

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

Honorable Fredrick E. Clement
Fresno Federal Courthouse
2500 Tulare Street, 5th Floor
Courtroom 11, Department A
Fresno, California

PRE-HEARING DISPOSITIONS

DAY: WEDNESDAY
DATE: OCTOBER 18, 2017
CALENDAR: 10:00 A.M. CHAPTER 7 ADVERSARY PROCEEDINGS

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

No Ruling: All parties will need to appear at the hearing unless otherwise ordered.

Tentative Ruling: If a matter has been designated as a tentative ruling it will be called. The court may continue the hearing on the matter, set a briefing schedule or enter other orders appropriate for efficient and proper resolution of the matter. The original moving or objecting party shall give notice of the continued hearing date and the deadlines. The minutes of the hearing will be the court's findings and conclusions.

Final Ruling: Unless otherwise ordered, there will be no hearing on these matters. The final disposition of the matter is set forth in the ruling and it will appear in the minutes. The final ruling may or may not finally adjudicate the matter. If it is finally adjudicated, the minutes constitute the court's findings and conclusions. If the parties stipulate to continue the hearing on the matter or agree to resolve the matter in a way inconsistent with the final ruling, then the court will consider vacating the final ruling only if the moving party notifies chambers before 4:00 pm at least one business day before the hearing date: Department A-Kathy Torres (559)499-5860; Department B-Jennifer Dauer (559)499-5870. If a party has grounds to contest a final ruling because of the court's error under FRCP 60 (a) (FRBP 9024) ["a clerical mistake (by the court) or a mistake arising from (the court's) oversight or omission"] the party shall notify chambers (contact information above) and any other party affected by the final ruling by 4:00 pm one business day before the hearing.

Orders: Unless the court specifies in the tentative or final ruling that it will issue an order, the prevailing party shall lodge an order within 14 days of the final hearing on the matter.

1. [15-13412](#)-A-7 BASILA CONSTRUCTION, STATUS CONFERENCE RE: COMPLAINT
[17-1075](#) INC. 8-3-17 [[1](#)]
HAWKINS V. JAMES G. PARKER
INSURANCE ASSOCIATES, INC.
PETER SAUER/Atty. for pl.
RESPONSIVE PLEADING

No Ruling

2. [17-12631](#)-A-7 JEFFREY MAZE CONTINUED STATUS CONFERENCE RE:
[17-1064](#) COMPLAINT
MAZE V. WESTERN NATIONAL 7-15-17 [[1](#)]
SECURITIES
TIMOTHY SPRINGER/Atty. for pl.
DISMISSED

Final Ruling

The adversary proceeding dismissed, the status conference is concluded.

3. [17-10841](#)-A-7 LLOYD HOLLINS CONTINUED STATUS CONFERENCE RE:
[17-1061](#) AMENDED COMPLAINT
RICHGROVE COMMUNITY SERVICES 8-21-17 [[9](#)]
DISTRICT V. HOLLINS
MARIO ZAMORA/Atty. for pl.

No Ruling

4. [17-10841](#)-A-7 LLOYD HOLLINS MOTION TO DISMISS ADVERSARY
[17-1061](#) DMG-2 PROCEEDING/NOTICE OF REMOVAL
RICHGROVE COMMUNITY SERVICES 9-13-17 [[19](#)]
DISTRICT V. HOLLINS
D. GARDNER/Atty. for mv.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Dismiss for Failure to State Claim

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

Disposition: granted with leave to amend

Order: Civil minute order

Defendant Lloyd Hollins ("Hollins") moves under Rule 12(b)(6) to dismiss plaintiff Richgrove Community Services District's ("RCSD") First Amended Complaint against him. RCSD opposes the motion.

FIRST AMENDED COMPLAINT'S ALLEGATIONS

The First Amended Complaint presents three causes of action which purport to except from discharge any pre-petition debt owed by Hollins to RCSD. 11 U.S.C. §§ 523(a)(2)(A), 523(a)(4), 523(a)(6). First Amended Compl., Aug. 21, 2017, ECF No. 9. The complaint spans five pages, and the agreement that forms the basis of this dispute is not appended to the complaint notwithstanding paragraph 9's representation that it is appended to the complaint. The First Amended Complaint alleges that (1) the debtor was the Co-CEO of "Global Multisolutions," doing business as "Diversified Energy and Management Oversight" ("DEM"); (2) in 2012, RCSD and DEM entered into an agreement whereby DEM would oversee and facilitate a development project on behalf of the plaintiff; (3) only a small portion of the work on the project was completed, notwithstanding the expenditure of 80% of the grant money received for project development; and (4) the "debtor misappropriated the grant funds provided for the construction of the [project] for personal or other unauthorized purposes." As alleged, the amount misappropriated was \$2.2 million dollars.

LEGAL STANDARDS

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6), *incorporated by* Fed. R. Bankr. P. 7012(b). "A Rule 12(b)(6) dismissal may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008); *accord Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

The Supreme Court has established the minimum requirements for pleading sufficient facts. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

In ruling on a Rule 12(b)(6) motion to dismiss, the court accepts all factual allegations as true and construes them, along with all reasonable inferences drawn from them, in the light most favorable to the non-moving party. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996).

Courts have adopted a two-step approach to applying *Iqbal* and *Twombly*, "First, the court must identify which statements in the complaint are factual allegations and which are legal conclusions. Courts are not bound to accept as true allegations that are legal conclusions, even if cast in the form of factual allegations. [See *Ashcroft v. Iqbal*, *supra*, 556 US at 681, 129 S.Ct. at 1951-'It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth' (emphasis added); *Chaparro v. Carnival Corp.* (11th Cir. 2012) 693 F3d 1333, 1337-"if allegations are indeed more conclusory than factual, then the court does not have to assume their truth"]. Second, the court,

drawing 'on its judicial experience and common sense,' must decide in the specific context of the case whether the factual allegations, if assumed true, allege a plausible claim. [*Ashcroft v. Iqbal*, supra, 556 US at 679, 129 S.Ct. at 1950; *Wilson v. Birnberg* (5th Cir. 2012) 667 F3d 591, 595]." O'Connell & Stevenson, *California Practice Guide: Federal Civil Procedure Before Trial* §§ (9:226.21-25) (Rutter Group 2017).

DISCUSSION

Section 523(a)(2)(A) Cause of Action

To succeed on a nondischargeability claim under § 523(a)(2)(A), a creditor must establish five elements: "(1) misrepresentation, fraudulent omission or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and (5) damage to the creditor proximately caused by its reliance on the debtor's statement or conduct." *Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman)*, 234 F.3d 1081, 1085 (9th Cir. 2000). "The purposes of [§ 523(a)(2)(A)] are to prevent a debtor from retaining the benefits of property obtained by fraudulent means and to ensure that the relief intended for honest debtors does not go to dishonest debtors." *Id.*

Since this is a claim alleging fraud, Rule 9(b) applies. This rule's heightened pleading standard requires a plaintiff to "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b), incorporated by Fed. R. Bankr. P. 7009. A plaintiff must include the "who, what, when, where, and how" of the fraud. *Vess v. Ciba-Geigy Corp. U.S.A.*, 317 F.3d 1097, 1106 (9th Cir. 2003).

Here, the allegations are too conclusory. The court disregards paragraph 12, which contains only conclusions made on information and belief.

RCSD further pleads: "Debtor, through DEM, presented experience in grant administration, claiming 25 years of experience providing grant administration and information technology technical assistance to California public agencies. Debtor also claimed prior experience successfully procuring, administering, and provided "technical program implementation for multiple million dollar grant projects with several school districts, and other California public agencies." First Amended Compl. ¶ 18, Aug. 21, 2017, ECF No. 9. It also pleads: "Debtor claimed to be contract professionals who had completed several similar projects prior to [RCSD project]." *Id.* at ¶ 22.

These allegations are insufficient for two reasons. First, Rule 9(b)'s standards enunciated in *Vess*, require that fraud be pled with particularity so that the defendant is sufficiently apprised of the allegations to mount a defense to a fraud cause of action. In this respect, the First Amended Complaint is lacking.

Second, and equally troubling, is the allegation that the "Debtor, through DEM" made particular factual misrepresentations. First Am. Compl. ¶ 18, Aug. 21, 2017, ECF No. 9. This allegations leaves the defendant (and the court) wondering whether Hollins personally misrepresented his experience as to grant administration or whether the plaintiff seeks to charge Hollins with misrepresentations made by

others. As a result, the court will dismiss this claim. The dismissal will be granted with leave to amend.

Section 523(a)(4) Cause of Action

Read most favorably to RCSD, the First Amended Complaint attempts to plead a cause of action for embezzlement.

Section 523(a)(4) excepts debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny." As one commentator noted, "[e]mbezzlement" 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 F.2d 551, 555]. Embezzlement under § 523(a)(4) requires a showing of: property rightfully in the possession of a nonowner; nonowner's appropriation of the property to a use other than which it was entrusted; and circumstances indicating fraud. [*In re Littleton, supra*, 942 F.2d at 555; *In re Wada* (9th Cir. BAP 1997) 210 BR 572, 576]. Fraudulent intent/circumstances indicating fraud: Embezzlement requires a fraudulent intent to deprive, which may be inferred from the debtor's conduct and the underlying circumstances. [*Savonarola v. Beran* (BC ND FL 1987) 79 BR 493, 496]." March, Ahart & Shapiro, *Cal. Practice Guide: Bankruptcy* § 22:640-41 (Rutter Group 2017).

Here, the plaintiff conflates Hollins and the corporation of which he was the Co-CEO. As pled, the agreement was between RCSD and DEM, not Hollins. First Am. Compl. ¶ 9, Aug. 21, 2017, ECF No. 9. And the money was entrusted to DEM, not Hollins. The First Amended Complaint sufficiently pleads that the grant monies were missing and that the project did not achieve the anticipated level of completion for the funds expended. It also pleads that Hollins was the Co-CEO, from which the court infers the right to control funds. But it does not allege that Hollins, personally, controlled those funds or that he came into possession of the funds or appropriated them. As a result, the court will dismiss this claim. The dismissal will be granted with leave to amend.

Section 523(a)(6) Cause of Action

Section 523(a)(6) excepts from discharge a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." The "malicious" injury requirement is separate from the "willful" injury requirement. *Barboza v. New Form, Inc. (In re Barboza)*, 545 F.3d 702, 706 (9th Cir. 2008).

A "malicious" 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) (quoting *In re Bammer*, 131 F.3d 788, 791 (9th Cir. 1997)).

A "willful" injury is a "deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998) (emphases in original). This willful injury requirement is satisfied "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, 1144-45 (9th Cir. 2002). By contrast, "debts arising from recklessly or negligently inflicted

injuries do not fall within the compass of § 523(a)(6).” *Geiger*, 523 U.S. at 64.

Thus, the standard is a subjective one, where the debtor must have “either a *subjective intent* to harm, or a *subjective belief* [or actual knowledge] that harm is substantially certain.” *Su*, 290 F.3d at 1444 (emphases added). In determining whether the debtor has actual knowledge, the court can infer that the debtor is usually “charged with the knowledge of the natural consequences of his actions.” *Ormsby v. First Am. Title Co. (In re Ormsby)*, 591 F.3d 1199, 1206 (9th Cir. 2010). “In addition to what a debtor may admit to knowing, the bankruptcy court may consider circumstantial evidence that tends to establish what the debtor must have actually known when taking the injury-producing action.” *Su*, 290 F.3d at 1146 n.6.

As one court stated, “Debts incurred by conversion of another’s property may be nondischargeable under § 523(a)(6). *Del Bino v. Bailey (In re Bailey)*, 197 F.3d 997, 1000 (9th Cir. 1999). The elements of conversion in California are the creditor’s ownership or right to possession of property at the time of conversion, a wrongful act or disposition of that property by another, and damages. *In re Thiara*, 285 B.R. at 427. Proof of conversion under state law is a necessary but not sufficient basis to deny discharge under § 523(a)(6). *Id.* A creditor must also demonstrate that the injury was willful and malicious.” *In re Javahery*, No. 2:14-BK-33249-DS, 2017 WL 971780, at *9 (B.A.P. 9th Cir. Mar. 14, 2017).

As applied to the intent elements of § 523(a)(6), the pleadings fall short of the *Iqbal* and *Twombly* standards. First, as in the prior two causes of action, the First Amended Complaint confuses the debtor and the corporation of which he was the “Co-CEO.” At least two reasonable inferences may be drawn. Either Hollins personally misappropriated the missing funds or his Co-CEO (or another employee) did so. Section 523(a)(6) liability might flow from the former; it is much less clear whether that liability might attach to the later scenario. In the Rule 12(b) context, reasonable inferences must be drawn in favor of the non-movant, Hollins. Therefore, the court draws the inference that Hollins’s co-CEO or another employee of DEM misappropriated the funds.

Second, the First Amended Complaint does not plead facts, as opposed to conclusions, from which the court can find a plausible § 523(a)(6) claim. For example, it pleads “Debtor’s conduct, including his failure to properly administer grand (sic) funds and complete the [project] was intentional, willful acts designed to drive a profit for himself. Debtor knew, or should have known, that such failures would cause injury too Plaintiff as a result of his conduct.” First Am. Compl. ¶ 32. This allegation is insufficient for the court to make a finding of plausibility. As a result, the court will dismiss this claim with leave to amend.

CIVIL MINUTE ORDER

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

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

Lloyd Hollins’s motion to dismiss has been presented to the court. Having considered the First Amended Complaint, August 21, 2017, ECF

No. 9, the motion, memorandum of points and authorities and the opposition,

IT IS ORDERED that the motion to dismiss is granted, and the First Amended Complaint is dismissed without prejudice.

IT IS FURTHER ORDERED that Richgrove Community Services District (RCSD) may file and serve a Second Amended Complaint, provided it does so not later than November 15, 2017, and provided that it also files therewith a redline copy.

IT IS FURTHER ORDERED that no later than December 6, 2017, defendant Hollins shall file and serve a responsive pleading or motion.

IT IS FURTHER ORDERED that the parties not enlarge time for the filing of a responsive pleading or motion without order of this court. Such an enlargement may be sought by ex parte application, supported by stipulation or other admissible evidence.

IT IS FURTHER ORDERED that if Hollins fails to file a responsive pleading or motion in a timely fashion, RCSD shall forthwith and without delay seek entry of Hollins's default.

IT IS FURTHER ORDERED that if Hollins files a motion under Rule 12(b) or otherwise, rather than an answer, the motion shall be set for hearing consistent with LBR 9014-1(f)(1) and set for hearing on January 10, 2018, at 10:00 a.m.

5. [16-13654](#)-A-7 JONATHAN/KATHERINE STATUS CONFERENCE RE: COMPLAINT
 [17-1074](#) DAVENPORT 8-2-17 [[1](#)]
 SALVEN V. STATE OF CALIFORNIA,
 FRANCHISE TAX BOARD
 RUSSELL REYNOLDS/Atty. for pl.
 DISMISSED

Final Ruling

The adversary proceeding dismissed, the status conference is concluded.

6. [15-13655](#)-A-7 LEE BROGGI CONTINUED STATUS CONFERENCE RE:
 [16-1083](#) AMENDED COMPLAINT
 MANFREDO V. THOMAS ET AL 12-4-16 [[15](#)]
 DAVID JENKINS/Atty. for pl.

Tentative Ruling

The status conference is continued to November 15, 2017, at 10:00 a.m.

7. [15-13655](#)-A-7 LEE BROGGI
[16-1083](#) DRJ-3
MANFREDO V. THOMAS ET AL
DAVID JENKINS/Atty. for mv.

MOTION FOR ENTRY OF DEFAULT
JUDGMENT
9-17-17 [[84](#)]

Tentative Ruling

Motion: Entry of Default Judgment

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

Disposition: Continued to November 15, 2017, at 9:00 a.m.

Order: Civil minute order

DEFAULT JUDGMENT

The clerk has entered default against the defendant in this proceeding. The default was entered because the defendant failed to appear, answer or otherwise defend against the action brought by the plaintiff. Fed. R. Civ. P. 55(b)(2), *incorporated by* Fed R. Bankr. P. 7055. The plaintiff has moved for default judgment.

Under Federal Rule of Civil Procedure 8(b)(6), the allegations of the complaint are admitted except for allegations relating to the amount of damages. Fed. R. Civ. P. 8(b)(6), *incorporated by* Fed. R. Bankr. P. 7008(a). The court accepts the well-pleaded facts in the complaint as true. Fed. R. Civ. P. 55(b)(2), *incorporated by* Fed. R. Bankr. P. 7055.

WELL-PLEADED FACTS

The complaint contains well-pleaded facts concerning the existence of a real estate contract between the trustee and Defendants Lillian Thomas, Todd Thomas, and April Brice (the "Buyers") for the sale of residential real property located at 2232 Del Norte, Los Osos, CA having a purchase price of \$559,000. The court also accepts the following factual allegations as true for purposes of this default-judgment motion. The complaint pleads sufficiently that the contract contained the liquidated damages clause described in the complaint. Further, the complaint pleads adequately that the real estate contract was not performed by closing through escrow because the Buyers notified the trustee that one of the buyers lost a job and could not get approval for the loan necessary to complete the contract. The Buyers deposited \$8,000 into escrow, and \$8,000 does not exceed the cap placed on liquidated damages in the contract, which is 3% of the purchase price (3% of the purchase price was \$17,070).

LOAN CONTINGENCY ISSUE

The trustee's complaint and motion for default judgment have not, however, addressed an issue the court finds pertinent. The contract (attached as an exhibit) contains a loan contingency provision whereby the Buyers' qualification for the loan for the purchase of the real estate is a contingency of the agreement unless otherwise specified in writing. Ex. A at 2, ECF No. 87 (Cal. Residential Purchase Agreement ¶ 3(J)(2)). Other provisions of the contract contain a provision for the removal of the loan contingency with in a time certain (21 days). *Id.* at 2 (Cal. Residential Purchase Agreement ¶ 3(J)(3)). The provision that opts out of the loan being a contingency has not been checked.

Importantly, the contract also contains a provision that continues the contingencies even after the 21-day period described in paragraph 14B(1) of the contract and before the seller cancels the contract. Ex. A at 6, ECF No. 87 (Cal. Residential Purchase Agreement ¶ 14B(4)). This provision continuing the contingencies also gives the Buyer the right to cancel the agreement based on a remaining contingency even after the 21-day period. If the seller cancels because the Buyers do not remove contingencies within the deadline specified, then the seller is obligated to return the Buyer's deposits. Ex. at 6 (Cal Residential Purchase Agreement ¶ 14D(1)).

The court requests a supplemental declaration addressing whether the trustee believes in good faith that the loan contingency was removed or whether it was not removed. If the loan contingency was not removed, the trustee shall state whether she cancelled the agreement because the loan contingency was not removed pursuant to paragraph 14D(1). These facts relate to whether a default occurred that would trigger the liquidated damages clause.

CIVIL MINUTE ORDER

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

IT IS ORDERED that the motion for default judgment is continued to November 15, 2017, at 9:00 a.m. Supplemental declarations shall be filed no later than November 7, 2017.

8. [16-11467](#)-A-7 JERRY/PAMELA STEVENS STATUS CONFERENCE RE: COMPLAINT
 [17-1078](#) 8-23-17 [[1](#)]
 HAWKINS V. STEVENS ET AL
 ROBERT HAWKINS/Atty. for pl.

Final Ruling

The status conference is continued to November 29, 2017, at 10:00 a.m. Not later than 7 days prior to the continued hearing date, the plaintiff shall file a status report.

9. [17-12272](#)-A-7 LEONARD/SONYA HUTCHINSON STATUS CONFERENCE RE: COMPLAINT
 [17-1076](#) 8-8-17 [[1](#)]
 HUTCHINSON ET AL V. THE UNITED
 STATES OF AMERICA, DEPARTMENT
 DAVID JENKINS/Atty. for pl.
 RESPONSIVE PLEADING

Final Ruling

The status conference is continued to November 1, 2017, at 10:00 a.m. to coincide with the hearing on the United States' motion to dismiss, September 27, 2017, ECF # 10.

10. [17-12781](#)-A-7 DALIP NIJJAR
[17-1065](#)
SALVEN V. NIJJAR
HARVEY KRAMER/Atty. for pl.
RESPONSIVE PLEADING

STATUS CONFERENCE RE: AMENDED
COMPLAINT
5-5-17 [[63](#)]

No Ruling

11. [17-12781](#)-A-7 DALIP NIJJAR
[17-1066](#)
SALVEN V. NIJJAR ET AL
HARVEY KRAMER/Atty. for pl.

STATUS CONFERENCE RE: AMENDED
COMPLAINT
5-5-17 [[63](#)]

No Ruling