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MAR 20 2017

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re:) Case No. 16-26371-B-7
)
 JAMES E. BROWN,) Adversary No. 17-2004
)
) DC No. GSJ-1
 Debtor(s).)
)
)
 DAVID GLASS, Trustee of Reiswig)
 Revocable Trust (Creditor),)
)
 Plaintiff(s),)
)
 v.)
)
 JAMES E. BROWN,)
)
 Defendant(s).)

ORDER (1) GRANTING MOTION TO DISMISS; AND
(2) GRANTING IN PART AND DENYING IN PART
REQUEST FOR JUDICIAL NOTICE

Presently before the court is a motion to dismiss and a request for judicial notice filed by defendant James E. Brown. Defendant's motion to dismiss and request for judicial notice are opposed by plaintiff Dr. David Glass, trustee of the Reiswig Revocable Trust Dated February 24, 1998, as Restated January 4, 2012 ("Reiswig Trust"). Defendant did not reply to plaintiff's opposition.

This matter was heard on March 14, 2017. Appearances were noted on the record. This order modifies the court's tentative decision stated on the record in open court. It also takes into

1 consideration the parties' arguments and plaintiff's request for
2 leave to amend. To the extent there are any differences between
3 the court's tentative decision stated orally on the record and
4 this written decision, this written decision governs. Playmakers
5 LLC v. ESPN, Inc., 376 F.3d 894, 896 (9th Cir. 2004) (citation
6 omitted).

8 Introduction

9 The complaint initiating this adversary proceeding was filed
10 on January 13, 2017. It purports to allege three claims for
11 relief under 11 U.S.C. § 523(a): a § 523(a)(2)(A) claim in the
12 first claim for relief; a § 523(a)(2)(B) claim in the second
13 claim for relief; and a § 523(a)(4) claim in the third claim for
14 relief. Defendant moves pursuant to Federal Rule of Civil
15 Procedure 12(b)(6) (applicable by Federal Rule of Bankruptcy
16 Procedure 7012(b)) to dismiss all three claims for relief.
17 Defendant also requests that the court take judicial notice of
18 exhibits consisting of documents filed in the underlying chapter
19 7 case, a related state court proceeding, certified copies of
20 recorded public documents, and other documents.

22 The court initially notes that the defendant's motion raises
23 a significant number of factual questions which are inappropriate
24 for determination on a motion to dismiss. For example, questions
25 regarding the defendant's intent and the truth or accuracy of
26 representations by the defendant are factual issues more
27 appropriate for summary judgment or trial. This is a motion to
28 dismiss and that means the court must take as true the factual
allegations in the complaint. If the complaint alleges that the

1 defendant's representations were false then, for purposes of this
2 motion, the court must assume the defendant's representations are
3 false. The same is true with respect to defendant's argument
4 that he lacked an intent to deceive. Again, intent is a factual
5 matter and typically not appropriate for resolution on a motion
6 to dismiss.

7 Nevertheless, the complaint is deficient. As explained
8 below, when considered in the context of matters subject to
9 judicial notice, the allegations in the complaint are not
10 sufficient to state actionable claims under §§ 523(a)(2)(A),
11 523(A)(2)(B), or 523(a)(4). Therefore, for the reasons and to
12 the extent explained below, defendant's motion to dismiss will be
13 granted and defendant's request for judicial notice will be
14 granted in part and denied in part.

15 Background

16
17 Defendant is the former successor trustee of the Reiswig
18 Trust. Following the commencement of an action by the plaintiff
19 in the San Joaquin County Superior Court captioned Reiswig
20 Revocable Trust, No. 39-2014-315733-PR-TR-STK, on March 20, 2015,
21 the state court suspended defendant as the successor trustee of
22 the trust. The state court appointed plaintiff as temporary
23 successor trustee on or about April 24, 2015. The state court
24 permanently removed defendant and appointed plaintiff as
25 successor trustee following a trial held on or about June 10,
26 2015.

27
28 The state court appointed the plaintiff as the successor
trustee because defendant obtained a \$262,000 loan secured by

1 real property located at 600 Windsor Drive, Lodi, California
2 ("Lodi Property"), a trust asset, and because the defendant
3 failed to adequately account for payments from trust assets
4 (deposit accounts) to himself or for his personal benefit. The
5 complaint alleges that the defendant obtained the \$262,000 with a
6 loan application in which he misrepresented that he had fee title
7 to the Lodi Property and authority to obtain financing on it when
8 he had only a life estate and had no such authority.¹ Without
9 providing any additional detail, the complaint merely refers to
10 the payments the defendant made to himself or for his benefit
11 from trust funds in deposit accounts and for which he did not
12 adequately account as a misappropriation of trust funds by the
13 defendant.

14
15 The complaint alleges the defendant owes the Reiswig Trust
16 at least \$105,303.91. The state court made that determination on
17 October 2, 2015, and allocated the defendant's repayment
18 obligation as follows: (i) the balance owed on the \$262,000 loan
19 after it was repaid;² plus, (ii) \$59,769 in payments the

20
21 ¹The Reiswig Trust documents grant defendant a life estate
22 in the Lodi Property. The remainder interest is held by the
23 First Baptist Church of Lodi and the American Cancer Society.
24 Plaintiff is a principal member of the First Baptist Church of
25 Lodi. The First Baptist Church of Lodi has paid plaintiff's
26 attorney's fees in the underlying chapter 7 case. Plaintiff
27 seeks to have the defendant's debt excepted from discharge, and
28 previously sought relief from the automatic stay, so that he can
terminate the defendant's life estate in the Lodi Property which
would be a substantial financial benefit to the First Baptist
Church of Lodi.

²Plaintiff secured a release of the deed of trust that
encumbered the Lodi Property on or about September 16, 2016. The
Lodi Property is now free and clear of all liens and interests
except the defendant's life estate and the remainder interests of

1 defendant made to himself or for his benefit from trust funds in
2 deposit accounts which were not adequately accounted for. A
3 judgment in that amount was entered against the defendant on June
4 29, 2016.

5
6 **Legal Standard**

7 A motion to dismiss under Rule 12(b)(6) tests the legal
8 sufficiency of the claims alleged in the complaint. Ileto v.
9 Glock, Inc., 349 F.3d 1191, 1199-1200 (9th Cir. 2003).

10 "Dismissal can be based on the lack of a cognizable legal theory
11 or the absence of sufficient facts alleged under a cognizable
12 legal theory." Balistreri v. Pacifica Police Dep't, 901 F.2d
13 696, 699 (9th Cir. 1990).

14 To survive a motion to dismiss, "a complaint must contain
15 sufficient factual matter, accepted as true, to 'state a claim to
16 relief that is plausible on its face.'" Ashcroft v. Iqbal, 556
17 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550
18 U.S. 544, 570 (2007)). All allegations of material fact are
19 taken as true and construed in the light most favorable to the
20 plaintiff. Johnson v. Lucent Techs., Inc., 653 F.3d 1000, 1010
21 (9th Cir. 2011). Additionally, the court may take judicial
22 notice of court records and certified recorded documents on a
23 motion to dismiss. C.B. v. Sonora Sch. Dist., 691 F. Supp. 2d
24 1123, 1138 (E.D. Cal. 2009) (stating that the court "may take
25 judicial notice of matters of public record, including duly
26 recorded documents, and court records available to the public
27
28

the First Baptist Church of Lodi and the American Cancer Society.

1 through the PACER system via the internet"); U.S. v. Ritchie, 342
2 F.3d 903, 908 (9th Cir. 2003) (court may consider matters
3 properly subject to judicial notice on a motion to dismiss).
4

5 Defendant's Request for Judicial Notice

6 To the extent judicially-noticed facts are included in the
7 court's presentation of facts, plaintiff's objection to the
8 defendant's request for judicial notice is overruled. For the
9 avoidance of doubt, the court will take judicial notice of
10 defendant's Exhibits A, B, C, D, E, F, and I.
11

12 Exhibits A and B are court documents filed in related
13 judicial proceedings. Exhibit A is a document filed in the
14 aforementioned state court proceeding which is related to this
15 adversary proceeding.³ Exhibit B is a document filed in the
16 underlying chapter 7 case in support of plaintiff's earlier
17 motion for relief from the automatic stay. Exhibits C, D, E, F,
18 and I are certified copies of public records.

19 It is not necessary for the court to take judicial notice of
20 defendant's Exhibits G, H, or J, or to draw any inferences from
21 those documents in order to dispose of defendant's motion to
22 dismiss. Therefore, as to those and any other documents,
23 defendant's request for judicial notice will be denied.
24

25 Discussion

26
27 ³Plaintiff's objection to judicial notice of Exhibit A is
28 somewhat disingenuous. In the underlying chapter 7 case, the
court granted plaintiff's request for judicial notice of three
documents from the same state court proceeding, including Exhibit
A. See Dkt. 12, Case No. 16-26371.

1 The § 523(a)(2)(B) Claim Alleged in the Second Claim for Relief.

2 The second claim for relief purports to allege a claim under
3 § 523(a)(2)(B). Section 523(a)(2)(B) states as follows:

4 (a) A discharge under section 727 . . . does not
5 discharge an individual debtor from any debt—
6 (2) for money, property, services, or an extension,
7 renewal, or refinancing of credit, to the extent
8 obtained by—

9 [. . .]

10 (B) use of a statement in writing—

11 (i) that is materially false;

12 (ii) respecting the debtor's or an
13 insider's financial condition;

14 (iii) on which the creditor to whom the
15 debtor is liable for such money, property,
16 services, or credit reasonably relied; and

17 (iv) that the debtor caused to be made or
18 published with intent to deceive[.]

19 11 U.S.C. § 523(a)(2)(B).

20 Although the complaint alleges the entire debt is non-
21 dischargeable under § 523(a)(2)(B), allegations in support of the
22 second claim for relief only refer to the defendant's written
23 misrepresentations associated with that portion of the debt the
24 state court allocated to the \$262,000 loan. The complaint refers
25 to a misappropriation of trust funds by the defendant. Construed
26 liberally and in the plaintiff's favor, that could refer to the
27 defendant's personal use of and failure to account for trust
28 funds from deposit accounts. And it may be that there were
written misrepresentations associated with that portion of the
debt as allocated by the state court which, if made, may meet the
requirements of § 523(a)(2)(B). Therefore, as to that portion of
the debt the state court allocated to the defendant's personal
use of and failure to adequately account for trust funds from
deposit accounts, the § 523(a)(2)(B) claim alleged in the second
claim for relief will be dismissed without prejudice and with

1 leave to amend. However, as to the portion of the debt the state
2 court allocated to the \$262,000 loan, the § 523(a)(2)(B) claim
3 will be dismissed with prejudice consistent with the court's
4 tentative decision stated on the record.

5 Section 523(a)(2)(B)(iii) requires reliance on the debtor's
6 written misrepresentations by the creditor to whom the debtor is
7 liable. The creditor to whom the defendant is liable here is the
8 plaintiff (or the trust). However, with respect to the portion
9 of the debt that the state court allocated to the \$262,000 loan,
10 the complaint does not allege that the defendant made any written
11 misrepresentations to the plaintiff (or the trust) which,
12 correspondingly, means the complaint does not allege that the
13 plaintiff (or the trust) relied on any written misrepresentations
14 that were made by the defendant. The complaint alleges only
15 that, as to the \$262,000 loan, the defendant made written
16 misrepresentations in an application submitted to a lender and
17 the lender relied on those misrepresentation to make the \$262,000
18 loan. Thus, on its face, the complaint fails to satisfy
19 § 523(a)(2)(B)(iii) as to the portion of the debt the state court
20 allocated to the \$262,000 loan.
21

22 It is true that in some circumstances a plaintiff who is not
23 the originally-defrauded creditor, and thus who did not rely on
24 the debtor's written misrepresentations, can satisfy
25 § 523(a)(2)(B)(iii) and state an actionable § 523(a)(2)(B) claim.
26 But that typically is when the plaintiff is the assignee of the
27 original creditor who was defrauded and who initially relied on
28 the debtor's written misrepresentations. Boyajian v. New Falls
Corp. (In re Boyajian), 564 F.3d 1088, 1092-93 (9th Cir. 2009);

1 see also In re Barlaam, 2012 WL 3288725, *5 (Bankr. C.D. Cal.
2 2012). The complaint here does not allege that the plaintiff is
3 the lender's assignee. In fact, inasmuch as it was the plaintiff
4 who personally secured a release of the deed of trust on the Lodi
5 Property it necessarily follows that the plaintiff would know if
6 the lender assigned him any claim it had against the defendant
7 arising out of the \$262,000 loan and plaintiff would have at
8 least mentioned any such assignment. However, there is no
9 mention of any assignment in the complaint or in any of the other
10 matters subject to judicial notice. Moreover, since the lender
11 released its lien on the Lodi Property the court can infer that
12 no claim to assign remains or exists. Therefore, as to that
13 portion of the debt the state court allocated to the \$262,000
14 loan, the § 523(a)(2)(B) claim alleged in the second claim for
15 relief will be dismissed with prejudice because that part of the
16 debt as allocated by the state court is not based on written
17 misrepresentations by the defendant to the plaintiff on which the
18 plaintiff relied and the plaintiff is not the assignee of the
19 entity who relied on the defendant's written misrepresentations.
20

21
22 The § 523(a)(2)(A) Claim Alleged in the First Claim for Relief.

23 The first claim for relief purports to allege a
24 § 523(a)(2)(A) claim. Section 523(a)(2)(A) states as follows:

- 25 (a) A discharge under section 727 . . . does not
26 discharge an individual debtor from any debt—
27 (2) for money, property, services, or an extension,
28 renewal, or refinancing of credit, to the extent
obtained by—
(A) false pretenses, a false
representation, or actual fraud, other than a
statement respecting the debtor's or an
insider's financial condition[.]

1 11 U.S.C. § 523(a)(2)(A).

2 The court initially notes that plaintiff's opposition
3 references the Supreme Court's recent opinion in Husky Int'l
4 Elec., Inc. v. Ritz, 136 S. Ct. 1581 (2016). In Husky, the
5 Supreme Court cited its earlier opinion in Field v. Mans, 516
6 U.S. 59 (1995), to highlight the distinction between a
7 § 523(a)(2)(A) claim pled on a misrepresentation and reliance
8 theory, as was the case in Mans, and a § 523(a)(2)(A) actual
9 fraud claim that requires no misrepresentations or reliance, as
10 was the case in the matter then before it. The court notes this
11 distinction here because plaintiff appears to argue in the
12 opposition that the complaint alleges a Husky actual fraud claim.
13 The court disagrees.

14 The complaint does not allege a Husky actual fraud
15 § 523(a)(2)(A) claim. Rather, it is apparent from paragraphs 9,
16 12, 14, and 20 of the complaint that the § 523(a)(2)(A) claim
17 alleged in the first claim for relief is based on a
18 misrepresentations theory, *i.e.*, the defendant misrepresented his
19 interest in the Lodi Property and his authority to borrow on it
20 in a loan application submitted to a lender and the lender relied
21 on the misrepresentations in the application to make the \$262,000
22 loan. Thus, the § 523(a)(2)(A) claim *as it is alleged in the*
23 *complaint* is more akin to a Mans misrepresentation theory
24 § 523(a)(2)(A) claim and not a Husky actual fraud § 523(a)(2)(A)
25 claim. It is also limited to the \$262,000 loan insofar as the
26 complaint appears to lack allegations regarding any
27 misrepresentations concerning the defendant's personal use of and
28 failure to adequately account for trust funds from deposit

1 accounts.

2 In order to prevail on the § 523(a)(2)(A) misrepresentation
3 theory claim *as it is alleged in the complaint*, the plaintiff
4 must prove the following elements by a preponderance of the
5 evidence: (1) a misrepresentation, fraudulent omission, or
6 deceptive conduct by the debtor; (2) knowledge of the falsity or
7 deceptiveness of the statement or conduct; (3) an intent to
8 deceive; (4) justifiable reliance by the creditor on the debtor's
9 statement or conduct; and (5) damage to the creditor proximately
10 caused by its reliance on the debtor's statement or conduct.

11 Ghomeshi v. Sabban (In re Sabban), 600 F.3d 1219, 1222 (9th Cir.
12 2010); Cardenas v. Shannon (In re Shannon), 553 B.R. 380, 388
13 (9th Cir. BAP 2016). The complaint lacks factual allegations
14 sufficient to establish the first and fourth elements.

15 As noted above, the complaint does not allege that defendant
16 made misrepresentations to the plaintiff which also means it does
17 not allege that the plaintiff justifiably relied on
18 misrepresentations by the defendant. The only misrepresentations
19 alleged in the complaint are to a lender and the only reliance on
20 those representations alleged in the complaint is the lender's
21 reliance on the misrepresentations in the loan application in
22 making the \$262,000 loan. Since the plaintiff is not an assignee
23 of the lender, In re Ashai, - F. Supp. 3d -, 2016 WL 7155837, *18
24 (C.D. Cal. 2016) (§ 523(a)(2)(B) analysis applies to
25 § 523(a)(2)(A)), "plaintiffs have failed to establish they can
26 maintain a § 523(a)(2) claim based on alleged misrepresentations
27 made not to them but to a third party." In re Cox, 462 B.R. 746,
28 757 (Bankr. D. Idaho 2011).

1 Nevertheless, even if the absence of allegations regarding
2 misrepresentation and reliance renders the § 523(a)(2)(A) claim
3 that pertains to the defendant's personal use of trust funds from
4 deposit accounts deficient, and even if the allegations regarding
5 misrepresentations to a third-party and the third-party's
6 reliance render the § 523(a)(2)(A) claim as it pertains to the
7 \$262,000 loan defective, Husky holds that a § 523(a)(2)(A) claim
8 may exist in the absence of misrepresentations and reliance.
9 That means the deficiency as it pertains to the alleged
10 misappropriation and the defect as it pertains to the \$262,000
11 loan are not fatal to the § 523(a)(2)(A) claim alleged in the
12 first claim for relief. Therefore, although the § 523(a)(2)(A)
13 claim alleged in the first claim for relief will be dismissed,
14 dismissal will be without prejudice and with leave to amend as to
15 the debt in its entirety.
16

17
18 The § 523(a)(4) Claim Alleged in the Third Claim for Relief.

19 The third claim for relief purports to allege a claim under
20 § 523(a)(4) which excepts from discharge debts for "for fraud or
21 defalcation while acting in a fiduciary capacity." 11 U.S.C. §
22 523(a)(4). To except a debt from discharge under
23 § 523(a)(4), a creditor must prove by a preponderance of the
24 evidence, see Lovell v. Stanifer (In re Stanifer), 236 B.R. 709,
25 713 (9th Cir. BAP 1999), "1) an express trust existed, 2) the
26 debt was caused by fraud or defalcation, and 3) *the debtor acted*
27 *as a fiduciary to the creditor at the time the debt was created.*"
28 Otto v. Niles (In re Niles), 106 F.3d 1456, 1459 (9th Cir. 1997)
(emphasis added, internal quotes, quotations and citations

1 omitted). The focus here is the third element.

2 In order to determine if the defendant was a fiduciary to
3 the plaintiff at the time the debt arose, the court must first
4 identify the debt and then ascertain when it arose. Nahman v.
5 Jacks (In re Jacks), 266 B.R. 728, 735 (9th Cir. BAP 2001)
6 (noting that the creditor must establish that the debtor was a
7 fiduciary to the creditor at the time the debt was created); In
8 re Danzi, 2010 WL 3811843 (Bankr. E.D. N.Y. 2010) ("Under section
9 523(a)(4) a creditor must establish that the debtor was acting in
10 a fiduciary capacity to the creditor at the time the debt arose,
11 and that the debtor committed the fraud or defalcation in that
12 capacity"). That is a question of federal law. Cal-Micro, Inc.
13 v. Cantrell (In re Cantrell), 329 F.3d 1119, 1125 (9th Cir.
14 2003); In re Florimonte, 558 B.R. 703, 708 (Bankr. M.D. Pa. 2016)
15 (non-dischargeability determined as a matter of federal law).

17 The Bankruptcy Code defines a "debt" as a "liability on a
18 claim." 11 U.S.C. § 101(12). A "claim" is defined as a "right
19 to payment, whether or not such right is reduced to judgment,
20 liquidated, unliquidated, contingent, matured, unmatured,
21 disputed, undisputed, secured, or unsecured." 11 U.S.C.
22 § 101(5)(A). Applying those definitions here, plaintiff (or the
23 trust) had a claim against the defendant when the defendant used
24 the Lodi Property to obtain a loan and used and failed to
25 adequately account for trust funds in deposit accounts. That
26 claim, however, did not become a debt until the defendant became
27 liable to the plaintiff (or trust) on it which, at the earliest,
28 occurred on October 2, 2015, when the state court ordered the
defendant to repay the trust. Since the defendant was suspended

1 as trustee in March 2015 and removed in June of 2015, the debt
2 that plaintiff seeks to except from discharge under § 523(a)(4)
3 arose several months after any fiduciary relationship between the
4 plaintiff (or trust) and the defendant ended. Put another way,
5 there was not and there could not be any fiduciary relationship
6 between the plaintiff (or trust) and the defendant at the time
7 the debt at issue in this adversary proceeding arose on October
8 2, 2015. That means plaintiff is unable to satisfy the third
9 element of an actionable § 524(a)(4) claim. That also means the
10 § 523(a)(4) claim alleged in the third claim for relief will be
11 dismissed with prejudice.
12

13 Conclusion

14 For all the foregoing reasons,

15 IT IS ORDERED that the following are **DISMISSED WITHOUT**
16 **PREJUDICE AND WITH LEAVE TO AMEND:**
17

- 18 (1) as to the entire debt, the § 523(a)(2)(A) claim
alleged in the first claim for relief; and
- 19 (2) as to that portion of the debt the state court
20 allocated to the defendant's personal use of trust
21 funds in deposit accounts and for which the defendant
22 failed to adequately account, the § 523(a)(2)(B) claim
alleged in the second claim for relief.

23 IT IS FURTHER ORDERED that the following are **DISMISSED WITH**
24 **PREJUDICE:**

- 25 (1) as to that portion of the debt the state court
26 allocated to the \$262,000 loan, the § 523(a)(2)(B)
claim alleged in the second claim for relief; and
- 27 (2) as to the entire debt, the § 523(a)(4) claim alleged in
the third claim for relief.

28 IT IS FURTHER ORDERED that any amended complaint shall be
filed and served by April 28, 2017. If an amended complaint is

1 not timely filed and served, then dismissal without prejudice
2 will become a dismissal with prejudice.

3 IT IS FURTHER ORDERED that defendant's request for
4 attorney's fees is DENIED WITHOUT PREJUDICE.

5 Dated: March 20, 2017.

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8 UNITED STATES BANKRUPTCY JUDGE

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**INSTRUCTIONS TO CLERK OF COURT
SERVICE LIST**

The Clerk of Court is instructed to send the attached document, via the BNC, to the following parties:

Mark Charles Bowman
1820 W Kettleman Ln #F
Lodi CA 95242

Grace S. Johnson
115 W Walnut #3
Lodi CA 95240