UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In Re: KELLY L. GREENE (formerly MELLEN), Debtor.	Chapter 12 Case No. 15-20433
KELLY L. GREENE (formerly MELLEN), Plaintiff/Counter-Defendant, v. J.D. STEWART FINANCIAL, INC. and JONATHAN D. STEWART, Defendants/Counterclaimants.	Adversary Proceeding Case No. 15-2016

MEMORANDUM OF DECISION

This matter is before me on the Plaintiff/Counterclaim-Defendant Kelly L. Greene's (the "Plaintiff") motion seeking summary judgment with respect to: (a) her claim against Defendants/Counterclaimants J.D. Stewart, Inc. ("J.D. Stewart") and Jonathan D. Stewart (J.D. Stewart and Mr. Stewart are collectively referred to as the "Defendants"), seeking punitive damages under § 362(k) of the United States Bankruptcy Code[1] (the "Bankruptcy Code") for an alleged willful violation of the automatic stay; and (b) counterclaims asserted by the Defendants against the Plaintiff seeking a determination of nondischargeability under §§ 523(a)(2)(A) and 523(a)(4) of the Bankruptcy Code with respect to certain debts allegedly owed by the Plaintiff to

[1] All references to the "Bankruptcy Code" or to specific statutory sections are to the Bankruptcy Reform Act of 1978, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, 11 U.S.C. § 101, et seq.

the Defendant. For the reasons set forth below, I hereby DENY summary judgment with respect to the Plaintiff's claim under § 362(k) and GRANT summary judgment in favor of the Plaintiff with respect to the Defendants' counterclaims under §§ 523(a)(2)(A) and (a)(4).

I. Jurisdiction and Venue.

This court has jurisdiction over the subject matter and the parties pursuant to 28 U.S.C. §§ 157(a), 1334, and United States District Court for the District of Maine Local Rule 83.6(a). This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A), (B) and (I). Venue here is appropriate pursuant to 28 U.S.C. §§ 1408 and 1409.

II. Background.

Although there are some questions regarding the timing of certain events and the specific content of various conversations, many of the material facts upon which the claims and counterclaims at issue are premised are not in dispute. In or around October of 2012, the Defendants entered into negotiations with Kathleen Lee, regarding a potential purchase of the accounting business of Thomas R. Lee Jr. Accounting, a d/b/a based in Old Orchard Beach, Maine ("Lee Accounting"). Those negotiations eventually led to a purchase and sale agreement, purportedly executed on November 29, 2012 (the "P&S Agreement"), pursuant to which J.D. Stewart agreed to purchase the business from Ms. Lee, the Seller, for $22,000. The P&S Agreement included the following additional terms and conditions:

> Seller:
> 1. The seller agrees to contact all existing clients, in writing, to make them aware of the business change within 7 days of December 1st.
> 2. The seller agrees to recommend and direct any clients to use the services of J.D. Stewart Financial, Inc.
> 3. Non-compete clause – The seller agrees not to offer any tax services in her name in the future, or contact the above mentioned clients for such service for a period of two years within a 50-mile radius of Old Orchard Beach.
> 4. The seller will provide hard copy and electronic client tax files to J.D. Stewart Financial, Inc. as needed for tax preparation and other financial services.

5. The seller will complete all year end quarterlies and the preparation of 2012 W2s and 1099s for the business clients.

Buyer:

1. The buyer agrees to respect the confidentiality of any records provided to by the seller.
2. The buyer agrees to hold harmless the seller for any errors or omissions which any client records transferred to the seller may contain.

Defendants' SMF, Exh. 3.[2] The P&S Agreement was signed by Mr. Stewart, individually, and in his capacity as President of J.D. Stewart as the buyer, and by Ms. Lee as the seller.

The Plaintiff was employed by Lee Accounting prior to, and during, the negotiations between Ms. Lee and the Defendants. The Defendants assert that they extended an offer of employment to the Plaintiff sometime during November of 2012 and further allege that, in declining that offer either that same month, or possibly, sometime in December of 2012, the Plaintiff assured the Defendants that she had no intention of continuing to provide tax preparation services after concluding her employment arrangement with Lee Accounting. The Defendants claim that this assurance was an important factor in their decision to purchase Lee Accounting.

While the Plaintiff agrees that an offer of employment was extended by the Defendants, and declined by her, she does not recall offering any specific assurances regarding her future employment and further claims that she did not then intend to open her own tax preparation business. The Defendants refute that claim by offering the affidavit of Lisa Curro, a former client of Lee Accounting, who claims that the Plaintiff informed her of her intentions to open her own tax preparation service in the early summer of 2012 (the "Curro Affidavit").[3] Accordingly,

[2] The term "Defendants' SMF" shall refer to Defendants' Response to Plaintiff's Statement of Material Facts, and Defendants' Statement of Additional Material Facts filed by the Defendants on May 3, 2016 (D.E. 39).

[3] The Plaintiff challenges the admissibility of the Curro Affidavit in her motion for sanctions (D.E. 58), in which she argues that the Curro Affidavit should be stricken from the record due to the willful and intentional failure by the Defendants and their counsel to disclose Ms. Curro as a defense and counterclaimant witness. I denied the motion

the timing, content and authenticity of any assurances offered by the Plaintiff with respect to her future employment are in dispute.

On or about December 1, 2012, Lee Accounting issued a letter to its clients informing them that the business would cease operating as of December 31, 2012, that Ms. Lee had selected J.D. Stewart to provide services previously provided by Lee Accounting and that the Plaintiff would assist in the transition of records and information (the "Release Letter"). The Release Letter included a detachable portion pursuant to which clients of Lee Accounting could choose to either pick up their records or have their records transferred by Lee Accounting to one of two J.D. Stewart locations. The extent of the Plaintiff's involvement in drafting and mailing the Release Letter appears to be in dispute but the parties do agree that the Plaintiff assisted, at some level, in processing the responses to the Release Letter and fielding inquiries from clients regarding the sale of the business.

At some point, the Plaintiff undertook efforts to open her own tax preparation office under the d/b/a Tax "N" More. On or about December 10, 2012, the Plaintiff sent a letter to former and/or current clients of Lee Accounting announcing an open house at her new office on December 28, 2012. Also apparently around the same time, the Plaintiff created a flyer announcing her tax preparation services. The Plaintiff argues that she decided to open Tax "N" More shortly before sending the December 10, 2012 letter while the Defendants point to the Curro Affidavit as evidence that the Plaintiff intended to open her own tax preparation business as early as the summer of 2012. While the parties disagree as to timing, they do agree that the Plaintiff ultimately did open Tax "N" More and her clientele included some portion of Lee Accounting's former clients.

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for sanctions in a separate opinion and, therefore, I have included the allegations set forth in that affidavit in the facts here. However, for the reasons set forth below, those allegations are irrelevant to my decision to enter summary judgment in favor of the Plaintiff on the counterclaims.

In 2013, the Defendants commenced litigation against the Plaintiff in state court asserting claims sounding in fraud and allegedly arising out of the Plaintiff's actions in connection with the sale of Lee Accounting. *See, J.D. Stewart Financial, Inc. and Jonathan Stewart v. Kelly Mellen*, YORSC-CV-13-056 (Me. Super., York) (the "State Litigation"). On June 12, 2015 (the "Petition Date") the Plaintiff filed a voluntary petition for relief commencing the underlying Chapter 13 bankruptcy case and staying the State Court Litigation.[4] The Plaintiff listed Defendant J.D. Stewart on Schedule F as a creditor with a disputed claim of $22,000.

On June 22, 2015, J.D. Stewart filed a proof of claim asserting an unsecured claim in the amount of $1,230,600.00 and stating, as the basis for the claim, "Debtor Fraud and Deceit re: creditor's business purchase." *See* Claim 1-1. No documentation was attached to the proof of claim and no reference was made to the State Court Litigation.

On the same day the proof of claim was filed, J.D. Stewart drafted and mailed a letter to a number of Plaintiff's clients notifying them of the bankruptcy filing, summarizing and characterizing certain information set forth in the Plaintiff's petition, schedules and statement of financial affairs and offering to review each recipient's tax returns, at no cost, whether or not such returns were prepared by the Plaintiff (the "J.D. Stewart Letter").[5] The letter attached the Notice of Chapter 13 Bankruptcy Case automatically generated and served by the Bankruptcy

[4] Since none of the pleadings filed in the State Litigation were made part of the record before this Court, the description of that litigation as set forth here was inferred from various representations by the parties in papers filed with this Court.

[5] The J.D. Stewart Letter stated:

> As you may be aware, Kelly Mellen, dba Tax "N" More, has filed for Chapter 13 bankruptcy relief in the U.S. Bankruptcy Court in Portland. In her filing, she describes her business as having no value and she lists several creditors to whom she owes substantial sums. According to her filings, Ms. Mellen owes several debts relating to various motor vehicle repossessions, a substantial prior judgment an attorney won against her, and a large lawsuit that J.D. Stewart Financial has been pursing against her in the York County Superior Court that was scheduled to go to a jury trial next week.
>
> If you would like to have your tax returns reviewed, whether they were prepared by Kelly Mellen or not, at no cost to you, please contact our office. We will be happy to make any necessary amendments and help you resolving any tax problems caused by inadequate assistance you may have been given.

Noticing Center upon the filing of a bankruptcy petition. The Plaintiff alleges that the J.D. Stewart Letter resulted in significant embarrassment, emotional distress and fear of lost income.

The Plaintiff commenced this adversary proceeding on July 7, 2015 by filing a complaint alleging that the Defendants willfully and intentionally violated § 362(a) of the Bankruptcy Code, seeking injunctive relief in the form of an order compelling J.D. Stewart to cease all communication with the Plaintiff's clients and requesting actual and compensatory damages, including emotional harm, costs, attorneys' fees and punitive damages. The Defendants counterclaimed, asserting that damages allegedly owed to them by the Plaintiff are nondischargeable under §§ 523(a)(2)(A) and 523(a)(4).

The Plaintiff now seeks summary judgment in her favor on her claim under § 362(k) and against the Defendants on their claims of nondischargeability under §§ 523(a)(2)(A) and 523(a)(4).

I. The Summary Judgment Standard

Summary judgment is appropriate when there is no genuine issue as to any material fact so that the moving party is entitled to judgment as a matter of law. *See* F.R. Civ. P. 56(a); Thompson v. Coca- Cola Co., 522 F.3d 168, 175 (1st Cir. 2008). A fact is material if it has the potential of determining the outcome of the litigation. *Id.* The court reviews the pleadings and considers the facts in the light most favorable to the non-moving party. However, "it is settled that the nonmovant may not rest upon the mere allegations, but must adduce specific, provable facts demonstrating that there is triable issue." Brennan v. Hendrigan, 888 F.2d 189, 191 (1st Cir. 1989) (citations and internal quotations omitted).

II. Plaintiff's Claim Under Section 362

In her complaint, the Plaintiff argues that the J.D. Stewart Letter constituted an attempt to coerce the Plaintiff into paying a pre-petition debt or, alternatively, to continue pursuing claims and relief sought in the stayed State Court Litigation. The Defendants admit to drafting and sending the J.D. Stewart Letter, and further admit to the contents of that letter. The only remaining question, then, is whether the Defendants' actions constitute a willful violation of the automatic stay. The automatic stay established by § 362 is one of the elemental debtor protections provided by the Bankruptcy Code and it ensures fair treatment to creditors by preventing the scrum that might otherwise occur when "opposing interests maneuver to capture the lion's share of the debtor's assets." In re Soares, 107 F.3d 969, 975 (1st Cir. 1997) (citations omitted). Section 362(a) describes the broad yet demarcated stay imposed upon the filing of a bankruptcy petition,[6] and § 362(k) provides that "an individual injured by any willful violation of

[6] It provides:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities of—
>
> (1) The commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (2) The enforcement, against the debtor or against property of the estate of a judgment obtained before the commencement of the case under this title;
>
> (3) Any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> (4) Any act to create, perfect, or enforce any lien against property of the estate;
>
> (5) Any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secured a claim that arose before the commencement of the case under this title;

a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, recovery punitive damages." "A debtor seeking damages under [§ 362(k)] bears the burden of proving by a preponderance of the evidence ... three elements: (1) that a violation of the automatic stay occurred; (2) that the violation was willfully committed; and (3) that the debtor suffered damages as a result of the violation." In re Perez, 556 B.R. 527, 530 (B.A.P. 1st Cir. 2016) (citations omitted).

The Defendants admit to having knowledge of the Plaintiff's bankruptcy case when they drafted and sent the J.D. Stewart Letter and further admit to having intentionally drafted and sent the letter. To prevail on her claim under § 362(k) then, Plaintiff need only establish that the Defendants' actions violated the automatic stay imposed by § 362(a). The Plaintiff argues the Defendants were undisputedly attempting to pursue the same claims asserted in the State Court Litigation and to harass and coerce the Plaintiff into paying a claim she has disputed in her chapter 13 bankruptcy case. These allegations most closely resemble the prohibition in § 362(a)(1) against the commencement or continuation of a judicial, administrative or other action or the prohibition in § 362(a)(6) against any attempt to collect or recover a pre-petition claim against the debtor. Unfortunately for the Plaintiff, however, the facts here do not fall squarely within either statutory provision.

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(6) Any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) The setoff of any debt owing to the debtor that arouse before the commencement of the case under this title against any claim against the debtor; and

(8) The commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

"It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms." Carminati v. United States, 242 U.S. 470, 485, 37 S. Ct. 192, 194, 61 L. Ed. 442 (1917). Section 362(a)(1) proscribes the continuation or commencement of a judicial, administrative, or other action or proceeding against the debtor. While the terms "action" or "proceeding" are to be broadly construed[7], they cannot be read out of the statute entirely. "Courts assume that every word, phrase, and clause in a legislative enactment is intended and has some meaning and that none was inserted accidentally." 2A Sutherland Statutory Construction § 46:6 (7th ed.)

Plaintiff alleges here that the J.D. Stewart Letter is a vehicle to pursue claims and remedies the Defendants sought through the State Court Litigation stayed by the filing of the petition. In other words, the Defendants sought to do through the J.D. Stewart Letter that which they could not do through the State Court Litigation. The argument must fail because the J.D. Stewart Letter is neither a continuation of the State Court Litigation, nor the commencement of a new proceeding or action. The mere mention of a pending proceeding in an informal letter is insufficient to invoke the protections of § 362(a)(1). Unlike the commencement of the State Court Litigation, which sought a judgment determining liability and awarding damages, the J.D. Stewart Letter does not seek either a judgment, or an order enforcing a judgment, from a court, administrative agency, arbitrator or adjudicative body. The letter is simply an informal communication to third parties mentioning, *inter alia*, the existence of a pending proceeding and, therefore, does not fall within the bounds of § 362(a)(1).

[7] "The scope of this paragraph is broad. All proceedings are stayed, including arbitration, administrative, and judicial proceedings. Proceeding in this sense encompasses civil actions and all proceedings even if they are not before governmental tribunals." 11 U.S.C. § 362(a)(1), Senate Report on Reform Act of 1978.

In the alternative, the Plaintiff contends that by sending the letter, the Defendants sought to coerce the Plaintiff into paying the Defendants' alleged pre-petition claim in violation of § 362(a)(6) which prohibits "Any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title". This argument certainly has more teeth than Plaintiff's argument under § 362(a)(1), but even here the Defendants' actions appear to amount to the proverbial square peg to the round hole of § 362(a)(6). The J.D. Stewart Letter—sent to third parties, without the Plaintiff's knowledge—does not describe the State Court Litigation, identify the nature or amount of the damages sought, reference the proof of claim filed in the Plaintiff's bankruptcy case or demand payment from the recipient. There is no question that the communication, at best, contains sensitive and embarrassing information and, at worst, improperly characterizes that information to cast the Plaintiff's professionalism and character in a negative light.

The Plaintiff argues that the only purpose for sending the letter was to cause the Plaintiff to pay the Defendants' claim out of embarrassment and concern for the financial viability of her business. The argument would be more persuasive if, before actually sending the J.D. Stewart Letter, the Defendants had threatened the Plaintiff with the release of the communication unless the Plaintiff paid their claim. In the absence of such a direct threat, the Court can readily imagine another purpose entirely for the J.D. Letter—i.e. competition in the marketplace.

The Defendants are not merely creditors in this case, but also competitors in the marketplace and while they could have, and indeed, may have, foreseen that at least one client would make the Plaintiff aware of the existence of the J.D. Stewart Letter, causing her embarrassment and concern, it would seem that the more direct and obvious benefit of sending the J.D. Stewart letter was to divert clients from the Plaintiff's business to J.D. Stewart for the

Defendants' economic benefit. While such sharp business practices by themselves may give rise to other causes of action, they do not, as presented in the summary judgment motion, represent the type of activity prohibited under § 362(a)(6).

The Plaintiff has not met her burden of establishing that the J.D. Stewart letter was an attempt to commence or continue a judicial, administrative or other action against the debtor or to collect, assesses, or recover a claim against her. While it remains to be seen if she can establish a stay violation at trial, at this stage of the proceedings she is not entitled to summary judgment on this issue.

III. Defendants' Counterclaims Under Sections 523(a)(2)(A) and (a)(4)

Plaintiff also seeks summary judgment with respect to the nondischargeability claims asserted by the Defendants under §§ 523(a)(2)(A) and 523(a)(4), as made applicable in chapter 13 by § 1328(a)(2). The relevant portions of § 523 except from discharge any debt:

> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> > (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition . . .
>
> (4) for fraud or defalcation while watching in a fiduciary capacity, embezzlement, or larceny[.]

11 U.S.C. § 523(a)(2)(A), (4). The burden of proof is upon the creditor asserting the existence of fraud. *See* Norton Bankruptcy Law and Practice 3d. § 57:15.

A. Section 523(a)(2)(A)

The First Circuit has held that a creditor seeking to establish the nondischargeability of a debt under § 523(a)(2)(A) must show that "1) the debtor made knowingly false pretenses, a false representation or one made in reckless disregard of the truth, 2) the debtor intended to deceive, 3) the debtor intended to induce the creditor to rely upon the false statement, 4) the creditor actually

relied upon the misrepresentation, 5) the creditor's reliance was justifiable, and 6) the reliance upon the false statement caused damage." McCrory v. Spigel (In re Spigel), 260 F.3d 27, 32 (1st Cir. 2001) (*citing,* Palmacci v. Umpierrez, 121 F.3d 781, 786 (1st Cir. 1997)).

Material questions of fact surround the timing and content of the Plaintiff's discussions with Ms. Lee and/or the Defendants regarding the Plaintiff's future employment intentions and, therefore, it cannot be determined as a matter of law whether the first three elements have been, or could be, established. Summary judgment is still appropriate, however, because every element must be established in order to prevail on a claim under § 523(a)(2)(A) and the record establishes that the Defendants cannot, as a matter of law, establish: (1) that the debt alleged by the Defendants was *obtained by* the Plaintiff's alleged falsehood or actual fraud; and (2) that the Defendants' reliance upon the Plaintiff's alleged falsehoods or actual fraud was justifiable.

The fraud exception to discharge arises with respect to debts 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. *See* § 523(a)(2)(A). In other words, this exception to discharge typically contemplates a bilateral, consensual credit relationship between the creditor and debtor.[8] No such relationship exists here. The Defendants claim that they entered into, and ultimately closed upon, the transaction with Ms. Lee in reliance, at least in part, on the Plaintiff's alleged assurances that she would not continue offering tax preparation services. As a result of those assurances, the Defendants paid the sale price—not to the Plaintiff—but to her employer, Lee Accounting. Section 523(a)(2)(A) simply does not

[8] I note that section 523(a)(2)(A) has also been held "to bar from discharge debts incurred through knowing and intentional receipt of fraudulent conveyances" and therefore is not strictly limited to the type of bilateral credit/debtor relationship discussed here. *See, e.g.*, Sauer Inc. v. Lawson (In re Lawson), 791 F.3d 214, 222 (1st Cir. 2015). The Defendants have not alleged, however, that the Plaintiff knowingly received property as part of a larger scheme to hinder, delay or defraud creditors and, therefore, this line of case law is inapplicable to the facts before this Court.

contemplate debt for money or property transferred by Party A to Party B in reliance upon assurances by Party C.

The proof of claim filed by Lee Accounting appears to allege damages resulting from the loss of business after the Plaintiff allegedly convinced clients to follow her to Tax "N" More instead of transitioning their files to J.D. Stewart. Even if the Plaintiff's communications with Ms. Lee and the Defendants amounted to fraud, and even if that fraud ultimately resulted in a diversion of clients from the Defendants, damages representing a loss of income *resulting from* fraud are distinguishable from debt for money, property or credit *obtained by* fraud. Accordingly, the debt alleged by the Defendants is not the type of debt described under § 523(a)(2)(A).

Second, the Defendants simply cannot establish that they justifiably relied upon the Plaintiff's assurances regarding her future employment prospects. The standard for justifiable reliance is relatively low; "A party may justifiably rely on a misrepresentation even when he could have ascertained its falsity by conducting an investigation." Sanford Institute for Savings v. Gallo, 156 F.3d 71 (1st Cir. 1998). *See also*, Lentz v. Spadoni (In re Spadoni), 316 F.3d 56, 59 (1st Cir. 2003) (*citing,* Field v. Mans*,* 516 U.S. 59, 73-74, 116 S.Ct. 437, 133 L.Ed.2d 351 (1995)). The Defendants claim that the Plaintiff's assurances that she would not continue working as a tax preparer were "extremely important regarding Stewart's decision to purchase the business." Defendants' SMF, ¶ 18.

Certainly, in a transaction such as the one between Lee Accounting and the Defendants, where a purchaser is primarily, it appears, purchasing goodwill and customer lists, the likelihood of competition is an important consideration in determining value. Recognizing this, the Defendants bargained for the non-compete provision contained in the P&S Agreement. That

non-compete, however, only bound Ms. Lee. The Plaintiff was not a party to the agreement and did not execute a separate non-compete agreement.

The Defendants either neglected to, or chose not to, condition the sale upon a non-compete with the Plaintiff. Recognizing a need to protect propriety information, courts have permitted parties to enter into noncompetition agreements but only to the extent that they are reasonable in duration, geographic area and the interests sought to be protected. *See* Brignull v. Albert, 666 A.2d 82, 84 (Me. 1995). These requirements reflect a recognition that individuals should be at liberty to exercise free will with respect to their employment prospects. Absent an agreement limiting that free will, and lacking adequate consideration, the Defendants could not justifiably rely on the assurances of a potential competitor who was neither a party to, nor a beneficiary of, the P&S Agreement.

As the Defendants have not, and cannot, as a matter of law, established that (i) the debt was *obtained by* false pretenses, a false representation, or actual fraud and/or (ii) any reliance by the Defendants on the Plaintiff's allegedly false pretenses or actual were justified, summary judgment must enter in favor of the Plaintiff on the counterclaim under § 523(a)(2)(A).

B. Section 523(a)(4)

The threshold issue in proving nondischargeability under the § 523(a)(4) exception is whether or not the debtor is a fiduciary.

> For a debt to be nondischargeable under this part of the Code § 523(a)(4), the fiduciary relationship must rest on a technical or express trust and not upon a trust implied in law from an act of wrongdoing. The express trust may arise from a contract or from statute, and may be inferred from conduct. The exception does not extend to equitable, implied or constructive trusts.

Norton Bankruptcy Law and Practice 3d, 57:21. An express or technical trust requires an explicit declaration of trust, a clearly defined *res*, and an intent to create trust relationship. *See* In

re Fahey, 482 B.R. 678, 688 (B.A.P. 1st Cir. 2012) (*citing* Gelhausen v. Olinger (In re Olinger)), 160 B.R. 1004, 1014 (Bankr. S.D. Ind. 1993).

Here, the Defendants have not alleged, much less established, that there was ever a trust of any kind. In fact, when asked at his deposition whether the Plaintiff owed a duty to the Defendants, Mr. Stewart conceded that she did not.[9] The Defendants do not point to any contract or statute and although the Defendants repeatedly refer to the Plaintiff as a "fiduciary," mere invocation of that term is insufficient to transform a debtor/creditor relationship into a fiduciary/beneficiary relationship. With that critical element missing, summary judgment must be granted in favor of the Plaintiff on the claim of nondischargeability under § 523(a)(4).

IV. Conclusion

For the foregoing reasons, I DENY summary judgment in favor of the Plaintiff with respect to her claim for damages under § 362(k) and GRANT summary judgment in favor of the Plaintiff with respect to the Defendants' claims of nondischargeability under §§ 523(a)(2)(A) and 523(a)(4).

Dated: December 13, 2016

/s/ Peter G. Cary
Judge Peter G. Cary
United States Bankruptcy Court

[9] During his deposition, Mr. Stewart provided the following testimony:

> Q Now in the counterclaim that you filed against Kelly Greene and I believe in the state court litigation as well that preceded the bankruptcy, there was some allegations that you believed that Kelly Greene owed some duty to you to not sort of take some of these clients or customers, is that generally—do you understand that to—is that your position?
>
> A Duty to me? I think the duty would have been to her employer which was Kathy Lee and the responsibility as an employee I think that would go with any company is to what is in the best interest of the employer and that—I guess I'm not really answering your question, but I don't—at no point did she work for me, so I knew that she didn't have to listen to what I had to say, but there was good communication as far as I knew between me and Kathy, between me and Kelly. There were e-mails that went back and forth between Kelly and I, so I thought everything was fine.

Plaintiff's Statement of Material Facts (D.E. 34), Stewart Depo. at 26:3-20.