UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

IN RE:	CASE NO.	13-30321 (JAM)
KELLY KATHERINE FOX,	CHAPTER	7
DEBTOR.		
SHANA BEAULIEU,	ADV. PRO. NO.	13-03017
PLAINTIFF	ECF NO.	1, 6
vs.		
KELLY KATHERINE FOX,		
DEFENDANT.		

APPEARANCES

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MEMORANDUM OF DECISION ON COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

Julie A. Manning, Chief United States Bankruptcy Judge

I. INTRODUCTION

Before the Court is the complaint of Shana Beaulieu (the "Plaintiff"), seeking to have a debt owed to her by Kelly Katherine Fox (the "Defendant"), deemed nondischargeable

pursuant to 11 U.S.C. §§ 523(a)(2), 523(a)(4), and 523(a)(6)[1]. A trial was held in this matter on January 30, 2014. The Plaintiff and the Defendant stipulated to the introduction of each party's exhibits and each party called witnesses. For the reasons that follow, judgment will enter in favor of the Plaintiff and against the Defendant.

II. JURISDICTION

The United States District Court for the District of Connecticut has jurisdiction over this matter pursuant to 28 U.S.C. §1334(b). This Court has authority to hear and determine this matter pursuant to 28 U.S.C. §§ 157(a), (b)(1) and (b)(2)(I) and the Order of Reference of the United States District Court dated September 21, 1984. The instant action is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Federal Rule of Civil Procedure 52, made applicable to this matter through Federal Rule of Bankruptcy Procedure 7052, the following are the Court's findings of fact and conclusions of law:

A. Findings of Fact

1. At all times relevant to the allegations in the Complaint, the Plaintiff and the Defendant were residents of Connecticut. (Defendant's Exhibit A at p. 1; Defendant's Exhibit B at p. 1; Testimony of Plaintiff and Defendant at January 30, 2014 trial).

2. During the summer of 2005, the Plaintiff and the Defendant worked together at a restaurant in Portland, Connecticut. The Plaintiff dated, and eventually became engaged to, the Defendant's brother. (Plaintiff's Exhibit 7 at p. 11-13; Testimony of Plaintiff and Defendant at January 30, 2014 trial).

[1] The complaint is dated May 28, 2013, and asserts six causes of action (the "Complaint"). At trial, Counts Two and Five of the Complaint were withdrawn by the Plaintiff.

3. In December 2005, the Plaintiff and the Defendant's brother were involved in a motor vehicle accident. The Plaintiff suffered serious injuries, and was placed in a medically induced coma. (Complaint at p. 4; Testimony of Plaintiff at January 30, 2014 trial).

4. The Defendant was aware of the serious injuries the Plaintiff sustained. The Defendant spent every free moment at Plaintiff's bedside while the Plaintiff was in the hospital, including during the period of time that the Plaintiff was in the medically induced coma. (Plaintiff's Exhibit 7 at p. 15-17; Testimony of Plaintiff and Defendant at January 30, 2014 trial).

5. The Plaintiff suffered permanent nerve damage to the right side of her body and permanent back damage as result of the motor vehicle accident. (Testimony of Plaintiff at January 30, 2014 trial).

6. The Plaintiff incurred medical bills in connection with the injuries suffered in the motor vehicle accident. (Testimony of Plaintiff at January 30, 2014 trial).

7. In January 2006, the Defendant helped organize and conduct a fund-raiser to raise monies to pay the Plaintiff's bills. (Defendant's Exhibit A at ¶ 12; Plaintiff's Exhibit 7 at p. 19; Testimony of Plaintiff and Defendant at January 30, 2014 trial).

8. Approximately $3,200.00 was collected at the fund-raiser for the benefit of the Plaintiff. (Defendant's Exhibit A at ¶ 14; Defendant's Exhibit B at ¶14; Plaintiff's Exhibit 6 at p. 5; Testimony of Plaintiff and Defendant at January 30, 2014 trial).

9. On or about February 2, 2006, the Defendant opened a checking account at T.D. Banknorth, N.A. (the "Bank Account"), and deposited the money collected at the fund-raiser into the Bank Account. The Bank Account was opened in the name of "Kelly Fox McIntosh Shana Beaulieu Fund." (Plaintiff's Exhibit 1; Defendant's Exhibits C and D).

10. The Defendant understood that when she opened the Bank Account, all of the money deposited into the Bank Account was to be used for the Plaintiff's benefit and that she had a responsibility to the Plaintiff to use the money solely for the Plaintiff's benefit. (Plaintiff's Exhibit 7 at p. 21; Testimony of the Plaintiff and Defendant at the January 30, 2014 trial).

11. The Defendant was the only person authorized to make deposits, withdrawals, and transfers into and out of the Bank Account. (Testimony of Plaintiff and Defendant at January 30, 2014 trial).

12. On February 2, 2006, the day the Bank Account was opened, the Defendant made two deposits into the Bank Account. The first deposit was in the amount of $2,820.00 and the second deposit was in the amount of $200.00, for a total deposit of $3,020.00. (Plaintiff's Exhibit 1; Defendant's Exhibit C; Testimony of Defendant at January 30, 2014 trial).

13. Between February 3, 2006 and February 16, 2006, the Defendant did not make any deposits, withdrawals, or transfers into or out of the Bank Account. (Plaintiff's Exhibit 1; Defendant's Exhibits C and D).

14. On February 17, 2006, the Defendant made a deposit into the Bank Account in the amount of $3,000.00, which resulted in a balance of $6,020.00 in the Bank Account. (Plaintiff's Exhibit 1; Defendant's Exhibit D).

15. Also on February 17, 2006, following the $3,000.00 deposit, the Defendant withdrew $3,000.00 from the Bank Account by preparing and signing a check payable to cash, leaving a balance of $3,020.00 in the Bank Account as of the close of business on February 17, 2006. (Plaintiff's Exhibit 1; Defendant's Exhibit D).

16. The Defendant testified that on February 17, 2006, instead of writing checks directly to third parties to pay the Plaintiff's bills, she wrote the $3,000.00 check to cash

because: (i) she needed to pay the Plaintiff's bills; (ii) she needed to get the money out of the Bank Account and give it to the Plaintiff's counsel; and (iii) that is what the bank told her to do. (Plaintiff's Exhibit 7 at p. 28-29; Testimony of the Defendant at the January 30, 2014 trial).

17. On February 23, February 27, March 6, and March 13, 2006, the Defendant made the following deposits and withdrawals from the Bank Account via "eTransfers" to and from a checking account bearing account number 4240640395:

February 23, 2006	$300.00	Withdrawal
February 27, 2006	$300.00	Withdrawal
February 27, 2006	$200.00	Withdrawal
March 6, 2006	$200.00	Deposit
March 6, 2006	$200.00	Withdrawal
March 13, 2006	$400.00	Withdrawal

(Plaintiff's Exhibit 1; Defendant's Exhibit D; Testimony of Defendant at January 30, 2014 trial).

18. At trial, the Defendant testified that she transferred funds from the Bank Account into her personal checking account and then utilized her personal debit card to pay the Plaintiff's bills. (Testimony of Defendant at January 30, 2014 trial).

19. As of the close of business on March 13, 2006, the Bank Account had a balance of $1,820.00. (Plaintiff's Exhibit 1; Defendant's Exhibit D).

20. The only evidence introduced at trial regarding an accounting of the funds in the Bank Account was the testimony of the Plaintiff and the Defendant and copies of two Bank Account statements for the period of February 2, 2006 through February 13, 2006 and February 14, 2006 through March 13, 2006. (Testimony of the Plaintiff and Defendant at the January 30, 2014 trial; Plaintiff's Exhibit 1; Defendant's Exhibits C and D). No evidence was

introduced regarding the balance of $1,820.00 in the Bank Account as of the close of business on March 13, 2006.

21. After the Plaintiff's counsel requested that the Defendant provide a specific, detailed accounting of the funds in the Bank Account, the Defendant delivered to the Plaintiff's counsel a money order in the amount of $2,020.00 payable to the Plaintiff, asserting that the $2,020.00 was the balance in the Bank Account after payment of the Plaintiff's bills in the amount of $1,200.00. (Plaintiff's Exhibit 6 at p. 5, 8, and 9; Defendant's Exhibits E, G, and H).

22. The Defendant failed to fully account for and pay over to the Plaintiff all monies in the Bank Account. (Testimony of Plaintiff at January 30, 2014 trial; Defendant's Exhibits D, E, F, G and H).

23. Sometime after the fund-raiser, the Plaintiff obtained insurance proceeds: (i) in the amount of $40,000.00 from the insurance carrier of the other vehicle involved in the motor vehicle accident; and (ii) in the approximate amount of $10,000.00 from the insurance carrier of the Defendant's brother. (Testimony of Plaintiff at January 30, 2014).

24. In August 2006, the Plaintiff loaned the Defendant $5,500.00 to purchase an automobile. The Plaintiff asserts that the Defendant was obligated to repay the loan with interest. Although the Defendant repaid a portion of the loan, the Defendant never repaid the entire loan. (Plaintiff's Exhibit 7 at p. 30-34; Defendant's Exhibit O; Testimony of Plaintiff and Defendant at January 30, 2014 trial).

25. In and around October and November 2008, funds of the Plaintiff in an amount not less than $25,000.00 were used by the Defendant to purchase a residence located at 12 Coe Avenue, Portland, Connecticut (the "Property"). (Plaintiff's Exhibit 6, Interrogatory No.

12; testimony of Plaintiff and Defendant at January 30, 2014 trial).

26. The Plaintiff claims that all of the funds used to purchase the Property were loaned by the Plaintiff to the Defendant. The Defendant claims that $25,000.00 of the funds used to purchase the Property were a gift from the Plaintiff to the Defendant. (Plaintiff's Exhibit 6, Interrogatory No. 12; testimony of Plaintiff and Defendant at January 30, 2014 trial, Defendant's Exhibit J).

27. For a period of time after the Defendant purchased the Property, the Plaintiff and the Defendant's brother also lived at the Property. The Plaintiff paid the share of the rent for the Defendant's brother. The Plaintiff often paid the obligations of the Defendant's brother throughout their relationship. (Testimony of the Plaintiff and the Defendant at January 30, 2014 trial).

28. On or about October 7, 2009, the financial affairs of the Plaintiff were placed into conservatorship and Heidi Guitard-Libera, the Plaintiff's step-mother, was appointed as the Conservator. (Defendant's Exhibit N at ¶ 3; Defendant's Exhibit O at p. 38).

29. Following her appointment, the Conservator commenced an action against the Defendant in the Connecticut Superior Court, J.D. Middlesex, entitled Heidi Guitard-Libera, Conservator for Shana Beaulieu v. Kelly Fox and Paul Cranick, CV-10-6002194-S (the "Superior Court action"). The Plaintiff filed a twelve count complaint against the Defendant and Paul Cranick alleging, among other things: (i) breach of fiduciary duty; (ii) conversion; (iii) statutory civil theft; and (iv) unjust enrichment. (Plaintiff's Exhibit 5).

30. In and around October, 2011, the Conservator and the Defendant resolved the claims asserted in the Superior Court action by executing a Mortgage Note in the amount of $15,000.00 payable by the Defendant to the Conservator, a Mortgage Deed in favor of the

Conservator recorded against the Property, and a General Release. (Plaintiff's Exhibits 8, 9 and 10).

31. The Defendant made seven payments under the terms of the Mortgage Note. The Defendant has made no further payments on the Mortgage Note. At the time the Defendant filed her Chapter 7 case, $13,200.00 remained due and owing under the Mortgage Note. (Testimony of Plaintiff and Defendant at January 30, 2014 trial).

32. On September 12, 2012, the Plaintiff commenced an action against the Defendant in the Connecticut Superior Court to recover monies owed under the Mortgage Note in a case entitled Shana Beaulieu v. Kelly Fox, MMX-CV-12-5008184-S (the "Breach of Mortgage Note action"). (Defendant's Exhibit A at ¶ 21).

33. On February 20, 2013, the Defendant filed a Chapter 7 Petition in the United States Bankruptcy Court for the District of Connecticut, which stayed the Breach of Mortgage Note action. (Defendant's Exhibit B at ¶ 22).

34. In the Schedules and Statement of Affairs filed with her Chapter 7 petition, the Defendant listed the following claims: (i) Schedule D: a secured claim of Heidi Guitard-Libera, Conservator for the Plaintiff, in the amount of $15,000.00 secured by a mortgage on the Property; and (ii) Schedule F: an unsecured claim of the Plaintiff as a "Money Judgment" in the amount of $27,800.00. (Case No. 13-30321, ECF. No. 1).

35. On May 28, 2013, the Plaintiff filed the Complaint in this action.

B. Conclusions of Law

While the Bankruptcy Code provides a debtor with a "fresh start," this unencumbered new beginning is reserved for the "honest but unfortunate debtor." *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991), *citing Local Loan Co. v. Hunt*, 292 U.S. 234 (1934). The

statutes governing nondischargeability of debts reflect a congressional decision to "exclude from the general policy of discharge certain categories of debt." *Id.* at 287. In *Grogan*, the Supreme Court established that in order for the Plaintiff to prevail on her claims, nondischargeability must be proven by a preponderance of the evidence. *Id.*

The facts and circumstances of this case paint a grim picture of events involving the parties over a period of years. The parties disagree on many facts and dispute many issues. After a thorough review all of the available evidence, including the testimony of the Plaintiff and the Defendant and the exhibits admitted at trial, the Plaintiff presented a more credible account of the events alleged in the Complaint.

1. <u>Settlement of the Superior Court action</u>

Approximately fifteen (15) months before the Defendant filed her Chapter 7 case, the Plaintiff and the Defendant settled all the claims in the Superior Court action by executing the Mortgage Note, the Mortgage Deed, and a General Release. Before addressing those claims, it is important to note that settlement of a fraud claim outside the bankruptcy court does not convert that claim to a dischargeable claim. *Archer v. Warner,* 538 U.S. 314, 123 S. Ct. 1462 (2003); *In re DeTrano*, 326 F.3d 319, 322 (2d Cir. 2003). In *Archer*, the United States Supreme Court discussed the dischargeability of a debt resulting from a previously settled state law fraud claim and noted that "the Court's basic reasoning in *Brown* applies" and "governs the outcome" of the dischargeability action. 538 U.S. at 321, *citing Brown v. Felsen*, 441 U.S. 127 (1979).

The factual circumstances in *Brown*, which are similar to this case, were summarized by the Court in *Archer* as follows:

> (1) Brown filed a state-court suit seeking money that he said Felsen had obtained through fraud; (2) the court entered a consent decree based on a stipulation providing that Felsen would pay Brown a certain amount; (3) neither the decree nor the stipulation indicated the payment was for fraud; (4) Felsen did not pay; (5)

> Felsen entered bankruptcy; and (6) Brown asked the Bankruptcy Court to look behind the decree and stipulation and hold that the debt was nondischargeable because it was a debt for money obtained by fraud.

Archer v. Warner, 538 U.S. 314, 319, 123 S. Ct. 1462, 1466.

In *Brown,* the Court reasoned "the mere fact that a conscientious creditor has previously reduced his claim to judgment should not bar further inquiry into the true nature of the debt." 442 U.S. at 138. Furthermore, the Court noted that Congress "intended the fullest possible inquiry" into whether a debt embodied in a stipulation and consent decree was for money obtained by fraud. *Id.* Based upon such reasoning, the Court in *Brown* held that "the bankruptcy court is not confined to a review of the judgment and record in the prior state-court proceeding when considering the dischargeability of [a debtor's] debt," and should instead look behind the stipulation and consent decree to determine if the debt was obtained by fraud. 442 U.S. at 138-39.

In *Archer*, the Court stated that "[t]he only difference we can find between *Brown* and the present case consists of the fact that the relevant debt here is embodied in a settlement, not in a stipulation and consent judgment." *Archer*, 538 U.S. at 321. The Court did not see how that difference "could prove determinative". *Id.* "The dischargeability provision applies to all debts that arise out of fraud . . . [and a] debt embodied in the settlement of a fraud case 'arises' no less 'out of' the underlying fraud than a debt embodied in a stipulation and consent decree." *Id.* Thus, even if the "settlement agreement and releases may have worked a kind of novation . . . that fact does not bar the Archers from showing that the settlement debt arose out of false pretenses, a false representation, or actual fraud and consequently is nondischargeable." *Id.* at 322 (internal quotations omitted).

Shortly after *Archer,* the United States Court of Appeals for the Second Circuit issued its decision in the case of *In re DeTrano*, 326 F.3d 319 (2d Cir. 2003). Like *Brown* and

Archer, the decision in *DeTrano* addressed previously settled tort claims. The Second Circuit held

> [b]oth the § 523(a)(2)(A) and § 523(a)(4) exceptions to discharge deal with fraudulent conduct. Accordingly, if the [settled] tort claims against [the debtor] would have created a nondischargeable debt under § 523(a)(4), had those claims been litigated to judgment . . . then it is no defense for [the debtor] to state that he has replaced that possible liability with a dischargeable contractual obligation through the settlement agreement. If the bankruptcy court determines that the debt . . . owe[d] pursuant to the settlement agreement "arises out of" fraud, that debt must be excepted from discharge.

In re DeTrano, 326 F.3d at 323.

The decisions in *Brown*, *Archer,* and *DeTrano* therefore govern the analysis the Court should undertake in this case. The Complaint in the Superior Court action alleged, among other things, breach of fiduciary duty, conversion, statutory civil theft, and unjust enrichment. All claims in the Superior Court action were settled for the sum of $15,000.00. However, as was true in *Brown*, *Archer,* and *DeTrano*, no evidence was presented to this Court to establish what portion of the $15,000.00 was attributable to the underlying allegations of fraud. Therefore, this Court must determine if the underlying claims in the Superior Court action, if proven, would create a nondischargeable debt under Section 523.

2. Fiduciary Defalcation

The initial debt owed to the Plaintiff arises out of a fund-raiser held for the Plaintiff's benefit following the motor vehicle accident. The Plaintiff alleges that the Defendant committed a "defalcation" under 11 U.S.C. § 523(a)(4) when she failed to turn over to the Plaintiff all of the monies collected at the fund-raiser.

To prevail on a claim of fiduciary defalcation under Section 523(a)(4), the Plaintiff must show: (i) the existence of a fiduciary relationship between the Plaintiff and Defendant, and (ii) a defalcation committed by the Defendant in the course of that relationship.

In re Nofer, 514 B.R. 346 (Bankr. E.D.N.Y. 2014); *accord, In re Yoshida*, 435 B.R. 102, 108 (Bankr. E.D.N.Y. 2010); *In re McDermott*, 434 B.R. 271, 280 (Bankr. N.D.N.Y. 2010) *aff'd sub nom. Econ. Dev. Growth Enterprises Corp. v. McDermott*, 478 B.R. 123 (N.D.N.Y. 2012); *see also, In re Eberhart*, 283 B.R. 97, 101 (Bankr. D. Conn. 2002) *subsequently aff'd,* 124 F. App'x 672 (2d Cir. 2005); *In re Welch*, 211 B.R. 788, 797 (Bankr. D. Conn. 1997).

a. Fiduciary Capacity

Under Section 523(a)(4), the issue "of whether a defalcation has occurred is reached only when the threshold determination that the debtor acted in a fiduciary capacity has been made." *Nofer*, 514 B.R. at 353, *quoting Andy Warhol Found. for the Visual Arts, Inc. v. Hayes (In re Hayes),* 183 F.3d 162, 170 (2d Cir. 1999). The Bankruptcy Code does not define the term "fiduciary" for purposes of 11 U.S.C. § 523(a)(4). *Yankowitz Law Firm v. Tashlitsky (In re Tashlitsky)*, 492 B.R. 640, 644 (Bankr. E.D.N.Y. 2013) *citing In re Hayes*, 183 F.3d at 167. The precise scope of the term is a matter of federal law, although "its application frequently turns upon obligations attendant to relationships governed by state law." *In re Hall*, 483 B.R. 281, 292 (Bankr. D. Conn. 2012), *quoting In re Hayes*, 183 F.3d at 166. Nonetheless, "what constitutes a fiduciary relationship under Connecticut law is a separate issue from what constitutes a 'fiduciary' within the purview of Section 523(a)(4) of the Bankruptcy Code" and not all state law fiduciaries also meet the definition of that term for purposes of Section 523(a)(4). *Id.*

In *Hayes*, the Second Circuit rejected the argument that a "fiduciary" is limited to trustees of an actual or technical trust, instead holding that "certain relationships not constituting actual [or technical] trusts are within the defalcation exception." 183 F.3d at 169. Courts in this District have further held that "'fiduciary capacity' under Section 523(a)(4)" may include

circumstances involving "'a difference in knowledge or power between fiduciary and principal which ... gives the former a position of ascendancy over the latter.'" *In re Wood*, 488 B.R. 265, 276 (Bankr. D. Conn. 2013), *quoting Hayes,* 183 F.3d at 167 (ellipsis in original).

In the particular circumstances of this case, the evidence presented establishes that the Defendant was acting in a fiduciary capacity and owed a fiduciary duty to the Plaintiff in connection with the fund-raiser. It is undisputed that the Defendant affirmatively decided to conduct a fund-raiser for the Plaintiff's benefit. Furthermore, the Defendant testified that she advertised the fund-raiser event and represented to the public that all the monies raised were to be used for the Plaintiff's benefit. Finally, it is clear that the Defendant voluntarily became the sole custodian of the monies raised expressly and exclusively for the Plaintiff's benefit.

The testimony of the Plaintiff and the Defendant established that both understood that the Defendant would collect and hold the monies, which would then be used for the Plaintiff's benefit. The Defendant opened the Bank Account for the purpose of depositing the funds collected at the fund-raiser. The Bank Account was opened in the name "Kelly Fox McIntosh Shana Beaulieu Fund." The Defendant's actions demonstrate her conscious and affirmative choice to be responsible and accountable for the funds. The Defendant took these actions when the Plaintiff was seriously injured, hospitalized, and unable to exercise any possession or control over the monies or over the Defendant's conduct. The Plaintiff credibly testified about the severity of her injuries which resulted in her diminished mental capacity, a condition that eventually required the appointment of a conservator to manage her affairs.

Therefore, under the particular circumstances of this case, the Defendant acted in a fiduciary capacity and had a fiduciary duty to the Plaintiff to account for and dispose of the monies collected at the fund-raiser.

b. **Defalcation**

"Defalcation" under Section 523(a)(4) is generally defined as "a failure to produce funds entrusted to a fiduciary and applies to conduct that does not necessarily reach the level of fraud, embezzlement or misappropriation." *In re Hall*, 483 B.R. 281, 294 (Bankr. D. Conn. 2012). The Supreme Court recently clarified that defalcation involves a "culpable" mental state, comprising either knowledge or gross recklessness regarding the improper nature of the relevant fiduciary conduct. *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754, 1757, 185 L. Ed. 2d 922 (2013). Specifically, the Supreme Court explained that

> where the conduct at issue does not involve bad faith, moral turpitude, or other immoral conduct, the term requires an intentional wrong. We include as intentional not only conduct that the fiduciary knows is improper but also reckless conduct of the kind that the criminal law often treats as the equivalent. Thus . . . [w]here actual knowledge of wrongdoing is lacking, we consider conduct as equivalent if the fiduciary consciously disregards (or is willfully blind to) a substantial and unjustifiable risk that his conduct will turn out to violate a fiduciary duty. That risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves *a gross deviation* from the standard of conduct that a law-abiding person would observe in the actor's situation.

Bullock, 133 S. Ct. at 1759-60, 185 L. Ed. 2d 922 (internal quotations omitted, emphasis in original).

Sufficient evidence was introduced to find a defalcation by a preponderance of the evidence, including the gross recklessness that such a finding requires. An obvious example of defalcation is the Defendant's failure to account for, *at the very least,* the $1,820.00 balance in the Bank Account as of the close of business on March 13, 2006. The balance in the Bank Account was never turned over to the Plaintiff and no evidence was introduced to explain what happened to that balance.

Further evidence of the Defendant's gross recklessness was established by her testimony. The Defendant made several contradictory assertions regarding the amount and final disposition of the fund-raiser monies. The Defendant did not introduce *any* exhibits to corroborate her testimony about paying the Plaintiff's bills or documenting what happened to any of the sums[2] deposited in the Bank Account. The Defendant's failure to account for the fund-raiser monies, the Defendant's further failure to turn over all the monies to the Plaintiff, and her unsupported, conclusory and contradictory testimony is "a gross deviation from the standard of conduct that a law-abiding person would observe" in her situation. *See, e.g., In re Shao Ke*, 09-32272, 2013 WL 4170250 (Bankr. N.D.N.Y. Aug. 14, 2013) (finding a Section 523(a)(4) defalcation and noting "[t]he Court's ruling is predicated both on the evidence presented and Debtor's lack of credibility . . . [as, i]n light of the standard set by the Supreme Court in *Bullock*, Debtor's credibility is highly relevant to [Creditor's] § 523(a)(4) nondischargeability claim"); *appeal denied, judgment aff'd sub nom. Shao Ke v. Jianrong Wang*, 5:13-CV-1203-GTS, 2014 WL 4626329 (N.D.N.Y. Sept. 15, 2014).

Given the circumstances discussed above and the controlling case law, both elements of fiduciary defalcation for purposes of Section 523(a)(4) have been proven by a preponderance of the evidence. A judgment of nondischargeability for fiduciary defalcation will therefore enter in favor of the Plaintiff pursuant to 11 U.S.C. § 523(a)(4).

3. <u>Embezzlement</u>

Although the Complaint does not specifically allege embezzlement, the Plaintiff also proved by a preponderance of the evidence that the underlying debt was obtained by

[2] The Defendant testified that she provided a full itemized accounting to the Plaintiff of all monies spent on the Plaintiff's behalf, yet such an accounting was not introduced into evidence. The only payment introduced into evidence was a money order in the amount of $2,020.00 payable to the Plaintiff dated April 4, 2006, and not a check from the Bank Account.

embezzlement. *See* 11 U.S.C. § 523(a)(4)[3]; *Grogan v. Garner*, 498 U.S. 279 (1991); *In re Lyon*, 348 B.R. 9, 24 (Bankr. D. Conn. 2006).

"Embezzlement" for the purposes of Section 523(a)(4) is defined by reference to federal common law, *see In re Miano*, 265 B.R. 352, 356 (Bankr. D. Conn. 2001), as "the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come." *In re Rivera*, 217 B.R. 379, 385 (Bankr. D. Conn. 1998). Embezzlement "consists of three elements: (1) the debtor rightfully possessed another's property; (2) the debtor appropriated the property for use other than the use for which the property was entrusted; and (3) the circumstances implied a fraudulent intent." *In re Dybowski*, No. 07-21152, 2012 WL 1945503 at *14 (Bankr. D. Conn. May 30, 2012) (internal quotations omitted). A court may determine fraudulent intent from the facts and circumstances surrounding the act. *In re Lyon,* 348 B.R. at 24. Further, embezzlement does not require the debtor to be acting in a fiduciary capacity. *Id.*

a. Rightful possession of another's property

As noted above, the evidence established that the Defendant helped organize and conduct the fund-raiser for the Plaintiff's benefit. The Defendant opened up the Bank Account and deposited the funds into the Bank Account solely for the Plaintiff's benefit. The parties both testified that the Defendant was the only person authorized to deposit, transfer or withdraw funds into and out of the Bank Account. Although the exhibits introduced show a slightly smaller dollar amount, both the Plaintiff and the Defendant testified that $3,200.00 was raised at the fund-raiser and deposited into the Bank Account by the Defendant. *See, e.g.*, Defendant's Exhibit A at ¶ 14; Defendant's Exhibit B at ¶14; Plaintiff's Exhibit 6 at p.5. The two Bank

[3] To the extent necessary, pursuant to Fed. R. Civ. Pro. 15 and Fed. R. Bankr. Pro. 7015, the Plaintiff is granted leave to amend the Complaint to allege embezzlement under 11 U.S.C. § 523(a)(4).

Account statements for the periods February 2, 2006 through March 13, 2006, admitted into evidence as Plaintiff's Exhibit 1 and Defendant's Exhibits C and D (the "Account Statements"), establish that $3,020.00 was deposited into the Bank Account on February 2, 2006, with no further deposits occurring for a period of fifteen (15) days. Furthermore, the Plaintiff agrees that at the outset, the Defendant was in rightful possession of the monies obtained at the fund-raiser. As such, the Plaintiff proved the first element of embezzlement by at least a preponderance of the evidence.

b. Misappropriation of another's property

The second element of a Section 523(a)(4) embezzlement claim, that the debtor "appropriated the property for use other than the use for which the property was entrusted[,]" *Dybowski*, 2012 WL 1945503; *supra,* was also proven by the Plaintiff by a preponderance of the evidence. The testimony and documentary evidence establish that the Defendant withdrew, transferred, converted to cash or otherwise disposed of at least some portion of the monies[4] contained in the Bank Account without explanation. Although the Defendant testified that all the monies in the Bank Account were either used to pay the Plaintiff's bills or given to the Plaintiff's counsel, the testimony was not supported by any exhibits demonstrating that even a single bill was paid by the Defendant on the Plaintiff's behalf. The Plaintiff's own more credible testimony was that the Plaintiff herself had already paid the expenses the Defendant claimed she paid with the fund-raiser monies.

Furthermore, although the Account Statements establish that $3,020.00 was initially deposited into the Bank Account on February 2, 2006, a thorough review shows that an additional $3,000.00 was deposited into the Bank Account on February 17, 2006. Thus, at some

[4] The characterization of a "portion of the monies" is necessary due to the lack of complete and accurate testimony regarding the specific amounts in the Bank Account.

point in time on February 17, 2006, the balance in the Bank Account was $6,020.00. However, after making the $3,000.00 deposit, the Defendant withdrew $3,000.00 by issuing a check payable to cash. The Defendant testified that the $3,000.00 in cash was to be used to pay the Plaintiff's bills and that any remaining balance would be turned over to the Plaintiff's counsel. However, the Defendant did not introduce any evidence regarding the additional $3,000.00 deposited into the Bank Account. The Defendant only explained what happened to $3,000.00 in cash withdrawn from the Bank Account, not what happened to the entire $6,020.00 that was in the Bank Account on February 17, 2006, prior to the cash withdrawal. The circumstances surrounding the $3,000.00 deposit and withdrawal on February 17, 2006, are, at the very least, questionable. The existence of the $3,000.00 disparity between the parties' testimony of the amount raised at the fund-raiser and the amount of funds in the Bank Account on February 17, 2006, again highlights issues regarding the Defendant's credibility.

Weighing the evidence in light of the above considerations, the Plaintiff's testimony that there were no outstanding or unpaid bills that the Defendant could have paid on her behalf with the monies in the Bank Account is more persuasive. Therefore, the Plaintiff has proven by a preponderance of the evidence that the Defendant's dissipation of those monies in the Bank Account was for a "use other than the use for which the property was entrusted."

c. Circumstances imply fraudulent intent

As to the third and final element of embezzlement, the Plaintiff must prove that the circumstances imply a fraudulent intent. The Plaintiff proved this element by at least a preponderance of the evidence. The Defendant's testimony regarding the monies in the Bank Account was inconsistent and contained unsupported assertions. For example, the Defendant's stated reason why she chose to write a $3,000.00 check to cash, rather than issuing a check to the

Plaintiff's counsel or to a third party to whom the Plaintiff owed money, was not credible. The Defendant testified that the bank would not permit her to write a check out of the Bank Account (a checking account) to another party and "told her" that if she needed money, she must make a check out to cash. Setting aside the lack of any corroborating evidence in support of this claim, it is not credible that a bank would deny the very individual who opened a checking account from writing a check to a third party from that account. The Defendant's testimony that the bank required her to make out a check to cash is not credible. The Defendant's lack of credibility suggests fraudulent intent inferable from the circumstances.

In addition, in response to a question on cross examination about the process the Defendant followed to pay the Plaintiff's bills, the Defendant testified that she regularly "eTransferred" the funds out of the Bank Account into her personal account and then paid the Plaintiff's bills via her debit card. The Account Statements show several eTransfers for various round sums out of the Bank Account and into the Defendant's personal checking account over the course of February and March 2006.

The transfer of funds out of the Bank Account and into the Defendant's personal checking account merely to pay the Plaintiff's bills was never adequately explained in the record. In addition, the fact that these regular eTransfers took the form of round sums, (e.g., $200.00 transferred out on February 27, 2006, $200.00 transferred out on March 6, 2006, $400.00 transferred out on March 13, 2006), does not support the claim that they were used to pay bills. These eTransfers support an inference that the asserted payment of bills was merely a pretext for other activity to use the monies. This pretext and the accompanying fraudulent intent is further bolstered by the Defendant's testimony that she preferred to pay the Plaintiff's bills by debit card. Payment by debit card should have enabled the Defendant to have clear and accurate

records of the payment of the Plaintiff's bills. Although the Defendant repeatedly testified that she itemized the payment of the Plaintiff's bills, not one piece of evidence was introduced beyond the Defendant's vague, contradictory, and not credible testimony that she used the monies from the fund-raiser to pay the Plaintiff's bills. The absence of such proof, coupled with the other circumstances noted above, further bolsters a finding of fraudulent intent.

As outlined above, the requisite elements of a Section 523(a)(4) embezzlement claim have been proven by at least a preponderance of the evidence with regard to fund-raising monies. Accordingly, the evidence establishes that the debt was for money obtained through embezzlement and judgment will enter in favor of the Plaintiff pursuant to 11 U.S.C. § 523(a)(4)[5].

IV. CONCLUSION

For the reasons set forth above, judgment will enter in favor of the Plaintiff. The unpaid portion of the Mortgage Note in the amount of $13,200.00 is deemed nondischargeable pursuant to 11 U.S.C. § 523(a)(4).

SO ORDERED.

At New Haven, Connecticut this 10th day of November, 2014.

BY THE COURT

Julie A. Manning
Chief United States Bankruptcy Judge

[5] The Plaintiff's claims under 11 U.S.C. §§ 523 (a)(2) and 523(a)(6) do not need to be addressed due to the entry of judgment in favor of the Plaintiff under 11 U.S.C. § 523(a)(4).