The relief described hereinbelow is SO ORDERED.

SIGNED this 12th day of April, 2012.

Robert D. Berger
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:

ARVINDER S. TOOR,
Debtor.

Case No. 11-20423
Chapter 7

MEMO MONEY ORDER COMPANY, INC.,
Plaintiff,

v.

Adv. No. 11-6200

ARVINDER S. TOOR,
Defendant.

ORDER DENYING CROSS-MOTIONS FOR SUMMARY JUDGMENT

The parties filed cross-motions for summary judgment, but factual disputes remain regarding Debtor's agreement and performance under a contract to sell Plaintiff's money orders.[1] Plaintiff Memo Money Order Company, Inc., seeks to except $63,095.62 from discharge under 11 U.S.C. §§ 523(a)(2)(A), 523(a)(4), and 523(a)(6). Debtor's motion seeks judgment under all

[1] Doc. Nos. 12, 13, 17, and 18.

three sections. Memo's motion seeks judgment under §523(a)(4). The Court has jurisdiction under 28 U.S.C. §§ 157 and 1334. The motions are denied because neither party has established the right to judgment as a matter of law.

The Uncontroverted Facts

Debtor filed for bankruptcy on February 24, 2011. Debtor was the sole officer and director of Toor Enterprises, Inc. In 2010, Toor Enterprises operated two convenience stores in Ohio. On May 24, 2010, Toor Enterprises and Debtor entered into an agreement with Memo to sell money orders. The agreement ended about two months later.

Conclusions of Law

A. Summary Judgment Standard.

Summary judgment is appropriate if the moving party demonstrates there is no genuine issue as to any material fact, and he is entitled to judgment as a matter of law.[2] Only when reasonable minds could not differ as to the import of the proffered evidence is summary judgment proper.[3] The court construes the record liberally in favor of the party opposing the motion.[4] An issue is "genuine" if sufficient evidence exists on each side "so that a rational trier of fact could resolve the issue either way" and "[a]n issue is 'material' if under the substantive law it is essential to the proper disposition of the claim."[5] The court does not weigh the evidence at this stage, but merely determines whether a trial is necessary.[6] As a general rule, questions involving intent or state of mind cannot be resolved by summary judgment.[7]

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[2] FED. R. BANKR. P. 7056; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).
[3] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).
[4] *McKibben v. Chubb*, 840 F.2d 1525, 1528 (10th Cir. 1988) (citation omitted).
[5] *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998).
[6] *Anderson*, 477 U.S. at 249.
[7] *Compton v. Herrman (In re Herrman)*, 355 B.R. 287, 291 (Bankr. D. Kan. 2006).

Cross-motions for summary judgment allow the court to assume the only evidence to be considered has been submitted with the pleadings. However, cross-motions are to be considered independently, and summary judgment is not appropriate if material facts remain in dispute.[8]

B. The Proper Procedure for Supporting Factual Positions.

Federal Rule of Civil Procedure 56 incorporated into adversary proceedings pursuant to Fed. R. Bankr. P. 7056 provides a party asserting a fact must support the assertion by citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials. Only admissible evidence may be considered. Documentary evidence must be sworn or certified by a sufficient affidavit or otherwise authenticated as required by Fed. R. Civ. P. 56 to be admissible.[9] Summary judgment affidavits must be based upon personal knowledge and must contain information admissible at trial.[10] Statements of mere belief are disregarded. An affidavit that purports to testify concerning another party's intent is improper. The affidavit may not be based upon conclusory statements without specific supporting facts. If a party is unable to present facts essential to justify its opposition, the court may allow the party more time to conduct discovery or obtain affidavits.[11] If a party fails to support his motion or opposition as required by Fed. R. Civ. P. 56(c), the court may give the party an opportunity to properly support or address the facts.[12]

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[8] *Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1148 (10th Cir. 2000).
[9] *See also* D. KAN. LBR 7056.1(d).
[10] FED. R. CIV. P. 56(c)(4).
[11] FED. R. CIV. P. 56(d).
[12] FED. R. CIV. P. 56(e).

C. Debtor's Factual Record Does Not Satisfy Fed. R. Civ. P. 56(c).

The conflicting evidence and assertions contained in the summary judgment motions raise far too many factual disputes to entitle either party judgment as a matter of law. Debtor's motion, in particular, is not properly supported. The memorandum in support contains only three facts. The core of Debtor's defense is actually comprised of unsupported factual assertions peppered throughout Debtor's briefs without so much as an affidavit from the Debtor himself. Yet, this case is not amenable to evidence presented solely by affidavits because the allegations and defenses asserted are going to depend on the credibility of the witnesses.

Just as Debtor's motion is not supported by a sufficient factual record, Debtor's opposition to Plaintiff's cross-motion for summary judgment is likewise deficient. Debtor shall be granted an opportunity to properly address Plaintiff's motion under either Fed. R. Civ. P. 56(d) and (e) or at trial. Despite Debtor's objection to the contrary, Plaintiff's affidavit from a Memo credit manager is properly sworn and becomes part of the record upon its inclusion in the summary judgment materials. One paragraph is inadmissible because it is based on belief. The rest of the affidavit is admissible. If Debtor's objection is that he has not had an opportunity to depose the affiant, Debtor may seek time to do so under Fed. R. Civ. P. 56(d)(2). While Fed. R. Civ. P. 56(e) allows the court to consider unanswered factual assertions to be undisputed for purposes of the motion, it also allows the party lacking support an opportunity to properly address the facts. Debtor shall be afforded that opportunity because Plaintiff's motion fails to establish it is entitled to judgment even if its facts are deemed undisputed.

D. Dischargeability under 11 U.S.C. §523.

An exception to discharge is narrowly construed with deference given to the fresh-start policy of the Bankruptcy Code.[13] The party opposing the discharge of a debt carries the burden of proof by a preponderance of the evidence.

E. Fraud or Defalcation While Acting in a Fiduciary Capacity.

A §523(a)(4) claim requires fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny. The plaintiff must establish a fiduciary relationship between itself and the defendant, and fraud or defalcation committed by the defendant while acting in his fiduciary capacity.[14] Fiduciary is narrowly defined under §523(a)(4) and is a question of federal law, although state law may be relevant in determining when a trust exists.[15] For questions of federal law, bankruptcy courts must follow the law of their own circuit.[16] The Tenth Circuit requires an express or technical trust to exist prior to the act creating the debt.[17] The mere use of the term "trust" does not necessarily create a trust.[18] A debt created while acting in a fiduciary capacity is the result of a breach of pre-existing trust obligations defined by law and is separate and distinct from any underlying contractual debt which arises from a debtor's breach of an agreement with respect to goods or services. Ordinary commercial relationships such as

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[13] *Colorado Judicial Dept. v. Sweeney (In re Sweeney*), 341 B.R. 35, 40 (B.A.P. 10th Cir. 2006) (quoting *Bellco First Fed. Credit Union v. Kaspar (In re Kaspar)*, 125 F.3d 1358, 1361 (10th Cir. 1997)).

[14] *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1371 (10th Cir. 1996); *Global Express Money Orders, Inc., v. Davis (In re Davis)*, 262 B.R. 673, 682 (Bankr. E.D. Va. 2001).

[15] *Young*, 91 F.3d at 1371.

[16] *U.S. v. Spedalieri*, 910 F.2d 707, 709, n.2 (10th Cir. 1990).

[17] *Young*, 91 F.3d at 1371; *Allen v. Romero (In re Romero*), 535 F.2d 618, 621 (10th Cir. 1976). Plaintiff cites *IBD, Inc., v. Jenkins (In re Jenkins)*, Adv. No. 10-6138 (Bankr. D. Kan. November 21, 2011) (Berger, J.), for an exception to the general rule. *Jenkins* does not apply. *Jenkins* is limited to the corporate plaintiff which sues its own officer for defalcation of corporate property. Kansas law recognizes an express trust comprised of corporate property entrusted to the corporate officer or director for the benefit of the corporation. Outside this particular exception, §523(a)(4) requires an express or technical trust, and the *Jenkins* opinion so noted.

[18] *Travelers Express Co. v. Washington (In re Washington)*, 105 B.R. 947, 951 (Bankr. E.D. Cal. 1989).

creditor-debtor or principal-agent do not rise to the level of the fiduciary relationship required by §523(a)(4).[19]

A defalcation generally refers to a failure to account for money or property entrusted to a fiduciary.[20] The Tenth Circuit has not defined defalcation, but it has indicated the term requires some portion of misconduct.[21] Other courts struggling to define defalcation have differed widely on the degree of fault, or type of intent, if any, required for a party to be guilty of a defalcation.[22] Plaintiff relies on the Fourth Circuit's definition which states defalcation may include negligence or even an innocent mistake.[23] The Tenth Circuit has indicated it will follow Judge Learned Hand's *Central Hanover Bank & Trust* opinion and the resulting line of cases requiring some degree of culpability.[24]

Plaintiff does not establish an uncontroverted factual record sufficient to show a fiduciary relationship or a defalcation as a matter of law. Tenth Circuit standards apply. It is not sufficient to establish a written contract and a failure to pay. The factual record does not

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[19] *In re Young*, 91 F.3d at 1372 (citing *In re Romero*, 535 F.2d at 621). A corporate officer may not be a fiduciary of the corporation's creditors absent a statutory, technical or express trust. *American Metals Corp. v. Cowley (In re Cowley)*, 35 B.R. 526, 529 n.1 (Bankr. D. Kan. 1983) (citing *Davis v. Aetna Acceptance Co.*, 293 U.S. 328 (1934); *In re Romero*, 535 F.2d at 618).

[20] *Cowley*, 35 B.R. at 529.

[21] *Oklahoma Grocers Ass'n, Inc., v. Millikan (In re Millikan)*, 188 Fed. Appx. 699, 702 (10th Cir. 2006).

[22] *M-R Sullivan Mfg. Co., Inc., v. Sullivan (In re Sullivan)*, 217 B.R. 670, 676-77 (Bankr. D. Mass. 1998), compiling the following: *Schwager v. Fallas (Matter of Schwager)*, 121 F.3d 177 (5th Cir.1997) (defalcation does require some level of mental culpability); *Lewis v. Scott (In re Lewis)*, 97 F.3d 1182 (9th Cir. 1996) (defalcation may cover cases where the default is innocent); *Meyer v. Rigdon*, 36 F.3d 1375 (7th Cir. 1994) (defalcation should be construed to require more than mere negligence); *Carlisle Cashway, Inc., v. Johnson (In re Johnson)*, 691 F.2d 249, 256 (6th Cir. 1982) (actions committed in ignorance of the law, regardless of ignorance, constitute a defalcation); *Central Hanover Bank & Trust Co. v. Herbst*, 93 F.2d 510, 511-12 (2d Cir. 1937) (defalcation may demand some type of misconduct); *Fed. Deposit Ins. Corp. v. Gaubert (In re Gaubert)*, 149 B.R. 819 (Bankr. E.D. Tex.1992) (defalcation requires recklessness); *Kwiat v. Doucette*, 81 B.R. 184, 190 (D. Mass. 1987) (ignorance or negligence will suffice to constitute a defalcation).

[23] *Republic of Rwanda v. Uwimana (In re Uwimana)*, 274 F.3d 806, 811 (4th Cir. 2001).

[24] *Millikan*, 188 Fed. Appx. at 702, citing *Central Hanover Bank & Trust*, 93 F.2d at 512.

establish a trust relationship as opposed to a debtor-creditor relationship or a principal-agent relationship. The written contract uses the word "trust," but it also refers to a principal-agent relationship and grants a security interest to Memo in the money order proceeds. The factual record is also lacking evidence regarding Debtor's intent or actions related to the alleged defalcation.

The briefs frame the parties' arguments; however they lack an adequate factual record. Summary judgment is not appropriate

Conclusion

IT IS THEREFORE ORDERED Plaintiff's Motion for Summary Judgment under 11 U.S.C. § 523(a)(4) is DENIED.

IT IS FURTHER ORDERED Defendant's Motion for Summary Judgment is DENIED.

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ROBERT D. BERGER
U.S. BANKRUPTCY JUDGE
DISTRICT OF KANSAS