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

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| In re: | * | |
| | | Case No. 04-35400 |
| Carl R. and Melinda L. Witt, | * | |
| | | Chapter 7 |
| Debtors. | * | |
| | | Judge William A. Clark |
| | * | |
| Samuel Casey, | * | Adv. Pro. No. 04-03285 |
| Plaintiff, | * | |
| v. | * | |
| Carl R. Witt, | * | |
| Defendant. | * | |

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**MEMORANDUM DECISION GRANTING DEFENDANT CARL R. WITT'S MOTION FOR SUMMARY JUDGMENT**

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Dated at Dayton, Ohio this 10th Day of June, 2005:

This matter is before the court on the Motion for Summary Judgment filed by the Debtor and Defendant, Carl R. Witt, on April 22, 2005 (the "Motion"). [Adv. Doc. # 23.] Plaintiff, Samuel Casey, has not responded to the Motion with any pleading. In the Motion, Witt seeks summary judgment as to Casey's claim that Witt's debt to Casey is nondischargeable because Witt obtained the money by embezzlement, false pretenses, and fraud. Because the evidence before the court is completely lacking in proof of embezzlement, false pretenses, or fraud, Witt's Motion is granted and this adversary proceeding will be dismissed.[1]

The court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the standing general order of reference entered in this district. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The following decision is determined in accordance with Fed. R. Bankr. P. 7056.

## I. Factual and Procedural Background

Defendant Witt worked as a financial consultant for Solomon Smith Barney. In the course of his business, Witt became acquainted with various Solomon Smith Barney clients, including Thelma Bergland, Samuel Casey, Dick and Carol Dornan, Leroy and Betty Scrivner, John R. Stenger, and Holly and Jerine Harris and Don Weisenbord (collectively, the "Plaintiffs"). Between September 10, 2001 and January 27, 2004, Witt individually approached the Plaintiffs and asked for and received personal loans. Witt did not pay those loans back before he filed for Chapter 7 bankruptcy relief on June 23, 2004. On October 15, 2004, the

[1] This adversary proceeding was one of six proceedings based upon the same set of facts and circumstances. Similar orders granting summary judgment to Witt are being filed in all six of the adversary proceedings as follows: *Bergland v. Witt*, Adv. Pro. No. 04-3284; *Casey v. Witt*, Adv. Pro. No. 04-3285; *Dornan, et al. v. Witt*, Adv. Pro. No. 04-3286; *Scrivner, et al. v. Witt*, Adv. Pro. No. 04-3287; *Stenger v. Witt*, Adv. Pro. No. 04-3288; and *Harris v. Witt*, Adv. Pro. No. 04-3289.

Plaintiffs each filed complaints against Witt arguing that the personal loans are nondischargeable.[2]

The complaints argue that Witt defrauded the plaintiffs while acting in a fiduciary capacity and committed embezzlement. The complaints allege nondischargeability under 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(4). Other than identifying Witt as a financial advisor—a position that could potentially involve a fiduciary duty to the plaintiffs—the complaints do not contain any specific factual allegations of fraud, deceit, and dishonesty or provide any evidence of embezzlement.

In his answer to the complaints, Witt admits that he received the personal loans from the Plaintiffs, but denies all allegations of fraud, deceit, and embezzlement. Witt points to interrogatory answers provided by the Plaintiffs regarding the nature of the transactions. Each of the Plaintiffs' interrogatories admit that the transactions were personal loans to Witt and, although several of the Plaintiffs allege that Witt never intended to return the loaned money, none provided any evidence of that fact or any other evidence of fraud or deceit. In addition, none of the interrogatory answers indicate that Witt utilized his position as an investment advisor inappropriately. Instead, all of the interrogatory answers indicate that all of the parties involved knew that the loans were personal in nature.

On the basis of the interrogatories, Witt now moves for summary judgment arguing that the plaintiffs cannot meet their burden of proving fraud or embezzlement under § 523 of the Bankruptcy Code. None of the plaintiffs have responded to Witt's motion.

[2] The personal loans totaled $32,403.86 and consisted of eight (8) individual loans as follow: $2,403.86 from Casey on September 10, 2001; $5,000 from Holly and Jerine Harris and Don Weisenbord on September 5, 2002; $5,000 from Thelma Bergland on November 8, 2002; $3,000 from Dick and Carol Doran on February 19, 2003; $5,000 from John R. Stenger on May 5, 2003; $5,000 from John R. Stenger on October 22, 2003; $2,000 from Leroy and Betty Scrivner on January 24, 2004; and $5,000 from Thelma Bergland on January 27, 2004.

## II. Summary Judgment Standard

The appropriate standard to be used by the court to address a motion for summary judgment is contained in Fed. R. Civ. P. 56(c) and is incorporated in bankruptcy adversary proceedings by reference in Fed. R. Bankr. P. 7056. Rule 56(c) states in part that a court must grant summary judgment to the moving party if:

> 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 a judgment as a matter of law.

Fed. R. Bankr. P. 7056(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). If the burden is on the nonmoving party at trial, the movant must: (1) submit affirmative evidence that negates an essential element of the moving party's claim; or (2) demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the non-moving party's claim. *See Celotex*, 477 U.S. at 331-32.

Thereafter, the opposing party "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (citations omitted); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51 (1986). "When the moving party has carried its burden under Rule 56(c), its opponent must do more that simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. To this end, the non-moving party must show more than the "mere existence of some alleged factual dispute between the parties to defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson*, 477 U.S. at 248 (emphasis added). All inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. *Matsushita*, 475 U.S. at 586-88.

In a case such as this, where the nonmoving party fails to respond to the summary judgment motion, the trial court is under no obligation to "search the entire record to establish that it is bereft of a genuine issue of material fact." *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989) (citation omitted). Instead, the trial court may rely on the "facts presented by the moving party." *Guarino v. Brookfield Township Trustees*, 980 F.2d 299, 404 (6th Cir. 1992). As such, the court has not searched for legal or factual support for the plaintiffs position, but instead relies on the affirmative evidence set forth by Witt in the motion and the interrogatories.

## III. Discussion

The Plaintiffs allege that the debts owed by Witt are nondischargeable under 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(4). The court will examine each section separately.

Section 523(a)(2)(A) states that a debt will not be dischargeable if it was obtained by "false pretenses, a false representation, or actual fraud." This court has found that in order to succeed on a charge of nondischargeability under §523(a)(2)(A), the creditor must prove four elements as follows:

> (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 the 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 the loss.

*In re Henderson*, 277 B.R. 889, 892 (Bankr. S.D. Ohio 2002) (quoting *Rembert v. AT&T Universal Card Service, Inc. (In re Rembert)*, 141 F.3d 277, 280-81 (6th Cir. 1998).

The evidence before the court fails each of those elements. Other than unsupported allegations that Witt did not intend to pay the money back found in a few of the Plaintiffs' answers to interrogatories, no evidence exists that Witt misrepresented anything when requesting and obtaining the loans. In fact, the written receipts provided by Witt in several cases show that Witt made it perfectly clear that the loan was personal in nature and that he intended to pay it back. The record is also void of evidence indicating that Witt intended to deceive the Plaintiffs.

Thus, the court finds that the Plaintiffs cannot support a cause of action for nondischargeability under § 523(a)(2)(A) and summary judgment will be granted to Witt on those claims.

Section 523(a)(4) states that a debt will not be dischargeable if the debt was "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." The Plaintiffs complaints indicate that the loans were obtained using fraud while acting in a fiduciary capacity and embezzlement.

The complaints, and the evidence before the court, are completely lacking of support for these claims. Witt asked for the loans in his personal capacity. No evidence indicates otherwise. If Witt had taken the money while acting in his capacity as a Solomon Smith Barney financial advisor by indicating to the Plaintiffs that it was being used as an investment in their personal portfolios, then an argument for fraud in a fiduciary capacity might be successful.[3] In this case, however, Witt simply asked the Plaintiffs for a personal loan and they complied. Any fiduciary relationship that existed between Witt and the plaintiffs was not implicated here.

In addition, none of the facts before the court indicate that embezzlement occurred. For purposes of § 523, embezzlement is defined as "the fraudulent appropriation of property by a

[3] The court emphasizes "might" be successful. The court makes no determination whether a fiduciary relationship existed between Witt and the Plaintiffs, only that such a fiduciary capacity, if it existed, was not implicated in the circumstances surrounding these loans.

person to whom such property has been entrusted or into whose hands it has lawfully come." *In re Thompson*, 262 B.R. 407, 411 (6th Cir. B.A.P. 2000) (quoting *Gribble v. Carlton (In re Carlton)*, 26 B.R. 202, 205 (Bankr. M.D. Tenn. 1982)). Under that definition, the court is unable to see how embezzlement took place in this case. There is no evidence that Witt represented that he would do anything other than used the loaned money for his own purposes. As is indicated in each of the Plaintiffs' interrogatory answers, he asked for a personal loans and got what he asked for. Embezzlement simply did not take place.

Since none of the nondischargeability claims set forth by the Plaintiffs are supported by the facts before the court, summary judgment will be granted and the claims will be dismissed.

It is therefore **ORDERED, ADJUDGED, AND DECREED,** that:

(1) Debtor and Defendant Carl R. Witt's Motion for Summary Judgment is granted.

(2) The Plaintiffs' claims and allegations regarding nondischargeability are unsupported by the record and are dismissed.

**It is so ordered.**

cc:
Samuel Casey, 5919 Tylersville Road, West Chester, Ohio 45069
Carl R. Witt, Kensington Place Nursing Home, 751 Kensington Street, Middletown, Ohio 45042
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United States Trustee

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