**The following constitutes the ruling of the court and has the force and effect therein described.**

**Signed February 3, 2010** **United States Bankruptcy Judge**

**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE NORTHERN DISTRICT OF TEXAS**
**FORT WORTH DIVISION**

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| IN RE: | § | |
| | § | CHAPTER 7 |
| SHERRY RAMON AND | § | |
| GILBERT RAMON, | § | |
| | § | CASE NO. 09-44325 (DML) |
| DEBTORS. | § | |
| | § | |
| ROSEMARY V. CHIZK, | § | |
| | § | |
| PLAINTIFF, | § | |
| | § | |
| V. | § | ADV. NO. 09-04281 (DML) |
| | § | |
| SHERRY RAMON AND | § | |
| GILBERT RAMON, | § | |
| | § | |
| DEFENDANTS. | § | |

**Memorandum Order**

Before the court is the *Motion to Dismiss for Failure to State a Claim On Which Relief Can be Granted, and for Inadequate Statement of Relief Sought* (the "Motion") filed by Gilbert and Sherry Ramon ("Defendants") asking that the court dismiss Rosemary Chizk's ("Plaintiff") *Second Amended Complaint for Adversary Proceedings of Dischargeability of Certain Debts* (the "Second Amended Complaint"). By the Second Amended Complaint Plaintiff asks that Defendants be denied their discharge or that their debt to Plaintiff be declared nondischargeable. Specifically, Plaintiff objects to Defendants' discharge of debt to her on the basis of sections 523(a)(2) and 523(a)(4) and urges that Defendants be denied a discharge under section 727 of the Bankruptcy Code (the "Code")[1].

The Motion was set for hearing on December 31, 2009 (the "Hearing"), during which time Defendants asked the court to dismiss the instant adversary. Plaintiff did not appear at the Hearing. Because Plaintiff is acting *pro se* the court took the Motion under advisement in order to determine whether any of the allegations in the Second Amended Complaint are sufficient to support a grant of relief.

The court exercises core jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(a) and 157(b)(2)(I). This memorandum order embodies the court's findings of fact and conclusions of law. FED. R. BANKR. P. 7052.

## I. Background

On February 2, 2004, Plaintiff and Defendant Sherry Ramon formed Parvenu, LLC ("Parvenu") in which they shared ownership 50/50. Parvenu owned and operated a gas station and convenience store (the "Gas Station") in Gulfport, Mississippi.

[1] 11 U.S.C. §§ 101 *et. seq.*

After forming Parvenu, Plaintiff gave Sherry Ramon a check for $35,000 which was to be spent on the Gas Station. Allegedly, Sherry Ramon promised that, should the Gas Station fail, Defendants would repay Plaintiff from the funds held in their 401(k) plan. After a few months Defendants closed the Gas Station, liquidated its inventory, and absconded with all remaining funds of Parvenu.[2]

Plaintiff then sued Defendants in the Chancery Court of Harrison County, Mississippi (the "State Court"). After Defendants failed to appear at multiple hearings, the State Court entered a judgment against them in favor of Plaintiff in the amount of $60,000 plus post-judgment interest at 8% per annum.[3]

Defendants filed their chapter 7 case on July 16, 2009, and their meeting of creditors pursuant to Code § 341 was originally scheduled for, and was held on, August 11, 2009. On the same day, Chizk filed her initial complaint, which sought denial of Defendants' discharge pursuant to Code § 727 – though without specifying the applicable provisions of that section under which she proposed to proceed. Defendants responded with a motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6) (applicable pursuant to FED. R. BANKR. P. 7012), and, on October 1, 2009, Plaintiff filed her *First Amended Complaint*, in which she made more specific allegations.

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[2] The court here states that Defendants closed the Gas Station and absconded with Parvenu's funds because the State Court (as defined below) found such to be true. While the court accepts the State Court judgment as true for the purpose of the Motion, the court reaches no conclusion as to its preclusive effect at this time. *See In re Pancake*, 106 F.3d 1026 (5th Cir. 1998); *In re Garner*, 56 F.3d 677 (5th Cir. 1995); *Harris v. Kiwi Services, Inc.*, 180 Fed. Appx. 485 (5th Cir. 2006).

[3] The facts described in this Memorandum Order are partially taken from the Second Amended Complaint and partially from the State Court judgment which was attached to Plaintiff's original complaint as an exhibit. None of Plaintiff's various complaints sufficiently described the factual circumstances of the disagreement between Plaintiff and Defendants for the court to understand fullyhow or why the disagreement arose. For the purposes of the Motion, the court must take Plaintiff's allegations of fact (including any in the State Court judgment) to be true. *See* 2 *Moore's Federal Practice* § 12.30[4] (Matthew Bender 3rd ed. 2009).

The Defendants' motion to dismiss the original complaint was set for hearing on October 1, 2009, and at that hearing Plaintiff asked that, as she was proceeding without counsel, the court allow her to further amend her complaint. The court did so, while cautioning her that she should obtain the assistance of counsel. On October 13, 2009, several days out-of-time under FED. R. BANKR. P. 4007(c), Plaintiff filed the Second Amended Complaint, in which she, for the first time, raised claims against Defendants under Code § 523. Defendants responded with an answer and motion to dismiss based upon FED. R. CIV. P. 9 (applicable by reason of FED. R. BANKR. P. 7009). It was that motion which was to be addressed at the Hearing. Although Plaintiff failed to appear at the Hearing, she contacted the court prior to the Hearing and advised that she would miss the Hearing due to car trouble.

## II. Discussion

In general a complaint need only contain a short and plain statement of (a) the grounds for the court's jurisdiction; (b) "the claim showing the pleader is entitled to relief;" and (c) the demand for relief sought. FED. R. BANKR. P. 7008; 10 COLLIER ON BANKRUPTCY ¶ 7008.02 (15th ed. Rev. 2007). Certain claims for relief require more specific allegations of facts. Thus, a party alleging fraud or mistake must "state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." FED. R. CIV. P. 9(b); FED. R. BANKR. P. 7009.

### A. Fraud Claims Requiring Particularity In Pleadings

In the case at bar the claims that must be pled with particularity are (a) fraud as a fiduciary (section 523(a)(4)); (b) obtaining money or credit through false pretences (section 523(a)(2)(A)); (c) obtaining money or credit through false representations (*id.*); and (d) actual fraud (*id.*). *See In re Dunlevy*, 75 B.R. 914, 916-7 (Bankr. S. D. Ohio 1987).

FED. R. CIV. P. 9(b) (made applicable in bankruptcy via FED. R. BANKR. P. 7009) serves three main purposes: "(1) providing a defendant fair notice of plaintiff's claim, to enable preparation of defense; (2) protecting a defendant from harm to his reputation or goodwill; and (3) reducing the number of strike suits." *DiVittorio v. Equidyne Extractive Indus.*, 822 F.2d 1242, 1247 (2d Cir. 1987). In discussing FED. R. BANKR. P. 7009(b) one Court wrote, "The purpose of Rule 9(b) is to place Defendants on notice of the precise misconduct with which they are charged, and to safeguard Defendants against spurious charges of fraudulent behavior." *End of the Road Trust ex rel. Fruehauf Trailer Corp. v. Terex Corp. (In re Fruehauf Trailer Corp.)*, 250 B.R. 168, 198 (D. Del. 2000)

In order for the court to deny discharge of a debt under section 523(a)(2)(A) on the basis that the debt is attributable to the debtor's false pretenses or representations, the plaintiff must prove the debtor's representations were "(1) knowing and fraudulent falsehoods, (2) describing past or current facts, (3) that were relied upon by the other party." *In re Allison*, 960 F.2d 481, 483 (5th Cir. 1992).

The requirements for denying discharge of a debt for actual fraud pursuant to section 523(a)(2)(A) are: "(1) the debtor made representations; (2) at the time they were made the debtor knew they were false; (3) the debtor made the representations with the intention and purpose to deceive the creditor; (4) that the creditor relied on such

representations; and (5) that the creditor sustained losses as a proximate result of the representations." *Recoveredge L.P. v. Pentecost*, 44 F.3d 1284 (5th Cir. 1995).

Under section 523(a)(4) denial of a debtor's discharge because of fraud or defalcation by the debtor requires a showing that (1) the debtor was a fiduciary, and (2) the debt arose through fraud or defalcation. *See In re Chavez*, 140 B.R. 413, 422 (Bankr. W.D. Tex. 1992). Federal law determines what constitutes a fiduciary for the purposes of section 523(a)(4). *Miller v. J.D. Abrams Inc. (In re Miller)*, 156 F.3d 598, 602 (5th Cir. 1998). In order for a fiduciary relationship to exist for the purposes of section 523(a)(4) there must be an express or technical trust relationship; a constructive trust relationship is insufficient to support the proposition that someone is a fiduciary for the purposes of 523(a)(4). *Id.* The court must look to applicable, typically state, law to determine whether a trust relationship exists. *Bennett v. Bennett (In re Bennett)*, 989 F.2d 779, 784 (5th Cir. 1993). The definition of fraud under section 523(a)(4) is the same as that under section 523(a)(2)(A). *In re McDaniel*, 181 B.R. 883 (Bankr. S.D. Tex. 1994).

In the case at bar Plaintiff pled with sufficient particularity, considering she is appearing *pro se*[4], the elements of (a) false pretences (section 523(a)(2)(A)); (b) false representations (*id.*); and (c) actual fraud (*id.*). In paragraph 17 of the Second Amended Complaint Plaintiff alleges:

> Debtor entered into an Oral Agreement with the Plaintiff that, should the business fail, all monies loaned would be repaid, in full, out of the debtors 401K. [Plaintiff] can now verify debtor did not have a 401K, and never had any intention of repaying the loan. Due to this misrepresentation, Plaintiff suffered mentally, physically and financially and, as a direct

[4] The court should construe a *pro se* litigant's pleadings liberally. *See, e.g., Haines v. Kerner*, 404 U.S. 519, 520 (1972) (stating that *pro se* complaints are held to less stringent standards than those drafted by lawyers).

> result, Plaintiff's home fell into foreclosure. [Plaintiff] has now become disabled and now receives a small income.

Paragraph 17 of the Second Amended Complaint describes facts that satisfy the three elements necessary to support denial of discharge of a debt based on Defendants' false pretences and false representations (523(a)(2)(A)). Plaintiff alleges that Defendants promised to repay her from their 401(k), but that they did not actually have a 401(k); if this is true, then it meets the first and second elements because a promise to pay someone out of a specific account that is then existing is a representation of a current fact; if that account does not actually exist, and the promisor is aware of that fact, it would be impossible to make such a representation without it being a knowing falsehood. The court can infer that Plaintiff relied on such representation because Plaintiff was injured. [5]

The allegations found in paragraph 17 of the Second Amended Complaint also fulfill the five elements necessary to show actual fraud (523(a)(2)(A)) because Plaintiff alleges: (1) Defendants made a representation that they would repay Plaintiff from the proceeds of their 401(k); (2) if the allegations are true, Defendants clearly knew their representation to repay Plaintiff from their 401(k) was false if they did not actually have a 401(k) at the time; (3) "[Defendants] never had any intention of repaying the loan"[6]; (4) and (5) Plaintiff states that she suffered a loss as a result of this misrepresentation.[7]

Plaintiff does not allege facts that meet all of the elements of fraud as a fiduciary (523(a)(4)) because Plaintiff failed to plead facts relating to Defendants' fiduciary status.

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[5] While Plaintiff did not explicitly state that she relied on Debtors' misrepresentation, the court is able to infer such because Plaintiff claims she was injured and because of the liberal construction given to *pro se* litigants' pleadings.

[6] Intent may be alleged generally. FED. R. BANKR. P 7009(b).

[7] The court infers that Plaintiff relied on Debtors' misrepresentation for the same reason it does so in note 5, above.

Generally, members of a limited liability company are not considered fiduciaries as to each other for the purpose of Code § 523(a)(4) unless specific facts, other than the mere existence of a limited liability company , creating a fiduciary relationship exists.[8] *See, e.g. Thomas Smith Merchs. Fin. Servs. Group, LLC v. Smith (In re Thomas Smith Merchs. Fin. Servs. Group, LLC)*, 386 B.R. 618, 620 (Bankr. N.D. Miss. 2007) Though the court may liberally construe pleadings of *pro se* litigants, there is nothing in the Second Amended Complaint that even superficially addresses why Defendants are fiduciaries for the purpose of Code § 523(a)(4). Moreover, the purpose of section 523(a)(4) is to reach conduct of a debtor while acting in a fiduciary capacity. Defendants' conduct has not been alleged to be while acting as a fiduciary except to the extent that Defendants are alleged to have misappropriated property of Parvenu – conduct covered by other language of section 523(a)(4).

Plaintiff met the requirements of FED. R. BANKR. P. 7009(b), at least as for false pretences, false representations, and actual fraud, because her allegations put the Defendants on notice of the particular fraud or misrepresentation Plaintiff claims they made: that Defendants would repay her from their 401(k) should the Gas Station fail. While Plaintiff's allegations are not specific as to time and place, the court expects that Defendants would be fully aware of any representations to Plaintiff by them respecting their 401(k) plan.[9] Certainly the Second Amended Complaint gives Defendants enough notice to understand of what – and whose – conduct Plaintiff complains and so satisfies

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[8] The State Court judgment established that Parvenu was a limited liability company. Plaintiff, however, did not plead whether Defendants were managers or directors or officers of Parvenu.

[9] Discover would easily flesh out the facts.

Rule 9. The court need not examine whether Plaintiff met the pleading requirements for fraud as a fiduciary because she failed to address all of its elements.

**B. Larceny and Embezzlement**

A pleading that asserts the nondischargeability of a debt under section 523(a)(4) of the Code for larceny or embezzlement does not allege fraud and, therefore, a more general pleading is sufficient. There are multiple paragraphs in the Second Amended Complaint that sufficiently allege conduct that amounts to larceny or embezzlement.[10] One example is found in paragraph 9 of the Second Amended Complaint:

> Debtor comingled assets in that debtor testified at the first meeting of creditors, that debtors had sold inventory, equipment and transferred all assets from Parvenu LLC to their own use. Also, in August 2004, after closing the business in June 2004, debtors cashed, in their own name and out of State, a check made out to the Company, converting the funds to their own personal use.

This paragraph is sufficient to support at least one of the Code § 523(a)(4) allegations not involving fraud. Because paragraph 9 is sufficient to support a claim of larceny or embezzlement under section 523(a)(4) of the Code, the court does not need to examine the Second Amended Complaint further to allow trial to proceed on the grounds of larceny or embezzlement.

**C. Code § 727 Claims**

[10] The judgment of the State Court also, by finding that Defendants "absconded" with the funds of Parvenu, would suffice as an allegation of larceny or embezzlement.

FED. R. BANKR. P. 4004 provides that an objection to a debtor's discharge under Code § 727 must be brought "no later than 60 days after the first date set for the meeting of creditors under § 341(a)."

In the case at bar the first date set for the creditors meeting was August 11, 2009. Plaintiff's original complaint was filed on the same day. The original complaint stated that it was an action under Code § 727(c). Clearly, Plaintiff objected to Defendants' discharge under Code § 727(c) in a timely manner, though the original complaint did not allege sufficient facts to support the section 727(c) objection to discharge.

In general a complaint need only contain a short and plain statement of (a) the grounds for the court's jurisdiction; (b) "the claim showing the pleader is entitled to relief;" and (c) the demand for relief sought. FED. R. BANKR. P. 7008.

Plaintiff amended her complaint twice, first on October 1, 2009, and next on October 13, 2009. In the October 1st version of her complaint, Plaintiff alleges sufficient facts in, *inter alia*, paragraphs 5, 7, and 16 to support Code § 727 claims.

Paragraph 5 alleges sufficient facts to deny discharge under Code § 727(a)(3). Paragraph 7 supports a cause of action to deny discharge under Code § 727(a)(2)(A). Plaintiff asserts facts in Paragraph 16 to support a denial of discharge under Code § 727(a)(4)(A). Plaintiff made numerous allegations under section 727, but failed to specify the specific provisions of 727 upon which she was relying; it is not the court's duty to parse the Second Amended Complaint to determine which provisions of section 727 Plaintiff is relying upon. However, it is clear to the court that she has asserted sufficient facts to support a denial of discharge under the various sections of Code § 727 cited above, and, therefore, those claims should be set for trial.

**D. Defendants' Attorney's Fees**

By the Motion Defendants ask that they be awarded attorney's fees under Code § 523(d). Code § 523(d) states:

> If a creditor requests a determination of dischargeability of a *consumer debt* under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding…

Code § 523(d) (emphasis added). "Consumer Debt" is defined by Code § 101(8) as "debt incurred by an individual primarily for personal, family, or household purpose."

The court must give effect to the plain meaning of a statute, unless doing so would lead to an absurd result. *Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 157 L. Ed. 2d 1024, 1033-34, 124 S. Ct. 1023, 1030 (2004) ("It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required is not absurd—is to enforce it according to its terms.'") (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 147 L. Ed. 2d 1, 120 S. Ct. 1942 (2000)).

The debts Plaintiff has objected to under Code § 523(a)(2) are not consumer debts because they were not incurred primarily for personal, family, or household purposes, but rather were incurred to start a business. Therefore, Defendants are not entitled to attorney's fees under Code § 523(d).

## III. Conclusion

The Second Amended Complaint is the third complaint that Plaintiff has filed in this adversary proceeding. She has had multiple opportunities to amend her various

complaints and to ensure that her allegations address at least the elements of her causes of action and that her complaint meets the requirements of the Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure. The court has suggested to Plaintiff that she retain counsel in order to assist her, but she has not done so. While the court may construe a *pro se* litigant's pleadings liberally (S*ee Haines*, 404 U.S. at 520.), a *pro se* litigant must nevertheless comply with the rules of procedure. *Lockhart v. Sullivan*, 925 F.2d 214, 216 (7th Cir. 1991) ("While we treat *pro se* litigants gently, a *pro se* attorney is not entitled to special treatment."); *Birl v. Estelle*, 660 F.2d 592, 593 (5th Cir. 1981) (noting that while a *pro se* litigant's pleadings are to be liberally construed, the *pro se* litigant must still follow the relevant rules of procedure); *Hall v. Vance*, 887 F.2d 1041, 1045 (10th Cir. 1989) (noting that *pro se* debtors are not entitled to special treatment under the Code).

The discharge of debts – the fresh start – afforded debtors is one of the principal purposes of Bankruptcy law and is the key reason for most individual chapter 7 filings. *See Marrama v. Citizens Bank*, 549 U.S. 365, 367 (2007). A delay in receiving discharge of debts is hard on a debtor, and the court is bound to avoid any such delay. *Wolfe v. Tri-State Ins. Co.*, 407 F.2d 16, 20 (10th Cir. 1969) (noting that debtors are entitled to prompt hearings on discharge objections). In the case at bar, Plaintiff has now had three chances to get her complaint right. Defendants have been left uncertain about whether they will be discharged at all and what the scope of the discharge will be for more than five months. The court believes Plaintiff has received all the special consideration she may be entitled to as a *pro se* litigant. She must now stand or fall on the Second Amended Complaint. To the extent it is deficient, it must now be dismissed. To the extent that she has, if

adequately, only barely pled causes of action, she must be put to her proof. Should her allegations prove unwarranted, she must face the same consequences under, for example, FED. R. BANKR. P. 9011, that every litigant faces.

Plaintiff failed to meet the pleading requirements for fraud as a fiduciary and, in fact, did not even address all of its elements. Plaintiff, through a liberal reading of the Second Amended Complaint by the court, pled all of the elements for claims based on Defendants' false pretences, false representations, actual fraud, embezzlement, and larceny, and met their pleading requirements. While Plaintiff did object to Defendants' discharge under Code § 727 in a timely manner, her first complaint did not allege sufficient facts to support such an action, though her first amended complaint, which was also timely filed, did allege sufficient facts to support an action under section 727 of the Code.

For the foregoing reasons the court must dismiss the Second Amended Complaint in part. It is therefore;

**ORDERED** that the claim based upon Defendants' fraud in a fiduciary capacity of Plaintiff's Second Amended Complaint is dismissed; it is further

**ORDERED** that the false pretences, false representations, actual fraud, embezzlement, larceny, and Code § 727(a)(2)(A), (3), and (4)(A) causes of action are to be set for trial at the next trial docket call on February 25, 2010; it is further

**ORDERED** that Defendants are denied attorney's fees, without prejudice to their in the future seeking fees based on applicable law.

### END OF MEMORANDUM ORDER ###