)). Dismissal based on the plaintiff's failure to plead fraud with particularity under Rule 9(b) is the equivalent of a Rule 12(b)(6) dismissal for failure to state a claim for relief. *Carroll v. Farooqi*, 486 B.R. 718, 724 (N.D. Tex. 2013).

Sandlot seeks determination of the dischargeability of its debt under § 523(a)(2), (a)(4), (a)(6), and (a)(11). Some of these subsections include elements of fraud and are subject to the heightened pleading standard of Rule 9(b), while other subsections are subject to the general pleading standard under Rule 8(a)(2), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." The Court will examine Sandlot's amended complaint in relation to each pleaded provision.

A. § 523(a)(2)

Section 523(a)(2)(A) and (B) contemplate the nondischargeability of two kinds of debts relevant to this matter:

> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by–
>
> > (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's

financial condition;

(B) use of a statement in writing--
(i) that is materially false;
(ii) respecting the debtor's or an insider's financial condition;
(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
(iv) that the debtor cause to be made or published with intent to deceive.

The first kind of nondischargeable debt, under (a)(2)(A), arises as the result of three related acts by the debtor to induce a creditor to provide money, property, services, or forms of credit to the debtor. "A 'false pretense' involves implied misrepresentation or conduct intended to create and foster a false impression." *The Merchants Nat'l bank of Winona v. Moen* (*In re Moen*), 238 B.R. 785, 791 (B.A.P. 8th Cir. 1999) (quoting *Leeb et al. v. Guy* (*In re Guy*), 101 B.R. 961, 978 (Bankr. N.D. Ind. 1988). A false representation or misrepresentation may include spoken or written words or other conduct that constitutes an assertion not consistent with the truth, as well as the debtor's strategic silence regarding a material fact. *Id.* "'Actual fraud, by definition, consists of any deceit, artifice, trick or design involving direct and active operation of the mind, used to circumvent and cheat another–something said, done or omitted with the design of perpetrating what is known to be a cheat or deception.'" *Id.* at 790 (quoting *RecoverEdge L.P. v. Pentecost*, 44 F.3d 1284, 1293 (5th Cir. 1995). All three are based in fraud and trigger the heightened pleading standard of Rule 9(b).

Courts use a single test to determine the dischargeability of a debt under § 523(a)(2)(A). A creditor must prove the following elements by a preponderance of the evidence:

(1) that the debtor made a representation;

(2) that at the time the debtor knew the representation was false;

(3) that the debtor made the representation deliberately and intentionally with the intention and purpose of deceiving the creditor;

(4) that the creditor justifiably relied on such representation; and

(5) that the creditor sustained the alleged loss and damage as the proximate result of the representation having been made.

Id. (quoting *Thul v. Ophaug*, 827 F.2d 340 (8th Cir. 1987)).

A review of the facts alleged in the amended complaint shows that Sandlot has failed to plead fraud with particularity in relation to the elements fundamental to a claim under § 523(a)(2)(A). Sandlot alleged that it and Timothy Daniel entered into three different agreements by which Sandlot provided money to Timothy Daniels, once as a payment intended for a third party and twice as business loans. According to Sandlot's allegations, Timothy Daniels only partially complied with each of the agreements and Sandlot was financially harmed as a result. The debtors subsequently signed a promissory note in favor of Sandlot in order to rectify the financial harm but then failed to make payments according to the terms. Taking these alleged facts as true, which the Court is required to do when determining a motion to dismiss under either Rule 12(b)(6) or Rule 9(b), the Court concludes that Sandlot has not stated a plausible claim under § 523(a)(2)(A). Plausibility turns on whether a plaintiff has "'allege[d] facts' that . . . are 'suggestive of illegal conduct.'" *Iqbal*, 556 U.S. 662, 696 (2009) (quoting *Twombly*, 550 U.S. at 564, n.8). Sandlot's pleaded facts indicate that Timothy Daniels breached several oral agreements and, with his wife, defaulted on a related promissory note–all of which may be actionable in other contexts but are not the kind of "illegal conduct" that § 523(a)(2)(A) addresses. *See Lindau v. Nelson* (*In re Nelson*), 357 B.R. 508, 514 (B.A.P. 8th Cir. 2006) ("Debts arising out of contract breaches are not excepted from discharge in bankruptcy.").

The only statements that suggest illegal conduct as to § 523(a)(2)(A) are the following allegations that Sandlot added to its amended complaint: that Timothy Daniels's representations to Sandlot "at all times herein" were knowingly false; that Sandlot relied on those representations; and that, as a result, Timothy Daniels's false representations

proximately caused damages to Sandlot. However, these are what the Supreme Court has called "threadbare recitals of the elements of a cause of action," which are alone insufficient to establish a claim for relief. *Iqbal*, 556 U.S. at 679-80. Sandlot does not pinpoint the date on which the debtors made false representations or the content of those false representations. Instead, the amended complaint simply provides dates upon which the parties "entered into an oral agreement" or "entered into an agreement."[3] As such, Sandlot failed to plead with particularity the first element of a fraud claim–a false representation–under § 523(a)(2)(A). *See S & L Enterprises I, LLC v. Eisaman* (*In re Eisaman*), 387 B.R. 219, 222 (Bankr. N.D. Ind. 2008) ("A complaint which fails to identify the fraudulent statements or the reasons why they are fraudulent does not satisfy the particularity requirements of Rule 9(b).") (citing *Skycom Corp. v. Telstar Corp.*, 813 F.2d 810, 818 (7th Cir. 1987)). Therefore, the Court dismisses Sandlot's claim under § 523(a)(2)(A).

The second kind of debt, under subsection (a)(2)(B), concerns a debtor's use of false written financial statements to induce a creditor to enter into business transactions with it. Sandlot has not alleged any facts involving the debtors' use of a false financial statement in their transactions. Therefore, to the extent Sandlot intended to proceed under this subsection, the Court also dismisses Sandlot's claim under § 523(a)(2)(B).

B. 523(a)(4)

The second provision under which Sandlot seeks nondischargeability of its debt is § 523(a)(4). This provision excepts from discharge debts that the debtor has incurred as a result of: (1) fraud while acting in a fiduciary capacity; (2) defalcation while acting in a fiduciary capacity; (3) embezzlement; or (4) larceny. In the case of the first two kinds of debt, the creditor must prove that the debtor acted within the confines of a fiduciary

[3] The most specific reference to a representation made by Timothy Daniels appears in Paragraph 13 of the amended complaint, which states, in part, that "[a]s consideration for the agreement, Defendant Daniels promised to share in the profits of the sale . . . ."

relationship "'arising from an express or technical trust that was imposed before and without reference to the wrongdoing that caused the debt.'"[4] *Tudor Oaks Ltd. Partnership v. Cochrane* (*In re Cochrane*), 124 F.3d 978, 984 (8th Cir. 1997) (quoting *Lewis v. Scott* (*In re Lewis*), 97 F.3d 1182, 1185 (9th Cir. 1996)). "'The broad, general definition of a fiduciary–a relationship involving confidence, trust and good faith–is inapplicable.'" *Jafarpour v. Shahrokhi* (*In re Shahrokhi*), 266 B.R. 702,707 (B.A.P. 8th Cir. 2001) (quoting *Mills v. Gergely* (*In re Gergely*), 110 F.3d 1448, 1450 (9th Cir. 1997)). The creditor also must show that the debtor committed fraud or defalcation, respectively. In the Eighth Circuit, a debtor's defalcation while acting in a fiduciary capacity does not require intentional fraud or wrongdoing.

> Defalcation is defined as the 'misappropriation of trust funds or money held in any fiduciary capacity; [the] failure to properly account for such funds.' Under section 523(a)(4), defalcation 'includes the innocent default of a fiduciary who fails to account fully for money received.' ... An individual may be liable for defalcation without having the intent to defraud.

Tudor Oaks Ltd. Partnership, 124 F.3d at 984 (quoting *Lewis*, 97 F.3d at 1186-87 (9th Cir. 1996)). The Eighth Circuit's position is the minority view– in the First, Second, Fifth, Sixth, Seventh, and Tenth Circuits, varying degrees of misconduct (including extreme recklessness or willful neglect) are required to show defalcation under § 523(a)(4). *Estate of Denton v. Hyman (In re Hyman*), 502 F.3d 61, 67-68 (2nd Cir. 2007).

The third and fourth kinds of debt under § 523(a)(4) are embezzlement and larceny. Embezzlement is "'the fraudulent appropriation of property of another by a person to whom such property has been entrusted or into whose hands it has lawfully come.'" *Arvest Mortgage Co. v. Nail* (*In re Nail*), 680 F.3d 1036, 1042 (8th Cir. 2012) (quoting *In*

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[4] An express trust is one that is "created with the settlor's express intent, usu[ally] declared in writing." *Reshetar Sys. Inc. v. Thompson* (*In re Thompson*), 458 B.R. 504, 509 (B.A.P. 8th Cir. 2011) (quoting *Black's Law Dictionary* 1650 (9th ed. 2009)). "A technical trust is one imposed by statute or common law." *Id.*

re Phillips, 882 F.2d 302, 304 (8th Cir. 1989)). Larceny is "[t]he unlawful taking and carrying away of someone else's personal property with the intent to deprive the possessor of it permanently." *Fleming Mfg. Co., Inc. v. Keogh* (*In re Keogh*), 509 B.R. 915, 937 (Bankr. E.D. Mo. 2014) (quoting Black's Law Dictionary 959 (9th ed. 2009). The difference between embezzlement and larceny is the condition under which the debtor takes possession of the property: for embezzlement, the debtor's possession is initially lawful; for larceny, however, the taking and possession is unlawful from the beginning. *Id.*

Some courts broadly apply the particularity pleading requirement of Rule 9(b) to all four provisions of § 523(a)(4) by reasoning that each includes aspects of fraud. *See Mirarchi v. Nofer* (*In re Nofer*), 514 B.R. 346, 357 (Bankr. E.D.N.Y. 2014); *Stello v. Aikin* (*In re Aikin*), Case No. 07-00121, Adv. No. 07-10017, 2007 WL 3305364 at *5 (Bankr. D.C. Nov. 5, 2007); *Nibbi et al. v. Kilroy (In re Kilroy*), 357 B.R. 411, 421 (Bankr. S.D. Tex. 2006). This Court finds that the four provisions vary in their pleading requirements. Clearly, Rule 9(b) applies to pleading a claim that the debtor committed fraud while acting in a fiduciary capacity. However, in the case of defalcation, the Eighth Circuit has ruled that even an innocent default of fiduciary duties may be actionable, meaning there is no fraud requirement. Accordingly, the Court holds that while a heightened pleading standard may be appropriate in some jurisdictions, in the Eighth Circuit the proper standard for pleading a debtor's defalcation while acting in a fiduciary capacity is under Rule 8(a)(2). All that is required is "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

Regardless of the differing pleading standards for a claim of fraud or a claim for defalcation under § 523(a)(4), both require facts to be plead regarding a fiduciary relationship between the debtor and the injured creditor. Neither of Sandlot's complaints contains allegations that the parties were engaged in a fiduciary relationship. In addition, while the Court is able to conclude that the parties' relationship was contractual, there is no indication that the parties' agreements imposed further duties that might give rise to

the kind of fiduciary relationship required under § 523(a)(4). *See Shahrokhi*, 266 B.R. at 708 ("A merely contractual relationship is less than what is required to establish the existence of a fiduciary relationship."). Therefore, the Court dismisses Sandlot's claim under § 523(a)(4) as to a debt arising from either "fraud or defalcation while acting in a fiduciary capacity."

In regard to the pleading standard for embezzlement and larceny, each requires a showing of fraudulent intent. However, fraudulent intent is distinguishable from the outright fraud contemplated under § 523(a)(2) or in the context of a fiduciary relationship under § 523(a)(4), both of which involve false representations for the purpose of inducing the creditor to act. As one court stated, fraudulent intent "is more accurately described as 'animus furandi' or intention to steal" in the context of embezzlement or larceny. *Alternity Capital Offering 2, LLC v. Ghaemi* (*In re Ghaemi*), 492 B.R. 321, 325-26 (Bankr. D. Colo. 2013). Whether embezzlement and larceny fall under the general pleading standard of Rule 8(a)(2) or the heightened standards of Rule 9(b), it is sufficient that the complaining party alleges that the debtor intended to steal the property at issue.[5] Unlike with outright fraud, allegations of a misrepresentation are not required. *Id.*

Neither of Sandlot's complaints pleads facts showing that either of the debtors unlawfully acquired Sandlot's property in a manner consistent with larceny. Therefore, to the extent Sandlot intended to proceed under a claim of larceny, it failed to state a plausible claim and the Court dismisses this cause of action. However, Sandlot did plead facts

[5] The *Ghaemi* court did not specify whether the pleading standard of Rule 8(a)(2) or Rule 9(b) was appropriate for claims of embezzlement and larceny, but by distinguishing the fraudulent intent element from the kind of fraud contemplated by § 523(a)(2)(A), the court seemed to indicate that Rule 9(b) was not applicable. Other courts also have declined to apply Rule 9(b) pleading standards to embezzlement and larceny. *See Old Republic Nat'l Title Ins. Co. v. Presley* (*In re Presley*), 490 B.R. 633, 639 (Bankr. N.D. Georgia 2013); *Sierra Chemicals, L.C. v. Moseley* (*In re Moseley*), Case No. 11-15299, Adv. No. 12-1166, 2012 WL 5193956 at *6-7 (Bankr. D.N.M. October 19, 2012).

potentially consistent with a claim for embezzlement. It alleged that it paid $150,457.51 to Timothy Daniels for the purpose of paying a third party to manufacture materials for a project, and that it later learned that Timothy Daniels had only paid the third party $63,000. In addition, both complaints allege that "Defendant Daniels wrongfully took the above-mentioned properties from the Plaintiff's possession and converted same to his/its own use by exercising distinct dominion over the property inconsistent to Plaintiff's rights" and that "Defendant Daniels had the intent to exercise dominion and/or control over the above-mentioned properties that is inconsistent with Plaintiff's rights."[6] All of these statements taken together are sufficient to allege that the Timothy Daniels lawfully took possession of Sandlot's property and later appropriated it with the requisite intent to steal. Accordingly, the Court finds that Sandlot stated a plausible claim for embezzlement under § 524(a)(4) as to Timothy Daniels.

C. § 523(a)(6)

The third provision under which Sandlot seeks a determination of nondischargeability of its debt is § 523(a)(6), which excepts from discharge a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." The Eighth Circuit requires that the debt be both a willful injury and a malicious injury in order to be nondischargeable under § 523(a)(6). *Blocker v. Patch* (*In re Patch*), 526 F.3d 1176, 1180 (8th Cir. 1985). With respect to contractual breaches, "a simple breach of contract is not the type of injury addressed by § 523(a)(6)." *Prewett v. Iberg* (*In re Iberg*), 395 B.R. 83, 89 (Bankr. E.D. Ark. 2008) (quoting *Snoke v. Riso* (*In re Riso*), 978 F.2d 1151, 1154 (9th

[6] While Sandlot's reference to "the above-mentioned properties" is not specific, a claim of embezzlement can only apply to the transaction for which Timothy Daniels allegedly failed to pay the third party and not to the other two business loan agreements on which he defaulted. A loan transfers ownership of money from the lender to the lendee. As the Eighth Circuit has stated, "[o]ne cannot embezzle one's own property." *Belfry v. Cardozo* (*In re Belfrey*), 862 F.2d 661, 662 (8th Cir. 1988). While Timothy Daniels may have had an obligation under the parties' agreement to repay Sandlot and also pay a percentage of profits gained as a result of the loans, his failure to do so does not constitute embezzlement under § 523(a)(4).

Cir. 1992)). A creditor must show that the debtor committed willful tortious conduct designed to injure the creditor for an intentional breach of contract to fall within the purview of § 523(a)(6). *Id.* "'Willful,' standing alone, means intentional or deliberate." *Barclays Am./Bus. Credit v. Long* (*In re long*), 774 F.2d 875, 880 (8th Cir. 1985). A malicious injury requires conduct that is specifically "targeted at the creditor . . ., at least in the sense that the conduct is certain or almost certain to cause financial harm." *Id.* at 881.

Fraud is not an element of a § 523(a)(6) action; therefore, the general pleading standard of Rule 8(a)(2) applies.[7] *Kilroy*, 354 B.R. at 489 (Bankr. S.D. Tex. 2006). Sandlot alleged in its amended complaint that the debtors converted Sandlot's property and that their acts were "willful, wanton, malicious, and oppressive." The facts contained within the amended complaint that are applicable to § 523(a)(6) are the same as those previously discussed for Sandlot's embezzlement claim–that Timothy Daniels received funds from Sandlot for the purpose of paying a third party but failed to do so. In Arkansas, "conversion is any distinct act of dominion wrongfully exerted over property in denial of, or inconsistent with the owner's rights." *Hoffinger Indus., Inc. v. Rinehart* (*In re Hoffinger Indus., Inc.*), 315 B.R. 74, 76 (Bankr. E.D. Ark. 2004) (*citing McQuillan v. Mercedes-Benz Credit Corp.*, 961 S.W.2d 729, 732 (1998)). It is also characterized as "a common law intentional tort action." *Id.* (citing *McQuillan*, 961 S.W.2d at 734). Because Sandlot has alleged conversion, which by definition is an intentional act, it has sufficiently pleaded that Timothy Daniels's acts were willful. It also has generally pleaded that the debtors acted with malicious intent. For these reasons, the Court finds that Sandlot has stated a plausible claim under § 523(a)(6) against Timothy Daniels.

[7] However, fraud that is willful and malicious could be prosecuted under § 523(a)(6). *Lerch v. Iommazo* (*In re Iommazo*), 149 B.R. 767, 772 (Bankr. D.N.J. 1993).

D. § 523(a)(11)

Finally, Sandlot asserts nondischargeability of the debt under § 523(a)(11), which excepts from discharge a debt

> provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institution regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity *committed with respect to any depository institution or insured credit union*.

(Emphasis added.) Aside from the Court's previous finding that Sandlot failed to plead the existence of a fiduciary relationship as contemplated by § 523(a)(4), nothing in the amended complaint alleges or suggests that Sandlot is a depository institution or insured credit union. Accordingly, the Court finds that no plausible claim for relief exists and dismisses Sandlot's claim under § 523(a)(11).

E. Sandlot's allegations as to Rachel Daniels, separately

Sandlot's initial and amended complaints argue that the debt owed to it should be deemed nondischargeable as to both Timothy Daniels and Rachel Daniels. According to the facts stated in Sandlot's initial adversary proceeding complaint, which incorporated all allegations contained within the circuit court complaint, the only transaction Rachel Daniels (then Rachel Baucom) participated in was jointly signing a promissory note with Timothy Daniels on July 20, 2012, in favor of Sandlot. In respect to all of the prior transactions for which Sandlot alleges wrongdoing, only Timothy Daniels (along with third-party Arkansas Commercial Fitness, LLC) was named as a participant. In the amended complaint, Sandlot collectively attributes all wrongdoing to the debtors and only specifically names Rachel Daniels by stating that "[t]he fraud of Defendant Timothy Daniels is imputed upon Defendant Rachel Daniels." (Paragraph 33)

The Court has already found that Sandlot failed to plead fraud with particularity under Rule 9(b) as to Timothy Daniels. Therefore, its statement that Timothy Daniels's fraud is imputed to Rachel Daniels fails. In addition, "[i]n a case involving multiple defendants,

Rule 9(b) mandates that the complaint inform each defendant of his alleged role in the deception. Broad allegations that . . . some defendants are guilty because of their association with others, do not inform each defendant of its role in the fraud and do not satisfy Rule 9(b)." *Gunderson v. ADM Investor Serv., Inc.*, 85 F.Supp.2d 892, 906 (N.D. Iowa 2000) (internal citations omitted). In relation to Sandlot's other causes of action not involving fraud, the only facts specifically attributable to Rachel Daniels involve the promissory note. As the Court previously stated, a default on a promissory note does not alone create a nondischargeable debt. Accordingly, the Court finds that Sandlot has failed to state a plausible cause of action against Rachel Daniels and dismisses all claims against her under both Rule 12(b)(6) and Rule 9(b).

Conclusion

For the reasons stated above, the Court finds that Sandlot's amended complaint has alleged plausible claims against Timothy Daniels only under § 524(a)(4) for embezzlement and under § 523(a)(6). All other causes of actions are dismissed for failure to state a claim under Rule 12(b)(6) and/or Rule 9(b). A trial on the surviving matters will be set by subsequent notice.

IT IS SO ORDERED.

Ben Barry
United States Bankruptcy Judge
Dated: 12/11/2014

cc: Dale Duke
Lyndsey D. Dilks