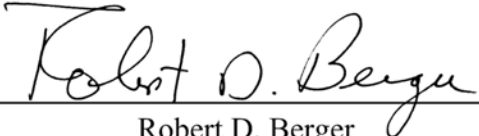


The relief described hereinbelow is **SO ORDERED**.

**SIGNED** this 19th day of March, 2024.



  
Robert D. Berger  
United States Bankruptcy Judge

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**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

In re:

**JULIE ANN TERRY,**

Case No. 17-21615  
Chapter 7

Debtor.

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**SOUTHAMPTON, LTD.,**

Adv. No. 17-06080

Plaintiff,

v.

**JULIE ANN TERRY,**

Defendant.

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**ORDER DENYING PLAINTIFF'S MOTION  
FOR SUMMARY JUDGMENT**

This matter comes before the Court on plaintiff-creditor Southampton, Ltd.’s motion for summary judgment that its claim against defendant-debtor Julie Terry is nondischargeable under 11 U.S.C. §§ 523(a)(2) and (a)(4).<sup>1</sup>

Southampton filed this adversary proceeding on November 27, 2017,<sup>2</sup> seeking a determination that its claim<sup>3</sup> is excepted from discharge as a debt for money or property obtained by actual fraud under 11 U.S.C.

§ 523(a)(2)(A)<sup>4</sup> and breach of fiduciary duty under 11 U.S.C. § 523(a)(4).<sup>5</sup>

Shortly after, on December 13, 2017, Southampton filed a motion for relief from the automatic stay to continue its pre-petition litigation in Oklahoma

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<sup>1</sup> ECF 33. Southampton, Ltd., is represented by attorneys Stephen J. Torline, Peyton Healey, and Kevin G. Corcoran. Julie Ann Terry is represented by attorney Jonathan Becker. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A), and venue is appropriate under 28 U.S.C. § 1409(a).

<sup>2</sup> ECF 1. In addition to its § 523(a) claims, Southampton also argues that Terry should not receive a discharge under 11 U.S.C. § 727(a)(4) because she knowingly made false statements on her Schedules. *Id.* However, Southampton did not include its § 727(a)(4) claims in this motion, seeking instead to pursue summary judgment only on its § 523(a) claims.

<sup>3</sup> In Terry’s Schedules E/F, she lists Southampton as an unsecured creditor with a claim of \$390,238.00, which she marks as “disputed” and “contingent.” *See* Chapter 7 Voluntary Petition for Individual, Case No. 17-21615, ECF 1 at 30, line 4.28.

<sup>4</sup> Section 523(a)(2)(A) exempts debt “for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition[.]” 11 U.S.C. 523(a)(2)(A).

<sup>5</sup> The complaint cites “breach of fiduciary duty”, but § 523(a)(4) is narrower than that. *See Fowler Brothers v. Young (In re Young)*, 91 F.3d 1367, 1371 (10th Cir. 1996). Section 523(a)(4) exempts debts that are incurred through “fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny[.]” 11 U.S.C. § 523(a)(4). Thus, to establish a fiduciary relationship under § 523(a)(4), a creditor must show that the money or property involving the debt at issue was entrusted to the debtor through an express or technical trust. *In re Young*, 91 F.3d at 1371.

against Terry, which this Court granted on January 18, 2018.<sup>6</sup> Now, after receiving a final judgment in the Oklahoma litigation, Southampton returns to this Court, arguing that the Oklahoma court's findings of fraud entitle it to summary judgment here.<sup>7</sup>

Summary judgment is appropriate when the movant shows that there is “no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).<sup>8</sup> An issue is genuine if “there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way.” *Thom v. Bristol-Myers Squibb Co.*, 353 F.3d 848, 851 (10th Cir. 2003) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Similarly, an issue is material if, under the substantive law, the issue could affect the outcome of the lawsuit. *Doe v. University of Denver*, 952 F.3d 1182, 1189 (10th Cir. 2020) (quoting *Jones v. Norton*, 809 F.3d 564, 573 (10th Cir. 2015)). In weighing the issues, the Court must draw all reasonable inferences in favor of the nonmoving party. *Thom*, 353 F.3d at 851.

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<sup>6</sup> See Motion for Relief from Stay, Case No. 17-21615, ECF 25; Order Granting Motion for Relief from Stay, Case No. 17-21615, ECF 49. Michael Terry, Terry's husband, was also a party to the state court litigation. See ECF 33, Ex. A. However, Michael is not involved in this adversary proceeding or the main bankruptcy case.

<sup>7</sup> ECF 33, ¶ 1.

<sup>8</sup> Rule 56(a) is applicable to this adversary proceeding through FED. R. BANKR. P. 7056.

In its motion, Southampton argues that the Oklahoma judgment—which it describes as one for “fraud and fraudulent transfer”—entitles it to summary judgment that its claim against Terry is nondischargeable under §§ 523(a)(2) and (a)(4).<sup>9</sup> However, the Oklahoma judgment does not contain any factual findings, nor does it refer to the substantive laws (presumably those governing fraud and/or fraudulent transfer in Oklahoma) upon which it is based. Nor does Southampton’s motion set out the elements of its Oklahoma claims and explain why they necessarily satisfy the elements of §§ 523(a)(2) and/or (a)(4).<sup>10</sup> Without more from Southampton, this Court is unable to determine whether any dispute of material fact exists in this proceeding.

For these reasons, Southampton’s motion for summary judgment is denied. However, the Court, pursuant to Fed. R. Civ. P. 56(e),<sup>11</sup> will allow

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<sup>9</sup> See ECF 33 ¶ 1.

<sup>10</sup> Although paragraph 31 of Southampton’s motion makes a broad-stroke argument to that effect, it misses the mark. Southampton argues, “It is undisputed that Debtor committed actual fraud, avoiding an obligation to Southampton via fraudulent transfers”—but not all fraudulent transfers constitute “actual fraud” for purposes of § 523(a)(2). See *Diamond v. Vickery (In re Vickery)*, 488 B.R. 680, 691 (B.A.P. 10th Cir. 2013) (“[O]nly ‘actual fraud’ is covered by § 523(a)(2)(A), not constructive, or implied fraud.”); *Husky Int’l Elecs., Inc. v. Ritz*, 578 U.S. 355, 360 (2016) (“‘Actual’ fraud stands in contrast to ‘implied’ fraud or fraud ‘in law’ . . .”). Southampton also argues, “It is undisputed that Debtor participated in her husband Michael Terry’s breach of fiduciary duty to Four Horsemen and its creditors”—but not all breaches of fiduciary duty constitute “fraud or defalcation in a fiduciary capacity” under § 523(a)(4). *In re Young*, 91 F.3d at 1371.

<sup>11</sup> Rule 56(e) states: “If a party fails to properly support an assertion of fact or fails to properly address another party’s assertion of fact as required by Rule 56(c), the court may: . . . (1) give an opportunity to properly support or address the fact; . . .” FED. R. CIV. P. 56(e).

Southampton 30 days from the date of this order to amend its motion to address the Court's concerns.

IT IS SO ORDERED.

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