

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

February 19, 2020 at 1:30 p.m.

1. <u>19-90382</u>-E-7 TRACY SMITH	CONTINUED STATUS CONFERENCE
<u>19-9012</u>	RE: COMPLAINT
ALVAREZ V. SMITH ET AL	7-26-19 [1]

Plaintiff's Atty: Shane Reich
Defendant's Atty: unknown

Adv. Filed: 7/26/19
Answer: none

Nature of Action:
Dischargeability - false pretenses, false representation, actual fraud
Dischargeability - willful and malicious injury
Dischargeability - fraud as fiduciary, embezzlement, larceny
Recovery of money/property - other

Notes:
Continued from 1/23/20 to be conducted in conjunction with the continued Motion for Entry of Default Judgment

The Status Conference is continued to 11:00 a.m. on XXXXXXXXXX, 2020, to be conducted in conjunction with the continued hearing on the Motion for Entry of Default Judgment.

The Movant has Requested a Continuance. The Courtroom Deputy has Requested that the Parties Provide the Court With a Mutually Agreeable Continuance Date. If One is not Provided, the Court Shall Select a Date.

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant-Debtor, Chapter 7 Trustee, and Office of the United States Trustee on December 26, 2019. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

The Motion for Entry of Default Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The hearing on the Motion for Entry of Default Judgment is **continued to 11:00 a.m. on xxxxxx xx, 2020.**

Tina Alvarez ("Plaintiff") filed the instant Motion for Default Judgment on December 26, 2019. Dckt. 22. Plaintiff seeks an entry of default judgment against Tracy Emery Smith and his wholly owned corporation, Sharp Investor Inc. ("Defendant-Debtor" or "Defendants") in the instant Adversary Proceeding No. 19-09012.

The instant Adversary Proceeding was commenced on July 26, 2019. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on July 26, 2019. Dckt. 3. The complaint

and summons were properly served on Defendant-Debtor. Dckt. 6, 7.

Defendant-Debtor failed to file a timely answer or response or request for an extension of time. Default was entered against Defendant-Debtor pursuant to Federal Rule of Bankruptcy Procedure 7055 by the Clerk of the United States Bankruptcy Court on October 16, 2019. Dckt. 13, 15.

February 5, 2020 Supplemental Brief

Debtor's Counsel filed a Supplemental Brief on February 5, 2020. Dckt. 28. Amongst other things, Debtor's Counsel requested additional time for further briefing and reported that due to illness he was unable to complete the briefing.

A continuance will also allow the Defendant-Debtor, who has appeared in connection with other proceedings to have counsel and, if obtained, review the matter and appear as they determine appropriate.

REVIEW OF COMPLAINT

Plaintiff filed a complaint for nondischargeability of debt and injunctive relief against Defendant-Debtor. The Complaint contains the following general allegations as summarized by the court:

- A. On or about November 30, 2018, Defendant Tracy Emery Smith ("Defendant Smith"), on his own behalf and on behalf of Defendant Sharp Investor Inc., agreed to sell Plaintiff Tina Alvarez a mobile home, together with improvements, identified as Decal # LAT6719, HUD Label # CAL023709 (the "Property") and located at 4837 Faith Home Rd, #58, Ceres, CA.
- B. On or about November 30, 2018, Defendant Smith, on his own behalf and on behalf of Sharp Investor Inc., represented and agreed, both orally and in writing, that he was an officer of Defendant Sharp Investor, Inc.
- C. He also represented that Defendant Sharp Investor Inc. had clear and valid title to the Property, with no encumbrances.
- D. Additionally, that he and Defendant Sharp Investor Inc. would transfer said title and possession of the Property upon payment of the agreed amount of \$40,000.
- E. Defendant Smith further represented and agreed that he had already arranged for Plaintiff and her spouse to be approved as renters of the mobile home park. Plaintiff agreed to buy the Property on those terms.
- F. Plaintiff performed all conditions, covenants, and promises required on her part to be performed in accordance with the terms and conditions of the contract.

- G. While Defendants did provide a Bill of Sale purporting to transfer the property, Defendants have failed and refused to convey title or possession of the Property.
- H. Plaintiff is now informed and believes that Defendants do not have title to the Property and that Plaintiff has not yet been approved as a resident of the mobile home park.
- I. In reliance on Defendants' representations and agreements, Plaintiff paid Defendants \$40,000.00, the agreed upon purchase price for the Property.
- J. Since February 2019, Plaintiff has repeatedly requested that Defendants perform their obligations under the contract, but have continuously refused to do so.
- K. Plaintiff demands that Defendants honor the agreement and transfer clear and valid title to the Property, free of all liens and encumbrances, and pay damages associated with the delay and other failures to meet their obligations, and that Defendants honor their promises as alleged above.
- L. In the alternative, Plaintiff seeks damages according to proof against both Defendants in excess of \$40,000.00. Plaintiff also seeks a determination that Defendant Tracy Emery Smith's obligations are nondischargeable in bankruptcy.
- M. Plaintiff alleges that Defendants defrauded her out of \$40,000.00, and caused additional damages according to proof at trial, plus interest according to proof at trial.
- N. In addition, Plaintiff has been damaged in an amount according to proof for the lost use of the Property and for any excess value in the Property over the contract amount if the property cannot be conveyed.
- O. Defendants' actions as specified herein were outrageous and despicable, malicious, fraudulent and oppressive, and Plaintiff is entitled to punitive damages in an amount to be determined by the court as a result.

First Claim for Relief—Obtaining Money By False Pretenses, False Representations And/Or Fraud - 11 U.S.C. §523(a)(2)

Plaintiff-Debtor alleges the following for the First Cause of Action:

- A. Defendants' representations to Plaintiff were, in fact, false, and Defendant Smith knew they were false when he made them. Defendants did not have clear and valid title to the Property, and had no intention or the ability to transfer said title and possession of the Property upon payment of the agreed amount.

- B. Defendant Smith, on his own behalf and on behalf of Sharp Investor Inc., further falsely represented and agreed that he had already arranged for Plaintiff and her spouse to be approved as renters of the mobile home park.
- C. Defendants intended for Plaintiff to rely on Defendants' misrepresentations, and Plaintiff did, in fact, reasonably rely on Defendants' misrepresentations, all to Plaintiff's damage as specified herein.
- D. Plaintiff would not have paid the money or acted as alleged herein but for her reliance on Defendant Smith's false representations.
- E. As a result, if clear title to the Property is not conveyed without encumbrances, Plaintiff has been damaged by at least \$40,000.00 plus the lost use of the property and other damages including but not limited to damages for inconvenience according to proof.
- F. Even if title is conveyed, Plaintiff has suffered additional damages as alleged herein.
- G. Plaintiffs' claims against Defendants are for money and property obtained by false pretenses, based on one or more false representations and/or actual fraud, and, as a result, Defendants' obligations are nondischargeable in bankruptcy.
- H. As such, Plaintiff is entitled to a determination that her claim for the transfer of the Property and damages are non-dischargeable under 11 U.S.C. §523(a)(2) and Plaintiff requests that the Court find that to be the case.
- I. Plaintiff seeks the conveyance of the Property, without encumbrances and with good and clear title, plus damages according to proof in excess of \$10,000 for the lost use of the property and the inconvenience associated therewith.
- J. In the alternative, if the foregoing cannot be accomplished within a reasonable time, Plaintiff seeks additional damages in excess of \$40,000.00.

Second Claim for Relief—Intentional Injury Under 11 U.S.C. §523(a)(6)

Plaintiff-Debtor alleges the following for the Second Cause of Action:

- A. Defendants' actions, in defrauding, converting property belonging to Plaintiff, and committing larceny against Plaintiff were intentional acts, and were intended to harm Plaintiff.

- B. Plaintiff suffered damages of \$40,000.00 plus additional sums in an amount subject to proof, plus interest according to proof, as a direct and proximate result of Defendants' actions.
- C. In light of the foregoing, Defendant Smith's liability to Plaintiff for his intentional actions of fraud, conversion and embezzlement is not dischargeable pursuant to 11 U.S.C. §523(a)(6).

Third Claim for Relief—Larceny Under 11 U.S.C. §523(a)(4)

Plaintiff-Debtor alleges the following for the Second Cause of Action:

- A. Defendants wrongfully and with fraudulent intent converted money for their own use and totaling \$40,000.00.
- B. Defendants actions constituted larceny under 11 U.S.C. §523(a)(4) and are nondischargeable.

Fourth Claim for Relief—For Conveyance of the Property and Damages Against Defendants

Plaintiff-Debtor alleges the following for the Second Cause of Action:

- A. Defendants breached their contract with Plaintiff, and obtained money by false pretenses, false representations and/or fraud.
- B. As a result of Defendants' actions, Plaintiff is entitled to the conveyance of the Property, together with good and marketable title thereto, free and clear of all liens and encumbrances, liabilities or any other adverse claims, plus damages according to proof in excess of \$10,000 for the lost use of the property and the inconvenience associated therewith.
- C. In the alternative, if the foregoing cannot be accomplished within a reasonable time, Plaintiff seeks additional damages in excess of \$40,000.00.

Prayer

Plaintiff-Debtor requests the following relief in the Complaint's prayer:

- A. For a determination that the debts owed to Plaintiff and Plaintiff's claims against Defendant Smith are non-dischargeable pursuant to 11 U.S.C. §523(a)(2), 11 U.S.C. §523(a)(4) and/or 11 U.S.C. §523(a)(6);
- B. For an order that Defendants Sharp Investor Inc. and Tracy Emery Smith convey the Property, together with good and marketable title thereto, free and clear of all liens and encumbrances, liabilities or any other adverse

claims, plus damages for the lost use of the property in an amount according to proof in excess of \$10,000.00, or, in the alternative, that they pay damages in an amount according to proof totaling \$40,000.00, or more, and other damages, in a sum according to proof in excess of \$10,000.00, and said judgment be determined to be nondischargeable pursuant to 11 U.S.C. §523(a)(2), 11 U.S.C. §523(a)(4) and/or 11 U.S.C. §523(a)(6);

- C. For interest on those damages, according to proof;
- D. For punitive damages according to proof;
- E. For costs of suit herein, including reasonable attorney's fees; and
- F. For such other relief as the court deems just and proper.

RELIEF SOUGHT IN MOTION FOR ENTRY OF DEFAULT JUDGMENT

On December 26, 2019, Plaintiff filed the Motion for Entry of Default Judgment, accompanied by a Declaration and two (2) exhibits: Declaration of Tina Alvarez; Exhibit A to the Declaration— Original Written Agreement; and Exhibit B to the Declaration— Bill of Sale. Dckt. 24.

In the Motion, Plaintiff requests the following relief:

1. For a determination that the debts and obligations owed to Plaintiff and Plaintiff's claims against Defendant Smith are nondischargeable pursuant to 11 U.S.C. §523(a)(2), 11 U.S.C. §523(a)(4) and/or 11 U.S.C. §523(a)(6),
2. For an order that Defendants convey the Property, with clear and valid title, free of all liens and encumbrances, and pay damages associated with the delay and other failures to meet their obligations in an amount to be determined after final transfer of the Property, and that Defendants be ordered to pay the fair rental value of the property of \$1,000.00 per month since the breach of contract (which will total \$11,000.00 as of the hearing date). Further, if that cannot be finally accomplished, for Plaintiff to be granted nondischargeable damages either in the amount of the contract, \$40,000.00, plus the fair rental value of the property of 1,000.00 per month, or, such lesser amount as is necessary to remove any potential encumbrances on the property plus the fair rental value of the property which is \$1,000.00 per month since February 21, 2019 (which will total \$11,000.00 as of the hearing date),
3. For interest on those damages, at the legal rate,
4. For costs of suit herein, and
5. For such other and further relief as the court determines just and proper.

MOTION'S ARGUMENT

The Motion states with particularity grounds for relief, with citations to the evidence presented, which are outlined by the court below.

Under Plaintiff's Motion for Default Judgment ("Motion"), Plaintiff alleges the following:

- A. Smith previously provided a bill of sale to Plaintiff for the Property, after Plaintiff fully performed all of her obligations under the contract, but Defendants have failed and refused to deliver possession. Motion at 1.
- B. Further, contrary to his repeated representations, neither Defendant Smith nor his co-defendant corporation held title clear title to the Property. *Id.* at 2.
- C. In reliance on his representations to the contrary, Plaintiff gave him \$40,000.00, which she would not have done had she known he did not have clear title and he did not intend to deliver title to her. *Id.*
- D. Default was entered against Defendants on 10/16/2019 as neither defendant filed any responsive pleading. *Id.*
- E. Defendants were validly served at their respective addresses as shown on the proof of service filed in this action and in the supplemental Declaration of Shane Reich regarding service. *Id.*
- F. Plaintiff Tina Alvarez is an individual and creditor of Defendants. *Id.*
- G. Defendant Smith is the sole owner of Sharp Investor Inc. which he claims has no assets. Defendant Sharp Investor Inc. is a corporation, wholly owned by Defendant Smith, that does business in Stanislaus County. Defendant Smith is an officer of Defendant Sharp Investor Inc. *Id.* at 2, 3.
- H. Prior to the filing of the Chapter 7 petition that initiated the above-referenced bankruptcy case, on or about November 30, 2018, Defendant Smith, on his own behalf and on behalf of Defendant Sharp Investor Inc., agreed to sell Plaintiff Tina Alvarez a mobile home, together with improvements, identified as Decal # LAT6719, HUD Label # CAL023709 (the "Property") and located at 4837 Faith Home Rd, #58, Ceres, CA. *Id.* at 3.
- I. On or about November 30, 2018, Defendant Smith, on his own behalf and on behalf of Sharp Investor Inc., represented and agreed, both orally and in writing, that he was an officer of Defendant Sharp Investor Inc., that Defendant Sharp Investor Inc. had clear and valid title to the Property, with no encumbrances, and that he and Defendant Sharp Investor Inc. would transfer said title and possession of the Property upon payment of the agreed amount, which was initially \$43,000 but

was later reduced by agreement between Plaintiff and Defendants to \$40,000. *Id.*

- J. Defendants further represented and agreed that Defendant Smith had already arranged for Plaintiff and her spouse to be approved as renters of the mobile home park. *Id.*
- K. Plaintiff agreed to buy the Property on those terms. (Exhibit 1, Declaration of Plaintiff, ¶3 and Exhibit 2).
- L. Plaintiff performed all conditions, covenants, and promises required on her part to be performed in accordance with the terms and conditions of the contract. While Defendants did provide a bill of Sale purporting to transfer the property, Defendants have failed and refused to convey title or possession of the Property. (Exhibit 1, Declaration of Plaintiff, ¶4, and Exhibit 3).
- M. In reliance on Defendants' representations and agreements, Plaintiff paid Defendants \$40,000.00 which was the agreed upon purchase price for the Property. (Exhibit 1, Declaration of Plaintiff, ¶5).
- O. Plaintiff has repeatedly requested that Defendants perform their obligations under the contract, but Defendants have refused and continue to refuse to do so. (Exhibit 1, Declaration of Plaintiff, ¶7).
- P. After paying the full amount due under the contract, Plaintiff is now informed and believes that Defendants do not have clear and valid title to the Property. *Id.* at 4.
- Q. Plaintiff, as the owner of the property, is entitled to testify about its rental value. Her declaration established that she has been damaged in an amount of \$1,000.00 per month for the lost use of the property, which will total \$11,000.00 as of the hearing date. *Id.*
- R. Based on the foregoing, and based on Defendant's admissions due to his failure to answer the complaint, it has been established that Defendant Smith's obligations and debt to Plaintiff are nondischargeable due to his obtaining money by false pretenses, false representations and/or fraud - 11 U.S.C. §523(a)(2)). *Id.*
- S. Defendants' representations to Plaintiff were, in fact, false, and Defendant Smith knew they were false when he made them. Defendants did not have clear and valid title to the Property, and Defendants did not intend or have the ability to transfer said title and possession of the Property upon payment of the agreed amount. Defendant Smith, on his own behalf and on behalf of Sharp Investor Inc., further falsely represented and agreed that he had already arranged for Plaintiff and her spouse to be approved as renters of the mobile home park. *Id.*

- T. Defendants intended for Plaintiff to rely on Defendants' misrepresentations, and Plaintiff did, in fact, reasonably rely of Defendants' misrepresentations, all to Plaintiff's damage as specified herein. Plaintiff would not have paid the money or acted as alleged herein but for her reliance on Defendant Smith's false representations. As a result, if clear title to the Property is not conveyed without encumbrances, Plaintiff has been damaged by at least \$40,000.00 plus the lost use of the property and other damages including but not limited to damages for inconvenience according to proof. Even if title is conveyed, Plaintiff has suffered additional damages as alleged herein. *Id.* at 5.
- U. The elements of deceit are: (1) a false representation or concealment of a material fact (or, in some cases, an opinion) susceptible of knowledge, (2) made with knowledge of its falsity or without sufficient knowledge on the subject to warrant a representation, (3) with the intent to induce the person to whom it is made to act on it, (4) and an act by that person in justifiable reliance on the representation, (5) to that person's damage. *South Tahoe Gas Co. v. Hofmann Land Improvement Co.* (1972) 25 Cal. App. 3d 750, 765. Fraud may be proved by inference and circumstantial evidence because it is often impossible to prove directly. The circumstances surrounding the transaction and the relationship of the parties will often be facts from which fraud may be inferred. *Balfour, Guthrie & Co. v. Hansen* (1964) 227 Cal. App. 2d 173, 192. *Id.*
- V. Defendants' actions, in defrauding, converting property belonging to Plaintiff, and committing larceny against Plaintiff were intentional acts, and were intended to harm Plaintiff. Plaintiff suffered damages of \$40,000.00 plus additional sums in an amount subject to proof, plus interest according to proof, as a direct and proximate result of Defendants' actions. In light of the foregoing, Defendant Tracy Emery Smith's liability to Plaintiff for his intentional actions of fraud, conversion and embezzlement is not dischargeable pursuant to 11 U.S.C. §523(a)(6). *Id.*
- W. As it is clear from the foregoing that Defendants wrongfully and with fraudulent intent converted money for their own use and totaling \$40,000.00. Defendants' actions constituted larceny under 11 U.S.C. §523(a)(4) and are nondischargeable under that subsection as well. *Id.* at 6.
- X. Finally, Defendants should convey the Property immediately as the contract was fully performed and a bill of sale delivered long before the bankruptcy was initiated. *Id.*

EVIDENCE IN SUPPORT OF THE MOTION

On December 26, 2019, Plaintiff filed three (3) exhibits. Dckt. 24. The properly authenticated exhibits filed in support of the Motion are:

- A. Declaration of Plaintiff Tina Alvarez (which is not an “exhibit,” but Plaintiff’s testimony in support of this Motion, which must be filed as a separate document and not as an exhibit - See L.B.R. 9004-2(c) and 9014-1);
- B. Exhibit A: Original Written Agreement; and
- C. Exhibit B: Bill of Sale

The Declaration of Tina Alvarez provides testimony under penalty of perjury that:

- A. Plaintiff relied on the following representations:
 - 1. On or about November 30, 2018, Defendant Smith, on his own behalf and on behalf of Sharp Investor Inc., represented to me and agreed, both orally and in writing that Defendant Sharp Investor Inc. had clear and valid title to the Property, with no encumbrances, and that he and Defendant Sharp Investor Inc. would transfer said title and possession of the Property upon payment of the agreed amount, which was initially \$43,000 but was later reduced by agreement between me and Defendants to \$40,000. Mr. Smith agreed to reduce the amount because we prepaid an additional amount. (Exhibit A) Declaration at ¶3.
 - 2. Mr. Smith further told me that was an officer of Defendant Sharp Investor Inc. and that he was the owner of that business. *Id.*
 - 3. Defendant Smith, further represented and agreed that he had already arranged for me and my spouse to be approved as renters of the mobile home park. *Id.*
 - 4. Mr. Smith further represented and agreed that the mobile home would be improved according to specifications we both agreed upon. *Id.*
 - 5. I agreed to buy the Property on those terms. Pursuant to the agreement, Mr. Smith was to transfer the property on or before January 5th, 2019. *Id.*
 - 6. I paid the agreed upon amounts. In reliance on Defendants’ representations and agreements, I paid Mr. Smith \$40,000.00

which was the agreed upon purchase price for the Property. While Defendants did provide a bill of Sale purporting to transfer the property, Defendants have failed and refused to convey title or possession of the Property. (Exhibit B) *Id.* at ¶¶ 4, 5.

7. When I made the last payment on the Property, Mr. Smith promised he would give the keys to the property. After that he made repeated and changing excuses as to why he could not give me the keys to the property. Thereafter, my husband and I both told Mr. Smith that we would take the property as is, but he still failed and refused to give possession of the property. *Id.* at ¶6.
8. Since February 2019, I have repeatedly requested that Defendants perform their obligations under the contract, but Defendants have refused and continue to refuse to do so. *Id.* at ¶7.
9. I estimate that the fair rental value of the property was at least \$1,000 per month since January 5, 2019. *Id.* at ¶8.

APPLICABLE LAW

Federal Rule of Civil Procedure 55 and Federal Rule of Bankruptcy Procedure 7055 govern default judgments. *Cashco Fin. Servs. v. McGee (In re McGee)*, 359 B.R. 764, 770 (B.A.P. 9th Cir. 2006). Obtaining a default judgment is a two-step process which requires: (1) entry of the defendant's default, and (2) entry of a default judgment. *Id.*

Even when a party has defaulted and all requirements for a default judgment are satisfied, a claimant is not entitled to a default judgment as a matter of right. 10 MOORE'S FEDERAL PRACTICE—CIVIL ¶ 55.31 (Daniel R. Coquillette & Gregory P. Joseph eds. 3d ed.). Entry of a default judgment is within the discretion of the court. *Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986). Default judgments are not favored, because the judicial process prefers determining cases on their merits whenever reasonably possible. *Id.* at 1472. Factors that the court may consider in exercising its discretion include:

- (1) the possibility of prejudice to the plaintiff,
- (2) the merits of plaintiff's substantive claim,
- (3) the sufficiency of the complaint,
- (4) the sum of money at stake in the action,
- (5) the possibility of a dispute concerning material facts,
- (6) whether the default was due to excusable neglect, and
- (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Id. at 1471–72 (citing 6 MOORE'S FEDERAL PRACTICE—CIVIL ¶ 55-05[s], at 55-24 to 55-26 (Daniel R. Coquillette & Gregory P. Joseph eds. 3d ed.)); *Kubick v. FDIC (In re Kubick)*, 171 B.R. 658, 661–62

(B.A.P. 9th Cir. 1994).

In fact, before entering a default judgment the court has an independent duty to determine the sufficiency of Plaintiff-Debtor's claim. *Id.* at 662. Entry of a default establishes well-pleaded allegations as admitted, but factual allegations that are unsupported by exhibits are not well pled and cannot support a claim. *In re McGee*, 359 B.R. at 774. Thus, a court may refuse to enter default judgment if Plaintiff-Debtor did not offer evidence in support of the allegations. *See id.* at 775.

Debts for Money, Property or Services Obtained by False Pretenses or Representations, or Actual Fraud Pursuant to 11 U.S.C. § 523(a)(2)(A)

11 U.S.C. § 523(a)(2)(A) requires the creditor demonstrate five elements:

- (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 Sabban, 600 F.3d 1219, 1222 (9th Cir. 2010). Creditor must show these elements by a preponderance of evidence. *In re Slyman*, 234 F.3d 1081, 1085 (9th Cir. 2000). 11 U.S.C. § 523(a)(2)(A) prevents the discharge of all liability arising from fraud. *Cohen v. de la Cruz*, 523 U.S. 213, 215 (1998).

Additionally, in 2016 the United States Supreme Court in *Husky International Electronics, Inc. v. Ritz*, __ U.S. __, 136 S. Ct. 1581 (2016) held that “the phrase [. . .] “actual fraud” to encompass fraudulent conveyance schemes, even when those schemes do not involve a false representation.” *Husky International Electronics, Inc. v. Ritz*, __ U.S. __, 136 S. Ct. 1581 (2016).

Debts for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny pursuant to 11 U.S.C. § 523(a)(4)

In section 523(a)(4), the term “while acting in a fiduciary capacity” does not qualify the words “embezzlement” or “larceny.” Therefore, any debt resulting from embezzlement or larceny falls within the exception of clause (4). *In re Booker*, 165 B.R. 164 (Bankr. M.D.N.C. 1994); *see also In re Brady*, 101 F.3d 1165 (6th Cir. 1996); *In re Littleton*, 942 F.2d 551 (9th Cir. 1991).

The required elements of embezzlement are: (1) appropriation of funds for the debtor's own benefit by fraudulent intent or deceit; (2) the deposit of the resulting funds in an account accessible only to the debtor; and (3) the disbursement or use of those funds without explanation of reason or purpose. *In re Bryant*, 28 C.B.C.2d 184, 147 B.R. 507 (Bankr. W.D. Mo. 1992). For purposes of section 523(a)(4) it is improper to automatically assume embezzlement has occurred merely because property is missing, since

it could be missing simply because of noncompliance with contractual terms. *In re Hofmann*, 27 C.B.C.2d 1291, 144 B.R. 459 (Bankr. D.N.D. 1992), *aff'd*, 5 F.3d 1170 (8th Cir. 1993); *see also In re Rose*, 934 F.2d 901 (7th Cir. 1991).

In short, section 523(a)(4) excepts from discharge debts resulting from the fraudulent appropriation of another's property, whether the appropriation was unlawful at the outset, and therefore a larceny, or whether the appropriation took place unlawfully after the property was entrusted to the debtor's care, and therefore was an embezzlement. 4 Collier on Bankruptcy P 523.10 (16th 2019)

Debt for Willful and Malicious Injury Pursuant to 11 U.S.C. § 523(a)(6)

In order for a claim to be nondischargeable pursuant to 11 U.S.C. § 523(a)(6) both willful and malicious injury must be established. *Ormsby v. First Am. Title Co. (In re Ormsby)*, 591 F.3d 1199, 1206 (9th Cir. 2010). The willful injury standard in this Circuit 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." *Carrillo v. Su (In re Su)*, 290 F.3d 1140, 1142 (9th Cir. 2002). Whereas the malicious injury standard is satisfied by demonstrating that the injury "involves (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse." *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1209 (9th Cir. 2001) (internal citations omitted).

For a determination that an obligation is nondischargeable pursuant to 11 U.S.C. § 523(a) the Plaintiff must establish the elements by the "ordinary preponderance-of-the-evidence standard." *Grogan v. Garner*, 498 U.S. 279, 291 (1991).

DISCUSSION

First Claim for Relief—Obtaining Money By False Pretenses, False Representations And/Or Fraud - 11 U.S.C. §523(a)(2)(A)

Here, Plaintiff has meets the elements required by 11 U.S.C. § 523(a)(2)(A).

Plaintiff testifies that Defendant Smith made false representation about his representation that Defendant Sharp Investor, Inc. had clear and valid title to the Property, with no encumbrances, and that they would transfer said title and possession of the Property upon payments of the \$40,000.00. Additionally, Defendant Smith represented that he had already arranged for Plaintiff and her spouse to be approved as renters of the mobile home park. Plaintiff relied on Defendant's misrepresentation that after she made the last payment, he would give her keys to the Property. A misrepresentation because after repeated and changing excuses as to why he could not give her the keys, he failed to give Plaintiff possession of the Property. Defendant Smith could not give what he did not have as it seems Defendants do not have title to the Property.

Defendant Smith knew that the representations he made were false and purposely concealed important information. Defendant intended to deceive Plaintiff in order to obtain Plaintiff's money. Plaintiff justifiably relied on all the information and documents provided by Defendant.

Plaintiff sustained the loss of \$40,000.00 as a proximate result of the misrepresentations made by Defendant.

Sufficient grounds have been established for the obligation to be non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).

Second Claim for Relief—Intentional Injury Under 11 U.S.C. §523(a)(6)

Here, Plaintiff has established the elements for willful and malicious injury.

The evidence shows that Defendant Smith must have had a subjective motive to injure Plaintiff. Defendant Smith took Plaintiff's \$40,000.00. This was not a mistake. When he was confronted by Plaintiff with a request to perform under the contract and give title to the Property, Defendants refused and continue to refuse to do so.

This was a malicious injury because conversion of Plaintiff's funds is a wrongful act. Defendant Smith was supposed to convey title to the Property to Plaintiff in exchange for the \$40,000.00. Instead, Defendant Smith took the money and though giving a bill of sale, Defendant Smith did not convey title to Plaintiff nor give her the keys. He did it intentionally. It caused an injury because Plaintiff lost \$40,000.00. Defendant Smith has no just cause for the fraud and conversion he committed.

Sufficient grounds have been established for the obligation to be nondischargeable pursuant to 11 U.S.C. § 523(a)(6).

Third Claim for Relief—Larceny Under 11 U.S.C. §523(a)(4)

Plaintiff has provided the court with evidence that there was a sale. The Bill of Sale, signed by Defendant Smith, certifies that there was a transaction for which Plaintiff paid \$1,000.00 as consideration for sale of the Property. Through her declaration, Plaintiff testifies under penalty of perjury that she paid Defendant Smith \$40,000.00. It is however unknown when exactly this last payment was made— either January 2019 or February 2019.

Sufficient grounds have been established for the obligation to be nondischargeable pursuant to 11 U.S.C. § 523(a)(4).

Fourth Claim for Relief—For Conveyance of the Property and Damages Against Defendants

In addition to the monetary award for the damages, the Motion states the following additional relief requested:

26. Finally, Defendants should convey the Property immediately as the contract was fully performed and a bill of sale delivered long before the bankruptcy was initiated.

Motion, ¶ 26; Dckt. 22.

This appears to be a request for specific performance or a mandatory injunction. No points and authorities is provided concerning such relief or how such relief is properly granted when the court is issuing a monetary judgment for the damages caused by the breach of the contract and fraud. Clearly, the Plaintiff cannot get the Property and also “pocket the cash” for the damages for not getting the Property.

At the hearing, counsel for Plaintiff addressed this additional relief, requesting a continuance to provide supplemental points and authorities.

Computation of Judgment Amount

Compensatory Damages

Plaintiff seeks an award of the compensatory damages either:

1. in the amount of \$40,000.00, plus the fair rental value of the Property of \$1,000.00 per month since the breach of contract, or,
2. such lesser amount as is necessary to remove any potential encumbrances on the property plus the fair rental value of the property which is \$1,000.00 per month since February 21, 2019 (which will total \$11,000.00 as of the hearing date).

The amount of the Judgment begins with the \$40,000.00 principal amount of the investment.

Interest

Plaintiff seeks an award of interest on the compensatory damages on the basis for lost use of the Property and the inconvenience associated therewith. However, Plaintiff fails to give a calculation for awarding such interest and does not identify the legal basis for such damages.

Attorney's Fees and Costs

Moving to costs, Plaintiff requests costs of suit herein. (Under Plaintiff's Complaint, the prayer for relief included reasonable attorney's fees as part of the costs.). However, no amounts or evidence of billing records in provided. No basis for the attorneys' fees is stated in the Motion.

Federal Rule of Bankruptcy Procedure 7054(b) specifies that attorneys' fees shall be requested pursuant to Federal Rule of Civil Procedure 54(d)(2)(A)-(C) and (E). Such request shall be made by post-judgment motion. Plaintiff shall request attorneys' fees, and identify the contractual or statutory basis, in a post-judgment motion, if Plaintiff chooses to seek such attorneys' fees.

For the costs in this Adversary Proceeding, Plaintiff may file a costs bill as provided in Federal Rule of Bankruptcy Procedure 7054.

Monetary Amount of the Judgment Compensatory Damages

The Plaintiff seeks damages first in the amount of \$40,000.00, which is the purchase priced paid for the Property. Not having received the Property, Plaintiff asserts to recover the purchase price in lieu of having received the Property. This appears to be a simple request. Default judgment is granted for the \$40,000.00 damages.

The Plaintiff then seeks further damages of \$1,000.00 a month for the “rental value” of the Property with was not delivered. Thus, it appears that Plaintiff wants to not have paid for the Property, Defendant-Debtor having defrauded Plaintiff out of the \$40,000.00, and recover the \$40,000.00, but then desires to recover rental value for the Property that was not purchased.

No legal authority is provided for the court granting a \$40,000.00 judgment for breach of the contract and fraud in purporting to sell Property that Defendant-Debtor could not sell, and then giving Plaintiff \$1,000.00 a month rental value for the Property which Plaintiff did not purchase. Entry of Default Judgment is denied for the additional “rental value” damages.

Monetary Amount of Judgment Punitive Damages

The prayer in Plaintiff’s Complaint requests that “punitive damages according to proof.” Complaint, p. 6:28; Dckt. 1. In the Motion for Entry of Default Judgment, no mention is made with respect to punitive damages.

It is unclear whether Plaintiff is waiving and dismiss any request for punitive damages, or whether Plaintiff believes that such relief cannot be awarded pursuant to the Complaint as drafted.

There being no request for punitive damages, such relief cannot be granted pursuant to this Motion.

At the hearing, counsel for Plaintiff addressed this additional relief, requesting a continuance to provide supplemental points and authorities.

Request for Specific Performance or Mandatory Injunction

After stating the grounds for a monetary judgment and that said monetary judgment, the Motion makes the perfunctory request that the Property should be turned over. The prayer in the Motion inverts the requested relief, appearing to ask for an “order” for the Property to be turned over and a nondischargeable monetary judgment for loss of use, and then if the Property is not turned over, a monetary judgment for the fraud and breach of contract. Paragraph 2 of the prayer states this requested relief (emphasis added):

2. For **an order** that Defendants Sharp Investor Inc. and Tracy Emery Smith **convey the Property, with clear and valid title**, free off all liens and encumbrances, **and pay damages associated with the delay** and other failures to meet their obligations in an amount **to be determined after final transfer of the Property**, and that Defendants be ordered to **pay the fair rental value of the property of 1,000.00 per month since the breach of contract** (which will total \$11,000.00 as of the hearing date). Further, **if that cannot be finally accomplished, Plaintiff be granted nondischargeable damages either in the amount of the contract, \$40,000.00**, plus the fair rental value of the property of 1,000.00 per month, or, such lesser amount as is necessary to remove any potential encumbrances on the property plus the fair rental value of the property which is 1,000.00 per month since February 21, 2019 (which will total 11,000.00

as of the hearing date),

Motion, p. 6:12-21; Dckt. 22.

It appears that Plaintiff is requesting a judgment for specific performance and a mandatory injunction for delivery of the Property, plus some loss of use damages. No points and authorities are provided as to whether such relief is proper and how the court should properly construct such relief in a judgment.

Further, while demanding \$1,000.00 a month in rental value damages, the court has little evidence of what that entails, other than Plaintiff testifying “I estimate that the fair rental value of the property was at least \$1,000.00 a month since January 5, 2019.” Declaration, Dckt. 24. It is not clear if this represents a gross rental value, net rental monthly profit, or Plaintiff’s rental damages by being deprived the use of the Property for which she paid \$40,000.00.

The Plaintiff has not given the court a basis for awarding the \$1,000.00 a month additional damages.

With respect to the request for possession, the requested relief appears similar when a trustee or debtor in possession requests the turnover of a fraudulent conveyance and then a monetary judgment if not turned over within the reasonable time specified in the judgment. 11 U.S.C. § 550. The court is uncertain if that is the relief being requested.

At the hearing, counsel for Plaintiff addressed this additional relief, requesting a continuance to provide supplemental points and authorities.

Interest

While requesting interest at the “legal rate,” the Motion does not provide the court with a computational analysis of what that would be.

At the hearing, counsel for Plaintiff addressed this additional relief, requesting a continuance to provide supplemental points and authorities.

Nondischargeability of Monetary Judgment

As discussed above, Plaintiff has stated grounds for which the monetary obligation for the \$40,000.00 paid is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A), § 523(a)(4) [larceny], and § 523(a)(6). While citing those Code sections, Plaintiff provided the court with no legal authorities or analysis why such \$40,000.00 amount would be nondischargeable, relying upon the graciousness of the court’s law clerk to provide such analysis.

Plaintiff provides the court with no legal authorities or analysis of why any additional amounts beyond the \$40,000.00 of which she was defrauded/taken by larceny/willfully and maliciously injured would be nondischargeable. While such may be possible, the court’s law clerk did not provide such additional service. ^{FN. 2}

FN. 2. Interestingly, Plaintiff did cite to two cases in support of its Motion for Entry of Default Judgment in this Federal Court based on Federal law arising under 11 U.S.C. §§ 523(a)(2)(A), (a)(4), and (a)(6). These are two California District Court of Appeal decisions relating to fraud and deceit - under state law. No analysis of applicable federal law is provided.
