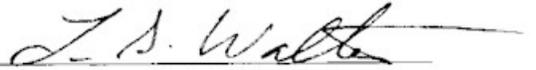


This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.

Dated: March 31, 2008

  
Lawrence S. Walter  
United States Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON

In re: RICHARD CAMPBELL,

*Debtor*

Case No. 07-31664

Adv. No. 07-3197

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COMMERCE BANK, NA,

*Plaintiff*

Judge L. S. Walter  
Chapter 7

v.

RICHARD CAMPBELL,

*Defendant*

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DECISION GRANTING, IN PART, AND DENYING, IN PART,  
DEFENDANT-DEBTOR'S MOTION TO DISMISS AND  
REQUIRING SUPPLEMENTAL FILING

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The court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(a) and 1334, and the standing General Order of Reference in this District. This matter is before the court on the

Motion to Dismiss filed by Defendant-Debtor Richard Campbell (“Debtor”) [Adv. Doc. 9] and the Response filed by Plaintiff Commerce Bank, NA (“Commerce Bank”) [Adv. Doc. 10].

### **FACTUAL AND PROCEDURAL BACKGROUND**

On August 16, 2007, Commerce Bank filed a complaint in this adversary proceeding requesting that the court determine that a debt owed to the bank was nondischargeable pursuant to various provisions of 11 U.S.C. § 523(a). On January 7, 2008, the Debtor filed a motion to dismiss the complaint asserting that the complaint fails to state a claim against the Debtor and that the First Count fails to plead fraud with specificity.

For purposes of determining the issues raised in the motion to dismiss, the court considers the following facts in Commerce Bank’s complaint as true:

Prior to his bankruptcy filing, the Debtor financed the purchase of a 2000 35-foot Fountain Boat and trailer through Commerce Bank pursuant to a retail installment contract and security agreement executed in September of 2004. [Adv. Doc. 1, ¶ 3.] Commerce Bank asserts that it possesses a security interest in the boat and trailer pursuant to the contract and/or the financing statement duly recorded with the Ohio Secretary of State. [*Id.*] The Debtor currently owes approximately \$56,652.41 to Commerce Bank pursuant to the contract. [*Id.* at ¶ 4.]

On April 23, 2007, the Debtor filed his Chapter 7 bankruptcy petition. In the Debtor’s Statement of Intention, the Debtor states: “Sold a 35 Ft. Fountain Boat – purchaser took over payments, but title was never transferred, bare legal title.” [*Id.* at ¶ 5.] The Debtor then stated that the property was to be surrendered in the bankruptcy. [*Id.*]

On or about May 2, 2007, Commerce Bank contacted the Debtor’s attorney, Thomas R. Noland, to arrange for the Debtor to surrender the boat and trailer pursuant to the Debtor’s Statement of Intention. [*Id.* at ¶ 6.] At that time, Commerce Bank learned that the Debtor

transferred the boat to another person and the Debtor does not know where the boat may be found. [*Id.*]

## **LEGAL ANALYSIS**

### **A. Legal Standard for Determining Motions to Dismiss**

The Debtor requests dismissal of Commerce Bank's complaint under Fed. R. Civ. P. 12(b)(6), incorporated in bankruptcy adversary proceedings by Fed. R. Bankr. P. 7012. He argues that the bank has failed to state any claim upon which relief can be granted.

To survive the motion, Commerce Bank's complaint "must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Varljen v. Cleveland Gear Co., Inc.*, 250 F.3d 426, 429 (6<sup>th</sup> Cir. 2001). *See also Bell Atlantic Corp. v. Twombly*, \_\_\_U.S.\_\_\_, 127 S.Ct. 1955, 1969 (2007) (noting that the accepted pleading standard is that "once a claim has been adequately stated, it may be supported by showing any set of facts consistent with the allegations in the complaint"). This standard does not require that a complaint attacked by a Rule 12(b)(6) motion to dismiss provide detailed factual allegations. *Bell Atlantic*, 127 S.Ct. at 1964. However, "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Id.*, at 1964-65 (further citations omitted) (holding that the factual allegations must be enough to raise a right to relief above the speculative level).

While the material elements must be asserted, the Federal Rules of Civil Procedure do not require a plaintiff to set out in detail the facts in support of each cause of action. *Limor v. Buerger (In re Del-Met Corp.)*, 322 B.R. 781, 793 (Bankr. M.D. Tenn. 2005). Rather, the Rules require a short and plain statement of the claim that will give defendants fair notice of what the plaintiff's claim is and upon what grounds it rests. *Id.* Furthermore, the court's responsibility on

a motion to dismiss is to assess the sufficiency of the claims asserted in the complaint and not to weigh the evidence. *Perry v. United Parcel Service*, 90 Fed. Appx. 860, 2004 WL 193203, at \*1 (6<sup>th</sup> Cir. Jan. 30, 2004) (noting that the complaint may be dismissed only if the plaintiff has failed to allege facts that, if true, would entitle him to relief).

**B. Complaint States a Claim Pursuant to 11 U.S.C. § 523(a)(2) for Fraud**

Count One of Commerce Bank’s complaint is pleaded under 11 U.S.C. § 523(a)(2). This Code Section states, in pertinent part:

(a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt—

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition[.]

1 U.S.C. § 523(a)(2)(A).<sup>1</sup> In order to except a debt from discharge under § 523(a)(2)(A), a creditor must prove:

. . . (1) the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss.

*Rembert v. AT&T Universal Card Services, Inc. (In re Rembert)*, 141 F.3d 277, 280-81 (6th Cir. 1998). This provision requires the creditor to prove, by a preponderance of the evidence, several elements including that the Debtor obtained his loan or financing through fraudulent means or false representations. 4 *Collier on Bankruptcy*, § 523.08[1][a] (Alan N. Resnick & Henry J. Sommer, eds., 15<sup>th</sup> ed. rev. 2007) (noting that the purpose of the provision is to “prevent a debtor

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<sup>1</sup> Although not specified in the complaint, it appears that Commerce Bank pleads its First Count pursuant to § 523(a)(2)(A) as opposed to § 523(a)(2)(B). Section 523(a)(2)(B) requires proof that the Debtor used a materially false statement in writing concerning his financial condition in order to obtain the financing. 11 U.S.C. § 523(a)(2)(B); *Buckeye Retirement Co., LLC v. Kakde (In re Kakde)*, 382 B.R. 411, 421-22 (Bankr. S.D. Ohio 2008). The complaint contains no allegations that the Debtor used a false written statement about his financial condition and, as such, the court’s analysis focuses solely on § 523(a)(2)(A).

from retaining the benefits of property obtained by fraudulent means . . .”). Consequently, in a case involving sale or conversion of a bank’s collateral, the bank does not state a claim pursuant to § 523(a)(2)(A) if the Debtor’s decision to convert or sell the collateral occurred after the loan was obtained.<sup>2</sup> See *Nat’l City Bank, Marion v. Imbody (In re Imbody)*, 104 B.R. 830, 839 (Bankr. N.D. Ohio 1989).

In the motion to dismiss, the Debtor argues that the complaint lacks any allegation that the boat financing was obtained through fraud or false pretenses. The court disagrees. Commerce Bank alleges that the Debtor obtained financing with Commerce Bank by agreeing to keep the boat and trailer in good condition and promising not to transfer or sell the collateral. [Adv. Doc. 1, ¶ 9.] Commerce Bank asserts that the Debtor’s statements were false and made with the intent to deceive because he intended to transfer the boat and trailer without the express or implied permission of the bank. [*Id.*, ¶ 11.] In extending credit, Commerce Bank asserts that it relied on the false statements of the Debtor. [*Id.*, ¶ 12.] Because Commerce Bank alleges that the Debtor, at the time he obtained financing, intended to transfer the boat and trailer in violation of his express promises, the court concludes that these facts do state a claim pursuant to § 523(a)(2)(A).

**C. Complaint Fails to State a Claim Pursuant to 11 U.S.C. § 523(a)(4) for Larceny or Embezzlement**

Commerce Bank’s complaint also includes a claim of larceny and/or embezzlement pursuant to 11 U.S.C. § 523(a)(4) which provides for the nondischargeability of a debt “for fraud

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<sup>2</sup>Another § 523(a)(2)(A) requirement that the bank must prove is that the Debtor’s fraud proximately resulted in a loss of its property. 4 *Collier on Bankruptcy*, ¶ 523.08[1][a] (Alan N. Resnick & Henry J. Sommer, eds., 15<sup>th</sup> ed. rev. 2007). In his motion, the Debtor argues that no loss has occurred because Commerce Bank continues to receive payments on the boat. [Adv. Doc. 9, ¶ 10.] The Debtor even suggests that the boat may still be obtained from the party to whom it was transferred. [*Id.*] All of these facts are not alleged in Commerce Bank’s complaint and, consequently, are properly excluded by the court in rendering its decision on the Debtor’s motion to dismiss. *Hartman & Tyner, Inc. v. Charter Township of West Bloomfield*, 985 F.2d 560, 1993 WL 15130, at \*2 & n.3 (6<sup>th</sup> Cir. Jan. 22, 1993). Nonetheless, if the facts are true, the court notes that it may be possible to resolve this matter through communication and cooperation of the parties rather than an unnecessarily lengthy and expensive trial.

or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.” Neither larceny nor embezzlement is defined within the Bankruptcy Code. In its response to the Debtor’s motion to dismiss, Commerce Bank does not address its embezzlement count, but does argue that the court should adopt Ohio’s state law definition of larceny. However, Sixth Circuit courts have concluded that federal common law provides the appropriate definitions of embezzlement and larceny for § 523(a)(4) purposes. *See Brady v. McAllister (In re Brady)*, 101 F.3d 1165, 1172-73 (6<sup>th</sup> Cir. 1996); *Williams v. Noblit (In re Noblit)*, 327 B.R. 307, 311 (Bankr. E.D. Mich. 2005); *Davis v. Kindrick (In re Kindrick)*, 213 B.R. 504, 509 (Bankr. N.D. Ohio 1997); 4 *Collier on Bankruptcy*, § 523.10[2] (Alan N. Resnick & Henry J. Sommer, eds., 15<sup>th</sup> ed. rev. 2007).

### **1. Larceny**

Federal common law defines larceny as “the fraudulent and wrongful taking and carrying away of the property of another with intent to convert such property to the taker’s use without the consent of the owner.” *Noblit*, 327 B.R. at 311; *Graffice v. Grim (In re Grim)*, 293 B.R. 156, 166 (Bankr. N.D. Ohio 2003). Significantly, larceny requires that the original taking of the property be unlawful. 4 *Collier on Bankruptcy*, § 523.10[2] (Alan N. Resnick & Henry J. Sommer, eds., 15<sup>th</sup> ed. rev. 2007). Consequently, an alleged conversion of a secured creditor’s collateral will not meet the criteria for larceny under § 523(a)(4) if the debtor came into lawful possession of the collateral subject to a valid security interest. *American General Finance, Inc. v. Heath (In re Heath)*, 114 B.R. 310, 311-12 (Bankr. N.D. Ga. 1990); *Peavey Electronics Corp. v. Sinchak (In re Sinchak)*, 109 B.R. 273, 276 (Bankr. N.D. Ohio 1990); *Imbody*, 104 B.R. at 842.

In this case, the complaint’s facts support that the Debtor came into lawful possession of the boat subject to the valid security interest of Commerce Bank and, consequently, the original

taking was not wrongful. Commerce Bank's complaint fails to state a claim for larceny pursuant to 11 U.S.C. § 523(a)(4) and that claim will be dismissed.

## **2. Embezzlement**

Count Two of Commerce Bank's complaint contains an alternative claim of embezzlement pursuant to 11 U.S.C. § 523(a)(4). For purposes of this provision, embezzlement is defined as, "the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." *Brady*, 101 F.3d at 1172-73. "A creditor proves embezzlement by showing that he entrusted his property to the debtor, the debtor appropriated the property for a use other than that for which it was entrusted, and the circumstances indicate fraud." *Id.* at 1173.

Although there are contrary decisions, the majority of courts dealing with this issue conclude that the transfer of collateral without the consent of the secured creditor does not constitute embezzlement. *Franklin Bank, S.S.B. v. Barnes (In re Barnes)*, 369 B.R. 298, 305-06 (Bankr. W.D. Tex. 2007) (noting majority and minority opinions). These courts begin with the principle that, to embezzle property from another, the other party must be the owner the property. *Id.* at 306 (noting that a person cannot embezzle from himself). In the opinion of the majority, a creditor's security interest does not rise to the level of ownership sufficient to support a claim of embezzlement. *Id.*; *Banco Popular v. Rodriguez (In re Rodriguez)*, 2007 WL 543750, at \*5-6 (Bankr. S.D. Tex. Feb. 15, 2007); *Bank Calumet v. Whitters (In re Whitters)*, 337 B.R. 326, 333 (Bankr. N.D. Ind. 2006); *First Premier Bank v. Moller (In re Moller)*, 2005 WL 1200916, at \*2 (Bankr. N.D. Iowa May 16, 2005); *Deere & Co. v. Contella (In re Contella)*, 166 B.R. 26, 30 (Bankr. W.D.N.Y. 1994); *Heath*, 114 B.R. at 311-12.

This court agrees with the majority. Although Commerce Bank holds a security interest, it is the Debtor who is the owner of the boat. Consequently, the Debtor's sale or transfer of the

boat does not constitute embezzlement of Commerce Bank's property pursuant to 11 U.S.C. § 523(a)(4). Commerce Bank's claim is dismissed.

**D. Complaint States a Claim Pursuant to 11 U.S.C. § 523(a)(6) for Willful and Malicious Injury**

Commerce Bank's complaint includes a third count pursuant to 11 U.S.C. § 523(a)(6) which makes nondischargeable a debt for a "willful and malicious injury by the debtor to another entity or property of another entity." The Debtor asserts that Commerce Bank's complaint fails to state a claim under § 523(a)(6) because there is no proof that the Debtor willfully and maliciously intended to harm the bank with the sale of the collateral nor is there proof that the bank was actually harmed since it continues to receive payments on the obligation.

It is true, as the Debtor argues in his motion to dismiss, that Commerce Bank must meet a stringent standard of proof under § 523(a)(6) given the Supreme Court's decision in the case of *Kawaauhau v. Geiger*, 523 U.S. 57 (1998). In *Geiger*, the Supreme Court defined what actions rise to the level of those causing a "willful" injury. The Supreme Court determined that the debtor's acts must not only be intentional, but must be committed with the intent or desire to cause injury. *Geiger*, 523 U.S. at 62-63. The Sixth Circuit further defined the standard by holding that the debtor must be found to have subjectively desired to intend the harm or had knowledge that the harm was substantially certain to result from the debtor's actions. *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 464 (6<sup>th</sup> Cir. 1999). The standard as set forth in these cases is intended to limit nondischargeable debts to those arising from intentional torts as opposed to debts arising from mere negligence or recklessness. *Monsanto Co. v. Trantham (In re Trantham)*, 304 B.R. 298, 306 (6<sup>th</sup> Cir. B.A.P. 2004).

Placing the standard in the context of this case, Commerce Bank is required to prove that the Debtor transferred the collateral intending to cause harm to Commerce Bank's lien rights or with substantial certainty that harm would result. *CMEA Title Agency, Inc. v. Little (In re Little)*,

335 B.R. 376, 386-87 (Bankr. N.D. Ohio 2005); *Call Federal Credit Union v. Sweeney (In re Sweeney)*, 264 B.R. 866, 871-72 (Bankr. W.D. Ky. 2001). *See also* 4 *Collier on Bankruptcy*, § 523.12[3] (Alan N. Resnick & Henry J. Sommer, eds., 15<sup>th</sup> ed. rev. 2007) (suggesting that the creditor must prove that the debtor not only knew of the security agreement, but also that the transfer was wrongful and substantially certain to result in financial harm to the creditor).

Commerce Bank's complaint includes allegations that the transfer of the boat was made "deliberately to harm and injure the rights of Commerce Bank to the Boat and Trailer and to cause it financial harm." [Adv. Doc. 1, ¶ 18.] The harm caused by the Debtor's alleged actions was the loss of Commerce Bank's collateral. [*Id.*, ¶ 6.] Although the standard of proof will be stringent at trial, these allegations are sufficient to state a claim for a willful and malicious injury pursuant to § 523(a)(6).

**E. Commerce Bank Pleads Fraud with Sufficient Particularity But Must Supplement with the Parties' Contract and Security Agreement**

The Debtor also asserts, with no supporting legal analysis, that Commerce Bank fails to plead fraud with sufficient particularity in Count One. Fed. R. Civ. P. 9(b), incorporated into bankruptcy adversary proceedings by Fed. R. Bankr. P. 7009, requires a party to plead the circumstances constituting fraud with sufficient particularity to give the answering party notice of the misconduct that is being challenged and allow him or her to prepare an informed pleading responsive to the specific allegations of fraud. *Coffey v. Foamex L.P.*, 2 F.3d 157, 161-62 (6<sup>th</sup> Cir. 1993); *Equal Justice Foundation v. Deutsche Bank Trust Co.*, 412 F.Supp.2d 790, 797 (S.D. Ohio 2005). The Sixth Circuit requires at a minimum that the allegations include the time, place, content of the alleged misrepresentation and/or fraudulent scheme and the injury resulting from the fraud. *Coffey*, 2 F.3d at 161-62. However, "[m]alice, intent, knowledge, and other condition of mind of a person may be alleged generally." Fed. R. Bankr. P. 7009(b).

In its complaint, Commerce Bank sufficiently pleads the circumstances giving rise to the alleged fraud, i.e. the Debtor's transfer of the collateral without the consent or knowledge of the secured creditor and in violation of the terms of the parties' agreement. While Commerce Bank avers the Debtor's fraudulent intent more generally, it is allowed to do so pursuant to Rule 9(b) requirements. Nonetheless, the court agrees with the Debtor that the parties' contract and security agreement are central to the allegations in the complaint [Adv. Doc. 1, ¶¶ 3, 9-11] and should be attached as an exhibit. For that reason, the court will require Commerce Bank to file the parties' contract and security agreement as a supplemental pleading within fourteen (14) days of the entry of this decision and the related order.

### **CONCLUSION**

In conclusion, the court denies the Debtor's motion to dismiss with respect to Count One: Non-dischargeability Pursuant to 11 U.S.C. § 523(a)(2) and Count Three: Non-dischargeability Pursuant to 11 U.S.C. § 523(a)(6). The court grants the Debtor's motion to dismiss with respect to Count Two: Non-dischargeability Pursuant to 11 U.S.C. § 523(a)(4). Count Two is dismissed in its entirety.

The court further requires Commerce Bank to file a copy of the parties' contract and security agreement referenced in the complaint as a supplemental pleading within fourteen (14) days of the entry of this decision and the related order.

**SO ORDERED.**

cc:

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