UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:
DEAN V. ROBBINS, III and
CAMILLE C. ROBBINS,
Debtor(s).

Chapter 7
Case No. 12-10126

BRADCO SUPPLY CORP.,

Plaintiff(s),

vs.

Adv. Pro. No. 13-90013

CAMILLE ROBBINS,
Defendant(s).

APPEARANCES:

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Robert E. Littlefield, Jr., United States Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

The matter before the court is the adversary complaint filed by Bradco Supply Corp. ("Bradco" or "Plaintiff") requesting that a certain debt owed by Camille Robbins ("Defendant") be excepted from discharge pursuant to 11 U.S.C. § 523(a)(4).[1] Defendant denies the allegations of the complaint and asserts four affirmative defenses. The court conducted a trial and accepted post-trial submissions from the parties in support of their positions. For the reasons that follow, the court finds in favor of Defendant and dismisses the complaint. Pursuant to Federal Rule of

[1] All section references refer to title 11 of the United States Code, and all rule references are to the Federal Rules of Bankruptcy Procedure, unless otherwise noted.

Bankruptcy Procedure 7052, this Memorandum-Decision and Order sets forth the court's findings of fact and conclusion of law.

JURISDICTION

The court has jurisdiction over this core matter pursuant to 28 U.S.C. §§ 157(a), (b)(1), (b)(2)(I) and 1334(b).

FACTS

The following facts are derived from the record before the court, including the Joint Stipulation of Facts filed with the parties' pre-trial submissions ("Joint Stip.," ECF No. 22), the testimony of Defendant, who was the only witness called to testify, and the documents submitted into evidence.

1. Defendant testified that she attended Schenectady County Community College for secretarial coursework and studied court reporting. (Trial Tr. 47, Dec. 8, 2013, ECF No. 29.)
2. Defendant was President and majority shareholder of The Universal Group of New York Incorporated ("TUGNY") (Joint Stip. ¶ 1), a company formed in 2008 (Trial Tr. 8). Defendant's husband, Dean Robbins, III, was Vice President (Pl.'s Ex. 1 at 4) and minority shareholder (Trial Tr. 8). TUGNY was a roofing contractor. (Joint Stip. ¶ 2.) Many of its customers were schools or municipalities. (Pl.'s Ex. 1 at 6.)
3. In her capacity as President of TUGNY, Defendant had check signing authority and did sign checks on behalf of TUGNY, including checks to herself. (Joint Stip. ¶ 7.) Even though Defendant had check signing authority, most of TUGNY's checks were signed by her husband. (Trial Tr. 13.) When Defendant was presented with a check to sign, it was not her practice to inquire about the payee, the reason for the

disbursement, or whether there were sufficient corporate funds to cover the check. (Trial Tr. 11, 15.) Defendant assumed if a check were given to her to sign, there would be funds to cover it. (Trial Tr. 15.) Defendant was unable to explain why certain checks were signed by her and others by her husband. (Trial Tr. 13.)

4. TUGNY operated out of Defendant's home. (Trial Tr. 10.) The company had a bookkeeper who picked up the mail, made deposits and maintained the company's records. (Pl.'s Ex. 1 at 7, 11.) Defendant did not know the location of TUGNY's records, but did note that they "had a flood during Hurricane Irene, so a lot of stuff got destroyed because [the company] had [its] business in the basement." (Pl.'s Ex. 1 at 12.)
5. Defendant testified that she was placed in her corporate position to enable TUGNY to apply for "woman owned business" status in New York. (Trial Tr. 8.) Defendant was aware that obtaining "woman owned business" status had the potential to increase business for TUGNY and, hence, income. (Trial Tr. 8, 11.) Other than looking at the New York State website regarding woman owned businesses and reading the booklet the state provided, Defendant did not make any other inquiries about the responsibilities associated with a woman owned business. (Trial Tr. 15.) Ultimately, TUGNY never obtained that status. (Trial Tr. 9.)
6. Defendant never prepared bids for TUGNY (Trial Tr. 47), estimated costs for jobs, placed a purchase order, or decided who or what accounts to pay (Trial Tr. 48). Her husband attended to those matters. (Trial Tr. 47-48.)
7. When asked if she played any other role at TUGNY aside from signing checks, Defendant replied that her husband had her check up on employees if he had to be out

of town. (Trial Tr. 14.) So, occasionally, if employees were in the office, Defendant would inquire about what they were doing. (Trial Tr. 14.) Defendant also testified that she thinks she went on one job visit, but could not recall where or when. (Trial Tr. 14.)

8. Defendant did not make any business plans for TUGNY, nor did she look at the books and records of the company because, according to Defendant, it would have been like "reading Greek." (Trial Tr. 14.)
9. Defendant did not speak with any accountants or lawyers about the financial condition of TUGNY. (Trial Tr. 14.) When asked if she knew that the company was in trouble shortly after it commenced operations, Defendant replied, "Well, I suppose I did." (Trial Tr. 10.)
10. Defendant did not make any inquiries regarding the legal duties of a contractor or subcontractor under New York law. (Trial Tr.16.) Defendant was unaware that her husband had been sued regarding an alleged diversion of trust funds in connection with one of his former companies that filed for bankruptcy relief. (Trial Tr. 11.)
11. Defendant received a weekly salary of about $900.00 from TUGNY (Trial Tr. 12). Defendant received this money from the inception of the company until at least September 2010. (Pl.'s Ex. 3.) At one point, Defendant knew her husband was no longer being paid by TUGNY. (Trial Tr. 11, 13.) Defendant's husband told her this was because they were not being paid by the general contractors. (Trial Tr. 13.) Defendant indicated she was aware of at least two jobs that TUGNY was not paid on, Onondaga Community College and another in the Utica, Syracuse area. (Pl.'s Ex. 1 at 9.) She could not recall others. (Pl.'s Ex 1 at 10.)

12. During all relevant times, Defendant was also a full-time employee of the New York State Legislature. (Joint Stip. ¶ 8.) As an office manager at the Legislature, Defendant handled scheduling and did some letter writing. (Trial Tr. 16.)
13. Between May 2010 and April 2011, Plaintiff sold and delivered roofing and building materials to TUGNY. TUGNY used the purchased materials for improvements to real property. (Joint Stip. ¶ 3.) Plaintiff invoiced TUGNY for the materials sold. (Joint Stip. ¶5.) Defendant personally guaranteed the debt to Plaintiff. (Trial Tr. 17; Pl.'s Ex. 2.) The invoices were not paid in full. (Joint Stip. ¶6.) A balance of $924,328.66 remains due. (Joint Stip. ¶ 6.)
14. Defendant was unaware, and made no inquiry, of what money came into TUGNY and what money was paid out. (Trial Tr. 18.)
15. TUGNY filed a voluntary petition for relief under chapter 11 on November 3, 2011. (Case No. 11-13466, ECF No. 1.) Although, as President of the company, Defendant authorized TUGNY's bankruptcy filing, she indicated she was unsure of the reasons for the filing. (Trial Tr. 17.) TUGNY's chapter 11 case was converted to one under chapter 7 on August 10, 2012. (Case No. 11-13466, ECF No. 63.)
16. Defendant was unaware that TUGNY reported income of millions of dollars for 2009 and 2010 on its bankruptcy petition. (Trial Tr. 17.)
17. Defendant testified that her husband only told her what he thought she needed to know about TUGNY's business. (Trial Tr. 11.) Defendant's focus was on raising her family. (Trial Tr. 18, 46.)

18. Defendant and her husband filed a joint petition for relief under chapter 11 on January 23, 2012. (Case No. 12-10126, ECF No. 1.) The case was subsequently converted to one under chapter 7 on October 25, 2012. (Case No. 12-10126, ECF No. 91.)
19. Plaintiff was listed on schedule F of Defendant's petition as a creditor holding a disputed, unsecured claim of $960,711.06 (the "Debt").
20. Pursuant to § 727(a)(10), Defendant's husband voluntarily waived his discharge under a stipulation entered into with the United States Trustee in September 2012, wherein he consented to a judgment of waiver of discharge being entered. (Case No. 12-10126, ECF Nos. 77, 80.) A judgment denying his discharge was entered on September 26, 2012. (Case No. 12-10126, ECF No. 81.)
21. Plaintiff commenced this proceeding with the filing of a complaint objecting to the dischargeability of the Debt on March 22, 2013.
22. The complaint alleges Defendant committed larceny[2] and violated New York State Lien Law's proscription against diversion of trust funds and, thus, the Debt should be deemed nondischargable under § 523(a)(4).

ARGUMENTS

The suppositions set forth in Plaintiff's complaint focus on Defendant's alleged transgressions of Article 3-A of the New York Lien Law. In its post-trial submissions, Plaintiff asserts that Defendant, as an officer and shareholder of TUGNY, was a fiduciary under Article 3-

[2] As Plaintiff did not pursue its §523(a)(4) cause of action based on larceny at trial or in its post-trial submissions, the court deems this claim abandoned. *Young v. Butler* (*In re Butler*), 308 B.R. 1, 19 (Bankr. S.D.N.Y. 2004) (plaintiff abandoned § 727 actions by failing to address them at the hearings or in her post-trial memorandum); *In re Aid Auto Stores, Inc. v. Pimpinella* (*In re Pimpinella*), 133 B.R. 694, 695 (Bankr. E.D.N.Y. 1991) (plaintiff's failure of to pursue § 727(a)(2) claim at trial and in its post-trial submissions, allows court to deem such claim abandoned).

A of the New York Lien Law and that she committed a defalcation in that capacity. More specifically, Plaintiff contends the monies TUGNY allegedly received on jobs where Plaintiff supplied materials were trust funds and that Plaintiff was one of the trust beneficiaries of those funds. Plaintiff argues Defendant's payment of her own wages and her failure to pay Plaintiff the trust fund monies constitute diversions in violation of the Lien Law. Plaintiff also asserts that TUGNY's failure to maintain appropriate books and records gives rise to a presumption of a diversion of trust funds under the Lien Law. It further posits that Defendant committed the alleged diversions with the intent required under *Bullock v. BankChampaign N.A.*, 133 S. Ct. 1754, 185 L. Ed. 2d 922 (2013) to establish defalcations under § 523(a)(4). In its post-trial memorandum, Plaintiff attempts to expand the parameters of its complaint by alleging Defendant was Plaintiff's fiduciary under "general corporate law." (Pl.'s Post-Trial Submission 3, ECF No. 31.)

In response, Defendant argues that Plaintiff has failed to prove the existence of any fiduciary relationship. She states that the Lien Law does not extend any of the trustee-related responsibilities to the officers or shareholders of a corporate entity. Defendant emphasizes this point by drawing analogies with personal liability issues regarding corporate tax obligations. Defendant argues, in the alternative, that even if there were a fiduciary relationship, there has been no evidence of a trust fund violation. She states there is no evidence that TUGNY received payment for jobs where Plaintiff's supplies were utilized. She further argues that even assuming TUGNY received funds for jobs involving Plaintiff's products, there is no evidence that such funds were used for any purpose other than as permitted by the Lien Law. Moreover, Defendant contends there is no proof that her actions meet the defalcation standard articulated in *Bullock*.

DISCUSSION

Section 523(a) provides, in part, that "[a] discharge under section 727 . . . does not discharge an individual debtor from any debt . . . (4) for fraud or defalcation while acting in a fiduciary capacity . . . or larceny." 11 U.S.C. § 523(a)(4). Plaintiff has the burden of proof by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 287 (1991). Because of the harsh consequences of adverse verdicts, "[e]xceptions to discharge are to be narrowly construed and genuine doubts should be resolved in favor of the debtor." *Denton v. Hyman* (*In re Hyman*), 502 F.3d 61, 66 (2nd Cir. 2007) (citing *In re Renshaw*, 222 F.3d 82, 86 (2nd Cir. 2000)).

The central issue in this case is whether there has been a defalcation by Defendant while acting in a fiduciary capacity. To prevail under § 523(a)(4), Plaintiff first must prove Debtor acted in a fiduciary capacity and then that Debtor committed a defalcation while acting in such capacity. *Andy Warhol Found. for Visual Arts, Inc. v. Hayes* (*In re Hayes*), 183 F.3d 162, 170 (2d Cir. 1999) ("The question of whether a defalcation has occurred is reached only when the threshold determination that the debtor acted in a fiduciary capacity has been made." (citations omitted)). The Second Circuit has established that under §523(a)(4), "fiduciary capacity" encompasses not only those fiduciary relationships that arise in trusts, but also certain non-trust fiduciary relationships. *In re Hayes*, 183 F.3d 162. The Supreme Court has held that in the context of § 523(a)(4), a defalcation "includes a culpable state of mind . . . involving knowledge of, or gross recklessness in respect to, the improper nature of the relevant fiduciary behavior." *Bullock*, 133 S.Ct. at 1757. Thus, for purposes of dischargability, defalcation requires something more than mere negligence. *Id.*

In support of its argument, Plaintiff offers two separate theories under which Defendant could be deemed to have been acting in a "fiduciary capacity" at the time of its alleged

transgressions. First, Plaintiff argues Defendant owed it a fiduciary duty under the principles of general corporate law. Second, Plaintiff alleges Defendant owed it a fiduciary duty under New York Lien Law. The court will discuss each theory in turn below.

Plaintiff's general corporate law argument provides little more than a cursory review of the fiduciary obligations owed by directors and officers to their corporation and the corporation's shareholders, creditors and community. In support of its argument, Plaintiff relies on two bankruptcy cases: *In re Mid-State Raceway, Inc.*, 323 B.R. 40 (Bankr. N.D.N.Y. 2005), and *Kittay v. Atlantic Bank of New York* (*In re Global Service Group, LLC*), 316 B.R. 451 (Bankr. S.D.N.Y. 2004). Neither case involves § 523(a)(4), nor does Plaintiff advance any argument as to why such obligations should be considered under § 523(a)(4). The *Mid-State* case concerns post-petition financing and the business judgment rule. The *Global Service* case involves fraudulent transfers and the accumulation of additional unpayable debt, caused by fiduciaries allowing the debtor-corporation to operate while insolvent. Plaintiff extracts three sound bites between the two cases as its primary argument in support of its corporate law theory of liability. First, that "[c]orporate officers and directors have an obligation [to the corporation and its shareholders] to perform their duties 'in good faith and with that degree of care which an ordinary prudent person in a like position would use under similar circumstances.'" *Mid-State*, 323 B.R. at 57-58 (quoting N.Y. Bus. Corp. L. §§ 715(h) and 717(a)). Second, that "[o]nce insolvency ensues, the fiduciary duties of corporate officers and directors also extend to creditors." *Global Service*, 316 B.R. at 460 (citing *New York Credit Men's Adjustment Bureau v. Weiss*, 305 N.Y. 1, 110 N.E.2d 397, 398 (1953)). Third, that "the debtor's board of directors has 'an obligation to the community of interest that sustained the corporation, to exercise judgment

in an informed, good faith effort to maximize the corporation's long-term wealth creating capacity.'" *Mid-State*, 323 B.R. at 58 (quoting *Global Service*, 316 B.R. at 460).

Plaintiff has offered no factual or legal analysis to demonstrate how these cases, theories and quotes intersect with § 523(a)(4). Moreover, even assuming such obligations arise under § 523(a)(4), each of Plaintiff's three sound bites contain factual deficiencies that prevent the court from finding any of these points in Plaintiff's favor. Therefore, the court will address the inadequacy of each of Plaintiff's three sound bites, which, as mentioned above, constitute Plaintiff's entire argument. As for Plaintiff's first point, upon the court's own research it is clear that the Second Circuit does in fact contemplate fiduciary obligations owed by directors and officers to the corporation under § 523(a)(4). *In re Hayes*, 183 F.3d 162, 168 (citing *Pepper v. Litton*, 308 U.S. 295, 306, 60 S.Ct. 238, 84 L.Ed. 281 (1939); *In re Hammond*, 98 F.2d 703, 705 (2d Cir.1938); *In re Bernard*, 87 F.2d 705, 707 (2d Cir.1937)). In this case, however, the question is not whether Defendant owed the corporation, TUGNY, a fiduciary obligation, but instead whether she owed a fiduciary duty to TUGNY's creditors. It is not self-evident that because the fiduciary obligations owed to the corporation arise under the purview of § 523(a)(4), the same would be the case for the fiduciary obligations owed to creditors, and the court has found no mandatory authority that would extend such obligations. Regarding Plaintiff's second point, Plaintiff fails to provide evidence of the date TUGNY became insolvent. Without knowing that date, the court cannot determine if Defendant owed Plaintiff a fiduciary duty at the time of her alleged breach. Finally, as to Plaintiff's third point, there is nothing in the record indicating that in addition to her position as an officer, Defendant was also a director of

TUGNY.[3] Thus, it is not at all clear whether this last sound bite is relevant to the case *sub judice*. For the reasons stated above, the court cannot find any basis to sustain Plaintiff's § 523(a)(4) complaint based on its general corporate law argument.

Plaintiff's second fiduciary duty argument finds greater support in case law. For this argument, the crucial question is whether the facts establish the existence of an Article 3-A trust relationship between Plaintiff and Defendant. Under Article 3-A of the Lien Law, monies received by a contractor for an improvement to real property constitute assets of a trust for the benefit of, *inter alia*, the materialmen who supplied materials for the improvement. N.Y. Lien Law § § 70, 71. Upon receipt of payment, the contractor becomes a statutory trustee to the trust beneficiaries and must apply the trust assets to pay the beneficiaries before using the assets for other purposes. N.Y. Lien Law § 72. Defendant concedes in her post-trial brief that under New York Lien Law, there are fiduciary ties between her company, TUGNY, and Plaintiff (Def.'s Post-Trial Mem. of Law, unnumbered 3, ECF No. 36). However, she asserts that these fiduciary obligations do not extend to her, in her individual capacity as President of the company, because § 70 of the Lien Law does not extend trustee status to the officers or shareholders of a corporation.

> Section 70 of the Lien Law defines "trusts" and states, in part:
>
> > 1. The funds described in this section . . . received by a contractor under or in connection with a contract for an improvement of real property . . . and any right of action for any such funds due or earned or to become due or earned, shall constitute assets of a trust . . . .
> > . . . .
> >
> > 2. The funds received by a contractor . . . and the rights of action with respect thereto, under or in connection with each contract . . . shall be a separate trust . . . .

[3] The court acknowledges that one could raise a similar argument about the duty officers owe to the community. *See Global Service*, 316 B.R. at 460. However, this was not raised by Plaintiff and, thus, the court will not address it.

> 3. Every such trust shall commence at the time when any asset thereof comes into existence . . . .

N.Y. Lien Law § 70. While a literal reading of the Lien Law creates a fiduciary obligation only in the contractor, courts have interpreted the statute in a manner that allows the fiduciary obligation to extend to directors and officers of a corporate contractor in certain contexts. *See Ippolito v. TJC Dev., LLC*, 83 A.D.3d 57, 920 N.Y.S.2d 108 (N.Y. App. Div. 2d Dep't. 2011); *Fleck v. Perla*, 339 N.Y.S.2d 246 (N.Y. App. Div. 4th Dep't. 1972); *Medco Plumbing, Inc. v. Sparrow Const. Corp.*, 802 N.Y.S.2d 730, 732 (2005) (citing *Edgewater Constr. Co. v. 81 & 3 of Watertown*, 769 N.Y.S.2d 343; *In re Grosso*, 9 B.R. 815 (Bankr. N.D.N.Y. 1981); *Schwadron v. Freund*, 329 N.Y.S.2d 945; *Jasel Bldg. Prods. Corp. v. Polidoro*, 12 B.R. 867, 870–871); *Atlas Bldg. Sys., Inc. v. Rende*, 236 A.D.2d 494, 495, 653 N.Y.S.2d 694, 695 (1997) (citing *South Carolina Steel Corp. v. Miller*, 566 N.Y.S.2d 368; *Fleck*, 339 N.Y.S.2d 246; *Schwadron*, 329 N.Y.S.2d 945; *In re Grosso*, 9 B.R. 815, 824–825). Based on these cases, it is clear that corporations' Article 3-A fiduciary obligations may extend to their directors and officers as a matter of New York law.

Bankruptcy courts have routinely concluded that the fiduciary relationship arising under Article 3-A is of the type contemplated by § 523(a)(4). *In re Barksdale*, 438 B.R. 25, 35 (Bankr. N.D.N.Y. 2010) (citing *In re Phillips*, 217 B.R. 427, 432 (W.D.N.Y. 1998)); *In re Tripp*, 189 B.R. 29, 35 (Bankr. N.D.N.Y. 1995) (citing *In re Grosso*, 9 B.R. 815). It appears, then, that an Article 3-A trust relationship could have existed between Plaintiff and Defendant, in her capacity as an officer of TUGNY. However, the record before the court lacks the evidentiary support necessary to allow a finding that such a relationship did, in fact, exist.

From the four corners of the record, we know that TUGNY purchased supplies from Plaintiff and that those supplies were used on projects involving improvements to real property from May 2010 to April 2011. We also know that TUGNY did not pay Plaintiff in full for the supplies and that a sum certain is still due and owing. To be within the confines of § 523(a)(4), we must be within the fiduciary envelope of the Lien Law. To that end, the Lien Law instructs that each job or contract involving Plaintiff's roofing products constitutes a separate trust. N.Y. Lien Law § 70(2). The corpus of each trust consists of the monies, or right to receive monies, for those specific jobs that utilize Plaintiff's products. N.Y. Lien Law § 70(2). Moreover, the trust only arises at the time when the contractor receives payment for his work, N.Y. Lien Law § 70(2), and, therefore, prior to his receipt of payment for a job, there is no fiduciary relationship between the contractor and his creditors for that job.

In this case, there is nothing in the record establishing the creation of an Article 3-A trust for the benefit of Plaintiff. We do not know if Plaintiff's products were used on every one of TUGNY's jobs, such that Plaintiff was a trust beneficiary of every dollar TUGNY received from every job. Nor is there anything in the record to show how many jobs involved Plaintiff's products. Most importantly, the record is void of any indication that TUGNY even received monies from those jobs where Plaintiff's products were used. Thus, there is no evidence establishing TUGNY held funds as trustee for Plaintiff. While Plaintiff references TUGNY's bankruptcy petition as evidence that it had income of millions of dollars for 2009 and 2010, we do not know the source of that income. In effect, without more factual testimony or exhibits, the court is unable to follow the money. Without that trail, it is not possible to make the findings necessary to answer the "fiduciary capacity" question posed by § 523(a)(4).

Looking to another section of the Lien Law, Plaintiff argues the court need not trace the money because Defendant's diversion can be presumed through TUGNY's failure to maintain proper books and records. Under Article 3-A of the Lien Law, a trustee is obligated to maintain books and records with respect to each trust sufficient to identify: (1) trust assets receivable; (2) trust accounts payable; (3) trust funds received; (4) trust payments made with trust assets; and (5) transfers in repayment of or to secure advances made pursuant to a "Notice of Lending." N.Y. Lien Law § 75(3). "Failure of the trustee to keep the books or records required by [the Lien Law] shall be presumptive evidence that the trustee has applied or consented to the application of trust funds actually received by him . . . for purposes other than a purpose of the trust . . . ." N.Y. Lien Law § 75(4). According to Plaintiff, TUGNY failed to properly maintain its records, so the court may, therefore, presume TUGNY misapplied trust funds. There are two problems with this argument. First, as mentioned above, Plaintiff has failed to show TUGNY actually received payment on any of its jobs that used Plaintiff's products. Without this initial finding, Plaintiff cannot prove this section is even applicable to this case because it cannot show that an Article 3-A trust was ever created for the benefit of Plaintiff. The second issue with this argument is even if the court were to assume TUGNY failed to maintain proper records, the statutory presumption under Lien Law § 75(4) only applies to the corporate-trustee; the presumption does not run to the corporate-trustee's officers and directors. *Bruce Supply Corp. v. Kofsky* (*In re Kofsky*), 351 B.R. 123, 126-27 (Bankr. S.D.N.Y. 2006) (citations omitted).

Because the court cannot find that a fiduciary relationship ever arose between Defendant and Plaintiff, it need not reach the analysis of whether Defendant committed a defalcation, under the standard established in *Bullock*. The resolution of that issue must await another case on another day.

CONCLUSION

For the reasons stated above, Plaintiff's adversary complaint is dismissed in its entirety.

It is SO ORDERED.

Dated: April 21, 2015
Albany, New York

/s/ Robert E. Littlefield, Jr.
Robert E. Littlefield, Jr.
United States Bankruptcy Judge