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

IN RE:	)	
	)	
Cindy Jackson Venable	)	
a/k/a Cindy Dayton Jackson	)	
	)	
Debtor.	)	**Adversary Proceeding No.: 00-6044W**
	)	
	)	
Serena Gail Clemens	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
Cindy Jackson Venable	)	
a/k/a Cindy Dayton Jackson	)	
	)	
Defendant.	)	

AMENDED
ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
(The following amendment is for typographical errors and not for substance.)

THIS MATTER came on for hearing before the undersigned bankruptcy judge in Winston-Salem, North Carolina upon the Defendant's Motion for Judgment on the Pleadings or for Summary Judgment. Appearing at the hearing were Guy B. Oldaker III and John A. Meadows, attorneys for Plaintiff, and A. Carl Penney, attorney for Defendant.

This court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 1334 and 157(a) and the General Order of Reference entered by the United States District Court for the Middle District of North Carolina on August 15, 1984. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (I) and (O) which this court may hear and determine.

Federal Rule of Civil Procedure 56(c), made applicable to these proceedings by Federal Rule of Bankruptcy Procedure 7056, provides that summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Lujan v. National Wildlife Fed'n, 497 U.S. 871, 883-84 (1990); Stone v. Liberty Mut. Ins. Co., 105 F.3d 188, 190-91 (4th Cir. 1997). This rule requires that a court enter judgment against a party who, "after adequate time for ... discovery fails to make a showing sufficient to establish the existent of an element essential to that party's case, on which that party will bear the burden of proof at trial." See Lujan, 497 U.S. at 884; Stone, 105 F.3d at 191. In determining whether a genuine issue of material fact has been raised, all inferences must be construed in favor of the nonmovant. If, however, the evidence is so one-sided in favor of a party that the party must prevail as a matter of law then summary judgment is appropriate. To survive a motion for summary judgment the nonmovant must demonstrate a specific material fact that gives rise to a genuine issue. Upon reviewing the record in this case, including the Affidavit of the Plaintiff, the Court finds that the Plaintiff has failed to come forward with a material fact to give rise to a genuine issue and the Defendant is entitled to judgment as a matter of law. The following facts are undisputed:

1. The Defendant filed her petition under Chapter 7 on May 12, 2000, listing her daughter, the Plaintiff, as an unsecured creditor.

2. The debt was incurred in April, 1990 when the Plaintiff loaned the Defendant and the Defendant's then husband, Roger Keith Jackson, $116,500.00 to buy a residence at 437 Lanier Drive, Lexington, North Carolina. The Plaintiff did not have the Defendant or Mr. Jackson execute a promissory note or a deed of trust. At the time of the transaction, the Plaintiff was nineteen (19) years old. The Plaintiff had recently received the sum of $151,311.10 as a

settlement of certain claims arising from the deaths of her father and paternal grandparents due to an automobile accident on December 29, 1989.

3. The Defendant and Mr. Jackson did use the money to purchase the residence at 437 Lanier Drive, Lexington, North Carolina. The Plaintiff resided in the lower level of the residence for approximately five years.

4. The Plaintiff demanded the balance from the Defendant in August, 1999. The Defendant has repaid the Plaintiff a total of approximately $33,775.00.

5. On March 16, 2000, the Plaintiff filed a Complaint against the Defendant and Mr. Jackson in the General Court of Justice, Superior Court Division, in Davidson County, North Carolina, requesting relief based on Breach of Fiduciary Duty, Constructive Fraud, Constructive Trust, Resulting Trust, Equitable Lien, and Injunction.

6. The Defendant filed her Chapter 7 petition on May 12, 2000, and on August 4, 2000, the Plaintiff filed this adversary proceeding, alleging that the remaining debt of $82,725.00 is nondischargeable on the grounds that the claim arose out of fraud, breach of fiduciary duty and breach of duties under a trust.

DISCUSSION

Pursuant to 11 U.S.C. § 523 (a)(2)(A), a discharge in bankruptcy does not discharge an individual debtor from any debt for money to the extent it was obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." Likewise, debts for "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny" are not subject to the discharge pursuant to section 523 (a)(4). The overriding purpose of the Bankruptcy Code is to grant a debtor a fresh start; therefore, there is a presumption in favor of the debtor that all debts are dischargeable. Local

Loan Co. v. Hunt, 292 U.S. 234 (1934). Exceptions to discharge are to be narrowly construed to effect bankruptcy's fresh start purpose. Combs v. Richardson, 838 F.2d 112 (4th Cir. 1988); In re Miller, 55 F.3d 1487 (10th Cir. 1995); In re Cohn, 185 B.R. 85 (N.D. Ga. 1995); In re Adkins, 183 B.R. 702 (M.D. N.C. 1995). The burden of proof under § 523 is always on the creditor, and the creditor must prove an exception to discharge under § 523(a) by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279 (1991); Combs v. Richardson, 838 F.2d 112 (4th Cir. 1988).

The undisputed facts in this case do not support a finding of fraud, breach of fiduciary duty or breach of trust.

First, the Plaintiff has not come forward with evidence to support a claim for fraud. In order to establish the nondischargeability of a debt based on fraud a plaintiff must prove the following five elements: (1) a false statement made by the debtor; (2) such representation was known to be false at the time it was made; (3) such representation was made with the intention and purpose of deceiving the creditor; (4) such representation was reasonably relied upon by the creditor; and (5) the creditor sustained loss or damage as a proximal result of such false representation. See In re Adkins, 183 B.R. 702, 706 (Bankr. M.D.N.C. 1995); In re Showalter, 86 B.R. 877 (W.D.Va.1988); In re Criswell, 52 B.R. 184 (E.D.Va.1985). The undisputed facts do not establish that the Defendant obtained money or property through fraud. The parties agree that at the time the Plaintiff transferred the money to the Defendant, the parties intended the transfer to be a loan. Some courts have found that incurring debts with the intent not to repay falls within the actual fraud exception to discharge. See In re Eashai, 87 F.3d 1082 (9th Cir. 1996). However, the Plaintiff cannot show that at the time the loan was made, the Defendant did not intend to repay the debt. In fact, the parties do not dispute that the Defendant repaid a

portion of the debt.

Additionally, the Plaintiff cannot, as a matter of law, establish breach of fiduciary duty or breach of duty under a trust. In North Carolina, the family relationship between parent and child is not a fiduciary relationship and does not raise a presumption of fraud or undue influence. Clodfelter v. Bates, 44 N.C.App. 107, 260 S.E. 2d 672 (1979), review denied by Clodfelter v. Bates, 265 S.E.2d 294 (1980); see also Hayes v. Cable, 52 N.C.App. 617, 279 S.E.2d 80 (1981); Davis v. Davis, 236 N.C. 208, 72 S.E.2d 414 (1952). Even if North Carolina law recognized the parent/child relationship as a fiduciary relationship, in order to fall within the discharge exception of section 523 (a)(4), the creditor must prove that the debtor was acting as a fiduciary as defined by federal law. In re Bachman, 203 B.R. 637, 639 (Bankr. S.D. Ohio 1996) (citing In re Johnson, 691 F.2d 249, 251 (6th Cir. 1992)); Matter of Angelle, 610 F.2d 1335, 1341 (5th Cir. 1980). "The traditional definition of 'fiduciary' -- a relationship involving confidence, trust and good faith, is not sufficient in proving 'fiduciary capacity' under Section 523(a)(4)." In re Johnson, 691 F.2d at 251. The term "fiduciary" as used in section 523(a)(4) is restricted to "the class of fiduciaries including trustees of specific written declarations of trust, guardians, administrators, executors or public officers and, absent special considerations, does not extend to the more general class of fiduciaries such as agents, bailees, brokers, factors, and partners." Martel v. Zeitler (In re Zeitler), 213 B.R. 457, 461 (Bankr. E.D.N.C. 1997) (quoting Harmon v. Scott (In re Scott), 203 B.R. 590, 596-597 (Bankr. E.D. Va. 1996) and Sager v. Lewis (In re Lewis), 94 B.R. 406, 410 (Bankr. E.D. Va. 1988)). Constructive trusts do not give rise to the fiduciary duty required by section 523(a)(4). Zeitler, 213 B.R. at 462. In order for a debt to be discharged for defalcation, there must be an express trust. Quaif v. Johnson, 4 F.3d 950, 953 (11th Cir. 1993); In re Cantrell, 88 F.3d 344, 347 (5th Cir. 1996) (citing Davis v. Aetna

Acceptance Co., 293 U.S. 328 (1934)). Therefore, for purposes of section 523(a)(4), a parent/child relationship without more is not sufficient to make the parent a fiduciary with respect to the child. Bachman, 203 B.R. at 639.

The Plaintiff argues that, notwithstanding the forgoing, a fiduciary relationship existed between the Plaintiff and the Defendant in this case based on the following: (1) there was a mother-daughter relationship; (2) the Plaintiff was young, 19 years old, when the transaction occurred; (3) the Plaintiff was financially inexperienced; (4) the Plaintiff was substantially dependant upon Defendant; and (5) the Plaintiff trusted the Defendant. However, the Court believes that these factors would be present in many relationships involving a parent and a 19 year old child. Nothing about the Plaintiff's relationship with the Defendant sets it so far apart from other parent/child relationships such that the Court would be willing to find an exception to the general rule observed under both North Carolina and federal law.

CONCLUSION

The Court concludes that, based on the undisputed facts, the Plaintiff cannot show as a matter of law that the debt should be excepted from discharge based on fraud, breach of fiduciary duty or breach of duties under a trust.

Therefore, IT IS ORDERED, ADJUDGED AND DECREED that the Defendant is entitled to summary judgment.

This the 26 day of March, 2002.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge