

Dated: September 12, 2017
The following is ORDERED:



Jennie D. Latta

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UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
GLEN A. McALEXANDER,
Debtor.

Case No. 16-27602-L
Chapter 7

Hattie M. Stewart,
Plaintiff,

v.
Glen A. McAlexander,
Defendant.

Adv. Proc. No. 16-00307

**ORDER GRANTING SUMMARY JUDGMENT FOR DEFENDANT
AND DISMISSING COMPLAINT**

BEFORE THE COURT is a motion for summary judgment filed by the Defendant, Glen A. McAlexander on July 19, 2017 [Dkt. No. 14]. The Complaint seeks a determination that a workers' compensation judgment rendered against the Defendant in favor of the Plaintiff is not dischargeable on two theories. The Plaintiff alleges that the judgment resulted from fraud or defalcation while acting in a fiduciary relationship and thus is nondischargeable by virtue of

11 U.S.C. § 523(a)(4), and the Plaintiff also alleges that the judgment resulted from willful and malicious injury by the Defendant to another entity or the property of another entity and thus is nondischargeable by virtue of 11 U.S.C. § 523(a)(6). In support of the motion, the Defendant offers (1) the Joint Pretrial Statement filed by the parties in this proceeding (Dkt. No. 8); (2) the Order on Complaint for Workers' Compensation Benefits entered in the case *Stewart v. McAlexander*, No. CH-09-1077 Part I (Ch. Ct. of Shelby County, Tenn., June 30, 2016); (3) Amended Schedule D filed by the Defendant in his bankruptcy case; and (4) a Statement of Undisputed Facts prepared by the Defendant.

The Plaintiff has filed an objection to the motion for summary judgment which is supported by (1) a Response to Defendant's Statement of Undisputed Facts; (2) a Statement of Additional Facts That Require Denial of Summary Judgment; and (3) Glen McAlexander's Response to Plaintiff's First Requests for Admission. The court has carefully considered the materials presented by the parties including their memoranda in support of their relative positions. For the following reasons, the court will enter judgment in favor of the Defendant.

JURISDICTION

Jurisdiction over a 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 Procedure Under the Bankruptcy Amendments Act of 1984*, Misc. No. 84-30 (W.D. Tenn. July 10, 1984). The determination of the dischargeability of a particular debt is a core proceeding arising under the Bankruptcy Code. *See* 28 U.S.C. § 157(b)(2)(I). The bankruptcy court has authority to enter a

final order determining whether a particular debt may be discharged subject only to appellate review. 28 U.S.C. § 157(b)(1).

SUMMARY JUDGMENT STANDARD

A motion for summary judgment may be granted if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a), incorporated at Fed. R. Bankr. P. 7056. ““Summary judgment is proper if the evidence, taken in the light most favorable to the nonmoving party, shows that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.”” *Pazdzierz v. First American Title Ins. Co. (In re Pazdzierz)*, 718 F.3d. 582, 586 (6th Cir. 2013), quoting *Mazur v. Young*, 507 F.3d 1013, 1016 (6th Cir.2007). The Court of Appeals for the Sixth Circuit has described the standards for granting summary judgment as follows:

A genuine issue of material fact exists when, “there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In deciding whether this burden has been met by the movant, this court views the evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). However, to survive summary judgment, the plaintiff must present affirmative evidence sufficient to show a genuine issue for trial. *Anderson*, 477 U.S. at 249, 106 S. Ct. 2505. Therefore, “[i]f evidence is merely colorable, or is not significantly probative, summary judgment may be granted.” *Id.* at 249-50, 106 S. Ct. 2505.

White v. Wyndham Vacation Ownership, Inc., 617 F.3d 472, 475-76 (6th Cir. 2010).

UNDISPUTED FACTS

The following facts are not in dispute:

1. The Plaintiff’s husband worked for the Defendant from August 31, 2007, through April 1, 2008.

2. The Plaintiff's husband died in a tragic work-related accident while working for the Defendant.
3. The Defendant did not maintain workers' compensation insurance.
4. The Defendant also did not maintain the workers' compensation security fund permitted under certain circumstances by Tennessee law.
5. The Defendant did not provide training to the Plaintiff's husband concerning the operation of a tow truck.
6. The Defendant did not have experience in the commercial tow business prior to starting the business known as Star Towing.
7. The Defendant did not equip his tow trucks with life lines, straps, or life jackets.
8. The Defendant did not have a written safety policy for his tow truck drivers.
9. On April 1, 2008, the Plaintiff's husband drowned while attempting to remove a car from a ditch filled with water.
10. On June 30, 2016, Chancellor Walter Evans entered an order awarding workers' compensation death benefits against the Defendant and in favor of the Plaintiff as surviving spouse in the amount of \$272,796 together with funeral expenses.
11. The judgment remains unpaid.
12. The Defendant filed a voluntary petition on August 22, 2016, seeking relief under Chapter 7 of the United States Bankruptcy Code.
13. The Plaintiff is identified as a creditor holding an unsecured claim in Schedule E/F filed with the bankruptcy petition.
14. No proof of claim deadline was set in the bankruptcy case because no non-exempt assets are available for distribution to creditors.

ANALYSIS

Applicable Standards and Plaintiff's Theories

Because one of the primary goals of the Bankruptcy Code is to provide honest debtors with a fresh start, exceptions to discharge are generally construed strictly against the creditor. *Allen v. Smith*, 567 B.R. 529, 537-38 (Bankr. M.D. Tenn. 2017), citing *Gleason v. Thaw*, 236 U.S. 558, 562, 35 S. Ct. 287, 59 L. Ed. 717 (1915); *see also Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367, 127 S. Ct. 1105, 166 L. Ed. 2d 956 (2007) (the primary purpose of bankruptcy is to grant a fresh start to the honest but unfortunate debtor). A party objecting to the discharge of a particular debt must prove by a preponderance of the evidence that one of the exceptions to discharge applies. *Grogan v. Garner*, 498 U.S. 279, 291, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991).

The Plaintiff seeks an exception to discharge for the workers' compensation judgment under two theories. The first is that the judgment resulted from the Defendant's fraud or defalcation while acting in a fiduciary capacity and thus is excepted from discharge pursuant to 11 U.S.C. § 523(a)(4). The second is that the judgment resulted from the Defendant's willful and malicious injury to the property of the Plaintiff and thus is excepted from discharge under section 523(a)(6).

Section 523(a)(4)

The Plaintiff's claim under section 523(a)(4) has two parts. First, the Plaintiff asserts that by failing to pay over amounts withheld from the decedent's wages for Social Security and Medicare taxes, the Defendant breached a fiduciary duty to the decedent thus creating a nondischargeable debt. Second, the Plaintiff asserts that by failing to maintain the trust fund permitted by Tennessee Code Annotated section 50-6-405 in lieu of insurance to guarantee

payment of workers' compensation claims, the Defendant breached a fiduciary duty to the decedent or to the Plaintiff.

With respect to the first part of the Plaintiff's argument, failure to pay over so-called "trust fund" taxes does create a debt, but it is a debt owed to the taxing authority, not the taxpayer. Such claims are entitled to eighth priority in distribution of the assets of a bankruptcy estate and are excepted from discharge. See 11 U.S.C. §§ 523(a)(1)(A) and 507(a)(8)(c). There is no debt owed by the Defendant to the Plaintiff as heir to the decedent arising from his failure to pay employment taxes.

With respect to the second part of the Plaintiff's argument, the defalcation provision of section 523(a)(4) applies exclusively to express or technical trusts. *Commonwealth Land Title Co. v. Blaszak (In re Blaszak)*, 397 F.3d 386, 391 (6th Cir. 2005). Moreover, *defalcation* as used in the Bankruptcy Code requires proof of moral turpitude or intentional wrong. *Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 133 S. Ct. 1754, 1759 (2013), citing *Neal v. Clark*, 95 U.S. 704, 709, 24 L. Ed. 586 (1877). Intentional conduct includes "not only conduct that the fiduciary knows is improper but also reckless conduct of the kind that the criminal law treats as the equivalent." *Id.* In *Bullock*, the Court gives succinct explanations of each of the terms used in section 523(a)(4):

As commonly used "embezzlement" requires conversion, and "larceny" requires taking and carrying away another's property. "Fraud" typically requires a false statement or omission. "Defalcation," as commonly used (hence as Congress might have understood it), can encompass a breach of fiduciary obligation that involves neither conversion, nor taking and carrying away another's property, nor falsity. (internal citations omitted).

Id. at 1760. Defalcation in the context of the Bankruptcy Code requires *scienter*, that is, a culpable state of mind. The defendant must act with knowledge of, or with gross recklessness in respect to, the improper nature of his fiduciary conduct. Where actual knowledge of wrongdoing

is lacking, a court must find that the “fiduciary ‘consciously disregards’ (or is willfully blind to) ‘a substantial and unjustifiable risk’ that his conduct will turn out to violate a fiduciary duty.” *Id.* at 1759, citing ALI, Model Penal Code § 2.02(2)(c), p. 226, Comment 9, at 248. Etymologically, *defalcation* indicates the action of cutting or lopping off or taking away; it indicates a diminution or deduction from an account or fund. See *Oxford English Dictionary online*, <http://www.oed.com>.

In this case, two questions are thus raised with respect to the Defendant’s failure to insure or maintain the fund required by Tennessee Code Annotated section 50-6-405. First, whether that statute creates a technical trust? Second, whether the failure to insure or maintain that fund constitutes defalcation in the context of the Bankruptcy Code?

Tennessee Code Annotated section 50-6-405 directs that every employer affected by it either insure his liability for workers’ compensation or possess a valid certificate of authority from the commissioner of commerce and insurance to self-insure after providing proof of financial ability to pay claims. Tenn. Code Ann. § 50-6-405(a)(1) and (2). The statute requires that the self-insurer maintain security in an amount not less than \$500,000 in the form of negotiable securities, a surety bond, a certificate of deposit, or a letter of credit. Tenn. Code Ann. § 50-6-405(b)(2)(A)(i). The statute further provides:

The security, or a contract between the self-insured employer, a depository institution and the commissioner of commerce and insurance evidencing the security held in the depository institution for purposes of compliance with this section, shall be held by the commissioner of commerce and insurance and shall be conditioned to run solely and directly for the benefit of the employees of the self-insured employer. Any legal actions to enforce the payment of the security being held for purposes of compliance with this section shall be brought by the commissioner of commerce and insurance for the benefit of the employees of the self-insured employer.

Tenn. Code Ann. § 50-6-405(b)(2)(A)(ii) (emphasis supplied). Further:

No employer shall self-insure its workers' compensation liabilities without a certificate of authority issued by the commissioner of commerce and insurance. It shall be unlawful for any employer to self-insure its liabilities for workers' compensation without first obtaining a duly issued certificate of authority from the commissioner of commerce and insurance. Whenever an employer has complied with subdivisions (a)(2) and (b)(2)(A) and (B), the commissioner of commerce and insurance, or the commissioner's designee, may issue to the employer a certificate of authority allowing the employer to self-insure under this section. Notice of this authorization shall be sent to the commissioner of labor and workforce development.

Tenn. Code Ann. § 50-6-405(b)(6) (emphasis added), (applicable to injuries occurring prior to July 1, 2014).

It is not legally possible for an employer to self-insure without first obtaining a certificate of authority from the commissioner of commerce and insurance. Moreover, those employers that properly self-insure do not themselves hold the security offered for their obligation. Rather, it is held by the commissioner for the benefit of the employees of the self-insured employer. No trust is created by the workers' compensation statute with respect to the employer, and thus, the Defendant cannot be found to have defalcated with respect to a fiduciary duty as those terms are understood in the context of the Bankruptcy Code. Cases have consistently held that an employer with a statutory obligation to obtain workers' compensation insurance does not serve as a fiduciary for his employees. *See, e.g., Smith v. Wheeler (In re Wheeler)*, 317 B.R. 783, 790 (Bankr. N.D. Iowa 2004); *Parker v. Grzywacz (In re Grzywacz)*, 182 B.R. 176, 177 (Bankr. E.D. Mich. 1995); *Carter v. Verhelst (In re Verhelst)*, 170 B.R. 657, 661 (Bankr. W.D. Ark. 1993). In addition, defalcation requires some misappropriation of money. A breach of duty, without more, does not constitute a misappropriation. *Grzywacz*, 182 B.R. at 177, citing *Black's Law Dictionary*, 504 (4th ed. 1968).

The Plaintiff's claim under section 523(a)(4) is without merit, and the Defendant is entitled to summary judgment with respect to that claim.

Section 523(a)(6)

The Plaintiff's second theory concerning why the workers' compensation judgment awarded to her should be excepted from discharge is that the judgment represents a debt for willful and malicious injury to the property of another entity. 11 U.S.C. § 523(a)(6). The Complaint asserts that the Defendant willfully and maliciously refused to obtain workers' compensation insurance causing injury to the Plaintiff and/or the decedent. Specifically, the Complaint alleges that:

27. [Plaintiff] has incurred and sustained willful and malicious injury ... by the defendant for his refusal to insure his liability under the Tennessee Workers' Compensation Act for the death of the deceased.

29. [I]t was clearly foreseeable to defendant that defendant's employee, Clyde Stewart, would be injured or that death could result in one of the most dangerous occupations in the workplace as a tow truck driver and that the failure to obtain workers' compensation insurance would injure Clyde Stewart's statutory right to workers' compensation insurance benefits.

30. [D]efendant acted willfully and maliciously by causing injury to Clyde Stewart's statutory right to workers' compensation insurance benefits.

31. The defendant's debt to plaintiff arising from his willful and malicious actions to cause injury to Clyde Stewart's statutory right to workers' compensation insurance benefits ... is non-dischargeable pursuant to 11 U.S.C.S. § 523(a)(6).

Complaint to Challenge and Determine Whether Certain Debts are Dischargeable, Dkt. No. 1, p. 9. The Complaint does not assert that the Defendant willfully and maliciously caused the death of the decedent, but rather that the Defendant willfully and maliciously caused injury to the Plaintiff's pecuniary interest in recovering insurance benefits after the death of her husband in a work-related accident.

The Supreme Court has made clear that the language of section 523(a)(6) calls to mind intentional torts as opposed to negligent or reckless torts. *Kawaauhau v. Geiger*, 523 U.S. 57, 118 S. Ct. 974 (1998). In order to be excepted from discharge, a debt must result from “a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury.” *Id.*, 523 U.S. at 61; 118 S. Ct. at 977. “Intentional torts generally require that the actor intend ‘the *consequences* of an act,’ not simply ‘the act itself.’” *Id.* quoting Restatement (Second) of Torts § 8A, Comment *a*, p. 15 (1964) (emphasis added in quotation).

Taking up this standard, the Sixth Circuit Court of Appeals explained that “unless ‘the actor desires to cause the consequences of his act, or ... believes that the consequences are substantially certain to result from it,’ he has not committed a ‘willful and malicious injury’ as defined under § 523(a)(6).” *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 464 (6th Cir. 1999). The court of appeals thus determined that its prior standard, announced in *Perkins v. Scharffe*, 817 F.2d 392 (6th Cir. 1987) (holding that willful and malicious injury will occur when one intends the act regardless of whether he intends the consequence), was overruled by the Supreme Court in *Geiger*. *Markowitz*, 190 F.3d at 464-65.

In two cases decided under the *Perkins* standard, courts within the Sixth Circuit rejected claims that an employer’s failure to maintain workers’ compensation insurance resulted in a debt excepted from discharge under section 523(a)(6). In the first, *Grzywacz*, the creditor-plaintiff contended that the debtor-employer’s failure to maintain workers’ compensation insurance caused her injury in that she was denied workers’ compensation benefits, and that the employer failed to maintain the insurance knowing that failure to do so could cause her economic injury. The bankruptcy court dismissed the claim noting that “a mere possibility of economic injury in the event of a work-related injury does not satisfy the test for ‘willful’ [under section 523(a)(6)].”

Id. at 178. In the second case, *Hall v. Hall (In re Hall)*, 194 B.R. 580 (W.D. Mich. 1996), the bankruptcy court for the Western District of Michigan granted summary judgment to a debtor-employer who failed to purchase and maintain workers' compensation disability insurance for a debt arising from a work-related injury to one of his employees. The district court affirmed saying that the willful and malicious act required by section 523(a)(6) must *necessarily* result in injury in order for a debt to be excepted from discharge. *Id.* at 582. The court found that where there was no claim that the employer willfully caused the personal injury to the creditor-plaintiff, the debtor's willful failure to buy workers' compensation insurance did not *necessarily* cause injury to the creditor-plaintiff.

Under the tests announced by the Court in *Geiger* as interpreted by the court of appeals in *Markowitz*, the Defendant is entitled to summary judgment with respect to the Plaintiff's section 523(a)(6) claim. Assuming for the purpose of this motion that the Defendant intentionally refused to obtain workers' compensation insurance, the failure to do so only resulted in the possibility that his employees and their dependents would suffer economic injury in the event of work-related injury or death. There is no proof that the Defendant intended to cause the death of the decedent. Thus there was no certainty that economic injury to the Plaintiff would follow from his failure to obtain insurance. Plaintiff's claim fails to satisfy the less rigorous *Perkins* standard. Moreover, there is no suggestion in the record that the Defendant intended to economically injure the Plaintiff by failing to obtain insurance, which is the heightened showing required under *Geiger*.¹

The Plaintiff's claim under section 523(a)(6) is without merit, and the Defendant is entitled to summary judgment with respect to that claim.

¹ Because the injury to the Plaintiff was not willful, it is not necessary to consider whether or not it was malicious, which is a separate requirement under section 523(a)(6).

CONCLUSION

For the foregoing reasons, summary judgment is **GRANTED** in favor of the Defendant, Glen A. McAlexander, on both of the Plaintiff's theories. The debts owed by the Defendant to the Plaintiff are discharged, and the Complaint is **DISMISSED**, with costs to the Plaintiff.

cc: Debtor/Defendant
Attorney for Debtor/Defendant
Plaintiff
Attorney for Plaintiff
Chapter 7 Trustee