

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 01-33301

ROLLAN ROBERTS  
d/b/a ROBERTS ENTERPRISES  
RENEE ROBERTS

Debtors

JAMES WEBBER

Plaintiff

v.

Adv. Proc. No. 01-3166

ROLLAN ROBERTS

Defendant

**MEMORANDUM ON MOTION TO DISMISS**

APPEARANCES: JENKINS & JENKINS ATTORNEYS, PLLC  
Benjamin W. Jones, Esq.  
2121 First Tennessee Plaza  
800 South Gay Street  
Knoxville, Tennessee 37929  
Attorneys for Plaintiff

McGEHEE, NEWTON & WYKOFF, P.C.  
John P. Newton, Jr., Esq.  
Cynthia T. Lawson, Esq.  
Post Office Box 2132  
Knoxville, Tennessee 37901  
Attorneys for Defendant

**RICHARD STAIR, JR.**  
**UNITED STATES BANKRUPTCY JUDGE**

On October 12, 2001, the Plaintiff filed a Complaint Objecting to the Dischargeability of Certain Debts (Complaint). According to the Complaint, a \$15,000.00 obligation from the Defendant to the Plaintiff should be declared nondischargeable pursuant to 11 U.S.C.A. § 523(a)(4) and/or (6) (West 1993).

Now before the court is the Defendant's Motion to Dismiss filed on December 19, 2001. The Motion to Dismiss, brought under FED. R. CIV. P. 12(b)(6) and FED. R. BANKR. P. 7012(b), asserts that both counts of the Complaint fail to state a claim upon which relief can be granted.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(I) (West 1993).

## I

By Real Estate Sales Contracts dated December 20, 2000, the Plaintiff contracted to purchase from the Defendant two rental properties located in Knoxville, Tennessee. The contracts recite that the Plaintiff paid \$15,000.00 to Meese Realty, LLC (Meese), as an earnest money deposit on the properties. According to the Complaint, however, the money was in fact tendered to the Defendant.

In letters dated January 13 and February 11, 2001, the Plaintiff expressed to Meese and the Defendant his dissatisfaction with the condition of the rental properties. According to the letters, the Defendant failed to fulfill numerous contractual obligations to clean and repair the structures prior to sale. The February 11 letter concludes with the Plaintiff's request for a refund of the \$15,000.00 earnest money.

On February 22, 2001, the parties signed an agreement providing, in part, that the Real Estate Sales Contracts were "not consummated." The agreement further provides that the Defendant would "refund the \$15,000.00" to the Plaintiff by March 31, 2001. Despite the agreement, however, the refund did not occur, although the Defendant contends that Meese refunded one-half of the money to the Plaintiff.

The Defendant and his wife then filed their Joint Voluntary Petition under Chapter 7 on July 5, 2001. The Plaintiff is scheduled as the holder of a \$7,500.00 unsecured nonpriority claim for "refund from real estate deal."

## II

As noted, the Motion to Dismiss is brought pursuant to FED. R. CIV. P. 12(b)(6)<sup>1</sup> and FED. R. BANKR. P. 7012(b). Those rules establish a defense against complaints failing "to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b).

The Sixth Circuit Court of Appeals has explained the standard for resolving Rule 12(b)(6) motions as follows:

This Court must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. A complaint need only give fair notice of what the plaintiff's claim is and the grounds upon which it rests. A judge may not grant a FED. R. CIV. P. 12(b)(6)

---

<sup>1</sup> Prior to his Motion to Dismiss, the Defendant filed an Answer on November 13, 2001. Rule 12(b) requires that a motion raising any of the 12(b) defenses "shall be made before pleading." Technically, therefore, since a pleading had already been filed, the Defendant's motion should have been brought as a motion for judgment on the pleadings under FED. R. CIV. P. 12(c). *See Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 n.1 (6<sup>th</sup> Cir. 1988). The court will, however, consider and resolve the Motion to Dismiss as filed, because motions for judgment on the pleadings and Rule 12(b)(6) motions are decided under identical standards for dismissal. *See id.*

motion to dismiss based on a disbelief of a complaint's factual allegations. While this standard is decidedly liberal, it requires more than the bare assertion of legal conclusions. In practice, a . . . complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under *some* viable legal theory.

*Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1240 (6<sup>th</sup> Cir. 1993) (internal citations and quotations omitted) (emphasis in original).

### III

By Count I of the Complaint, the Plaintiff asserts that the earnest money debt should be declared nondischargeable pursuant to 11 U.S.C.A. § 523(a)(6). That section provides that a discharge under Chapter 7 does not discharge a debtor from any debt “for willful and malicious injury by the debtor to another entity or to the property of another entity[.]” 11 U.S.C.A. § 523(a)(6) (West 1993). An injury is “willful and malicious” if “the actor desires to cause [the] consequences of his act, or . . . believes that the consequences are substantially certain to result from it.” *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 464 (6<sup>th</sup> Cir. 1999) (citation omitted).

The Complaint alleges that by retaining the \$15,000.00 at issue the Defendant intentionally converted funds belonging to the Plaintiff.<sup>2</sup> It does not appear beyond doubt to the court that the Plaintiff would be unable to prove a “willful and malicious” injury. See *Windsor v. The Tennessean*, 719 F.2d 155, 158 (6<sup>th</sup> Cir. 1983) (“The claim should not be dismissed unless it

---

<sup>2</sup> Conversion is the exercise of dominion or control over the property of another, in a manner inconsistent with the owner’s rights, resulting in injury to the owner. See *General Elec. Cred. Corp. of Tenn. v. Kelly & Dearing Aviation*, 765 S.W.2d 750, 753 (Tenn. Ct. App. 1988).

appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”). If the Defendant in fact “intentionally converted” the Plaintiff’s funds, it is then conceivable that he desired or believed the Plaintiff’s financial injury would be the substantially certain result of the conversion. *See Markowitz*, 190 F.3d at 464. The Motion to Dismiss, to the extent it requests dismissal of Count I of the Complaint, must therefore be denied.

#### IV

The Complaint also contends that the subject debt is nondischargeable pursuant to § 523(a)(4) for “defalcation while acting in a fiduciary capacity.” Section 523(a)(4) provides for the nondischargeability of any debt “for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny[.]” 11 U.S.C.A. § 523(a)(4) (West 1993). “Defalcation,” for purposes of § 523(a)(4), is a debtor’s misappropriation of, or failure to account for, funds held by the debtor in an express or technical trust relationship. *See R.E. America, Inc. v. Garver (In re Garver)*, 116 F.3d 176, 179-80 (6<sup>th</sup> Cir. 1997).

Under Tennessee law, earnest money payments are “regarded as trust funds.” *See Lake Assocs., Inc. v. Pugh*, Henry Equity No. 1, 1987 WL 7962, at \*3 (Tenn. Ct. App. March 19, 1987). The Complaint alleges that the \$15,000.00 was paid to the Defendant rather than to Meese. Accepting all factual allegations of the Complaint as true, the Plaintiff has stated a claim upon which relief can be granted under § 523(a)(4) - namely, the misappropriation of earnest money held by the Defendant in a fiduciary capacity. Accordingly, the Motion to Dismiss, as it relates to Count II of the Complaint, must also be denied.

An appropriate order will be entered.

FILED: January 18, 2002

BY THE COURT

*/s/*

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 01-33301

ROLLAN ROBERTS  
d/b/a ROBERTS ENTERPRISES  
RENEE ROBERTS

Debtors

JAMES WEBBER

Plaintiff

v.

Adv. Proc. No. 01-3166

ROLLAN ROBERTS

Defendant

**ORDER**

For the reasons set forth in the Memorandum on Motion to Dismiss filed this date, the court directs that the Defendant's Motion to Dismiss filed December 19, 2001, is DENIED.

SO ORDERED.

ENTER: January 18, 2002

BY THE COURT

/s/

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE