**SO ORDERED.**
**SIGNED this 12th day of June, 2019**

Suzanne H. Bauknight
UNITED STATES BANKRUPTCY JUDGE

**THIS ORDER HAS BEEN ENTERED ON THE DOCKET.**
**PLEASE SEE DOCKET FOR ENTRY DATE.**

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

In re
LESTER DAN PIERCY, JR.
Case No. 3:18-bk-32261-SHB
DOLORES J. PIERCY
Case No. 3:18-bk-32260-SHB
JOSEPH SHAUN PIERCY
Case No. 3:18-bk-32262-SHB

Debtors

M. DUSTIN LONG

Plaintiff

v.

LESTER DAN PIERCY, JR., et al.

Defendants

CONSOLIDATED CASES
**Adv. Proc. No. 3:18-ap-3043-SHB**
Adv. Proc. No. 3:18-ap-3044-SHB
Adv. Proc. No. 3:18-ap-3046-SHB

**MEMORANDUM AND ORDER ON MOTION FOR SUMMARY JUDGMENT**

Plaintiff filed a Complaint in each of the foregoing adversary proceedings on October 22, 2018, asking the Court to determine that a judgment he obtained against Defendants in the state

court is nondischargeable pursuant to 11 U.S.C. § 523(a)(4). Defendants each filed a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure[1] on November 21, 2018, arguing that Plaintiff's claim is barred by the doctrine of judicial estoppel; however, because Defendants offered documents outside the pleadings in support of the motions to dismiss, the Court directed that, pursuant to Rule 12(d), the motions would be treated as if for summary judgment under Rule 56,[2] and the parties were directed to supplement their arguments and provide undisputed material facts as required by Rule 56(c). [Docs. 6, 7, 10.] The Court also consolidated the adversary proceedings under Rule 42[3] because they involve common questions of fact and law.[4] [Doc. 9.]

Currently before the Court are the converted motions for summary judgment. [Doc. 6.] Defendants filed their statement of undisputed material facts on March 5, 2019 [Doc. 13], supported by a certified copy of the Complaint that was filed by Plaintiff against Defendants in Grainger County Chancery Court on February 7, 2012 ("State Court Complaint") and the Amendment to Complaint filed on August 30, 2013 ("Amended State Court Complaint") [Doc. 13-1]; the transcript of the chancellor's opinion delivered on September 19, 2013 ("State Court Opinion") [Doc. 13-2]; the Affidavits of Lester Dan Piercy and Joseph Shane Piercy [Docs. 13-3, 13-4]; and a supplemental brief in support of their collective argument that the relief sought by Plaintiff is barred by the doctrine of judicial estoppel, which incorporated arguments raised in Defendants' briefs in support of the motions to dismiss [Doc. 14; *see also* Doc. 7]. In response,

[1] Rule 12 is applicable to adversary proceedings pursuant to Federal Rule of Bankruptcy Procedure 7012.

[2] Rule 56 is applicable to adversary proceedings pursuant to Federal Rule of Bankruptcy Procedure 7056.

[3] Rule 42 is applicable to adversary proceedings pursuant to Federal Rule of Bankruptcy Procedure 7042.

[4] Adv. Proc. No. 3:18-ap-3043-SHB was designated as the lead case through which all filings would be made, and all references to document and docket numbers correspond to that adversary proceeding.

in addition to his original responses in opposition to the motions to dismiss [Doc. 8], Plaintiff timely filed a supplemental response and brief [Doc. 15], a response to the statement of undisputed material facts [Doc. 16], and his affidavit [Doc. 16-1]. The Court also takes judicial notice of and considers all pleadings of record in the adversary proceedings and all attachments thereto. *See* Fed. R. Evid. 201(a) (applicable in bankruptcy cases and adversary proceedings pursuant to Fed. R. Evid. 1101(a), (b); Fed. R. Bankr. P. 9017).

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

## I. Facts

The following facts are not in dispute and are established by the record, including the unopposed documentation provided. On February 7, 2012, Plaintiff commenced *Long v. Goins Hollow Quarry, LLC, et al.*, No. 2012-CH-12, in the Grainger County Chancery Court ("State Court Action"), which was brought in connection with a Contract executed by the Plaintiff and Defendants on April 27, 2011, that states the following:

> This agreement provides compensation from the sale of DGA and shot rock which will be crushed and screened from the location of Grainger/Claiborne line along Highway 25E. This material is being purchased for $2.67 per ton from Hinkle Contracting Company, LLC, by Assignment and Assumption and Transfer Agreement [("Assignment Agreement")[5]], which agreement has been signed by the parties, Dustin Long and Dan Piercy, Jr.
>
> The following percentages will apply to the profit from the sale of aforesaid DGA and shot rock:
>
> > Twenty-five percent (25%) for Dustin Long
> > Twenty-five percent (25%) for Dolores Piercy
> > Twenty-five percent (25%) for Shane Piercy
> > Twenty-five percent (25%) for Dan Piercy, Jr.
>
> All parties agree to these percentages for the profit made from the sale of these products[.]

[5] The Assignment Agreement between Hinkle Contracting Company, LLC ("Hinkle"), Plaintiff, and Goins Hollow Quarry, LLC (of which Defendants are members) is found in the record at Doc. 13-1, pp. 5-10.

[Doc. 13-1, p. 11.]

In the State Court Complaint, Plaintiff alleged that the Defendants did not properly divide the profits under the terms of the Contract (including shorting him on certain payments and wholly failing to make other payments when due), refused to provide him with an accounting or access to any business records, and refused to provide him access to the partnership scales to weigh the rock that Plaintiff had sold, which in turn caused Hinkle to allege that Plaintiff breached the Assignment Agreement. [Doc. 13-1, p. 1-3 (State Court Compl., ¶¶ 7-13).] In his request for relief before the state court, Plaintiff sought (1) "a judgment against [D]efendants, jointly and severally, in the amount of $492,060, less any amounts paid before trial, with prejudgment interest at 10%"; (2) a sworn accounting; (3) an injunction against Defendants' interference with Plaintiff's right to use the partnership equipment and to have full access to business records; (4) court costs and discretionary costs to be taxed against Defendants; (5) an attorney's fee award; and (6) any other appropriate relief. [*Id*., p. 4.] The State Court Complaint was subsequently amended on August 30, 2013, through which Plaintiff sought an accounting and judicial supervision of dissolution and winding up of the partnership pursuant to Tennessee Code Annotated §§ 61-1-405(b) and 61-1-801(5). [*Id*., p. 14-15 (Amended State Court Compl. ¶¶ 15-17).]

Following a trial, Chancellor Telford E. Forgety, Jr. delivered a bench opinion on September 19, 2013 (the "Bench Decision"). [Doc. 13-2.] After first finding that the Contract was entered into between Plaintiff and Defendants individually, notwithstanding that the Contract stated that it was between Plaintiff and Goins Hollow Quarry, LLC [*id.*, pp. 2-4], Chancellor Forgety defined the issue before him as follows:

> Now, the big, the really big thing here is whether the percentages for profit that were to be paid to the signatories to the contract, Dustin Long, Shane, Dan, and

> Delores Piercy, the percentages to the profit are to be applied to gross profit after payment of the one item. That is to say, the royalty to Hinkle, or was it net profit after payment of the royalty to Hinkle and all the other costs of production. That is the biggest issue in the case.

[*Id.*, p. 4, lines 4-13.] He continued his analysis of the parties' arguments concerning the Contract and the primary issue, opining that:

> The evidence here is, as we all know[,] is absolutely contradictory. Mr. Long says, look, we discussed it. The deal was that they were to provide all of the machinery, the labor, the fuel, the insurance, et cetera, et cetera, et cetera, and they were to get seventy-five percent and me only twenty-five percent after payment of the royalty. On the other hand, the Piercys say, no, the deal was that we were to get seventy-five percent of the net profit after the payment of all expenses, not just the two sixty-seven [$2.67] in royalty to Hinkle, but all the costs of production, et cetera. So the evidence is absolutely contradictory. Now, so how does the Court resolve that. Well, I've got to look at what is the preponderance of the evidence, understanding that each side has an absolutely different story on it.

[*Id.*, p. 4, line 13 – p. 5, line 9.]

Chancellor Forgety reviewed evidence solely concerning the meaning of "profit" and found that the Contract was to be construed in favor of Plaintiff and strictly against Defendants because it was drafted by them [*id.*, p. 5, lines 11-13]. He then determined that the Contract should be interpreted to mean that Plaintiff's share was twenty-five percent of the gross profit minus the royalty to Hinkle such that Plaintiff was entitled to a judgment for the difference between what Defendants had paid to Plaintiff and what Plaintiff should have received under the gross profit calculation. [*See id.*, p. 5, line 16 – p. 10, line 9.] Important here, Chancellor Forgety also stated that he found Plaintiff's claim for lost anticipated profits speculative and he could not determine why the partnership came to an end, saying, "[Q]uite frankly, I cannot hold the preponderance of the evidence, two different views of why it came to an end, I cannot hold on the preponderance of the evidence that the Piercys breached it." [*Id.*, p. 10, lines 13-19.] Finally, he refused to hold any party in contempt, saying "[a]t this point in time, I don't think it would

serve any purpose." [*Id*., p. 13, lines 17-21.] Costs were assessed against Defendants. [*Id*., p. 13, lines 23-24.]

The Bench Decision was memorialized in the Judgment entered against Defendants on October 7, 2013, in the amount of $151,670.87 ("Judgment"), which states in its entirety the following:

> The Court conducted a bench trial in this action on September 19, 2013. In accordance with Tennessee Rule of Civil Procedure 52.01, the Court's findings of fact and conclusions of law appear in a transcript of the ruling, which has been filed with the clerk and master, and is incorporated by reference. Based on the pleadings, the testimony, the exhibits, the arguments of counsel, and the entire record, the Court finds that defendant Goins Hollow Quarry, LLC, should be dismissed, but that the plaintiff is entitled to judgment against the remaining defendants.
>
> Therefore, the Court DISMISSES the claims against Goins Hollow Quarry, LLC, and awards M. Dustin Long JUDGMENT against defendants Delores Piercy, Shane Piercy, and Lester Dan Piercy Jr., jointly and severally, for $151,670.87 (which has been reduced by the stipulated setoffs of $9,593.34 for the defendants' counterclaim and $2,499.31 for the two checks already paid to Long).
>
> Finally, the Court ORDERS that Long may seek contribution from the defendants if Hinkle Contracting Company, LLC, gets a judgment against him for any unpaid royalties. The Court further holds that each individual party in this action is ultimately responsible for 25% of any reclamation amounts found to be owed to Hinkle Contracting in its Davidson County action, so any party may seek contribution from the others to the extent that he or she is forced to pay more than 25% of the total amount due.
>
> Costs are taxed to Delores Piercy, Shane Piercy, and Lester Dan Piercy Jr.

[Doc. 1-1.]

Each of the Defendants filed a Chapter 7 bankruptcy petition on July 24, 2018, and Plaintiff timely filed the complaints initiating each adversary proceeding on October 22, 2018. Through the adversary proceedings, Plaintiff seeks a determination that the $151,670.87 Judgment [Doc. 1-1] entered against Defendants jointly and severally is nondischargeable pursuant to 11 U.S.C. § 523(a)(4). Because the State Court Action neither alleged nor did the

state court find that Defendants committed "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny," 11 U.S.C. § 523(a)(4), summary judgment in favor of Defendants appears to be appropriate. Because, however, the Court believes that summary judgment should be granted and this case dismissed on grounds not directly raised by the motion, based on material facts in the record that do not appear to be genuinely in dispute, the Court will utilize the procedure under Rule 56(f) to provide notice and a reasonable time for Plaintiff to respond.

**II. Summary Judgment Standard**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When deciding a motion for summary judgment, the court does not weigh the evidence to determine the truth of the matter asserted but simply determines whether a genuine issue for trial exists. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* at 248.

Defendants, the moving parties, bear the burden of proving, based on the record before the Court, that they are entitled to judgment as a matter of law because there is no genuine dispute concerning any material fact, such that the defenses alleged are factually unsupported. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). The burden then shifts to Plaintiff to prove that there are genuine disputes of material fact for trial; however, he may not rely solely on allegations or denials contained in the pleadings because reliance on a "mere scintilla of evidence in support of the nonmoving party will not be sufficient." *Nye v. CSX Transp., Inc*., 437 F.3d

556, 563 (6th Cir. 2006); *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*,475 U.S. 574, 586 (1986). The facts and all resulting inferences are viewed in a light most favorable to Plaintiff as non-movant, with the Court to decide whether "the evidence presents a sufficient disagreement to require submission to a [fact-finder] or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 243. Nevertheless, when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (citations omitted).

## III. Analysis

Plaintiff's Complaint here asks the Court to find that the Judgment is nondischargeable under 11 U.S.C. § 523(a)(4), which makes nondischargeable a debt obtained by larceny, embezzlement, or through fraud or defalcation while acting in a fiduciary capacity. Specifically, Plaintiff alleges that "[b]y padlocking [Plaintiff] off the partnership property and wrongfully taking his share of the profits from the partnership, [Defendants'] debt is nondischargeable under Code § 523(a)(4)." [Doc. 1, ¶ 11.]

### A. Judicial Estoppel

Defendants argue that they are entitled to summary judgment and dismissal of the adversary proceedings filed against them based on the doctrine of judicial estoppel because the State Court Lawsuit was nothing more than an action for breach of contract, with no mention of embezzlement, and that Plaintiff cannot change his position now to argue that embezzlement occurred. [Doc. 6, p. 7.] Defendants also argue that there is no mention of embezzlement in the Judgment or in the Bench Decision. [*Id.*] Plaintiff, in response, argues that he has never wavered in his averments against Defendants' misconduct in failing to pay him the proper profits he was owed and in padlocking him off of the partnership property. [Doc. 15, p. 2.]

Under the doctrine of judicial estoppel, "[w]he[n] a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (citation omitted). In other words, "[t]he doctrine of judicial estoppel 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" *Id*. (citations omitted); *see also White v. Wyndham Vacation Ownership, Inc*., 617 F.3d 472, 476 (6th Cir. 2010). Whether to allow judicial estoppel as an equitable defense is within the discretion of the Court, which may consider factors such as whether the party's later legal position is "clearly inconsistent" with the prior position, whether a court has accepted the earlier legal position such that "judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled,'" and whether the party asserting the different legal position "would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire*, at 750-51 (citations omitted).

Based on the record, the Court finds that judicial estoppel simply does not apply here. The State Court Complaint contains similar averments to those made in the Complaints initiating the adversary proceedings in this Court: that Defendants did not pay profits and "diverted funds" [*compare* Doc. 13-1, ¶¶ 11-12 *with* Doc. 1, ¶ 6] and that they denied him access to property belonging to the partnership [*compare* Doc. 13-1, ¶ 13 *with* Doc. 1, ¶ 7]. That Plaintiff has changed the terminology of his averments to better comport with the language of the Bankruptcy Code does not constitute a change in his legal position between the State Court Lawsuit and these adversary proceedings.

**B. Res Judicata**

A finding that the doctrine of judicial estoppel is inapplicable does not end the Court's inquiry based on the record before it, i.e., whether, in light of the State Court Action, Plaintiff has sufficiently pled facts that would entitle him to a determination that the Judgment is nondischargeable. The doctrine of res judicata appears to bar Plaintiff's claim here.

**1. 11 U.S.C. § 523(a)(4)**

For purposes of § 523(a)(4), 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." *Brady v. McAllister (In re Brady)*, 101 F.3d 1165, 1172-73 (6th Cir. 1996). Larceny is also the fraudulent misappropriation of funds; however, it differs from embezzlement because possession of the property was never lawful. *See First Nat'l Bank v. Simerlein (In re Simerlein)*, 497 B.R. 525, 537 (Bankr. E.D. Tenn. 2013). Finally, defalcation while acting in a fiduciary capacity encompasses both embezzlement and larceny, as well as the failure to properly account for any funds, but may only be the basis for a nondischargeable debt if the plaintiff proves "(1) a pre-existing fiduciary relationship; (2) breach of that fiduciary relationship; and (3) a resulting loss." *Commonwealth Land Title Co. v. Blaszak (In re Blaszak)*, 397 F.3d 386, 390 (6th Cir. 2005). Additionally, within the Sixth Circuit, a fiduciary relationship is found only in "those situations involving an express or technical trust relationship arising from placement of a specific res in the hands of the debtor." *R.E. Am., Inc. v. Garver (In re Garver)*, 116 F.3d 176, 180 (6th Cir. 1997). Of the three options available for nondischargeability under subsection (a)(4), because there was no express trust here and Defendants were lawfully in possession of funds received from sales made in connection with the Contract, only embezzlement is a potential basis for recovery under the facts of this case.

Embezzlement is demonstrated by proof that the creditor entrusted property to the debtor who then appropriated it for a use other than the entrusted use and the circumstances indicate fraud or deceit. *See Board of Trs. v. Bucci (In re Bucci)*, 493 F.3d 635, 644 (6th Cir. 2007) (citing *In re Brady*, 101 F.3d at 1173); *Dantone v. Dantone (In re Dantone)*, 477 B.R. 28, 39 (B.A.P. 6th Cir. 2012). "Both the intent and the actual misappropriation necessary to prove embezzlement may be shown by circumstantial evidence . . . , [and] the Plaintiff must prove fraud in fact, involving moral turpitude or intentional wrong, rather than implied or constructive fraud." *WebMD v. Sedlacek (In re Sedlacek)*, 327 B.R. 872, 880-81 (Bankr. E.D. Tenn. 2005) (citations and quotation marks omitted); *see also Bombardier Capital, Inc. v. Tinkler (In re Tinkler)*, 311 B.R. 869, 876-77 (Bankr. D. Colo. 2004); *Goodmar, Inc. v. Hamilton (In re Hamilton)*, 306 B.R. 575, 582 (Bankr. W.D. Ky. 2004) (citations omitted). Fraudulent intent can be deduced by examining "the facts and circumstances surrounding the act." *Estate of Harris v. Dawley (In re Dawley)*, 312 B.R. 765, 779 (Bankr. E.D. Pa. 2004) (citation omitted)); *see also Powers v. Powers (In re Powers)*, 385 B.R. 173, 179-80 (Bankr. S.D. Ohio 2008) ("The fraud element may also be satisfied by a showing of deceit . . . , and intent can be inferred from the relevant circumstances.").

A finding of embezzlement does not require the existence of a fiduciary relationship, *In re Sedlacek*, 327 B.R. at 880, but "a mere lien or security interest does not rise to the level of ownership sufficient to support a claim under § 523(a)(4)'s embezzlement provision." *Hulsing Hotels Tenn., Inc. v. Steffner (In re Steffner)*, 479 B.R. 746, 766 (Bankr. E.D. Tenn. 2012); *see also Kraus Anderson Capital, Inc. v. Bradley (In re Bradley)*, 507 B.R. 192, 200 (B.A.P. 6th Cir. 2014) ("As owner of the collateral, the debtor remained the owner of its proceeds, even though both the collateral and its proceeds were subject to a security interest. No person can embezzle

from himself." (citation omitted)).

Plaintiff's Complaint clearly avers that Defendants fraudulently withheld profits from him and that the Judgment was awarded against Defendants for their fraudulent conduct. Plaintiff concludes, accordingly, that the Judgment is nondischargeable. Although the facts of the case as laid out in the State Court Lawsuit and the Bench Decision support Plaintiff's claim that Defendants intentionally withheld funds that should have been paid to Plaintiff, there is no reference in either the Bench Decision or the Judgment itself concerning fraud. Instead, Chancellor Forgety's analysis indicates a perception that Plaintiff's claim was merely for breach of contract. Indeed, Chancellor Forgety focused on finding the parties' intent as to the term "profits" and stated that he was construing the Contract in favor of Plaintiff and strictly against Defendants because Defendants drafted it [Doc. 13-2, p. 5, lines 11-13]. Chancellor Forgety settled on Plaintiff's definition of profit – that only the royalty owed to Hinkle under the Assignment Agreement, and not all other costs of the operation, were properly deductible from total sales receipts before division among the partners. The dollar amount of the Judgment resulted from the court's re-calculation of the profit (under the adjudicated definition) divided among the four partners under the terms of the Contract. [*See id.*, p. 5, line 16-p. 10, line 9.] Critically, Chancellor Forgety made no mention of embezzlement or fraud and, in fact, stated that he was unsure "that either side had carried the preponderance of the evidence to prove that the other side was the one that breached the agreement." [*Id.*, p. 10, line 23-p. 11, line 2.] Thus, his finding that Defendants breached the agreement was limited to their failure to calculate and pay Plaintiff's share from the partnership operations under the applicable definition of profit.

**2. Rule 56(f)**

Although it was not raised by Defendants, the Court has determined that the record

appears to support application of the doctrine of res judicata to preclude Plaintiff's attempts to argue embezzlement or fraud in this adversary proceeding. Under long-standing Sixth Circuit law,

> [a] claim is barred by the res judicata effect of prior litigation if all of the following elements are present: "(1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their "privies'; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action."

*Browning v. Levy*, 283 F.3d 761, 771 (6th Cir. 2002) (quoting *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 880 (6th Cir. 1997)). "Res judicata, at least in the Sixth Circuit, incorporates both issue and claim preclusion, and is an affirmative defense that is generally waived if not raised." *Wohleber v. Skurko (In re Wohleber)*, 596 B.R. 554, 566 n.11 (B.A.P. 6th Cir. 2019).

Federal Rule of Civil Procedure 56(f)(2) and (3) provide that "[a]fter giving notice and a reasonable time to respond, the court may . . . grant the motion on grounds not raised by a party[] or . . . consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute." Because the Court is inclined to determine that res judicata applies in this case to preclude Plaintiff from raising any claim that was or should have been raised before Chancellor Forgety, the Court directs the following:

1. No later than July 5, 2019, Plaintiff shall file a brief to set forth his argument, if any, against the application of the doctrine of res judicata to his Complaint for entry of summary judgment in favor of Defendants.

2. No later than July 15, 2019, Defendants shall file any reply to Plaintiff's arguments against summary judgment under the doctrine of res judicata.

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