UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

In re:	)	
	)	
Judy Williams Helms,	)	Case No. 03-51201
	)	
Debtor.	)	
	)	
FSC Securities Corporation,	)	
	)	Adversary Proc. No. 03-6108
Plaintiff,	)	
vs.	)	
	)	
Judy Williams Helms,	)	
	)	
Defendant.	)	

ORDER RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This matter came on before the Court for consideration upon the parties' cross-motions for summary judgment in this dischargeability proceeding. Jennifer D. Maldonado appeared on behalf of the Plaintiff and Robert E. Price, Jr., appeared on behalf of the Debtor, Judy Williams Helms. This court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b) which this court may hear and determine. After considering the matters set forth in the pleadings, the evidence, and the supporting briefs, the court finds as follows:

FACTS

On January 12, 2000, a check in the amount of $49,665.57 was issued by Principal Life Insurance Company payable to Sun America, Inc. for the benefit of Judy Diane Helms. On January 26, 2000, the Plaintiff, FCS Securities Corporation ("FSC"), incorrectly deposited the

funds into the account of Judy Williams Helms (the "Debtor"), the defendant and debtor in this proceeding, at Pershing Bank, a brokerage clearing house for FCS. Shortly thereafter, the Debtor received her January statement for this account indicating that the sum of $49,665.57 had been deposited into her account (hereinafter the "Deposit"). The Debtor was surprised by the Deposit, and contacted Pershing Bank to determine whether the Deposit had been made in error.[1]

In early February 2000, having yet to hear from the bank, the Debtor drove to the bank with her daughter, and met with Michael Rollins, a registered FSC representative. Mr. Rollins informed the Debtor that he would investigate the matter and let her know if a mistake had been made. Mr. Rollins called Tony Howard at FSC on February 3, 2000, and notified him that the sum of $49,665.57 had been deposited into the Debtor's account. Mr. Howard requested a copy of the check and attempted to inform Pershing Bank through a wire that the Deposit had been made in the incorrect account. Mr. Howard received a response wire on February 8, 2000, and assumed the matter was resolved; however, Mr. Howard had actually made an error in placing the wire. The misplaced funds were never transferred to the correct account. The Debtor was not informed during this time period that the Deposit had indeed been placed into her account in error, or that FSC was attempting to recall the funds.

The funds remained intact for almost six months until, finally, on June 15, 2000, the Debtor transferred the sum of $50,405.68 from her account at Pershing Bank[2] to her State

---

[1]The Debtor contends that she had previously received a significant monetary gift from a family member without initial identification from the source and that, therefore, she believed these funds could be a gift.

[2]On April 27, 2000, an internal transfer of the funds was made, at Pershing Bank's request, from the Debtor's FSC account to a Linsco Private Ledger Financial Services account.

Employees Credit Union ("SECU") account. The next day, she transferred $40,000.00 into a SECU money market account, leaving approximately $10,000.00 in her checking account. Over the course of the following eight months, the Debtor disposed of the funds deposited into her account. The Debtor has been extremely ill for several years, and used the funds for medical expenses[3], living expenses, entertainment and gambling. Finally, on December 4, 2001, almost two years after this original Deposit, Pershing sent a recall notice to SECU. On December 5, 2001, an employee of SECU contacted the Debtor by telephone and advised her that the funds were being recalled. By the time of the recall, the Debtor's bank records reflect that she had no resources from which to repay the funds.

FSC filed a civil action on March 19, 2002 in the Superior Court of Wake County alleging claims against the Debtor for fraud, conversion, and unfair and deceptive trade practices. The Debtor failed to file any responsive pleading to the claims asserted against her. Accordingly, a Default Judgment in the amount of $50,405.68 against the Debtor was entered on October 11, 2002. On April 25, 2003, the Debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code.

On July 25, 2003, the FSC commenced this adversary proceeding seeking relief under 11 U.S.C. §§ 523(a)(2)(A), 523(a)(6), and 523(a)(11). The Debtor's health continued to decline, so on May 13, 2004, the Debtor's attorney filed a motion to stay this proceeding because the Debtor was unable to assist in her defense. As stated in a letter submitted to the court from her doctor, the Debtor is extremely weak and her ability to do much outside the home is severely limited. As

---

[3] In the year 2001, the Debtor listed an itemized deduction on her tax return for medical expenses in the amount of $38,746.00.

an alternative to staying the proceeding, the parties agreed to pursue motions for summary judgment. The Debtor was excused from attending the hearing and, instead, submitted her own affidavit into evidence.

DISCUSSION

1. Summary Judgment Standard

The standard for summary judgment is set forth in Fed. R. Civ P. 56, which is made applicable to this proceeding by Bankruptcy Rule 7056, and provides that the movant will prevail on a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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." Fed. R. Civ. P. 56(c). See also Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed. 2d 265 (1986). The movant has the initial burden of establishing that there is an absence of any genuine issue of material fact, and all reasonable inferences must be drawn in favor of the nonmoving party. Id.

2. Section 523(a)(2)(A)

The Complaint asserts that the Debtor's indebtedness to FSC is a non-dischargeable debt as a result of fraud. Section 523(a)(2)(A) provides that an individual debtor will not be discharged from any debt for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition. 11 U.S.C. § 523(a)(2)(A) (emphasis added). A cause of action under this section requires a showing of the traditional elements of fraud, including that (1) the debtor made representations (2) the debtor

knew of the falsity of those representations (3) that the debtor acted with the intent to deceive (4) that the creditor relied on such representations (5) that the creditor sustained damages as a result of the misrepresentations having been made. See e.g., In re Bebber, 192 B.R. 120, 123 (W.D.N.C. 1995); In reMcKnew, 270 B.R. 593, 618 (Bankr. E.D. Va. 2001); In re Simos, 209 B.R. 188, 191 (Bankr. M.D.N.C. 1997).

The Court finds that the allegations in the Complaint do not support a cause of action against the Defendants under § 523(a)(2)(A). In this case, the Debtor did not make any representations to the Plaintiff to obtain the sum of $49,665.57, and the Plaintiff did not rely upon any representations of the Debtor. Rather, the Plaintiff deposited $49,665.57 into the Debtor's account unsolicited, simply as a result of its own mistake. Because the Debtor did not obtain this money by false pretenses, a false representations, or actual fraud, § 523(a)(2)(A) does not apply. Accordingly, the Debtor's Motion for Summary Judgment will be granted and Plaintiff's Complaint will be dismissed to the extent relief is sought under 11 U.S.C. § 523(a)(2)(A).

3. Section 523(a)(6)

Section 523(a)(6) provides that a discharge under section 727 of the Bankruptcy Code does not discharge an individual debtor from any debt for willful and malicious injury by the debtor to another entity or to the property of another entity. 11 U.S.C. § 523(a)(6). Conversion can constitute a willful and malicious injury to property for the purpose of § 523(a)(6). See Haemonetics Corp. v. Dupre, 238 B.R. 224, 229 (D. Mass. 1999) (wife's knowing use of embezzled funds to support extravagant lifestyle constituted conversion which was sufficient to support a nondischargeability complaint under section 523(a)(6)); In re Granati, 270 B.R. 575,

591 (Bankr. E.D. Va. 2001) (finding that debtor's redirection of annuity payments to personal bank account, in violation of rights she had granted to creditor under valid equitable assignment of annuity proceeds, qualified as "conversion" of creditor's property, and constituted a willful and malicious injury to property for the purpose of § 523(a)(6)); In re Wong, 291 B.R. 266, 280 (Bankr. S.D.N.Y. 2003) (allegations in complaint that debtor had removed funds to prevent bank from collecting them were sufficient to state claim under § 523(a)(6)).

The Supreme Court has found that the term "willful," as used in section 523(a)(6), requires an intentional injury, not merely an intentional act that results in injury. See Kawaauhau v. Geiger, 523 U.S. 57, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998). The Court reasoned that "[t]he word "willful" in (a)(6) modifies the word "injury," indicating that nondischargeability takes a deliberate or intentional *injury,* not merely a deliberate or intentional *act* that leads to injury." Id. "Willful" also requires more than a "reckless disregard." Kawaauhau v. Geiger, 523 U.S. at 61, 118 S.Ct. 974. Therefore, the court must examine the debtor's subjective state of mind to determine whether the debtor acted deliberately in knowing disregard of a creditor's rights in property. In re Bundick, 303 B.R. 90, 109 (Bankr. E.D. Va. 2003). As it is unlikely that a debtor will admit that he or she intended to cause injury, the requisite willful and malicious intent may be proven by circumstantial evidence. In re Stanley, 66 F.3d 664, 668 (4th Cir. 1995).

The pivotal issue in this case is whether the Debtor had the requisite intent to cause injury. For the Plaintiff to prevail on its motion for summary judgment, it must show that the Debtor intended to exercise control over its property, *and* that the Debtor did so intending to injure the Plaintiff's interest in the property. For the purposes of the Plaintiff's motion, the court will accept the Debtor's contention, as set for in her affidavit, that she believed the funds could

have been an anonymous gift from a family member. If so, the Debtor lacked the requisite willful and malicious intent to cause injury. Because the Debtor raises issues of fact regarding the willfulness and maliciousness of her intent, the Plaintiff's motion for summary judgment will be denied.

The Debtor's motion for summary judgment must also be denied as to this claim. The Plaintiff argues that the Debtor had knowledge that the funds did not belong to her because she called her bank shortly after receiving the Deposit to inquire about the error. The Plaintiff also argues that the Debtor simply should have known that the money rightfully belonged to someone else because money doesn't "grow on trees." [4] Therefore, in spending money that she knew did not belong to her, the Debtor was willfully and maliciously injuring the property of another. The Debtor, on the other hand, states in her affidavit that she contacted the bank because she was not sure whether the Deposit was a mistake, and that the bank eventually assured her that the funds did belong to her. The Debtor contends that she truly believed the Deposit could have been a gift. Unfortunately, the Debtor did not present any evidence or details regarding the previous unexpected monetary gift. Consequently, the court finds that the Plaintiff's allegations raise genuine issues of material fact regarding the Debtor's intent that also preclude summary judgment in favor the Debtor on this count.

---

[4] The Plaintiff also contends that when it finally did recall the Deposit, 23 months later, the Debtor had sufficient funds at SECU to cover the amount of the recall and she closed her account shortly thereafter. In support of this allegation, the Plaintiff has submitted an affidavit by Daniel Quinn, Vice President of Pershing, that an employee of SECU informed one of his colleagues that the Debtor has sufficient resources. The evidence shows that this allegation is simply false. The Debtor's bank records from SECU reflect that the funds were depleted at least six months before the recall, and that she never closed her account.

4. Section 523(a)(11)

Section 523(a)(11) states that a debt "provided for in any...decree entered in any court...of any State...arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union" shall not be discharged. The Plaintiff's Complaint asserts that the debt at issue falls under this exception to discharge. Assuming, for the sake of argument, that the Plaintiff's pleadings established that Debtor incurred the debt at issue by a fraud committed with respect to a depository institution or insured credit union, the Plaintiff would not prevail on this claim.

The Plaintiff has failed to allege that Debtor was a fiduciary of the Plaintiff. The Plaintiff did not present evidence or allege the existence of a trust agreement, a fiduciary relationship, or any other express trust that arose prior to the point that the debt was incurred. The use of the term "fiduciary" in § 523(a) has been consistently defined to include only those trusts that are expressly and technically created. See, e.g., In re Lewis, 97 F.3d 1182, 1185 (9th Cir. 1996); In re Hanes, 214 B.R. 786, 812-13 (Bankr. E.D. Va. 1997); Davis v. Aetna Acceptance Co., 293 U.S. 328, 333 (1934) (only a subset of fiduciary obligations is encompassed by the term "fiduciary"). The Plaintiff has neither alleged nor attempted to prove this element of the exception. Therefore, the Debtor is entitled to summary judgment. The Plaintiff's Complaint will be dismissed to the extent relief is sought under §523(a)(11).

CONCLUSION

Based on the foregoing, it is therefore ORDERED that summary judgment is granted in favor of the Debtor with respect to the Plaintiff's claims pursuant to § 523(a)(2)(A) and § 523(a)(11). The Plaintiff's claims pursuant to § 523(a)(2)(A) and § 523(a)(11) in this adversary

proceeding are hereby dismissed. It is further ORDERED that the Plaintiff's Motion for Summary Judgment and the Debtor's Motion for Summary Judgment are denied with respect to the Plaintiff's claim pursuant to § 523(a)(6).

This the 2 day of September 2004.

Catharine R. Carruthers

Catharine R. Carruthers
United States Bankruptcy Judge