ORDERED in the Southern District of Florida on June 08, 2011.

Erik P. Kimball, Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

In re: **Case No.: 10-17531-EPK**
Chapter 7

JEFFREY SILBERSTEIN and
ROSEMARY SILBERSTEIN,

Debtor.
_______________________________________/

KAREN YONADI, **Adv. No. 10-03295-EPK**

Plaintiff,
vs.

JEFFREY SILBERSTEIN and
ROSEMARY SILBERSTEIN,

Defendants.
_______________________________________/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER came before the Court for trial on March 22 and March 28, 2011 upon the *Complaint to Determine Dischargeability and Objecting to Discharge* [DE 1] filed by Karen Yonadi (the "plaintiff") against Jeffrey Silberstein and Rosemary Silberstein (together, the "defendants"). The Court held a hearing on June 6, 2011 for the purpose of delivering an oral ruling. At the June 6, 2011 hearing, the Court stated as follows:

> This case came before the court for trial on March 22 and March 28, 2011 upon a complaint filed by Karen Yonadi against Rosemary Silberstein and Jeffrey Silberstein. The complaint requests exception from discharge for certain debts alleged by the plaintiff and denial of the discharge of both defendants.
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> As plaintiff, Ms. Yonadi has the burden of proof on all matters before the court. Consistent with the Supreme Court's directive in Grogan v. Garner, 498 U.S. 279 (1991), the evidentiary standard is preponderance of the evidence.
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> This is, unfortunately, a variation of a dispute this court sees often. Friends go into business together. Things do not go as planned. There are misunderstandings. Rarely, however, do the facts present the level of culpability that merits exception from discharge or denial of discharge.
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> Based on the record presented at trial, the court makes the following findings of fact:
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> Karen Yonadi and Rosemary Silberstein were personal friends for a number of years before they decided to go into business together. In 2007 they agreed to open a shoe store in Boca Raton, Florida.
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> Early in 2007, Rosemary Silberstein and her husband, Jeffrey Silberstein, traveled to New York to meet with the owner of the French Sole brand, a potential source of inventory for the shoe store. Mr. Silberstein is an architect. It is not relevant to the present dispute that Jeffrey Silberstein may have met with the owner of the French Sole brand for the purpose of discussing architectural work on other stores.
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> After this trip to New York, the plaintiff and Mrs. Silberstein agreed to form a corporation, Rosie, Inc. At that time, it was their intention to operate a shoe store selling only the French Sole brand. Although they discussed sharing corporate responsibility and ownership 50% each, when the corporation was formed Mrs. Silberstein was designated as holding 51% of the stock, and the plaintiff was designated as holding 49% of the stock. The evidence is undisputed that the plaintiff, at a minimum, acquiesced in this allocation of corporate ownership.
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> In May 2007, the plaintiff and Mrs. Silberstein traveled to New York to select inventory for their new shoe store. They each paid approximately

$42,000 to French Sole New York as a deposit on French Sole brand shoes. These amounts were paid by personal check.

The plaintiff obtained a line of credit, secured by her home, in part for the purpose of financing her investments in Rosie, Inc. The plaintiff also obtained a corporate American Express card for the business, on which she was personally liable.

From the evidence presented, it is unclear whether the parties intended to obtain a French Sole franchise from the start. There is no question that all parties initially believed that French Sole New York would be the only source of inventory for the new shoe store. The relationship between Rosie Inc. and French Sole New York quickly deteriorated. In the end, it appears that French Sole New York did not have the legal authority to offer a franchise. Rosie Inc. never received any French Sole brand inventory.

By letter dated October 25, 2007, Rosie, Inc. demanded the deposit back from French Sole New York. This letter is included in plaintiff's Exhibit 4. Based on the testimony of the parties, and plaintiff's Exhibit 4, the plaintiff at least acquiesced in the terms of this letter. The plaintiff's name is included as a sender. She received a copy of the letter the same day it was sent. Although the plaintiff expressed concern over the tone of the letter, she did not request that it be retracted. The plaintiff testified that she had no knowledge of this letter before it was sent. Her testimony on this point appeared coached and the court did not find it credible.

It does not matter that Mr. Silberstein drafted the October 25, 2007 letter. It is also not material to the present dispute that Mr. Silberstein is a signatory on the letter. Mr. Silberstein was not at that time a director or officer of Rosie, Inc. However, in addition to being the interior architect for the store, Mr. Silberstein was a guarantor on the commercial lease and was thus financially obligated in connection with the enterprise. It is not surprising that Mr. Silberstein was involved in this matter. Indeed, given the rocky status of the shoe store's relationship with its then sole source of inventory, and Mr. Silberstein's personal liability on the store lease, one would expect Mr. Silberstein to be involved.

The October, 2007 letter was followed by litigation against French Sole New York. Eventually, French Sole New York agreed to settle the litigation by returning the shoe deposit.

Without French Sole New York as a supplier, the shoe store changed its street name to "Butter." The plaintiff complains that she was not involved in this business decision. But by the time of the name change the plaintiff had systematically removed herself from management of the enterprise, specifically rejecting ongoing involvement in the business and going so far as to forward bills, including the American Express bills, to Mrs. Silberstein unopened. The plaintiff's departure from management of the enterprise culminated in her December 9, 2007 e-mail to Mrs. Silberstein, admitted as plaintiff's Exhibit 6, in which the plaintiff requested that Mrs. Silberstein find a buyer for the plaintiff's shares in Rosie, Inc. Mr. Silberstein immediately responded that this was not as easy as the plaintiff thought.

Plaintiff's Exhibit 11 is useful in the court's analysis, and supports many of the findings made today. Mrs. Silberstein wrote to the plaintiff on December 11, 2007, just two days after the plaintiff asked to be bought out of Rosie, Inc. From the tone of this e-mail, it appears that Mrs. Silberstein was resigned to the fact that the plaintiff was no longer engaged in the effort of opening the shoe store, and that the entire responsibility would fall on Mrs. Silberstein. The initial e-mail, from Mrs. Silberstein to the plaintiff, reads as follows:

"We got word today from the attorney, that they are very positive about the mediation, and it will be taking place next week. Which day they aren't sure of yet, if you would like to know I will let you and you can come if you would like to know the outcome or I can just let you know. Also, the build out is proceeding, and I am going to proceed with the store, as planned which means I need the check book and other stuff you have, and I need to know when the bags are coming etc. A lot has been left in my lap which is fine, but I am not changing credit cards or checking accounts until I open up the store, because I am not going to do anything to jeopardize the opening anymore. And you need to see that part thru, then once the store is open I will go to my accct. and figure out the your half of the amount and start paying you back. With Christmas around the corner and shoes ordered it has to continue as planned. If you change your mind let me know, I will be at the gym wed. 730 to 830 if I can get the check book. or I can pick everything up at your house, please let me know."

Among other things, Mrs. Silberstein reported in this e-mail that the build out of the store was proceeding as planned. It is apparent that the plaintiff had by this point completely abandoned any management responsibility for Rosie, Inc. Mrs. Silberstein here requested that the plaintiff turn over the business check book and other records and information in the plaintiff's possession. Mrs. Silberstein unequivocally stated that she did not intend to change the corporate checking or credit card accounts until after the store opened, as she believed this could jeopardize the opening of the store. Mrs. Silberstein specifically demanded that the plaintiff follow through on the plaintiff's obligations until the store opened. Mrs. Silberstein then pledged to start paying the plaintiff back after the store opened.

There are several intervening e-mails. Then the plaintiff responds as follows:

"i understand what we planned, the plans have changed and that is why i do not want be a part of the business, i do not plan on putting any more money into this business, after the store opens we can discuss repayment of monies i put in."

Finally, Mrs. Silberstein responds with:

"That's fine Karen, just bring me everything and explain to me anything I need to know. It must me nice though to decide you just want out, and leave a partner with everything to deal with, just imagine if now I decided I wanted out because I just can go it alone, and we have both are names signed to things. Luckily I am not going to do that. so just please bring me everything I am training at 7 30"

The plaintiff argues that Mrs. Silberstein's pledge to start paying the plaintiff back her investment after the store opened was an unconditional promise without regard to the financial ability of Rosie, Inc. to repay amounts invested by the plaintiff. This is a completely unreasonable position. The plaintiff's suggestion that she expected to be paid back after the store opened, no matter what, is not credible. Indeed, it is inconsistent with her own statement that the parties could discuss repayment after the store opened. In any case, from the evidence presented it is clear that Rosie, Inc. was insolvent both before and after the store opened, and that repayment of the plaintiff's investment ahead of other creditors, including the landlord, would have been contrary to the law.

Mrs. Silberstein's frustration is palpable in this e-mail exchange. Her frustration was reasonable under the circumstances. Mrs. Silberstein's understanding was that the plaintiff had pulled out of the enterprise, threatened not to advance any further funds, and had left the entire effort of opening the store in Mrs. Silberstein's hands. Mrs. Silberstein's statements in this e-mail are consistent with her credible testimony before the court. Mrs. Silberstein showed frustration and dismay consistent with a person who was surprised by the behavior of her partner, the plaintiff. If Mrs. Silberstein had been attempting to mislead the plaintiff from the start, or at any intermediate stage of the enterprise, her frustration and dismay would be hollow. They were not. Plaintiff's Exhibits 7 and 8 further show both defendants' attempts to keep the plaintiff involved in the business. Based on the evidence presented, the court cannot find that Rosemary or Jeffrey Silberstein exhibited an intent to mislead the plaintiff, before, during or after this e-mail interchange.

After this e-mail exchange, in December, 2007, the plaintiff paid the balance due on the business American Express account from the corporate checking account and closed the corporate American Express account. After December, 2007, the plaintiff did not take part in the business in any material way.

On January 14, 2008, Mrs. Silberstein called and e-mailed the plaintiff, asking that the plaintiff re-open the business American Express account. Mrs. Silberstein testified credibly that the business had earlier placed orders for shoe inventory using the corporate American Express account, that such orders were due to be delivered in the weeks leading up to the opening of the store, and that the corporate American Express would be charged for the shoes concurrent with their shipment. Mrs. Silberstein testified credibly that she was concerned that the plaintiff's closing of the corporate American Express account would threaten timely delivery of inventory for the store. The plaintiff re-opened the corporate American Express account. Thereafter, the store incurred charges on the corporate American Express account. That some of these charges were disputed by Mrs. Silberstein is not material to the court's analysis here.

The plaintiff testified that Mrs. Silberstein promised that all corporate American Express charges would be paid in order to induce the plaintiff to re-open the account. The plaintiff's testimony was the only evidence supporting this contention. It appeared coached and was not credible. Mrs. Silberstein testified credibly that she did not make any such specific promise, that she was focused only on getting the store open at that point. The court notes that Mrs. Silberstein did in fact cause the first bill issued after the American Express account was re-opened to be paid in a timely manner. This is consistent with Mrs. Silberstein's credible testimony that she intended to pay all of Rosie, Inc.'s bills. Mrs. Silberstein did in fact obtain a new corporate charge card for the store, and started charging on it when received. Only a few charges were made on the corporate American Express card after Mrs. Silberstein had obtained a new corporate card. From the credit card statements and Mrs. Silberstein's credible testimony, it appears that she stopped using the corporate American Express card as soon as she could. Only when the store was failing, and Mrs. Silberstein was unable to pay all of the store's bills, did Mrs. Silberstein demand that the plaintiff pay the corporate American Express bill, claiming that it was part of plaintiff's responsibility as a shareholder. Whether Mrs. Silberstein's demand in this regard has any legal merit is not relevant to the dispute at hand. The context of that demand, and its timing after Mrs. Silberstein had already paid an intervening bill on the corporate American Express, support the court's finding that Mrs. Silberstein had no ill intent at the time she asked the plaintiff to re-open the corporate American Express account or when any of the unpaid charges were incurred.

The plaintiff had more than sufficient notice of the Silbersteins' expectation that the plaintiff would share in store expenses. Plaintiff's Exhibit 12 is a letter from the Silbersteins to the plaintiff dated January 13, 2008, in which the Silbersteins demand that the plaintiff cover certain expenses of the business. The plaintiff testified that she received this letter by regular mail after January 14, 2008. Because no specific date was given, the court assumes the letter was received by the plaintiff on January 15, 2008. This is one day after the e-mail admitted at Plaintiff's Exhibit 13, in which Mrs. Silberstein requested that the corporate American Express account be re-opened. The court notes that all of the charges to the corporate American Express account on the second bill received after the account was re-opened -- the bill that was not paid by Mrs. Silberstein -- were incurred after January 15, 2008. The lion's share of that bill was incurred nearly two weeks after plaintiff received the January 13 letter. All of this can be seen in Plaintiff's Exhibit 26, a composite exhibit containing the account statements. After receipt of the January 13 letter, if the plaintiff wanted to ensure that she would not be personally liable for any charges on the corporate American Express account, she had ample opportunity to close that account again and failed to do so.

The store opened on February 3, 2008.

The plaintiff testified that she was surprised to discover, in February 2008, that the store did not have any French Sole merchandise and was called "Butter." This testimony lacked credibility. The evidence shows that the plaintiff was aware of the dispute with French Sole New York and the letter sent in January. In light of that dispute, a reasonable person would not be surprised that French Sole did not provide any shoes to the store. In March, 2008, the plaintiff signed an amendment to the store lease, admitted as defendants' Exhibit Z, reflecting the change of the store name to "Butter."

French Sole New York eventually agreed to settle the dispute with Rosie, Inc. by returning the approximately $84,000 paid as a deposit for shoe inventory. Mrs. Silberstein informed the plaintiff of this by e-mail on February 26, 2008, admitted as plaintiff's Exhibit 15. The text of that e-mail assumes that the plaintiff was knowledgeable of the French Sole New York litigation. Mrs. Silberstein informed the plaintiff that the plaintiff would need to sign a release.

Plaintiff's Exhibit 16 includes an e-mail from the plaintiff to Mrs. Silberstein suggesting that the plaintiff intended to use what she perceived to be her portion of the returned deposit to pay down her home equity line. Mrs. Silberstein responded to this e-mail, but did not acknowledge the suggestion that funds would be paid to the plaintiff.

The plaintiff testified that upon receipt of plaintiff's Exhibit 17, which includes the form of release in the French Sole dispute, the plaintiff telephoned Mrs. Silberstein to discuss how the plaintiff would receive her share of the settlement proceeds. According to the plaintiff's testimony, Mrs. Silberstein told the plaintiff that counsel would send a check directly to the plaintiff. There is no other evidence to support a finding that Mrs. Silberstein promised that the plaintiff would receive any part of the returned shoe deposit. The plaintiff's testimony on this issue appeared coached and was not credible.

Plaintiff's position with regard to the French Sole deposit is inconsistent with all of the other credible evidence presented on the issue. The shoe store had only been open about a month at that point. The plaintiff and both defendants were jointly and severally liable on the store's commercial lease, a liability in the hundreds of thousands of dollars. The store was not profitable and never would be. The store was unable to pay its present obligations to non-insider creditors. The store needed the settlement proceeds in order to pay its costs of operation, including for shoe inventory. Both the plaintiff and Mrs. Silberstein treated the initial shoe deposit to French Sole as part of their personal investment in Rosie, Inc. In the complaint, the plaintiff consistently refers to these funds as a loan to Rosie, Inc. Whether the deposits represented a loan to Rosie, Inc., or a capital contribution, is not relevant. In either case, it would have been inappropriate for Rosie, Inc. to repay any of such funds to either Mrs. Silberstein or the plaintiff. Rosie, Inc. had significant obligations to other parties who were entitled to priority over repayment to the insiders of the enterprise. Mrs. Silberstein's credible testimony was consistent with this analysis. The plaintiff herself testified that as a shareholder she did not expect to be paid ahead of the corporation's creditors.

At trial and in a post-trial brief, the plaintiff argued that the deposit funds were at the time paid to French Sole New York, and remained at the time returned, personal assets of the plaintiff and Mrs. Silberstein. The plaintiff takes the position that such funds never became property of Rosie, Inc. -- that they were neither lent to Rosie, Inc. nor a capital contribution. This position is not consistent with the allegations in the plaintiff's own complaint. Nor is it consistent with the credible evidence presented to the court. Both the plaintiff and Mrs. Silberstein testified that, initially, they expected the store to sell only French Sole brand shoes. They sought inventory from French Sole New York. The court does not know whether Rosie, Inc. had a corporate bank account at the time the checks were written. It is possible no such account existed. In any case, in order to facilitate the store's first inventory order, the two owners wrote personal checks in payment of the inventory. It is hard to imagine an accountant treating this as anything other than a capital contribution to the new enterprise. Although the complaint repeatedly refers to the inventory deposit as a loan to Rosie, Inc., there is no documentation in evidence to support this position. Nor is there any documentation in evidence to support the unlikely circumstance that such funds were not intended as an investment in the new enterprise. The logical conclusion is consistent with Mrs. Silberstein's position, that she and the plaintiff made their first significant capital investment in Rosie, Inc. by making a deposit for inventory. In a letter attached as Exhibit H to plaintiff's Exhibit 31, plaintiff's own counsel refers to the shoe deposit as sums contributed to the corporation. The court finds that the French Sole deposit funds represented capital investments by the plaintiff and Mrs. Silberstein in Rosie, Inc.

Mr. Silberstein's involvement in the French Sole litigation and the settlement thereof has no bearing on the dispute before this court. The fact that Mr. Silberstein received partial payment for architectural services rendered to French Sole New York is not material to this court's analysis. The fact that Mr. Silberstein was involved in the matter is, again, unsurprising given his significant personal financial risk in connection with the shoe store. It would have been more surprising had he taken no interest and remained uninvolved.

The French Sole settlement funds were wire transferred to a Rosie, Inc. bank account. Mrs. Silberstein testified that because the plaintiff remained a signatory on the corporate bank account, Mrs. Silberstein determined to open a new corporate bank account. She opened a new account at National City Bank on March 18, 2008. In the meantime, on March 13, 2008, Mrs. Silberstein wire transferred $20,000 from the old corporate account to her personal account. She later transferred an additional $70,000 from the old corporate account to her personal account. Thus, shortly after Rosie, Inc. received the French Sole settlement proceeds, Mrs. Silberstein transferred $90,000 from the Rosie, Inc. corporate account to her personal account.

The plaintiff asks the court to give weight to the fact that when Mrs. Silberstein opened the new corporate bank account she indicated Mr. Silberstein as an approved signatory and as a vice-president of Rosie, Inc. The plaintiff argues that Mr. Silberstein was not a vice-president of Rosie, Inc. The court notes that Mrs. Silberstein was the 51% shareholder of Rosie, Inc., an officer and a director. Under Florida law, Mrs. Silberstein had the ultimate power to appoint junior officers of the corporation.

Admittedly, she did not employ the typical formalities of corporate law. In light of all the circumstances of this case, it is hard to imagine how the plaintiff could emphasize this fact in good faith. By the middle of March, 2008, the plaintiff had long abandoned any involvement in the corporate enterprise, specifically leaving all corporate decisions to Mrs. Silberstein. To now complain that Mrs. Silberstein should not have appointed her husband as a vice-president to facilitate opening a corporate bank account, particularly as he had a significant economic stake in the enterprise, flies in the face of reason. In the end, it does not matter for this court's purposes whether Mr. Silberstein was in fact appointed as a vice-president of Rosie, Inc.

Mrs. Silberstein testified credibly that she opened the new corporate bank account and transferred funds out of the old corporate bank account to avoid the plaintiff getting control of such funds. Given the fact that the plaintiff had ceded all control of the enterprise to Mrs. Silberstein, this was a reasonable move. The plaintiff argues that funds were transferred and the new account opened primarily to stymie the repayment of French Sole settlement funds to the plaintiff. This argument is not supported by the credible evidence. Soon after the $20,000 and $70,000 transfers from the corporate account to Mrs. Silberstein's personal account, Mrs. Silberstein transferred $65,000 from her personal bank account to the new Rosie, Inc. corporate account at [National City Bank].[1] This left $25,000 of the original $90,000 in Mrs. Silberstein's personal account. However, in the ensuing weeks and months, the Silbersteins transferred additional funds to Rosie, Inc., and paid obligations of Rosie, Inc., far exceeding the remaining $25,000. The plaintiff argues that even this temporary retention of funds in Mrs. Silberstein's personal account shows an intent to deprive Rosie, Inc. of the funds. Instead, the credible evidence shows that the Silbersteins used these funds, and tens of thousands of dollars of their own funds, to attempt to keep the store afloat. The evidence does not support a conclusion that Mrs. Silberstein intended to deprive Rosie, Inc. of the funds or that either of the Silbersteins intended to use such funds for their own purposes.

Plaintiff's Exhibit 18 is a copy of a letter from Mrs. Silberstein to the plaintiff. This letter was sent via e-mail soon after receipt of the French Sole settlement proceeds. Mrs. Silberstein's statements in this letter are consistent with her credible testimony during trial. Mrs. Silberstein recounts the plaintiff's withdrawal from involvement in the business in December, leaving Mrs. Silberstein responsible for all decisions. Mrs. Silberstein notes that because the plaintiff pulled her financial support as well, Mr. Silberstein was forced to get more involved in the shoe store. Mrs. Silberstein states that her and the plaintiff's investments will only be returned when the business can pay them back. Mrs. Silberstein

[1] As intended by the Court.

demands that the plaintiff pay half of the start-up expenses. Again, the legal merits of the demand for additional funds are not material to the court's decision. Other than the fact that one corporate American Express bill remained unpaid because the shoe store could not pay it, the plaintiff did not invest any funds in the enterprise after, at the latest, December, 2007. Mrs. Silberstein outlines expenses to date in Exhibit 18. She requests that the plaintiff provide detail as to the plaintiff's investment. All of this is consistent with both defendants' testimony in this case.

The plaintiff suggests that the defendants were spending corporate funds for personal reasons during early 2008. There is no reasonable dispute that the defendants invested tens of thousands of dollars in the shoe store, considerably more than the amount invested by the plaintiff, in the end to their detriment. There is no credible evidence to support the conclusion that any of the expenditures pointed to by the plaintiff are other than actual business expenses.

The shoe store failed and the Silbersteins caused Rosie, Inc. to complete an assignment for the benefit of creditors under Florida law. The plaintiff points to Rosie, Inc. financial records, arguing that the inventory on hand at the time of the assignment had much greater value than the inventory allegedly transferred to the assignee. The court notes from significant experience in this area that the value of inventory on a corporation's books and in its tax returns is often considerably greater than the value obtained in a liquidation. Here, much of the evidence regarding inventory on hand is stale in relation to the date of the assignment for the benefit of creditors, and the testimonial evidence was not helpful to the plaintiff's position. There is no credible evidence to support the plaintiff's suggestion that the defendants absconded with shoe inventory.

The plaintiff complains that the assignment for the benefit of creditors of Rosie, Inc. was undertaken without formal notice to the plaintiff as a shareholder. In light of Mrs. Silberstein's 51% ownership interest in Rosie, Inc., an ultimate controlling interest under Florida law, and the obvious insolvency of the business, and in light of the plaintiff's refusal to take part in the business in any meaningful way, Mrs. Silberstein was left with few options. Completing an assignment for the benefit of creditors was a reasonable course of action under the circumstances. There is no credible evidence that Mrs. Silberstein undertook the assignment for the benefit of creditors for any reason other than a valid business reason. The fact that Mrs. Silberstein did so without prior notice to the plaintiff resulted in no material harm to the plaintiff. The plaintiff participated in the assignment proceeding and received a distribution. Mr. Silberstein's involvement in the assignment for benefit of creditors is not helpful to the plaintiff's arguments here. Nor is it material that Mr. Silberstein knew the obvious, that the plaintiff would recover little or nothing in the liquidation. Again, there is no credible evidence that the assignment case was anything other than a proper liquidation of the corporate enterprise after the business had failed.

Count IV of the complaint seeks denial of discharge under sections 727(a)(2) and 727(a)(3) of the Bankruptcy Code. Section 727(a)(2) addresses pre-petition transfers of property of the debtor and post-petition transfers of property of the estate. The plaintiff points to the pre-petition assignment for the benefit of creditors of Rosie, Inc. as a transfer covered by this provision. But that transfer involved only corporate assets and not assets of either debtor here. There is no evidence to support a conclusion that either debtor transferred, removed, destroyed, mutilated, or concealed their property either before or after the filing of this case. Section 727(a)(3) addresses financial records of the debtor. The complaint here focuses on records of the corporation, Rosie, Inc. There is no evidence that either debtor in this case concealed, destroyed, mutilated, falsified, or failed to preserve records regarding their financial condition or business transactions in violation of section 727(a)(3). All relief under Count IV is denied.

Counts I, II and III state claims under section 523(a) of the Bankruptcy Code. That section provides that certain enumerated debts are not discharged in bankruptcy. In order to obtain a dischargeability determination, the claimant must first establish a debt. In many cases, the debt is established by pre-bankruptcy litigation resulting in a judgment. Sometimes a debt exists as a matter of law. Here, the plaintiff presents various claims under theories of civil theft, embezzlement and fraudulent inducement. Although the 11th Circuit Court of Appeals has yet to rule on the matter, most circuit courts considering the issue have determined that the Bankruptcy Court has the power to liquidate to judgment claims that may also be determined as exceptions to discharge. That is, this court can enter judgment on the underlying claims, thereby establishing a debt, and then determine whether that debt is excepted from discharge under section 523(a).

The complaint here does not ask this court to liquidate the plaintiff's claim, thereby establishing a debt. Counts I, II and III of the complaint request only that this court find that certain as yet unproved debts are not dischargeable. Nevertheless, at trial the plaintiff requested entry of judgment and attempted to prove damages, and the defendants did not object. Thus, the court considers the complaint to be amended consistent with a request for judgment on the claims presented, as well as a finding of dischargeability.

As is evident from the court's findings of fact, the plaintiff failed to meet its burden of proving any debt obligation owing from either defendant to the plaintiff. The evidence shows only that the plaintiff invested money in a corporate enterprise, later withdrew from management of that corporate enterprise, the corporation failed, and the plaintiff lost most of her investment. Even if there was evidence that the defendants were negligent in the operation of the corporate enterprise, and there is no credible evidence to support even that conclusion, such negligence would be insufficient to support the claims made by the plaintiff here.

In Count I of the complaint, the plaintiff states a claim for fraudulent misrepresentation and asks that that claim be excepted from discharge under section 523(a)(2)(A). The plaintiff must establish the traditional elements of common law fraud to prevail in a section 523(a)(2)(A) action. The plaintiff must establish that the debtor made a false representation, known to be false at the time or made with indifference to its truth, with the purpose and intent to deceive the plaintiff, that the plaintiff relied on the misrepresentation, that the plaintiff's reliance was justified, and that the plaintiff thereby sustained a loss. The same elements apply to a fraudulent misrepresentation claim under Florida law.

The plaintiff failed to meet her burden on this claim. As is apparent from the court's findings, the evidence shows no false representation. The plaintiff did not prove by a preponderance of the evidence that either defendant had an intent to deceive the plaintiff at any time relevant to the claims here. All relief under Count I is denied.

In Count II of the complaint plaintiff states that the defendants "embezzled Plaintiff's loans to the Corporation" and "took active steps to prevent Plaintiff from recovering or otherwise accessing her funds after same were loaned to the Corporation." During trial, plaintiff also argued that defendants' actions constituted civil theft under Florida law, and thus larceny within the meaning of section 523(a)(4).

To state a claim for embezzlement, the plaintiff must show that the defendants had lawful possession of plaintiff's property while in a position of trust, that the defendants converted such property to their own use, and that the defendants had the intent to defraud the plaintiff at the time of such conversion. Embezzlement has been defined as the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come. To prove this claim plaintiff must show fraudulent intent.

As is apparent from the court's findings, the plaintiff did not meet her burden in proving embezzlement. To begin with, the funds alleged to have been converted were funds of the corporation and not the plaintiff's funds. The evidence does not support a conclusion that either defendant converted any property whatsoever. Indeed, the defendants themselves lost more than the plaintiff in this failed enterprise. Most importantly, the evidence does not support a finding that either defendant had the requisite intent to defraud the plaintiff. The defendants were only attempting to get the shoe store up and running in an effort to recover their, and the plaintiff's, investment.

To state a claim for civil theft under Florida law, the plaintiff must show that the defendants knowingly obtained or used, or endeavored to obtain or use, property of the plaintiff, with a felonious intent, either temporarily or permanently to deprive the plaintiff of her right to or a benefit from property or to appropriate the property to the defendants' own use or to the use of any person not entitled to the property. Under Florida Statutes section 772.11, the plaintiff must show by clear and convincing evidence that she was injured by violation of the criminal statute. The plaintiff did not meet this burden. The plaintiff invested in a corporate enterprise. She allowed her credit to be used in connection with a credit card by that corporate enterprise. The corporation failed and she did not recover her investment. There is no credible evidence to support a finding that either defendant took any action with the intent to harm the plaintiff.

The plaintiff did not meet her burden in proving any claim that could be excepted from discharge under section 523(a)(4). All relief under Count II is denied.

Count III states a claim under section 523(a)(6) for willful and malicious injury to the plaintiff or property of the plaintiff. In order to present a claim under this provision, the plaintiff must prove a debt arising from an intentional act by the defendants meant to injure the plaintiff or having a substantial likelihood of injuring the plaintiff, that was wrongful and without just cause. This court issued an opinion extensively analyzing the requirements of section 523(a)(6). Drewes v. Levin (In re Levin), 434 B.R. 910 (Bankr. S.D. Fla. 2010). The Levin decision is incorporated in this ruling in its entirety.

Each of the following is stated in the complaint as a basis for relief under section 523(a)(6):

1. The defendants willfully and maliciously induced the plaintiff to make substantial loans to Rosie, Inc.

2. The defendants willfully and maliciously usurped control of the corporation.

3. The defendants willfully and maliciously embezzled plaintiff's loans to Rosie, Inc.

4. The defendants willfully and maliciously effectuated the assignment of the assets of Rosie, Inc. for the benefit of creditors.

The plaintiff alleges that each of these acts was with the deliberate intention to injure the plaintiff and the plaintiff's property.

In light of the relevant legal standards, there is no credible evidence to support any of these claims. The plaintiff willingly invested in Rosie, Inc. and made her credit available for Rosie, Inc. The plaintiff gave up any management control of Rosie, Inc. Such control was not usurped by the defendants. Indeed, without the defendants' efforts there would have been no enterprise at all. There is no evidence that either defendant embezzled any funds of Rosie, Inc., let alone funds of the plaintiff. There is no evidence that the assignment for the benefit of creditors was completed for any reason other than a valid business reason. In the end, the evidence does not support a finding that either defendant had the requisite intent to harm the plaintiff under the standard outlined by this court in the Levin case. All relief under Count III is denied.

The court will enter judgment in favor of the defendants on all counts.

The above constitutes the Court's findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052. The Court will enter a separate final judgment in favor of the defendants pursuant to Fed. R. Bankr. P. 7058.

SO ORDERED.

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Copies Furnished To:

All parties of record by the Clerk.