IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
LINDA FAY JENKINS,	§	CASE NO. 02-38913-BJH-7
Debtor.	§	(Chapter 7)
DONALD ARMSTRONG,	§	
Plaintiff,	§	
- against -	§	ADV. PRO. NO. 03-03138-BJH
LINDA FAY JENKINS,	§	
Defendant.	§	

Memorandum Decision

On June 16, 2003, the Court held a hearing on the motion to dismiss amended complaint filed by Linda Fay Jenkins ("Jenkins") in the above adversary proceeding and a motion for partial summary judgment filed by Donald Armstrong ("Armstrong").[1] By Order entered on September 4, 2003, the Court denied Armstrong's partial summary judgment motion on the ground that there are

[1] Armstrong filed his original complaint against Jenkins in United States District Court for the Northern District of Texas, Case No.3:01CV2611-N (the "District Court Action") on December 10, 2001. Armstrong first filed his summary judgment motion in the District Court Action on July 24, 2002. At the time of Jenkins's bankruptcy filing, the District Court had not ruled on the summary judgment motion. As a result of an agreement between the parties following a motion by Armstrong to withdraw the reference, this Court entered a Report and Recommendation to the District Court recommending that the District Court Action be consolidated with this nondischargeability adversary proceeding (the "Adversary Proceeding") and referred to this Court for jury trial by consent. On June 5, 2003, the District Court entered an order referring the District Court Action to this Court. As part of the parties' agreement, this Court then entered an Order consolidating the District Court Action with the Adversary Proceeding. Thus, Armstrong's previously filed summary judgment motion was before this Court and ripe for decision. Following the June 16 hearing, the Court entered an Order on June 26, 2003 directing Armstrong to supplement the record and directing Jenkins to advise the Court whether she continues to dispute the existence of an attorney-client relationship between Armstrong and she (the "Attorney-Client Relationship Issue"). That Order further directed the parties to advise the Court if they consented to a bench trial of the Attorney-Client Relationship Issue, following which the Court would advise the parties if a ruling on Jenkins's motion to dismiss and Armstrong's motion for summary judgment would await a separate trial of the Attorney-Client Relationship Issue. The parties complied with the first two directives, but Armstrong requested clarification of the Order regarding the potential bench trial of the Attorney-Client Relationship Issue. Accordingly, the Court held a further hearing, following which the Court entered an Order on September 4, 2003 which, among other things, denied Armstrong's summary judgment motion without prejudice to renew after a separate trial of the Attorney-Client Relationship Issue and announced that Jenkins's motion to dismiss was under advisement.

genuine issues of material fact with respect to the existence of an attorney-client relationship between the parties, without prejudice to renew after a separate trial of that issue. By that same Order, the Court took the motion to dismiss the amended complaint under advisement.

The prior proceedings in this case have been extensive, and will not be repeated here. Nevertheless, a brief procedural history is appropriate.

Procedural History

As originally filed on December 10, 2001, the complaint in the District Court Action alleged claims for legal malpractice, negligent misrepresentation, breach of fiduciary duty, negligence, gross negligence, violation of the Texas Deceptive Trade Practices Act and Consumer Protection Act, and fraud. Armstrong seeks to recover actual damages, as well as damages for mental anguish, loss of reputation, credit rating and business opportunities, a return of all attorneys' fees paid to Jenkins, all other attorneys' fees incurred by Armstrong, and punitive damages.

On October 7, 2002, Jenkins filed her voluntary Chapter 7 petition in this Court. On January 13, 2003, Armstrong filed the Adversary Proceeding in which he incorporated the allegations contained in the District Court Action and further alleged that the damages judgment he would obtain in the District Court Action was nondischargeable in Jenkins's bankruptcy case under 11 U.S.C. §§ 523(a)(2), (4) and/or (6). Between the District Court Action and the Adversary Proceeding, Armstrong's complaints have been amended several times, and Jenkins has filed several motions to dismiss those complaints.[2]

The present motion to dismiss, styled as one under Fed. R. Bankr. P. 7012, was filed on April

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[2] Jenkins's first motion to dismiss was denied by the District Court for failure to comply with N.D. Tex. Local Rule 7.1 on June 5, 2002. As noted previously, on January 13, 2003, Armstrong filed the Adversary Proceeding and a motion to withdraw the reference of the Adversary Proceeding, so that the Adversary Proceeding and the District Court Action would be tried by the same court. *See* fn 1, *supra*. Because the Adversary Proceeding incorporated the allegations of the District Court Action, Jenkins filed another motion to dismiss on February 18, 2003, although that motion appears to be directed to the newly filed nondischargeability complaint. On February 20, 2003, this Court held a hearing on the motion to withdraw the reference. At that hearing, Armstrong decided that he no longer wished for the reference to be withdrawn and the parties agreed that the District Court Action would be referred to this Court for consolidated trial with the Adversary Proceeding. On April 14, 2003, Armstrong filed an amended complaint in the Adversary Proceeding, and on April 22, 2003, Jenkins filed the most recent motion to dismiss the amended complaint in the Adversary Proceeding. On May 2, 2003, Armstrong filed an amended complaint in the District Court Action, which duplicated his amended complaint in the Adversary Proceeding, and by Order entered on June 5, 2003, the District Court Action was referred to this Court for disposition. All references in the Memorandum Decision to the "complaint" refer to the amended complaint filed in the Adversary Proceeding on April 14, 2003.

22, 2003. In support of the motion, Jenkins relies upon evidence outside the pleadings, as does Armstrong in opposing the motion. This most recent motion to dismiss is upon the grounds that Armstrong's claims, even if proven, are dischargeable in Jenkins's Chapter 7 bankruptcy case because Armstrong has failed to plead (or raise a genuine issue of material fact regarding each of the required elements of) a proper claim under 11 U.S.C. §§ 523(a)(2), (4), and/or (6). Jenkins asserts that Armstrong may not rely upon the allegations of the amended complaint in response to a motion for summary judgment, but instead must provide specific facts to indicate that there is a genuine issue for trial, and that "no such evidence exists with respect to the Plaintiff's allegations that the claims he has asserted against Defendant are not dischargeable in her bankruptcy case under 11 U.S.C. §§ 523(a)(2), (4) & (6)." *Reply Brief Supporting Def's Mot. to Dismiss Amended Compl.*, p. 3. By agreement of the parties and/or for the reasons set forth in the Memorandum Decision and Order entered on October 9, 2003, the motion to dismiss shall be treated as one for summary judgment pursuant to Fed. R. Bankr. P. 7056.[3]

Factual Background[4]

In 1989, Armstrong purchased an apartment building in Fort Worth. In 1994, he contracted to sell it to John and Rosalie Feece, who formed Steppes Apartments, Ltd. ("Steppes") for the purchase. Before closing, Armstrong severed title to the land and building from the personal property in the complex, and created two trusts, conveying the land to one and the personal property

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[3] In short, Armstrong argued repeatedly in response to the various motions to dismiss that the motions be treated as summary judgment motions because both parties were relying upon extensive materials outside of the pleadings. At the outset of the hearing, the Court concluded that it was appropriate to treat Jenkins's motion to dismiss as a motion for summary judgment because both parties had requested that the Court do so. As the hearing progressed and the shortcomings of Armstrong's pleadings and evidence became apparent, Armstrong changed his mind and "objected" to the Court treating the motion to dismiss as a motion for summary judgment, notwithstanding his prior, clearly articulated consent in writing (in the various responses to the multiple motions to dismiss). After the hearing, Armstrong then filed a motion to supplement the record, which the Court denied by its Memorandum Decision and Order dated October 9, 2003. Accordingly, Jenkins's motion to dismiss will be treated as a motion for summary judgment by agreement of the parties or, to the extent that Armstrong withdrew his agreement, in accordance with the federal rules, as both parties have submitted matters outside the pleadings, both have had ample opportunity to submit evidence, Armstrong failed to file a proper motion seeking a continuance on the ground that discovery is required in order to respond to the summary judgment motion, and Armstrong failed to demonstrate, in support of his oral request for further discovery, any specific facts explaining his alleged inability to make a substantive response and any showing as to "how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact." *SEC v. Spence & Green Chem. Co.*, 612 F.2d 896, 901 (5th Cir. 1980).

[4] Much of this factual background is taken from the findings and opinions of the Court of Appeals, Second District of Texas, Fort Worth and the 67th District Court of Tarrant County, attached to the Affidavit of Donald E. Armstrong in Opposition to Defendant's Motion to Dismiss dated March 27, 2003 as Exhibits 8, 10, and 11.

to the other. At closing, one trust conveyed the building and land to Steppes and the other conveyed the personal property. A dispute among the parties arose and eventually, Steppes filed a suit for declaratory judgment in Texas state court. The state court granted partial summary judgment in favor of Armstrong, finding Steppes in default. Armstrong then posted the property for foreclosure and Steppes sought to enjoin the foreclosure and for reconsideration of the partial summary judgment in Armstrong's favor.

The state court reversed the partial summary judgment after learning that Armstrong had apparently altered his summary judgment proof, ordered the parties to attempt to settle the litigation, and ordered Armstrong to provide calculations for his payoff demands. After several hearings, Armstrong provided a payoff summary and, shortly thereafter, Steppes amended its pleadings to include claims for usury and double usury.

After several procedural maneuvers, the suit went to trial in 1996 and the state court found in favor of Steppes on its usury claims, rendering judgment on September 23, 1996. Armstrong then objected to the entry of judgment because of Steppes' failure to give notice of the action to the trusts' beneficiaries pursuant to a Texas statute that required their participation. The state court vacated the judgment, but issued orders to the beneficiaries to show cause why a judgment should not be entered against them.

At this point in the litigation, March 1997, Armstrong hired Jenkins to represent the beneficiaries at the show cause hearing. The state court ruled against the beneficiaries at that hearing and entered a modified judgment in favor of Steppes. After entry of that modified judgment, Jenkins prepared and filed a motion for new trial, which was subsequently denied. Jenkins then appealed the adverse judgment on behalf of the beneficiaries, which was also unsuccessful.

Armstrong's complaint essentially alleges that Jenkins agreed to represent the beneficiaries in connection with the Steppes state court action in March of 1997, and that she represented to Armstrong (who hired her on behalf of the beneficiaries) that she was well qualified to represent the beneficiaries in that litigation. Armstrong further alleges that Jenkins's representations regarding her ability to represent the beneficiaries were false, that Jenkins did "not comply with or follow through with her representations," *Compl.* p. 2, and that as a result of her actions and inactions, Armstrong

has suffered "millions of dollars in damages." *Id.* Specifically, Armstrong alleges that he requested Jenkins to make certain arguments supported by specific case law and certain Texas statutes which he provided to her, but that she failed to put forth the arguments requested and did not cite to the appropriate authorities. He further alleges that Jenkins "had a fiduciary duty to the Beneficiaries of the Trusts and committed fraud and defalcation" and "willfully and intentionally caused damages to the Beneficiaries of the Trusts," including Armstrong. *Id.* at 3.

Jenkins's present motion asserts that even if Armstrong's underlying claims are proven, the resulting judgment would be dischargeable in her Chapter 7 bankruptcy case because Armstrong has failed to plead (or raise a genuine issue of material fact regarding each of the required elements of) a proper claim under 11 U.S.C. §§ 523(a)(2), (4), and/or (6).

Legal Analysis

Summary Judgment Standard

Summary judgment is proper if the summary judgment record shows that there is "no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(b); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Abbott v. Equity Group, Inc.*, 2 F.3d 613, 619 (5th Cir. 1993). The summary judgment movant:

> [N]eed not support the motion with evidence negating the opponent's case; rather, once the movant establishes that there is an absence of evidence to support the non-movant's case, the burden is on the non-movant to make a showing sufficient to establish an issue of fact for each element as to which that party will have the burden of proof at trial.

Epps v. NCNB Texas Nat'l Bank, 838 F. Supp. 296, 299 (N.D. Tex.), *aff'd* 7 F.3d 44 (5th Cir 1993) (citing *Celotox Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986)). "[U]nsubstantiated assertions are not competent summary judgment evidence." *Abbott,* 2 F.3d at 619. The nonmoving party must "'come forward with specific facts showing there is a genuine issue for trial' . . . [and] must do more than simply show some 'metaphysical doubt as to the material facts.'" *Epps,* 838 F. Supp. at 299 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)).

Armstrong's Nondischargeability Claims

Section 523 of the Bankruptcy Code excepts certain types of debts from a debtor's discharge. However, these exceptions to discharge are strictly construed in favor of dischargeability to facilitate a debtor's fresh start. *See Texas Lottery Comm'n v. Tran (In re Tran)*, 151 F.3d 339, 342 (5th Cir. 1998); *In re Hudson*, 107 F.3d 355, 356 (5th Cir. 1997). The creditor filing the nondischargeability complaint bears the burden of proof at trial by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279 (1991); *FDIC v. Smith (In re Smith)*, 160 B.R. 549, 552 (N.D. Tex. 1993), *aff'd*, 39 F.3d 320 (5th Cir. 1994); *Hayden v. Hayden (In re Hayden)*, 248 B.R. 519 (Bankr. N.D. Tex. 2000).

Section 523(a)(2)(A)

Under § 523(a)(2)(A), a debtor is denied a discharge for "any debt – for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud . . . ." 11 U.S.C. § 523(a)(2)(A). To prevail on a claim under § 523(a)(2)(A), the creditor must establish that (i) the debtor made false representations describing past or current facts, (ii) the representations were made with the intent and purpose of deceiving the creditor, (iii) the creditor justifiably relied on the representations, and (iv) the creditor sustained a loss as a result of the representations. *See McCoun v. Rea (In re Rea)*, 245 B.R. 77, 85 (Bankr. N.D. Tex. 2000) (*citing RecoverEdge L.P. v. Pentecost*, 44 F.3d 1284, 1292 (5th Cir.1995)).

As noted earlier, Armstrong's complaint alleges that Jenkins represented to him that she was qualified to represent the beneficiaries in the state court litigation. As evidence that she made such representations, Armstrong points to his own affidavit[5] which states that she made such

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[5] The only document entitled "Affidavit" which Armstrong has submitted is the Affidavit dated March 27, 2003. Armstrong's amended complaint, however, is sworn under penalty of perjury. In view of the liberal pleading standards afforded to *pro se* litigants, the Court will treat his amended complaint as an affidavit under 28 U.S.C. § 1746. That section provides:

> Wherever, under any law of the United States or any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same . . . such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form . . . (2) if executed within the United States . . . "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct."

Armstrong's complaint meets these requirements and thus may be considered as competent summary judgment evidence. *Hart v. Hairston*, 343 F.3d 762 (5th Cir. 2003) (sworn declaration of *pro se* inmate accepted as competent summary judgment evidence); *King v. Dogan*, 31 F.3d 344 (5th Cir. 1994) (verified complaint can be considered as summary judgment evidence to the extent it comports with Rule 56(e)); *Freeman v. Bowles*, No. 301CV1871BD,

representations. The affidavit does not give the date, place or time of the representations, or state the specific representations about her qualifications which were allegedly made. It is, however, some evidence that she made such representations. In support of his claim that the representations were false, Armstrong again points only to his affidavit in which he states that Jenkins did not present the case law and statutes which he had previously provided to her to the Texas state courts in connection with the motion for new trial and/or the appeal of the adverse judgment. At the June 16, 2003 hearing, Armstrong also contended that the Court can infer, from Jenkins's failure to raise those statutes and cite that case law, that her representations that she was qualified to represent the beneficiaries were false.

In response, Jenkins points to her affidavit in which she states that in her professional opinion as a licensed attorney, neither the case law nor the statutes which Armstrong requested her to cite was applicable. Therefore, she argues that her failure to present that law to the state court was proper and consequently does not show that she was ill qualified to represent the beneficiaries. She therefore contends that there is no evidence that her representations to Armstrong about her qualifications were false.

Again, the Court believes that Armstrong's affidavit is some evidence that her alleged representations were false, and is sufficient to survive a motion for summary judgment. For the same reason, Armstrong's affidavit which alleges that he relied upon her representations is also some evidence of reliance.

However, to survive the summary judgment motion, Armstrong must also come forward with evidence that he suffered a loss as a result of the representations. *See McCoun v. Rea (In re Rea)*, 245 B.R. at 85. Because the damage he complains of is the entry of judgment against him (in his capacity as a beneficiary), to show the causal relationship between Jenkins's representations respecting her ability to handle the litigation on behalf of the beneficiaries and the damage, Armstrong must come forward with evidence that the judgment would not have been taken against the beneficiaries had Jenkins handled the case differently. Under Texas law, when the alleged

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2002 WL 1359717 (N.D. Tx. June 18, 2002) (*pro se* litigant's verified complaint accepted as competent summary judgment evidence).

malpractice involves the handling of prior litigation, in order to establish the element of causation between the malpractice and the damage, a plaintiff must show that he would have prevailed in the underlying action but for his attorney's negligence. *Millhouse v. Wiesenthal*, 775 S.W.2d 626 (Tex. 1989). This is the requirement to prove a "suit within a suit." *Hall v. White, Getgey, Meyer & Co.*, No. 01-50981, 2003 WL 22245553 at *5 (5th Cir. Oct. 1, 2003).

As his evidence, Armstrong again points to his affidavit, in which he states that he provided certain specified cases and statutes to Jenkins, but that she failed to argue those authorities to the state courts. Armstrong asks this Court to take judicial notice of the cases and statutes and conclude that the outcome would have been different had she presented those authorities. However, under Texas law, expert testimony is necessary to establish two elements of a legal malpractice claim: (i) the standard of care required of an attorney and (ii) causation. *Ramsey v. Reagan, Burrus, Dierksen, Lamon & Bluntzer, P.L.L.C.*, 2003 WL 124206 (Tex. App. - Austin 2003); *Ersek v. Davis & Davis, P.C.*, 69 S.W.3d 268 (Tex. App. - Austin 2002); *Hall v. Rutherford*, 911 S.W.2d 422 (Tex. App. - San Antonio 1995) (affirming summary judgment in favor of defendant-attorney where affidavit by plaintiff's expert was defective). The consequence of not producing such expert testimony is to fail to prove an essential element(s) of such a claim. *Ramsey*, 2003 WL 124206 at *6 (affirming grant of no-evidence summary judgment motion where client's expert testimony was excluded); *Ersek*, 69 S.W.3d at 274.

The Fifth Circuit has also upheld the requirement of expert testimony in a legal malpractice action. *Geiserman v. MacDonald*, 893 F.2d 787 (5th Cir. 1990) (upholding grant of summary judgment against legal malpractice plaintiff whose expert's testimony had been excluded). While the *Geiserman* court noted that expert testimony is not required where the alleged malpractice is so egregious as to be obvious to a lay person (citing a case in which an attorney failed to inform his client to answer interrogatories), *see id.* at 794, and Armstrong argued that he was not required to present expert testimony because Jenkins's failure to cite the statutes and cases which he gave to her is obviously egregious, the Court concludes that Jenkins's alleged failures to act are not so obviously egregious that the standard of care is properly proven without expert testimony. Under Texas law, the most common example of a case in which no expert testimony is required is one in which an

attorney allows the statute of limitations to run on a client's claim, *see e.g.*, *James V. Mazuco & Assoc. v. Schumann*, 82 S.W.3d 90 (Tex. App. - San Antonio 2002), a circumstance far different from that at issue here.

Regarding causation, under Texas law expert testimony is also necessary to prove causation unless the causal relationship between the alleged malpractice and the loss is so obvious that lay people are competent to resolve the issue. *Turtur & Assoc. v. Alexander*, 86 S.W.3d 646 (Tex. App. - Houston [1st Dist.] 2001). Again, the Court is unable to conclude that a layperson could adequately assess the consequences of Jenkins's failure to make the statutory and constitutional arguments Armstrong wanted her to make to the state courts including whether the outcome of the litigation would have been different had those arguments and authorities been presented.

Finally, even assuming Armstrong raised a genuine issue of material fact with respect to the causal connection between her alleged malpractice and his damages, Armstrong has also failed to submit any evidence whatsoever that the false representations were made with the requisite intent.[6] As noted previously, Armstrong must come forward with some evidence that Jenkins made the false representations with the intent and purpose of deceiving him. *See McCoun v. Rea (In re Rea)*, 245 B.R. at 85. In the absence of such evidence, summary judgment in favor of Jenkins on the § 523(a)(2)(A) claim is appropriate.

Section 523(a)(4)

Under § 523(a)(4), a debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny" may not be discharged in bankruptcy. Armstrong relies solely upon the existence of the attorney-client relationship to create the "fiduciary capacity" required by § 523(a)(4), and argues that the "fraud" Jenkins committed while acting as counsel is the same "fraud" as is alleged in his § 523(a)(2)(A) claim – *i.e.*, that Jenkins represented she was qualified to represent the beneficiaries when in fact she was not. Jenkins asserts that more than the mere existence of an

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[6] Although Armstrong's affidavit also states that Jenkins intended to deceive him, his affidavit may only be considered as summary judgment evidence when it otherwise comports with Rule 56(e). *Freeman v. Bowles*, No. 301CV1871BD, 2002 WL 1359717 (N.D. Tx. June 18, 2002). That rule requires that affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Obviously, Armstrong is not competent to testify to Jenkins's intent and state of mind.

attorney-client relationship is required as a matter of law to state a claim under § 523(a)(4), and that Armstrong has failed to come forward with evidence of the necessary fiduciary capacity to create a genuine issue for trial.[7]

The cases are split as to whether the existence of an attorney-client relationship, without more, is sufficient to create the "fiduciary capacity" required by § 523(a)(4). As noted in *In re Young*, 91 F.3d 1367 (10th Cir. 1996):

> In cases where the debtor is an attorney and the creditor is a client . . . the majority of courts that have considered the issue have applied the above principles to require more than an attorney-client relationship alone to establish a fiduciary relationship for purposes of § 523(a)(4). *See In re Kudla*, 105 B.R. at 991 (finding that a fiduciary relationship existed where the creditor relied on the debtor's "status as escrow agent and as an attorney to protect [the creditor's] funds" (emphasis added)); *Braud v. Stokes (In re Stokes)*, 142 B.R. 908, 909-10 (Bankr.N.D.Cal.1992) (holding that § 523(a)(4) does not cover fiduciary relationships arising simply from an attorney-client relationship); *Gafni v. Barton (In re Barton)*, 465 F.Supp. 918, 924 (S.D.N.Y.1979) (reasoning that under Bankruptcy Act § 17(a)(4), the predecessor of Bankruptcy Code § 523(a)(4), where an attorney's former client made a loan to a corporation, of which the attorney was the President, and the attorney guaranteed such loan, the parties intended only a lender-borrower, not a fiduciary, relationship). Courts have generally required a trust relationship to exist between an attorney-debtor and a client-creditor to find a fiduciary relationship for purposes of dischargeability. *See In re Ducey*, 160 B.R. at 470; *In re McDowell*, 162 B.R. at 139; In re Stokes, 142 B.R. at 909-10.

Young, at 1372 .[8] *See also In re Garver,* 116 F.3d 176 (6th Cir. 1997); *In re Bigelow,* 271 B.R. 178 (9th Cir. BAP 2001); *In re Parker,* 264 B.R. 685 (10th Cir. BAP 2001), *aff'd* 313 F.3d 1267 (10th Cir. 2002); *In re Woods,* 284 B.R. 282 (D. Colo. 2001). Other courts have held that an attorney-client relationship, without more, is sufficient under § 523(a)(4). *See In re Hayes*, 183 F.3d 162 (2nd Cir. 1999); *Tudor Oaks Ltd. P'ship v. Cochrane (In re Cochrane)*, 124 F.3d 978 (8th Cir. 1997).

Although the Fifth Circuit has not spoken to this precise issue, it has construed § 523(a)(4) on numerous occasions and in a fashion that this Court finds controlling here. After considering these prior decisions, the policy reasons underlying the discharge provisions of the Bankruptcy Code,

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[7] The Court has already ruled that there is a genuine issue of material fact regarding the Attorney-Client Relationship Issue. However, for purposes of disposing of this motion, the Court assumed that an attorney-client relationship existed as Armstrong contends.

[8] The *Young* court noted that courts which have found the requisite trust relationship to be created have done so by application of state codes of professional responsibility. However, the *Young* court concluded that the ethics rule at issue there was insufficient to place the debtor in the position of a fiduciary.

and Texas state law regarding the nature of the attorney-client relationship, the Court concludes that an attorney-client relationship, without more, is insufficient to create the fiduciary capacity required to state a proper claim under § 523(a)(4).

In construing § 523(a)(4), the Fifth Circuit stated in *Texas Lottery Comm'n v. Tran (In re Tran)*,151 F.3d 339 (5th Cir.1998) that

> Congress designed [this] discharge exception to reach "debts incurred through abuses of fiduciary positions and through active misconduct whereby a debtor has deprived others of their property by criminal acts; both classes of conduct involve debts arising from the debtor's acquisition or use of property that is not the debtor's." Consistent with the principle that exceptions to discharge are to be narrowly construed, the concept of fiduciary under § 523(a)(4) is narrower than it is under the general common law. Under § 523(a)(4), "fiduciary" is limited to instances involving express or technical trusts. The purported trustee's duties must, therefore, arise independent of any contractual obligation. The trustee's obligations, moreover, must have been imposed prior to, rather than by virtue of, any claimed misappropriation or wrong. Constructive trusts or trusts *ex malificio* thus also fall short of the requirements of § 523(a)(4). Statutory trusts, by contrast, can satisfy the dictates of § 523(a)(4). It is not enough, however, that a statute purports to create a trust: A state cannot magically transform ordinary agents, contractors, or sellers into fiduciaries by the simple incantation of the terms "trust" or "fiduciary." Rather, to meet the requirements of § 523(a)(4), a statutory trust must (1) include a definable res and (2) impose "trust-like" duties. The question whether a state statute creates the type of fiduciary relationship required under § 523(a)(4) is one of federal law. To make this determination a federal court must nevertheless look to state law . . . to discern whether the supposed fiduciary relationship possesses the attributes required under § 523(a)(4) which brings us to the case at hand.

Id. at 342-43 (citations and footnotes omitted).

Thus, while the question of whether Jenkins was acting in a fiduciary capacity within the meaning of § 523(a)(4) is one of federal law, state law is important in determining whether trust-type obligations exist. *Id.* Under Texas law, a fiduciary duty exists between attorneys and clients as a matter of law. *General Motors Acceptance Corp. v. Crenshaw, Dupree & Milam, LLP*, 986 S.W.2d 632 (Tex. App. - El Paso 1998). However, attorneys may be liable for a breach of that fiduciary duty only where there are "allegations of self-dealing, deception, or misrepresentations that go beyond the mere negligence allegations in a malpractice action." *See Goffney v. Rabson*, 56 S.W.3d 186, 193-94 (Tex.App.-Houston [14th Dist.] 2001). If "the gist of a client's complaint is that the attorney did not exercise that degree of care, skill, or diligence as attorneys of ordinary skill and knowledge commonly possess, then that complaint should be pursued as a negligence claim, rather than some other claim." *Deutsch v. Hoover, Bax & Slovacek, L.L.P*, 97 S.W.3d 179, 189 (Tex.App.-Houston

[14 Dist.] 2002). In Texas, the focus of a breach of fiduciary duty claim is

> whether an attorney obtained an improper benefit from representing a client, while the focus of a legal malpractice claim is whether an attorney adequately represented a client. The essence of a breach of fiduciary duty involves the 'integrity and fidelity' of an attorney. A breach of fiduciary duty occurs when an attorney benefits improperly from the attorney-client relationship by, among other things, subordinating his client's interests to his own, retaining the client's funds, using the client's confidences improperly, taking advantage of the client's trust, engaging in self-dealing, or making misrepresentations. Unlike a claim for breach of fiduciary duty, legal malpractice is based on negligence, because such claims arise from an attorney's alleged failure to exercise ordinary care. A cause of action for legal malpractice arises from an attorney giving a client bad legal advice or otherwise improperly representing the client."

Kimleco Petroleum, Inc. v. Morrison & Shelton, 91 S.W.3d 921, 923-24 (Tex.App.-Ft. Worth 2002) (citations omitted). Thus, under Texas law a breach of fiduciary duty claim does not arise from a failure to properly represent the client, and a client may not re-cast an ordinary malpractice claim as one for breach of fiduciary duty – that is an impermissible fracturing of claims under Texas law. *Aiken v. Hancock*, 115 S.W.3d 26 (Tex. App. - San Antonio 2003).

Applying these principles here, the Court concludes that it is proper to draw a distinction between the general fiduciary nature of the attorney-client relationship and the conduct and injury required to state a claim for breach of fiduciary duty under Texas law, when determining whether a debtor/attorney committed a "fraud or defalcation while acting in a fiduciary capacity" within the meaning of § 523(a)(4) of the Bankruptcy Code. *See In re Bigelow*, 271 B.R. 178 (9th Cir. BAP 2001) (broad fiduciary relationship existing as a matter of law between attorney and client under state law does not fit within narrow federal definition of the term 'fiduciary'; relationship rises to level required by § 523 (a)(4) where client trust funds are involved). A fair reading of Armstrong's complaints against Jenkins (whether formally in the amended complaint or in his affidavit) is that Jenkins did not exercise that degree of care, skill or diligence as attorneys of ordinary skill and knowledge commonly possess. As such, and in accordance with Texas law, Armstrong has, at most, a malpractice claim against Jenkins, not a claim for breach of fiduciary duty. His attempts to recast his malpractice claim against Jenkins into one for breach of fiduciary duty fails.

In *In re Miller*, 156 F.3d 598 (5th Cir. 1998), a judgment creditor sought, *inter alia*, to have its state court judgment declared nondischargeable under § 523(a)(4). Because the jury had found

that the debtor had not breached any fiduciary duty to the creditor in the underlying state court action, the *Miller* court concluded that the debtor could not have committed a "fraud or defalcation while acting in a fiduciary capacity" as a matter of law. *Id.* at 602. In reaching its conclusion, the Fifth Circuit stated:

> The instruction given to the jury in the state case here was far broader, noting that 'implicit in this [fiduciary] duty is that an officer or director may not serve his own personal interest at the expense of the corporation and its stockholders.' Because the federal standard will never identify a 'fiduciary' where Texas law would not, the state court judgment is issue preclusive with respect to whether there was 'fraud or defalcation while acting in a fiduciary capacity.'

Id. (citing *Texas Lottery Comm'n v. Tran (In re Tran)*, 151 F.3d at 339, for the meaning of the term "fiduciary" under § 523(a)(4)).

In light of the Fifth Circuit's analysis in *Miller*, because Armstrong has not stated, or offered any evidence supporting, a claim for breach of fiduciary duty under Texas law, he cannot state a claim against Jenkins for "fraud or defalcation while acting in a fiduciary capacity." Summary judgment is therefore appropriate in Jenkins's favor on the claim under § 523(a)(4).[9]

Section 523(a)(6)

Section 523(a)(6) excepts a debt "for any willful and malicious injury by the debtor to another entity or to the property of another entity" from a debtor's discharge. 11 U.S.C. § 523(a)(6). The United States Supreme Court has established guidelines for determining whether a debt arises from a willful and malicious injury and, therefore, is excepted from discharge under § 523(a)(6). *See Kawaauhau v. Geiger,* 523 U.S. 57, 59, (1998). In *Geiger,* the Court concluded the provision applies to "acts done with the actual intent to cause injury," but excludes intentional acts that cause injury. *Id.* at 61. The Court held that nondischargeability takes a deliberate or intentional *injury,* not merely a deliberate or intentional *act* that leads to injury, and that the actor must "intend 'the consequences of an act,' not simply 'the act itself.' " *Id.* at 61-62. After *Geiger*, the Fifth Circuit has held that for a debt to be nondischargeable, a debtor must have acted with "objective substantial

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[9] Even if there was evidence in the summary judgment record to support the existence of the required fiduciary capacity, the Court also concludes, for the reasons stated in the Court's discussion of Armstrong's § 523(a)(2)(A) claim, that Armstrong failed to come forward with any evidence of the intent necessary to prove a fraud claim. Armstrong concedes that the only "fraud" Jenkins allegedly committed acting as the beneficiaries' counsel is her false representation about her qualifications. *See* pp. 6-7, *supra*.

certainty or subjective motive" to inflict injury. *In re Miller*, 156 F.3d at 603.

Jenkins argues that there is no evidence of willful and malicious intent to injure, and that as a matter of law, debts arising from reckless or negligently inflicted injuries occurring from professional malpractice do not fall within the scope of § 523(a)(6). She asserts that the "thoroughness and quality" of the pleadings she prepared, which are attached to her affidavit, coupled with the fact that her invoices reflect over $100,000 of professional services, rebuts any claim that she acted maliciously with the intent to injure Armstrong.

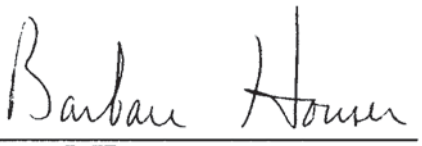
Armstrong conceded at the June 16, 2003 hearing that there is no evidence in the summary judgment record to support his current contentions (which are not alleged in the amended complaint) that Jenkins committed malpractice with the subjective motive to inflict injury upon him or that her malpractice was so egregious that there was objective, substantial certainty of injury to him. Although he urged that he needs discovery to locate such evidence, for the reasons set forth in the Memorandum Decision and Order Denying Motion to File Supplemental Brief entered on October 9, 2003, the Court concludes that Armstrong has failed to meet his burden to specifically demonstrate why the discovery is needed and how it will allow him to demonstrate a genuine issue of material fact. *Hinds v. Dallas Indep. School Dist.*, 188 F.Supp. 2d 664 (N.D. Tex. 2002); *see also SEC v. Spence & Green Chem. Co.,* 612 F.2d 896, 901 (5th Cir. 1980). As there is no evidence in the summary judgment record that Jenkins acted (or, more accurately, failed to act) with the subjective intent to injure Armstrong, or that Jenkins's failure to act was objectively certain to cause injury, the Court must grant summary judgment in favor of Jenkins on the claim under § 523(a)(6).

Conclusion

The Court recognizes that pro se litigants are held to a more relaxed pleading standard and are entitled to have their pleadings liberally construed. S*ee Taylor v. Books a Million, Inc.*, 296 F.3d 376 (5th Cir. 2002). Nevertheless, proceeding pro se does not relieve a litigant from the usual requirements when facing a motion for summary judgment. *See Verone v. Catskill Regional Off-Track Betting Corp.*, 10 F.Supp.2d 372 (S.D.N.Y. 1998) (granting summary judgment against pro se plaintiff who had failed to produce sufficient evidence in an age discrimination case despite liberal reading of responsive papers). Because Armstrong failed to come forward with evidence to establish

a genuine issue of material fact on each of the elements of the claims on which he will bear the burden of proof at trial, summary judgment in Jenkins's favor on those claims is proper.

Signed: November 5, 2003.



Barbara J. Houser
United States Bankruptcy Judge