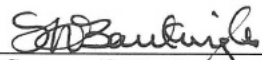




SO ORDERED.

SIGNED this 1st day of October, 2018

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


Suzanne H. Bauknicht
UNITED STATES BANKRUPTCY JUDGE

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

In re

ROBERT KEITH CASH
fdba WAFFEN WERKS

Debtor

CARL LANSDEN,
ROBERT H. CASH, and
CARL H. LANSDEN

Plaintiffs

v.

ROBERT KEITH CASH

Defendant

Case No. 3:17-bk-30291-SHB
Chapter 7

Adv. No. 3:17-ap-03025-SHB

**MEMORANDUM AND ORDER
DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff filed the Complaint to Determine Nondischargeability of Debt and/or for Denial of Discharge ("Complaint"), commencing this adversary proceeding on June 29, 2017, and

seeking an accounting and a determination of nondischargeability under 11 U.S.C. § 523(a)(2)(A) and/or (4) and objecting to Defendant's discharge under 11 U.S.C. § 727(a)(2)(A) and (3). On July 6, 2018, Defendant filed a Motion for Summary Judgment ("Motion") [Doc. 40]. Defendant supported his Motion with a brief, a statement of undisputed facts as required by E.D. Tenn. LBR 7056-1(a),¹ the Affidavit of Robert "Keith" Cash, the Affidavit of Lisa Perkey Cash, the Affidavit of Jill Kaufman, the Affidavit of Myron Ely, the Deposition of Butch Cash with selected exhibits, and the Deposition of Stefni Cash Cassidy with selected exhibits. [Docs. 40, 41, 42.] Plaintiffs responded to the Motion and the statement of undisputed facts and filed the Affidavit of Robert H. Cash, the Deposition of Robert H. "Butch" Cash with exhibits, the Deposition of Carl Lansden with exhibits, the Deposition of Erin Taylor, the Deposition of Mike Carpenter, the Deposition of Mark Rogers, the Deposition of Robert Keith Cash with exhibits, and the Deposition of Stefni Cassidy with exhibits. [Docs. 47, 48, 49, 51, 53, 54, 55, 56, 57, 59.] Finally, Defendant filed a reply to Plaintiffs' response on August 24, 2018, making this matter ripe for determination. [Doc. 65.]²

I. UNDISPUTED FACTS

The Court has parsed through the Statement of Undisputed Facts and Plaintiffs' Response thereto and finds, for purposes of summary judgment, that only the following facts are undisputed.

Defendant filed a Voluntary Petition commencing his Chapter 7 bankruptcy case on

¹ The Court notes that although Defendant filed a statement of undisputed facts, for most of the assertions, Defendant failed to provide "specific citation[s]" to the numerous affidavits and deposition transcripts that were submitted by Defendant in support of the Motion. Citation generally to a particular affidavit or deposition transcript is inadequate compliance with E.D. Tenn. LBR 7056-1(a).

² Defendant filed a motion on August 21, 2018, seeking additional time to respond to Plaintiffs' response, stating that he believed the deadline to reply was August 21 [Doc. 63]. Notwithstanding that the Court's Local Rules do not provide any such reply time, because the parties tendered an agreed order reflecting that Plaintiffs had no objection to Defendant's request [Doc. 64], Defendant was allowed to file a reply.

February 3, 2017, and this adversary proceeding was filed on June 29, 2017. Defendant is the son of Plaintiff Robert “Butch” Cash, nephew of Plaintiff Carl Lansden, and cousin to Plaintiff Carl Hugh Lansden.

Defendant, who personally owned guns and rifles, held a federal firearms license to manufacture and sell firearms wholesale and to import and possess gun and rifle parts as necessary for such operations. From approximately 2003 through 2014, Defendant operated a sole proprietorship called Waffen Werks, through which he assembled guns from a shop located at his residence. Additionally, before December 2009, Defendant assembled gun parts for sale by Tennessee Guns International (“TGI”), which was owned in part by Charles Jones, who had obtained financing from Plaintiffs for a number of years. TGI supplied necessary firearms parts to Waffen Werks, which charged TGI a flat fee for assembling each gun or rifle.

In November 2009, the federal Bureau of Alcohol, Tobacco, and Firearms raided TGI, and Jones commenced discussions with Plaintiffs for a workout and payment of the defaulted debt obligations owed by Jones to Plaintiffs. During the negotiations, Plaintiffs requested that Defendant pick up and move from TGI certain parts that were to be transferred to Plaintiffs as part of the debt workout with Jones, and Defendant moved parts to the Waffen Werks location on December 22, 2009 (a list of the transported items, which was attached to the Complaint as Exhibit B, was reviewed and approved by Defendant). Defendant agreed to assemble guns for Plaintiffs in December 2009 and that at least some expenses would be paid from the proceeds, but the parties did not enter into a written agreement at that time. Plaintiffs and Jones entered into a written settlement agreement (“ISDA”) on April 29, 2010. Although Defendant was not a party to the ISDA, he was expressly designated as Plaintiffs’ agent under the agreement. After Jones filed for bankruptcy and Plaintiffs filed an adversary proceeding for a determination of

dischargeability relating to the debt that was the subject of the ISA [Adv. No. 3:14-ap-3048-SHB], this Court entered a memorandum opinion on January 26, 2018, and entered an Amended Judgment on April 4, 2018.

From January 2011 until approximately January 2012, Defendant's sister Stefni Cash Cassidy worked for Defendant as a bookkeeper, during which time she provided at least some records to Plaintiffs, paid some bills of Waffen Werks, and paid some money to Plaintiffs on behalf of Waffen Werks. In October 2012, the parties changed the financial terms of their agreement, and all guns assembled and invoiced thereafter were payable to Plaintiffs.

II. ANALYSIS

A. Rule 56 – Standard for Summary Judgment

Federal Rule of Civil Procedure 56, which is applicable to adversary proceedings by virtue of Rule 7056 of the Federal Rules of Bankruptcy Procedure, provides that “[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[.]” utilizing the procedures defined in subparts (c)(1) through (c)(4). When deciding a summary judgment motion, 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, and “[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

As movant, Defendant bears the burden of proving that, based on the record presented to the Court, there is no genuine dispute concerning any material fact and that he is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *Owens Corning v. Nat'l Union Fire Ins. Co.*, 257 F.3d 484, 491 (6th Cir. 2001). “A genuine dispute of

material fact exists when ‘there is sufficient evidence favoring the nonmoving party for a [fact-finder] to return a verdict for that party.’” *Laster v. City of Kalamazoo*, 746 F.3d 714, 726 (6th Cir. 2014) (quoting *Anderson*, 477 U.S. at 249). “[The] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion[,]” *Celotex Corp.*, 477 U.S. at 323, and “[a]s the party moving for summary judgment, Defendant[] bear[s] the burden of showing the absence of a genuine issue of material fact as to at least one essential element of Plaintiff[s]’ claim[s].” *Laster*, 746 F.3d at 726.

Once the initial burden of proof is met, the burden shifts to the nonmoving party to prove that there are genuine disputes of material fact for trial, but reliance solely on allegations or denials contained in the pleadings is insufficient because 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). “[Any] party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials[.]” Fed. R. Civ. P. 56(c)(1)(A). The Court must view the facts and all resulting inferences in a light most favorable to Plaintiffs (as the respondent) and 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. Summary judgment is appropriate only if the fact-finder could not find for the non-moving party based on the “the record taken as a whole.” *Matsushita*, 475 U.S. at 587.

B. Defendant's Argument

In his Motion, Defendant argues (1) that the Complaint fails to state a statutory or other basis on which Plaintiffs seek an accounting (Plaintiffs' Count I); (2) that Plaintiffs' § 523(a)(2)(A) claims (Plaintiffs' Counts II, III, and IV) should be denied because the affidavits and depositions that he provided establish "that no inducement or misrepresentations were made by the Defendant to enter into the agreement to assemble guns" [Doc. 40 at p.2]; (3) that the § 523(a)(4) claims (Counts V, VI, and VII) should be denied because "[d]efalcation by a fiduciary requires an express or technical trust . . . [and] no such 'technical' trust existed and none were pled in the Complaint" [Doc. 40 at p.2-3]; (4) that all of the transfers at issue were public record and that the affidavits of Lisa Perkey and Myron Ely establish a lack of the intent required under § 727(a)(2)(A) (Count VIII); and (5) that the undisputed facts establish the availability of records to defeat Plaintiffs' § 727(a)(3) cause of action (Count IX).

For the reasons stated herein, the Court finds that Defendant has not met his burden of proving that the undisputed facts establish that Plaintiffs cannot satisfy necessary elements of their stated causes of action. Because genuine disputes of material fact exist, Defendant is not entitled to judgment as a matter of law.

C. Count I: Accounting

Defendant seeks summary judgment and dismissal of Plaintiffs' request for an accounting, arguing that they have not pled any statutory theory authorizing them to obtain an accounting from Defendant. While the Court agrees that Count I of the Complaint does not provide a statutory or common law reference for seeking an accounting, Plaintiffs do cite to Tennessee Code Annotated § 61-1-404(b)(1) in Count VII of the Complaint, alleging that Defendant has failed or refused to account for property and profits that came into his possession.

Additionally, under common law, “[a]n accounting is an equitable remedy which allows the court to determine the extent of a misallocation of expenses and the damages resulting therefrom when there is fiduciary relationship between the parties.” *Lubber, Inc. v. Optari, LLC*, No. 3:11-0042, 2011 WL 4738264, at *10 (M.D. Tenn. Oct. 6, 2011) (quoting *Law v. Bioheart, Inc.*, No. 2:07-cv-2177, 2009 WL 693149, at *16 (W.D. Tenn. Mar. 13, 2009)). The Sixth Circuit has also explained that “[a]n accounting is a species of disclosure, predicated upon the legal inability of a plaintiff to determine how much, if any, money is due him from another. It is an extraordinary remedy, and like other equitable remedies, is available only when legal remedies are inadequate.” *Bradshaw v. Thompson*, 454 F.2d 75, 79 (6th Cir. 1972). Plaintiffs have alleged facts that would establish a fiduciary relationship between the parties, and Defendant acknowledges that he was their agent for the purposes of the ISDA. *See Morrison v. Allen*, 338 S.W.3d 417, 450 (Tenn. 2011) (“Agency is a fiduciary relationship that arises when the principal manifests assent to the agent that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests or otherwise consents to act on the principal's behalf.” (citing Restatement (Third) of Agency § 1.01, at 17)). Defendant has failed to meet his burden under Rule 56 to show that no genuine dispute exists concerning Plaintiffs’ request for an accounting, and summary judgment is not appropriate.

D. Counts II, III, and IV: 11 U.S.C. § 523(a)(2)(A)

Defendant next asks the Court to find that the undisputed facts do not support Plaintiffs’ allegations of misrepresentation by Defendant concerning any agreement between the parties and that Plaintiffs cannot prove that Defendant obtained money or property from them through false pretenses, false representations, or actual fraud. To satisfy the requirements of 11 U.S.C. § 523(a)(2)(A) for false pretenses or false representations, Plaintiffs must prove that Defendant

obtained money from or belonging to Plaintiffs through material misrepresentations that Defendant knew were false or were made with gross recklessness, that Defendant intended to deceive Plaintiffs, that Plaintiffs justifiably relied on Defendant's false representations, and that Plaintiffs' reliance was the proximate cause of their losses. *See McDonald v. Morgan (In re Morgan)*, 415 B.R. 644, 649 (Bankr. E.D. Tenn. 2009). Debts may also be nondischargeable under § 523(a)(2)(A) for "actual fraud," which "encompasses forms of fraud, like fraudulent conveyance schemes, that can be effected without a false representation." *Husky Int'l Elecs., Inc. v. Ritz*, ___ U.S. ___, 136 S. Ct. 1581, 1586 (2016).

Because "[s]cienter is a required element of any cause of action under section 523(a)(2)(A)," Plaintiffs were required to "produce some evidence to show there is a genuine dispute of fact over whether Defendant possessed the requisite intent." *Summit Credit Union v. Goldbeck (In re Goldbeck)*, Adv. No. 17-103, 2018 WL 4377231, at *4 (Bankr. W.D. Wis. Sept. 7, 2018). Summary judgment on claims that involve the issue of fraudulent intent is very rare because intent is almost always an issue of fact. *See Mendelsohn v. Jacobowitz (In re Jacobs)*, 394 B.R. 646, 658 (Bankr. E.D.N.Y. 2008) (citing *Golden Budha Corp. v. Canadian Land Co. of Am.*, 931 F.2d 196, 201-02 (2d Cir. 1991); *New York v. North Storonske Cooperage Co.*, 174 B.R. 366, 390 (N.D.N.Y. 1994)). Such is true here. Taking the pleadings and all inferences created therein in a light most favorable to Plaintiffs, the Court finds that the record includes support for Plaintiffs' allegations that Defendant misrepresented profits, misrepresented overhead costs, and misrepresented that he would keep separate bank accounts; that Plaintiffs relied on each of the foregoing representations; and that they suffered damages proximately related to those actions. Because such allegations, if ultimately proved, would suffice to sustain a finding under § 523(a)(2)(A), Defendant has not met his obligation under Rule 56, and

summary judgment is not appropriate.

E. Counts V, VI, and VII: 11 U.S.C. § 523(a)(4)

Defendant also argues that the Court should grant summary judgment and dismiss Plaintiffs' claims under 11 U.S.C. § 523(a)(4) that Defendant obtained money from Plaintiffs through embezzlement or fraud or defalcation while acting in a fiduciary capacity.³ Specifically, Defendant argues that no "technical" trust existed and none was pled by Plaintiffs so that absent a fiduciary relationship, no § 523(a)(4) claim can stand.

Within the scope of § 523(a)(4), embezzlement is "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) (citation omitted); however, "the defalcation provision of § 523(a)(4) is 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." *R.E. Am., Inc. v. Garver (In re Garver)*, 116 F.3d 176, 180 (6th Cir. 1997). Under Tennessee law, an express trust is created by a direct and positive action by the parties in writing or by a court order. *Tenn. Educ. Lottery Corp. v. Cooper (In re Cooper)*, 430 B.R. 480, 494 (Bankr. E.D. Tenn. 2010) (quoting *Jackson v. Dobbs*, 290 S.W. 402, 404 (Tenn. 1926)). A technical trust results when an obligation arises from the confidence placed in a person to whom an owner of property entrusts property with the understanding that the former will "faithfully apply the property according to the wishes" of the owner. *Id.* at 495. Such a trust may be created not only "by an agreement between the parties to impose a trust relationship" but also "by a statute that specifically imposes fiduciary obligations on a party." *Id.* (quoting *Smallwood v. Howell (In re Howell)*, 178 B.R. 730, 732 (Bankr. W.D. Tenn. 1995)).

³ The third option under § 523(a)(4), larceny, was not pled and is not at issue in this adversary proceeding.

Embezzlement under § 523(a)(4) requires proof of the following elements: (1) that the debtor was lawfully in possession of property owned by someone else; (2) the debtor misappropriated the property; and (3) the circumstances indicate fraudulent intent. *See WebMD Practice Servs., Inc. v. Sedlacek (In re Sedlacek)*, 327 B.R. 872, 880 (Bankr. E.D. Tenn. 2005). Here, the record contains sufficient facts, which are in dispute, that could sustain a finding of nondischargeability for embezzlement under § 523(a)(4), including the allegations that Defendant commingled personal funds with Plaintiffs' funds and failed to remit all monies earned from the ISDA inventory to Plaintiffs.

Likewise, reviewing the record and drawing all inferences therefrom in Plaintiffs' favor, the Court finds that there are genuine issues of material fact that could sustain an action for defalcation by a fiduciary under § 523(a)(4). "Defalcation 'encompasses not only embezzlement and misappropriation by a fiduciary, but also the 'failure to properly account for such funds.'"" *In re Cooper*, 430 B.R. at 489 (quoting *Bd. of Trs. of the Ohio Carpenters' Pension Fund v. Bucci (In re Bucci)*, 493 F.3d 635, 639 (6th Cir. 2007)). Although Defendant correctly argues that Plaintiffs have failed to prove the existence of an express trust under Tennessee law, they have cited to Tennessee Code Annotated § 61-1-404(a) and (b)(1) as a statutory basis for the trust and fiduciary relationship and have supplied evidence – which Defendant disputes – that, if accepted as true, could establish the existence of a technical trust under Tennessee law, including the undisputed fact that Defendant was designated as their agent under the ISDA. Because Defendant has not met his burden under Rule 56, his request for summary judgment pertaining to § 523(a)(4) will be denied.

F. Count VIII: 11 U.S.C. § 727(a)(2)(A)

Defendant next argues that Plaintiffs cannot create a genuine issue of material fact as to

the Defendant's intent concerning transfers of real and personal property, such that they cannot sustain a cause of action under § 727(a)(2)(A). Denial of a debtor's discharge under § 727(a)(2)(A) requires proof that, within one year of filing for bankruptcy, a debtor disposed of, transferred, or concealed property with the intent to hinder or defraud creditors by doing so. *See Roberts v. Oliver (In re Oliver)*, 414 B.R. 361, 381 (Bankr. E.D. Tenn. 2009); *see also Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 683-84 (6th Cir. 2000). Plaintiffs also rely on Tennessee Code Annotated §§ 66-3-101 and -301 as authority for their fraudulent transfer claim.

Plaintiffs allege, and Defendant does not dispute, that within the year before he filed his bankruptcy petition, quit claim deeds were executed that affected the ownership status of his residential real property. Plaintiffs also note that the record reflects evidence that Defendant had a large private firearms collection that was not disclosed in his bankruptcy schedules. Plaintiffs argue that the circumstances alone permit an inference of fraudulent intent sufficient to overcome summary judgment. As previously stated, issues of intent are rarely appropriate for summary judgment. Because there are disputed facts surrounding the real property transfer and the question of undisclosed personalty, the Court finds that there are genuine issues of material fact concerning Defendant's intent. Accordingly, Defendant is not entitled to summary judgment on Plaintiffs' § 727(a)(2)(A) claims.

G. Count IX: 11 U.S.C. § 727(a)(3)

Finally, Defendant seeks summary judgment on Plaintiffs' claim that Defendant should not receive a discharge because he did not maintain records reflecting the firearms transactions that he conducted. Defendant asserts that Plaintiffs had access to his business records at all times, but Plaintiffs clearly dispute such an assertion. [Docs. 42 at ¶ 23, 48 at ¶ 23.] In order to satisfy their burden of proof under § 727(a)(3), which does not require fraudulent intent,

Plaintiffs must show that Defendant “failed to maintain adequate books and records and that such failure render[ed] it impossible to discern [his] true financial condition.” *Ayers v. Babb (In re Babb)*, 358 B.R. 343, 354 (Bankr. E.D. Tenn. 2006) (quoting *Christy v. Kowalski (In re Kowalski)*, 316 B.R. 596, 601 (Bankr. E.D.N.Y. 2004)).

The parties dispute whether records have been provided to Plaintiffs by Defendant and whether those records that were provided are complete. Further, Plaintiffs assert through sworn testimony that Defendant has failed to provide complete and accurate records outlining the full scope of Defendant’s business transactions. If such assertions are accurate, Plaintiffs could sustain a cause of action under § 727(a)(3). Accordingly, Defendant is not entitled to summary judgment on Plaintiffs’ § 727(a)(3) claim.

III. SUMMARY

In summary and for the foregoing reasons, the Court finds that the record establishes genuine disputes of material facts concerning whether obligations that Defendant owes to Plaintiffs are nondischargeable under 11 U.S.C. § 523(a)(2)(A) and/or (4) and concerning whether Defendant should be denied his discharge pursuant to 11 U.S.C. § 727(a)(2)(A) and/or (3). The Court finds that, upon consideration of the summary-judgment record, viewed in favor of Plaintiffs as required by Rule 56, Defendant has not shown that he is entitled to judgment as a matter of law on any of Plaintiffs’ claims. The Court, therefore, directs that the Defendant’s Motion for Summary Judgment filed on July 6, 2018 [Doc. 40] is DENIED.

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