

SO ORDERED.

SIGNED this 11th day of July, 2019.



*Benjamin A. Kahn*

BENJAMIN A. KAHN  
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF NORTH CAROLINA  
GREENSBORO DIVISION

In re:	)	
	)	
Daniel P. Caswell,	)	Case No. 18-10107
Gennell D. Caswell,	)	
	)	
Debtors.	)	
_____	)	
Frederich Hof; Wanda Leyes;	)	
and Frederich Hof, as Trustee	)	
for the Genevieve E. Stewart	)	
Winger Revocable Living	)	
Trust, Dated December 17,	)	
1999;	)	
	)	
Plaintiffs,	)	Adversary No. 18-02013
	)	
v.	)	
	)	
Daniel P. Caswell,	)	
Gennell D. Caswell,	)	
	)	
Defendants.	)	

---

**ORDER GRANTING IN PART AND DENYING IN PART**  
**MOTION FOR SUMMARY JUDGMENT**

This adversary proceeding is before the Court on the Plaintiff's Motion for Summary Judgment, ECF No. 42, and the Brief in Support of Plaintiff's Motion for Summary Judgment, ECF No. 43, filed by Plaintiff Frederich Hof, as Trustee for the Genevieve E. Stewart Winger Revocable Living Trust, Dated December 17, 1999 (the "Trust"). For the reasons set forth herein, Plaintiff's Motion for Summary Judgment will be granted in part and denied in part.

**Jurisdiction and Authority**

The Court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. Under 28 U.S.C. § 157(a), the United States District Court for the Middle District of North Carolina has referred this case and this proceeding to this Court by its Local Rule 83.11. This dischargeability action is both a constitutionally and statutorily core proceeding. See 28 U.S.C. § 157(b)(2)(I). The parties have consented to this Court entering final judgments on all matters raised in the pleadings. ECF No. 30. The Court has constitutional authority to enter final judgments in this adversary proceeding. Wellness Int'l Network, Ltd. v. Sharif, --- U.S. ---, 135 S. Ct. 1932, 1947 (2015).

### **Procedural History**

Daniel P. Caswell and Gennell D. Caswell commenced the underlying bankruptcy case by filing a voluntary petition for relief under chapter 7 on January 31, 2018. The first meeting of creditors under 11 U.S.C. § 341 was set for February 26, 2018, making April 27, 2018, the deadline for creditors to commence an action to determine the dischargeability of any debt. See 11 U.S.C. § 523(c); Fed. R. Bankr. P. 4007(c). On April 9, 2018, Frederich Hof and Wanda Leyes, in their individual capacities, timely filed a Complaint seeking a determination that the debt owed under the General Judgment and Supplemental Judgment described below are nondischargeable. ECF No. 1.

On May 10, 2018, the Caswells moved to dismiss the original Complaint under Federal Rule of Civil Procedure ("Civil Rule") 12(b)(6), made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure ("Bankruptcy Rule") 7012(b). The Caswells argued that Frederich Hof and Wanda Leyes, in their individual capacities, were not the proper parties in interest to maintain the dischargeability action. ECF No. 5. Two weeks later, Frederich Hof, Wanda Leyes, and Frederich Hof, as Trustee for the Trust, filed an Amended Complaint (the "Amended Complaint") as a matter of course under Civil Rule 15(a)(1)(B), made applicable here by Bankruptcy Rule 7015. ECF No. 12.

On May 29, 2018, the Caswells moved to dismiss the Amended Complaint under Civil Rules 12(b)(6) and 15(c). ECF No. 13. The Court denied the original dismissal motion as moot the following day. ECF No. 15. On July 2, 2018, the Court granted the Caswells' Motion to Dismiss the Amended Complaint as to Frederich Hof and Wanda Leyes in their individual capacities, and denied the motion as to Frederich Hof, as Trustee for the Trust. ECF No. 28.

On February 26, 2019, Plaintiff moved for summary judgment, ECF No. 42, and filed a brief in support of his motion.<sup>1</sup> ECF No. 43. On March 14, 2019, the Caswells moved to extend the time to respond to Plaintiff's Motion for Summary Judgment. ECF No. 44. The Court granted the Caswells' motion and extended the response deadline until March 25, 2019. ECF No. 45. The Caswells filed their Response and Brief in Opposition to Plaintiff's Motion for Summary Judgment on March 27, 2019. ECF No. 47. The Court scheduled a hearing on the Motion for Summary Judgment for April 9, 2019. ECF Nos. 48, 49. On April 8, Plaintiff filed a reply brief. ECF No. 52. At the hearing, James W. Sprouse, Jr. appeared on behalf of Plaintiff and Robert A. Lefkowitz appeared on behalf of the Caswells. Following the arguments of counsel, the Court took the matter under advisement.

---

<sup>1</sup> Plaintiff moved for summary judgment under Civil Rule 56, made applicable to this adversary proceeding by Bankruptcy Rule 7056.

### Factual Background

Ms. Genevieve E. Stewart Winger ("Ms. Winger") established the Trust on December 17, 1999. ECF No. 42-5 at 17, Ex. 19. Toward the end of her life, Ms. Winger moved in with her daughter, Ms. Caswell, and her daughter's husband, Mr. Caswell. ECF No. 42-2 at 36, Ex. 4; ECF No. 42-4 at 37, Ex. 14. Ms. Winger suffered from a number of serious health issues while living with the Caswells. ECF No. 42-5 at 18, Ex. 19. Ms. Winger died on October 15, 2012, leaving four beneficiaries of the Trust—Frederich Hof, Wanda Leyes, Deborah Lynn Winger, and Gennell D. Caswell.<sup>2</sup> Id. at 17-18. Ms. Caswell assumed the role of trustee of the Trust prior to Ms. Winger's death and, with the involvement of Mr. Caswell, administered the Trust. Id.

In September 2014, Frederich Hof and Wanda Leyes, in their individual capacities, (the "State Court Plaintiffs") sued the Caswells in the Circuit Court for the State of Oregon (the "State Court"), asserting five claims for relief: (1) remove trustee, require accounting; (2) undue influence; (3) unjust enrichment; (4) breach of fiduciary duty; and (5) intentional interference with a prospective inheritance. See Pet. & Compl. Case No.

---

<sup>2</sup> The General Judgment indicates that Deborah Lynn Winger is a beneficiary of the Trust. ECF No. 42-5 at 17, Ex. 19. Deborah Lynn Winger was not a party to the State Court litigation nor is she a party to this adversary proceeding.

14CV13762 (the "Original State Court Complaint"), ECF No. 42-2 at 24-28, Ex. 3B.

Ms. Caswell responded to the Original State Court Complaint by moving for dismissal, ECF No. 42-2 at 29-38, Ex. 4, and Mr. Caswell filed a "Motion to Remove Daniel P. Caswell," alleging that he "had no responsibility what so ever [sic] to the Genevieve E. Stewart-Winger Revocable Living Trust or any assets." Id. at 39-46, Ex. 5. The State Court denied both motions, ECF No. 42-3 at 1, Ex. 6, and Ms. Caswell and Mr. Caswell each filed answers to the Original State Court Complaint, Id. at ECF No. 42-3 at 4-13, Exs. 7, 8. The State Court Plaintiffs then moved to add a sixth claim for relief for surcharge, ECF No. 42-4 at 1-29, Exs. 11-13, and the Caswells moved to void the Trust. Id. at 30-42, Ex. 14. The State Court held a hearing on both motions on April 7 at which counsel for the State Court Plaintiffs appeared and the Caswells appeared telephonically. Id. at 43-46, Ex. 15. The State Court denied the motion to void the Trust, Id., and granted the amendment. ECF No. 42-5 at 1-4, Ex. 16.

The State Court Plaintiffs filed an amended petition and complaint, see Am. Pet. & Compl. Case No. 15PB00594 (formerly 14-CV-13762) (the "Amended State Court Complaint"), ECF No. 42-5 at 5-12, Ex. 17, and the Caswells responded shortly thereafter. Id. at 13-16, Ex. 18. Following a two-day trial, the State Court entered judgment on June 1, 2017, in favor of the State Court

Plaintiffs on four of the six claims for relief: (1) remove trustee, require accounting; (2) undue influence; (3) breach of fiduciary duty; and (4) surcharge. See id. at 17-23, Ex. 19. The State Court set forth its findings of fact and conclusions of law in the General Judgment and Money Award ("General Judgment"), entered on October 19, 2017. Id. The General Judgment, in relevant part, provides:

Because of the nature of Mrs. Caswell's role as Trustee of the Trust, and Mr. Caswell's involvement in Trust activities, the Caswells both were required to exercise undivided loyalty to the Trust, and the Trust's beneficiaries, and to exercise care and skill as persons with ordinary prudence would in administering a trust.

As for the First Claim for Relief, [Ms. Caswell] did not administer the Trust in good faith in accordance with its terms, and it is proper to remove her as Trustee of the Trust.

In regard to the Sixth Claim for Relief, for Surcharge, the evidence established the Caswells breached their obligations to the Trust in the following ways:

- a. By failing to keep, or at any point provide, an accounting of the disposition of \$341,141.03 of the Trust's \$458,791.14 in funds and/or assets;
- b. By intentionally and in bad faith creating an artificial line of credit in order to defalcate large sums of money from the Trust's accounts to Mr. Caswell's business, which was done for Mr. and Mrs. Caswell's own benefit and which constitutes a serious breach of Trust duties;
- c. By ignoring legal advice about how to administer the Trust properly;
- d. By not researching what would constitute a reasonable compensation for providing for Ms. Winger's care;
- e. By not sharing with the beneficiaries any of the financial decisions the Caswells made on behalf of

the Trust as Mrs. Caswell had been advised by counsel to do;

- f. By allowing the withdrawal of \$18,257.65 from the Trust with no credible explanation as to what the withdrawals were for, some of which withdrawn [sic] during a time Ms. Winger was in respite care and could not have made the transactions herself. These withdrawals were not consistent with Ms. Winger's past habits, and she did not have the capacity to authorize or make the transactions;
- g. By Mrs. Caswell withdrawing \$10,000.00 from the Trust and paying it to herself as a gift from Ms. Winger without a credible explanation;
- h. By generally abusing their discretion in exercising Trust obligations;
- i. By intentionally, carelessly, and in bad faith defalcating Trust assets;

The evidence also established Ms. Winger shared a confidential relationship with the Caswells, and the presence of several suspicious circumstances surrounding that relationship. Ms. Winger was completely dependent on the Caswells to both care for her and to manage her money wisely. Additionally, the evidence established the following suspicious circumstances, which the Caswells could not and did not rebut:

- a. Ms. Winger was susceptible to the Caswells' influence due to the fact that she needed 24-hour care, had memory problems, and was very dependent on the Caswells;
- b. Ms. Winger's children, other than Mrs. Caswell, had a hard time keeping in touch with her to the point that she was isolated from them;
- c. The Caswells caused Ms. Winger to execute a document justifying the payment of \$200 per day to themselves as a household contribution;
- d. Mrs. Caswell made a gift to herself from Trust funds of \$10,000;
- e. Others who encountered Ms. Winger had concerns about her ability to protect herself from people who might try to take her money.



The Caswells used their confidential relationship with [Ms. Winger] to appropriate the majority of Ms. Winger and the Trust's assets for their own use.

Id. The State Court appointed Frederich Hof as successor trustee for the Trust and entered judgment against the Caswells, jointly and severally, in the sum of \$341,141.03.<sup>3</sup> Id.

As required by Oregon Statute § 18.042, the State Court separately set out the money award in the General Judgment, which portion specifically identifies Frederich Hof, as Trustee for the Trust, as the judgment creditor. Id. at 20-21, Ex. 19. The money award portion of the General Judgment further provided for attorneys' fees as well as costs and disbursements "to be determined by supplemental judgment." Id. Thereafter, the State Court entered its Supplemental Judgment, awarding Frederich Hof, as Trustee for the Trust, an additional money award of \$150,000.00 for attorneys' fees including post-judgment interest at 9% per annum. Id. at 24-26, Ex. 20.

#### **Standard of Review**

Summary judgment is appropriate when "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(a); Fed. R. Bankr. P. 7056; Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

---

<sup>3</sup> The General Judgment awards this amount in three separate paragraphs, addressing the State Court Plaintiffs' second (undue influence), fourth (breach of fiduciary duty), and sixth (surcharge) claims for relief, respectively.

In considering a motion for summary judgment, the Court must construe the "facts and inferences drawn therefrom in the light most favorable to the nonmoving party." Seabulk Offshore, Ltd. v. Am. Home Assur. Co., 377 F.3d 179, 183 (4th Cir. 2001). The party moving for relief must carry the initial burden of proving an absence of any genuine issue of material fact based on the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any. Celotex, 477 U.S. at 323. The nonmoving party must then set forth specific facts sufficient to raise a genuine issue for trial. Matsushita Elect. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986).

"A dispute is genuine only if, on the entirety of the record, a reasonable jury could resolve a factual matter in favor of the non-movant." Sweats Fashions, Inc. v. Pannill Knitting Co., 833 F.2d 1560, 1562 (Fed. Cir. 1987). Determinations of credibility, weighing the evidence, and drawing legitimate inferences from the facts are not appropriate on a motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [the non-movant's] favor." Id.

The Court may consider any evidence in the record that would be admissible at trial. See Fed. R. Civ. P. 56(c)(2) ("A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible into

evidence."); see also Celotex, 477 U.S. at 324 ("We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment."). What matters is not that the parties submit evidence in support or opposition to the motion in an admissible form, but that the "substance or content of the evidence . . . be admissible . . . ."

11 James Wm. Moore et al., Moore's Federal Practice, ¶ 56.91[2] (3d ed. 2014). Moreover, if a party fails to object to the inadmissibility of evidence offered in support of a motion for summary judgment, the Court may deem any objection to admissibility waived and consider the evidence. See Fed. R. Evid. 103(a); see also Local R. 7056-1(c) ("All facts set forth in the statement of the movant shall be deemed admitted for the purpose of the motion for summary judgment unless specifically controverted by the opposing party.").

### **Discussion**

Plaintiff seeks to except the debt owed under the General Judgment and the Supplemental Judgment (the "underlying Judgments") from the Caswells' discharge pursuant to 11 U.S.C. § 523(a)(4).<sup>4</sup> Relying solely on the underlying Judgments for support, Plaintiff asserts that

[t]he findings in the [General] Judgment establish conclusively that the Defendants were acting in a

---

<sup>4</sup> Section 523(a)(4) excepts from discharge "any debt . . . for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny."

fiduciary capacity for the trust and its beneficiaries, breached their fiduciary duty, and the Defendants' actions constitute willful defalcation of the Trust assets.

ECF No. 43 at 7. Plaintiff further argues that the Rooker-Feldman and collateral estoppel doctrines preclude the Caswells from relitigating these issues. Id. at 7-11. The Caswells disagree, arguing that the underlying Judgments do not establish the intent required for a finding of defalcation under § 523(a)(4). ECF No. 47 at 4.<sup>5</sup> The Court will address these arguments in turn beginning with the doctrines Plaintiff asserts.

**1. Rooker-Feldman and Collateral Estoppel**

**a. The Rooker-Feldman Doctrine**

"The Rooker-Feldman doctrine prevents the lower federal courts from exercising jurisdiction over cases brought by 'state-court losers' challenging 'state-court judgments rendered before the district court proceedings commenced.'" Lance v. Dennis, 546 U.S. 459, 460 (2006) (quoting Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005)).<sup>6</sup> In other words, "lower federal courts are precluded from exercising appellate jurisdiction over final state-court judgments." Id. at 463. The Rooker-Feldman doctrine is applicable when "(1) the federal

---

<sup>5</sup> The Caswells also argue that the "Oregon Court did not have jury instructions." Id. This Court does not see how such an argument is relevant given that the Oregon litigation involved bench trials.

plaintiff lost in state court; (2) the plaintiff complains of injuries caused by the state-court judgments; (3) those judgments were rendered before the federal suit was filed; and (4) the plaintiff is inviting the district court to review and reject the state-court judgments." In re Infinity Bus. Grp., Inc., 497 B.R. 495, 499 (Bankr. D.S.C. 2013) (citing Exxon, 544 U.S. at 284). In the Fourth Circuit, "the Rooker-Feldman doctrine is narrow and focused." Thana v. Bd. of License Comm'rs for Charles Cty., Md., 827 F.3d 314, 319 (4th Cir. 2016). "[T]he Rooker-Feldman doctrine only bars collateral attacks on state court judgments; it does not supplant the normal rules of preclusion." Sartin v. Macik, 535 F.3d 284, 287 n.1 (4th Cir. 2008).

In defending this action, the Caswells do not challenge the underlying Judgments. Rather, the Caswells argue that "the State Court findings do not establish all of the factors required in establishing that a debt is [nondischargeable] under 11 U.S.C. [§] 523(a)(4)." ECF No. 47 at 2. As a result, the Rooker-Feldman doctrine is inapplicable. Sartin, 535 F.3d at 287 n.1. "[T]he rules of preclusion govern whether a litigant may, in a bankruptcy proceeding, revisit an issue previously addressed in a state court action." Id.

**b. Collateral Estoppel Doctrine**

"Under the doctrine of collateral estoppel, once an issue of fact or law is resolved by the final judgment of a court, then it

is conclusively resolved in subsequent actions between the parties.” In re O’Quinn, 401 B.R. 739, 742-43 (Bankr. M.D.N.C. 2009) (citations omitted). Collateral estoppel principles apply in dischargeability proceedings under § 523(a). Grogan v. Garner, 498 U.S. 279, 285 n.11 (1991). Further, collateral estoppel may “preclude litigation of one or more of the elements of a dischargeability claim, even where collateral estoppel does not bar litigation of other elements of the claim.” In re Pixley, 504 B.R. 852, 864 (Bankr. E.D. Mich. 2014).

“In determining the preclusive effect of a state-court judgment, the federal courts must, as a matter of full faith and credit, apply the forum state’s law of collateral estoppel.” In re McNallen, 62 F.3d 619, 624 (4th Cir. 1995) (quoting Allen v. McCurry, 49 U.S. 90, 96, 101 S.Ct. 411, 415 (1991), for the proposition that “Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so”). Under Oregon law, five elements are necessary for collateral estoppel or issue preclusion to apply:

1. The issue in the two proceedings is identical.
2. The issue was actually litigated and was essential to a final decision on the merits in the prior proceeding.
3. The party sought to be precluded has had a full and fair opportunity to be heard on that issue.
4. The party sought to be precluded was a party or was in privity with a party to the prior proceeding.

5. The prior proceeding was the type of proceeding to which this court will give preclusive effect.

Nelson v. Emerald People's Util. Dist., 318 Or. 99, 104, 862 P.2d 1293, 1297 (1993) (citations omitted). "The party asserting issue preclusion bears the burden of proof on the first, second, and fourth requirements, whereupon the burden shifts to the party against whom preclusion is asserted to show that the third and fifth requirements are not met." In re Szewc, 568 B.R. 348, 360 (Bankr. D. Or. 2017) (quoting Thomas v. U.S. Bank Nat'l Assoc., 244 Or. App. 457, 469, 260 P.3d 711, 719 (2011)).

## **2. Nondischargeability Standard Under § 523(a)(4)**

To determine whether collateral estoppel precludes relitigation of an issue, the Court must compare the elements of nondischargeability for defalcation with the findings in the underlying Judgments that were necessary for the State Court's disposition of the matter. To establish that a debt is nondischargeable under § 523(a)(4), a plaintiff must show that: "(1) the debt in issue arose while the [d]ebtor was acting in a fiduciary capacity; and (2) the debt arose from the defalcation." In re Causey, 519 B.R. 144, 151 (Bankr. M.D.N.C. 2014). Plaintiff, as the party seeking relief, bears the burden of proving "by a preponderance of the evidence that his claim is not dischargeable." Grogan, 498 U.S. at 287.

As to the first element, "whether a debtor is a fiduciary [under § 523(a)(4)] is a matter of federal law, although state law is relevant to the inquiry." In re Emberton, 501 B.R. 392, 398 (Bankr. D. Colo. 2013). "The broad, general definition of 'fiduciary' is inapplicable in the dischargeability context," In re Lewis, 97 F.3d 1182, 1185 (9th Cir. 1996) (citations omitted), and "[g]eneral fiduciary duties under state law are insufficient to form the basis of nondischargeability under § 523(a)(4)." Emberton, 501 B.R. at 398.

Although "[t]he term 'fiduciary capacity' is not defined in the Bankruptcy Code," O'Quinn, 374 B.R. 171, 178 (Bankr. M.D.N.C. 2007), "[c]ourts have found that, in th[e] context [of § 524(a)(4)], a fiduciary capacity 'only arises in conjunction with a technical trust.'" In re Watford, 374 B.R. 184, 189-90 (Bankr. M.D.N.C. 2007) (quoting In re Tucker, No. 06-50092JDW, 2007 WL 1100482, at \*2 (Bankr. M.D. Ga. Apr. 10, 2007)); see also In re Mele, 501 B.R. 357, 363 (B.A.P. 9th Cir. 2013) (quoting Lewis, 97 F.3d at 1185) ("[T]he fiduciary relationship must be one arising from an express or technical trust that was imposed before and without reference to the wrongdoing that caused the debt."); In re Bratt, 489 B.R. 414, 425-26 (Bankr. D. Kan. 2013) (holding that the "general fiduciary duty of confidence, trust, loyalty, and good faith" implied by state law is insufficient to support a claim under § 523(a)(4), and "the fiduciary relationship must be



shown to exist prior to the creation of the debt in controversy") (quoting Fowler Bros. v. Young (In re Young), 91 F.3d 1367, 1371-72 (10th Cir. 1996)). A trustee of an express trust undoubtedly acts in a fiduciary capacity for purposes of § 523(a)(4). In re Goodwich, 517 B.R. 572, 584 (Bankr. D. Md. 2014) (quoting In re Heilman, 241 B.R. 137, 169-70 (Bankr. D. Md. 1999)) ("The types of fiduciary capacity intended by Congress to render a debt nondischargeable are persons in positions of ultimate trust, such as public officers, executors, administrators, guardians, trustees of express trusts, attorneys and corporate directors.").

Regarding the second element, the term "defalcation" in § 523(a)(4) "cover[s] a trustee's failure . . . to make a trust more than whole" [and] "includes a culpable state of mind requirement." Bullock v. BankChampaign, N.A., 569 U.S. 267, 269-73 (2013). As described by the Supreme Court, the intent standard is "one involving knowledge of, or gross recklessness in respect to, the improper nature of the relevant fiduciary behavior." Id. at 269.

### **3. Applicability of Collateral Estoppel**

#### **a. Fiduciary Capacity When Debt Arose**

In the State Court litigation, the State Court Plaintiffs, among other causes of action, asserted a claim against Ms. Caswell for breach of fiduciary duty and sought to remove Ms. Caswell as trustee for the Trust. ECF No. 42-5 at 6-9, Ex. 17. After a two-

day trial, the State Court entered judgment against Ms. Caswell and Mr. Caswell, jointly and severally, for breach of fiduciary duty, and removed Ms. Caswell as trustee. Id. at 20, Ex. 19.

The State Court determined that prior to Ms. Winger's death, Ms. Caswell "assumed the role of Trustee of the Trust and power of attorney over Ms. Winger." Id. Additionally, according to the State Court,

[b]ecause of the nature of Mrs. Caswell's role as Trustee of the Trust, and Mr. Caswell's involvement in Trust activities, the Caswells both were required to exercise undivided loyalty to the Trust, and the Trust's beneficiaries, and to exercise care and skill as persons with ordinary prudence would in administering a trust.

Id.

Based on the State Court's findings, Plaintiff argues that collateral estoppel precludes the Caswells from relitigating the issue of whether the debt arose while they were acting in a fiduciary capacity. ECF No. 42 at 7. The Court agrees with Plaintiff with respect to Ms. Caswell, but not Mr. Caswell.

**i. Ms. Caswell**

Plaintiff has established the requirements for collateral estoppel under Oregon law with respect to the issue of whether Ms. Caswell was acting in a fiduciary capacity when the debt arose. Therefore, the Caswells may not relitigate that issue in this Court.

First, "the issue in the two proceedings is identical." Nelson, 318 Or. at 104, 862 P.2d at 1297 (citing N. Clackamas Sch.

Dist. v. White, 305 Or. 48, 53, 750 P.2d 485, modified on other grounds 305 Or. 468, 752 P.2d 1210 (1988); State Farm Fire & Cas. Co. v. Reuter, 299 Or. 155, 158, 700 P.2d 236 (1985)). An "issue in two proceedings is identical if the first case decided the precise factual or legal issue presented in the second case." Graham v. U.S. Bank, Nat'l Ass'n, No. 3:15-CV-0990-AC, 2015 WL 10322087, at \*6 (D. Or. Dec. 2, 2015) (citing Nelson, 318 Or. at 104), report and recommendation adopted, No. 3:15-CV-00990-AC, 2016 WL 393336 (D. Or. Feb. 1, 2016).

The issue before this Court is whether Ms. Caswell was acting in a fiduciary capacity when the debt owed to Plaintiff arose. The State Court had to determine whether Ms. Caswell was a trustee of the Trust before ordering removal or recovery for breach.<sup>7</sup> The State Court so found, holding that prior to Ms. Winger's death, Ms. Caswell "assumed the role of Trustee of the Trust and power of attorney over Ms. Winger." ECF No. 42-5 at 18, Ex. 19. Because a trustee of an express trust undoubtedly acts in a fiduciary capacity for purposes of § 523(a)(4), Goodwich, 517 B.R. at 584, and because the State Court determined that Ms. Caswell was acting

---

<sup>7</sup> To recover under Oregon law for breach of fiduciary duty, a plaintiff must show "(1) the existence of a fiduciary relationship, (2) breach of a fiduciary duty, and (3) identifiable loss or injury as a result of the breach." In re Bond, 548 B.R. 570, 577 n.5 (Bankr. D. Or. 2016) (quoting Noel v. Hall, 2012 WL 3241858, \*16 (D. Or. Apr. 27, 2012)).

as a trustee of an express trust when the debt arose, the issues are identical.

Second, “[t]he issue was actually litigated and was essential to a final decision on the merits in the prior proceeding.” Nelson, 318 Or. at 104, 862 P.2d at 1297 (citing Heller v. Ebb Auto Co., 308 Or. 1, 5, 774 P.2d 1089 (1989)). Ms. Caswell moved to dismiss the State Court complaint, acknowledging that she was the trustee of the Trust. ECF No. 42-2 at 29-38, 30, Ex. 4. Further, as discussed above, the State Court necessarily had to find that Ms. Caswell was a trustee of the Trust before ordering her removal as trustee of the Trust or entering judgment against Ms. Caswell for breach of fiduciary duty.

Third, “[t]he party sought to be precluded has had a full and fair opportunity to be heard on that issue.” Nelson, 318 Or. at 104, 862 P.2d at 1297 (citing Chavez v. Boise Cascade Corp., 307 Or. 632, 635, 772 P.2d 409 (1989); State v. Ratliff, 304 Or. 254, 258, 744 P.2d 247 (1987)). “A party receives a full and fair opportunity to be heard ‘if the parties had both a full opportunity and the incentive to contest the point at issue on a record that also was subject to judicial review.’” Dean v. Parker, 45 F. App’x 742, 745 (9th Cir. 2002) (quoting Dodd v. Hood River Cty., 136 F.3d 1219, 1226 (9th Cir. 1998)).

The allegations asserted in the State Court litigation incentivized Ms. Caswell to contest her role as trustee when the

debt arose because in the absence of such a finding, Ms. Caswell could not have been removed and could not have been held liable for breach. See ECF No. 42-5 at 18, Ex. 19. Ms. Caswell chose not to contest this issue, see ECF Nos. 42-2 at 30, Ex. 4, instead moving to void the Trust, ECF No. 42-4 at 32, Ex. 14, and to dismiss the allegations on other grounds. ECF No. 42-2 at 29-38, Ex. 4. Given judicial review of Ms. Caswell's many and active efforts to contest the allegations asserted, the State Court litigation afforded a full and fair opportunity for Ms. Caswell to be heard on the issue of fiduciary capacity when the debt arose. Moreover, Ms. Caswell has not offered any evidence tending to refute the fullness of the opportunity afforded in the State Court litigation and her associated incentives to contest the issue. Accordingly, Ms. Caswell had a full and fair opportunity to be heard on the relevant issue.

Fourth, "[t]he party sought to be precluded was a party or was in privity with a party to the prior proceeding." Nelson, 318 Or. at 104, 862 P.2d at 1297 (citing White, 305 Or. at 53; Reuter, 299 Or. at 159). The Caswells do not dispute that Ms. Caswell was a party in the prior proceeding.

Fifth, "[t]he prior proceeding was the type of proceeding to which this court will give preclusive effect." Nelson, 318 Or. at 104, 862 P.2d at 1297 (citing White, 305 Or. at 52; Ratliff, 304 Or. at 258). Under Oregon law, a court proceeding that concludes

in a judicial judgment “unquestionably satisfies the final requirement of issue preclusion.” State Farm Fire & Cas. Co. v. Sallak, 140 Or. App. 89, 94, 914 P.2d 697, 700 (1996); cf. O’Connell-Babcock v. Multnomah Cty., Or., No. CIV. 08-459-AC, 2009 WL 1139441, at \*7 (D. Or. Apr. 24, 2009) (describing how Oregon courts give preclusive effect to court actions). Thus, the State Court litigation, which concluded with entry of the underlying Judgments, is the type of proceeding to which Oregon courts will give preclusive effect.

Given the presence of all five requirements for applying collateral estoppel under Oregon law, the Court will grant summary judgment in favor of Plaintiff on the issue of whether Ms. Caswell was acting in a fiduciary capacity when the debt arose.

**ii. Mr. Caswell**

In contrast, Plaintiff fails to establish that collateral estoppel applies to the issue of Mr. Caswell acting in a fiduciary capacity as contemplated by § 523(a)(4) when the debt arose. Critically, the issues in the two proceedings are not identical. Although the State Court entered judgment against both of the Caswells on the claims for undue influence, breach of fiduciary duty, and surcharge, the State Court never determined that Mr. Caswell was a trustee of an express or technical trust. Instead, the underlying Judgments—as they pertain to Mr. Caswell—cite the State Court’s findings that (1) Mr. Caswell had a confidential

relationship with Ms. Winger; and (2) Mr. Caswell owed fiduciary duties to the Trust and its beneficiaries “[b]ecause of the nature of Mrs. Caswell’s role as Trustee of the Trust, and Mr. Caswell’s involvement in Trust activities.” ECF No. 42, Ex. 1A.

As discussed above, “[t]he broad, general definition of ‘fiduciary’ is inapplicable in the dischargeability context,” Lewis, 97 F.3d at 1185, and “[g]eneral fiduciary duties under state law are insufficient to form the basis of nondischargeability under § 523(a)(4).” Emberton, 501 B.R. at 398. Although the State Court determined that Mr. Caswell owed fiduciary duties to the Trust and its beneficiaries, this finding does not resolve the narrower issue of whether Mr. Caswell was acting in the requisite fiduciary capacity when the debt arose. In re Smith, No. 14-17306, 2016 WL 3943710, at \*7 (Bankr. D. Md. July 14, 2016) (“Because the state and federal bankruptcy definitions of fiduciary differ, a judgment on a state law breach of fiduciary duty claim is insufficient evidence that the [state court] actually determined that the defendants were fiduciaries under the narrower definition applicable to a § 523(a)(4) claim.”). Accordingly, the Court will deny summary judgment on the issue of whether Mr. Caswell was acting in a fiduciary capacity when the debt arose.

**b. Debt Arose from Defalcation**

Among the findings in the General Judgment, the State Court concluded that “the evidence established the Caswells breached

their obligations to the Trust . . . [b]y intentionally, carelessly, and in bad faith defalcating Trust assets." ECF No. 42-5 at 18-19, Ex. 19. Plaintiff argues that the State Court's findings conclusively establish the requisite level of intent under Bullock. Accordingly, Plaintiff asserts that collateral estoppel precludes the Caswells from relitigating that issue in this Court. The Caswells, on the other hand, argue that the State Court "did not find that there was intent to defraud." ECF No. 47 at 4.

As articulated by the Supreme Court, the term "defalcation" in § 523(a)(4) "includes a culpable state of mind requirement . . . involving knowledge of, or gross recklessness in respect to, the improper nature of the relevant fiduciary behavior." Bullock, 569 U.S. at 269. In this case, the State Court entered judgment against the Caswells on four claims: (1) remove trustee, require accounting; (2) undue influence; (3) breach of fiduciary duty; and (4) surcharge. Although the State Court made findings regarding the Caswells' mental states, collateral estoppel is inapplicable because none of these claims require the intent standard articulated under Bullock.

**i. Remove Trustee, Require Accounting**

Under Oregon law, "[a] trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this



chapter." Or. Rev. Stat. § 130.650(1). Four circumstances justify the removal of a trustee under Oregon law:

A court may remove a trustee if the court finds:

- (a) The trustee has committed a serious breach of trust;
- (b) Lack of cooperation among cotrustees substantially impairs the administration of the trust;
- (c) Removal of the trustee best serves the interests of the beneficiaries because the trustee is unfit or unwilling, or has persistently failed to administer the trust effectively; or
- (d) Removal of the trustee best serves the interests of all of the beneficiaries and:
  - (A) There has been a substantial change of circumstances or removal has been requested by all of the qualified beneficiaries;
  - (B) A suitable cotrustee or successor trustee is available; and
  - (C) The trustee fails to establish by clear and convincing evidence that removal is inconsistent with a material purpose of the trust.

Or. Rev. Stat. § 130.625(2).

The State Court found that Ms. Caswell "did not administer the Trust in good faith in accordance with its terms." ECF No. 42-5 at 18, Ex. 19. The State Court also found that Ms. Caswell's actions "constitute[d] a serious breach of Trust duties." Id. Although the State Court made additional findings regarding the Caswells' mental states, these findings were not necessary to order removal. See Nelson, 318 Or. at 104, 862 P.2d at 1297 (describing how the issue must have been essential to the determination in the prior proceeding in order for collateral estoppel to apply under Oregon law).

## **ii. Undue Influence**

Likewise, a finding of undue influence under Oregon law does not require a finding of a specific mental state. "In an undue influence proceeding, the party seeking to have probate revoked or a contract voided must first present evidence that the influencer and the victim were in a 'confidential relationship' and that some other 'suspicious circumstances' were present." Gibson v. Bankofier, 275 Or. App. 257, 272, 365 P.3d 568, 579 (2015). "Once it has been established that the parties were in a confidential relationship and that there were additional suspicious circumstances, an inference of undue influence arises that, unless rebutted, is sufficient to establish undue influence." Id. Because Oregon law does not include a requisite mental state for a finding of undue influence, any findings by the State Court on the Caswells' mental states were not essential to the undue influence determination.

## **iii. Breach of fiduciary duty**

To recover under Oregon law for breach of fiduciary duty, a plaintiff must show "(1) the existence of a fiduciary relationship, (2) breach of a fiduciary duty, and (3) identifiable loss or injury as a result of the breach." Bond, 548 B.R. at 577 n.5 (quoting Noel, 2012 WL 3241858 at \*16). Further, "[t]here is no intent or bad faith element needed to establish the claim." Id. Therefore, any finding by the State Court that the Caswells acted in bad faith

or with a culpable state of mind was unnecessary for the State Court to enter judgment against the Caswells for breach of fiduciary duty.

#### **iv. Surcharge**

Regarding "suffered losses" by the Trust, the State Court Plaintiffs sought a "surcharge [of] all such amounts, including pre-judgment and post-judgment interest, or such other amount 'required to restore the value of the Trust property and Trust distributions to what they would have been had the breach not occurred' within the meaning of ORS 130.805(1)." ECF No. 42-5 at 10, Ex. 17. Under Oregon Statute 130.805(1):

A trustee who commits a breach of trust is liable to the beneficiaries affected for the greatest of:

- (a) The amount of damages caused by the breach;
- (b) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or
- (c) The profit the trustee made by reason of the breach.

As with the judgment for breach of fiduciary duty, any findings by the State Court about the Caswells' mental states were unnecessary for entry of the surcharge judgment because surcharge damages flow from the breach of fiduciary duty.

Therefore, the Caswells are not precluded from litigating the issue of whether the debt owed to Plaintiff arose from defalcation as contemplated by § 523(a)(4) and Bullock. See In re Correia-Sasser, No. ADV 2:10-1632-RJH, 2014 WL 4090837, at \*8 (B.A.P. 9th

Cir. Aug. 19, 2014) (holding that "the bankruptcy court did not have to give [the state court's] additional and unnecessary findings preclusive effect.").

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the Plaintiff's Motion for Summary Judgment is granted with respect to the issue of whether Ms. Caswell was acting in a fiduciary capacity when the debt owed to Plaintiff arose; denied with respect to the issue of whether Mr. Caswell was acting in a fiduciary capacity when the debt owed to Plaintiff arose; and denied with respect to the issue of whether the debt owed to Plaintiff arose from the Caswells' defalcation as contemplated by 11 U.S.C. § 523(a)(4).

[END OF DOCUMENT]

**PARTIES TO BE SERVED**

Daniel P. Caswell  
Gennell D. Caswell  
8318 Maloe Ct.  
Oak Ridge, NC 27310

Frederich Hof  
Wanda Leyes  
c/o Sprouse Law Firm, PLLC  
3101 Poplarwood Court, Suite 115  
Raleigh, NC 27604

Robert A. Lefkowitz  
The Lefkowitz Law Firm  
3500 Brunswick Ct.  
Winston-Salem, NC 27104

James W. Sprouse, Jr.  
Sprouse Law Firm, PLLC  
3101 Poplarwood Court, Suite 115  
Raleigh, NC 27604

William P. Miller  
Bankruptcy Administrator  
101 South Edgeworth Street  
Greensboro, NC 27401