

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA**

Honorable Fredrick E. Clement
Sacramento Federal Courthouse
501 I Street, 7th Floor
Courtroom 28, Department A
Sacramento, California

DAY: TUESDAY
DATE: OCTOBER 5, 2021
CALENDAR: 1:30 P.M. ADVERSARY PROCEEDINGS

RULINGS

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling.

"No Ruling" means the likely disposition of the matter will not be disclosed in advance of the hearing. The matter will be called; parties wishing to be heard should rise and be heard.

"Tentative Ruling" means the likely disposition, and the reasons therefor, are set forth herein. The matter will be called. Aggrieved parties or parties for whom written opposition was not required should rise and be heard. Parties favored by the tentative ruling need not appear. Non-appearing parties are advised that the court may adopt a ruling other than that set forth herein without further hearing or notice.

"Final Ruling" means that the matter will be resolved in the manner, and for the reasons, indicated below. The matter will not be called; parties and/or counsel need not appear and will not be heard on the matter.

CHANGES TO PREVIOUSLY PUBLISHED RULINGS

On occasion, the court will change its intended ruling on some of the matters to be called and will republish its rulings. The parties and counsel are advised to recheck the posted rulings after 3:00 p.m. on the next business day prior to the hearing. Any such changed ruling will be preceded by the following bold face text: "**[Since posting its original rulings, the court has changed its intended ruling on this matter]**".

ERRORS IN RULINGS

Clerical errors of an insignificant nature, e.g., nomenclature ("2017 Honda Accord," rather than "2016 Honda Accord"), amounts, ("\$880," not "\$808"), may be corrected in (1) tentative rulings by appearance at the hearing; or (2) final rulings by appropriate ex parte application. Fed. R. Civ. P. 60(a) *incorporated by* Fed. R. Bankr. P. 9024. All other errors, including those occasioned by mistake, inadvertence, surprise, or excusable neglect, must be corrected by noticed motion. Fed. R. Bankr. P. 60(b), *incorporated by* Fed. R. Bankr. P. 9023.

1. [20-23726](#)-A-11 **IN RE: AME ZION WESTERN EPISCOPAL DISTRICT**
[21-2005](#)

CONTINUED STATUS CONFERENCE RE: COMPLAINT
1-14-2021 [[1](#)]

AME ZION CHURCH OF PALO ALTO,
INC. V. AME ZION WESTERN
EDWARD JOHNSON/ATTY. FOR PL.

No Ruling

2. [20-23726](#)-A-11 **IN RE: AME ZION WESTERN EPISCOPAL DISTRICT**
[21-2016](#) [GT-3](#)

CONTINUED STATUS CONFERENCE RE: MOTION TO DISMISS CAUSE(S)
CROSS-COMPLAINT
8-10-2021 [[90](#)]

AFRICAN METHODIST EPISCOPAL
ZION CHURCH ET AL V. AME ZION
HOWARD STEINBERG/ATTY. FOR MV.

Final Ruling

This motion is dropped from calendar as the Cross-Complaint was suspended by Stipulation and Order, ECF No. 133.

3. [21-20167](#)-A-13 **IN RE: HARLAN/CHARLOTTE CONFER**
[21-2024](#)

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
6-2-2021 [[8](#)]

WATSON ET AL V. CONFER, III ET
AL
BARRY SPITZER/ATTY. FOR PL.

No Ruling

4. [19-24685](#)-A-13 **IN RE: EMILIA ARDELEAN**
[19-2135](#) [TBG-5](#)

MOTION FOR SUMMARY JUDGMENT AND/OR MOTION FOR PARTIAL
SUMMARY JUDGMENT
8-24-2021 [[114](#)]

MASSIOUI V. ARDELEAN
DANIEL GRIFFIN/ATTY. FOR MV.
RESPONSIVE PLEADING

Tentative Ruling

Matter: Motion for Summary Judgment

Notice: LBR 9014-1(f)(1), 7056-1; written opposition required

Disposition: Granted in part and denied in part; notice of intent to grant summary judgment against nonmovant, Fed. R. Civ. P. 56(f)(1)

Order: Civil minute order

Defendant Emelia Ardelean ("Ardelean" or "defendant Ardelean") moves for summary judgment in an adversary proceeding filed by plaintiff Houria El Massioui ("El Massioui" or "plaintiff El Massioui") under 11 U.S.C. § 523(a)(2), (a)(4). Plaintiff El Massioui opposes the motion.

For the most part, defendant Ardelean has not sustained her burden of proof. Apparently undisputed facts suggest that the court should grant summary judgment against Ardelean: (1) as to El Massioui's status as an employee, rather than an independent contractor, between June 2015, and March 2018; (2) Ardelean's violation of California Industrial Welfare Commission IWC Order 5-2001 with respect to overtime and meal period; and (3) two of the three elements of elements of embezzlement, 11 U.S.C. § 523(a)(4), *In re Littleton*, 942 F.2d 551, 555 (9th Cir. 1991), (A) property, i.e., wages due El Massioui, were in possession of Ardelean; and (B) Ardelean appropriated those wages for a use other than that which it was entrusted. As a result, except as to fraud/defalcation in a fiduciary capacity, 11 U.S.C. § 523(a)(4), defendant Ardelean's motion will be denied. Notice of intent to grant summary judgment against Ardelean on limited issues will be continued to November 16, 2021, to allow Ardelean to submit briefs and augment the evidentiary record.

FACTS

As alleged in the complaint, plaintiff El Massioui immigrated to the United States from Morocco. First Am. Compl. 2:10-13, ECF No. 17. She has "somewhat limited" higher education and English skills. *Id.*

Defendant Ardelean owned and operated three elder care homes: "Elderly Inn II"; "Chrisman Community;" and "I Love You Dad." *Id.* at 1:28-2:2. Each facility was licensed and regulated by the

California Department of Social Services and provided "in-home care to the elderly." *Id.* at 2:6-9.

Between June 2015, and March 2018, El Massioui worked as a caregiver and domestic worker in one, or more, the residential care facilities owned and operated by Ardelean. *Id.* at 2:8-19. Prior to El Massioui' commencement of employment, Ardelean told El Massioui that she would be lawfully paid and would receive "all wages she was entitled to under the law." *Id.* at 3:7-13. Ardelean was aware that these representations were untrue. *Id.* at 3:13-16. Wages were paid in part by check and in part in cash.

The crux of the dispute appears to arise from Ardelean's decision to pay El Massioui as an independent contractor, rather than an employee. *Id.* at 4:22-28. She did not deduct applicable taxes, Social Security contributions, Medicare or California Disability Insurance contributions from the amounts paid plaintiff El Massioui. *Id.* She also did not honor the California's wage and hours laws regarding overtime and double time, Cal. Lab. Code § 1198, Industrial Welfare Commission IWC Order 5-2001 §§ 3-4, or meal/rest breaks. Cal. Lab. Code §§ 512, 226.7, IWC 5-2001 §§ 11-12. First Am. Compl. 2:20-3:6.

In 2017, another employee, Carmelita Mancía, brought suit against Ardelean for violation of California's labor laws. *Mancía v. Ardelean*, No. 34-2017-00209727 (Sacramento County Super. Ct. 2017); First Am. Comp. at 3:19-24. In response, Ardelean altered her practices, by deducting taxes, Social Security, Medicare and California Disability Insurance, but she continued to ignore California's overtime, double-time or meal/rest period labor laws. *Id.* at 3:25-4:2.

In February 2019, El Massioui brought suit against Ardelean. *El Massioui v. Ardelean*, No. 34-2019-00250513 (Sacramento County Super. Ct. February 13, 2019). *Id.* at 4:21-5:2. El Massioui contended that Ardelean (1) had been improperly classified her as an independent contractor, rather than an employee; (2) failed to keep accurate wage and hours records; and (3) deprived her of wages due her under California law. *Id.*

Five months later, in July 2019, and before El Massioui's state court action was resolved, Ardelean filed a Chapter 13 bankruptcy petition. Carmelita Mancía filed a claim for \$21,555.97. Proof of Claim No. 13-1. El Massioui has filed a claim for \$662,734.82. Proof of Claim No. 12-2. Neither Ardelean, nor the Chapter 13 trustee, have objected to either Proof of Claim.

Ardelean has filed three Chapter 13 plans. Plans, ECF Nos. 12, 23, 238. Plan confirmation has consistently been opposed by the Chapter 13 trustee, David Cusick, and by Ardelean's former employees

Carmelita Mancina and Houria El Massioui. Ardelean has not yet achieved plan confirmation.

PROCEDURE

In response to the Chapter 13 petition, plaintiff El Massioui filed an adversary complaint to except the debt owed to her from discharge. 11 U.S.C. § 523(a)(2), (a)(4), (a)(6). First Am. Compl., ECF No. 17. Defendant Ardelean answered the complaint. Answer, ECF No. 41.

The court issued a scheduling order. Scheduling Order, ECF No. 103.

After the scheduling order the court realized that relief under 11 U.S.C. § 523(a)(6) would not lie unless and until Ardelean sought a hardship discharge, 11 U.S.C. § 1328(c). 11 U.S.C. § 1328(b), 523(a)(6); *In re Toste*, 2014 WL 3908139 at *2 (9th Cir. BAP August 12, 2014). In response, the court issued an order to show cause for dismissal of the § 523(a)(6). After receiving briefs, the court dismissed without prejudice El Massioui's request for relief under § 523(a)(6). Order, ECF No. 108. Plaintiff El Massioui's causes of action for relief under 11 U.S.C. § 523(a)(2), (a)(4) remain. *Id.*

Defendant Ardelean now moves for summary judgment. She argues that there is no genuine dispute as to any material fact: (1) as to the absence of each element of fraud, 11 U.S.C. § 523(a)(2)(A), (A) misrepresentation, and (B) reliance; (2) as to the absence of each element fraud or defalcation while acting in fiduciary capacity, 11 U.S.C. § 523(a)(4), (A) no fiduciary capacity; or (B) no identifiable res; (3) the applicability of the doctrine of unclean hands; and (4) the applicability of comparative fault, which she also describes as willful blindness. Mem. P.&A. 2:8-24, ECF No. 116.

JURISDICTION

This court has jurisdiction. 28 U.S.C. § 1334(a)-(b); *see also* General Order No. 182 of the Eastern District of California. This is a core proceeding. 28 U.S.C. § 157(b)(2)(L). In the event that matter is determined to be non-core, the parties may consent to the entry of final orders and judgments by this court. 28 U.S.C. § 157(b)(3); *Wellness Int'l Network, Ltd. v. Sharif*, 135 S.Ct. 1932, 1945-46 (2015). Here, the parties have so consented. Scheduling Order § 2.0, ECF No. 103.

LAW

Federal Rule of Civil Procedure 56 requires the court to grant summary judgment on a claim or defense "if 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),

incorporated by Fed. R. Civ. P. 56. “[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.” *California v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). “A fact is ‘material’ when, under the governing substantive law, it could affect the outcome of the case.” *Thrifty Oil Co. v. Bank of Am. Nat’l Trust & Sav. Ass’n*, 322 F.3d 1039, 1046 (9th Cir. 2003) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

“The court must view the evidence in the light most favorable to the non-movant and draw all reasonable inferences in the non-movant’s favor.” *Swoger v. Rare Coin Wholesalers*, 803 F.3d 1045, 1047 (9th Cir. 2015) (citing *Clicks Billiards Inc. v. Sixshooters Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001)).

A shifting burden of proof applies to motions for summary judgment. *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010). “The moving party initially bears the burden of proving the absence of a genuine issue of material fact.” *Id.*

“Where the non-moving party [e.g., a plaintiff] bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party’s case. Where the moving party meets that burden, the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial.” *Id.* (citation omitted). The Ninth Circuit has explained that the non-moving party’s “burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence.” *Id.* “In fact, the non-moving party must come forth with evidence from which [the factfinder] could reasonably render a verdict in the non-moving party’s favor.” *Id.*

When the moving party has the burden of persuasion at trial (e.g., a plaintiff on claim for relief or a defendant as to an affirmative defense), the moving party’s burden at summary judgment is to “establish beyond controversy every essential element of its . . . claim. *S. California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003) (internal quotation marks omitted). In such a case, there is no need to disprove the opponent’s case “[i]f the evidence offered in support of the motion establishes every essential element of the moving party’s claim or [affirmative] defense.” Hon. Virginia A. Phillips & Hon. Karen L. Stevenson, *Federal Civil Procedure Before Trials, Calif. & 9th Cir. Edit.*, Summary Judgment, Burden of Proof ¶ 14:126.1 (Rutter Group 2019).

A party may support or oppose a motion for summary judgment with affidavits or declarations that are “made on personal knowledge” and that “set out facts that would be admissible in evidence.” Fed. R.

Civ. P. 56(c)(4). The assertion "that a fact cannot be or is genuinely disputed" may be also supported by citing to other materials in the record or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

"A motion for summary judgment cannot be defeated by mere conclusory allegations unsupported by factual data." *Angel v. Seattle-First Nat'l Bank*, 653 F.2d 1293, 1299 (9th Cir. 1981) (citing *Marks v. U.S. Dep't of Justice*, 578 F.2d 261, 263 (9th Cir. 1978)).

"Furthermore, a party cannot manufacture a genuine issue of material fact merely by making assertions in its legal memoranda." *S.A. Empresa de Viacao Aerea Rio Grandense v. Walter Kidde & Co.*, 690 F.2d 1235, 1238 (9th Cir. 1982).

DISCUSSION

Admissibility of Evidence

Motions for summary judgment must be supported by admissible evidence. Fed. R. Civ. P. 56(c)(1), (c)(4), incorporated by Fed. R. Bankr. P. 7056. "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." *Id.*

Declarations: Plaintiff El Massioui and Defendant Ardelean

| Description | Admit/Deny | Reason |
|--------------------------------|---------------------------------|--|
| Ardelean decl., ECF No. 117 | Admit | Fed. R. Evid. 401-402 |
| Griffin decl., ECF No. 118 | Deny | No personal knowledge by attorney. FRE 602, 901-902; <i>Brainard v. American Skandia Life Assur.</i> , 432 F.3d 655, 667 (6th Cir. 2005); <i>Estremera v. United States</i> , 442 F.3d 580, 584-585 (7th Cir. 2006); <i>Orr v. Bank of America, NT & S.A.</i> , 285 F.3d 764, 774 (9th Cir. 2002). |
| Harrington decl., ECF No. 127 | Admit as to ¶ 10, deny all else | Fed. R. Evid. 401-402 |
| El Massioui decl., ECF No. 128 | Admit | Fed. R. Evid. 401-402 |
| Sun decl., ECF No. 129 | Admit | Fed. R. Evid. 401-402 |

Documentary

Offered by Movant/Defendant Ardelean

| Description | Admit/Deny | Reason |
|---|------------|---|
| Exh. 1: El Massioui Tr. | Admit | FRE 901(b)(1) |
| Exh. 2: 2015-2018 Bank Records | Deny | No personal knowledge by attorney. FRE 602, 901-902; <i>Brainard v. American Skandia Life Assur.</i> , 432 F.3d 655, 667 (6th Cir. 2005); <i>Estremera v. United States</i> , 442 F.3d 580, 584-585 (7th Cir. 2006); <i>Orr v. Bank of America, NT & S.A.</i> , 285 F.3d 764, 774 (9th Cir. 2002). ¹ |
| Exh. 3: Pl. 2015-2018 Tax Returns & ancillary documents | Deny | No personal knowledge by attorney. FRE 602, 901-902; <i>Brainard v. American Skandia Life Assur.</i> , 432 F.3d 655, 667 (6th Cir. 2005); <i>Estremera v. United States</i> , 442 F.3d 580, 584-585 (7th Cir. 2006); <i>Orr v. Bank of America, NT & S.A.</i> , 285 F.3d 764, 774 (9th Cir. 2002). ² |
| Exh. 4: Pl. Medi-Cal Documents | Deny | No personal knowledge by attorney. FRE 602, 901-902; <i>Brainard v. American Skandia Life Assur.</i> , 432 F.3d 655, 667 (6th Cir. 2005); <i>Estremera v. United States</i> , 442 F.3d 580, 584-585 (7th Cir. 2006); <i>Orr v. Bank of America, NT & S.A.</i> , 285 F.3d 764, 774 (9th Cir. 2002); |

¹ Though some of these documents are referenced in the deposition transcript, the court is unable to ascertain whether these documents are true and correct copies of the same documents used by counsel at the deposition. And, therefore, that is not a sufficient basis of authentication.

² See footnote 2.

| | | |
|---|------|--|
| | | document not provided (request for sealing rejected). |
| Exh. 5: Medi-Cal Income Limits/Poverty Guidelines | Deny | No personal knowledge by attorney. FRE 602, 901-902; <i>Brainard v. American Skandia Life Assur.</i> , 432 F.3d 655, 667 (6th Cir. 2005); <i>Estremera v. United States</i> , 442 F.3d 580, 584-585 (7th Cir. 2006); <i>Orr v. Bank of America, NT & S.A.</i> , 285 F.3d 764, 774 (9th Cir. 2002). |

Offered by Respondent/Plaintiff El Massioui³

| Description | Admit/Deny | Reason |
|----------------------------------|-------------------|---|
| Exh. 2: Employer Records Request | Deny | No personal knowledge by attorney. FRE 602, 901-902; <i>Brainard v. American Skandia Life Assur.</i> , 432 F.3d 655, 667 (6th Cir. 2005); <i>Estremera v. United States</i> , 442 F.3d 580, 584-585 (7th Cir. 2006); <i>Orr v. Bank of America, NT & S.A.</i> , 285 F.3d 764, 774 (9th Cir. 2002) |
| Exh. 8: El Massioui Tr. | Admit | See Def. Exh. 1 (above) |

³ Plaintiff El Massioui has submitted her documentary evidence and request for judicial notice as but a single document. Harrington decl., ECF No. 127. For clarity, the court has separated the admissibility of documentary evidence from requests for judicial notice.

Request for Judicial Notice

Offered by Movant/Defendant Ardelean

| Description | Judicial Notice | Reason |
|---|---|--------------------------|
| Req. No. 1: Pl.'s Compl. | The court takes notice of the contents of the docket, but not of facts alleged therein. | Fed. R. Evid. 201(b) (2) |
| Req. No. 2: Pl.'s Am. Compl. | The court takes notice of the contents of the docket, but not of facts alleged therein. | Fed. R. Evid. 201(b) (2) |
| Req. No. 3: Def.'s Answer | The court takes notice of the contents of the docket, but not of facts alleged therein. | Fed. R. Evid. 201(b) (2) |
| Req. No. 4: Order to Show Cause | The court takes notice of the contents of the docket. | Fed. R. Evid. 201(b) (2) |
| Req. No. 5: Civil minutes | The court takes notice of the contents of the docket. | Fed. R. Evid. 201(b) (2) |
| Req. No. 6: Am. Scheduling Order | The court takes notice of the contents of the docket. | Fed. R. Evid. 201(b) (2) |
| Req. No. 7: Second Am. Scheduling Order | The court takes notice of the contents of the docket. | Fed. R. Evid. 201(b) (2) |

Offered by Respondent/Plaintiff El Massioui

| Description | Judicial Notice | Reason |
|---|--|--|
| Exh. No. 1: State court compl. | The court takes notice that Pl. filed an action entitled <i>El Massioui v. Ardelean</i> , No. 19-00250513 (Sac. County Sup. Ct. 2019); notice is not taken of facts alleged therein. | Fed. R. Evid. 201(b) (2) |
| Exh. No. 3: Proof of Service of summons and complaint in <i>Massioui v. Ardelean</i> , No. 19-00250513 (Sac. County Sup. Ct. 2019) | The court does not take notice that Def. Ardelean received summons and complaint. ⁴ | Fed. R. Evid. 201(b) - service is fact generally known and its accuracy may reasonably be questioned |
| Exh. No. 4: Proof of Claim No. 12-2 | The court takes notice of the contents of the docket, but of facts alleged therein. | Fed. R. Evid. 201(b) (2) |
| Exh. No. 5: IWC Wage Order 5-200 | The court takes notice of the organic law of the State of California, including the IWC orders. | Fed. R. Evid. 201(b) (2) |
| Exh. No. 6: Statement of Decision in <i>Karppala v. Robert Carlyle Group</i> , No. 18-00236038 (Sac. County Sup. Ct. March 16, 2020). | Notice of this decision is not taken. | Fed. R. Evid. 401-402 (not relevant) |
| Exh. No. 7: Judgment in <i>Reyes v. Haven Valley Care, Inc.</i> , No. 17-00208136 (Sac. County | Notice of this decision is not taken. | Fed. R. Evid. 401-402 (not relevant) |

⁴ Moreover, it is not a properly authenticated document by attorney Harrington. It was signed by Brandon Lee Ortiz.

| | | |
|--------------------------------|---|-------------------------|
| Sup. Ct. February 16, 2017). | | |
| Exh. No. 8: State court compl. | The court takes notice that Carmelia Mancia filed an action entitled <i>Mancia v. Ardelean</i> , No. 17-00209727 (Sac. County Sup. Ct. 2017); notice is not taken of facts alleged therein. | Fed. R. Evid. 201(b)(2) |

The bottom line is simple; the only evidence that will be considered by this court in deciding this motion is: (1) Ardelean's declaration, ECF No. 117; (2) Harrington's declaration ¶ 10, ECF No. 127; (3) El Massioui decl., ECF No. 128; (4) El Massioui deposition transcript, Exhs. 1; (5) clerk's docket in this adversary proceeding; and (6) that state court actions were filed by El Massioui and Mancia prior to the instant adversary proceeding.

Employees v. Independent Contractor

Industrial Welfare Commission regulates the wages, hours and meal/rest breaks for the public housekeeping industry. IWC Order No. 5-2001. The order is applicable to the "Public Housekeeping Industry." The public housekeeping industry means "any business or establishment which provides meals, housing or maintenance services." *Id.* at § 2(P). That industry includes rest homes, homes for the aged and "similar establishments offering board or lodging." *Id.* It covers employees. For the purposes of the order, "employee" is a defined term; it includes "any person employed by an employer" covered by the order "(1) who does not use his or her own funds to purchase requisite supplies; (2) who does not maintain an appointment book separate and distinct from that of the establishment in which the space is located, and (3) who does not have a business license where applicable." *Id.* at § 2(F). Executive, administrative and professional positions are exempt. *Id.* at § 1.

The evidence shows that El Massioui was a caregiver employed by Ardelean. El Massioui Depo. 11:24-17:13, ECF No. 119; El Massioui decl. 2:2-20. No party suggests she is exempt. As a result, this court finds that she is an employee covered by Industrial Welfare Commission IWC Order 5-2001.

11 U.S.C. § 523(a)(2)(A): Fraud

Section 523(a)(2)(A) excepts from discharge debts for money, property, or services "to the extent obtained by false pretenses, a false representation or actual fraud." 11 U.S.C. § 523(a)(2)(A). The creditor must demonstrate by a preponderance of the evidence: "(1) the debtor made ... representations; (2) that at the time he knew they were false; (3) that he made them with the intention and purpose of deceiving the creditor; (4) that the creditor relied on such representations; [and] (5) that the creditor sustained the alleged loss and damage as the proximate result of the misrepresentations having been made." *In re Javahery*, No. 2:14-BK-33249-DS, 2017 WL 971780, at *7 (B.A.P. 9th Cir. Mar. 14, 2017), *aff'd*, 742 F. App'x 307 (9th Cir. 2018), quoting *Am. Express v. Hashemi (In re Hashemi)*, 104 F.3d 1122, 1125 (9th Cir. 1997).

Plaintiff El Massioui bears the burden of proof at trial. *Grogan v. Garner*, 498 U.S. 279 (1991). From that it follows that Defendant Ardelean must prove "an absence of evidence to support the non-movant's case. *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010).

Misrepresentation(s)

Read broadly, the adversary proceeding contends that Ardelean misrepresented three facts and/legal conclusions to her: (1) she was an independent contractor, rather than an employee; (2) Ardelean would comply with wage and hours recordation; and (3) Ardelean would pay all wages due her under California law.

Defendant Ardelean contends that plaintiff El Massioui remembers no such representations prior to the commencement of employment. Def. Separate Statement of Undisputed Facts 2:22-26, ECF No. 122. In support of that fact she cites the plaintiff's deposition testimony. El Massioui deposition 32:1-25.

There are two problems with this argument. First, the cited page and lines do not stand for the proposition cited. Second, and more importantly, this court read El Massioui's deposition transcript (106 pages), twice. And at no point did Defendant Ardelean question El Massioui about these issues. As a result, this court can not say that Ardelean has shown the absence of evidence on the issue of misrepresentation.

Reliance

Defendant Ardelean contends that Defendant El Massioui could not justifiably rely on any representation because at all times she posted employee's rights poster at the Chrisman Community and the Elderly Inn II. Ardelean decl. ¶ 4, ECF NO. 117.

Justifiable reliance has a particular meaning.

...A person may justifiably rely on a representation "even if the falsity of the representation could have been ascertained upon investigation. In other words, negligence in failing to discover an intentional misrepresentation" does not defeat justifiable reliance. [*In re Eashai*, supra, 87 F3d at 1090; *In re Medley* (9th Cir. BAP 1997) 214 BR 607, 613—"the standard does protect the ignorant, the gullible, and the dimwitted"; *In re Apte* (9th Cir. BAP 1995) 180 BR 223, 229—"justifiable" reliance is a mixture of objective and subjective standards, which takes into account knowledge and relationship of the parties themselves].

However, a person cannot justifiably rely on a representation if he or she knows it is false or its falsity is obvious: "[A] person cannot purport to rely on preposterous representations or close his eyes to avoid discovery of the truth." [*In re Kirsh* (9th Cir. 1992) 973 F2d 1454, 1459 (internal quotes omitted)]

March, Ahart & Shapiro, *California Practice Guide: Bankruptcy, Discharge and Dischargeability* § 22:481 (Rutter Group December 2020).

A genuine issue of material fact exists. Two inferences are possible. One inference is that the posting of an employee's rights literature, which explained wage, hour and overtime laws, imputed actual knowledge to El Massioui. *Kirsh*, 973 F.2d at 1459 (actual knowledge defeats fraud). The other inference is that El Massioui should have, but did not actually, understand her rights. *In re Apte*, 180 B.R. at 229 (failure to investigate does not defeat fraud). The mere existence of the inference defeats summary judgment. But here, the inference of a lack of actual knowledge is strong. There is no evidence that El Massioui actually saw the poster. English was not El Massioui's first language. El Massioui Depo. 6:25-7:24, ECF No. 119. Even if she saw the literature pertaining to employee's rights she may, or may not, have understood its significance as applied to her employment situation.

As a result, Ardelean's motion will be denied.

11 U.S.C. § 523(a)(4): Breach of Fiduciary Duty/Embezzlement

"A discharge under section 727, 1141, 11921 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—... (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 5232(a)(4).

Plaintiff El Massioui bears the burden of proof at trial. *Grogan v. Garner*, 498 U.S. 279 (1991). From that it follows that Defendant Ardelean must prove "an absence of evidence to support the non-movant's case. *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010).

Fraud or defalcation in fiduciary capacity

When seeking to accept a debt under § 523(a)(4) the creditor must prove that the debtor acted as a fiduciary and, while acting that a fiduciary capacity, the debtor committed fraud or defalcation. *In re Stanifer*, 236 B.R. 709, 713 (9th Cir. BAP 1999).

The existence of a fiduciary relationship is defined by federal, not state, law. *In re Berman*, 629 F.3d 761, 767-768 (7th Cir. 2011); *In re Nail*, 446 B.R. 292, 299-300 (8th Cir. BAP 2011); March, Ahart & Shapiro, *California Practice Guide: Bankruptcy, Discharge and Nondischargeability* § 22:608.1 (Rutter Group December 2020). The fiduciary relationship must arise out of "an express or technical trustee." *Id.* at § 22:609, citing *Double Bogey, L.P. v. Enea*, 794 F.3d 1047, 1050 (9th Cir. 2015).

A fiduciary relationship is not present. Defendant Ardelean correctly notes that the employer-employee relationship will not support a § 523(a)(4) claim. *Bos v. Board of Trustees*, 795 F.3d 1006 (9th Cir. 2015); *Moore v. Moore*, 186 B.R. 962, 974 (N.D. Cal. 1995); *Castro v. Han*, 2015 WL 5610886 *4 (Bankr. C.D. Cal. 2015). Neither the record, nor El Massioui's brief, suggests otherwise.

Embezzlement

Section 523(a)(4) embezzlement has three elements.

'Embezzlement' is the fraudulent appropriation of property by one to whom it is entrusted or into whose hands it has lawfully come. [*Moore v. United States* (1895) 160 US 268, 269-270, 16 S.Ct. 294, 295; *In re Littleton* (9th Cir. 1991) 942 F2d 551, 555].

Embezzlement under § 523(a)(4) requires a showing of: [1] property rightfully in the possession of a nonowner; [2] nonowner's appropriation of the property to a use other than which it was entrusted; and [3] circumstances indicating fraud. [*In re Littleton*, supra, 942 F2d at 555; *In re Wada* (9th Cir. BAP 1997) 210 BR 572, 576].

March, Ahart & Shapiro, *California Practice Guide: Bankruptcy, Discharge and Dischargeability* § 22:640 (Rutter Group December 2020).

An employer's failure to pay earned wages may form the basis of a § 523(a)(4) embezzlement action. *Mouraveiko v. Moglia*, 2014 WL 1407311 *3-4 (Bankr. D. OR April 10, 2014); *In re Ramirez*, 556 B.R. 446, 454 (Bankr. N.D. Cal. 2016). Central to the issue is whether state law recognizes earned but unpaid wages as the employee's property. California does so. *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal.4th 163 (2000) (once earned, wages are property of the employee); *Sims v. AT & T Mobility Services, LLC*, 955 F.Supp.2d 1110, 1118-1120 (E.D. Cal. 2013) ("there is clear authority under California law that employees have a vested property interest in the wages they earn, failure to pay them is a legal wrong that interferes with the employee's title in the wages, and an action for conversion can therefore be brought to recover unpaid wages"); *Alvarenga v. Carlson Wagonlit Travel, Inc.*, 2016 WL 466132 *3-5 (E.D. Cal. February 8, 2016).

Defendant Ardelean has not demonstrated the absence of evidence with respect to § 523(a)(4) embezzlement. Much to the contrary, the apparent undisputed evidence suggests embezzlement did occur. *Littleton's* first element, lawful original possession of business proceeds, i.e., funds, is not disputed. *Littleton's* second element, appropriation to a use other than that entrusted, i.e., failure to pay lawfully earned overtime and meal periods, is also not disputed. Defendant Ardelean has not negated *Littleton's* third element, circumstances indicating fraud. Though largely not addressed by the evidentiary record, Ardelean's own declaration suggests that she was, in fact, aware that her actions violated applicable labor laws, i.e., posting the statutorily required, wage and hours posters promulgated by the California Industrial Welfare Commission.

I have complied with California law and posted employee rights posters every year summarizing California employment law at both Elderly Inn II and Chrisman Community. These posters were always in place on the wall to the left of the entrance, next to my license, any resident disclosure and other public information. Plaintiff could not have ignored these posters because she worked at the facility. These posters explained California wage, hour, and overtime laws.

Ardelean decl. 2:7-12, ECF No. 112 (emphasis added).

Ardelean has argued that El Massioui is charged with knowledge of these laws, notwithstanding the fact that English was not El Massioui's first language. But the evidence cuts the other way, and that sharply. If El Massioui is charged with knowledge, how much more so for Ardelean? And this gives rise to the inference of knowledge and, from there, circumstances suggesting fraud. But a competing inference, i.e., failure to fully appreciate the applicability to her situation defeats summary judgment.

For each of these reasons, the court will grant Ardelean's motion as to fraud or defalcation while acting a fiduciary capacity but will deny the motion as to embezzlement. 11 U.S.C. § 523(a)(4).

Unclean Hands

The doctrine of unclean hands may bar an action under 11 U.S.C. § 523(a). *Republic of Rwanda v. Uwimana (In re Uwimana)*, 274 F.3d 806, 810 (4th Cir.2001); *abrogated on other grounds by Bullock v. BankChampaign, N.A.*, --- U.S. ----, 133 S.Ct. 1754, 1758-59 (2013).

That doctrine states requires that an aggrieved plaintiff "have acted fairly and without fraud or deceit as to the controversy in issue." *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091, 1097 (9th Cir.1985). The doctrine is one of equity. *Young v. United States*, 535 U.S. 43, 50, 122 S.Ct. 1036 (2002). It has been summarized thusly:

To prevail on a defense of unclean hands, a defendant must demonstrate by clear and convincing evidence (1) "that the plaintiff's conduct is inequitable;" and (2) "that the conduct relates to the subject matter of [the plaintiff's] claims." *Fuddruckers*, 826 F.2d at 847 (citing *CIBA-GEIGY Corp. v. Bolar Pharm.*, 747 F.2d 844, 855 (3d Cir.1984)); *see also TrafficSchool.com, Inc. v. Edriver, Inc.*, 653 F.3d 820, 833 (9th Cir.2011) (holding that a defendant must demonstrate that an unclean hands defense applies with "clear, convincing evidence").

POM Wonderful LLC v. Coca Cola Co., 166 F. Supp. 3d 1085, 1092 (C.D. Cal. 2016)

The elements are further particularized. The first element, inequitable conduct, is very specific. "Only a showing of wrongfulness, willfulness, bad faith, or gross negligence, proved by clear and convincing evidence, will establish sufficient culpability for invocation of the doctrine of unclean hands." *Pfizer, Inc. v. Int'l Rectifier Corp.*, 685 F.2d 357, 359 (9th Cir.1982)." *Id.* at 1092. The second element, related to the subject matter of the asserted claim, involves a comparison of the plaintiff's wrongful conduct to the rights asserted:

...[A]lthough "precise similarity" between the plaintiff's inequitable conduct and the plaintiff's claims is not required, the misconduct "must be 'relative to the matter in which [the plaintiff] seeks relief.' Stated more clearly, the defense should only be applied "where some unconscionable act of one coming for relief has immediate and necessary relation to the equity that he seeks in respect of the matter in litigation. Thus, "the relevant inquiry is 'not [whether] the plaintiff's

hands are dirty, but [whether] [s]he dirtied them in acquiring the right [s]he now asserts, or [whether] the manner of dirtying renders inequitable the assertion of such rights against the defendants.'

Id. (internal citation omitted) (emphasis added).

Even so, its application is not automatic. *Northbay Wellness Group, Inc. v. Beyries*, 789 F.3d 956, 960 (9th Cir. 2015) (11 U.S.C. § 523(a)(4) action). *Northbay Wellness Grp.* reminds us that its application involves a careful balancing of the plaintiff's wrongdoing against the substance of the plaintiff's rights.

The Supreme Court has emphasized, however, that the doctrine of unclean hands "does not mean that courts must always permit a defendant wrongdoer to retain the profits of his wrongdoing merely because the plaintiff himself is possibly guilty of transgressing the law." *Yellow Cab*, 321 U.S. at 387, 64 S.Ct. 622. Rather, determining whether the doctrine of unclean hands precludes relief requires balancing the alleged wrongdoing of the plaintiff against that of the defendant, and "weigh[ing] the substance of the right asserted by [the] plaintiff against the transgression which, it is contended, serves to foreclose that right." *Republic Molding Corp. v. B.W. Photo Utils.*, 319 F.2d 347, 350 (9th Cir.1963). In addition, "the clean hands doctrine should not be strictly enforced when to do so would frustrate a substantial public interest." *EEOC v. Recruit U.S.A., Inc.*, 939 F.2d 746, 753 (9th Cir.1991).

Northbay Wellness Grp., 789 F.3d at 960.

Here, Ardelean argues that El Massioui should be barred from pursuing her claim because she failed to fully report her income at Chrisman Community and Elderly Inn II when paying federal and state income taxes and when applying for Medi-Cal low income benefits.

A genuine dispute of facts exists as to the application of the doctrine of unclean hands. "Bad intent" is central to the doctrine. *Wells Fargo & Co. v. Stagecoach Props., Inc.*, 685 F.2d 302, 308 (9th Cir. 1982). Here, there are competing facts and inferences regarding El Massioui's actions: whether she acted with intent to evade the tax and Medi-Cal laws or whether she did so in ignorance. El Massioui 3:6-13, ECF No. 128. Moreover, "the misconduct must bear 'immediate and necessary relation' to the manner in which [the plaintiff] acquired its rights or to the equities of this case)." *S. Cal. Darts Ass'n v. Zaffina*, 762 F.3d 921, 933 (9th Cir. 2014); *Metal Jeans, Inc. v. Metal Sport, Inc.*, 843 F. App'x 898, 899 (9th Cir. 2021). Here, it appears that Ardelean's actions giving rise to these causes of action predate El Massioui's conducts, which

suggests that the matter does not fit within the "manner in which [El Massioui] acquired" her rights against Ardelean.

As a result, the motion will be denied.

Comparative Fault/Willful Blindness

Defendant Ardelean refers to her last ground for summary judgment alternately as "comparative fault," Notice of Motion 3:15, ECF No. 115, or as "willful blindness." Mem. P. & A. 12:6-11, ECF No. 116.

As to the 11 U.S.C. § 523(a)(2)(A) (fraud) cause of action, comparative fault is not a defense. *Field v. Mans*, 516 U.S. 569, 570 (1995), citing Restatement (Second) Torts § 537 (1976) ("Illustration: 1. A, seeking to sell land to B, tells B that the land is free from all incumbrances. By walking across the street to the office of the register of deeds in the courthouse, B could easily learn that there is a recorded and unsatisfied mortgage on the land. B does not do so and buys the land in reliance upon A's misrepresentation. His reliance is justifiable."); *Matter of Mayer*, 51 F.3d 670, 675-676.

As to the § 523(a)(4) (embezzlement) cause of action, comparative fault is not a defense. The court has been able to find any case applying comparative fault to § 523(a)(4) embezzlement. *Field v. Mans*, 516 U.S. 569 (1995) is a § 523(a)(2) case; *American General Life and Accident Ins. v. Findley*, 2013 WL 1120662 (C.D. Cal. 2013), refers only to § 523(a)(3) (unscheduled debts). Willful blindness is a defense to defalcation while acting as a fiduciary. *Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 273-274 (2013). But this court has already ruled that the employer-employee relationship does not give rise to a fiduciary relationship.

As a result, comparative fault and/or willful blindness are not as basis to grant this motion.

Notice of Intent to Grant Partial Summary Judgment for El Massioui

Rule 56(f) provides:

After giving notice and a reasonable time to respond, the court may: (1) *grant summary judgment for a nonmovant*; (2) grant the motion on grounds not raised by a party; or (3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

Fed. R. Civ. P. 56(f), *incorporated by Fed. R. Bankr. P. 7056* (emphasis added).

This court believes that the evidence is undisputed with respect to the following issues:

(1) that from June 2015, to March 2018, El Massioui was an employee of Emilia Ardelean at the Elderly Inn II and/or, Chrisman Community care homes;

(2) Industrial Welfare Commission Order No. 5-2001 is applicable to her employment;

(3) El Massioui is not exempted from IWC Order No. 5-2001;

(4) Ardelean wrongfully classified El Massioui as an independent contractor in violation of IWC 5-2001; and

(5) insofar as El Massioui's claim for embezzlement, 11 U.S.C. § 523(a)(4) is concerned, two of the three elements necessary to prevail on an embezzlement claim have been established:

(A) property, i.e., unpaid wages, was originally rightfully in the possession of a nonowner, i.e., Amelia Ardelean; and

(B) nonowner, i.e., Emilia Ardelean, appropriated that property to a use other than which it was entrusted. *In re Littleton*, 942 F.2d 551, 555 (9th Cir. 1991).

The court will on Defendant Ardelean's motion as indicated but will continue the Rule 56(f)(1) (intent to grant summary judgment against nonmovant) to allow her to augment the evidentiary record and file briefs.

CONCLUSION

Defendant Ardelean's motion for summary judgment will be granted as to the fraud or defalcation while acting in a fiduciary capacity, 11 U.S.C. § 523(a)(4), but will otherwise be denied. The Rule 56(f)(1) (intent to grant summary judgment against Ardelean) with respect to the five factual issues identified will be continued to November 16, 2021, at 1:30 p.m.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Defendant Emilia Ardelean's motion for summary judgment has been presented to the court. Given the procedural deficiencies discussed by the court in its ruling,

IT IS ORDERED that the motion is this motion is bifurcated: (1) summary judgment as to Defendant Ardelean's claims and defenses, i.e., 11 U.S.C. § 523(a)(2), (a)(4), unclean hands, comparative fault, and willful blindness; and (2) summary judgment against the non-moving party, i.e., Emilia Ardelean, Fed. R. Civ. P. 56(f)(1);

IT IS FURTHER ORDERED that Defendant Ardelean's motion for summary judgment is granted as to fraud or defalcation while acting in a fiduciary capacity, 11 U.S.C. § 523(a)(4), but is otherwise denied;

IT IS FURTHER ORDERED that the Defendant Ardelean is hereby notified that the court deems the following facts without dispute and, after an opportunity for her to file additional briefs and evidence, the court intends to summarily adjudicate the following facts: (1) from June 2015, to March 2018, El Massioui was an employee of Emilia Ardelean at the Elderly Inn II, and/or Chrisman Community; (2) Industrial Welfare Commission Order No. 5-2001 is applicable to her employment; (3) El Massioui is not exempted from IWC Order No. 5-2001; (4) Ardelean classified her as an independent contractor in violation of IWC 5-2001; and (4) insofar as El Massioui's claim for embezzlement, 11 U.S.C. § 523(a)(4) are concerned two of the three elements are established: (A) property, i.e., unpaid wages, rightfully in the possession of a nonowner, i.e., Amelia Ardelean; and (B) nonowner, i.e., Emilia Ardelean appropriated that property to a use other than which it was entrusted.

IT IS FURTHER ORDERED that the court makes no finding as to the third element of embezzlement, i.e., circumstances indicating fraud, *In re Littleton*, 942 F.2d 551, 555 (9th Cir. 1991), the amount, if any, of damages due El Massioui and/or the applicability/inapplicability of any affirmative defense;

IT IS FURTHER ORDERED that the notice of intent to grant judgment against Emilia Ardelean, Fed. R. Civ. P. 56(f)(1), is continued to November 16, 2021, at 1:30 p.m.;

IT IS FURTHER ORDERED that not later than October 19, 2021, Emilia Ardelean may file and such briefs and further evidence in response to the court's notice under Rule 56(f);

IT IS FURTHER ORDERED that not later than October 26, the plaintiff may file and serve a responsive brief thereto; and

IT IS FURTHER ORDERED that as of the close of business on October 26, 2021, the record is closed with respect to this matter and, absent leave of court, no further filings are authorized.

5. [21-22096](#)-A-7 **IN RE: KANI JAHNKE**
[21-2055](#)

STATUS CONFERENCE RE: COMPLAINT
8-2-2021 [[1](#)]

JAHNKE V. JAHNKE
JAMES MCGRATH/ATTY. FOR PL.

No Ruling