

**FILED**

**JUN 11 2012**

United States Bankruptcy Court  
San Jose, California

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re

JAMES PATRICK MESSINA,

Debtor.

JAMES KUTLESA,

Plaintiff,

vs.

JAMES PATRICK MESSINA,

Defendant.

Case No. 10-53873-ASW

Chapter 7

Adv. Proc. No. 10-05248

**ORDER DENYING PLAINTIFF'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT, WITHOUT PREJUDICE**

This matter comes before the Court on a Motion for Partial Summary Judgment filed by Plaintiff James Kutlesa (hereafter "Plaintiff"), who is represented by attorney Leo Siegel. Defendant James Patrick Messina, who is represented by attorney Scott Sagaria, has not filed any opposition to the motion. The motion was set to be heard on June 12, 2012, at 2:15 p.m., but based upon the moving papers, the Court sees no purpose for oral argument.

1 Despite the lack of an opposition, the Court is nevertheless  
2 compelled to deny the motion, without prejudice, for reasons which  
3 the Court shall explain.

4 **I. Standard of Review**

5 Summary judgment shall be rendered by the Court if the  
6 pleadings, depositions, answers to interrogatories, and admissions  
7 on file, together with the affidavits, if any, show that there is  
8 no genuine issue as to any material fact and that the moving party  
9 is entitled to a judgment as a matter of law. Fed. R. Bankr. P.  
10 7056 (incorporating Fed. R. Civ. P. 56); Matsushita Elec. Indus.  
11 Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 584-85 (1986). All  
12 reasonable inferences must be drawn against the moving party.  
13 Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970); United  
14 States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Material facts  
15 are those that may affect the outcome of the case. A dispute as to  
16 a material fact is genuine if there is sufficient evidence for a  
17 reasonable jury to return a verdict for the non-moving party.  
18 Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 248 (1986). Where the  
19 moving party has the burden of proof at trial -- as Plaintiff does  
20 here -- the movant must affirmatively demonstrate that no  
21 reasonable trier of fact could find for the Defendant. Soremekun  
22 v. Thrifty Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007).

23 Here, Plaintiff moves for summary judgment on the first four  
24 claims in Plaintiff's adversary complaint. On each of these  
25 claims, Plaintiff bears the burden of proof at trial. Therefore, in  
26 order to prevail on the instant motion, Plaintiff bears the burden  
27 of producing sufficient evidence to support the elements of each of  
28 Plaintiff's claims.

1           **II. Analysis**

2           The first three claims on which Plaintiff seeks summary  
3 judgment are asserted under various subsections of 11 U.S.C. § 523,  
4 and the fourth is asserted under 11 U.S.C. § 727(a)(3). On each of  
5 these claims, Plaintiff seeks a determination that Defendant's debt  
6 to Plaintiff in the approximate amount of \$280,000 -- which  
7 allegedly represents the equity Plaintiff held in real property  
8 transferred to Defendant -- is not dischargeable due to fraud.  
9 Plaintiff also asks that Defendant be denied a Chapter 7 discharge,  
10 also due to fraud.

11           **Problem 1: Fraud was Never Pled with Particularity.**

12           In considering the instant motion, the first problem which  
13 became apparent to the Court is that the claims are not narrowly  
14 focused given the manner in which the claims were pled. Under Fed.  
15 R. Bankr. P. 7009, which incorporates Fed. R. Civ. P. 9, and Rule  
16 9(b) in particular, the circumstances constituting fraud must be  
17 pled with particularity. Allegations of fraud must be "specific  
18 enough to give defendants notice of the particular misconduct . . .  
19 so that they can defend against the charge and not just deny that  
20 they have done anything wrong[.]" Kearns v. Ford Motor Co., 567  
21 F.3d 1120, 1124 (9th Cir. 2009) (cites and quotes omitted).  
22 Pleading fraud with particularity requires pleading "the who, what,  
23 when, where, and how" of the alleged fraudulent acts. Id.

24           Here, Plaintiff's complaint alleges fraud but alleges no  
25 specific facts to support fraud. Instead, Plaintiff's complaint is  
26 premised entirely upon a state court complaint filed in the Santa  
27 Clara County Superior Court, which was never fully adjudicated.  
28 The adversary complaint refers generally to the state court

1 complaint, but in pleading the claims, Plaintiff never made any  
2 attempt to link particular acts of fraud to the nondischargeability  
3 or § 727 claims being asserted. The complaint offers no specifics  
4 as to what actions Defendant took, or when, where, or how Defendant  
5 took such actions. Instead, the Court is left to guess the facts  
6 on which each claim is based.

7 Although the matter is before the Court on Plaintiff's summary  
8 judgment motion, and Defendant has not moved to dismiss the claims  
9 for a pleading deficiency under rule 9(b), the failure to plead  
10 fraud with particularity presents a problem because the Court is  
11 unable to discern the claims (and the facts underlying any claims)  
12 on which Plaintiff moves for summary judgment. Arguably, Plaintiff  
13 might cure these pleading deficiencies through production of  
14 evidence linked to the elements of each claim. However, the motion  
15 for summary judgment is equally deficient.

16 **Problem 2: The Motion is Deficient.**

17 The Motion for Partial Summary Judgment is deficient because  
18 the Plaintiff asks the Court to determine that the Defendant  
19 violated state law and does not address the required elements of  
20 the claims being asserted in the adversary proceeding. In essence,  
21 the Plaintiff is asking the Court to rule upon the merits of the  
22 state law claims which Plaintiff asserted in the Santa Clara County  
23 Superior Court but which were never fully adjudicated there,  
24 presumably because of the filing of the Defendant's bankruptcy case  
25 and the automatic stay. However, the issue this Court must  
26 determine is whether the Plaintiff has supported the Plaintiff's  
27 claims asserted under the Bankruptcy Code with sufficient evidence.

28

1           **Claim 1 - § 523(a)(2)**

2           Claim 1 alleges that Defendant's debt is not dischargeable  
3 under 11 U.S.C. § 523(a)(2). Claim 1 is very general and does not  
4 specify a particular subsection of § 523(a)(2), which as a general  
5 matter disallows a debtor from obtaining a discharge from a debt  
6 for money, property, services, or an extension, renewal, or  
7 refinancing of credit, obtained in one of many possible fraudulent  
8 manners, including through written and oral representations. Claim  
9 1, itself, does not specify any particular fraudulent manner in  
10 which Defendant allegedly procured the debt, but instead refers to  
11 the unverified state court complaint in which the Plaintiff  
12 asserted various state law claims against Defendant under the  
13 California Home Equity Sales Contracts Act, the California  
14 Foreclosure Consultant's Act, and the California Credit Services  
15 Act. Generally, Plaintiff alleges that Defendant committed acts of  
16 fraud by embezzling Plaintiff's funds.

17           In the motion, Plaintiff makes no specific argument concerning  
18 why Plaintiff is entitled to relief on Claim 1. Plaintiff does not  
19 specify what evidence supports the claim, or what provisions in  
20 § 523(a)(2) form the basis of Claim 1. Because Claim 1 is too  
21 amorphous and Plaintiff has made no factual demonstration to  
22 support it, the Court cannot grant Plaintiff summary judgment on  
23 this claim.

24           **Claim 2 - § 523(a)(2)(A)**

25           Claim 2 alleges that the Defendant's debt is not dischargeable  
26 under § 523(a)(2)(A). According to In re Cai, No. 08-31525-BR,  
27 slip. op., 2012 WL 1588834 at \*3 (B.A.P. 9th Cir. 2012), a creditor  
28

1 must establish the following five elements to establish such a  
2 claim:

3 (1) the debtor made representations; (2) that at the time  
4 he knew were false; (3) that he made them with the  
5 intention and purpose of deceiving the creditor; (4) that  
6 the creditor relied on such representations; and (5) that  
7 the creditor sustained the alleged loss and damage as the  
8 proximate result of the debtor's misrepresentations.

9 A creditor bears the burden of proving each of these elements, and  
10 exceptions to discharge under this statute are construed strictly  
11 against creditors and in favor of debtors. Id.

12 In the Motion for Partial Summary Judgment and supporting  
13 memorandum, Plaintiff has made no attempt to link Plaintiff's  
14 evidence to these elements. Although pages 9 and 10 of the  
15 memorandum argue that Defendant made false representations on which  
16 Plaintiff relied to Plaintiff's detriment, Plaintiff has not  
17 offered any evidence of any specific representations made by  
18 Defendant to Plaintiff, when the representations were made, or how  
19 the representations were false. As evidence, Plaintiff relies  
20 exclusively upon unanswered requests for admissions -- which are  
21 deemed admitted under Fed. R. Civ. P. 36 -- as well as a  
22 declaration from Plaintiff. However, these documents are  
23 conclusory. Plaintiff's declaration contends that Defendant agreed  
24 to perform credit restoration services for Plaintiff in accordance  
25 with a "plan," but Plaintiff offers no evidence as to what those  
26 services would be, what the "plan" was, how Plaintiff justifiably  
27 relied, how Defendant failed to perform, or even what  
28 representations Defendant made in connection with the "plan."  
Compare In re Ma, No. LA 07-01907-BR, slip. op., 2011 WL 3300156  
(B.A.P. 9th Cir. 2011), in which the Bankruptcy Appellate Panel  
affirmed a mid-trial dismissal of an adversary proceeding where the

1 only evidence of a § 523(a)(2)(A) claim was a conclusory  
2 declaration lacking specific facts. Moreover, the requests for  
3 admission suffer from a peculiar defect, in that several of the  
4 requests seek admission from Defendant that Defendant made certain  
5 representations to, or took money from, "Plaintiff James Messina"  
6 - but James Messina is the Defendant, and James Kutlesa is the  
7 Plaintiff. These typographical errors have the effect of rendering  
8 such admissions meaningless. Therefore, Plaintiff has failed to  
9 meet Plaintiff's burden of production on Claim 2.

10 **Claim 3 - § 523(a)(4)**

11 Claim 3 alleges that the Defendant's debt is not dischargeable  
12 under § 523(a)(4) because Defendant owed Plaintiff a fiduciary duty  
13 in Defendant's role as Plaintiff's foreclosure consultant, equity  
14 purchaser, and credit services' organization.

15 When a claim is asserted under § 523(a)(4), the broad  
16 definition of "fiduciary" under nonbankruptcy law -- which refers  
17 to a relationship involving trust, confidence, and good faith --  
18 does not apply. In re Honkanen, 446 B.R. 373, 378 (B.A.P. 9th Cir.  
19 2011). Instead, the definition of "fiduciary" is quite narrow in  
20 nondischargeability actions. Id.

21 For instance, a fiduciary relationship can arise for purposes  
22 of § 523(a)(4) with only three types of trusts: express, technical,  
23 and statutory trusts. With express and technical trusts, "the  
24 fiduciary relationship must be one arising from an express or  
25 technical trust that was imposed before, and without reference to,  
26 the wrongdoing that caused the debt as opposed to a trust ex  
27 maleficio, constructively imposed because of the act of wrongdoing  
28 from which the debt arose." Id. at 378-79. In addition, "fiduciary

1 relationships imposed by statute may cause the debtor to be  
2 considered a fiduciary under § 523(a)(4)." In re Hemmeter, 242  
3 F.3d 1186, 1190 (9th Cir. 2001). However, fiduciary duties arising  
4 from constructive, resulting, or implied trusts do not fall within  
5 the purview of § 523(a)(4). Id. at 1189-90.

6 In evaluating whether there are facts to support an express,  
7 technical, or statutory trust, the Court looks at state law. The  
8 applicable state law -- which for purposes of this case is  
9 California law -- "must clearly define fiduciary duties and  
10 identify trust property." In re Honkanen, 446 B.R. at 379. In  
11 California, an express trust exists when the following five  
12 criteria are met: "1) present intent to create a trust, 2) trustee,  
13 3) trust property, 4) a proper legal purpose, and 5) a  
14 beneficiary." Id. at 379 n.6. By comparison, a technical trust  
15 arises "from the relation of attorney, executor, or guardian, and  
16 not to debts due by a bankrupt in the character of an agent,  
17 factor, commission merchant, and the like." Id. at 379 n.7.  
18 Furthermore, a fiduciary relationship can exist when a statute  
19 "(1) defines the trust res; (2) identifies the fiduciary's fund  
20 management duties; and (3) imposes obligations on the fiduciary  
21 prior to the alleged wrongdoing." In re Hemmeter, 242 F.3d at  
22 1190.

23 Here, Plaintiff has argued fiduciary fraud in broad terms, but  
24 has made no effort to demonstrate that Defendant was a fiduciary  
25 within the meaning of the Bankruptcy Code. Plaintiff also has made  
26 no attempt to demonstrate the existence of any trust.

27 The Ninth Circuit has identified one other circumstance in  
28 which a fiduciary relationship can arise: partnerships. Partners in



1 a California partnership are fiduciaries for purposes of  
2 § 523(a)(4). Ragsdale v. Haller, 780 F.2d 794, 796-97 (9th Cir.  
3 1986). However, Plaintiff does not contend that Plaintiff and  
4 Defendant were partners. Therefore, Plaintiff has not met  
5 Plaintiff's burden of production on this claim.

6 **Claim 4 - § 727(a)(2)**

7 In Claim 4, Plaintiff alleges that Defendant transferred,  
8 removed, concealed, or mutilated property belonging to Plaintiff  
9 within one year before filing Defendant's Chapter 7 bankruptcy  
10 petition. Under In re Retz, 606 F.3d 1189, 1200 (9th Cir. 2010),  
11 Plaintiff must provide evidence of the following to prevail on this  
12 claim: (1) a disposition of property, such as transfer or  
13 concealment, and (2) a subjective intent on the part of the debtor  
14 to hinder, delay or defraud the Plaintiff through the act of  
15 disposing of the property.

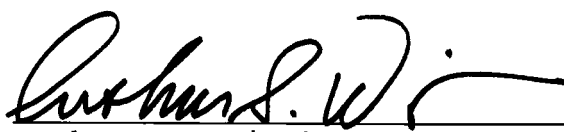
16 Arguably, Plaintiff has produced minimal evidence that  
17 Defendant disposed of property, specifically, that Plaintiff paid  
18 money to Defendant which Defendant did not return. However,  
19 Plaintiff has not provided any evidence of Defendant's subjective  
20 intent. Therefore, Plaintiff has not supported Claim 4.

21 **Conclusion**

22 The Motion for Partial Summary Judgment presently before this  
23 Court is not adequately supported, and the Court denies the motion,  
24 without prejudice. The hearing set for June 12, 2012 at 2:15 p.m.  
25 is vacated.

26 IT IS SO ORDERED.

27 Dated: 6/11/12

28   
Arthur S. Weissbrodt  
United States Bankruptcy Judge

Court Service List

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Leo B. Siegel  
Law Offices of Leo B. Siegel  
3425 S. Bascom Ave. # I  
Campbell, CA 95008  
  
Scott J. Sagaria  
Law Offices of Scott J. Sagaria  
333 W San Carlos St. #1750  
San Jose, CA 95110