FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
August 31, 2010
Blaine F. Bates
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE RUSSELL ROSCOE BURTON, Debtor.	BAP No. CO-10-022
TOM BARENBERG, Plaintiff – Appellant, v. RUSSELL ROSCOE BURTON, Defendant – Appellee.	Bankr. No. 09-15177 Adv. No. 09-01353 Chapter 7 OPINION*

Appeal from the United States Bankruptcy Court
for the District of Colorado

Before MICHAEL, NUGENT, and SOMERS, Bankruptcy Judges.

SOMERS, Bankruptcy Judge.

Tom Barenberg appeals the bankruptcy court's order granting Defendant/Debtor's motion to dismiss his amended complaint and its order denying his motion to reconsider the dismissal. We affirm in part and reverse in part.[1]

* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

[1] The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

I. FACTUAL BACKGROUND

In October 2007, Barenberg and Burton Custom Homes, LLC ("BCH"), entered into an agreement to form Brookwood 4, LLC ("Brookwood"), for the purpose of building a single family residence in Douglas County, Colorado.[2] Brookwood's Operating Agreement called for Barenberg to provide the funds required to purchase a specified building lot ("the Property"), while BCH would obtain a construction loan, and manage, supervise and control the construction of improvements on the Property.[3] Barenberg contributed to Brookwood $350,430.80 that Brookwood used to buy the Property called for by the Operating Agreement.

Debtor Russell Roscoe Burton ("Debtor") was the sole member, manager, and owner of BCH. Barenberg claimed Debtor induced him to enter into the Brookwood Operating Agreement by representing that (1) Debtor would use Barenberg's capital contribution to purchase a vacant residential lot, (2) Debtor would obtain a construction loan to cover the costs of building a house on the lot, (3) Barenberg's investment would be secured by a second deed of trust lien on the lot, subject only to the construction loan, (4) no other liens would be placed on the Property, and (5) on sale of the Property with improvements, Barenberg's investment would be repaid first, then any profits divided between Barenberg and BCH.

On November 20, 2007, just thirty-six days after Debtor signed the Brookwood Operating Agreement for BCH, BCH obtained a $100,000 loan secured by a deed of trust on the Property. Barenberg alleged that "[Debtor], either individually or through BCH, used the proceeds [from that loan] for his

---

[2] *Amended Complaint, Exhibit 1, Operating Agreement of Brookwood 4 LLC, in* Appellant's Appendix ("App."). at 68-83.

[3] *Id.* at ¶¶ 6.1 and 6.6, *in* App. at 70.

own personal benefit or the benefit of entities solely owned by [him], and for purposes other than construction of improvements upon the Property."[4] Neither Debtor nor BCH repaid the loan.

Debtor filed a Chapter 7 petition in March 2009. In June 2009, Barenberg, through Distressed Properties, LLC, paid off the balance owed on the loan secured by the Property, a bit over $118,000.[5] Barenberg then filed a timely nondischargeability complaint against Debtor pursuant to 11 U.S.C. § 523(a)(2)(A),[6] (a)(4) and (a)(6).[7] He claimed Debtor's actions had improperly diminished the value of his interest in the Property by the amount he paid on the loan.[8]

Debtor filed a motion to dismiss Barenberg's complaint, which the bankruptcy court ruled on in November 2009.[9] In its order, the bankruptcy court concluded that Barenberg's allegations failed to suggest Debtor owed him a debt, or that such debt would be nondischargeable under § 523(a)(2)(A), (a)(4) or (a)(6). The bankruptcy court found that (1) Barenberg had failed to allege Debtor committed the conduct that caused the injury, and did not allege facts necessary to pierce BCH's corporate veil; (2) Barenberg's allegations did not suggest Debtor owed him a fiduciary duty or had breached any such duty; and (3) any

---

4 *Amended Complaint, General Allegations* at ¶ 16, *in* App. at 65.

5 *Id.* at ¶ 18.

6 We note neither of Barenberg's complaints referred specifically to subsection (A) of § 523(a)(2). However, none of his allegations suggest Debtor gave him anything that could constitute a written statement about his or BCH's financial condition, a requirement for subsection (B) of § 523(a)(2) to apply. We conclude the bankruptcy court correctly treated both complaints as trying to assert a claim under § 523(a)(2)(A), but not (B).

7 Unless otherwise noted, all further statutory references in this decision will be to the Bankruptcy Code, codified as Title 11 of the United States Code.

8 *Amended Complaint, Prayer for Relief, in* App. at 67.

9 *Order on Motion to Dismiss, in* App. at 61-62.

injury alleged in the complaint had been suffered by Brookwood, not Barenberg directly, and Barenberg was not asserting a derivative action on behalf of Brookwood. The bankruptcy court ordered that Barenberg's complaint would be dismissed unless Barenberg filed an amended complaint within 20 days.

Barenberg timely filed his Amended Complaint.[10] Debtor filed a motion to dismiss, claiming the Amended Complaint suffered from the same deficiencies as the original one.[11] In February 2010, the bankruptcy court granted the motion to dismiss ("Dismissal Order").

Barenberg filed a timely motion for reconsideration of the Dismissal Order, citing newly discovered evidence and legal error as grounds for reconsideration.[12] The bankruptcy court summarily denied that motion on April 1, 2010 ("Reconsideration Order"), finding that "[Barenberg's] Motion does not raise any new facts or issues that would be a proper basis for reconsideration of its prior Order."[13] Barenberg filed a notice of appeal on April 14, 2010, specifying the order being appealed as "the judgment, order, or decree of the bankruptcy judge entered . . . on the 1st day of April, 2010, upon defendant's Motion to Dismiss Complaint."[14]

II. APPELLATE JURISDICTION

Federal Rule of Appellate Procedure 3(c)(1)(B) provides that a notice of appeal must designate the judgment, order, or part thereof being appealed.

---

10 *Amended Complaint*, *in* App. at 63-95.

11 Debtor*'s Motion to Dismiss Amended Complaint*, *in* App. at 96-103.

12 *Motion for Reconsideration*, *in* App. at 125-138.

13 *Order Denying Plaintiff's Motion for Reconsideration*, *in* App. at 163.

14 *Notice of Appeal*, *in* App. at 164. In his motion for reconsideration, Barenberg also sought permission to amend his complaint to add a claim under § 523(a)(19). Because he has not mentioned that request in his appellate briefs, he did not appeal it and we will not address it in this opinion.

Because it includes the date of the Reconsideration Order but not the date of the Dismissal Order, Barenberg's notice of appeal might be interpreted to designate only the Reconsideration Order as the ruling being appealed, but we think the reference to Debtor's motion to dismiss indicates that Barenberg intended to appeal the Dismissal Order as well. Furthermore, Debtor has not complained that he was not aware the earlier order was being appealed and has fully briefed all the issues Barenberg has raised, so he has not been misled or prejudiced by the somewhat vague reference to the Dismissal Order.[15] We conclude Barenberg's notice of appeal was sufficient to give us jurisdiction to review the Dismissal Order, and not just the Reconsideration Order. Barenberg's notice of appeal was timely filed from the order disposing of his timely post-judgment motion.[16] The Dismissal Order and the Reconsideration Order are final orders for purposes of 28 U.S.C. § 158(a), and neither party elected to have this appeal heard by the district

---

[15] *Sanabria v. United States*, 437 U.S. 54, 67 n.21 (1978) ("A mistake in designating the judgment appealed from is not always fatal, so long as the intent to appeal from a specific ruling can fairly be inferred by probing the notice and the other party was not misled or prejudiced."); *see also McBride v. CITGO Petroleum Corp.*, 281 F.3d 1099, 1104 (10th Cir. 2002) ("[A] notice of appeal which names the final judgment is sufficient to support review of all earlier orders that merge in the final judgment.").

[16] *See* Fed. R. Bankr. P. 8002(a) and (b)(2), and Fed. R. Bankr. P. 9023.

court.[17] Therefore, this Court has appellate jurisdiction over this appeal.[18]

III. ISSUES AND STANDARD OF REVIEW

Federal Rule of Bankruptcy Procedure 7012(b) makes Federal Rule of Civil Procedure 12(b) apply to adversary proceedings like the one Barenberg filed against Debtor. The bankruptcy court dismissed Barenberg's Amended Complaint under Civil Rule 12(b)(6) on the ground it failed to state a claim for relief. We review the grant of a Rule 12(b)(6) motion to dismiss *de novo*, applying the same legal standards as the bankruptcy court.[19] To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must include in the complaint "enough facts to state a claim to relief that is plausible on its face."[20] This requires "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[21] "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are

---

[17] *See Moya v. Schollenbarger*, 465 F.3d 444, 448-451 (10th Cir. 2006) (an order dismissing a complaint is ordinarily non-final (since amendment would generally be available), unless, in a practical sense, the order has dismissed the action as well); *In re San Miguel Sandoval*, 327 B.R. 493, 505 (1st Cir. BAP 2005) (Bankruptcy court order denying reconsideration is "final appealable order if the underlying order was a final appealable order, and together the orders end the litigation on the merits."). Because the bankruptcy court previously allowed an amendment, the Dismissal Order granted Debtor's motion to dismiss Barenberg's Amended Complaint without giving an opportunity for another amendment, and the Reconsideration Order denied reconsideration of the Dismissal Order, we conclude the bankruptcy court intended for the Dismissal Order to finally resolve Barenberg's claims against Debtor. Thus, both Orders are final and appealable.

[18] 28 U.S.C. § 158(c).

[19] *Sutton v. Utah State School for Deaf and Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999).

[20] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). *See also Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009).

[21] *Twombly*, 550 U.S. at 555.

true (even if doubtful in fact)."[22] In ruling on a motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff, take as true all factual allegations, and make all reasonable inferences in the plaintiff's favor that can be drawn from the pleadings.

We review the denial of a motion for reconsideration for an abuse of discretion.[23]

IV. DISCUSSION

Because all of Barenberg's claims are based on an alter-ego or piercing-the-corporate-veil theory, we must first determine whether the Amended Complaint contains sufficient allegations to support a claim to pierce BCH's corporate veil. A threshold question is whether state or federal law should be applied. Federal common law determines the parameters of the alter-ego doctrine when the underlying cause of action is based on federal law, while state law controls when the underlying cause of action is based on state law.[24] Because Barenberg's claims are based on state law fraud and conversion, this Court will apply Colorado law on piercing the corporate veil.

In *Micciche v. Billings*,[25] the Colorado Supreme Court discussed piercing the corporate veil, stating:

> Generally, a corporation is treated as a legal entity separate from its shareholders, thereby permitting shareholders to commit limited capital to the corporation with the assurance that they will have no personal liability for the corporation's debts. Krendl & Krendl, *Piercing the Corporate Veil: Focusing The Inquiry*, 55 Den.L.J. 1 (1978). When, however, the corporate structure is used so improperly that the continued recognition of the corporation as a separate legal entity would be unfair, the corporate entity may be disregarded and corporate principals held liable for the corporation's

---

22 *Id.* (citations and emphasis omitted).

23 *In re Dewey*, 237 B.R. 783, 787 (10th Cir. BAP 1999).

24 *U.S. v. Carell*, 681 F. Supp. 2d 874, 890 (M.D. Tenn. 2009).

25 727 P.2d 367 (Colo. 1986).

> actions. *Id.* at 2. Thus, if it is shown that shareholders used the corporate entity as a mere instrumentality for the transaction of their own affairs without regard to separate and independent corporate existence, or for the purpose of defeating or evading important legislative policy, or in order to perpetrate a fraud or wrong on another, equity will permit the corporate form to be disregarded and will hold the shareholders personally responsible for the corporation's improper actions.[26]

Under Colorado law, then, imposing personal liability on a shareholder for a corporate debt is appropriate when three elements are present: (1) the corporation was a mere alter ego of the shareholder, (2) the corporate structure was used to perpetrate a wrong, and (3) piercing the corporate veil would achieve an equitable result.[27] "An alter ego relationship exists when the corporation is a mere instrumentality for the transaction of the shareholders' own affairs, and there is such unity of interest in ownership that the separate personalities of the corporation and the owners no longer exist."[28] Colorado courts consider a variety of factors in determining whether to disregard the corporate fiction and treat a corporation and its shareholder as alter egos, including whether "(1) the corporation is operated as a distinct business entity, (2) funds and assets are commingled, (3) adequate corporate records are maintained, (4) the nature and form of the entity's ownership and control facilitate misuse by an insider, (5) the business is thinly capitalized, (6) the corporation is used as a 'mere shell,' (7) shareholders disregard legal formalities, and (8) corporate funds or assets are used

---

[26] *Id.* at 372-73.

[27] *Connolly v. Englewood Post No. 322 Veterans of Foreign Wars of the United States, Inc., (In re Phillips)*, 139 P.3d 639, 644 (Colo. 2006) (en banc). *Connolly* actually used the word "perpetuate" instead of "perpetrate," which was used in *Micciche*. "Perpetuate" means "to make perpetual or cause to last indefinitely" but "perpetrate" means "to bring about or carry out (as a crime)," *see Webster's Ninth New Collegiate Dictionary* 877 (1988). We believe "perpetrate" is the correct word in this context, meaning the shareholder used the corporate structure to commit a wrong, not to make a wrong perpetual or cause it to last indefinitely.

[28] *Id.* (internal citations and quotation marks omitted).

for noncorporate purposes."[29]

Unlike the bankruptcy court, we are convinced Barenberg sufficiently pled all three elements of corporate veil piercing in the Amended Complaint. He alleged "alter ego status" by pleading Debtor was BCH's sole member, manager, and owner, with full control of BCH,[30] an arrangement that facilitates misuse by a company's sole insider. He alleged the corporate structure was used to perpetrate a wrong by pleading "[Debtor] used BCH to transact [his] personal affairs" and "[he] used BCH to facilitate his fraud."[31] Although the third element, "achieving an equitable result," was not specifically pled, we infer from the overall claims that Barenberg alleged upholding the corporate form would lead to injustice by allowing Debtor to escape any personal obligation to repay a loan he used for improper purposes. We conclude that Barenberg adequately asserted an alter-ego or veil-piercing theory under Colorado law.[32] We now consider each individual claim.

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

Section 523(a)(2)(A) of the Bankruptcy Code excepts from discharge any debt "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by — (A) false pretenses, a false representation, or

---

[29] *Id.*

[30] Amended Complaint at ¶¶ 6, 24, and 32, *in* App. at 64, 66.

[31] *Id.* at ¶¶ 8 and 9, *in* App. at 64. *See also* ¶¶ 16 and 17, *in* App. at 65 ("Defendant, either individually or through BCH[.]").

[32] This is not to suggest Barenberg's theory will necessarily succeed at trial. Colorado appellate courts have affirmed trial court rulings that a corporate entity was a person's alter ego based in part on his or her control of the entity, *e.g.*, *Harding v. Lucero*, 721 P.2d 695, 698 (Colo. App. 1986), and that a corporate entity was not a person's alter ego despite his or her control of the entity, *e.g.*, *Jarnagin v. Busby, Inc.*, 867 P.2d 63, 69 (Colo. App. 1993). The Tenth Circuit has similarly affirmed a lower court's decision, applying Colorado law, not to pierce a corporate veil even though a single shareholder owned all the corporation's stock. *Lowell Staats Mining Co. v. Pioneer Uravan, Inc.*, 878 F.2d 1259, 1263 (10th Cir. 1989).

actual fraud, other than a statement respecting the debtor's . . . financial condition." Establishing an exception to discharge based on misrepresentation requires proving the following elements: (1) the debtor made a representation; (2) at the time of the representation, the debtor knew it to be false; (3) the debtor made the representation with the intent to deceive the creditor; (4) the creditor justifiably relied on the representation; and (5) the creditor sustained damage as a proximate result of the debtor making the representation.[33]

Complaints asserting claims for fraud must meet a heightened pleading standard. Federal Rule of Civil Procedure Rule 9(b), made applicable by Bankruptcy Rule 7009, provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." In assessing claims under § 523(a)(2)(A), "[t]he bankruptcy court must consider whether the totality of the circumstances 'presents a picture of deceptive conduct by the debtor which indicates an intent to deceive the creditor.'"[34]

The bankruptcy court concluded that Barenberg's Amended Complaint failed to state a claim for relief under § 523(a)(2)(A) because it failed to allege Debtor made representations he knew were false when he made them, he made the representations with the intent to deceive Barenberg, and Barenberg justifiably relied on the representations. Although the Amended Complaint is minimal in some respects, making the question a close one, we disagree.

Barenberg's Amended Complaint does not explicitly allege that Debtor's representations were false when he made them and he knew they were false.

---

[33] *E.g.*, *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1373 (10th Cir. 1996) (identifying these five elements of § 523(a)(2)(A) claim, but requiring creditor's reliance to be reasonable); *Field v. Mans*, 516 U.S. 59, 69-76 (1995) (reliance under § 523(a)(2)(A) need only be justifiable, overruling *Fowler Bros.* to extent it required reliance to be reasonable).

[34] *Groetken v. Davis (In re Davis)*, 246 B.R. 646, 652 (10th Cir. BAP 2000) (*quoting* 3 William L. Norton, Jr., *Norton Bankruptcy Law and Practice 2d*, § 47:16, n.62 (1999)).

However, Barenberg alleged Debtor convinced him to sign the Brookwood Operating Agreement and invest in Brookwood by representing that Debtor would get a loan secured by the Property for the sole purpose of building improvements on it, would place no other liens on the Property, and would give Barenberg a lien on the Property second only to the construction loan, but just thirty-six days later, Debtor pledged the Property as security for a loan he used for his own personal benefit or the benefit of other entities he owned, and for purposes other than building on the Property. Although it would be better practice to more clearly allege the representations were false when made and made with the intent to deceive, we believe allegations that representations were made to induce someone to invest money, but then were violated only a short time later, are sufficient to suggest the representations were knowingly false when they were made and were made with the intent to deceive the potential investor.

Barenberg also alleged that he relied on Debtor's representations without stating that his reliance was justifiable. The purpose of a complaint, however, is simply to give the defendant notice of the plaintiff's claims. We conclude alleging actual reliance on representations is sufficient to state a claim under § 523(a)(2)(A). That Barenberg believes his actual reliance met the required legal standard is implied by the fact he is suing Debtor. In sum, we are convinced Barenberg's Amended Complaint asserted a claim for relief under § 523(a)(2)(A) that is "plausible on its face," which is all the pleading rules require. Consequently, the bankruptcy court erroneously dismissed Barenberg's claim under that provision.

B. Section 523(a)(4) claim

Section 523(a)(4) provides that debts for fraud or defalcation while acting in a fiduciary capacity are nondischargeable. To state a § 523(a)(4) claim, a plaintiff must allege that: (1) a fiduciary relationship existed between the debtor and the creditor, and (2) the debt owed to the creditor is attributable to a fraud or

defalcation committed by the debtor in the course of the fiduciary relationship. Barenberg's Amended Complaint alleged that a technical trust relationship existed between Barenberg and Debtor based on Debtor being the managing member of their joint venture, Brookwood.[35] The bankruptcy court concluded that such a relationship was insufficient to establish a fiduciary relationship for purposes of dischargeability, citing this Court's decision in *Holaday v. Seay (In re Seay)*.[36] We agree.

For a fiduciary relationship to exist under § 523(a)(4), as the Tenth Circuit explained in *Fowler Brothers v. Young (In re Young)*, there must be an express or technical trust.[37] The existence of such a fiduciary relationship is determined under federal law, although state law is relevant to the inquiry.[38] The provision does not usually apply to ordinary commercial relationships.[39]

Barenberg argues that commercial relationships which are not by themselves adequate to impose § 523(a)(4) fiduciary status may ripen into such status by the entrustment of property to a venturer, citing *Beebe v. Schwenn (In re Schwenn)*,[40] and *Cundy v. Woods (In re Woods)*.[41] Barenberg alleged in his

---

35 *Amended Complaint*, ¶¶ 24-30, *in* App. at 66.

36 *Order Granting Motion to Dismiss Plaintiff's Amended Complaint* at 3, *in* App. at 123 (citing *Holaday v. Seay (In re Seay)*, 215 B.R. 780 (10th Cir. BAP 1997)).

37 91 F.3d at 1372.

38 *Id.* at 1371.

39 *See Horejs v Steele (In re Steele)*, 292 B.R. 422, 431 (Bankr. D. Colo. 2003) ("The very earliest cases interpreting predecessors to the current § 523(a)(4) recognized that excepting a debt from discharge for a breach of a fiduciary duty requires much more than is present in the types of relationships common in the commercial world.").

40 126 B.R. 351 (D. Colo. 1991).

41 284 B.R. 282, 289 (D. Colo. 2001).

Amended Complaint and contends here that he entrusted the Property to Debtor.[42] He argues the bankruptcy court erred in requiring the trust *res* to be titled in Debtor's name.

Barenberg's reliance on *Schwenn* and *Woods* is misplaced. In *Schwenn*, the district court concluded that Colorado common law imposes on partners a technical trust relationship and that partners hold in trust profits acquired in the course of the partnership.[43] *Schwenn* is factually distinguishable from this case. In *Schwenn*, the venture property, an oil lease, was in the debtor's name only and the debt arose from the misappropriation of joint venture profits. Here, the Property was not in Debtor's name and the debt did not involve any misappropriation of profits.[44] Moreover, in *Seay*, this Court recognized that the Tenth Circuit's decision in *Fowler Brothers* had rejected the conclusion reached in *Schwenn*.[45]

Contrary to Barenberg's argument, *Woods* supports the bankruptcy court's conclusion that Barenberg's allegations did not assert the kind of fiduciary relationship required for § 523(a)(4) to apply. Relying on the Tenth Circuit's decision in *Fowler Brothers*, the *Woods* court said it could find a § 523(a)(4) fiduciary relationship existed only if money or property on which the relevant debt was based had been entrusted to the debtor, because without a *res* there could be no technical trust.[46] Both cases cited by the *Woods* court for the proposition that an ordinary commercial relationship can ripen into § 523(a)(4)

---

[42] *Amended Complaint* at ¶ 24, *in* App. at 66 ("Plaintiff entrusted the Property . . . to defendant.").

[43] 126 B.R. at 353.

[44] *Amended Complaint, Exhibit 1, Brookwood 4 LLC Operating Agreement, in* App. at 70.

[45] 215 B.R. at 786-87.

[46] *Woods*, 284 B.R. at 289.

status involved money being held by the debtor.[47] The *Woods* court reversed the bankruptcy court's conclusion that the debtor's power to act for a venture, including the power to encumber the venture's property and impose personal liability on the venturers, constituted the necessary *res* that had been entrusted to the debtor, saying that was one step removed from an actual entrustment of venture property.[48] As in *Woods*, the property Barenberg contends was entrusted to Debtor (through BCH) was the power to act for Brookwood, including the power to encumber its property. Without something more, Debtor's status as the sole managing member of Brookwood (through BCH) is insufficient, as a matter of law, to establish the existence of a § 523(a)(4) fiduciary relationship between the parties.[49] Thus, Barenberg's claim under § 523(a)(4) is not "plausible on its face," and the bankruptcy court correctly dismissed it.

C. Section 523(a)(6) claim

Section 523(a)(6) excepts from discharge any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." To state a claim for relief under § 523(a)(6), the creditor must include allegations that would support a reasonable inference that the debtor caused a deliberate or intentional injury to the creditor.[50] Debts resulting from

---

[47] *Kartchner v. Kudla (In re Kudla)*, 105 B.R. 985, 990-91 (Bankr. D. Colo. 1989) (creditor wired $100,000 to attorney-debtor's trust account); *Anderson v. Currin (In re Currin)*, 55 B.R. 928, 933-934 (Bankr. D. Colo. 1985) (real estate broker diverted rental revenues into his account).

[48] 284 B.R. at 289-90.

[49] *See Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1371-1373 (10th Cir. 1996); *Seay*, 215 B.R. at 785-787; *Woods*, 284 B.R. at 288-290; *Horejs v. Steele (In re Steele)*, 292 B.R. 422, 426-434 (Bankr. D. Colo. 2003).

[50] *See Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998); *KingVision Pay Per View, Ltd. v. DeMarco (In re DeMarco)*, 240 B.R. 282, 287-288 (Bankr. N.D. Ill. 1999).

recklessness or negligence do not fall within § 523(a)(6).[51]

Barenberg argues that he has pled a claim for conversion, and he did not have to allege the conversion was willful and malicious to state a claim under § 523(a)(6), citing *Tague & Beem, P.C., v. Tague (In re Tague)*.[52] *Tague* does not stand for that proposition. In *Tague*, the court did say that "[c]onversion which is also shown to be both willful and malicious may justify nondischargeability under section 523(a)(6),"[53] but went on to make clear the complaint before it contained allegations that the conversion was willful and malicious. In other words, *Tague* does not suggest alleging conversion alone is enough to state a claim for relief under § 523(a)(6). Instead, as the Supreme Court made clear in *Kawaauhau v. Geiger*, an intent to cause injury is required to bring a debt within § 523(a)(6).[54] Since a person can convert property without intending to injure the interests others may have in the property, a creditor must include allegations suggesting the debtor committed the conversion with the intent to injure to adequately state a claim for relief under § 523(a)(6).

Here, Barenberg alleged Debtor converted Brookwood's Property by using it as security for a loan and used the loan proceeds for his personal benefit or for the benefit of other entities he owned, but failed to make any factual allegation that Debtor acted willfully and maliciously. Barenberg argues that whether Debtor's alleged conversion was willful and malicious are issues to be determined at trial. This argument puts the cart before the horse. Before they can become issues in this proceeding at all, Barenberg must first sufficiently allege Debtor

---

[51] *Kawaauhau*, 523 U.S. at 64.

[52] 137 B.R. 495 (Bankr. D. Colo. 1991). *See* Appellant's Opening Brief at 10-11, and Appellant's Reply Brief at 7.

[53] *Tague*, 137 B.R. at 501.

[54] *See also Kawaauhau*, 523 U.S. at 64 (citing *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 332 (1934)).

inflicted an injury on him willfully and maliciously. The failure to allege an intent to injure is fatal to a claim seeking an exception to discharge under § 523(a)(6). We conclude the bankruptcy court correctly held that Barenberg's Amended Complaint failed to state a claim for relief under that provision.

D. Order Denying Reconsideration

Barenberg also appeals the Reconsideration Order, which denied his motion for reconsideration of the Dismissal Order. Bankruptcy Rule 9023 makes Civil Rule 59 apply to bankruptcy proceedings, and a motion to reconsider is treated as a motion to alter or amend under Rule 59(e) so long as it is filed, as Barenberg's was, within the applicable time limit.[55] The standard for granting a motion to alter or amend is very strict, and typically Rule 59(e) motions are denied.[56] Such motions "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment."[57] As stated by the Tenth Circuit, "[t]he purpose for such a motion is to correct manifest errors of law or to present newly discovered evidence."[58] "New evidence in the context of Rule 59(e) refers to evidence newly discovered after the hearing."[59]

In his motion, Barenberg alleged newly discovered evidence supported his claim under § 523(a)(2)(A) because it substantiated that Debtor knew his representations were false when he made them. Given our reversal of the bankruptcy court's dismissal of that claim, Barenberg's appeal of the bankruptcy

---

[55] *See, e.g., Comm. for First Amendment v. Campbell*, 962 F.2d 1517, 1523 (10th Cir. 1992).

[56] 11 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice & Procedure: Civil* § 2810.1 at 124-28 (2d ed. 1995).

[57] *Id.* at 127-28 (footnotes omitted).

[58] *Webber v. Mefford*, 43 F.3d 1340,1345 (10th Cir. 1994) (quoting *Campbell*, 962 F.2d at 1523).

[59] *Prop. Techs., Ltd., v. TelNet Corp. (In re Prop. Techs., Ltd.)*, 296 B.R. 701, 706 (Bankr. E.D. Va. 2002).

court's refusal to reconsider the claim's dismissal is moot.

With respect to Barenberg's claims under §§ 523(a)(4) and (a)(6), his motion for reconsideration asserted essentially the same arguments he has pressed on appeal. Having concluded the bankruptcy court properly dismissed those claims, we conclude the bankruptcy court did not abuse its discretion in refusing to reconsider their dismissal.

V. CONCLUSION

For the reasons stated above, we AFFIRM the bankruptcy court's dismissal of Barenberg's claims under §§ 523(a)(4) and (a)(6), but REVERSE its dismissal of his claim under § 523(a)(2)(A).