UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Bankruptcy Judge Joseph G. Rosania, Jr.

In re: MARIA ELIDA HERNANDEZ, SSN: xxx-xx-8072 Debtor.	Case No. 18-15269-JGR Chapter 7
PABLO NAJERA CHACON, Plaintiff v. MARIA ELIDA HERNANDEZ, Defendant.	Adv. Pro. No. 18-01318-JGR

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pablo Najera Chacon ("Plaintiff") filed his Complaint seeking a determination that a debt owed to him by Maria Elida Hernandez ("Debtor") is excepted from discharge under 11 U.S.C. § 523(a)(4) or, alternatively, under 11 U.S.C. § 523(a)(6). Specifically, he alleges that the Debtor wrongfully withheld from him certain of his personal property: a Rolex watch, a Bulova watch, a gold medallion, a gold chain, and two rings (collectively, "jewelry"). The Debtor timely answered the complaint, and the matter was tried before the Court on August 20, 2019.

The Court has subject matter jurisdiction over the adversary proceeding under 28 U.S.C. § 1334, 28 U.S.C. § 157(a), and 28 U.S.C. §§ 157(b)(1) and (b)(2)(I).

BACKGROUND

The dispute arises from the ubiquitous tale of romance gone sour. To believe the Plaintiff, the Debtor is a vengeful person who stole his prized possessions and held them hostage for financial gain and personal convenience. On the other hand, the Debtor tells a story of broken promises, threats, and abuse—a story of an ex-lover continuing to punish her and still wanting control over her life. Between black and white, there lies infinite shades of gray.

At trial, Plaintiff introduced eight (8) exhibits. Exhibit 1 was a Settlement Agreement between the parties dated August 5, 2016, dividing certain items of personal property between the parties. The agreement specified that certain items of personal property would be retained by the Plaintiff, including a Rolex wristwatch, a Bulova wristwatch, and a Virgin de Guadalupe medallion.

Exhibit 2 was a Verified Complaint in Replevin, Case No. 18C54026, filed by Plaintiff against the Debtor in Denver County Court[1] with an attached itemization of "Property Seized," consisting of a Rolex wristwatch valued at $9,000 and a Bulova wristwatch valued at $5,999.

Exhibit 3 consisted of pleadings filed in the Debtor's bankruptcy case, specifically the Voluntary Petition dated June 16, 2018; earnings statements; Notice of Chapter 7 Bankruptcy Case; Statement of Financial Affairs; Summary of Assets and Liabilities with Schedules of assets, liabilities, leases, co-debtors, income and expenses, and a declaration regarding the same; Chapter 7 Statement of Current Monthly Income; Statement of Intention; and Notice of Possible Dividends.

Exhibit 4 was a docket report for a criminal proceeding in Denver County, Case No. 16GS003076, wherein Plaintiff was charged with Assault and Disturbing the Peace on March 10, 2016. The report bears a certification by the Clerk dated June 22, 2018.

Exhibit 5 consisted of photocopies of thirty-eight (38) screen shots of text messages; six (6) screen shots of telephone calls; and two (2) screen shots of a text message log between the Plaintiff and Debtor. The messages cover a period from March 2016 through September 2, 2017.

Exhibit 6 was a one-page calendar for the years 2016, 2017, and 2018. Exhibit 7 was a photocopy of a compact disc with the name and seal of the U.S. Citizenship and Immigration Services, bearing Plaintiff's name, dated October 10, 2019. Exhibits 6 and 7 were not referred to at trial.

Finally, Exhibit 8 was a photocopy of a sales receipt dated December 2, 2016, naming Plaintiff and reflecting a cash purchase of a Bulova watch for $179 and an Ultimate Watch Warranty for $69.99. With tax, the total purchase price was $263.31.

Plaintiff testified in support of his claims and called a corroborating witness, Ms. Carmen Torres.

Defendant introduced nine (9) exhibits. Exhibits A, B, F, G, and H were photographs showing Plaintiff wearing a watch and/or jewelry. Exhibit F bears a date of November 21, 2016.

Exhibit C was a Buyer's order from Family Trucks and Vans dated March 30, 2018, reflecting the Debtor's purchase of a 2014 GMC Sierra truck and the trade in of a 2004 Ford F250 truck.

[1] At the time, the jurisdictional limit for claims brought in Colorado county courts was $15,000.00.

Exhibit D was a Discharge Note dated October 15, 2016, from Littleton Adventist Hospital for the Debtor's hospital stay, beginning October 14, 2016. Because the exhibit contains the Debtor's personal information, it has been sealed.

Exhibit E was a document from Public Storage showing that Plaintiff rented a 10' x 10' storage unit from September 17, 2016, through November 30, 2016.

Exhibit I was a copy of Plaintiff's Complaint in this Adversary Proceeding.

Debtor testified in defense against the allegations of the Complaint.

Closing arguments were presented, and the matter was taken under advisement. Pursuant to Fed.R.Bankr.P. 7052 and Fed.R.Civ.P. 52, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Plaintiff's Testimony

Plaintiff, through a Spanish-to-English translator, testified that he first met the Debtor in approximately 2010. In 2011, they bought a home together in Denver, 3407 W. Gill Place. While the home was purchased together, title was held solely in the Plaintiff's name. The Debtor and her daughter relocated to Colorado sometime after the home was purchased and moved into the home. Although Plaintiff and Debtor lived together, they never married.

Plaintiff began noticing difficulties in the relationship approximately two years later, while he was attending to divorce proceedings from a prior marriage in California. The Debtor began going out, and Plaintiff "suspected something" (Tr. 16:21-22).

Things came to a head in March 2016, when Plaintiff testified "she had me put in jail" (Tr. 17:17). As evidenced by Exhibit 4, Plaintiff was arrested for assault and disturbing the peace, although he denies that he committed "violence" against the Debtor or her daughter (Tr. 17:7-14). As a result of a restraining order issued in connection with the incident, Plaintiff testified that he didn't return to the home and the last time he saw his jewelry was a few days before the arrest.

Plaintiff testified thereafter, that he and the Debtor agreed to sell the home and entered into a settlement agreement (Exhibit 1; the "Settlement Agreement") to divide their assets. In part, the Settlement Agreement provided that Plaintiff would retain the following items of personal property:

i. All items from the garage, including horse trailer; hand tools; and, saddle and tack.
ii. Antler collection
iii. Rolex wristwatch
iv. Bulova wristwatch
v. 3 hats
vi. 3 belts

vii. 1 Virgin de Guadalupe medallion
viii. Other various items of clothing
ix. Large screen television

With respect to the home, the Settlement Agreement further provided: "The parties agree that irrespective of the final selling price of the real property [Debtor] shall be paid exactly One Hundred Thousand and 00/110 Dollars ($100,000.00) and the entire remainder of the net proceeds shall be paid to [Plaintiff]."

Plaintiff testified that upon the sale of the home, the Debtor was paid the $100,000 by way of direct deposit, but she retained his jewelry. Plaintiff testified that an oral agreement was reached whereby he would help the Debtor move to Las Vegas, and then his jewelry would be returned.

In November 2016, Plaintiff moved to California. The Debtor visited him four or five times, each time promising to return the jewelry but never following through. Plaintiff believed that the Debtor used the promise of returning the jewelry to get him to do favors for her, give her rides, and rent hotel rooms for her.

Finally, Plaintiff filed a lawsuit seeking return of the jewelry, and the matter went to trial. He testified that at the trial, the Debtor claimed that she did not have the jewelry, but the court ordered her to pay him $15,000.

Plaintiff testified that he brought this Adversary Proceeding to get his jewelry back, not to be vindictive, and that he remarried in April 2018.

The Plaintiff was then asked to identify Exhibit 8, a receipt for a Bulova wristwatch. He testified that the receipt was for the watch he was presently wearing in the Courtroom. Then Plaintiff was shown Debtor's Exhibits A, B, F, G, and H. Each exhibit was a picture showing Plaintiff wearing a watch. Plaintiff testified that the watch in each of the photographs was the same watch he was presently wearing.

Carmen Torres's Testimony

Carmen Torres testified in support of Plaintiff's case. Ms. Torres and her former husband boarded horses. She testified that she first met the Debtor in 2012, when the Debtor made arrangements to board a horse. Thereafter, Ms. Torres and her former husband became acquainted with the Plaintiff and Debtor as they tended to the horse. The four became friends and engaged in various social activities.

In 2013, when Ms. Torres's marriage began to deteriorate, so did her friendship with the Debtor. Ms. Torres did remain in contact with the Debtor, as the two worked together and would occasionally talk during breaks.

Ms. Torres testified that she was aware of the Debtor and Plaintiff's relationship problems, and that she also became aware of their agreement to sell the home. Ms. Torres testified that the Debtor believed she was entitled to all the equity in the home because the Plaintiff had no rights to it.

Ms. Torres testified that the Debtor moved into a room in her house for approximately two months, from the end of October 2016 through the middle of December 2016. During this time, in approximately November 2016, Ms. Torres claimed that the Debtor showed her a little box containing jewelry. Specifically, two watches, a medallion, a chain, and rings. Ms. Torres testified that one of the watches was a Bulova and one was a Rolex. Ms. Torres testified that she told the Debtor to return the items to Plaintiff, but the Debtor refused.

Ms. Torres testified that the Debtor moved out of her house in December 2016. After that, the Debtor kept quiet about the details of any ongoing relationship with the Plaintiff but continued to refuse to return the jewelry.

Ms. Torres acknowledged that she testified as a witness at the state court trial, contradicting the Debtor's testimony that she didn't know anything about any jewelry. Ms. Torres recalled that after the Debtor admitted she signed the Settlement Agreement, a money judgment of $15,000 was entered against the Debtor and in favor of the Plaintiff.

Debtor's Testimony

The Debtor used a separate Spanish-to-English translator for her testimony. The Debtor testified that she and her daughter shared a home with Plaintiff. The home was purchased by the Plaintiff, solely in his name, using funds in the amount of $97,000 that the Debtor had received from the sale of her home in California.

Plaintiff promised to return the funds to her within six months after the purchase. When that did not occur, the Debtor wanted "to put the house in order the way it should be," but Plaintiff declined to add her name to the title, insisting that he would return the money.

The Debtor testified that in March 2016, an altercation occurred between the Plaintiff and her daughter, which resulted in a criminal complaint for assault and disturbing the peace and the issuance of a protective order preventing Plaintiff from contacting her or her daughter.

The Debtor testified that after the order was issued, Plaintiff returned to the home in a patrol car to retrieve his personal belongings.

The Debtor then testified that Plaintiff threatened to sell the home, for which her name was never added to the title, unless she agreed to dismiss the criminal charges and enter into a settlement agreement for the disposition of the home and other personal property.

The Debtor, who was not represented by an attorney in connection with the Settlement Agreement, testified that she understood the Settlement Agreement to mean that the Plaintiff would keep the personal property stored outside the home (tools, etc.), and she would keep the personal property located within the home (furniture, etc.). She testified she was never in possession of the Plaintiff's watches or jewelry and did not know where he kept the items.

After the home sold, the Plaintiff helped her move about half of her belongings to Las Vegas, while the rest were stored in a locked horse trailer.

The Debtor lived in hotels for two or three weeks, then spent a week at Ms. Torres's house. She spent three weeks in California, then one more week at Ms. Torres's house before moving into an apartment in the Denver area.

During this time, the Debtor and the Plaintiff were attempting to reconcile and contemplated moving to California together. However, the Debtor abandoned attempts at reconciliation after an argument with Carmen Torres, who also confided to the Debtor that she a romantic relationship with the Plaintiff.

The Debtor testified that it was Ms. Torres who raised the issue of returning the jewelry, not the Plaintiff. Further, the Debtor denied that she had possession of the jewelry, knew the whereabouts of the jewelry, or ever showed the jewelry to Ms. Torres.

The Debtor testified that the Plaintiff never asked her to return the jewelry and that she was surprised the Plaintiff accused her in the lawsuit of having the items. The Debtor testified that she did not have an attorney in the state court case, but after the judge verified that she signed the Settlement Agreement, a judgment for breach in contract in the amount of $15,000 was entered against her.

On cross examination the Debtor was consistent in her testimony. She again testified that she agreed to dismiss the criminal complaint and sign the Settlement Agreement because she would receive nothing from the sale of the house if she did not. The Debtor denied that she took the Plaintiff's jewelry. Her explanation that she did not pay attention to his jewelry and did not know where he kept it was credible.

The Debtor testified that she does not speak or read English. The Settlement Agreement was prepared by the Plaintiff and his lawyer. The Debtor was not represented by counsel. She obtained a protective order against the Plaintiff because she felt threatened. The threats continued when he told her he would sell the home and she would get nothing unless she dismissed the criminal charges and signed the Settlement Agreement. She testified that she had no alternative but to agree.

Her testimony was not rebutted. The Court finds her testimony credible. Much more credible than the testimony of the other two witnesses, by a wide margin.

Plaintiff's Credibility

The Plaintiff's testimony was so riddled with inconsistencies and contradictions that it must be discounted almost entirely. The following examples illustrate numerous holes in his story.

Most glaring was the Plaintiff's testimony regarding a Bulova watch that he was wearing in Court during the trial. On direct examination, he insisted that the watch he had on in the Courtroom was the same watch he was wearing in each photograph endorsed as an exhibit.

Exhibit 8 is a copy of a receipt for the purchase of a Bulova watch. The receipt, dated December 2, 2016, reflects a cash purchase. The receipt contains no reference to any prior purchase or exchange.

On cross examination, the Plaintiff was shown Exhibit F, a picture depicting him wearing the watch. The picture was dated November 21, 2016, nearly two weeks prior to December 2, 2016, the date on the purchase receipt.

The Plaintiff then changed his story to claim that, actually, there was a prior purchase of a defective watch that was exchanged on December 2, 2016. The explanation was wholly unconvincing.

The Plaintiff testified that after the entry of the protective order, he never returned to the home, and the last time he saw his jewelry was just before he was arrested. This assertion is belied by the Debtor's testimony that he returned to the home in the presence of a law enforcement officer and was allowed to retrieve his personal belongings. It strains credulity to believe that he was not afforded an opportunity to gather his belongings. It also strains credulity to believe that he would not have retrieved his jewelry along with other items of personal property, and that if the jewelry was not there, that fact would not have been brought to the attention of the officer and/or the Debtor

Plaintiff claims that he repeatedly asked the Debtor for the return of the jewelry. Plaintiff endorsed Exhibit 5, photocopies of thirty-eight (38) screen shots of text messages; six (6) screen shots of telephone calls; and two (2) screen shots of a text message log between Plaintiff and Debtor covering the period from March 2016 through September 2, 2017. The photocopies were provided by the Plaintiff to his attorney. He could not identify a single instance in those extensive communications where he asked for the return of the jewelry. His explanation that communications demanding the return of the jewelry were missing because the Debtor kept his phone and would not return it does not pass even the most cursory smell test.

Plaintiff's Exhibit 2 is a complaint in replevin filed with the Denver County Court. The complaint was verified by the Plaintiff: "I swear/affirm under oath that I have read the forgoing Complaint and the statements set forth therein are true and correct to the best of my knowledge." The complaint sought the return of a Rolex watch valued at $9,000 and a Bulova watch valued at $5,999. The Plaintiff admitted in his testimony before this Court that his previous sworn valuation of the Bulova was false: "It cost me 400/370" (Tr. 38:17).

It is also noteworthy that only the two watches were listed in the complaint. No mention is made as to any other items of jewelry.

Plaintiff's testimony regarding the Rolex is equally tenuous. He claims that he has no documentation regarding his ownership of the watch because he received it as a gift. He claims to have received an oral appraisal of the watch by a jeweler of somewhere between $8,000 and $14,000 but produced no independent evidence of the valuation. The evasiveness of the Plaintiff's testimony is demonstrated by the following exchange

on cross examination:

> Q. What investigation have you done to determine the value of your Rolex?
>
> A. No, just the appraisal.
>
> Q. The appraisal of the Rolex?
>
> A. Yes.
>
> Q. Where is that at?
>
> A. I don't have it in writing.
>
> Q. Okay. Where did you buy that Rolex?
>
> A. It was a gift.
>
> Q. And did that Rolex have a serial number on it?
>
> A. Yes.
>
> Q. And did you find out where it was purchased at?
>
> A. No, no, it was a gift.
>
> Q. Did you try to find out anything more about the Rolex in terms of the style and how much it would be worth?
>
> A. The most they would offer was 14,000, the least they would offer was 8,000.
>
> Q. When you say -- when did that happen, those numbers? When were you given those numbers?
>
> A. After the jewelry was returned to me I inquired, seeing what the characteristics were of the Rolex to see what it was worth.
>
> Q. Okay. You said that when the jewelry was returned to you. What do you mean by that?
>
> A. No. I said they didn't return it to me, but since they didn't return it to me I researched what the prices would be (Tr. 35:15-36:16).

The Court finds that Plaintiff lacked credibility and discounts his testimony accordingly.

Carmen Torres's Credibility

Ms. Torres's testimony is best described as "combative." When asked if she was ever romantically involved with the Plaintiff, her response was "if you can prove that!" (Tr. 68:19). Only after being pressed by the Court as to what she meant did she deny that she had relationship with the Plaintiff beyond friends. It was not convincing.

Ms. Torres's description of the Rolex watch appeared "coached." She testified that Debtor showed her a box of jewelry, once, nearly three years ago. Her description of the watch defied logic. Much too detailed, too precise, and a virtual carbon copy of the Plaintiff's description.

Ms. Torres's claim that her relationship with the Debtor simply ceased rings hollow. The Debtor's explanation that her relationship with Ms. Torres ended because Ms. Torres was romantically involved with the Plaintiff is much more credible.

Finally, Ms. Torres's testimony that she "friended" the Plaintiff on social media sometime much later in 2017 is at odds with the Debtor's testimony that Ms. Torres claimed she had a relationship with the Plaintiff in 2016 and demanded the return of the jewelry on his behalf.

On balance, the Debtor's testimony was markedly more credible than Ms. Torres's testimony.

CONCLUSIONS OF LAW

Plaintiff's Complaint seeks to except the judgment obtained in the Denver County Court from discharge under the provisions of 11 U.S.C. § 523(a)(4) or, alternatively, (a)(6).

Claims seeking exceptions to discharge are narrowly construed, and to further the fresh start objectives of bankruptcy, doubt is to be resolved in the debtor's favor. *In re Bolling*, 600 B.R. 838, 848 (Bankr. D. Colo. 2019).

As a preliminary matter, the Court questions whether the Settlement Agreement is enforceable. "A contract is voidable on the grounds of duress if a party's manifestation of assent is induced by an improper threat that leaves no reasonable alternative." *Vail/Arrowhead v. Eagle County Dist. Ct.*, 954 P.2d 608, 612 (Colo. 1998); *Bennett v. Coors Brewing Co.*, 189 F.3d 1221, 1231 (10th Cir. 1999).

Provided the exertion of pressure through threats "actually subjugated the mind and will of the person against whom they were directed, and were thus the sole and efficient cause of the action which he took." *Electrology Lab., Inc. v. Kunze*, 169 F. Supp. 3d 1119, 1148 (D. Colo. 2016) (internal citations omitted).

The Plaintiff failed to add the Debtor's name to the title to the home. The Plaintiff threatened the Debtor that unless she signed the Settlement Agreement, she would receive nothing from the sale of her home. She had no reasonable alternative to signing the agreement, and at the time she had every reason to believe that the Plaintiff would

make good on the threats, as she previously had to obtain a protective order against the Plaintiff as a result of domestic violence.

However, because the obligation was reduced to judgment in the Denver County Court after hearing, this Court is precluded from revisiting the issue. The *Rooker-Feldman* Doctrine, derived from two Supreme Court Cases, *Rooker v. Fid. Tr. Co.*, 263 U.S. 413 (1923), and *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983), "forbids lower federal courts from reviewing state-court civil judgments." *Mayotte v. U.S. Bank Nat'l Ass'n for Structured Asset Inv. Loan Tr. Mortg. Pass-Through Certificates, Series 2006-4*, 880 F.3d 1169, 1170 (10th Cir. 2018).

Plaintiff's Claims Under 11 U.S.C. § 523(a)(4)

11 U.S.C. § 523(a)(4) excepts from discharge debts that arise from "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." The existence of a fiduciary relationship under 11 U.S.C. § 523 is determined under federal law. An express or technical trust must be present for a fiduciary relationship to exist under 11 U.S.C. § 523(a)(4). Neither a general fiduciary duty of confidence, trust, loyalty, and good faith, nor an inequality between the parties' knowledge or bargaining power is sufficient to establish a fiduciary relationship for purposes of dischargeability. Further, the fiduciary relationship must be shown to exist prior to the creation of the debt in controversy. A finding regarding the existence of a fiduciary duty is a legal finding, rather than a factual finding. *Fowler Brothers v. Young*, 91 F.3d 1367, 1371-72 (10th Cir. 1996).

Without citing any legal authority, Plaintiff argues that a fiduciary duty was imposed upon the Debtor as a result of their prior romantic relationship to adhere to the terms of the Settlement Agreement. The complained breach is alleged to be the failure to return the jewelry.

In the Tenth Circuit, it is well settled that a qualifying fiduciary relationship exists only where a debtor has been entrusted with money pursuant to an express or technical trust. *In re Kalinowski*, 482 B.R. 334, 338 (10th Cir. BAP 2012).

The Court holds that no fiduciary duty existed at the time the settlement agreement was executed. No express trust existed. The parties were adverse when the agreement was signed.

Plaintiff's second claim under 11 U.S.C. § 523 (a)(4) arises from the allegations that the Debtor refused to return the jewelry.

The elements of larceny and embezzlement are similar, distinguished by how the property was obtained, lawfully or unlawfully. "The difference between these two types of misconduct is that, with embezzlement, the debtor initially acquires the property lawfully whereas, with larceny, the property is unlawfully obtained." *Kim v. Sun (In re Sun)*, 535 B.R. 358, 367 (B.A.P. 10th Cir. 2015)

Larceny involves the taking of property without the owner's consent, but without force or violence. It is the felonious stealing, taking and carrying, leading, riding, or driving

away another's personal property, with intent to convert it or to deprive the owner thereof. *United States v. Smith*, 156 F.3d 1046, 1056 (10th Cir. 1998).

"Embezzlement" is "the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." *In re Tinkler*, 311 B.R. 869, 876 (Bankr. D. Colo. 2004) (quoting *Klemens v. Wallace (In re Wallace)*, 840 F.2d 762, 765 (10th Cir.1988)) (internal quotation marks omitted). The elements of embezzlement are as follows: "1. Entrustment (property lawfully obtained originally); 2. Of property; 3. Of another; 4. That is misappropriated (used or consumed for a purpose other than that for which it was entrusted); 5. With fraudulent intent." *Id*. at 876. The distinction between an embezzlement claim and a larceny claim is that larceny requires that the funds originally come into the debtor's hands unlawfully. *See id*.

The evidence presented by Plaintiff to show that the jewelry was misappropriated by the Debtor was limited. It consisted of his testimony that he repeatedly asked the Debtor for its return, which is testimony that was contradicted by the absence of any such request in the numerous phone communications. It also consisted of the testimony of Ms. Torres that the Debtor showed her a box containing the jewelry and indicated that she wasn't going to return the jewelry. Ms. Torres's testimony was rebutted by the Debtor's testimony.

Plaintiff failed to establish by a preponderance of the evidence that the Debtor engaged in either larceny or embezzlement. The balance of his claim under 11 U.S.C. § 523(a)(4) fails.

Plaintiff's Claim Under 11 U.S.C. § 523(a)(6)

11 U.S.C. § 523(a)(6) excepts from discharge debts that arise from "willful and malicious injury by the debtor to another entity or to the property of another entity." A detailed analysis of 11 U.S.C. § 523(a)(6) claims is set forth in the case of *In re Parra*, 483 B.R. 752 (Bankr. D.N.M. 2012):

> In the Tenth Circuit, non-dischargeability under this subsection requires that the debtor's actions be both willful and malicious. *Panalis v. Moore (In re Moore)*, 357 F.3d 1125, 1129 (10th Cir.2004) ("Without proof of both [willful and malicious elements under 523(a)(6)], an objection to discharge under that section must fail.") (emphasis in original); *Mitsubishi Motors Credit of America, Inc. v. Longley (In re Longley)*, 235 B.R. 651, 655 (10th Cir. BAP 1999) (stating that "[i]n the Tenth Circuit, the phrase 'willful and malicious injury' has been interpreted as requiring proof of two distinct elements—that the injury was both 'willful' and 'malicious.'"). The "willful" element requires both an intentional act and an intended harm; an intentional act that leads to harm is not sufficient. The Tenth Circuit has articulated the "willful" component as requiring proof that the debtor "must 'desire ... [to cause] the consequences of his act ... or believe [that] the consequences are substantially certain to result from it.'"

> *Longley*, 235 B.R. at 657. Whether the debtor had the requisite intent to harm is evaluated under a subjective standard that focuses on the debtor's state of mind. Evidence of the debtor's state of mind may be inferred from the circumstances. An intentional breach of contract, without more, is insufficient to sustain a non-dischargeable claim under 11 U.S.C. 523(a)(6).
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> After *Geige*r [*Kawaauhau v. Geiger*, 523 U.S. 57, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998)], some courts have determined that "willful and malicious" has been compressed into a single standard. Indeed, courts, including the Tenth Circuit, have defined "malicious" in terms that seem equivalent to the definition of "willful" under the Geiger standard. *See*, *Moore*, 357 F.3d at 1129 (stating that the "malicious" component "requires proof 'that the debtor either intend the resulting injury or intentionally take action that is substantially certain to cause the injury.'") (quoting *Hope v. Walker (In re Walker)*, 48 F.3d 1161, 1164 (11th Cir.1995)). But because the Tenth Circuit directs that willful and malicious are separate, distinct requirements, "malicious" must be defined so that it is distinguishable from "willful." This Court concludes that the "malicious" component of 11 U.S.C. 523(a)(6) requires an intentional, wrongful act, done without justification or excuse.
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> Conversion of a creditor's property interest can support a nondischargeability claim under 11 U.S.C. § 523(a)(6). As explained by the Supreme Court in *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 55 S.Ct. 151, 79 L.Ed. 393 (1934), decided under subsection (6) of § 17(a) of the Bankruptcy Act of 1898, the precursor to 11 U.S.C. § 523(a)(6),
>
> There is no doubt that an act of conversion, if willful and malicious, is an injury to property within the scope of this exception .... But a willful and malicious injury does not follow as a matter of course from every act of conversion, without reference to the circumstances. There may be a conversion which is innocent or technical, an unauthorized assumption of dominion without willfulness or malice. 293 U.S. at 332 (citations omitted).

Id. at 771-73.

As described in detail above, the evidence presented to the Court failed to establish, by a preponderance, that the Debtor converted the jewelry. No reliable evidence was presented to establish that the Debtor took any willful or malicious action with respect to the jewelry. Plaintiff's claim under 11 U.S.C. § 523(a)(6) must fail.

Debtor's Request for Attorney's Fees Under 11 U.S.C. § 523(d)

The Debtor made an oral request for attorney's fees in open court pursuant to 11 U.S.C. § 523(d). 11 U.S.C. § 523(d) provides:

> If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

The Court finds that the Debtor's request must be denied. First, the Court is not convinced that the claims raised by Plaintiff are consumer debts. Second, the Court declines to find that the claims were not substantially justified. Although Plaintiff failed to meet his burden of proof, the claims were previously reduced to judgment in the county court, preventing this Court from finding that Plaintiff's position was not substantially justified. Accordingly,

This Court Hereby Orders:

1. Plaintiff's first claim for relief under 11 U.S.C. § 523(a)(4): "First Cause of Action Defalcation While Acting In Fiduciary Capacity" is DENIED.

2. Plaintiff's second claim for relief under 11 U.S.C. § 523(a)(6): "Second Cause of Action Willful and Malicious Injury" is DENIED.

3. The Debtor's request for an award attorney fees made in open court pursuant to 11 U.S.C. § 523(d) is DENIED.

4. The complaint is dismissed, with prejudice, each party to pay their own fees and costs, and the Clerk of the Court shall enter judgment accordingly.

Dated this 29th day of April, 2020.

BY THE COURT:

Joseph G. Rosania, Jr.
United States Bankruptcy Judge