Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
March 25, 2022

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

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In re: RUOMEI ZHENG, Debtor.	Case No.: 21-13950-mkn Chapter 7
JIANJIE JIANG, Plaintiff, v. RUOMEI ZHENG, Defendant.	Adv. Proc. No.: 21-01227-mkn Date: January 12, 2022 Time: 9:30 a.m.

ORDER ON MOTION TO DISMISS JIANJIE JIANG'S COMPLAINT OBJECTING TO DISCHARGEABILITY OF DEBT PURSUANT TO 11 U.S.C. §523(A)(2), (4), (6) AND (19)[1]

On January 12, 2022, the court heard the Motion to Dismiss Jianjie Jiang's Complaint Objecting to Dischargeability of Debt Pursuant to 11 U.S.C. §523(A)[sic](2), (4), (6) and (19) ("Dismissal Motion"), brought on behalf of defendant Ruomei Zheng ("Debtor"), in the above-

[1] In this Order, all references to "ECF No." are to the number assigned to the documents filed in the above-captioned bankruptcy case as they appear on the docket maintained by the clerk of court. All references of "AECF No." are to the documents filed in the above-captioned adversary proceeding. All references to "Section" or "§§ 101-1532" are to the provisions of the Bankruptcy Code. All references to "Civil Rule" are to the Federal Rules of Civil Procedure. All references to "FRE" are to the Federal Rules of Evidence. All references to "NRS" are to the Nevada Revised Statutes.

captioned adversary proceeding. The appearances of counsel and the parties were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND[2]

On August 10, 2021, Debtor filed a voluntary Chapter 7 petition. (ECF No. 1). The case was assigned for administration to Chapter 7 panel trustee Brian D. Shapiro.

On November 10, 2021, Jianjie Jiang ("Plaintiff") filed a complaint against the Debtor commencing the above-captioned adversary proceeding ("Complaint"). (AECF No. 1). Plaintiff seeks a determination that a certain investment-related debt owed by the Debtor is excepted from a Chapter 7 discharge under Section 523(a).[3]

On November 15, 2021, an order of discharge was entered with respect to all other debts. (ECF No. 25).

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[2] Pursuant to FRE 201(b), the court takes judicial notice of all materials appearing on the docket in the above-captioned adversary proceeding and the above-captioned Bankruptcy Case See Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015) ("The Court may consider the records in this case, the underlying bankruptcy case and public records.").

[3] On April 24, 2020, Plaintiff apparently commenced a civil action for securities fraud in the Eighth Judicial District Court, Clark County, Nevada, denominated Case No. A-20-814077-C ("State Court Action"). The action was brought against numerous defendants, including Debtor, her former husband Patrick Sun ("Sun"), Marco Valle (Valle"), Chateau Les Trois Funding GP, LLC, Chateau Les Trois Development, LLC, Silver State Regional Center, LLC and Does 1-10 and ROE Corporations 1-10. That action alleged that the defendants induced foreign parties to invest in a Las Vegas real estate project known as Chateau Les Trois ("CLT") in order to obtain visas under the federal EB-5 immigrant investor program. See Complaint at ¶¶ 1 and 2. As to the Debtor, the action was stayed when she filed her Chapter 7 petition on August 10, 2021. With respect to Sun, however, a default judgment was entered on September 7, 2021, in the amount of $996,572. Id. at (preliminary) ¶ 5. Because the facts underlying the default judgment were never actually litigated, the judgment would not have issue preclusive effect on any factual issues. See Howard v. Sandoval (In re Sandoval), 126 Nev. 136, 141 (Nev. 2010). For Sun, in the event he ever sought Chapter 7 relief, the absence of actual litigation may not be dispositive of whether that default judgment would be excepted from discharge under Section 523(a)(19). See 4 COLLIER ON BANKRUPTCY, ¶ 523.27 (Richard Levin & Henry J. Sommer, eds. 16th ed. 2021) ("However, under section 523(a)(19), a debt for violation of a securities law or fraud committed in connection with the purchase or sale of a security is nondischargeable once the judgment is entered, regardless of whether any issues are actually litigated."). Moreover, because Sun is no longer the Debtor's spouse, any judgment entered in this adversary proceeding likely would have no issue preclusive effect on him either.

On December 10, 2021, Debtor filed the instant Dismissal Motion under Civil Rule 12(b)(7) and Civil Rule 12(b)(7). (AECF No. 8). Under the former, Debtor asserts that the Complaint must be dismissed under Civil Rule 19 because it fails to join an indispensable party. Under the latter, Debtor asserts that dismissal of the Complaint under Civil Rule 12(b)(6) is required because it fails to state a claim for which relief may be granted. The Dismissal Motion was noticed to be heard on January 12, 2022. (AECF No. 9).

On December 23, 2021, Plaintiff filed her opposition to the Dismissal Motion ("Opposition"). Attached to Plaintiff's Opposition is a declaration of her attorney, David Liebrader ("Liebrador Declaration"). (AECF No. 12).

On January 4, 2022, Debtor filed a response to the Opposition ("Reply"). (AECF No. 14).

APPLICABLE LEGAL STANDARDS

A. Failure to Join an Indispensable Party under Civil Rule 19.

Pursuant to Civil Rule 12(b)(7), a party may move to dismiss a case for "failure to join a party under Rule 19." See FED.R.CIV.P. 12(b)(7). The moving party for a Civil Rule 12(b)(7) motion to dismiss bears the burden of producing evidence in support of the motion. See Nat'l Loan Acquisitions Co. v. Niswonger, 2021 WL 2948887, at *2 (E.D. Cal. July 14, 2021). A motion to dismiss under Civil Rule 12(b)(7) demands a practical, and fact-specific inquiry. See Camacho v. Major League Baseball, 297 F.R.D. 457, 461 (S.D. Cal. 2013) (external citation omitted). Id. The court may consider additional evidence outside the pleadings when making a Civil Rule 19 determination. Id.

Civil Rule 19 entails a three-step inquiry: (1) is the absent party necessary (i.e., required to be joined if feasible) under Civil Rule 19(a)?; (2) if so, is it feasible to order that absent party to be joined?; and (3) if joinder is not feasible, can the case proceed without the absent party, or is the absent party indispensable such that the action must be dismissed? See Salt River Project Agr. Imp. & Power Dist. v. Lee, 672 F.3d 1176, 1179 (9th Cir. 2012). Under the three-step analysis for Civil Rule 19, the court must first determine whether the absent party is necessary, and if so, the court would then move on to steps two and three. See In re DBSI Inc., 2013 WL

1498365, at *4 (Bankr. D. Idaho Apr. 11, 2013). "Thus, dismissal of a case is required only if the party is necessary, cannot be joined, *and* is indispensable." Id. at *4 (emphasis in original) (external citation omitted).

A party is considered necessary when: (1) complete relief cannot be granted in the party's absence; or (2) the district court determines that the absent party's participation is necessary to protect its legally cognizable interests or to protect other parties from a substantial risk of incurring multiple or inconsistent obligations because of those interests. See Camacho v. Major League Baseball, 297 F.R.D. 457, 461 (S.D. Cal. 2013) (external citation omitted). "Such a legally cognizable interest must be more than a financial stake in the outcome of the litigation." Id.

B. Failure to State a Claim for Relief under Civil Rule 12(b)(6).

A defendant may obtain dismissal of a claim alleged in a complaint under Civil Rule 12(b)(6) if the relevant claim alleged in the complaint lacks a cognizable legal theory or lacks sufficient facts to support a cognizable legal theory. See Taylor v. Bosco Credit LLC, 840 Fed.Appx. 125, 126 (9th Cir. 2020); see also Los Angeles Lakers, Inc. v. Fed. Ins. Co., 869 F.3d 795, 800 (9th Cir. 2017). In considering a motion under Civil Rule 12(b)(6), the court accepts as true all factual allegations made by, and draws all reasonable inferences in favor of, the plaintiff. See Barnes v. Belice (In re Belice), 461 B.R. 564, 573 (B.A.P. 9th Cir. 2011). An adversary complaint can survive a dismissal motion if the complaint alleges sufficient factual matter to "state a claim to relief that is plausible on its face." Curb Mobility, LLC v. Kaptyn, Inc., 434 F. Supp.3d 854, 858 (D. Nev. 2020) quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

This plausibility standard requires more than the mere possibility that the defendant is liable to the plaintiff. See Nationstar Mortgage, LLC v. Maplewood Springs Homeowners Ass'n, 238 F. Supp. 3d 1257, 1265 (D. Nev. 2017) ("When a complaint pleads facts that are merely consistent with a defendant's liability, and shows only a mere possibility of entitlement, the complaint does not meet the requirements to show plausibility of entitlement to relief.") (external citation omitted). Formulaic recitations of the elements of a claim for relief are insufficient by themselves to meet the plausibility standard. Id. at 1265.

Finally, where amendment to the subject complaint would be futile, dismissal without leave to amend may be appropriate. See Ramachandran v. Best & Krieger, 2021 WL 428654, at *4 (N.D. Cal. Feb. 8, 2021). Amendment is futile when it is clear that amendment would not remedy the complaint's deficiencies. Id.

DISCUSSON

By the instant motion, Debtor now seeks to dismiss this Adversary Proceeding based on the unavailability of her former husband and the sufficiency of the factual allegations in the Complaint. The court will first address Debtor's arguments under Civil Rule 12(b)(7) which allows a civil complaint to be dismissed if it fails to join a party under Civil Rule 19.

1. Failure to Join an Indispensable Party.

Debtor argues that Sun, her former husband and a non-party to this case, is a necessary party because he has a "significant interest in the action." See Dismissal Motion at 5:21-22. She asserts that Sun's absence leaves Debtor with a "substantial risk of incurring double, multiple or otherwise inconsistent obligations because of his interest in the matter." Id. at 5:22-24. Debtor maintains that Sun was the primary force behind CLT LP/Silver State and the subsequent, related business operations. Id. at 5:24-27. She alleges that she has never spoken with or met Plaintiff and maintains that she was not involved in any executive or operational decisions regarding the companies. Id. at 5:27-28. Debtor argues that joinder of Sun is not feasible since his whereabouts are currently unknown and it is believed he may have fled the country. Id. at 6:5-8. She asserts that a judgment rendered in Sun's absence would be unconscionable to her and cause her prejudice, and somehow would deprive Sun of due process. Id. at 6:10-12. Debtor included several exhibits attached to the Dismissal Motion to support her assertions.[4] As previously mentioned, on a motion brought under Civil Rule 12(b)(7), the court can consider evidence

[4] Normally, attaching documents to a dismissal motion which are not attached to the complaint or incorporated by reference in the complaint, and are thus outside the scope of the pleadings, would require a dismissal motion to be treated as one for summary judgment pursuant to Civil Rule 56 unless the materials are excluded by the court. See FED.R.CIV.P. 12(d). However, for the purposes of the court's Civil Rule 19 determination, as raised by the Debtor in this Dismissal Motion, the additional evidence outside the pleadings as provided can be considered without the need to treat the Dismissal Motion as one for summary judgment.

outside of the pleadings. See Camacho v. Major League Baseball, 297 F.R.D. at 461, citing McShan v. Sherrill, 283 F.2d 462, 464 (9th Cir.1960) ('To determine whether Rule 19 requires the joinder of additional parties, the court may consider evidence outside the pleadings.').

In response, Plaintiff argues that she already obtained a judgment against Sun in the State Court Action, and therefore she has no reason to name him as a party in the instant adversary proceeding. See Opposition at ¶ 5. She argues that the Debtor was a "control person" for CLT LP and Silver State within the meaning of state and federal law, and that Debtor's name was on certain documents regarding the entities that participated in the CLT project. Id. at 3:19-23;4:1-3. Plaintiff further argues that Sun is not necessary for a determination of whether the Debtor was a control person for the Chateau Les Trois entities, but that the documentary evidence and testimony will establish her as the control person. Id. at 4:15-18.

After careful consideration of the facts and circumstances, the court concludes that Sun is not a necessary party to this case. As a result, further analysis under Civil Rule 19 is unnecessary. This conclusion was made based on several reasons. First, the alleged facts in the Complaint, the supporting documents accompanying the Opposition, the State Court judgment against Sun, and the Dismissal Motion in general, all point to Debtor's involvement in some way in the entities created for the CLT project. Compare In re DBSI Inc., 2013 WL 1498365, at *8 ("The absence of an entity that is separately or independently liable does not generally impede the defense of present defendants.") (external citation omitted). Second, while this case is still in its early stages, the claims Plaintiff has alleged could be provable (or not provable) against the Debtor without the need to include Sun. In other words, complete relief can be granted in Sun's absence if Plaintiff successfully proves her claims. Third, because the State Court Action already awarded Plaintiff a default judgment against Sun, and the instant Chapter 7 proceeding was commenced only by the Debtor, it is unclear what interest Sun would have in this adversary proceeding. Fourth, there is no substantial risk to the Debtor of incurring multiple or inconsistent obligations because Plaintiff is the only party seeking a determination of nondischargeability as to a particular debt. See In re DBSI Inc., 2013 WL 1498365, at *8 ("[W]here the plaintiff sues one of two tortfeasors, the defendant does not face 'multiple liability' because it may lose in the

original action and then lose in the subsequent action for contribution against the other joint tortfeasor.") (internal quotations omitted) (external citation omitted). Finally, Debtor's assertion of the equivalent of an innocent spouse defense requires more than simply pointing a finger at an "empty chair."[5] In the event sufficient circumstantial evidence is admitted to support Plaintiff's allegations against her, Debtor will have to provide credible evidence to the contrary, perhaps even through her own testimony under oath.

Because Sun is not a necessary party, it also is not necessary to determine whether it is feasible to order him to be joined as a party, nor to determine whether he is an indispensable party. He is not. Dismissal under Civil Rule 12(b)(7) therefore is not warranted.

2. Failure to State a Claim for Relief.

The Complaint is framed as four separate claims brought under Section 523(a). The sufficiency of the allegations for each claim is addressed separately.

i. Section 523(a)(2)(A).[6]

Under Section 523(a)(2)(A), a Chapter 7 discharge does not include a debt "for money, property, services or an extension … of credit to the extent obtained by false pretenses, false representations, or actual fraud..." 11 U.S.C. § 523(a)(2)(A) (emphasis added). Under Section 523(a)(2)(A), a creditor must demonstrate, by a preponderance of the evidence, five elements: (1) the debtor made representations; (2) that at the time he knew were false; (3) that he made them with the intention and purpose of deceiving the creditor; (4) that the creditor justifiably relied on such representations; and (5) that the creditor sustained the alleged loss and damages as

[5] Even among married couples, one spouse occasionally will assign responsibility to the other spouse to avoid certain legal consequences in bankruptcy proceedings. See, e.g., In re Tarkanian, 562 B.R. 424, 466-67 (Bankr. D. Nev. 2014) (innocent spouse doctrine asserted in response to objection to Nevada homestead exemption).

[6] The Complaint does not allege that the Debtor or Sun provided a materially false statement in writing respecting their financial condition on which the Plaintiff relied. If so, Plaintiff's claim under Section 523(a)(2) could be brought only under subsection (2)(B) and would be excluded from subsection (2)(A). See, e.g., Lamar, Archer & Cofrin, LLP v. Appling, 138 S.Ct. 1752 (2018) (debtor's oral representation about a single asset is a statement respecting his financial condition which is excluded by Section 523(a)(2)(A) and not encompassed by Section 523(a)(2)(B)). The court therefore examines only whether a claim has been stated under Section 523(a)(2)(A).

the proximate result of the misrepresentations having been made. See Wickam v. Ivar (In re Werner), 817 Fed. Appx. 432, 435 (9th Cir. 2020); see also Ghomeshi v. Sabban (In re Sabban), 600 F.3d 1219, 1222 (9th Cir. 2010). Where representations are made through the acts of an agent, such acts may be imputed to the debtor if he or she knew or should have known of the fraud. See Sachan v. Huh (In re Huh), 506 B.R. 257, 265–66 (B.A.P. 9th Cir. 2014).[7] "Intent to defraud is a question of fact." Cowen v. Kennedy (In re Kennedy), 108 F.3d 1015, 1018 (9th Cir. 1997), as amended (Mar. 21, 1997). "Intent to deceive can be inferred from surrounding circumstances." Thomas v. Kenmark Ventures, LLC (In re Thomas), 716 Fed. Appx. 647, 649 (9th Cir. 2018).

The Supreme Court of Nevada noted that, "a defendant may be found liable for misrepresentation even when the defendant does not make an express misrepresentation, but instead makes a representation which is misleading because it partially suppresses or conceals information." Epperson v. Roloff, 102 Nev. 206, 212 (Nev. 1986). Even absent an express misrepresentation, a defendant engages in misrepresentation if statements are calculated to mislead another into believing something that is not true. Id. at 213. A defendant engages in misrepresentation by partially concealing information or if statements are calculated to mislead another. Id. at 212-13.

A debtor's concealment of important facts and information from a creditor can qualify as a "false representation" for purposes of Section 523(a)(2)(A). See Citibank (S.D.) N.A. v. Eashai (In re Eashai), 87 F.3d 1082, 1089 (9th Cir. 1996). The mere failure to perform a promise is not fraud, but a projection or a statement of belief constitutes an actionable factual misstatement "if (1) the statement is not actually believed, (2) there is no reasonable basis for the belief, or (3) the speaker is aware of undisclosed facts tending seriously to undermine the statement's accuracy." Provenz v. Miller, 102 F.3d 1478, 1487 (9th Cir. 1996); Kaplan v. Rose,

[7] As discussed in note 3, supra, the default judgment entered against Sun has no preclusive effect as to any factual issues. Thus, even if the acts of Wan Tong or Valle were imputed to Sun or the Debtor in that proceeding, that determination would not have preclusive effect in this adversary proceeding. Compare Zuckerman v. Abel (In re Zuckerman), 2021 WL 3186444, at *6 (B.A.P. 9th Cir. July 28, 2021) (state court found in prior action that the debtor was central to a fraudulent development project and made the relevant misrepresentations).

49 F.3d 1363, 1375 (9th Cir. 1995). However, "[a] promise made with a positive intent not to perform or without a present intent to perform satisfies § 523(a)(2)(A)." In re Carlson, 426 B.R. 840, 855 (Bankr. D. Idaho 2010) (external quotations omitted).

In the instant case, Plaintiff alleges that Wan Tong was the authorized agent for both Sun and the Debtor, and that Valle was the appointed agent and employee of the Debtor. See Complaint ¶¶ 15 and 19. Plaintiff further alleges that the Debtor and Sun "commissioned, authorized and provided the information for the preparation of false and misleading marketing materials used by their authorized agents W[a]n Tong to induce investors into investing in the CLT project." Id. at ¶ 37. She also alleges that "These misleading statements concerned their skill and experience in completing EB-5 projects, as well as misrepresentations by omission of the fact that they did not own the real estate on which the CLT project was to be built." Id. Plaintiff further asserts that the Debtor and Sun knew that funding for the CLT project was highly unlikely and that they did not have the requisite skill set to see the project to its completion. See Complaint at ¶ 38. Plaintiff alleges that the Debtor and Sun hid this information from her and allowed their agents to provide materially false information via marketing materials to Plaintiff, which Plaintiff relied on when making her investment in the CLT project. See Complaint at ¶ 39. Plaintiff states her reliance on these alleged misrepresentations and omissions led to her suffering damages due to her investment loss, as well as administrative and lawyer's fees paid. See Complaint at ¶¶ 40-41.

Debtor argues that the company Wan Tong solicited Plaintiff, and that Plaintiff does not allege that the Debtor communicated or committed to anything. See Dismissal Motion at 7:9-11. Debtor further details Silver State, CLT LP, Wan Tong, Valle, and Sun's actions as described in the Complaint, while pointing out she was not mentioned by Plaintiff in several instances involving alleged misrepresentations. Id. at 7:14-23. Thus, Debtor argues that Plaintiff invested her money based upon representations made by Valle, Sun, and Wan Tong, rather than the Debtor. Id. at 7:24-25. Debtor further argues that the money paid by Plaintiff, which was supposedly for a law firm to assist the Debtor in her EB-5 immigration application, was not paid to or obtained by the Debtor. Id. at 7:26-28. Instead, Plaintiff apparently was told by the law

firm Harmon Wang that her U.S. Immigration I-797 form was a fake, likely photoshopped by Sun. Id. at 7:27-28; see also Complaint at ¶ 27.[8] Thus, Debtor maintains that she never obtained any money by fraud or otherwise. See Dismissal Motion at 8:3-4.

Just as the Debtor alleges that her former husband is a necessary party who was responsible for the alleged wrongful conduct, she also maintains that any agents or employees were responsible for that conduct rather than herself. Plaintiff sufficiently alleges that Wan Tong and Valle, along with Sun, made multiple misrepresentations that led to the damages sought by the Complaint. She also alleges that Wan Tong and Valle were agents and/or employees of the Debtor. Plaintiff also alleges that the agents used information obtained from the Debtor and Sun or concealed by the Debtor and Sun, including that they had never secured funding to purchase the land for the CLT project nor possessed the ability to protect the Plaintiff's immigration status. She also alleges that she relied on the misrepresentations and concealment of information in sustaining damages. Accepting these and other allegations as true for purposes of a motion under Civil Rule 12(b)(6), Plaintiff has alleged a plausible basis for a claim under Section 523(a)(2)(A).

ii. Section 523(a)(4).

Section 523(a)(4) of the Bankruptcy Code does not allow an individual debtor to discharge a debt incurred by "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4).[9] A plaintiff claiming an exception to discharge under Section 523(a)(4) for fraud must demonstrate, by a preponderance of the evidence, that a fiduciary relationship existed between the parties and the defendant committed

[8] The Complaint refers to the law firm as Law Huang, not Harmon Wang.

[9] Section 523(a)(4) requires proof of "fraud or defalcation" while acting in a fiduciary capacity, or proof of larceny or embezzlement regardless of fiduciary capacity. "Defalcation" while in a fiduciary capacity refers to instances where a debtor's activity involves "knowledge of, or gross recklessness in respect to the improper nature of the fiduciary behavior." Bullock v. BankChampaign, N.A., 569 U.S. 267 (2013). For purposes of this part of Section 523(a)(4), a court must first determine whether the debtor was acting in a fiduciary capacity.

fraud in the course of that fiduciary relationship.[10] See In re Zimmerman, 2011 WL 1753779, at *4. To prove fraud under Section 523(a)(4), a plaintiff must show fraud in fact, involving moral turpitude or intentional wrong, rather than implied or constructive fraud. Id. Circumstantial evidence may be used to determine fraudulent intent. Id.

Under Section 523(a)(4), the term "fiduciary" is narrowly defined. See Cal-Micro, Inc. v. Cantrell (In re Cantrell), 329 F.3d 1119, 1125 (9th Cir. 2003). The broad definition of a fiduciary as a relationship involving confidence, trust, and good faith, is inapplicable under Section 523(a)(4). Id. For the purposes of Section 523(a)(4), a fiduciary relationship must be one which arises "from an express or technical trust that was imposed before and without reference to the wrongdoing that caused the debt." In re Park, 2021 WL 6138231, at *6 (Bankr. C.D. Cal. Dec. 29, 2021) (internal quotations omitted) (external citation omitted). While the definition of fiduciary is governed by federal law, the Ninth Circuit makes it clear that state law is to be consulted to ascertain whether the requisite express or technical trust relationship exists. See In re Tolman, 491 B.R. 138, 150 (Bankr. D. Idaho 2013) (external citations omitted).

Under Nevada law, an express trust requires the following: First, the settlor properly manifests an intention to create a trust; and second, there is trust property except as otherwise provided by statute. See NEV.REV.STAT. § 163.003. "There are various methods to create a trust, including a declaration by the owner of property that he or she holds the property as trustee or a transfer of property by the owner during his or her lifetime to another person as trustee." In re Plyam, 530 B.R. 456, 472 (B.A.P. 9th Cir. 2015) citing NEV.REV.STAT. § 163.002.

Nevada law does not define a "technical trust," but case law in the Ninth Circuit provides this Court with guidance. See Plyam, 530 B.R. at 472. "In the absence of a definition under state law, we construe a technical trust as one imposed by law." Id. The Supreme Court of

[10] It is important to acknowledge that Section 523(a)(4) not only excepts from discharge any debt for fraud while acting in a fiduciary capacity, but also any debt for defalcation while acting in a fiduciary capacity, and for embezzlement, or larceny. See In re Zimmerman, 2011 WL 1753779, at *4 (Bankr. D. Ariz. May 6, 2011) (the court in Zimmerman provides a detailed account of the different elements necessary under Section 523(a)(4) for a plaintiff to prove, including the definitions of defalcation and embezzlement). Because the Complaint only alleges fraudulent conduct in connection with this claim, the court will not address the defalcation, embezzlement or larceny aspects of Section 523(a)(4). See Complaint at ¶ 49.

Nevada has recognized that under Nevada law, "members of a joint venture generally owe each other fiduciary duties, including the duty of loyalty for the duration of their venture. See Brinkerhoff v. Foote, 132 Nev. 950, 387 P.3d 880 (2016) (internal quotations omitted) (external citation omitted).

In the instant case, Plaintiff argues that the Debtor was a fiduciary of the Plaintiff with respect to the safekeeping of Plaintiff's funds in escrow pending their use in the CLT project. See Complaint at ¶ 46. She also alleges, however, that she was never provided a private placement memorandum reflecting her investment and only received promotional materials touting the CLT project. Id. at ¶¶ 16, 20, 32, and 34. Plaintiff further argues at the time she made her investment, Debtor knew that she would not be able to complete the CLT project as represented to Plaintiff because the Debtor and Sun did not own the land, did not have sufficient funds to acquire the land, and could not secure additional financing to acquire the land. Id. Plaintiff also allege that the Debtor and Sun failed to keep her investment in escrow in case the CLT project failed. Id.

Debtor argues that, according to the Complaint, it was Sun who promised to return Plaintiff's money, not the Debtor. See Dismissal Motion at 8:10-12. Additionally, the Complaint alleges that it was Sun who claimed to be responsible and in control of the money in a WeChat session, rather than the Debtor. Id. at 8:9-10. Finally, Debtor argues it was Valle and Wan Tong that allegedly gave false assurances about the CLT project and the Debtor and Sun's credentials and qualifications. Id. at 8:12-15. In light of these allegations, Debtor argues that any fraud in a fiduciary capacity, if any, was committed by other entities. In other words, she maintains that she is innocent of any of the alleged misconduct.

In this instance, Plaintiff's mere allegation that the Debtor is a fiduciary within the meaning of Section 523(a)(4) is insufficient. She does not allege that a writing was provided that would suggest the creation of an express trust. Plaintiff does not allege that an escrow arrangement existed for the $500,050 that she transferred to Chateau Les Trois Funding LLC. She does not allege that a joint venture was ever formed but alleges that the actual investment was treated as a five-year low-interest loan. See Complaint at ¶ 20. Plaintiff does not allege that

there is an applicable statutory provision that gives rise to a technical trust relationship. Under these circumstances, the allegations are insufficient to state a plausible claim for misconduct while acting in a fiduciary capacity.

iii. Section 523(a)(6).

Section 523(a)(6) prevents discharge of a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). There are three elements required in a Section 523(a)(6) claim: (1) willfulness; (2) maliciousness and (3) injury. See Smith v. Entrepreneur Media, Inc. (In re Smith), 2009 Bankr. LEXIS 4582, at *20 (B.A.P. 9th Cir. 2009). Furthermore, the Supreme Court has explained that the actor must intend the consequences of the act, not simply the act itself. See Kawaauhau v. Geiger (In re Geiger), 523 U.S. 57, 61-62 (1998). Willfulness and maliciousness must both be proven to prevent a discharge of debt under Section 523(a)(6). See Ormsby v. First American Title Co. (In re Ormsby), 591 F.3d 1199, 1206 (9th Cir. 2010). Reckless or negligent acts are not sufficient to establish liability under Section 523(a)(6). See In re Geiger, 523 U.S. at 61.

Willfulness is defined as the intent to cause injury; specifically, the injury must be deliberate or intentional, not the mere act that leads to the injury. See In re Ormsby, 591 F.3d at 1206. When determining the existence of willfulness, a court may consider circumstantial evidence that establishes what a debtor actually knew when conducting the injury creating action and not just what a debtor admits to knowing. Id. Since reckless conduct requires an intent to act instead of an intent to cause injury, recklessly inflicted injuries do not meet the willfulness requirement under Section 523(a)(6). See In re Geiger, 523 U.S. at 64. Thus, the "willful injury requirement is met only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct." In re Ormsby, 591 F.3d at 1206, quoting Carillo v. Su (In re Su), 290 F.3d 1140, 1142 (9th Cir. 2002).

Under Section 523(a)(6), a malicious injury is one which involves the following: (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse. See In re Ormsby, 591 F.3d at 1207, citing Petralia v. Jercich (In re Jercich), 238 F.3d 1202, 1209 (9th Cir. 2001). Malice may be inferred based on the nature of the

wrongful act, but to make such an inference, willfulness must be established first. See In re Ormsby, 591 F.3d at 1207.

In the instant case, Plaintiff alleges that Debtor's misrepresentations through her authorized agents, Wan Tong and Valle, as well as her omissions of material facts, were misleading since neither she nor Sun had the requisite skills to complete the CLT project with its accompanying immigration component. See Complaint at ¶ 52. Plaintiff also argues at the time the Debtor and Sun solicited Plaintiff's investment they both knew they had failed repeatedly to secure the funding needed to acquire the land for the CLT project, and they both did not have the skills or knowledge to comply with immigration law when operating Silver State to ensure Plaintiff's immigration status was protected. Id. Plaintiff argues these facts were hidden from her, and Debtor was aware the CLT project with immigration benefits held no "basis in reality." See Complaint at ¶ 53.

Plaintiff further alleges Debtor's conduct and employment of agents to raise money for the CLT project was designed to deceive Plaintiff and constituted willful and malicious injury to Plaintiff and her property. See Complaint at ¶ 54. Plaintiff states that Debtor's conduct was knowing, willful, and it was foreseeable the CLT project would not be completed, nor would Plaintiff obtain her "green card." See Complaint at ¶ 54.

Debtor argues that Valle and Wan Tong were responsible for making false assurance to the Plaintiff, not the Debtor. See Dismissal Motion at 8:20-21. Debtor also argues it was Sun and Wan Tong who made false assurances to the Plaintiff regarding her immigration paperwork, not the Debtor. See Dismissal Motion at 8:22-23. Debtor explains that Silver State was terminated by U.S. Immigration Services long after Debtor divorced Sun, which meant she no longer had control of Silver State. See Dismissal Motion at 8:23-25. Debtor further argues that Wan Tong produced promotional materials misrepresenting the progress of the CLT project, not the Debtor. See Dismissal Motion at 8:25-26. According to Debtor, Sun provided the Plaintiff with faulty immigration advice, not the Debtor. See Dismissal Motion at 8:27-28. In other words, the Debtor again maintains that she is innocent of any of the alleged misconduct.

As previously discussed, Debtor alleges that her former husband (Sun) is a necessary party who was responsible for the alleged wrongful conduct, along with any agents or employees (Wan Tong and Valle). While Debtor asserts that those parties are culpable, Plaintiff alleges that the Debtor and Sun knew that the required land had not been obtained, knew that they did not have the ability to protect the Plaintiff's immigration status, knew that they had provided misinformation or concealed information from Wan Tong and Valle, and knew that their agents or employees were misrepresenting or concealing true information from the Plaintiff. Under those circumstances, the injury alleged by the Plaintiff is substantially certain to result and therefore would necessarily cause injury. For purposes of a motion under Civil Rule 12(b)(6), the allegations are accepted as true, and inferences may be drawn as to the Debtor's belief and intent. For purposes of a claim under Section 523(a)(6), the allegations are sufficient to allege a plausible basis for a claim.

iv. Section 523(a)(19).

Section 523(a)(19) precludes discharge of a debt that:

> (A) is for—
>
> > (i) the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934), any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or
> >
> > (ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and
>
> (B) results, before, on, or after the date on which the petition was filed, from—
>
> > (i) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;
> >
> > (ii) any settlement agreement entered into by the debtor; or
> >
> > (iii) any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.

See 11 U.S.C. § 523(a)(19); see also In re Lyndon, 2018 WL 3004588, at *3 (Bankr. D. Haw. June 13, 2018).

The elements for a debt to be nondischargeable under Section 523(a)(19) are as follows: "First, the debt must be 'for' a securities law violation or fraud in connection with the sale of a security. Second, the debt must 'result from' some judicial or administrative proceeding or a

settlement agreement." In re Lyndon, 2018 WL 3004588, at *3 (Bankr. D. Haw. June 13, 2018) (external citation omitted). As to the first element, Section 523(a)(19) overlaps with Section 523(a)(2)(A) as the latter "renders debts nondischargeable arising from common law fraud." 4 Collier on Bankruptcy, supra, ¶ 523.27[1]. As to the second element, the Ninth Circuit has taken the view that a bankruptcy court may enter a judgment that would satisfy the requirements of Section 523(a)(19)(B). See In re Chui, 538 B.R. 793, 807 (Bankr. N.D. Cal. 2015), aff'd sub nom. Tradex Glob. Master Fund Spc Ltd. v. Chui, 559 B.R. 520 (N.D. Cal. 2016), aff'd sub nom. Tradex Glob. Master Fund SPC LTD v. Chui, 702 Fed. Appx. 632 (9th Cir. 2017). ("Given that current Ninth Circuit authority authorizes this court to liquidate claims in conjunction with determining their nondischargeability, and the fact that the plain language of the statute contemplates entry of judgment after the filing of the petition, the more reasonable interpretation of section 523(a)(19)(B) is that this Court may enter a judgment in satisfaction of that section.").

In the instant case, Plaintiff argues the CLT investment sold to her was a security under both federal and state law. See Complaint at ¶ 58. Plaintiff also argues the CLT offering was not registered, but it was not exempt from registration under state of federal securities law as the time it was sold to Plaintiff. Id. at ¶ 59. Additionally, Plaintiff claims that the Debtor was a control person of the entity issuing the securities, as well as a control person of the other entities created to materially aid in the fraudulent scheme to sell CLT securities to the public. Id. Further, Plaintiff argues that Debtor is also liable under section 15 U.S.C. 77 as well as NRS § 90.660 and NRS § 90.460 for the sale of unregistered securities; and as a control person and "material aider" under NRS § 90.660 for the sale of securities based on material misrepresentations and omissions of fact pursuant to NRS § 90.570. Id. at ¶¶ 60, 61, and 63.

Debtor argues that in order for a defendant to be held liable under Section 523(a)(19), the debtor must have either violated federal securities law or perpetrated fraud in connection with the sale of any security. See Dismissal Motion at 9:2-4. She argues that such a cause of action is not supported by any of the alleged facts in the Adversary Complaint. Id. at 9:4-5. Debtor explains how Sun, Valle, and Wan Tong were responsible for various conduct in connection with the CLT project's investments, not the Debtor. See Dismissal Motion at 9:6-14. Debtor argues that none

of the alleged facts demonstrate that she had any connection with the sale of any securities or that she violated federal securities law. Id. at 9:15-17. In other words, Debtor's position is the same for this claim as all of the other claims: others were responsible for the alleged misconduct.

As previously stated, for purposes of a motion under Civil Rule 12(b)(6), the allegations of the Complaint are accepted as true. The court previously concluded that the allegations are sufficient to state a plausible claim for common law fraud under Section 523(a)(2)(A). Plaintiff alleges that the CLT project was an investment scheme offered under the EB-5 program for the Plaintiff to obtain legal residency status. See Complaint at ¶ 5. If the investments created equity positions in the project, they might constitute securities within the meaning of state or federal law. Because the court is authorized to enter a judgment after the Debtor's bankruptcy petition was filed, the allegations are sufficient to allege a plausible basis for a claim under Section 523(a)(19).

IT IS THEREFORE ORDERED that the Motion to Dismiss Jianjie Jiang's Complaint Objecting to Dischargeability of Debt Pursuant to 11 U.S.C. §523(A)(2), (4), (6) and (19), brought on behalf of defendant Ruomei Zheng, Adversary Docket No. 8, be, **DENIED IN PART and GRANTED IN PART** with leave to amend.

IT IS FURTHER ORDERED that the Dismissal Motion under Rule 12(b)(7) of the Federal Rules of Civil Procedure is **DENIED.**

IT IS FURTHER ORDERED that the Dismissal Motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure is **DENIED** as to plaintiff's claims under 11 U.S.C. §§523(a)(2)(A), 523(a)(6), and 523(a)(19).

IT IS FURTHER ORDERED that the Dismissal Motion is **GRANTED** as to plaintiff's claim under 11 U.S.C. §523(a)(4) with leave to amend. **No later than April 14, 2022**, plaintiff may, but is not required, to file an amended complaint with respect to the claim under 11 U.S.C. §523(a)(4).

IT IS FURTHER ORDERED that that **no later than April 29, 2022**, defendant shall file an answer or other response to the existing complaint, or any amended complaint filed in this adversary proceeding.

IT IS FURTHER ORDERED that the initial scheduling conference in this adversary proceeding currently set for **April 14, 2022**, is continued to **May 12, 2022, at 10:00 a.m.**

Copies sent via CM/ECF ELECTRONIC FILING

Copies sent via BNC to:

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