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

In re JEFFREY FOSTER BROBECK and JANET LAVON BROBECK, Debtors.	No. 03-21784 Chapter 7
MAX L. COX, Plaintiff, vs. JEFFREY FOSTER BROBECK, Defendant.	Adv. Pro. No. 03-2043

M E M O R A N D U M

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

In this adversary proceeding, the plaintiff Max L. Cox seeks a judgment against the debtor Jeffrey Brobeck and a determination of nondischargeability under 11 U.S.C. § 523 (a)(4) and (6). Presently before the court are the debtor's motion to dismiss for failure to prosecute and motion to dismiss for failure to state a claim or for summary judgment. For the reasons discussed hereafter, the debtor's motion for summary judgment will be granted as to the plaintiff's nondischargeability claim under § 523(a)(4) "for fraud or defalcation while acting in a fiduciary capacity" and "larceny." In all other respects, the debtor's motions will be denied. This is a core proceeding. *See* 28 U.S.C. § 157 (b)(2)(I).

I.

The debtor Jeffrey Brobeck and his wife filed for bankruptcy relief under chapter 7 on May 15, 2003, and plaintiff commenced the instant adversary proceeding against Mr. Brobeck alone on August 15, 2003. In the complaint, the plaintiff alleges that he and the debtor "entered into oral contract whereby the [debtor] used Plaintiff's money to purchase an inventory of automobiles for resale" with plaintiff receiving upon the resale of each vehicle the original purchase price plus $100. The plaintiff alleges that in this relationship the debtor was a fiduciary to the plaintiff and held the inventory and resulting monies in either a constructive or resulting trust for the benefit of the plaintiff. The plaintiff further alleges that the debtor "committed fraud, defalcation, theft and embezzlement by intentionally converting the money and inventory held in trust for the benefit of the Plaintiff for his own personal use," and that "the failure of the [debtor] to fulfill his contractual obligation rose to an intentional breach of contract because it was accompanied by the willful and malicious conversion on the part of the [debtor] of Plaintiff's money and equitable interest in the inventory." The plaintiff concludes that as a result of these acts by the debtor, he has suffered losses totaling

$167,000, which should be excepted from discharge under 11 U.S.C. § 523(a)(4) and (6).

The debtor timely filed an answer to the complaint, and afterwards, this court set this adversary proceeding for a scheduling conference. As a result of the conference, the court entered an order on November 6, 2003, setting a trial date of April 28, 2004, and certain deadlines, including dates for the completion of discovery and the filing of any dispositive motions. Thereafter, on February 24, 2004, an agreed order was entered, continuing the trial to September 1, 2004, the discovery completion date to July 2, 2004, and the dispositive motion deadline to July 17, 2004.

On July 19, 2004, the debtor filed the two dispositive motions which are presently before the court. The motions are supported by memoranda of law and the debtor's personal affidavit. The plaintiff has now filed responses in opposition to the two motions, supported by the personal affidavits of the plaintiff and one of his co-counsel, Russell D. Mays.

II.

In the first motion, the debtor seeks dismissal under Fed. R. Bankr. P. 7041 for plaintiff's alleged failure to prosecute this adversary proceeding. The debtor asserts in the motion that the agreed order continuing the trial date was at the plaintiff's behest, that the discovery deadline has now passed without the plaintiff conducting any discovery, and that this adversary proceeding, which was only filed to harass the debtor, should be dismissed because it has been abandoned by the plaintiff. In response, the plaintiff admits that there has been one continuance in this case at his request and that no formal discovery has taken place. The plaintiff denies, however, that these facts constitute, or that there has been a failure by him, to prosecute this adversary proceeding. He contends that he has actively pursued his cause of action against

the debtor, and that absent illness, he will be ready for trial on the scheduled trial date of September 1. As to the lack of formal discovery, the plaintiff states that he was able to obtain the necessary informal discovery regarding this case from two other lawsuits involving the debtor, a criminal bad check prosecution in which the plaintiff was the victim, and an action by the chapter 7 trustee against the plaintiff arising out of his transactions with the debtor. The plaintiff also notes that initially in this proceeding, the debtor refused to submit to a deposition based on his constitutional rights under the Fifth Amendment, and that debtor's counsel threatened to seek an order quashing any deposition notice directed at the debtor. Lastly, the plaintiff contends that mere failure to obtain discovery does not provide a basis for dismissal of an adversary proceeding.

The first sentence of Fed. R. Civ. P. 41(b) states that "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant." Fed. R. Bankr. P. 7041 provides that Rule 41 applies in adversary proceedings. The Sixth Circuit Court of Appeals has indicated that "dismissal of an action is a harsh sanction which the court should order only in extreme situations where there is a showing of a clear record of delay or contumacious conduct by the plaintiff." *Little v. Yeutter*, 984 F.2d 160, 162 (6th Cir. 1993).

Applying that standard to the present case, this court is unable to conclude that either a "clear record of delay" or "contumacious conduct by the plaintiff" has been established. The debtor agreed to the one trial continuance in this case, and even with this continuance, the trial is scheduled to take place September 1, 2004, only slightly more than a year after this adversary proceeding was commenced on August 15, 2003. One continuance in an adversary proceeding is not at all unusual, especially in an adversary proceeding which originally had an early trial date, such as the present one. Nor is a single trial

continuance unusual in a discharge or dischargeability proceeding where the debtor is concurrently the defendant in a criminal action and has raised his Fifth Amendment privilege.[1]

The fact that the plaintiff has failed to conduct formal discovery is not relevant. This court's November 6, 2004 scheduling order did not compel either party to conduct discovery; it only set a deadline for the completion of any discovery which the parties desired to conduct. The plaintiff has violated no orders to compel discovery; nor is there an allegation that he has failed to provide any discovery requested by the debtor. *Cf. Urban Elec. Supply and Equip. Corp. v. New York Convention Ctr. Dev. Corp.*, 105 F.R.D. 92, 97 (E.D.N.Y. 1985)("where a party has failed to obey an order to provide discovery, the court may dismiss the action"). By failing to conduct formal discovery, the plaintiff runs the risk that he will be unable to carry his burden of proof at trial; he does not, however, subject himself to dismissal for failure to prosecute. The debtor's motion to dismiss for failure to prosecute will be denied.

III.

In the debtor's second motion, he seeks dismissal for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6), as incorporated by Fed. R. Bankr. P. 12(b), and for summary judgment under Fed. R. Bankr. P. 7056, incorporating Fed. R. Civ. P. 56. The debtor asserts in his motion that any debt to the plaintiff has been satisfied and that the facts of this case do not meet the requirements for nondischargeability under either § 523(a)(4) or (6) of the Bankruptcy Code.

"[T]he determination of whether a complaint states a claim for relief is a question of law." *Andrews*

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[1]The court notes that the trial date has now been continued by agreement upon plaintiff's request until December 1, 2004.

v. *State of Ohio*, 104 F.3d 803, 806 (6th Cir. 1997). In deciding a motion to dismiss under Fed. R. Civ. P. 12(b)(6):

> 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 plaintiff's claim is and the grounds upon which it rests." A judge may not grant a Fed. R. Civ. P. 12(b)(6) motion to dismiss based on a disbelief of a complaint's factual allegations. While this standard is decidedly liberal, it requires more than a 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."

Id. (quoting *Allard v. Weitzman (In re DeLorean Motor Co.*), 991 F.2d 1236, 1240 (6th Cir.1993)).

Rule 12(b) itself provides that if matters outside the pleadings are presented for consideration in the context of a motion to dismiss for failure to state a claim, "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 ...." As previously noted, matters outside the pleadings have been presented in connection with the debtor's motion. He has submitted his personal affidavit and plaintiff has tendered his affidavit along with that of his co-counsel in opposition to the motion. Accordingly, the court will treat the entire motion as one for summary judgment. Rule 56(c) mandates the entry of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In ruling on a motion for summary judgment, the inference to be drawn from the underlying facts contained in the record must be viewed in a light most favorable to the party opposing the motion. *See National Enters., Inc. v. Smith*, 114 F.3d 561, 563 (6th Cir. 1997).

The first contention asserted by the debtor in support of his motion for summary judgment is accord

and satisfaction. The debtor argues that "the alleged debt upon which Plaintiff bases his complaint against [him] has been satisfied." As set forth in the debtor's affidavit:

> Mr. Cox agreed to settle the "accounts" in full between us in exchange for all of my interest in the property and building at 2719 Highway 11-E, Telford, Tennessee, which was my home and business property. My equity in the property was worth approximately $136,000 according to my estimates at the time. Mr. Cox also demanded possession of a lot I owned, without liens, in Venture Out Campgrounds in Cosby, Tennessee, which I gave along with my interest in a 1996 12ft by 35ft Chariot Eagle camper, already in foreclosure. Mr. Cox bought the camper from First Tennessee Bank for $10,000 and sold it and the lot, which I had transferred to him free and clear, for $32,000. I also gave Mr. Cox a 2000 Yamaha Millennium Edition motorcycle with a $5600 loan on it but worth about $10,500. Additionally, I gave Mr. Cox my interest in a late 1990's model F350 Super Duty rollback truck (wrecker).
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> It was my understanding with Mr. Cox that the transfers and release of these properties and items to him settled all my debt to him in full including the returned [sic] a returned check for $19,975.
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> At the time, I would not have signed over my interest in these considerable properties, including my extensively and newly remodeled and expanded home and business with new appliances and fixtures, without being fully relieved of any further obligation to Mr. Cox.
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> Mr. Cox came to my home on or about January 8, 2003. Mr. Cox said the only way to get all of this behind us was for me to give him the property I had already offered him plus my property in Cosby, Tennessee. This I did.
>
> I have paid Mr. Cox in full under our agreement of January 2003.

In response the plaintiff denies that the debt to him has been satisfied. He admits in his affidavit that the debtor transferred some property to him in partial payment of the debt but disputes the nature of the interests transferred and their value. More specifically, the plaintiff states that he did receive from the debtor title to the Cosby, Tennessee lot which he was able to sell and after expenses make a profit of $14,000. However, as to the Telford, Tennessee property, the plaintiff states that rather than an outright deed to the realty, the debtor gave him a second mortgage on the property to secure an $85,000

promissory note. The plaintiff states that to keep the property out of foreclosure, he had to purchase a $96,000 note held by the first mortgage holder, and then had to foreclose both mortgages in order to acquire title. The plaintiff questions whether the realty has any value above the amount of the first mortgage since in attempts to sell the property, the only offer received by him was in the amount of $75,000. As to the motorcycle allegedly given to the plaintiff by the debtor, the plaintiff states in his affidavit that the debtor never owned the motorcycle, that it was instead owned by East Gate Motors, a business owned by the plaintiff. Similarly, the plaintiff states that the 1995 Ford F350 rollback truck was never in debtor's name, that the debtor traded two cars purchased with $33,000 of plaintiff's money for the truck, that debtor admitted to the plaintiff that he knew the truck was not worth $33,000, and that when plaintiff eventually sold the truck, he only received $20,000, thus losing $13,000 on the transaction. The plaintiff concludes in his affidavit that he is still owed $132,200 by the debtor, less restitution payments currently being made by the debtor and a third party and less $10,000[2] from the sale of the Cosby property.

According to the Tennessee Supreme Court:

> An accord is an agreement whereby one of the parties undertakes to give or perform, and the other to accept in satisfaction of a claim, liquidated or in dispute, and arising either from contract or from tort, something other than or different from what he is or considers himself entitled to; and a satisfaction is the execution of such agreement.
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> To constitute a valid accord and satisfaction it is also essential that what is given or agreed to be performed shall be offered as a satisfaction and extinction of the original demand; that the debtor shall intend it as a satisfaction of such obligation, and that such intention shall be made known to the creditor in some unmistakable manner. It is equally essential that the creditor shall have accepted it with the intention that it should operate as a satisfaction. The intention of the parties, which is of course controlling must be

[2]The court questions why this amount is not $14,000 since plaintiff states earlier in his affidavit that he made a profit of $14,000 on the sale.

determined from all the circumstances attending the transaction.

R.J. Betterton Mgmt. Servs. v. Whittemore, 733 S.W.2d 880, 882 (Tenn. App. 1987)(quoting *Lytle v. Clopton*, 261 S.W. 664, 666-67 (Tenn. 1924)(quoting 1 C.J.S. *Accord and Satisfaction*)). "Whether there has been an accord and satisfaction is a question of fact to be determined by the trier of fact." *Lindsey v. Lindsey*, 930 S.W.2d 553, 557 (Tenn. App. 1996).

Clearly from his affidavit, the plaintiff disputes the debtor's contention that the plaintiff accepted the property transferred to him in full satisfaction of his claim against the debtor. And, the assertion that an accord had been reached appears to be contradicted by the plaintiff's prosecution of a bad check criminal complaint against the debtor although the court has no evidence before it as to the timing of these events. Because the conflicting affidavits present a genuine issue of disputed fact as to whether the defense of accord and satisfaction has been established, the debtor's motion for summary judgment on this issue must be denied.

IV.

The next issue raised by the debtor's summary judgment motion concerns plaintiff's dischargeability claim under § 523(a)(4) of the Bankruptcy Code which excepts from discharge a debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." The debtor contends that the plaintiff will be unable to establish at trial the required elements of "fraud or defalcation while acting in a fiduciary capacity" because "[c]ontrary to the assertion and claim of Plaintiff's complaint, the defalcation and the fiduciary duty cannot arise as the result of a constructive or resulting trust," citing *R.E. America, Inc. v. Garver (In re Garver)*, 116 F.3d 176, 180 (6th Cir. 1997). In response, the plaintiff admits that

"[i]t is settled law that an express or technical trust is required" and also notes that "[i]t is a rare case where the court will find a fiduciary relationship among business people arising from contractual dealings since most people act for their own betterment first, rather than second," citing *Sallee v. Fort Knox Nat'l Bank (In re Sallee)*, 286 F.3d 878, 891 (6th Cir. 2002). The plaintiff contends, however, that "this case is unique," in that "[f]rom past business dealings, Brobeck had gained Cox's trust," which enabled him to intentionally convert the plaintiff's monies.

> In a series of cases, the Sixth Circuit Court of Appeals addressed the meaning of fiduciary capacity,[3] holding that as compared to the traditional state law meaning of a fiduciary, a more narrow interpretation is required under § 523(a)(4). In particular, the Sixth Circuit requires that, in addition to the existence of a fiduciary relationship, the debtor, prior to the time of the alleged injury, must have held the funds at issue in a trust for the benefit of a third party. *R.E. America, Inc. v. Garver (In re Garver)*, 116 F.3d 176, 179 (6th Cir.1997). Furthermore, the type of trust that will give rise to a nondischargeable debt under § 523(a)(4) are, in the words of the Sixth Circuit, "limited to only those situations involving an express or technical trust relationship arising from placement of a specific res in the hands of the debtor." *Id.* at 180. This is opposed to a trust which the law implies from a contract or from an event of wrongdoing—i.e., a constructive trust. [Citations omitted.]

Graffice v. Grim (In re Grim), 293 B.R. 156, 166 (Bankr. N.D. Ohio 2003). *See also Brady v. McAllister (In re Brady)*, 101 F.3d 1165, 1173 (6th Cir. 1996)("The term 'fiduciary' under section 523(a)(4) 'applies only to express or technical trusts and does not extend to implied trusts, which are imposed on transactions by operation of law as a matter of equity.'").

> Under Tennessee law, an express trust is created "by the direct and positive acts of the parties, by some writing, deed, or will; or by the action of a court in the exercise of

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[3]The *Grim* court noted that "[t]hese cases are, *Carlisle Cashway, Inc. v. Johnson (In re Johnson)*, 691 F.2d 249, 251 (6th Cir.1982), *Capitol Indemnity Corp. v. Interstate Agency, Inc. (In re Interstate Agency, Inc.)*, 760 F.2d 121 (6th Cir.1985), *R.E. America, Inc. v. Garver (In re Garver)*, 116 F.3d 176 (6th Cir.1997)." *In re Grim*, 293 B.R. at 166 n.4.

> its authority." [Citations omitted.] "At a minimum, there must be a grantor or settlor who intends to create a trust; a corpus (the subject property); a trustee; and a beneficiary." [Citations omitted.] A technical trust is defined as "an obligation arising out of a confidence reposed in a person to whom the legal title of property is conveyed, that he will faithfully apply the property according to the wishes of the creator of the trust." [Citation omitted.]

Houghton v. Lusk (In re Lusk), 308 B.R. 304, 310 (Bankr. E.D. Tenn. 2004).

The facts of the present case do not establish the existence of either an express trust or a technical trust, as these terms are defined under Tennessee law. With regard to the lack of an express trust, the debtor states in this affidavit that he and the plaintiff "had no written agreement, contract, financing plan or other writing of any kind whatsover evidencing the business relationship or agreement between us. We had no express trust agreement, no trust account ....." These statements are not contradicted in the plaintiff's affidavit, and there is no evidence that the parties intended to create a trust with a corpus, trustee, and beneficiary. Similarly, this is not a situation where a court has previously exercised its authority to create a trust.

As to the existence of a technical trust, there is no evidence that the plaintiff transferred title to the funds in his bank account to the debtor as is required for the existence of a technical trust. To the contrary, the plaintiff states in his affidavit that he permitted the debtor to write checks out of his personal bank account under the name of East Gate Enterprises and that titles to the vehicles purchased with the plaintiff's funds were in the name of East Gate Motors or East Gate Enterprises owned by the plaintiff. Accordingly, because no express or technical trust existed in connection with the parties' relationship, any debt owed by the debtor to the plaintiff does not satisfy the requirements for nondischargeability under § 523(a)(4)

as "fraud or defalcation while acting in a fiduciary capacity."[4] The debtor's motion for summary judgment on this issue will be granted.

With respect to the plaintiff's claim of embezzlement, the debtor contends that for embezzlement to be established by the plaintiff, the following three elements must be shown: "(1) debtor lawfully acquired the property with the creditor's consent; (2) the debtor then appropriated the property for his own use; and ... (3) unlike the case of defalcation by a fiduciary, some form of fraud or deceit was used," citing *Kuck v. Shane (In re Shane)*, 140 B.R. 964 (Bankr. N.D. Ohio 1991). The debtor argues that the last two elements are not present in this case because he did not appropriate the plaintiff's property for his own use and no fraud or deceit occurred. According to the memorandum the debtor filed in support of his motion, he "never attempted to hide, cover up, or otherwise deceive Mr. Cox in any way about the transactions or money involved, fully disclosing everything that he did or that had occurred in connection with their business dealings. Mr. Brobeck acted openly with full knowledge and consent of Mr. Cox."

The plaintiff specifically denies these assertions in his response to the debtor's motion, stating "Brobeck wrote checks on the bank account of East Gate, purchased automobiles, sold the automobiles, pocketed all of the money and returned none of the money to Mr. Cox." To support this assertion, the plaintiff references his affidavit wherein he states, "On or about January 6, 2002, Jeffrey Brobeck came

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[4]Notwithstanding the plaintiff's assertion that "this case is unique," it is highly questionable whether the debtor and the plaintiff were in a fiduciary relationship, even as defined under the more liberal approach which does not require the existence of an express or technical trust. *See In re Sallee,* 286 F.3d at 894 ("The relationship of debtor and creditor without more is not a fiduciary relationship."); *Oak Ridge Precision Indus., Inc. v. First Tennessee Bank Nat'l Ass'n*, 835 S.W.2d 25, 30 (Tenn. App. 1992)("[T]he dealings between a lender and borrower are not inherently fiduciary absent special facts and circumstances").

to my house and said he had done me wrong. I said, 'what are you talking about?' He said, 'the cars I told you were in inventory are not. I have sold them one or more at a time or swapped them for material and labor on my house.'" The plaintiff also states in his affidavit that the debtor "falsified an inventory list which led me to believe that the cars which he purchased with my money were still in his possession and control but, by Mr. Brobeck's own admission, he had sold them or traded them and used the money for his own purposes."

> Federal law defines "embezzlement" under section 523(a)(4) as "the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." *Gribble v. Carlton (In re Carlton)*, 26 B.R. 202, 205 (Bankr. M.D. Tenn.1982) (quoting *Moore v. United States*, 160 U.S. 268, 269, 16 S. Ct. 294, 295, 40 L. Ed. 422 (1895)). A creditor proves embezzlement by showing that he entrusted his property to the debtor, the debtor appropriated the property for a use other than that for which it was entrusted, and the circumstances indicate fraud. *Ball v. McDowell (In re McDowell)*, 162 B.R. 136, 140 (Bankr .N.D. Ohio 1993).

In re Brady, 101 F.3d at 1172-73.

Applying this standard to the facts of the present case, it is clear that the plaintiff's affidavit presents evidence from which a court could find that the debtor misappropriated monies entrusted to him, coupled with fraud or deceit. The debtor's affidavit to the contrary informs the court that there are disputed issues of fact regarding the plaintiff's embezzlement claim, thus precluding summary judgment.

The last cause of action under § 523(a)(4) is an exception from discharge for debts arising from "larceny." The debtor contends that "the plaintiff's complaint does not allege facts that demonstrate the required elements of his claim." "Larceny" for § 523(a)(4) purposes, has been defined as "the fraudulent and wrongful taking and carrying away of the property of another with the intent to covert such property to the taker's use without the consent of the owner." *Sullivan v. Clayton (In re Clayton)*, 198 B.R. 878,

884 (Bankr. E.D. Pa.1996). Larceny differs from embezzlement in that with respect to the latter, the original taking of the property was lawful or with the consent of the owner while larceny requires that the initial appropriation of the property of another be wrongful. *Id*.

In the present case, there is no allegation in the complaint that the debtor's initial possession of plaintiff's monies was wrongful. Instead, the plaintiff alleges that he gave the debtor access to his bank account and that thereafter, the debtor used the monies for purposes other than the parties had agreed. Because the debtor's initial possession of the plaintiff's property was with the plaintiff's consent, the facts as pled do not set forth a claim for larceny within the meaning of § 523(a)(4). The debtor's motion for summary judgment on this issue will be granted.

V.

Finally, the court turns to the debtor's contention that the complaint fails to state a claim for relief under 11 U.S.C. § 523(a)(6), which excepts from discharge a debt arising out of "willful and malicious injury by the debtor to another entity or to the property of another entity." In *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998), the Supreme Court held that only acts of the debtor done with the intent to cause injury, as opposed to acts merely done intentionally, can satisfy the "willful and malicious injury" aspect of 11 U.S.C. § 523(a)(6). In other words, a deliberate or intentional injury is required, not simply an intentional or deliberate act that leads to an injury. "Negligent or reckless acts ... do not suffice to establish that a resulting injury is willful and malicious." *Geiger*, 523 U.S. at 63-64. The Sixth Circuit has interpreted *Geiger* to mean "that unless 'the actor desires to cause consequences of his act, or believes that the consequences are substantially certain to result from it,' ... he has not committed a 'willful and

malicious injury' as defined under § 523(a)(6)." *Markowitz v. Campbell*, 190 F.3d 455, 464 (6th Cir. 1999).

The second component of (a)(6), that the injury not only be willful, but also "malicious," means "in conscious disregard of one's duties or without just cause or excuse; it does not require ill-will or specific intent to do harm." *Wheeler v. Laudani*, 783 F.2d 610, 615 (6th Cir. 1986). Stated another way, "There must ... be a consciousness of wrongdoing.... It is this knowledge of wrongdoing, not the wrongfulness of the debtor's actions, that is the key to malicious under 523(a)(6)." *ABF v. Russell (In re Russell)*, 262 B.R. 449, 455 (Bankr. N.D. Ind. 2001).

As set forth in his memorandum filed in support of his motion, the debtor asserts that the complaint filed by the plaintiff "fails to state with adequate particularity the nature of his claim under 11 U.S.C. § 523(a)(6)," but that "[i]t appears ... to be a charge that the Defendant improperly converted Plaintiff's property with the direct intent to personally harm Plaintiff." The debtor argues that no conversion occurred because the plaintiff neither owned the property in question nor did he have a security interest in the property. According to the debtor, the automobiles were titled in the name of "Eastgate Motors or Eastgate Enterprises," which was owned by an individual named Jason Weems. The debtor also denies that he intentionally and maliciously injured the plaintiff, noting that negligent or reckless conduct does not rise to the level of nondischargeability under § 523(a)(6).

In response, the plaintiff states in his affidavit that he, rather than Jason Weems, owned "East Gate Motors, Inc., d/b/a East Gate Enterprises" and that Mr. Weems was his employee. The plaintiff also disputes the contention that the injury suffered by him was negligently inflicted, arguing that the debtor "perpetuated a belief in a false inventory," and intentionally utilized the proceeds from the sale of vehicles

for his own use rather than repaying the plaintiff.

"The conversion of another's property without his knowledge or consent, done intentionally and without justification and excuse, to the other's injury, constitutes a willful and malicious injury within the meaning of § 523(a)(6)." *Bino v. Bailey (In re Bailey)*, 197 F.3d 997, 1000 (9th Cir. 1999). While bankruptcy law governs whether a claim is nondischargeable under § 523(a)(6), a court must look to state law to determine whether an act falls within the tort of conversion. *Id.* Under Tennessee law, "[a] conversion, in the sense of the law of trover, is the appropriation of the thing to the party's own use and benefit, by the exercise of dominion over it, in defiance of plaintiff's right." *Mammoth Cave Prod. Credit Ass'n v. Oldham*, 569 S.W.2d 833, 836 (Tenn. App. 1977).

As with respect to other issues in this case, sufficient facts have been alleged from which the court could find the elements of nondischargeability under § 523(a)(6). The parties' affidavits which present conflicting versions of certain facts establish once again that genuine issues of material fact exist in this case which preclude summary judgment. Accordingly, the debtor's motion for summary judgment as to the plaintiff's § 523(a)(6) count will be denied.

VI.

To summarize, the debtor's motion to dismiss for failure to prosecute will be denied. The debtor's motion for summary judgment will be granted as to larceny and fraud or defalcation by a fiduciary under § 523(a)(4). The debtor's motion for summary judgment as to the plaintiff's charges of embezzlement under § 523(a)(4) and willful and malicious injury under § 523(a)(6) will be denied. Likewise, the court will deny the debtor's motion for summary judgment on his affirmative defense of accord and satisfaction.

Contemporaneously with the filing of this memorandum opinion, the court will enter an order reflecting these rulings.

FILED: August 26, 2004

BY THE COURT

/s/

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE