

**United States Bankruptcy Court  
District of New Mexico**

**Document Verification**

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**Case Number:** 02-01304  
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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEW MEXICO

In re:

TERRY L. MARSHALL,  
Debtor.

No. 7-02-16996 SA

MANDY V. MARSHALL,  
Plaintiff,

v.

Adv. 02-1304 S

TERRY L. MARSHALL,  
Defendant.

**MEMORANDUM OPINION ON DEFENDANT'S  
MOTION TO DISMISS**

This matter is before the Court on Defendant Terry L. Marshall's Motion to Dismiss (doc 23), Plaintiff Mandy V. Marshall's Response (doc 25), and Defendant's Reply (doc 30). Defendant appears through his attorney Puccini & Meagle, P.A. (Louis Puccini and Shay Meagle). Plaintiff appears through her attorney Christal K. Grisham. This is a core proceeding. 28 U.S.C. § 157(b).

Facts

Debtor filed his Chapter 7 proceeding on October 1, 2002. The first meeting of creditors under § 341 was scheduled for November 4, 2002, and the Bankruptcy Rule 4004/4007 deadline for objecting to discharge or dischargeability of a debt was January 3, 2003.

On December 30, 2002, Plaintiff filed her "Adversary Complaint for Nondischargeability of Debt." The allegations were, briefly:

¶¶ 1-3: jurisdiction.

¶ 4: Defendant is indebted to Plaintiff for over \$7,000 on a debt for false representations and breach of fiduciary duty.

¶ 5: The parties are ex-spouses and therefore fiduciaries to each other and a debt incurred in violation of fiduciary duty can be the sole responsibility of the spouse incurring the debt.

¶ 6: While the parties were still married Defendant promised to pay the Rio Grande Federal Credit Union Mastercard bill and close the account.

¶ 7: Plaintiff accepted these statements as true. In reasonable reliance thereon Plaintiff paid the Sandia Area Federal Credit Union Visa card.

¶ 8: Defendant agreed to indemnify Plaintiff from claims on the Mastercard account.

¶ 9: These agreements were incorporated into the parties' March 1999 divorce decree.

First Cause of Action: False representation

¶¶ 10-12: At the time of the representations Defendant had no actual intent to pay the debt nor the means to do so. As a result of the false representations Plaintiff has been damaged by over \$7,000.

Second Cause of Action: Breach of fiduciary duty

¶¶ 13-14: Defendant breached his fiduciary duty to Plaintiff by incurring debts on the Mastercard before the divorce which did not benefit the marital community, and by failing to remove her from the account and by failing to indemnify her from any demands from the Mastercard account.

Wherefore

Plaintiff seeks a judgment declaring the balance due on the Mastercard nondischargeable and costs and attorney fees.

On February 5, 2003, Defendant filed a motion to dismiss. The Court held a pretrial conference on February 19, 2003, at which Plaintiff orally moved to file an amended complaint. On March 6, 2003, the Court entered an order granting Plaintiff 20 days from that date to file an amended complaint. Plaintiff filed her amended complaint on March 26, 2003. The allegations were, briefly:

¶¶ 1-3: jurisdiction.

¶ 4: Defendant is indebted to Plaintiff for over \$7,000 on a debt for false representations or actual fraud (§

523(a)(2)), fraud or defalcation while acting in a fiduciary capacity (§ 523(a)(4)), for support of a former spouse (§ 523(a)(5)), and for an educational benefit or loan made insured or guaranteed by a governmental unit (§ 523(a)(8)), and arising out of a property settlement pursuant to a divorce (§ 523(a)(15)).

¶ 5: The parties are ex-spouses and therefore fiduciaries to each other and a debt incurred in violation of fiduciary duty can be the sole responsibility of the spouse incurring the debt.

¶ 6: Plaintiff's relationship with debtor was the type of "fiduciary relationship" recognized under bankruptcy law.

¶ 7: While the parties were still married, and during the course of their mediated divorce, Defendant promised to pay the Rio Grande Federal Credit Union Mastercard bill and close the account. He further represented he would pay \$10,500 of the amount due on the parties' student loan debt.

¶ 8: Defendant committed to indemnify Plaintiff from any claims on the Mastercard.

¶ 9: Defendant knew or should have known that the representations were false either because he had no actual intent to pay or knew or should have known that he did not have the assets necessary to meet these obligations.

¶ 10: Plaintiff reasonably relied on Defendant's representations.

¶ 11: In reliance, Plaintiff paid the Sandia Area Federal Credit Union debt of \$8,000 and transferred to Defendant all her rights in a retirement account which was a community property asset.

¶ 12: The parties divorce was final on March 8, 1999.

¶ 13: Defendant breached his agreement with Plaintiff by failing to remove her name from the Mastercard, by making additional charges, and by failing to pay the Mastercard.

¶ 14: Plaintiff has been damaged by creditor's written demands on her to pay the Mastercard, and she will be further damaged by demands to pay the unpaid student loans and she will have to use assets that otherwise would have been available to support herself and her minor daughter.

First cause of action: False representation

¶¶ 15-17: Plaintiff was damaged by false pretenses, false representations and actual fraud.

Second cause of action: Breach of fiduciary duty

¶¶ 18-20: Plaintiff was damaged by Defendant's failure to discharge his fiduciary duty to Plaintiff.

Third cause of action: Debt for support

¶¶ 21-23: Plaintiff was damaged by Defendant's failure to discharge his duty of payment or indemnity as agreed in the parties' property settlement.

Fourth cause of action: Student loan debt

¶¶ 24-26: Plaintiff will be damaged if Defendant is not required to pay the student loan debt.

Fifth cause of action: Marital settlement agreement

¶¶ 27-29: Plaintiff will be damaged if Defendant is not required to pay the debt he assumed in the property settlement agreement.

Wherefore

Plaintiff seeks a judgment declaring the balance due on the Mastercard nondischargeable, a judgment for \$10,500 for the student loan, a judgment that the indemnification is nondischargeable and that the duty to support plaintiff is nondischargeable, for attorney fees and costs, and for prejudgment interest.

Defendant filed a motion to dismiss the amended complaint. It seeks to dismiss counts 3, 4, and 5 as barred by the statute of limitations. It also seeks to dismiss counts 1, 2, 3, 4 and 5 for failure to state a claim.

Bankruptcy Rules and Code

Bankruptcy Rule 4007(c) provides:

A complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). . . . On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

Bankruptcy Rule 9006(b)(3) provides:

The court may enlarge the time for taking action under Rules . . . 4007(c) . . . only to the extent and under the conditions stated in those rules.

Section 523(c) provides:

[T]he debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), (6), or (15) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), (6), or (15), as the case may be, of subsection (a) of this section.

Code section 523(a)(2) makes nondischargeable debts to the extent obtained by false pretenses, false representations, or actual fraud or from use of a materially false financial statement on which a creditor reasonably relied. Code section 523(a)(4) makes nondischargeable debts "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." Code section 523(a)(5) makes nondischargeable debts to a former spouse "for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or



other order of a court of record." Code section 523(a)(6), not applicable in this case, makes nondischargeable debts "for willful and malicious injury by the debtor to another entity or to the property of another entity." Code section 523(a)(8) makes nondischargeable debts for an educational benefit or loan made, insured or guaranteed by a governmental unit. Code section 523(a)(15) makes nondischargeable debts, other than alimony or child support, that are incurred in a divorce decree unless the debtor does not have the ability to pay the debt or unless discharging the debt would result in a benefit to the debtor that outweighs the detrimental consequences to the former spouse. In sum, actions under sections 523(a)(2), (4), (6) and (15) must be brought within the 60 day deadline of Bankruptcy Rule 4007(c). There is no deadline for actions under other subsections of section 523.

I. Motion to Dismiss: Statute of Limitations

Bankruptcy Rule 4007(c) sets a strict 60 day time limit for objecting to the discharge of a debt. Themy v. Yu (In re Themy), 6 F.3d 688, 689 (10<sup>th</sup> Cir. 1993). Any extension can only be granted for cause, and only by motion made before the expiration of the 60 days. Id. Rules 4007(c) and 9006(b)(3) together prohibit a court from sua sponte extending the time for filing dischargeability complaints. Id. The Tenth

Circuit has strictly construed these deadlines. Id.  
Defendant has moved to dismiss counts 3, 4, and 5 on statute  
of limitations grounds.

On the other hand, an amended complaint can be  
considered timely if it only amplifies or clarifies causes of  
action plead in an original timely complaint. See KBHS  
Broadcasting Co., Inc. v. Sanders (In re Bozeman), 226 B.R.  
627, 630 (8<sup>th</sup> Cir. BAP 1998)(discussing relation back  
doctrine). See also Shapiro v. Halberstram (In re  
Halberstram), 219 B.R. 356, 361 (Bankr. E.D. N.Y.  
1998)(Additional grounds for seeking exception to discharge  
may not be added after the deadline, but amplification of  
timely-filed complaints may be permitted.); Wells v. Jennings  
(In re Jennings), 188 B.R. 110, 114 (Bankr. E.D. N.Y.  
1995)(Amended complaint filed after deadline introduced  
entirely new cause of action which was dismissed.) Federal  
Rule of Civil Procedure 15(c) allows relation back of a claim  
asserted in an amended pleading if the claim "arose out of the  
conduct, transaction, or occurrence set forth or attempted to  
be set forth in the original pleading." Fed.R.Civ.P. 15(c).  
The test is whether the amended pleading is related to the  
general fact situation alleged in the original pleading.  
Bozeman, 226 B.R. at 630.

A. Count 3

Count 3 is labeled "Debt for Support" and is based upon Defendant's failure to "discharge his duty of payment or indemnity as agreed in the terms of the parties' property settlement." Paragraph 14 of the amended complaint also alleges that Plaintiff will have to satisfy the Mastercard and student loan debts from assets she would otherwise use as support for herself and her minor daughter. Support obligations are made nondischargeable by Code section 523(a)(5), which is not subject to the 60 day time limitation. See 11 U.S.C. § 523(c)(1). Therefore, the motion to dismiss count 3 on statute of limitations grounds should be denied.

B. Count 4

Count 4 seeks to have a debt declared nondischargeable as a student loan debt. However, the statutory provision for student loan debt is section 523(a)(8) which is not subject to the 60 day limitation of section 523(c). Therefore, the motion to dismiss count 4 on statute of limitations grounds should be denied.

C. Count 5

Count 5 seeks to have a debt declared nondischargeable as a property settlement under section 523(a)(15). The theories underlying count 5 ("Marital Settlement Agreement") were not

specifically plead in the original complaint. Plaintiff did not request an extension of time to add this cause of action<sup>1</sup> until the pretrial conference on February 19, 2003, well beyond the filing deadline of January 3, 2003. Under In re They the Court cannot extend the time to add this cause of action.

The Court will next examine Count 5 to determine if it is an amplification or clarification of the original causes of action. The original complaint had two theories for recovery: false representations of the Defendant's intent to pay the Mastercard debt, and the Defendant's breach of fiduciary duty to Plaintiff by using the Mastercard and not paying the bill. There are no allegations that the debt was a non-support marital debt and that debtor had the financial ability to pay the debts and that discharging the debt would result in a benefit to the debtor that outweighs the detrimental consequences to Plaintiff. Count 5 should be dismissed on statute of limitations grounds.

## II. Motion to Dismiss: Failure to State Claim

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<sup>1</sup>In fact, Plaintiff did not request an extension to plead any particular cause of action, and the Order does not specifically permit new causes of action to be raised in the amended complaint.

Under Bankruptcy Rule 7012(b)(6), which incorporates Fed.R.Civ.P. 12(b)(6), a motion to dismiss for failure to state a claim upon which relief can be granted should be granted only if it appears beyond doubt that plaintiff can prove no set of facts in support of plaintiff's claim which would entitle plaintiff to relief. Swanson v. Bixler, 750 F.2d 810, 813 (10<sup>th</sup> Cir. 1984). In considering a motion to dismiss, all well pleaded facts, as opposed to conclusory allegations, are presumed true and all reasonable inferences are to be drawn in favor of the plaintiff. Id. The pleadings must be liberally construed. Id. A dismissal under Rule 12(b)(6) is a "harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." Morse v. Regents of the Univ. of Colo., 154 F.3d 1124, 1127 (10<sup>th</sup> Cir. 1998)(quoting Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357, 1359 (10<sup>th</sup> Cir. 1989).)

A. Count 1

Count 1 seeks relief for false representations or actual fraud, 11 U.S.C. § 523(a)(2). Paragraphs 7, 8, 9, 10, 11, 13, and 15-17 allege representations by Defendant that he knew or should have known were false because he had not the intent or ability to meet the obligations, reasonable reliance, damages

and breach of an agreement. To establish a claim under section 523(a)(2)(A) the creditor must prove: a false representation, made with the intent to deceive the creditor; reliance on the representation; the reliance was reasonable; and the representation caused the creditor to sustain a loss. In re Young, 91 F.3d at 1373. Count 1 states a claim for relief.

B. Count 2

Count 2 seeks relief for fraud or defalcation while acting in a fiduciary capacity, 11 U.S.C. § 523(a)(4). Paragraphs 5, 6, 18, 19 and 20 allege that Defendant was in a fiduciary capacity from his status as spouse and that this is sufficient under bankruptcy law<sup>2</sup> to hold his debt nondischargeable. The amended complaint does not allege the existence of a trust predating the debt, or money or property entrusted to the Defendant. See Fowler Bros. V. Young (In re Young), 91 F.3d 1367, 1371-72 (10<sup>th</sup> Cir. 1996); Allen v. Romero (In re Romero), 535 F.2d 618, 621 (10<sup>th</sup> Cir. 1976). Nor does it allege fraud or defalcation while acting as a fiduciary; all it alleges is the existence of a deemed fiduciary duty under state law. These are fatal flaws and Count 2 should be dismissed for failure to state a claim. See also Cone v. Sims

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<sup>2</sup>This is a conclusory allegation not presumed true.

(In re Sims), Adv. No. 99-1198 M, Order at 3 (Bankr. D. N.M. filed Dec. 6, 2000)(Failure to allege technical or express trust results in dismissal for failure to state a claim.); Davis v. Aetna Acceptance Co., 293 U.S. 328, 333 (1934)(Debtor must have been a trustee at the time the debt arose.)(Decided under former law.)

C. Count 3

Count 3 seeks to declare a debt nondischargeable as support, 11 U.S.C. § 523(a)(5). Paragraphs 4, 5, 7, 8, 11, 12, 14 and 21-23 allege that the parties were married, that Defendant promised to pay certain debts and indemnify Plaintiff, that Plaintiff transferred her community property retirement account to Defendant, the parties divorced, and that Plaintiff will have to use assets that she would have used to support herself to pay debts. Although Plaintiff refers throughout to a "property settlement," see ¶ 22 of Amended Complaint, whether the agreement was a property settlement or a support arrangement is a question of federal bankruptcy law. Young v. Young (In re Young), 35 F.3d 499, 500 (10<sup>th</sup> Cir. 1994). To determine the nature of the arrangement, a bankruptcy court must 1) "divine the spouses' shared intent as to the nature of the payment" by looking behind the words and labels of the agreement, id. (citing

Sampson v. Sampson (In re Sampson), 997 F.2d 717, 721 (10<sup>th</sup> Cir. 1993)) and 2) if the court determines that the payment was intended as support, it must determine that the substance of the payment was in the nature of support at the time of the divorce. Id. Therefore, on a motion to dismiss the Court cannot state as a matter of law that the payment arrangement was purely a property settlement; rather, the Court needs to hear the evidence surrounding the creation of this obligation. Count 3 states a claim for relief.

D. Count 4

Count 4 seeks to have Defendant's obligation to pay a student loan declared nondischargeable, 11 U.S.C. § 523(a)(8). Paragraph 25 of the Amended Complaint states: "Plaintiff will be damaged if Debtor is not required to pay the student loan debt which he incurred, and which he agreed to pay in the parties' property settlement." Taking Plaintiff's allegation as true, which we must on this motion to dismiss, Defendant is liable<sup>3</sup> for a student loan debt "which he incurred". The student loan debts listed in § 523(a)(8) are automatically not

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<sup>3</sup>If Defendant is a co-signer or is liable under the community property laws he would still have a liability to the student loan creditor and the debt would be governed by § 523(a)(8). In re Pelkowski, 990 F.2d 737, 742 (3<sup>rd</sup> Cir. 1993); Palmer v. Student Loan Finance Corp. (In re Palmer), 153 B.R. 888, 895 (Bankr. D. S.D. 1993).



discharged unless a debtor affirmatively seeks a discharge under the "undue hardship" exception. Defendant has not filed such a claim. Therefore, Plaintiff's count 4 would be premature for any debts incurred by Defendant.

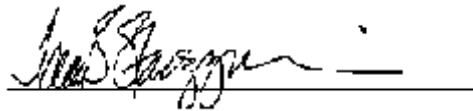
However, Plaintiff also alleges that Defendant's liability is pursuant to a property settlement. If Defendant's liability arises only from the property settlement and not as a co-signer or community debt obligation, then the debt is not in the nature of a student loan covered by § 523(a)(8). Santa Fe Medical Services, Inc. v. Segal (In re Segal), 57 F.3d 342, 348 (3<sup>rd</sup> Cir. 1995)(Section 523(a)(8) does not refer to "an obligation to repay funds received as or used to repay an educational benefit.") (Emphasis in original.); Siegel v. U.S.A. Group Guarantee Services (In re Siegel), 282 B.R. 629, 632 (Bankr. N.D. Ohio 2002)("[S]tudent loans made entirely by private entities are, in the absence of other grounds for nondischargeability, dischargeable debts within the meaning of § 523(a)(8).") Rather, Defendant's liability would be only a debt pursuant to a property settlement, and Count 4 is untimely per the discussion above regarding Count 5 statute of limitations.

E. Count 5

Count 5 is being dismissed on statute of limitations grounds, so failure to state a claim would be moot.

**SUMMARY**

The Court will deny the motion to dismiss Count 1. The Court will grant the motion to dismiss Count 2 for failure to state a claim. The Court will deny the motion to dismiss Count 3. The Court will grant the motion to dismiss Count 4. The Court will grant the motion to dismiss Count 5 on statute of limitations grounds.



Honorable James S. Starzynski  
United States Bankruptcy Judge

I hereby certify that on March 17, 2004, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

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