

So Ordered.

Dated: March 31, 2021



Katherine M. Perhach

Katherine Maloney Perhach
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

In re:
Brody Coates and
Kristin Coates,
Debtors.

Chapter 7

Case No. 19-29067-kmp

Terrance Faust et al.,
Plaintiffs,

v.

Adv. No. 19-2210

Brody Coates,
Defendant.

**DECISION AND ORDER
DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

The Plaintiffs in this adversary proceeding are all former employees of Coates Electric, LLC (the "LLC"), a now-defunct electrical contractor solely owned by Brody Coates, a debtor in this bankruptcy case. They are seeking a determination in this case that their unpaid wages are nondischargeable under 11 U.S.C. § 523(a)(4) due to Mr. Coates' embezzlement of funds from the LLC. Some of the Plaintiffs have moved for summary judgment asserting that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law. For the reasons stated below, the Plaintiffs' motion for summary judgment is denied.

Statement of Jurisdiction

The Court has jurisdiction over the Motion pursuant to 28 U.S.C. § 1334 and the order of reference from the district court pursuant to 28 U.S.C. § 157(a). *See* Order of Reference (E.D. Wis. July 10, 1984) (available at www.wied.uscourts.gov/gen-orders/bankruptcy-matters) (last accessed March 31, 2021). As a proceeding to determine the dischargeability of a debt, this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I) and the Court may enter a final judgment pursuant to 28 U.S.C. § 157(b)(1). Neither the Complaint nor the Answer contained a statement that the party “does or does not consent to entry of final orders or judgment by the bankruptcy court” as required by Bankruptcy Rules 7008 and 7012(b). Pursuant to Local Rules 7008 and 7012, such a failure “constitutes a forfeiture of that party’s right to withhold that consent.” Accordingly, the Court has the consent of all parties and may enter a final judgment.

Summary Judgment Standard

Summary judgment is only appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); Fed. R. Bankr. P. 7056. At the summary judgment stage, the role of the court is not to weigh evidence, but to determine whether there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). In determining whether there is a genuine issue of material fact, the Court must construe facts and inferences in a light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

Background

The Plaintiffs in this case are all former employees of the LLC. Brody Coates, one of the debtors in the above-captioned bankruptcy case, owned and operated the LLC from 2009 until it

stopped operating in October 2018. Coates Affidavit, Docket No. 54-1, ¶ 3. The Plaintiffs filed this adversary proceeding seeking to have their unpaid wages excepted from Mr. Coates' discharge pursuant to 11 U.S.C. § 523(a)(4). In their Complaint, the Plaintiffs asserted two claims under § 523(a)(4): (1) "defalcation in a fiduciary capacity"; and (2) "embezzlement or theft." Some of the Plaintiffs have moved for summary judgment on one of their claims, the embezzlement or theft claim. Those Plaintiffs have filed declarations in support of the motion for summary judgment stating the amount of wages they are owed. In all, those Plaintiffs are owed \$22,783.53 in unpaid wages for work performed during the period between October 7, 2018 and November 10, 2018. Workers' Affidavits, Docket Nos. 28, 30-44.

Analysis

The Plaintiffs bear the burden of proving by a preponderance of the evidence that an exception to discharge applies. *Estate of Cora v. Jahrling (In re Jahrling)*, 816 F.3d 921, 925 (7th Cir. 2016) (citing *Grogan v. Garner*, 498 U.S. 279, 291 (1991)). Section 523(a)(4) of the Bankruptcy Code provides that "[a] discharge under section 727 . . . does not discharge an individual debtor from any debt – for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." "[T]he first step in determining whether or not a particular debt is dischargeable is to make certain that there is, indeed, a debt owing by the debtor to the creditor. Without such an obligation, there is no debt which could be excepted from the scope of the debtors' discharge." *S&L Enters. I, LLC v. Eisaman (In re Eisaman)*, 387 B.R. 219, 224 (Bankr. N.D. Ind. 2008). Once a debt is established, the Court then looks to see if the debt falls within any of the types of debts excepted from discharge in § 523. That means, in this case, to support their nondischargeability claim under § 523(a)(4), the Plaintiffs must establish that: (1) Mr. Coates owes the Plaintiffs a debt; and (2) the elements of an embezzlement claim.

The challenge in this case is that the Plaintiffs are owed wages from the LLC, not from the Debtor, Brody Coates. The Plaintiffs pursue two avenues in their attempt to prove that Mr. Coates owes the Plaintiffs a debt and to hold Mr. Coates personally liable for their wages. First, the Plaintiffs argue that Mr. Coates committed civil theft under Wis. Stat. § 943.20, and but for that alleged theft from the LLC, the LLC would have had money in its bank account and the Plaintiffs could have filed and enforced wage liens. Second, the Plaintiffs argue that the LLC fraudulently transferred money to Mr. Coates or for his benefit in violation of Wis. Stat. § 242.05, and they are entitled to avoid those fraudulent transfers under Wis. Stat. § 242.07 to the extent necessary to satisfy their own claims against the LLC.

I. The Plaintiffs Have Not Shown That They Have a Claim Against Mr. Coates for Civil Theft.

The Plaintiffs' first argument in support of their assertion that Mr. Coates owes them a debt for their unpaid wages is that Mr. Coates committed civil theft pursuant to Wis. Stat. § 895.446(1) and § 943.20. Section 895.446(1) states: “[a]ny person who suffers damage or loss by reason of intentional conduct . . . that is prohibited under . . . s. 943.20 [Wisconsin’s theft statute] . . . has a cause of action against the person who caused the damage or loss.” The elements of a statutory civil theft claim are as follows: “(1) the defendant intentionally used, transferred, or retained possession of movable property of another; (2) the owner of the property did not consent to taking and carrying away the property; (3) the defendant knew the owner did not consent; and (4) the defendant intended to deprive the owner permanently of the possession of the property.” *Estate of Miller v. Storey*, 2017 WI 99, ¶ 40, 378 Wis. 2d 358, 903 N.W.2d 759; Wis. Stat. § 943.20 (defining theft to include the intentional use, transfer, concealment, or retention of possession of money “without the owner’s consent, contrary to his or her authority, and with intent to convert . . . to the use of any other person except the owner.”). To have a civil

theft claim, the plaintiff must have an ownership interest in the stolen property. *Milwaukee Ctr. for Indep., Inc. v. Milwaukee Health Care, LLC*, 929 F.3d 489, 494 (7th Cir. 2019) (“Under Wisconsin law, both conversion and civil theft require the victim to have an ownership interest in the property converted or stolen.”).

The Plaintiffs argue that Mr. Coates committed civil theft when he: (1) acquired possession of accounts receivable paid by owners and general contractors to the LLC; (2) intentionally transferred the monies to allegedly pay his personal loans and allegedly pay himself a \$10,696 distribution; (3) transferred the money when the LLC was allegedly insolvent and thus prohibited from consenting to such a transfer; and (4) converted the monies to his own use. The Plaintiffs assert that this shows that Mr. Coates committed civil theft against the LLC.

The problem with this argument is that, for the purpose of this nondischargeability case, the Plaintiffs have to show that Mr. Coates owes them a debt, not that Mr. Coates owes the LLC a debt. To have a claim for civil theft, the Plaintiffs must have an ownership interest in the allegedly stolen funds. The Plaintiffs have not demonstrated that they have any such ownership interest. The Plaintiffs assert that if Mr. Coates had not absconded with the LLC’s money, the Plaintiffs could have filed wage liens under Wis. Stat. § 109.09 and their liens would have taken priority over all of the other debts of the LLC, including the LLC’s debts to its commercial lending institutions. The hypothetical ability to file wage liens does not demonstrate that the Plaintiffs had an ownership interest in the funds in the LLC’s bank account. It may be that Mr. Coates took the funds of the LLC for his own benefit, but the Plaintiffs were not the actual owners of the funds so misappropriated. Therefore, the Plaintiffs have not established that Mr. Coates owes them a debt for civil theft under Wis. Stat. § 943.20.

II. There Are Genuine Issues of Material Fact for Trial as to Whether the LLC Fraudulently Transferred Money to or for the Benefit of Mr. Coates.

The Plaintiffs' second argument in support of their assertion that Mr. Coates owes them a debt for their unpaid wages is that the LLC fraudulently transferred money to Mr. Coates or for his benefit in violation of Wisconsin's fraudulent transfer law, and they are entitled to avoid those fraudulent transfers and recover the funds from Mr. Coates. Under Wisconsin's enactment of the Uniform Fraudulent Transfer Act,

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose *before the transfer was made* or the obligation was incurred if the debtor made the transfer or incurred the obligation *without receiving a reasonably equivalent value* in exchange for the transfer or obligation and the *debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation*.

Wis. Stat. § 242.05(1) (emphasis added).¹ The prevailing creditor may “obtain avoidance of the transfer or obligation to the extent necessary to satisfy the creditor’s claim.” Wis. Stat. § 242.07(1)(a). A creditor pursuing a claim under Wis. Stat. § 242.05(1) must satisfy three requirements:

- (1) the creditor’s claim arose before the transfer was made;
- (2) the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer; and
- (3) the debtor either was insolvent at the time of the transfer or became insolvent as a result of the transfer.

Badger State Bank v. Taylor, 2004 WI 128, ¶ 14, 276 Wis. 2d 312, 688 N.W.2d 439. For there to be fraudulent transfers in this case, the Plaintiffs must prove that:

¹ A “debtor” means “a person who is liable on a claim.” Wis. Stat. § 242.01(6). A “claim” is “a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured.” Wis. Stat. § 242.01(3). A “creditor” means a “person who has a claim.” Wis. Stat. § 242.01(4).

- (1) the Plaintiffs' claims arose before the transfer was made;
- (2) the LLC did not receive a reasonably equivalent value in exchange for the transfer; and
- (3) the LLC either was insolvent when it made the transfer or became insolvent because of the transfer.

There are two buckets of transfers that the Plaintiffs allege as fraudulent transfers. The Plaintiffs assert that the LLC fraudulently transferred funds when it (1) repaid Mr. Coates' alleged personal loans and made his personal retirement account contributions; and (2) made a \$10,696.30 payment to Mr. Coates. As best the Court can tell from what has been filed, the fraudulent transfers alleged by the Plaintiffs can be summarized as follows:

Date	Amount	Payee
September 11, 2018	\$7,623.73	Santander Bank
September 11, 2018	\$4,863.13	California Commercial Loan
September 17, 2018	\$839.44	Northwestern Mutual
October 10, 2018	\$7,623.73	Santander Bank ²
October 11, 2018	\$4,863.13	California Commercial Loan
October 16, 2018	\$839.44	Northwestern Mutual
December 11, 2018	\$10,696.30	Mr. Coates
	\$37,348.90	

A. Unpaid Wage Claims Arose for Some of the Plaintiffs Before the Transfers Were Made by the LLC.

For their alleged fraudulent transfer claim, the first thing the Plaintiffs must prove is that their "claims arose before the transfers were made." Each of the Plaintiffs involved with this Motion has submitted a Declaration summarizing his or her respective unpaid wages. Docket Nos. 28, 30-44. The Plaintiffs have also submitted a chart in which they attempt to summarize the total unpaid wages. Declaration of Yingtao Ho, Docket No. 27-1 (the "Wage Computation"). There are discrepancies between the Declarations and the Wage Computation. The following

² The Plaintiffs' Motion references "\$15,647.46 in payments to Santander Bank in September and October of 2018." However, the U.S. Bank statements submitted as exhibits in support of the Plaintiffs' Motion include a total of \$15,247.46 paid to Santander Bank in September and October 2018, so for the purpose of this Motion, the Court has relied upon the numbers as stated in the bank statements. Docket No. 49.

chart attempts to summarize the Plaintiffs' respective unpaid wages as stated in their

Declarations with the discrepancies in the Wage Computation noted in the footnotes below:

Name	Rate	Standard hours	Overtime hours	Total	Date of unpaid wages
Timothy McPhail	\$39.31	24	4	\$1,179.30	10/08/2018-10/10/2018
Douglas Carter ³	\$39.31	32		\$1,257.92	10/07/2018-10/13/2018
James Wilkinson ⁴	\$31.45	36		\$1,132.20	10/07/2018-10/13/2018
Don Starzman	\$39.31	32		\$1,257.92	10/07/2018-10/13/2018
		8		\$314.48	10/14/2018-10/16/2018
Erik Jacobi	\$39.31	16		\$628.96	10/21/2018-10/23/2018
Cal Falkenberg	\$39.31	16		\$628.96	10/21/2018-10/23/2018
Chad Stewart	\$39.31	6		\$235.86	10/15/2018-10/16/2018
Bruce Howard	\$39.31	37		\$1,454.47	10/28/2018-11/02/2018
Glen Savage	\$39.31	8		\$314.48	10/19/2018
		40	8	\$2,044.12	10/20/2018-10/26/2018
		37		\$1,454.47	10/27/2018-11/01/2018
Ty Jeranek ⁵	\$17.00	30		\$510.00	10/21/2018-10/27/2018
		31		\$527.00	10/28/2018-11/03/2018
		21		\$357.00	11/04/2018-11/09/2018
Dan Anderson	\$39.31	35.5		\$1,395.51	10/21/2018-10/27/2018
Michael Helt ⁶	\$39.31	16		\$628.96	10/28/2018-11/04/2018
Jeff Roblee	\$39.31	40		\$1,572.40	10/28/2018-11/03/2018
Bob Kashak	\$45.21	40		\$1,808.40	10/28/2018-11/03/2018
		40		\$1,808.40	11/04/2018-11/10/2018
Walter Thornton	\$14.43	32		\$461.76	10/07/2018-10/13/2018
		40		\$577.20	10/14/2018-10/20/2018
		6.5		\$93.79	10/24/2018
Justin Beatovic	\$14.43	40		\$577.20	10/21/2018-10/27/2018
		39		\$562.77	10/28/2018-11/03/2018
Total unpaid wages				\$22,783.53	

³ The Wage Computation states that Mr. Carter worked 39 hours instead of the 32 hours reflected in his Declaration.

⁴ The Wage Computation states that Mr. Wilkinson's hourly rate was computed as the difference between the \$13.76/hour rate that he was paid, and the \$45.21/hour rate that he should have received. However, Mr. Wilkinson's hourly rate is not entirely clear because he reports his wage rate as both \$45.21/hour and as \$39.31/hour in his Declaration. For the purpose of this chart, the Court has used the hourly rate calculation reported on the Wage Computation, but there remains a fact issue as to Mr. Wilkinson's proper hourly rate. Mr. Wilkinson also reports in his Declaration that he received a replacement check for his October 14-October 19, 2018 hours in the after taxes amount of \$402.57. Based upon his Declaration, it is unclear whether he is asserting additional lost wages for this time period, so those wages have not been included in the chart above.

⁵ The Wage Computation states that Mr. Jeranek's hourly rate was \$14.43/hour.

⁶ The Wage Computation states that Mr. Helt has not been paid for 16 hours. Based upon his Declaration, it is unclear whether Mr. Helt is also owed additional unpaid wages for the week of October 14-October 20, 2018 and the week of October 21-October 27, 2018. The Court has not included these additional wages in the chart above because it is not clear from the Declaration whether they have been paid or not.

Based upon the Workers' Declarations as summarized above, the LLC did not owe any of the unpaid wages that are the subject of this adversary proceeding on September 17, 2018 because the work had not yet been performed. Therefore, none of these Plaintiffs can assert fraudulent transfer claims for the \$7,623.73 transfer that took place on September 11, 2018 to Santander Bank, the \$4,863.13 transfer that took place on September 11, 2018 to California Commercial Loan, or the \$839.44 transfer that took place on September 17, 2018. As to the September transfers, these Plaintiffs are not creditors whose claims arose before the transfer and they therefore cannot state a claim for a fraudulent transfer under Wis. Stat. § 242.05(1) as to these transfers.

Further, it appears that only Mr. McPhail, Mr. Carter, Mr. Wilkinson, Mr. Starzman, Mr. Stewart, and Mr. Thornton have claims that arose before the alleged fraudulent transfers that took place in October. As noted in the chart above, the LLC made transfers of \$7,623.73 to Santander Bank on October 10, 2018, \$4,863.13 to California Commercial Loan on October 11, 2018, and \$839.44 to Northwestern Mutual on October 16, 2018. Therefore, as to these October transfers, only the Plaintiffs with unpaid wages that predate October 16, 2018 have shown that their "claims arose before the transfers were made."

Finally, it appears that all the Plaintiffs who filed Declarations have claims that arose before the alleged fraudulent transfer to Mr. Coates in the amount of \$10,696.30 on December 11, 2018. Therefore, as to this transfer, all these Plaintiffs have shown that their claims "arose before the transfer was made."

B. There Remain Genuine Issues of Material Fact for Trial Regarding Whether the LLC Received Reasonably Equivalent Value for the October Transfers or the December Transfer.

The second element the Plaintiffs must prove to support their fraudulent transfer claim as to the October transfers and the December transfer is that the LLC “did not receive a reasonably equivalent value in exchange for the transfer.” Wis. Stat. § 242.05(1). The Court finds based on the submissions that there remain genuine issues of material fact as to whether the LLC received reasonably equivalent value for the October transfers and the December transfer.

1. The October Transfers

With regard to the October transfers, the dispute over whether the LLC received reasonably equivalent value for the transfers is dependent on whether the Court finds that the transfers were for the LLC’s business expenses or for Mr. Coates’ personal expenses. The Plaintiffs, of course, assert that the October transfers were paid by the LLC to Santander Bank, California Commercial Loan, and Northwestern Mutual for Mr. Coates’ personal loans and his personal retirement account. As payments on personal loans and personal expenses, the Plaintiffs assert that the LLC did not receive reasonably equivalent value for the October transfers.

Mr. Coates, on the other hand, states in his Affidavit that all of these payments were made for business expenses or business debts. Specifically, he avers, “I assert that all debts paid by Coates Electric, LLC were business expenses or business debts including loans from US Bank, OnDeck Capital, Santander Bank, Cali Comm Loan, Signature Financial, and Chase credit cards.” Coates Aff. ¶ 8. He also states,

My understanding is that the difference between “personal expenses” and “business expenses” is not based on whether I am personally liable for the expense or debt. Rather, business expenses are expenses or debts incurred for the purpose of operating Coates

Electric, LLC. Personal expenses are expenses and debts incurred in my life not as an employee, owner, or operating [sic] of Coates Electric, LLC.

Id. ¶ 7. Mr. Coates denies paying personal expenses from business bank accounts.

The Plaintiffs are quick to point out that Mr. Coates' affidavit is not consistent with the testimony he gave at his Rule 2004 examination about Santander or California Commercial Loan. At his deposition, Mr. Coates did not know what California Commercial Loan was, what Santander Bank was, or what Signature Financial was. Docket No. 26, p. 12, 44, 46. When asked what business loans the LLC had in 2018, Mr. Coates only identified U.S. Bank, OnDeck, the loan from his parents, and the home equity line of credit he obtained from Brewery Credit Union. *Id.*, p. 44-45. When asked about the Northwestern Mutual expense, he identified it as his retirement fund, but disagreed that it was a personal expense, stating, "it's more an employment payment, or an employment benefit, since I was set up with the company as an employee." *Id.*, p. 46.

The Court acknowledges that affidavits "offered to contradict the affiant's deposition are so lacking in credibility as to be entitled to zero weight in summary judgment proceedings unless the affiant gives a plausible explanation for the discrepancy." *Beckel v. Wal-Mart Assocs., Inc.*, 301 F.3d 621, 623 (7th Cir. 2002). Mr. Coates has not offered an explanation for the discrepancy between his deposition testimony, where he did not know what Santander Bank was or what California Commercial Loan was, and his affidavit, where he now claims that the payments made by the LLC to Santander Bank and California Commercial loan were for business loans and business expenses.

That being said, the Plaintiffs bear the burden of proving that the October transfers were payments on personal loans and personal expenses such that the LLC did not receive reasonably

equivalent value for the October transfers. And the only facts in the record before the Court right now come from Mr. Coates' Rule 2004 examination in which he states he does not know what California Commercial Loan is or what Santander Bank is. There is no direct evidence related to why there are twelve separate withdrawals to Santander Bank on the LLC's bank account in the exact same dollar amounts in September and October 2018 or what the withdrawals might be for California Commercial Loan. The Plaintiffs espouse a theory in their motion that prior to September 2018, instead of taking wages from the LLC, Mr. Coates took distributions in the form of repayments of the loans and contributions to his retirement fund. Mr. Coates counters this in his Affidavit, stating that he was paid wages until September 2018 and reported wages of \$60,000 on his tax return. Coates Aff. ¶ 4. He explains in his Affidavit that wages are not appearing individually on the bank statements because the LLC used a third-party payroll service to pay wages, including his wages, and the business bank statements show lump sums submitted to the payroll service and not individual pay checks to employees. *Id.* ¶ 5.

When assessing a summary judgment motion, the Court's job "is not to weigh evidence, make credibility determinations, resolve factual disputes and swearing contests, or decide which inferences to draw from the facts." *Miller v. Gonzalez*, 761 F.3d 822, 827 (7th Cir. 2014) (citing *McCann v. Iroquois Mem'l Hosp.*, 622 F.3d 745, 752 (7th Cir. 2010)). Construing the facts and inferences in a light most favorable to Mr. Coates, the Court finds that there are genuine issues of material fact as to whether the October transfers were for the LLC's business expenses or for Mr. Coates' personal expenses and thus whether the LLC received reasonably equivalent value for the October transfers.

2. The December Transfer

The dispute over whether the LLC received “reasonably equivalent value” for the December transfer of \$10,696.30 from the LLC to Mr. Coates revolves around whether this transfer represents Mr. Coates’ wages or a distribution to Mr. Coates.

Throughout the litigation, Mr. Coates has consistently referred to the December transfer as his wages. Mr. Coates asserts in his affidavit that the LLC paid him wages in the amount of \$10,696.30 in December 2018. Coates Aff. ¶ 6. In his Rule 2004 examination, Mr. Coates testified:

- Q There’s also a payment of a little bit over \$10,000 to you, it’s the fourth one
- A Correct.
- Q --from the top on the right. How did you figure that amount out?
- A That was -- that was my, um, wages that I did not collect as an employee during the same time period as everybody else.
- Q For what time period?
- A I could double check, but it was an extensive time period that I didn’t pay myself a dime.

Docket No. 26, p. 76. In a supplemental response to the Plaintiffs’ interrogatories, Mr. Coates stated that the December transfer accounted for paychecks in the amount of \$914.60 for the weekly pay periods from October 3, 2018 to December 5, 2018. Docket No. 27-12. It also included \$10.30 for parking reimbursement, \$1,000 for “Reimbursement for wages paid to Lee W,” and \$540.00 for an “Oct/Nov Loan Payment,” which is further described as “Repayment for personal loan Brody made to Coates Electric, LLC.” *Id.*

In their Motion, the Plaintiffs contend that the \$10,696 payment could not have been a payment of wages and that it was instead a distribution to Mr. Coates. The Plaintiffs note that the LLC’s bank statements show four payments of \$914.60 on September 5 and 6, 2018 and four

payments of \$914.60 on October 4, 2018. Docket No. 49. The Plaintiffs characterize the payments shown on the bank statements as Mr. Coates' wages. The Plaintiffs argue that if the \$10,696 payment was intended to be a wage payment that covered October 2018 until December 2018, as stated in Mr. Coates' interrogatory response, deposition, and affidavit, and Mr. Coates cashed the additional four \$914.60 wage checks in October 2018, as shown on the LLC's bank statements, Mr. Coates, in essence, paid himself twice for the same work.

Based on the evidence before the Court at this time, and construing the facts and inferences in a light most favorable to Mr. Coates, the Court is not able to find that there is no genuine issue of material fact as to whether the December payment to Mr. Coates was for wages or a distribution. There is nothing in the record that explains to the Court whether the four payments of \$914.60 in September 2018 were payments in arrears for services rendered in August. There is nothing in the record that explains to the Court whether the four payments of \$914.60 in October 2018 were payments in arrears for services rendered in September. If the four payments of \$914.60 in October 2018 were for services provided in September 2018, then there was no "double dipping" by Mr. Coates and the Plaintiffs' theory does not work.

It is not clear to the Court at this time why the LLC apparently started to cut \$914.60 checks to Mr. Coates in September 2018 and October 2018 when those checks did not appear in the LLC's bank records prior to those dates. Mr. Coates offers in his affidavit that the LLC used a third-party payroll service to pay wages, including his wages, so the business bank statements only show lump sums submitted to the payroll service and not individual pay checks to employees. It is also not clear to the Court at this time why Mr. Coates was continuing to draw a wage in November and December if the LLC stopped operating in October. These are all fact issues to be resolved at trial.

There remain fact issues for this Court to try and credibility assessments for this Court to make related to whether the \$10,696 payment made by the LLC to Mr. Coates was for wages or whether it was a distribution and thus whether the LLC received reasonably equivalent value for the December transfer.

C. There Remain Genuine Issues of Material Fact for Trial Regarding Whether the LLC Was Insolvent at the Time of the October Transfers, but Not as to the December Transfer.

The third and final element the Plaintiffs must prove to support their fraudulent transfer claim as to the October transfers and the December transfer is that the LLC either was insolvent when it made the transfer or became insolvent because of the transfer. Wis. Stat. § 242.05(1). Pursuant to Wis. Stat. § 242.02(2), a “debtor is insolvent if the sum of the debtor’s debts is greater than all of the debtor’s assets at a fair valuation.” The Court finds based on the submissions that there remain genuine issues of material fact as to whether the LLC was insolvent at the time it made the October transfers, but not as to the December transfer.

1. The October Transfers

The only direct evidence of solvency is a balance sheet dated December 7, 2018, after the October transfers. Coates Aff. Ex. 2. The Plaintiffs argue that there is “no evidence showing the LLC’s balance sheet was more positive in September and October of 2018 compared to December of 2018.” Plaintiffs’ Reply Brief, Docket No. 55 at 8. “[A]ll of the September and October payments from the U.S. Bank account for California Commercial Loan and Santander Bank loan occurred by no later than October 11, 2018,” and the LLC invoiced more than half a million dollars of accounts receivable between October 13, 2018 and November 15, 2018. *Id.*; Docket No. 56-1. The Plaintiffs presumably suggest that this means that the LLC was actually in better shape in December 2018, when its liabilities exceeded its assets by more than half a million dollars, than it would have been in September 2018. They also suggest that the fact that

Mr. Coates borrowed \$100,000 from his parents in October 2018 indicates the LLC was insolvent in that month. They further dispute the valuations of the LLC's assets. This is all just conjecture based on circumstantial evidence without any real proof as to the insolvency of the LLC in October 2018. Viewing these facts in the light most favorable to Mr. Coates, none of this shows that the LLC was insolvent when the October transfers were made. Because the Plaintiffs have not established that the LLC was insolvent at the time of the transfers, the Court cannot conclude on summary judgment that Mr. Coates is liable for the payments as fraudulent transfers.

2. The December Transfers

As mentioned above, Mr. Coates has put into evidence as part of his affidavit a balance sheet dated December 7, 2018, which shows the LLC had assets of \$1,652,863.99 and liabilities of \$2,202,473.83 as of December 7, 2018. Coates Aff. ¶ 10, Ex. 2. The \$10,696 transfer from the LLC to him was dated December 11, 2018, a short four days after the balance sheet showing that the LLC's liabilities exceeded its assets by over half a million dollars. Mr. Coates states in his affidavit that "prior to ceasing operations of Coates Electric, LLC in October 2018, the company had a book of business that I anticipated would generate \$3,518,270.00 of gross income. This is not listed on the balance sheet." Coates Aff. ¶ 11. Pursuant to Wis Stat. § 242.02(2), a "debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation." It is difficult to see how a book of business would be an asset in December 2018, after the company ceased business in October 2018. Coates Aff. ¶ 3. It is also difficult to see why such an asset, if it were an asset, would not be included on the balance sheet. Accordingly, and based upon the evidence before the Court, at least in December 2018, at the time Mr. Coates paid himself \$10,696, the LLC was insolvent.

III. There Are Genuine Issues of Material Fact as to Whether Mr. Coates Has Committed Embezzlement Under § 523(a)(4).

“Embezzlement” is a ground for denying a debtor a discharge of a debt under § 523(a)(4). Embezzlement is the “fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come.” *In re Weber*, 892 F.2d 534, 538 (7th Cir. 1989). Embezzlement need not be committed by a fiduciary. However, the objecting party must prove by a preponderance of the evidence that the debtor acted with fraudulent intent or deceit. *Id.* It is rarely appropriate on summary judgment for a court to make a finding on state of mind. *Alexander v. Wisconsin Dept. of Health & Family Serv.*, 263 F.3d 673, 681 (7th Cir. 2001) (cases involving questions of intent and credibility are inappropriate for summary judgment); *Stumph v. Thomas & Skinner, Inc.*, 770 F.2d 93, 97 (7th Cir. 1985) (“Summary judgment is notoriously inappropriate for determination of claims in which issues of intent, good faith and other subjective feelings play dominant roles.”) (quoting *Pfizer, Inc. v. International Rectifier Corp.*, 538 F.2d 180, 185 (8th Cir. 1976), *cert. denied*, 429 U.S. 1040, 97 S. Ct. 738, 50 L. Ed. 2d 751 (1977)).

The “state of mind” analysis involved in determining whether Mr. Coates acted with “fraudulent intent” in causing the LLC to make these transfers precludes the entry of summary judgment in favor of the Plaintiffs. To decide whether Mr. Coates committed embezzlement, the Court must make a finding that he acted with fraudulent intent. This type of determination is ill-suited for summary judgment. Without hearing from Mr. Coates, and assessing his credibility on the witness stand, the Court cannot say one way or the other what his intent was in causing the LLC to make the October transfers and the December transfer. There are simply not enough undisputed facts in the record from which the Court can discern Mr. Coates’ intent. This precludes the entry of summary judgment in favor of the Plaintiffs.

Conclusion

There are genuine issues of material fact as to whether Mr. Coates received fraudulent transfers pursuant to Wis. Stat. § 242.05, namely (1) whether the LLC received reasonably equivalent value for the October transfers or the December transfer and (2) whether the LLC was insolvent at the time of the October transfers or became insolvent because of the October transfers. Further, there are genuine issues of material fact as to whether he committed embezzlement. The Court must deny summary judgment as to the Plaintiffs' claim for embezzlement or theft under 11 U.S.C. § 523(a)(4). Accordingly,

IT IS THEREFORE ORDERED: the Plaintiffs' Motion for Summary Judgment is denied.

IT IS FURTHER ORDERED: the Court will hold a telephone status conference on **April 20, 2021, at 12:00 p.m.** to schedule the matter for further proceedings.

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