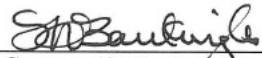




**SO ORDERED.**

**SIGNED this 20th day of October, 2021**

**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

MICHAEL SHAWN PATRICK MARTIN

Debtor

LEXPAL, INC. dba OUT OF EDEN  
GARDEN CENTER

Plaintiff

v.

MICHAEL SHAWN PATRICK MARTIN

Defendant

Case No. 3:21-bk-30220-SHB  
Chapter 7

Adv. Proc. No. 3:21-ap-3026-SHB

**MEMORANDUM AND ORDER ON  
MOTION TO DISMISS ADVERSARY COMPLAINT**

Plaintiff filed the Complaint to Determine Dischargeability of Debt commencing this adversary proceeding on May 21, 2021, asking the Court to determine that a state-court judgment entered in its favor against Defendant is nondischargeable under 11 U.S.C. § 523(a)(2)(A),

(a)(4), or (a)(6). [Doc. 1.] On June 22, 2021<sup>1</sup> [Doc. 8], Defendant filed a Motion to Dismiss Complaint to Determine Dischargeability of Debt (“Dismissal Motion”) seeking dismissal under Federal Rule of Civil Procedure 12(b)(6).<sup>2</sup> Plaintiff filed an Amended Complaint to Determine Dischargeability of Debt (“Amended Complaint”) on July 11, 2021 [Doc. 10], and the Court entered an order on July 16, 2021 [Doc. 11], directing Defendant either to withdraw the Dismissal Motion to the extent the deficiencies were cured or to amend the motion to address any remaining deficiencies. Defendant filed a Motion to Dismiss Amended Complaint to Determine Dischargeability of Debt (the “Amended Dismissal Motion”) on July 30, 2021 [Doc. 13],<sup>3</sup> and on August 20, 2021, Plaintiff timely responded in opposition to the Amended Dismissal Motion in accordance with E.D. Tenn. LBR 7007-1(a) [Doc. 14].

### **I. Rule 12(b)(6) Standard**

Rule 12(b)(6) requires dismissal for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). “A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court’s jurisdiction . . . ; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.” Fed. R. Civ. P. 8(a).<sup>4</sup> When fraud is alleged, Rule 8 is read in conjunction with Rule 9(b),<sup>5</sup> which requires fraud to be pled with particularity so that the defendant has sufficient notice of the alleged

---

<sup>1</sup> Defendant first filed a dismissal motion on June 21, 2021, but the Court denied it without prejudice for noncompliance with the Local Rules of this Court. [Docs. 6, 7.]

<sup>2</sup> Rule 12 is applicable in adversary proceedings under Rule 7012(b) of the Federal Rules of Bankruptcy Procedure.

<sup>3</sup> The Court considers the Amended Dismissal Motion notwithstanding that no supporting brief was filed as required by E.D. Tenn. LBR 7007-1(a). Counsel is again instructed to read and follow the Local Rules of this Court.

<sup>4</sup> Rule 8 is applicable in adversary proceedings under Rule 7008 of the Federal Rules of Bankruptcy Procedure.

<sup>5</sup> Rule 9 is applicable in adversary proceedings under Rule 7009 of the Federal Rules of Bankruptcy Procedure.

misconduct. *U.S. ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 501 F.3d 493, 503 (6th Cir. 2007) (requiring that, “at a minimum, [the complaint] must ‘allege the time, place, and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud’” (quoting *Coffey v. Foamex L.P.*, 2 F.3d 157, 161-62 (6th Cir. 1993))).

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The complaint need not contain “detailed factual allegations[; however,] a plaintiff’s obligation to provide the grounds of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of a cause of action’s elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level[.]” *Twombly*, 550 U.S. at 545.

[Although] a complaint will survive a motion to dismiss if it contains “either direct or inferential allegations respecting all material elements” necessary for recovery under a viable legal theory, [the] court “need not accept as true legal conclusions or unwarranted factual inferences, and conclusory allegations or legal conclusions masquerading as factual allegations will not suffice.”

*Phila. Indem. Ins. Co. v. Youth Alive, Inc.*, 732 F.3d 645, 649 (6th Cir. 2013) (quoting *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 275-76 (6th Cir. 2010)).

A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’”

*Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556-57).

When deciding whether to dismiss under Rule 12(b)(6), the court “construe[s] the complaint in the light most favorable to the plaintiff, accept[s] its allegations as true, and draw[s] all reasonable inferences in favor of the plaintiff.” *Bassett v. Nat’l Collegiate Athletic Ass’n*, 528 F.3d 426, 430 (6th Cir. 2008) (quoting *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007)). The Court also “consider[s] the complaint in its entirety, as well as . . . documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.” *Solo v. United Parcel Serv. Co.*, 819 F.3d 788, 794 (6th Cir. 2016) (alterations in original) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)).

Here, the Amended Complaint alleges that a \$14,102.38 judgment awarded to Plaintiff on August 14, 2020, by the Blount County General Sessions Court (“Judgment”)<sup>6</sup> is nondischargeable because Defendant, a former employee of Plaintiff, submitted fraudulent commission requests to Plaintiff in connection with his employment, as a result of which Plaintiff paid unearned commissions to Defendant on jobs that were not started or completed, or not completed satisfactorily. [Doc. 10 at ¶¶ 4, 8-10, 13-16.] Defendant argues that Plaintiff has not pleaded sufficient facts to support a determination that the Judgment is nondischargeable under 11 U.S.C. § 523(a)(2)(A), (a)(4), or (a)(6) because the allegations in the Amended Complaint do not meet the heightened pleading standard required by Rule 9, including a failure to provide specific dates and invoices concerning the commission requests [Doc. 13 at pp. 3-4]; Plaintiff did not attach an employment contract, manual, or policy to demonstrate that it had a clear policy controlling how commission payments were paid [*id.* at pp. 3-4]; Plaintiff did not

---

<sup>6</sup> The state court case was styled *LexPaul, Inc. dba Out of Eden Garden Center v. Michael Shawn P. Martin*, No. CV-30588. [Doc. 10, Ex. 1.] The Judgment, which was entered after a hearing before the Blount County General Sessions Judge, was based on Plaintiff’s allegations of “breach of employment contract, conversion, [and] promissory fraud [for which] Plaintiff is seeking reimbursement of commissions advanced, punitive damages, attorney’s fees and costs.” [*Id.*] The Judgment was on appeal to the Blount County Circuit Court when Defendant filed the underlying Chapter 7 bankruptcy case. [Doc. 10 at ¶¶ 19-20.]

allege that it justifiably relied on the false representations [*id.* at p. 5]; Plaintiff did not allege that Defendant carried away its property [*id.*]; Plaintiff did not allege that Defendant's initial receipt of the commissions was unlawful [*id.* at pp. 5-6]; and Plaintiff failed to allege that Defendant acted with malice [*id.* at p. 6].

Because the Amended Complaint contains allegations of fact that meet the requirements of Federal Rules of Civil Procedure 8 and 9 as they apply to the asserted claims of nondischargeability under § 523(a), and because Plaintiff is not required to prove its case-in-chief in the complaint, after accepting all allegations as true and in a light most favorable to Plaintiff as required by Federal Rule of Civil Procedure 12(b)(6), the Amended Dismissal Motion will be denied.

## II. 11 U.S.C. § 523(a)(2)(A)

To the extent obtained by false pretenses, false representations, or actual fraud, a debt may be excepted from discharge by § 523(a)(2)(A). Courts construe § 523(a) actions liberally in favor of debtors and strictly against creditors, who bear the burden of proving the necessary elements by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 291 (1991); *Rembert v. AT&T Universal Card Servs., Inc. (In re Rembert)*, 141 F.3d 277, 281 (6th Cir. 1998). To satisfy the statutory elements, Plaintiff ultimately must prove that Defendant obtained money from or belonging to it through actual fraud or material misrepresentations that Defendant knew were false or were made with gross recklessness, that Defendant intended to deceive Plaintiff, that Plaintiff justifiably relied on Defendant's false representations, and that Plaintiff's reliance was the proximate cause of its losses. *McDonald v. Morgan (In re Morgan)*, 415 B.R. 644, 649 (Bankr. E.D. Tenn. 2009). "In the context of § 523(a)(2)(A), 'false representations and pretenses encompass statements that falsely purport to depict current or past facts.'" *Almasudi v.*

*Ibrahim (In re Ibrahim)*, 580 B.R. 218, 234 (Bankr. E.D. Tenn. 2017) (quoting *Peoples Sec. Fin. Co. v. Todd (In re Todd)*, 34 B.R. 633, 635 (Bankr. W.D. Ky. 1983)); *see also Haney v. Copeland (In re Copeland)*, 291 B.R. 740, 761 (Bankr. E.D. Tenn. 2003) (stating that material misrepresentations under § 523(a) are “substantial inaccuracies of the type which would generally affect a lender’s or guarantor’s decision.” (quoting *Candland v. Ins. Co. of N. Am. (In re Candland)*, 90 F.3d 1466, 1470 (9th Cir. 1996))). Nevertheless, “[f]raudulent intent requires an actual intent to mislead, which is more than mere negligence.” *In re Copeland*, 291 B.R. at 766 (citations omitted).

As it relates to § 523(a)(2)(A), the Amended Complaint includes allegations that Defendant “submitted no fewer than eleven separate requests . . . for payments of commissions” [Doc. 10 at ¶ 23]; “[b]y submitting these commission requests, and subsequently receiving the commission payments,” Defendant “falsely represented . . . that [he] either had earned or intended to earn these commissions for each individual job” [*id.* at ¶ 24]; Defendant “knew his representations regarding payment/receipt of commissions were false” when he made them [*id.* at ¶ 25]; Defendant “submitted [the] fraudulent commission payment requests with the intent of deceiving [Plaintiff] into paying out said commissions” [*id.* at ¶ 26]; and in reliance on the commission requests, Plaintiff issued payments between October 19, 2019, and January 17, 2020, totaling \$14,102.38 [*id.* at ¶ 27].

Under the Rule 12(b)(6) standard, with the assumptions that these factual allegations are true, taken in a light most favorable to Plaintiff, the Court reasonably infers that Plaintiff can prove the § 523(a)(2)(A) elements. Furthermore, the foregoing allegations provide sufficient detail to satisfy the purpose of Rule 9: that Defendant has notice of his alleged misconduct such that he can defend himself. *United States ex rel. Snapp v. Ford Motor Co.* 532 F.3d 496, 503 (6th

Cir. 2008). Rules 8 and 9 simply do not require “an exhaustive roadmap of a plaintiff’s claims.”  
*Id.*

### III. 11 U.S.C. § 523(a)(4)

Nondischargeability under § 523(a)(4) requires a showing that the debt was incurred by embezzlement, larceny, or fraud, or defalcation while acting in a fiduciary capacity. Plaintiff seeks a determination under larceny, which is a fraudulent misappropriation of funds unlawfully taken and held by the defendant. *See First Nat’l Bank v. Simerlein (In re Simerlein)*, 497 B.R. 525, 537 (Bankr. E.D. Tenn. 2013). Larceny has been defined as “the felonious taking of another’s personal property with the intent to convert it or deprive the owner of the same.” *Dean v. Hunter (In re Hunter)*, 484 B.R. 721, 727 (Bankr. E.D. Tenn. 2012) (quoting 4 Collier on Bankruptcy ¶ 523.10[2] (16th ed. 2012) (citations omitted)). Larceny under § 523(a)(4) requires proof of fraudulent intent; i.e., “fraud in fact, involving moral turpitude or intentional wrong” that can be “established by circumstances demonstrating an intent to permanently deprive another of [its] property.” *RDLG, LLC v. Leonard (In re Leonard)*, Adv. No. 13-5002, 2014 WL 1025823, at \*19 (Bankr. E.D. Tenn. Mar. 14, 2014) (quoting *Cash Am. Fin. Servs., Inc. v. Fox (In re Fox)*, 370 B.R. 104, 116 (B.A.P. 6th Cir. 2007)).

Plaintiff relied on the same factual allegations for its subsection (a)(4) cause of action as for subsection (a)(2)(A). [Doc. 10 at ¶29.] Notwithstanding Defendant’s argument that Plaintiff failed to allege that Defendant “carried away Plaintiff’s property” [Doc. 13 at pp. 5-6], the Amended Complaint asserts that Defendant knew when he sought commission payments that he “had no intention on starting and/or completing the work required to earn the commissions.” [Doc. 10 at ¶¶ 9, 13.] Thus, when taken as true and in a light most favorable to Plaintiff,

Plaintiff's allegations are sufficient to withstand the Amended Dismissal Motion as to the claim under § 523(a)(4) for larceny.

#### IV. 11 U.S.C. § 523(a)(6)

To prevail under § 523(a)(6), Plaintiff ultimately must prove (1) the existence of “a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury,” *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998), and (2) that Defendant either desired to cause injury or believed with “substantial certainty” that injury would occur, *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 464 (6th Cir. 1999). Under Sixth Circuit authority, “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).” *Id.* at 464 (quoting Restatement (Second) of Torts § 8A, at 15 (Am. L. Inst. 1964)); *see also Guthrie v. Kokenge (In re Kokenge)*, 279 B.R. 541, 543 (Bankr. E.D. Tenn. 2002) (“[D]ebts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)” (quoting *Geiger*, 523 U.S. at 64)). “That a reasonable debtor ‘should have known’ that his conduct risked injury to others is simply insufficient. Instead, the debtor must ‘will or desire harm, or believe injury is substantially certain to occur as a result of his behavior.’” *In re Kokenge*, 279 B.R. at 543 (quoting *In re Markowitz*, 190 F.3d at 465 n.10).

As with the other subsections at issue here, the allegations in the Amended Complaint, when taken as true and in a light most favorable to Plaintiff, are sufficient to withstand the Amended Dismissal Motion. Plaintiff alleges that Defendant knew (1) “he had no intention on completing the respective landscaping jobs . . . [to] earn[] the commissions” and (2) “when he submitted and received such commissions that . . . [Plaintiff] would not be able to charge back [Defendant’s] fraudulently obtained commission payments.” [Doc. 10 at ¶¶ 33-34.]



## **V. CONCLUSION**

Simply, Plaintiff need not prove its case-in-chief at the initial pleading stage, and its allegations in the Amended Complaint sufficiently put Defendant on notice of the alleged fraudulent actions as required by Rules 8 and 9, as well as provide the Court with sufficient information to form its required inferences under Rule 12(b)(6).

## **VI. ORDER**

Taking the allegations of the Amended Complaint as true and considering it in the light most favorable to Plaintiff, as required by Rule 12(b)(6), the Court directs the following:

1. The Motion to Dismiss Amended Complaint to Determine Dischargeability of Debt filed on July 30, 2021 [Doc. 13], is DENIED.

2. Pursuant to Federal Rule of Civil Procedure 12(a)(4)(A), Defendant shall file an answer to the Amended Complaint within fourteen days from entry of this Order.

###