

Slip Copy, 2010 WL 2737201 (Bkrcty.D.N.M.)
 (Cite as: 2010 WL 2737201 (Bkrcty.D.N.M.))

Only the Westlaw citation is currently available.

United States Bankruptcy Court,
 D. New Mexico.
 In re David BRUTON and Charlene Bruton, Debtors.
 First New Mexico Bank, Plaintiff,
 v.
 David Bruton and Charlene Bruton, Defendants.
Bankruptcy No. 7-09-13458 JA.
Adversary No. 09-1187 J.

July 12, 2010.

Frederick Sherman, Deming, NM, for Plaintiff.

Steve H. Mazer, William P. Gordon, Albuquerque, NM, for Defendants.

MEMORANDUM OPINION

ROBERT H. JACOBVITZ, Bankruptcy Judge.

*1 THIS MATTER is before the Court on the Motion to Dismiss Third Amended Complaint on the Pleadings and for Summary Judgment (“Motion”) filed by Defendants, David Bruton and Charlene Bruton, by and through their attorneys Bill Gordon and Associates (Steve H. Mazer). *See* Docket No. 13.

PROCEDURAL HISTORY

Plaintiff First New Mexico Bank's Third Amended Complaint Excepting Dischargeability of Debt (“Complaint”), filed April 6, 2010, requests a determination that a certain debt is non-dischargeable under 11 U.S.C. § 523(a)(2)(A) (fraud), 11 U.S.C. § 523(a)(4) (fraud or defalcation while acting in a fiduciary capacity), and/or 11 U.S.C. § 523(a)(6) (willful and malicious injury). Plaintiff's non-dischargeability claims arise from the sale of De-

fendants' business, Sure Printing & Signs LLC (“Sure Printing”), including certain equipment subject to a Commercial Security Agreement dated February 21, 2007 (“Security Agreement”), allegedly without obtaining Plaintiff's prior authorization and without paying all the proceeds from the sale to Plaintiff. Plaintiff seeks a nondischargeability determination as to both David Bruton and his wife Charlene Bruton.

The Motion seeks dismissal of all claims under Rule 12, Fed.R.Civ.P., made applicable to this adversary proceeding by Rule 7012, Fed.R.Bankr.P. Although the Motion also requests summary judgment in the alternative only as to the claims against Charlene Bruton, Defendants failed to file with the Motion a written memorandum in support of the Motion with a list of authorities relied upon, or a statement of the material facts as to which the movants contend no genuine issue exists, as required by NM Local Rule 7056 for motions for summary judgment.^{FN1} Further, Defendants failed to submit with the Motion any evidence supporting their claim for summary judgment.^{FN2} The Motion itself argues only that that the Third Amended Complaint fails to state a claim.

^{FN1}. NM LBR 7056 provides in part: “The moving party shall file with the motion a written memorandum containing a short, concise statement in support of the motion with a list of authorities relied upon. A motion for summary judgment filed without the required written memorandum may be summarily denied.” The Rule further provides: “The memorandum in support of the motion shall set out as its opening a concise statement of all of the material facts as to which movant contends no genuine issue exists. The facts shall be numbered and shall refer with particularity to those portions of the record upon which movant relies.” NM LBR 7056.

FN2. Eight days after filing the Motion, Defendants filed an Affidavit of Charlene Bruton in support of the Motion. Thereafter, on May 7, 2010, Plaintiff filed the Affidavit of Jacob Penn in opposition to the Motion.

At a Scheduling Conference held May 13, 2010, with the concurrence of the parties, the Court decided to treat all aspects of the Motion as a motion for summary judgment,^{FN3} and gave the parties an opportunity to submit additional evidence and legal authorities in support of or in opposition to the Motion.^{FN4} Plaintiff filed a Supplemental Response to Motion to Dismiss and Motion for Summary Judgment as to Third Amended Complaint (“Supplemental Response”) on May 18, 2010, and Defendants filed an affidavit of David Bruton in support of the Motion on May 25, 2010. In defense of the Motion, Plaintiff also submitted to the Court a certified copy of the transcript of the deposition of Defendant David B. Bruton II taken October 28, 2009, with attached exhibits, and a certified copy of the transcript of the deposition of Defendant Charlene Bruton taken March 18, 2010. Defendants agreed to the admissibility of the 2003 tax returns attached to Plaintiff’s Supplemental Response as Exhibit 1.

FN3. At the Scheduling Conference, before the Motion was converted to a motion for summary judgment as to all claims, the Court initially ruled that the Motion should be denied as to Plaintiff’s claims against David Bruton under 11 U.S.C. § 523(a)(2)(A) and 11 U.S.C. § 523(a)(6), and granted as to Plaintiff’s claims against David Burton and Charlene Bruton under 11 U.S.C. § 523(a)(4). This opinion supersedes those rulings.

FN4. Whenever matters outside the pleadings are considered, a motion to dismiss must be treated as a motion for summary judgment under Fed.R.Civ.P. 56. See Fed.R.Civ.P. 12(d), made applicable to ad-

versary proceedings by Fed.R.Bankr.P. 7012 (“If, on a motion under rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.”).

Defendants contend that they were entitled to sell the equipment as part of the sale of their business, and that because the equipment that Defendants sold continues to be used at the same business location and was sold without repudiation of Plaintiff’s Security Agreement, Plaintiff has not been damaged by the sale of the assets. Further, because the transactions at issue involved Defendants’ business, Sure Printing, and because Defendant Charlene Bruton claims that she did not actively participate in the operation of the business, Defendant Charlene Bruton asserts that Plaintiff cannot sustain a non-dischargeability claim against her.

*2 Consistent with the Court’s initial ruling at the Scheduling Conference, summary judgment cannot be granted in favor of Defendant Bruton on Plaintiff’s claims under 11 U.S.C. § 523(a)(2)(A) or 11 U.S.C. § 523(a)(6) based on any of the additional materials submitted by the parties. Similarly, Plaintiff cannot sustain its claim against Defendants premised on 11 U.S.C. § 523(a)(4). As for Defendants’ request for summary judgment on Plaintiff’s claims against Defendant Charlene Bruton, the Court finds, based on the Defendants’ Motion, Plaintiff’s Supplemental Response, the supporting and opposing affidavits, and the certified transcripts of the depositions, that the undisputed facts are sufficient to grant summary judgment in favor of Defendant Charlene Bruton on Plaintiff’s claim under 11 U.S.C. § 523(a)(6), but that a genuine issue of material fact precludes summary judgment on Plaintiff’s claim against Defendant Charlene Bruton under 11 U.S.C. § 523(a)(2)(A).

DISCUSSION

Summary Judgment Standards

It is appropriate for the Court to grant summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Fed.R.Civ.P. 56(c)*, made applicable to adversary proceedings by *Fed . R.Bankr.P. 7056*. In considering a motion for summary judgment, the Court must “ ‘examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment.’ “ *Wolf v. Prudential Inc. Co. of America*, 50 F.3d 793, 796 (10th Cir.1995)(quoting *Applied Genetics Int’l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir.1990)). In defending a motion for summary judgment, the party opposing summary judgment may not rely on the allegations contained in the pleadings, but must, through affidavit testimony or other evidence, demonstrate specific facts showing that there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)(stating that “a party opposing a properly supported motion for summary judgment may not rest on mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial .”)

There is no genuine issue as to the following facts:

1. Defendants at all material times were principals and owners of Sure Printing.
2. On or about February 21, 2007, on behalf of and as manager of Sure Printing, Defendant David Bruton II executed a Promissory Note in favor of Plaintiff in the principal amount of \$60,100.00. *Deposition of David B. Bruton, II-Exhibit 6*.
3. Defendant Charlene Bruton did not sign the

Promissory Note. *Id.*

4. On the same date, to secure the Promissory Note, Defendant David Bruton II executed a Commercial Security Agreement on behalf of and as manager of Sure Printing. *Deposition of David B. Bruton, II-Exhibit 7*.

*3 5. Defendant Charlene Bruton did not sign the Commercial Security Agreement. *Id.*

6. The borrower on the Promissory Note and the Commercial Security Agreement is identified as Sure Printing & Signs LLC.

7. Tax returns filed by Sure Printing for 2003 reflect that Defendant Charlene Bruton holds a 50% interest in Sure Printing as a limited partner. The 2003 Tax return also reflects that the name of the taxpayer is Sure Printing & Signs, LLC. *See attachment to Affidavit in Opposition to Motion to Dismiss Third Amended Complaint attached to Supplemental Response.*

Affidavit and Deposition Testimony

In support of the Motion, Defendant Charlene Bruton filed an affidavit that included the following statements which Plaintiff has not controverted with any evidence:

1. That Charlene Bruton was not employed by Sure Printing or by anyone else between August 2004 and June of 2007; she was a full time student during that time. *Affidavit of Charlene Bruton*, ¶ 9.
2. That she was issued a 24% interest in Sure Printing to permit Sure Printing to apply for gender preferred contracts, but that no such contracts were ever won. *Afidavit of Charlene Bruton*, ¶ 11.
3. That she attended membership meetings of Sure Printing in 2006, but the managing member did not discuss his intent to restructure or borrow

Slip Copy, 2010 WL 2737201 (Bkrtcy.D.N.M.)
 (Cite as: 2010 WL 2737201 (Bkrtcy.D.N.M.))

approximately 60,000 from Plaintiff, nor was she informed that the loan would be secured by assets of Sure Printing or that David Bruton would personally guarantee the loan. *Affidavit of Charlene Bruton*, ¶ 15.

4. That she did not participate in the sale or otherwise authorize the sale of the collateral without Plaintiff's authority or otherwise. *Affidavit of Charlene Bruton*, ¶ 21.

5. That the proceeds from the sale of Defendants' business were not paid to her or to the Defendants' joint bank account. *Affidavit of Charlene Bruton*, ¶ 23.

6. That she was never a managing or controlling officer of Sure Printing. *Affidavit of Charlene Bruton*, ¶ 25.

Similarly, Defendant David Bruton filed an affidavit in support of the Motion that included the following statements which Plaintiff has not controverted with any evidence:

1. That Charlene Bruton was only on the business premises for personal reasons and never as an employee of Sure Printing after October of 1999. *Affidavit of David Bruton*, ¶ 8.

2. That Charlene Bruton was not asked to read and did not read the agreements for the sale of the business before the sales were consummated. *Afidavit of David Bruton*, ¶ 13.

3. That the proceeds from the sale of the business were not deposited in Defendants' joint account. *Affidavit of David Bruton*, ¶ 14.

The Affidavit of Jacob Penn offered by Plaintiff in opposition to the Motion includes testimony that after the sale of the assets of Sure Printing David Bruton came to First New Mexico Bank, and paid the Bank \$15,000 on the loan in question. *Affidavit of Jacob Penn*, ¶ 2. Mr. Penn's affidavit states that Mr. Bruton represented to the Bank that the sale price was enough to pay off the loan, that Sure

Printing had not yet received all of the sale proceeds, and that the balance owed on the loan would be paid from the remaining sale proceeds. *Id.* at ¶ 2. Mr. Penn states that he later discovered that the sale price was not enough to pay off the loan, that Sure Printing had already received all of the sale price, and that if Mr. Penn had known the truth the Bank would have taken steps to protect its interests, including action to collect from the collateral and attaching funds from the sale that had not been paid to the Bank. *Id.* at ¶¶ 2 and 3.

*4 The Affidavit of Teresa Sanchez offered by Plaintiff in opposition to the Motion does not include any statements regarding Ms. Bruton or her involvement in Sure Printing. The Affidavit of Jacob Penn states that he relied on the 2003 tax returns which reflected that Ms. Bruton was a 50/50 partner in Sure Printing, and that he believed that her status as an equal partner with Mr. Bruton meant that she was responsible along with Mr. Bruton. *See Affidavit of Jacob Penn*, ¶¶ 7-8.

Plaintiff also relies on certain statements in the deposition of Charlene Bruton in which Ms. Bruton stated that she was told about the loan with Plaintiff (Deposition of Charlene Bruton, p. 19, line 8), that she recognized that she had a 50% interest in the business (contrary to the 24% interest as stated in her affidavit) (Deposition of Charlene Bruton, p. 26, line 2), and that she was at the business on a personal basis all the time (Deposition of Charlene Bruton, p. 16, lines 24-25).

Defendant Charlene Bruton asserts that she did not actively participate in the transactions that form the basis of Plaintiff's claims, and, further, that she did not actively participate in the business operations of Sure Printing. It is undisputed that she did not sign the Promissory Note or the Commercial Security Agreement on behalf of Sure Printing. Defendant's deposition testimony that she was at the business on a personal basis quite often is not inconsistent with her testimony that she did not take an active role in the day to day business operations of Sure Printing. Further, Plaintiff has not alleged that Charlene

Slip Copy, 2010 WL 2737201 (Bkrtcy.D.N.M.)
 (Cite as: 2010 WL 2737201 (Bkrtcy.D.N.M.))

Bruton made any direct representations to Plaintiff concerning the sale of Defendants' business or the disposition of the proceeds from the sale of the business.^{FN5} Thus, for Plaintiff to prevail against Charlene Bruton, it must impute the alleged wrongdoing of David Bruton to Charlene Bruton based upon her status as a member of Defendants' business entity, Sure Printing.

FN5. A knowing misrepresentation is a required element under 11 U.S.C. § 523(a)(2)(A). See *Fowler Bros v. Young (In re Young)*, 91 F.3d 1367, 1373 (10th Cir.1996) (the required elements under 11 U.S.C. § 523(a)(2)(A) are: “1) [t]he debtor made a false representation; the debtor made the representation with the intent to deceive the creditor; the creditor relied on the representation; the creditor's reliance was [justifiable]; and the debtor's representation caused the creditor to sustain a loss.”); *Field v. Mans*, 516 U.S. 59, 116 S.Ct. 437, 133 L.Ed.2d. 351 (1995) (changing the standard of reliance under 11 U.S.C. § 523(a)(2)(A) from “reasonable” to “justifiable.”).

Claim Against David Bruton Under 11 U.S.C. § 523(a)(2)(A).

A creditor seeking a determination of non-dischargeability under 11 U.S.C. § 523(a)(2)(A) bears the burden of proving, by a preponderance of the evidence, that: “1) [t]he debtor made a false representation; the debtor made the representation with the intent to deceive the creditor; the creditor relied on the representation; the creditor's reliance was [justifiable]^{FN6}; and the debtor's representation caused the creditor to sustain a loss.” *Young*, 91 F.3d at 1373. “False representations are ‘representations knowingly and fraudulently made that give rise to the debt.’ “ *Adams County Dept. of Soc. Services v. Sutherland-Minor (In re Sutherland-Minor)*, 345 B.R. 348, 354 (Bankr.D.Colo.2006) (quoting *Cobb v. Lewis (In re*

Lewis), 271 B.R. 877, 885 (10th Cir.BAP2002)). False pretenses, as distinguished from false representations, “involve[] an implied misrepresentation that is meant to create and foster a false impression.” *Gordon v. Bruce (In re Bruce)*, 262 B.R. 632, 636 (Bankr.W.D.Pa.2001) (citing *In re Scarlata*, 127 B.R. 1004, 1009 (N.D.Ill.1991)). Defendants have failed to demonstrate an absence of a genuine issue of material fact and entitlement to judgment as matter of law regarding Plaintiff's nondischargeability against David Bruton under 11 U.S.C. § 523(a)(2)(A).

FN6. *Field v. Mans*, 516 U.S. 59, 116 S.Ct. 437, 133 L.Ed.2d. 351 (1995) changed the standard of reliance under 11 U.S.C. § 523(a)(2)(A) from “reasonable” to “justifiable.”

*5 The Affidavit of Jacob Penn offered by Plaintiff in opposition to the Motion includes statements addressing all required elements for a claim of non-dischargeability under 11 U.S.C. § 523(a)(2)(A). The alleged false representation is Mr. Bruton's statement to Mr. Penn upon remitting payment of \$15,000 from the sale of the Defendant's business that Mr. Bruton had sold the business, received a portion of the proceeds from the sale, and would pay the balance owed on the loan from the remaining sales proceeds when, in fact, Mr. Bruton had already received \$45,000 from the sale of the business and did not remit the entire sales proceeds to Plaintiff. Mr. Penn states that he relied on Mr. Bruton's statements. Because Mr. Bruton did not remit the entire \$45,000 to the Plaintiff, the Plaintiff was damaged.

Mr. Bruton's Affidavit is not sufficient to establish that there are no genuine issues of material fact as to the elements necessary to a non-dischargeability claim under 11 U.S.C. § 523(a)(2)(A). For example, Mr. Bruton states that he disclosed to Plaintiff his plans for the sale of Sure Printing before and during the negotiation for the sale of the business, and that the Plaintiff's representative “acquiesced in the sale and accepted partial payment with the understand-

Slip Copy, 2010 WL 2737201 (Bkrtcy.D.N.M.)
 (Cite as: 2010 WL 2737201 (Bkrtcy.D.N.M.))

ing that it would receive the balance when the purchasers of the business paid off the sale prices.” *Affidavit of David Bruton*, ¶¶ 18. and 20. However, given the conflicting affidavit testimony from the Plaintiff’s representatives, Defendant David Bruton is not entitled to summary judgment on Plaintiff’s non-dischargeability claim under 11 U.S.C. § 523(a)(2)(A).

Claim Against Charlene Bruton Under 11 U.S.C. § 523(a)(2)(A).

It may be possible under certain limited circumstances to impute liability to parties who did not actively participate in the alleged wrongdoing under principles of agency or partnership and, consequently, sustain a creditor’s non-dischargeability claim under 11 U.S.C. § 523(a)(2)(A) against a person who did not perpetuate fraud.^{FN7} Courts that impute liability under partnership or agency principles look to state law to determine whether the “innocent” party would be held jointly and severally liable with the wrongdoing party.^{FN8} In imposing vicarious liability under 11 U.S.C. § 523(a)(2)(A), some courts reason that because 11 U.S.C. § 523(a)(2)(A) “focuses on the character of the debt, not the culpability of the debtor or whether the debtor benefitted from the fraud,” non-dischargeability under that section requires a finding that debtors “cannot discharge any debts that arise from fraud so long as they are liable to the creditor for the fraud [under state law].” *M.M. Winkler & Associates*, 239 F.3d. at 749 (citing Lawrence Ponoroff, *Vicarious Thrills: The Case for Application of Agency Rules in Bankruptcy Dischargeability Litigation*, 70 Tul. L.Rev. 2515, 2542 (1996)).

FN7. See, e.g., *Strang v. Bradner*, 114 U.S. 555, 5 S.Ct. 1038, 29 L.Ed. 248 (1885) (imputing liability of guilty partner to innocent partners, provided the guilty party acted within the scope of his authority and provided that the partnership benefitted from the fraud in some way, whether direct

or indirect); *Matter of Luce*, 960 F.2d 1277, 1284 n. 9 (5th Cir.1992)(fraud of one partner may be imputed to another partner for acts taken in the ordinary course of the partnership’s business); *In re M.M. Winkler & Associates*, 239 F.3d 746 (5th Cir.2001)(holding that debt arising from innocent partner’s fraud, and for which innocent partner was jointly and severally liable under state law, was non-dischargeable under § 523(a)(2)(A)); *In re In re Tsurukawa*, 287 B.R. 515, 527 (9th Cir. BAP2002)(imputing fraud of one spouse to the “innocent” spouse upon a finding that the spouses operated a partnership business, reasoning that one partner’s wrongdoing that occurred during the course of the partnership business can be imputed to an innocent partner); *Cutclif v. Reuter (In re Reuter)*, 427 B.R. 727, 757 (Bankr.W.D.Mo.2010) (acknowledging that, “[i]n the Eighth Circuit, a partner’s liability under § 523(a)(2)(A) may be imputed to an agent or partner even in the absence of evidence that the agent or partner knowingly participated in the fraud.”)(citing *In re Treadwell*, 423 B.R. 309, 316-318 (8th Cir. BAP2010); *Maynard Sav. Bank v. Banke (In re Banke)*, 275 B.R. 317, 329 (Bankr.N.D.Iowa 2002)(stating that “[i]f a husband and wife are partners in a business, separate from the marital relationship, both may be held responsible for the fraudulent acts of one of them.”) (citations omitted); See also, *Impulsora del Territorio Sur v. Cecchini (In re Cecchini)*, 780 F.2d 1440, 1444 (9th Cir.1986) (imputing knowledge and intent of partner who acted on behalf of the partnership in the ordinary course of the partnership’s business to debtor-partner despite no direct involvement of debtor-partner in converting funds).

Slip Copy, 2010 WL 2737201 (Bkrtcy.D.N.M.)
 (Cite as: 2010 WL 2737201 (Bkrtcy.D.N.M.))

FN8. See, e.g., *Capital One Bank v. Walters (In re Walters)*, 2010 WL 1531084, at *5 (Bankr.E.D.La. April 14, 2010)(stating that “[a]gency issues are matters of state law, not federal law” and applying applicable Louisiana law in determining whether to impute liability under agency principles).

However, courts have been reluctant to extend vicarious liability outside of traditional partnership or agency relationships.^{FN9} Holding a debtor liable for the fraudulent acts of another party when there has been no allegation of a partnership or agency relationship is “inconsistent with the general principle that § 523(a)(2)(A) ‘contemplates frauds involving moral turpitude or intentional wrong; fraud implied in law which may exist without imputation of bad faith or immorality, is insufficient.’ “ *RecoverEdge L.P. v. Pentecost*, 44 F.3d at 1297 (quoting *Allison v. Roberts (In re Allison)*, 960 F.2d 481, 483 (5th Cir.1992)(remaining citation and internal quotes omitted)). Unlike general partnerships, where all partners are jointly and severally liable for the debts incurred by any one of the general partners, business forms like corporations and limited liability companies generally protect individuals from personal liability unless the individual officer, director, shareholder or limited liability member actively participated in the wrongful acts, or cause otherwise exists to pierce the corporate veil.^{FN10}

FN9. See *RecoverEdge L.P. v. Pentecost*, 44 F.3d 1284, 1287 (5th Cir.1995) (rejecting argument that fraud of two shareholders in a corporation could be imputed to the debtor, who was president and one-third shareholder for purposes of § 523(a)(2)(A)); *In re DavisCourt*, 353 B.R. 674 (10th Cir. BAP2006)(affirming bankruptcy court's refusal to impute alleged fraud of debtor-husband to debtor-wife despite debtor-wife's position as officer of the debtor's company, where there was no

evidence that she made any representation to the creditor or that she authorized her husband to act as her agent); *Bank of Washington County v. Wright (In re Wright)*, 299 B.R. 648 (Bankr.M.D.Ga.2003)(refusing to impute fraud of one shareholder, officers, and directors of a corporation to the debtor who was the only other shareholder, officer and director of the corporation). See also, *Porter Capital Corp. v. Campbell (In re Campbell)*, 2008 WL 4682785, *4 (Bankr.E.D.Tenn. October 21, 2008) (noting that “[c]ourts addressing the issue of vicarious liability under § 523(a)(2)(A) have uniformly refused to extend the provision's fraud exception to fraud committed by someone other than the debtor, except in the narrow circumstance of partnership/agency liability.”)

FN10. See, e.g., N.M.S.A.1978 § 53-19-13 (Repl.Pamp.2001) (“... the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company.”). See also, *Cash America Fin. Services, Inc. v. Fox (In re Fox)*, 370 B.R. 104, 113 (6th Cir.BAP2007) (acknowledging that “[u]nless the corporate veil is pierced, general corporate law principles shield officers and directors ... from personal liability for the debts or actions of the separate corporate entity[]” but that under applicable Ohio agency law, “ ‘a corporate officer can be held personally liable for a tort committed while acting within the scope of his employment .’ ”)(quoting *Yo-Can, Inc. v. The Yogurt Exch., Inc.* 149 Ohio App.3d 513, 778 N.E.2d 80, 90 (2002)).

*6 In this case, the contracting party was Sure Printing, not the Defendants individually. If Sure

Slip Copy, 2010 WL 2737201 (Bkrtcy.D.N.M.)
 (Cite as: 2010 WL 2737201 (Bkrtcy.D.N.M.))

Printing at all material times was a limited liability company, then any alleged fraud perpetrated by David Bruton would not be imputed to Charlene Bruton. There exists a material issue of fact whether Sure Printing was a limited liability company at all material times. The Commercial Security Agreement and Promissory Note and 2003 tax return reflect the name, Sure Printing & Signs, LLC. The Affidavit of David Bruton states that Sure Printing is a New Mexico limited liability company. On the other hand, the Affidavit of Jacob Penn offered by Plaintiff in defense of the Motion asserts that he believed Charlene Bruton and David Bruton were partners in their business.^{FN11}

The 2003 Tax return has the box checked stating that Charlene Bruton and David Bruton hold limited partnership interests, even though the name of the taxpayer is Sure Printing & Signs, LLC. In Under New Mexico law, formation of a limited liability company requires the filing of a certificate of organization with the New Mexico Public Regulatory Commission. See N.M.S.A.1978 §§ 53-19-7 through 53-19-10.^{FN12}

In view of the conflicting evidence before the Court, in the absence of any evidence whether a certificate of organization was properly filed for Sure Printing and that Sure Printing remained registered with the State of New Mexico as a limited liability company at all material times, the Court cannot conclude on summary judgment that the Defendants' business form is a limited liability company as Defendants' assert. Thus a genuine issue of material fact exists as to whether the Defendants operated Sure Printing as a limited liability company. Summary judgment on the claim against Charlene Bruton under 11 U.S.C. § 523(a)(2)(A) will be denied.^{FN13}

^{FN11.} Plaintiff has not alleged that Defendant Charlene Bruton otherwise authorized her husband David Bruton to act as her agent concerning the sale of the Defendants' business.

^{FN12.} Attached to the Affidavit of Charlene Bruton is a copy of the Operating

Agreement of Sure Printing & Signs, LLC. However, the Affidavit does not authenticate the Operating Agreement; rather, the Affidavit of Charlene Bruton states only that the operating agreement "sets out the management format" for Sure Printing. Because the Operating Agreement of Sure Printing has not been authenticated, the Court cannot consider it as evidence that the Defendants' business is a limited liability company. See *Goguen v. Textron, Inc.*, 234 F.R.D. 13, 16 (D.Mass.2006) (noting that any documentary evidence submitted in support of summary judgment must either be properly authenticated or self authenticating under the Federal Rules of Evidence.). And in any event, the existence of an operating agreement would not establish formation of a limited liability company in accordance with the Limited Liability Act, N.M.S.A.1978 §§ 53-19-1 et. seq.

^{FN13.} The Court is not deciding whether nondischargeable liability would be imputed to Charlene Bruton if Sure Printing operated as a partnership.

Claim Against Charlene Bruton and David Bruton Under 11 U.S.C. § 523(a)(4)

In defense of the Motion, Plaintiff has submitted a copy of the Commercial Security Agreement which includes the following language:

Unless waived by lender, all proceeds from any disposition of the Collateral (for whatever reason) shall be held in trust for Lender and shall not be commingled with any other funds.

The fiduciary relationship contemplated by 11 U.S.C. § 523(a)(4) is extremely narrow; it only arises when there is an express or technical trust, and must exist prior to and not as a result of the wrongdoing. See *Duncan v. Neal (In re Neal)*, 324

Slip Copy, 2010 WL 2737201 (Bkrtcy.D.N.M.)
 (Cite as: 2010 WL 2737201 (Bkrtcy.D.N.M.))

B.R. 365, 370 (Bankr.W.D.Okla.2005), *aff'd*, 342 B.R. 384 (10th Cir. BAP2006) (“The Tenth Circuit has taken a very narrow view of the concept of fiduciary duty under this section.”); *Allen v. Romero*, 535 F.2d 618, 621 (10th Cir.1976) (stating that “[t]he exception under § 17(a)(4) [the predecessor under the former Bankruptcy Act to § 523(a)(4)] applies only to technical trusts and not those which the law implies from a contract.”) (citation omitted). *See also*, *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 333, 55 S.Ct. 151, 154, 79 L.3d. 393 (1934)(noting that the debtor “must have been a trustee before the wrong and without reference thereto.”).

*7 The language contained in the Commercial Security Agreement upon which Plaintiff relies is insufficient in itself to create a fiduciary relationship within the meaning of 11 U.S.C. § 523(a)(4); such language consists of one sentence of boilerplate buried in a loan document. *See Southwest State Bank v. Ellis (In re Ellis)*, 310 B.R. 762, 765 (Bankr.W.D.Okla.2004) (“Use of terms such as “trust” or “in trust” are insufficient by themselves to create an express or technical trust.”)(citing *American Honda Fin. Corp. v. Tester (In re Tester)*, 62 B.R. 486, 491 (Bankr.W.D.Va.1986)); *Ford Motor Credit Co. v. Talcott (In re Talcott)*, 29 B.R. 874, 878 (Bankr.D.Kan.1983)(stating that the language in a document purporting to create a trust is not conclusive; rather, substance controls over form). As explained by the bankruptcy court in *In re Ellis*, this type of language contained in a security agreement “does not impose a fiduciary duty; it simply creates a debtor-creditor relationship.” *Ellis*, 310 B.R. at 765. Because such language is routinely included in security agreements, courts find that such language is insufficient to create an express or technical trust^{FN14} sufficient to except the debt from discharge under 11U.S.C. § 523(a)(4), especially where, as here, there is no other mention of a trust relationship between the debtor and the creditor. *Ellis*, 310 B.R. at 765. (citing *Bombardier Credit, Inc. v. Theis (In re Theis)*, 109 B.R. 474, 475 (Bankr.M.D.Fla.1989) and *Barclays American/Busi-*

ness Credit, Inc. v. Long (In re Long), 44 B.R. 300, 305 (Bankr.D.Minn.1983)). *See also Electrolux Fin. Corp. v. Grant (In re Grant)*, 325 B.R. 728, 734 (Bankr.W.D.Ky.2005) (rejecting creditor's argument that because the security agreement provides that the proceeds are to be held “in trust,” a trust and attendant fiduciary duties was formed, stating that “[t]he Creditor cannot turn this contractual obligation into a fiduciary relationship merely by inserting the words ‘in trust’ into a security agreement.”). *But see Kubota Tractor Corp. v. Strack (In re Strack)*, 524 F.3d 493, 499 (4th Cir .2008)(applying Virginia law and finding that a security agreement providing that borrower “shall segregate the proceeds ... and hold the same in trust” was sufficient to demonstrate an intent to create an express trust).

FN14. A technical trust is a trust “imposed by state statutes ... which may lead to the existence of a fiduciary relationship.” *Neal*, 324 B.R. at 370. *See also, Cundy v. Woods (In re Woods)*, 284 B.R. 282, 288 (D.Colo.2001)(noting that “[a] technical trust may arise as a result of defined obligations imposed upon the debtor by state or federal statute.”) (citing *Allen v. Romero*, 535 F.2d at 622).

Plaintiff also relies on the following New Mexico statutes in connection with its claim under 11 U.S.C. § 523(a)(4): N.M.S.A.1978 § 56-10-19 (fraudulent transfer as to present creditors)^{FN15}; N.M .S.A.1978 § 30-16-18 (criminal liability based on improper sale, disposal, removal or concealing of encumbered property)^{FN16}; and N.M.S.A.1978 § 30-16-6 (criminal fraud based on an intentional misappropriation).^{FN17} A state statute can give rise to a technical trust within the meaning of 11 U.S.C. § 523(a)(4). *See, e.g., Allen v. Romero*, 535 F.2d at 621 (finding that the New Mexico statute governing licensed contractors “clearly imposes a fiduciary duty upon contractors who have been advanced money pursuant to construction contracts.”). However, none of these statutes contain trust-type

language specifically providing that one party is charged with holding specific property as trustee for another party.^{FN18} Rather, they impose liability for wrongdoing, which, even if such statutes could be construed as creating trust-like obligations, would constitute a resulting trust or trust *el maleficio* which only arises as a result of the wrong. Such trusts cannot support a non-dischargeability claim under 11 U.S.C. § 523(a)(4).^{FN19} The Court, therefore, confirms its ruling at the Scheduling Conference that Plaintiff's claim against Defendants under 11 U.S.C. § 523(a)(4) fails as a matter of law, whether premised on the Commercial Security Agreement or on the above New Mexico statutes.

FN15. That section provides:

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation. N.M.S.A.1978 § 56-10-19.

FN16. That section provides, in part:

A. Improper sale, disposal, removal or concealing of encumbered property consists of a person knowingly, and with intent to defraud, selling, transferring, removing or concealing, or in any manner disposing of, any personal property upon which a security interest, chattel mortgage or other lien or encumbrance has attached or been retained, without the written consent of the holder of the security interest, chattel mortgage, conditional sales contract, lien or encumbrance.

....

G. Whoever commits improper sale, disposal, removal or concealing of encumbered property when the value of the property exceeds twenty thousand dollars (\$20,000) is guilty of a second degree felony. N.M.S.A.1978 § 30-16-18

FN17. That section provides, in part:

A. Fraud consists of the intentional misappropriation or taking of anything of value that belongs to another by means of fraudulent conduct, practices or representations ...

F. Whoever commits fraud when the value of the property misappropriated or taken exceeds twenty thousand dollars (\$20,000) is guilty of a second degree felony.

N.M.S.A.1978 § 30-16-6.

FN18. See *Tway v. Tway (In re Tway)*, 161 B.R. 274, 279 (Bankr.W.D.Okla.1993) (explaining that an express trust includes specific language in a written document providing that one party is directed to hold specific property as trustee for another party).

FN19. See, *Tway*, 161 B.R. at 279 (“the term fiduciary capacity ... does not extend to trusts *ex maleficio* or those that may be imposed because of the very act of wrongdoing out of which the contested debt arose.”) (citation omitted); *In re Baird*, 114 B.R. 198, 202 (9th Cir. BAP1990) (stating that, in order for a state statute to give rise to a fiduciary duty for non-dischargeability purposes, the statute must “impose a trust prior to and without reference to the wrong which created the debt.”) (citing *In re Weedman*, 65 B.R. 288, 291 (Bankr.W.D.Ky.1986)). See also, *Fox-*

Slip Copy, 2010 WL 2737201 (Bkrtcy.D.N.M.)
 (Cite as: 2010 WL 2737201 (Bkrtcy.D.N.M.))

worth Gailbraith Lumber Co. v. Manelos (In re Manelos), 337 B.R. 409 (Bankr.D.N.M.2006)(concluding that a New Mexico statute that references the wrong that gives rise to the debt cannot support a claim under 11 U.S.C. § 523(a)(4)).

Claim Against David Bruton Under 11 U.S.C. § 523(a)(6).

*8 Plaintiff's complaint also includes a claim for non-dischargeability under 11 U.S.C. § 523(a)(6). Non-dischargeability under § 523(a)(6) requires an intentional act *and* an intentional harm, not merely an intentional act that results in a consequent injury.^{FN20} Plaintiff's claim under 11 U.S.C. § 523(a)(6) is premised upon the sale of Plaintiff's collateral contrary to the terms of the Commercial Security Agreement. Claims of this nature, which amount to a debtor's conversion of the creditor's collateral, can support a claim under 11 U.S.C. § 523(a)(6), provided the creditor can show that the debtor acted with knowledge of the creditor's security interest and, nevertheless, took action in violation of those rights by converting the proceeds from the sale of the creditor's collateral to the debtor's own use, knowing that the creditor would suffer as a result.^{FN21} Defendant David Bruton's Affidavit stating that he "did at no time act knowingly, willfully, maliciously, or wrongfully" as to Plaintiff's interests is insufficient to establish that Defendant failed to act with the requisite intent. Such statements are self-serving and conclusory, and not supported by specific facts, and cannot serve to defeat [or grant] a motion for summary judgment.^{FN22} Consequently, summary judgment cannot be granted in favor of Defendant David Bruton on Plaintiff's non-dischargeability under 11 U.S.C. § 523(a)(6).

FN20. See *Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S.Ct. 974, 977, 140 L.Ed.2d 90 (1998)(holding that "the word 'willful' in (a)(6) modifies the word 'injury,' indicat-

ing that nondischargeability takes a deliberate or intentional *injury*, not merely ... a deliberate or intentional *act* that leads to injury.") (emphasis in original).

FN21. See, e.g., *Bancfirst v. Padgett (In re Padgett)*, 105 B.R. 665, 667 (Bankr.E.D.Okla.1989)(finding a malicious conversion by the president of the business who failed to remit the proceeds derived from the sale of the creditor's collateral, stating that "malicious intent must be demonstrated by evidence that the debtor had knowledge of the creditor's rights and that, with that knowledge, proceeded to take action in violation of those rights.") (quoting *In re Nelson*, 67 B.R. 491, 497 (Bankr.D.Minn.1985)(internal quotation marks and remaining citation omitted)); *Ocean Equity Group, Inc. v. Wooten*, 423 B.R. 108, 135 (Bankr.E.D.Va.2010)(finding that debtor who converted creditor's collateral by selling his business's equipment without remitting the proceeds from the sale to the creditor acted "willfully and maliciously" within the meaning of § 523(a)(6)); *First Am. Title Ins. Co. v. Lett (In re Lett)*, 238 B.R. 167, 190 (Bankr.W.D.Mo.1999) (debtor's conversion of sales proceeds constituted a willful and malicious injury under 11 U.S.C. § 523(a)(6)). See also, *Barclays American/Business Credit, Inc. v. Long (In re Long)*, 774 F.2d 875, 879, 881 (8th Cir.1985)(formulating the following test to determine whether a conversion constitutes a willful and malicious injury: the conduct must be "(1) headstrong and knowing ('willful') and, (2) targeted at the creditor ('malicious'), at least in the sense that the conduct is certain or almost certain to cause financial harm."). Not all acts of conversion will, however, support a non-dischargeable claim for willful and malicious injury. See, e.g., *In re Peklar*, 260

Slip Copy, 2010 WL 2737201 (Bkrtcy.D.N.M.)
 (Cite as: 2010 WL 2737201 (Bkrtcy.D.N.M.))

F.3d 1035, 1039 (9th Cir.2001)(debt was dischargeable when the debtor's conversion of the creditor's property "was at worst negligent, and at best 'innocent or technical.'").

FN22. See *In re Loper*, 329 B.R. 704, 707 (10th Cir. BAP2005)("An affidavit containing conclusory statements without specific supporting facts lacks probative value, and, thus, cannot defeat summary judgment.") (citing *Harris v. Beneficial Oklahoma, Inc. (In re Harris)*, 209 B.R. 990, 997 (10th Cir. BAP1997)); *In re Wickens*, 416 B.R. 775, 776 (Bankr.D.N.M.2009)(noting that "statements of mere belief in an affidavit must be disregarded" and noting further that "conclusory and self-serving affidavits are insufficient.")(citing *Hall v. Bellmon*, 935 F.2d 1106, 1111 (10th Cir.1991)).

Claim Against Charlene Bruton Under 11 U.S.C. § 523(a)(6).

Finally, Plaintiff's claim against Defendant Charlene Bruton under 11 U.S.C. § 523(a)(6) fails as a matter of law. Because 11 U.S.C. § 523(a)(6) FN23 requires a willful and malicious injury caused "by the debtor," courts uniformly reject vicarious or imputed liability under this section. FN24 As noted by the bankruptcy court in *Nolan*, the addition of the phrase "by the debtor" to 11 U.S.C. § 523(a)(6), the successor to former Bankruptcy Act § 17(a)(8), "indicates a rejection of an imputed or vicarious liability theory." 220 B.R. at 732 (citations omitted). This Court agrees that non-dischargeability of a debt under 11 U.S.C. § 523(a)(6) cannot, as a matter of law, be based on imputed or vicarious liability of the debtor for acts committed by someone else. Consequently Defendants are entitled to summary judgment on Plaintiff's non-dischargeability claim against Charlene Bruton premised upon 11 U.S.C. § 523(a)(6).

FN23. Section 523(a)(6) provides, in relevant part:

A discharge under section 727 ... of this title does not discharge an individual debtor from any debt-

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity.

11 U.S.C. § 523(a)(6).

FN24. See, e.g., *Hamilton v. Nolan (In re Nolan)*, 220 B.R. 727 (Bankr.D.Dist.Col.1998)(refusing to impute liability to vice-president, part-owner for purposes of non-dischargeability under § 523(a)(6)); *Columbia Farms Dist., Inc v. Maltais (In re Maltais)*, 202 B.R. 807, 813 (Bankr.D.Mass.1996)(acts of husband in transferring assets of wholly owned corporation in which creditor held a security interest could not be imputed to wife for purposes of 11 U.S.C. § 523(a)(6), agreeing "with the majority [of courts] who have ruled that non-dischargeability of a debt under § 523(a)(6) cannot be grounded on the imputation to the debtor of the acts of another.").

CONCLUSION

Based on the foregoing, the Court concludes that Defendant's Motion should be granted, in part. Summary judgment will be granted in favor of Defendant Charlene Bruton on Plaintiff's claims against Charlene Bruton under 11 U.S.C. § 523(a)(6) and 11 U.S.C. § 523(a)(4) and granted in favor of Defendant David Bruton on Plaintiff's claim against David Bruton under 11 U.S.C. § 523(a)(4). Summary judgment is denied with respect to Plaintiff's nondischargeability claims against David Bruton based on 11 U.S.C. § 523(a)(2)(A) and 11 U.S.C. § 523(a)(6) and its claim against Charlene Bruton based on 11 U.S.C.

Slip Copy, 2010 WL 2737201 (Bkrcty.D.N.M.)
(Cite as: 2010 WL 2737201 (Bkrcty.D.N.M.))

§ 523(a)(2)(A). An order consistent with this ruling
will be entered accordingly.

Bkrcty.D.N.M.,2010.

In re Bruton

Slip Copy, 2010 WL 2737201 (Bkrcty.D.N.M.)

END OF DOCUMENT