UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

GEORGE E. HAIDAMOUS, aka CELL ONE, aka DISCOUNT WIRELESS GROUP, aka SIGNAL COMMUNICATIONS, aka SPARTAN WIRELESS,	Case No. DL 07-04176 Hon. Scott W. Dales Chapter 7
Debtor. /_____	
LESTER J. MORGAN,	Adversary Proceeding No. 07-80294
Plaintiff,	
v.	
GEORGE E. HAIDAMOUS and SIGNAL COMMUNICATIONS, LLC,	
Defendants. /_____	

MEMORANDUM DECISION AND ORDER

In his three-count Amended Complaint in this Adversary Proceeding, Plaintiff Lester J. Morgan ("Plaintiff") seeks to except from discharge a debt in the amount of $30,356.76 (plus attorneys fees) pursuant to 11 U.S.C. § 523(a)(2) alleging fraud[1] and (a)(4) alleging embezzlement[2] and breach of fiduciary duty.[3] This matter is before the court on the Plaintiff's Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56 (the "Rule 56

[1] Amended Complaint, Count I.
[2] Amended Complaint, Count II.
[3] Amended Complaint, Count III.

Motion"). The court has jurisdiction to render judgment pursuant to 28 U.S.C. § 1334. The adversary proceeding is a "core proceeding" under 28 U.S.C. § 157(b)(2)(I) because it involves the Debtor's right to a discharge with respect to a particular debt.

Under Federal Rule of Civil Procedure 56, I am required to render judgment if the pleadings, affidavits, discovery and disclosure materials on file 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. The governing law determines in large measure whether factual disputes are material.

I am familiar with the standards governing summary judgment as expressed in the Supreme Court's seminal decision in Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986), and its more recent progeny. I also understand that I should, where practicable, determine what material facts are not at issue and what material facts remain in dispute, by examining the pleadings and evidence before me, and by interrogating the attorneys. I have done so in response to the Rule 56 Motion.

Plaintiff asserts a right to summary judgment on Count I (the "Fraud Count") and Count III (the "Defalcation Count") but not with respect to the embezzlement allegations in Count II.

In regard to the Fraud Count, I have read the Amended Complaint and the Rule 56 Motion, reviewed 11 U.S.C. § 523(a)(2), and considered the parties' oral and written arguments.

To prevail on the Fraud Count, Plaintiff must prove that the Defendant fraudulently misrepresented his intent to perform his duties under an agreement (see Amended Complaint, Exh. A) at the time the parties entered into the bargain. Further, he must prove that the

Defendant's fraudulent misrepresentation induced him to pay $30,356.76 to the Defendant, directly or indirectly, in exchange for a 50% membership interest in Signal Communications, LLC. In support of the Rule 56 Motion, the Plaintiff pointed to the Defendant's post-payment conduct, contending that the Defendant failed to perform his end of the bargain. As a result of these alleged contractual breaches, the Plaintiff urges me to infer that the Defendant, from the very beginning, never intended to perform the agreement, and that he misrepresented his intent when he signed the agreement.

I have also reviewed the Defendant's Response to the Rule 56 Motion, including, *inter alia*, the Defendant's Counter Affidavit (the "Counter Affidavit"). The Counter Affidavit raises genuine issues of fact for trial on precisely what statements the Defendant made, what he intended at the time, and whether he misrepresented his intent. In addition, Defendant states he thought Plaintiff was supposed to be a "silent partner." *See* Counter Affidavit at ¶ 2. The Counter Affidavit also offers a different view of the facts surrounding the Defendant's conduct throughout the parties' business venture.

I fully understand that a party opposing a motion for summary judgment may not simply rest on his pleadings, Summers v. Leis, 368 F.3d 881 (6th Cir. 2004), but I also understand that finding in favor of the Plaintiff on the Fraud Count would require me to determine, as a factual matter, that the Defendant misrepresented his intent. Questions of intent do not easily lend themselves to resolution on a Rule 56 motion, involving as they frequently do the credibility of the alleged wrong-doer. Manly v. Plasti-Line, Inc., 808 F.2d 468 (6th Cir. 1987). Because the law favors trial on the merits over summary disposition, and given the factual nature of the intent

element in the Fraud Count, I am constrained to draw inferences against the moving party. Agristor Financial Corp. v. Van Sickle, 967 F.2d. 233 (6th Cir. 1992). Accordingly, the court will deny the Rule 56 Motion with respect to the Fraud Count.

Plaintiff fares no better with respect to the Defalcation Count. He argues that the Michigan Uniform Partnership Act (the "UPA") and the Michigan Limited Liability Company Act (the "LLCA") impose fiduciary duties upon the Defendant that would support a judgment of non-dischargeability under 11 U.S.C. § 523(a)(4). The Plainitff cites Holmes v. Kraus (In re Kraus), 37 B.R. 126 (Bankr. E.D. Mich. 1984), and Longo v McLaren (In re McLaren), 3 F.3d 958 (6th Cir. 1993). I have reviewed the Kraus and McLaren cases, as well as other authorities within our Circuit regarding the scope of 11 U.S.C. § 523(a)(4), including Board of Trustees of the Ohio Carpenters Pension Fund v. Bucci (In re Bucci), 493 F.3d 635 (6th Cir. 2007). I respectfully disagree with the holding in Kraus because the Sixth Circuit has repeatedly held that an exception to discharge under Section 523(a)(4) requires a technical trust (express or statutory), not a trust *ex maleficio*. In other words, our Circuit has reiterated the Supreme Court's pre-Code teaching in Davis v. Aetna Acceptance Co., 293 U.S. 328 (1934), that the defalcation exception to discharge applies only to debts arising from "the placement of a specific *res* in the hands of the debtor." Bucci, 493 F.3d at 639-40. As the Supreme Court held, "[i]t is not enough that, by the very act of wrongdoing out of which the contested debt arose, the bankrupt has become chargeable as trustee *ex maleficio*." Davis, 293 U.S. at 333.

The Plaintiff's reliance on the UPA and the LLCA demonstrates the futility of the Defalcation Count by revealing that the contested debt is not the specific *res* described in those

statutes. The fiduciary provisions of the UPA and LLCA refer to a *res* different from the Plaintiff's initial investment, the recovery of which he seeks in this proceeding. The statutory language in both Acts arguably requires the Defendant to account to the limited liability company or partnership and hold as trustee for either entity any profit or benefit derived by the manager or the partner from any transaction connected with the conduct of the limited liability company or partnership. See MCLA §§ 449.21 and 450.4404(5). The debt at issue in this proceeding relates to the creation of Signal Communications, LLC, not the conduct of its business. This reinforces the point that the Plaintiff does not seek to recover a specific *res* because he cannot show the existence of a technical trust, and neither the UPA nor the LLCA fills the void. The fiduciary duties that MCLA § 450.4404(5) imposes run to the corporate entity, not to the Plaintiff. And, to the extent that the Plaintiff suggests the Defendant owed a fiduciary duty directly to the Plaintiff, this duty, even if established as a matter of fact, is more akin to the obligations under a common law fiduciary relationship – obligations that would not support relief under 11 U.S.C. § 523(a)(4). Bucci, 493 F.3d at 639-40 (citing R.E. America, Inc. v. Garver (In re Garver), 116 F.3d 176, 180 (6th Cir. 1997)).

Although the Plaintiff argued in his brief and at oral argument that McLaren affirmed the lower courts' findings that a partner's breach of fiduciary duty will support an exception to discharge under 11 U.S.C. § 523(a)(4), in fact the Sixth Circuit found that the plaintiff's success under 11 U.S.C. § 523(a)(2) made it unnecessary to address the partnership argument. McLaren, 3. F.3d at 964 n.3. Therefore, the McLaren case does not support the Plaintiff's position. More generally, statutory exceptions to discharge are construed in favor of the

Debtor. Bucci, 493 F.3d at 643. I am honoring that rule of construction by rejecting Plaintiff's broad interpretation of "defalcation" and denying the Rule 56 Motion.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Plaintiff's Rule 56 Motion is DENIED.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Memorandum Decision and Order pursuant to Fed. R. Bankr. P. 9022 and LBR 5005-4 upon Richard A. Foster, Esq. and Philip E. Hodgman, Esq.

Dated: April 30, 2008
Grand Rapids, Michigan

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Scott W. Dales
United States Bankruptcy Judge