UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
ADAM RAY RUCKER	)	CASE NO. 14-32604 HCD
DEBTOR	)	CHAPTER 7
	)	
	)	
AMIT SHAH, and	)	
RECYCLING CONCEPTS LLC	)	
PLAINTIFFS	)	
vs.	)	PROC. NO. 15-3001
	)	
ADAM RAY RUCKER	)	
DEFENDANT	)	

DECISION AND ORDER ON PLAINTIFFS'
MOTION TO STRIKE AND
MOTION FOR SUMMARY JUDGMENT

At South Bend, Indiana, on August 4, 2015.

Two related matters are now before the court. The first is Plaintiffs' Motion for Summary Judgment (Summary Judgment Motion) and related pleadings in support of and opposing the Motion. The second is Plaintiffs' Motion to Strike Paragraphs in the Affidavit of Adam Rucker (Motion to Strike).

In this adversary proceeding the Plaintiffs seek to have a debt owed to them by Defendant Rucker excepted from discharge pursuant to 11 U.S.C. § 523(a)(4) and (a)(6). By filing this Summary Judgment Motion, Plaintiffs Amit Shah and Recycling Concepts LLC (LLC) assert that there is no genuine issue as to any material fact and they are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). To prevail on summary judgment, the Plaintiffs

> must lay out the elements of the claim, cite the facts which [the plaintiffs believe] satisfies these elements, and demonstrate why the record is so one-sided as to rule out the prospect of a finding in favor of the non-movant on the claim. If the movant has failed to make this initial showing, the court is obligated to deny the motion.

Hotel 71 Mezz Lender LLC v. National Retirement Fund, 778 F.3d 593, 601 (7th Cir. 2015) (internal citations omitted). For the reasons set out below, the court denies in part and grants in part the Motion to Strike and denies the Summary Judgment Motion.

Motion to Strike

Before the court can address summary judgment, it must first consider the Motion to Strike. The Motion to Strike asks this court to strike portions of Rucker's affidavit filed in response to the Summary Judgment Motion. "Admissibility is the threshold question because a court may consider only admissible evidence in assessing a motion for summary judgment." *Gunville v. Walker*, 583 F.3d 979, 985 (7th Cir.2009). A party may not rely on inadmissible hearsay to oppose a motion for summary judgment. *Vazquez v. Fries*, 2010 WL 4789257, *3 (N.D. Ind. Nov. 17, 2010).

Plaintiffs direct the court's attention generally to Rules 801 and 802 of the Federal Rules of Evidence without suggesting the particular subsections of these rules they believe apply. They argue that several paragraphs of Rucker's affidavit contain inadmissible hearsay, conclusory statements, statements that

contradict the Rucker's other sworn statements, and statements made without personal knowledge.

Hearsay is an out of court statement that a party offers to prove the truth of the matter asserted. Fed. R. Evid. 801(c). An out of court statement offered for some other legitimate purpose, such as showing the statement's effect on the declarant, does not qualify as hearsay. *See United States v. Horton*, 847 F.2d 313, 324 (6th Cir. 1988). (Statements were properly admissible because they were not offered to prove the truth of the matters asserted but were admitted to show their effect.) The court finds the Plaintiffs' objection is well taken only in so far as the statement is offered to attribute a specific value to Rucker's ownership interest. For purposes of ruling on this Summary Judgment Motion, the court will not consider any statement concerning the substance of the challenged out-of-court communications, including valuation of the Rucker's ownership interest, in assessing the Motion. Paragraph 3 of Rucker's affidavit will only be considered to show he had conversations with Shah and Shah's representatives.

Plaintiffs next objection asserts Rucker's affidavit includes contradictory statements. They argue Rucker's statement that "Amit Shah handled all the financial activity" and reconciliation of accounts stands in contradiction with his other statements, saying that he wrote checks. In a small business setting, such as the one giving rise to this adversary proceeding, it would not be out of the ordinary to have the same individual writing checks, reconciling bank statements and maintaining other financial records. However, having internal financial

controls that separate the functions of check writing from bank statement reconciliation and other record keeping is also common for small businesses. The court does not find these statements in conflict. Where the record is not conclusive, the court must view it in the light most favorable to Rucker. *Scott v. Harris*, 550 U.S. 372, 378 (2007); *In re Flowers*, 360 B.R. 888, 891 (Bankr. N.D. Ind. 2007). Paragraph 6 may be considered in the court's decision on the Summary Judgment Motion.

Plaintiffs assert that Rucker's statement in his affidavit claiming Shah locked him out of the business contradicts Rucker's testimony in a discovery deposition taken in connection with state court litigation involving the Plaintiffs, Rucker, and a third party not part of this adversary proceeding. Whether or not they locked out Rucker is not a determinative issue in this adversary proceeding. His paragraph 10 will not be considered in the determination of the Summary Judgment Motion.

Lastly, Plaintiffs ask the court to strike portions of Rucker's affidavit because they contain conclusory statements made without Rucker's personal knowledge. The court finds these objections well taken. The court will not consider the matters addressed in paragraphs 7, 8, 11, 12, 13, and 14 in its review of the Summary Judgment Motion.

Summary Judgment Motion

Summary judgment is proper only where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of

law. Fed. R. Bankr. P. Rule 7056; Fed. R. Civ. P. Rule 56(a). "[T]he moving party has the burden of demonstrating that there are no genuine questions of material fact and that he is entitled to judgment as a matter of law." *Green v. Whiteco Industries, Inc.*, 17 F.3d 199, 201 (7th Cir. 1994).

In ruling on a summary judgment motion, the court accepts the nonmoving party's evidence as true, draws all inferences in favor of the nonmoving party, and does not weigh the evidence and credibility of the witnesses. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *In re United Air Lines, Inc.*, 438 F.3d 720, 727 (7th Cir. 2006), *cert. denied* 549 U.S. 826 (2006) (The court views all facts and inferences in a light most favorable to the nonmoving party.) At the same time, the court is mindful that only admissible evidence may be considered in ruling on a summary judgment motion. *Sow v. Fortville Police Dept.*, 636 F.3d 293, 301 (7th Cir. 2011); *see also Gunville*, 583 F.3d at 985. (The court may only consider admissible evidence in assessing a motion for summary judgment.)

The parties in this adversary proceeding disagree both as to the material facts forming the basis for the Plaintiffs' complaint and the legal effect of those facts. The Plaintiffs, as the movant seeking summary judgment, bear the ultimate burden of proof that they are entitled to a judgment as a matter of law. To prevail at trial in this adversary proceeding, they must meet the tests for exceptions to discharge under § 523(a)(4) and (a)(6). Viewing the record in a light most favorable to the Defendant, the evidence currently before the court is not so one

sided that Plaintiffs must prevail as a matter of law. *In re Staggs*, 178 B.R. 767, 772 (Bankr. N.D. Ind. 1994), *aff'd* 177 B.R. 92 (N.D. Ind. 1995).

Collateral Estoppel - Issue Preclusion

The Plaintiffs point to a state court judgment in their favor as support for their Summary Judgment Motion. They argue that Rucker should not relitigate the state court proceeding in this court. This court notes the state court entered judgment on a summary judgment motion. The record in this court does not show findings of fact by the state court concerning any fiduciary duty of Rucker. The state court final judgment only awarded Plaintiffs a money judgment.

The existence of a fiduciary relationship between the Plaintiffs and Defendant Rucker is an essential component of the Plaintiffs' case in this adversary proceeding. The record before this court does not clearly establish the scope and nature of that relationship. "Whether a debtor is a 'fiduciary' under section 523(a)(4) is a question of federal law, not state law." *In re Hivon*, 2015 WL 687124, *5 (Bankr. N.D. Ill. Feb. 13, 2015); *see also In re Frain*, 230 F.3d 1014, 1017 (7th Cir. 2000) ("It bears emphasis that not all fiduciary relationships qualify under the Bankruptcy Code.").

§ 523(a)(4)

"The scope of a fiduciary relationship under § 523(a)(4) is not as broad as the traditional state law concept, and not everyone the state defined as a fiduciary is necessarily held to act in a 'fiduciary capacity' for § 523(a)(4) purposes." *In re Berman*, 629 F.3d 761, 767 (7th Cir. 2011). The current record is insufficient to

establish a fiduciary relationship between the Plaintiffs and Rucker that could support an exception from discharge under § 523(a)(4).

To establish that a debt is non-dischargeable under § 523(a)(4), a creditor must show by a preponderance of the evidence (1) that the debtor acted as a fiduciary to the creditor at the time the debtor created the debt, and (2) that the debt was caused by fraud or defalcation. *In re Pierce*, 2013 WL 1867606, at *3 (Bankr. S.D. Ind. April 30, 2013) (citing *In re Berman*, 629 F.3d at 765-66).

Bankruptcy courts narrowly construe exceptions to discharge in favor of the debtor. *See, e.g.*, *In re Chambers*, 348 F.3d 650, 654 (7th Cir. 2003) (courts have confined exceptions to discharge "to those plainly expressed in the Code and are narrowly construed in favor of the debtor"); *In re Reines*, 142 F.3d 970, 972-73 (7th Cir. 1998) (courts construe exceptions to discharge of a debt strictly against a creditor and liberally in the debtor's favor). Even if the state court found that Rucker owed a fiduciary duty to the Plaintiffs, the Plaintiffs have not shown any state court finding that might meet the requirements for an exception to discharge under § 523(a)(4) for fraud or defalcation, or embezzlement, or larceny. The Plaintiffs have not shown they are entitled to have their debt excepted from discharge as a matter of law.

<u>§ 523(a)(6)</u>

The Plaintiffs also argue that § 523(a)(6) prevents a discharge of their debt. Section 523(a)(6) excepts from discharge debts "for willful and malicious injury by the debtor to another entity or to the property of another entity." In the

Seventh Circuit, "a willful and malicious injury, precluding discharge in bankruptcy of the debt created by the injury, is one that the injurer inflicted knowing he had no legal justification and either desiring to inflict the injury or knowing it was highly likely to result from his act." *Jendusa-Nicolai v. Larsen*, 677 F.3d 320, 324 (7th Cir. 2012). The Supreme Court instructs that "nondischargeability takes 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) (emphasis in original). The record presently before this court does not support a finding that Rucker acted in a "willful and malicious" way to injure the Plaintiffs. The record only shows that Rucker wrote three checks from the LLC bank account. The record does not show that Rucker intended to harm the Plaintiffs.

Conclusion

For the reasons stated in this order, the court denies in part and grants in part the Plaintiffs' Motion to Strike. The court denies the Plaintiffs' Motion for Summary Judgment. The court will schedule a pretrial conference in this adversary proceeding by separate order.

SO ORDERED.

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