


**Dated: April 02, 2014**  
**The following is ORDERED:**



  
**Jennie D. Latta**  
**UNITED STATES BANKRUPTCY JUDGE**

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UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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In re

MARSHA LYNN POINTER,  
  
Debtor.

Case No. 13-27498-L  
Chapter 7

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Ronnie Mack,  
Plaintiff,  
v.  
Marsha Lynn Pointer,  
Defendant.

Adv. Proc. No. 13-00472

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**DECLARATORY JUDGMENT**

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THIS CAUSE came before the court on March 27, 2014, upon the Expedited Motion for Default Judgment filed by the Plaintiff, Ronnie Mack (Dkt. No. 5). The underlying complaint seeks a declaration that a debt owed by the Defendant to the Plaintiff is excepted from discharge pursuant to 11 U.S.C. §§ 523(a)(2) and (4). At a previous setting, the court determined that no answer was timely filed and entered default. At this setting, the Plaintiff appeared and gave testimony.

## **JURISDICTIONAL STATEMENT**

Jurisdiction over an adversary proceeding arising under the Bankruptcy Code lies with the district court. 28 U.S.C. § 1334(b). Pursuant to authority granted to the district courts at 28 U.S.C. § 157(a), the district court for the Western District of Tennessee has referred to the bankruptcy judges of this district all cases arising under title 11 and all proceedings arising under title 11 or arising in or related to a case under title 11. *In re Jurisdiction and Proceedings Under the Bankruptcy Amendments Act of 1984*, Misc. No. 81-30 (W.D. Tenn. July 10, 1984). The determination of the dischargeability of a particular debt is a core proceedings arising under the Bankruptcy Code. *See* 28 U.S.C. § 157(b)(2)(I). The bankruptcy court has authority to enter an order determining whether a debtor is excepted from discharge subject only to appellate review.

## **FACTS**

Based upon the testimony of the Plaintiff and the case record as a whole, the court makes the following findings of fact:

1. The Defendant, Marsha Lynn Pointer, and her husband, Brian Lee Robinson, filed a voluntary Chapter 13 petition on August 6, 2009 (Pointer and Robinson are collectively known as the “Debtors”).
2. The Plaintiff, Ronnie Mack, filed a proof of claim in the amount of \$15,875.75, on September 13, 2012. The proof of claim was amended on October 18, 2012, but the amount of the claim was unchanged.
3. The Debtors filed an objection to the proof of claim on October 23, 2012, and an amended objection on January 16, 2013.

4. The parties were directed to liquidate the claim through a pending suit in the General Sessions Court of Shelby County Tennessee. The litigation resulted in a judgment for the plaintiff in the amount of \$18,375.75. The objection to the proof of claim was denied on April 10, 2013 (Bankr. Dkt. No. 134).
5. On May 8, 2013, the Debtors filed a second objection to the allowance of the claim of the Plaintiff, alleging that the claim was for a post-petition debt that they did not wish to include in their plan.
6. On July 16, 2013, the Defendant gave notice of the conversion of the case to Chapter 7 for herself only. The converted case was given the number 13-27498.
7. On August 1, 2013, Robinson filed an objection to the claim in his Chapter 13 case, which was sustained.
8. On October 18, 2013, the Plaintiff commenced this adversary proceeding by filing his Complaint to Challenge Dischargeability of Debt. The complaint alleged that the Plaintiff and Defendant are cousins; that the Defendant convinced the Plaintiff to appoint her as his fiduciary; that in October 2011, the Plaintiff executed a General Durable Power of Attorney appointing the Defendant his attorney-in-fact; that shortly thereafter, the Plaintiff received a disability settlement in the amount of \$15,964.00; that the Defendant deposited these funds to an account over which she had signatory authority, and withdrew \$15,900.00, which was converted to her own use; that the Plaintiff obtained judgment against her in the amount of \$18,375.75 on March 5, 2013, which included \$2,500.00 in punitive damages.

9. The Defendant failed to answer or otherwise respond after being served with a copy of the complaint.
10. Pursuant to the motion of the Plaintiff, default was entered by the court on March 4, 2014, and a hearing was scheduled for March 27, 2014, to hear the testimony of the Plaintiff, because there was no affidavit attached to the complaint or submitted with the motion for default judgment.
11. The Plaintiff testified that the facts set forth in the complaint are true, and the court finds them to be true.

### **ANALYSIS**

The Plaintiff asks that the judgment obtained by him against the Defendant in the amount of \$18,375.75 be excepted from discharge pursuant to 11 U.S.C. § 523(a)(2)(A), based upon false pretenses or actual fraud, and/or 11 U.S.C. § 523(a)(4), based upon fraud or defalcation while acting in a fiduciary capacity. Based upon the Plaintiff's testimony, it is not clear that the Defendant obtained the Plaintiff's Power of Attorney with fraudulent intent (although it is certainly possible that she did), but it is clear that as the result of receiving the Plaintiff's Power of Attorney, she was his attorney-in-fact, and received his funds in the amount of \$15,900.00. It is further clear that she converted these funds to her own use.

A debt is non-dischargeable as the result of defalcation when a plaintiff shows by a preponderance of the evidence: (1) a pre-existing fiduciary relationship; (2) breach of that relationship; and (3) resulting loss. *Patel v. Shamrock Floorcovering Servs., Inc. (In re Patel)*, 565 F.3d 963, 968 (6th Cir. 2009); see also *Grogan v. Garner*, 498 U.S. 279, 291, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991) (adopting preponderance of the evidence standard for § 523(a) discharges).

For purposes of the exception to dischargeability, defalcation is “limited to ... those situations involving an express or technical trust relationship arising from placement of a specific res in the hands of the debtor.” *R.E. America, Inc. v. Garver (In re Garver)*, 116 F.3d 176, 180 (6th Cir. 1997). The express trust requirement, however, does not preclude the showing of trust-type relationships created pursuant to state or common law. *See Capitol Indemnity Corp. v. Interstate Agency, Inc., (In re Interstate Agency, Inc.)*, 760 F.2d 121 (6th Cir. 1985) (applying fiduciary status to the officer of a corporate fiduciary under Michigan law). Under Tennessee law:

The execution and exercise of a power of attorney establishes a fiduciary relationship between the attorney-in-fact and the grantor of the power. The fiduciary is obligated to deal with the property of his [or her] principal in the utmost good faith. The duties of loyalty and honesty are also a part of a fiduciary’s obligation.

*Teague v. Kidd*, 2012 WL 5869637, slip op. at \*7 (Tenn. Ct. App. 2012) (citations omitted).

The execution of the Power of Attorney by the Plaintiff created a fiduciary relationship within the meaning of section 523(a)(4) of the Bankruptcy Code. That relationship pre-dated the receipt by the Defendant of the Plaintiff’s funds. The Defendant converted those funds to her own use, and the Defendant’s loss stemmed directly from her wrong-doing. Therefore, the Plaintiff has established that the Defendant’s debt to him is one for defalcation while acting in fiduciary capacity. As a result, the compensatory damages awarded by the General Sessions Court are not dischargeable. The punitive damages awarded by the General Sessions Court are likewise non-dischargeable because they are included within the debt for defalcation. *Cohen v. de la Cruz*, 523 U.S. 213, 118 S. Ct. 1212 (1998).

## **CONCLUSION**

For the foregoing reasons, the court **DECLARES** that the debt owed by the Defendant, Marsha Lynn Pointer, to the Plaintiff, Ronnie Mack, in the amount of \$18,375.75, represented by the judgment of the General Sessions Court, is **NON-DISCHARGEABLE** in this or any other bankruptcy case that the Defendant may file.

cc: Plaintiff  
Attorney for Plaintiff  
Debtor/Defendant  
Attorney for Debtor/Defendant (if any)  
Chapter 7 Trustee