

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
ROBERT IRVIN DAVIS, II,)	CASE NO. 09-35612 HCD
)	CHAPTER 7
)	
DEBTOR.)	
)	
)	
ALLIED FENCE, LLC,)	
)	
PLAINTIFF,)	
vs.)	PROC. NO. 10-3003
)	
ROBERT IRVIN DAVIS, II,)	
)	
DEFENDANT.)	

Appearances:

Jamie C. Woods, Esq., counsel for plaintiff, Thorne Grodnik, LLP, Post Office Box 1210, Mishawaka, Indiana 46546-1210; and

Michael Banik, Esq., counsel for defendant, 217 Fourth Street, Elkhart, Indiana 46516.

MEMORANDUM OF DECISION

At South Bend, Indiana, on September 14, 2010.

Before the court is the Motion for Summary Judgment filed by the plaintiff Allied Fence, LLC (“plaintiff” or “Allied Fence”) against the defendant Robert Irvin Davis, II (“defendant” or “debtor”). The defendant declined to file a response to the Motion. For the reasons that follow, the court grants the plaintiff’s summary judgment motion.¹

BACKGROUND

¹ The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

The following material facts are undisputed.² The defendant was employed by Allied Fence as a sales person on April 12, 2004. He provided customers with estimates for the fencing work to be done on their properties and for servicing the jobs as the work proceeded. However, the defendant told certain customers to make the checks payable to him, rather than to Allied Fence, for work that was done or would be done by the plaintiff. According to the plaintiff, the defendant diverted to his own benefit \$37,467.00 of Allied Fence's money while he was employed by Allied Fence. *See* R. 12, Ex. B, ¶ 7. In her Affidavit, Managing Member Kelly J. Rathka provided copies of checks written by Allied Fence customers that were payable to the defendant, not to the plaintiff:

- Ex. 2 Forks RV Inc. – \$9,000 check
- Ex. 4 John and Rita Geisler – \$2,000 check
- Ex. 4 John and Rita Geisler – \$1,322 check
- Ex. 5 Benjamin Johnson – \$3,250 check
- Ex. 6 Elcona Country Club – \$8,000 check
- Ex. 7 Elcona Country Club – \$1,700 check
- Ex. 8 Lippert Components, Inc. – \$7,656 check
- Ex. 9 Lippert Components, Inc. – \$2,200 check
- Ex. 10 Lippert Components, Inc. – \$2,339 check

Id., ¶¶ 8-17. Rathka also presented six examples in which the defendant reduced the estimates originally given to certain customers. *See id.*, ¶¶ 24-29, Ex. 10-16. According to the Managing Member, those unauthorized reduced estimates resulted in an aggregate loss of funds to the plaintiff in the amount of \$36,534.00 for the work done or to be done by the plaintiff. By knowingly and intentionally taking from the plaintiff \$74,001.00 in payments made by Allied Fence's customers, Rathka claimed, the defendant breached his fiduciary duty to his employer. *See id.* ¶¶ 35, 37.

On September 13, 2006, the Elkhart Superior Court entered judgment by default in favor of Allied Fence, LLC, against the defendant. *See* R. 1, Ex. A. The court found that the defendant

² The plaintiff presented a Statement of Undisputed Material Facts and Designated Evidence in its Memorandum of Law supporting its summary judgment motion. *See* R. 12, pp. 1-3. It also attached the state court judgment and the Affidavit of Kelly J. Rathka, Managing Member of the plaintiff, who was responsible for maintaining the business records of the plaintiff. Rathka attached exhibits as evidence of the affirmed statements. *See id.*, Ex. A, B, exs. 1-16. The defendant filed no response. Those documents thus form the evidence of the undisputed facts upon which this decision is based.

“misappropriated and embezzled \$74,001.00 from the plaintiff” while he was an employee of the plaintiff. *See id.*, ¶ 1. It awarded the plaintiff treble damages and attorney’s fees pursuant to Indiana Code § 34-24-3-1, for a total award of \$229,503.00 plus court costs. *See id.*, ¶¶ 2, 3.

The defendant filed a voluntary chapter 7 petition on November 25, 2009. After the chapter 7 Trustee filed a no-asset report, the debtor was granted a discharge on March 8, 2010, and the bankruptcy case was closed on March 17, 2010. However, the plaintiff filed a timely Complaint Objecting to Discharge of Debt alleging the defendant’s misappropriation and embezzlement from Allied Fence and requesting a declaration that the debt was nondischargeable under 11 U.S.C. § 523(a)(4). *See R. 1.*

The defendant filed a timely answer to the Complaint. *See R. 7.* He admitted that a judgment was granted against him, but denied that he had misappropriated or embezzled funds while he was an employee of Allied Fence. He insisted that the Complaint failed to state a claim and sought the opportunity to reduce or to mitigate damages. On March 19, 2010, the parties filed a Joint Report Regarding Mediation, in which they stated that they tentatively had reached an agreement in the adversary proceeding. However, on March 24, 2010, the plaintiff filed a Motion for Summary Judgment, with a supporting Memorandum of Law, as to its claims under 11 U.S.C. § 523(a)(2)(A), (a)(4), and (a)(6) against the defendant. The defendant never filed a response.

DISCUSSION

Under Rule 56(c) of the Federal Rules of Civil Procedure, made applicable in this court by Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475

U.S. 574, 585-86 (1986). In order to avoid trial, the moving party bears the burden of showing that no genuine issue of material fact is in dispute. See *Anderson*, 477 U.S. at 256; *Celotex*, 477 U.S. at 322. “To avoid summary judgment . . . the nonmoving party [is] required to set forth ‘specific facts showing that there is a genuine issue for trial,’ Fed. R. Civ. P. 56(e), and, further [has] to produce more than a scintilla of evidence in support of his position.” *Silk v. City of Chicago*, 194 F.3d 788, 798 (7th Cir. 1999). In order to demonstrate that a real factual dispute exists, the nonmovant must produce evidence of the dispute rather than relying solely on the allegations or denials in its pleadings. See *Barber v. United States (In re Barber)*, 236 B.R. 655, 659 (Bankr. N.D. Ind. 1998); N.D. Ind. L.B.R. B-7056-1. Summary judgment must be granted “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322. In this case, the nonmovant defendant produced no evidence of a dispute; indeed, he did not file any response to the summary judgment motion. When there is no response by the nonmovant, “summary judgment should, if appropriate, be entered against that party.” Fed. R. Civ. P. 56(e)(2). Nevertheless, summary judgment is appropriate only when both prongs of the Rule 56(c) test are met: The moving party also must be entitled to a judgment as a matter of law. See *Johnson v. Gudmondsson*, 35 F.3d 1104, 1112 (7th Cir 1994) (“even where many or all of the material facts are undisputed, the court still must ascertain that judgment is proper ‘as a matter of governing law’”). Therefore, the court considers whether the defendant’s failure to file a response to a summary judgment motion is a sufficient reason for entering summary judgment against him as a matter of law.

The plaintiff’s summary judgment claim of embezzlement is based upon § 523(a)(4), which excepts from a debtor’s discharge any debt “for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.” 11 U.S.C. § 523(a)(4). The party objecting to the discharge of the debt bears the burden of proof by a preponderance of the evidence. See *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991); *Digital Sys. Eng’g, Inc. v. Moreno (In re Moreno)*, 414 B.R. 485, 491 n.4 (Bankr. W.D. Wisc. 2009).

The Seventh Circuit Court of Appeals has defined embezzlement as the “fraudulent appropriation of property by a person to whom such property was entrusted or into whose hands it has lawfully come.” *In re Weber*, 892 F.2d 534, 538 (7th Cir. 1989) (quoting *Moore v. United States*, 160 U.S. 268, 269, 16 S. Ct. 294, 295, 40 L.Ed. 422 (1895)). Embezzlement and larceny are similar; each involves fraudulent appropriation of property. “The difference between them lies in whether or not the debtor’s original possession of that property was wrongful. If so, we are dealing with larceny. If not, the charge is embezzlement.” *Oak Street Funding LLC v. Brown (In re Brown)*, 399 B.R. 44, 47 (Bankr. N.D. Ind. 2008) (citing *In re Rose*, 934 F.2d 901, 903 (7th Cir. 1991) (discussing larceny); *In re Weber*, 892 F.2d at 538 (discussing embezzlement)).

“To prove embezzlement, the creditor must show . . . that (1) the debtor appropriated funds for his or her own benefit; and (2) the debtor did so with fraudulent intent or deceit.” *In re Weber*, 892 F.2d at 538 (citing cases); *see also Pierce v. Pyritz*, 200 B.R. 203, 205 (N.D. Ill. 1996).

The uncontested facts presented to the court demonstrate that the defendant received checks written by Allied Fence customers payable to the defendant, not to the plaintiff. The defendant then kept the proceeds for his own personal use, without the plaintiff’s consent. The defendant also reduced estimates originally given to customers by the plaintiff, without the plaintiff’s consent. It is clear that the original taking of the funds was lawful; however, the defendant then appropriated the funds to his own benefit, with fraudulent intent or deceit. He did not turn the funds over to the plaintiff, which furnished the materials and labor being paid for by the funds taken by the defendant. The defendant took the materials and labor entrusted to him by the plaintiff, built a fence or accomplished the job required, received payment for the property, and then kept the payment himself with fraudulent intent to convert that property to his own use without the owner’s consent. The court finds that the plaintiff has presented sufficient facts to demonstrate that the defendant misappropriated the plaintiff’s property to his own use with fraudulent intent. *See, e.g., Martello v. Fowers (In re Fowers)*, 360 B.R. 888, 898-90 (Bankr. N.D. Ind. 2007). It concludes that there

is no genuine issue as to any material fact that the defendant embezzled \$74,001.00 from the plaintiff and that the debt owed to the plaintiff by the defendant is excepted from the defendant's discharge under § 523(a)(4).

Having determined that the debt owed to the plaintiff is not dischargeable in bankruptcy under the embezzlement exception, § 523(a)(4), the court declines to consider the plaintiff's other claims in its Motion for Summary Judgment that the debt is nondischargeable under § 523(a)(2)(A) and (a)(6).³

One last matter – the amount of the debt – must be considered. A bankruptcy judge is authorized to find a debt nondischargeable and to determine the dollar amount of the debt. *See Wallner v. Liebl (In re Liebl)*, _ B.R. _, 2010 WL 3018331 at *3 (Bankr. N.D. Ill. July 27, 2010) (citing *In re Hallahan*, 936 F.2d 1496, 1508 (7th Cir. 1991)). The Supreme Court has held that the bankruptcy court can determine the amount of a debt that is excepted from discharge under § 523(a)(2)(A), and can include treble damages, attorney's fees, and costs pursuant to state law. *See Cohen v. de la Cruz*, 523 U.S. 213, 223, 118 S. Ct. 1212, 1219, 140 L.Ed.2d 341 (1998). Since *Cohen*, courts have found that a treble damages award can be nondischargeable under § 523(a)(4). *See Roussos v. Michaelides (In re Roussos)*, 251 B.R. 86, 94 (9th Cir. B.A.P. 2000) (“The Court read § 523(a)(2) *in pari materia* with other nondischargeability sections, including § 523(a)(4) and (a)(6).”); *Petty v. Petty (In re Petty)*, 333 B.R. 472, 483 (Bankr. M.D. Fla. 2005) (entering judgment with treble damages under § 523(a)(4)).

This court found, from the undisputed material facts, that the defendant embezzled \$74,001.00 from the plaintiff under § 523(a)(4). The Elkhart Superior Court Judgment also found actual damages of

³ The summary judgment motion expanded the Complaint's § 523(a)(4) claim to include two other exceptions to discharge. The Complaint alleged only misappropriation and embezzlement and sought a finding of nondischargeability only under § 523(a)(4). It did not allege that the defendant obtained money from the plaintiff under false pretenses, false representation, or actual fraud or that he willfully and maliciously injured the plaintiff. In short, the Complaint did not plead causes of action under §§ 523(a)(2)(A) or (a)(6). Although the court has the discretion to allow the plaintiff to amend its Complaint, it is unnecessary once the debt is found nondischargeable under any subsection. Because the factual allegations recited in the Complaint, Motion for Summary Judgment, and attachments supported the § 523(a)(4) claim, they were sufficient to sustain the exception to discharge of the plaintiff's debt.

\$74,001.00; however, it allowed the plaintiff to treble damages and attorney's fees pursuant to Indiana Code § 34-24-3-1.⁴ Two Indiana bankruptcy courts recently have considered whether treble damages are nondischargeable. The Honorable Judge Philip Klingeberger acknowledged the possibility of a treble damages claim but found that the plaintiff had failed to plead an adequate claim under § 523(a) and thus could not recover treble damages. *See Centier Bank v. Young (In re Young)*, 428 B.R. 804, 822 (Bankr. N.D. Ind. 2010) ("To the extent that [the plaintiff] can state a claim within the provisions for exception to discharge under 11 U.S.C. § 523(a), it may be able to assert a claim for incidental damages arising from conduct within § 523(a) allowed by applicable state law with respect to that conduct."). The Honorable Judge Anthony J. Metz III explained that a plaintiff who proved that the debtor's actions violated provisions of Indiana Code § 35-43 (for example, that the defendant's conduct constituted theft, conversion, or unauthorized possession of the plaintiff's property under Indiana law) then would be entitled to recover three times its actual pecuniary losses and damages under Indiana Code § 34-24-3-1, plus costs and reasonable attorney's fees. That debt in its entirety then can be found nondischargeable under the provisions of § 523(a). *See Midwestern Electric, Inc. v. Hummel (In re Hummel)*, 2008 WL 1911176 at *4 (Bankr. S.D. Ind. Apr. 25, 2008) (ordering that the plaintiff had a valid claim under § 523(a)(2)(A), (a)(4) and (a)(6) and could recover treble damages).

In this case, the state court Judgment did not base its treble damages award on the defendant's violation of any Indiana law provision; indeed, the defendant was not adjudged by the Elkhart Superior Court to have violated "one of the crimes which Indiana law allows to serve as the basis for a civil action by the

⁴ Indiana Code § 34-24-3-1 provides, in pertinent part:

Damages in civil action. If a person suffers a pecuniary loss as a result of a violation of IC 35-43, IC 35-42-3-3, IC 35-42-3-4, or IC 35-45-9, the person may bring a civil action against the person who caused the loss for the following:

- (1) An amount not to exceed three (3) times the actual damages of the person suffering the loss.
- (2) The costs of the action.
- (3) A reasonable attorney's fee. . . .

victim seeking treble damages and attorney fees.” *Salin Bank & Trust Co. v. Seybold (In re Seybold)*, 2008 WL 1321878 at *1 (Bankr. N.D. Ind. March 11, 2008). Nor did the plaintiff argue that the defendant’s conduct violated the provisions of specific state laws that allowed recovery under Indiana Code § 34-24-3-1.⁵ Without a demonstration that the defendant’s actions violated provisions of the Indiana Code that allowed the plaintiff to recover treble damages under § 34-24-3-1, the court must limit its award to the plaintiff to the actual pecuniary losses established by plaintiff, in the amount of \$74,001.00.

CONCLUSION

For the reasons set forth in this Memorandum of Decision, the court grants the Motion for Summary Judgment of the plaintiff Allied Fence, LLC. Summary judgment is entered in favor of the plaintiff and against the defendant Robert Irvin Davis, II, on the Complaint Objecting to Discharge of Debt. The amount of the defendant’s obligation to the plaintiff, \$74,001.00, is held nondischargeable in the defendant’s bankruptcy under § 523(a)(4) of the Bankruptcy Code.

SO ORDERED.

/s/ HARRY C. DEES, JR.

HARRY C. DEES, JR., JUDGE
UNITED STATES BANKRUPTCY COURT

⁵ The argument that the defendant’s conduct violated Indiana Code § 35-43-4-2, found in paragraphs 19 and 31 of the Affidavit of Kelly Rathke, was inappropriate. Rathke was familiar with and responsible for maintaining the business records of Allied Fence but not for declaring that the defendant was guilty of theft.