UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

FRANK J. COSENTINO	CASE NO. 97-62763
Debtor	Chapter 7

JAMES N. CAHILL

Plaintiff

vs. ADV. PRO. NO. 97-70193A

FRANK J. COSENTINO

Defendant

APPEARANCES:

CAHILL & BEEHM Attorneys for Plaintiff 145 Washington Avenue P.O. Box 119 Endicott, New York 13761-0119	JAMES N. CAHILL, ESQ. Of Counsel
MARTIN, MARTIN & WOODARD, LLP Attorneys for Defendant One Lincoln Center Syracuse, New York 13202	DAVID CAPRIOTTI, ESQ. Of Counsel

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Presently before the Court is a motion for summary judgment, filed by Frank J. Cosentino ("Debtor") on March 3, 1998, pursuant to Rule 56 of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), incorporated by reference in Rule 7056 of the Federal Rules of Bankruptcy

Procedure ("Fed.R.Bankr.P."), in the adversary proceeding commenced by James N. Cahill ("Plaintiff") on July 31, 1997.[1]

The Court heard oral argument at its regular motion term on March 17, 1998, in Syracuse, New York ("Hearing") and the parties were given the opportunity to file memoranda of law. The matter was submitted for decision on April 14, 1998.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1), (b)(2)(A) and (I).

FACTS

Southern Tier Management Co., Inc. ("STM") is a New York corporation owned solely by the Plaintiff and Debtor (collectively, "the parties") who are its only officers and directors.[2] The Plaintiff indicates that the parties owned real estate ("Real Estate") in Tompkins County, New York operated as the "Best Western University Inn" motel ("Motel").[3] *See* Complaint at

---

[1]The Court notes that the Debtor failed to submit a statement of material facts as required by 7056-1 of the Local Rules of Bankruptcy Practice for the Northern District of New York.

[2]Plaintiff is the vice-president, secretary and a director of STM and owns a fifty percent interest. Debtor is the president, treasurer and a director of STM and also owns a fifty percent interest.

[3]The Plaintiff states that the Motel is located on land owned by Cornell University and leased to the parties individually. *See* Plaintiff's complaint ("Complaint"), filed August 1, 1997, at ¶ 8. According to the Plaintiff, the parties sub-leased this land to STM. *See id*.

¶ 7; Plaintiff's Affidavit ("Plaintiff's Affidavit"), filed on March 6, 1998, at ¶ 8; Plaintiff's Supplemental Affidavit, filed April 2, 1998, at ¶ 3. According to the Plaintiff, the Savings Bank of Utica ("Bank") held a first mortgage on the Real Estate. *See* Complaint at ¶ 22; Plaintiff's Affidavit at ¶ 8. Between 1987 and December of 1994, STM operated the Motel. In December of 1992, the parties formed a new corporation identified as University Inn of Ithaca, Inc. ("University Inn") to act as a successor to STM in the operation of the Motel. The University Inn is also owned by the parties who act as its directors and officers.[4] On or about January 1, 1994, the University Inn began collecting income from the Motel. The Plaintiff indicates that the parties defaulted on their first mortgage to the Bank who acquired the Real Estate in a foreclosure sale. *See* Complaint at 22; Plaintiff's Affidavit, at ¶ 8-9.

In December of 1995, it is undisputed that the Plaintiff commenced an action against the Debtor in the State of New York Supreme Court, Tompkins County, ("State Court") for conversion. *See* Plaintiff's State Court amended Complaint, attached as Exhibit "D" to Plaintiff's Supplemental Affidavit, filed March 17, 1998.[5] In the State Court, the issue of standing was raised by the Debtor in a motion to dismiss the complaint, and the Honorable Phillip R. Rumsey, Justice of the State Court, denied the motion, concluding that James Cahill had standing to maintain the action pursuant to New York Business Corporation Law § 720

---

[4]The parties each hold a fifty percent interest in the stock of the University Inn. The Plaintiff indicates that although no officers or directors were formally elected or appointed, the debtor acted as the president and treasurer and the plaintiff acted as the vice-president and secretary. *See* Complaint at ¶¶ 11-12.

[5]Specifically, the State Court action is captioned: Southern Tier Management Co., Inc. d/b/a University Inn Corporation and James N. Cahill v. Frank J. Cosentino, Nancy Cosentino and Kenneth P. Lass.

("NYBCL"). *See* Exhibit "B" of Plaintiff's Affidavit.

Debtor filed a voluntary petition ("Petition") pursuant to chapter 7 of the Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code") on May 5, 1997.[6] The Debtor lists the Plaintiff as a creditor holding a fixed and liquidated claim in the amount of $1,000,000 based upon a lawsuit. *See* Schedule F of Debtor's Schedules.

The Plaintiff commenced an adversary proceeding with the filing of a Complaint on July 31, 1997. The Plaintiff alleges that the Debtor, while acting in his fiduciary capacity as the President of STM/ University Inn (collectively, the "Corporations"), committed fraud, defalcation, embezzlement and larceny in the amount of approximately $350,000 from the Corporations. *See* Complaint at ¶¶ 20-21; Plaintiff's Supplemental Affidavit, filed March 17, 1998, at ¶ 3. Additionally, the Plaintiff alleges that the embezzlements by the Debtor caused the parties to default on their first mortgage held by the Bank resulting in the loss of the Real Estate in a foreclosure sale which caused damages to the Plaintiff in the amount of $600,000 for a loss of equity. *See id*. at ¶ 22. The Plaintiff seeks a determination that the debt owed to him by the Debtor is nondischargeable. *See* Complaint at 7. The Debtor filed an answer ("Answer") on September 15, 1997. The Debtor asserts failure to state a cause of action, the doctrine of unclean hands and a lack of standing as affirmative defenses. *See* Answer at ¶¶ 5-7.

ARGUMENTS

[6]The State Court action was stayed by the filing of the Debtor's Petition. *See* 11 U.S.C. § 362(a)(1).

The Debtor contends that in order to prevail under Code § 523(a)(4), the Plaintiff must establish that the alleged debt arose while the Debtor was acting in a fiduciary capacity and without this element, the Complaint fails to state a cause of action. The Debtor points out that the Plaintiff conceded that he brought his action for $350,000 pursuant to NYBCL § 720 allowing him to sue in his individual capacity and/or as a director of the corporation. The Debtor asserts that while as a director he owed a fiduciary duty to the Corporations and its shareholders, he owed no fiduciary duties to a fellow director of the Corporations. Therefore, the Plaintiff argues that the fiduciary element of Code § 523(a)(4) is not satisfied as a matter of law.

The Debtor argues that the Plaintiff's claim in the amount of $600,000 for a loss of equity is not covered by Code § 523(a)(4). The Debtor characterizes the claim for a loss of equity as consequential damages from the alleged embezzlement of $350,000 from the Corporations. The Debtor asserts that he owes no fiduciary duty to the Plaintiff as an individual. The Debtor points out that the Plaintiff did not allege that $600,000 was embezzled or misappropriated by the Debtor. The Debtor further asserts that the Plaintiff does not allege that the Debtor acquired or obtained $600,000 through fraud or defalcation. As such, the Debtor argues that this claim fails to state a cause of action upon which relief can be granted.

The Plaintiff argues that pursuant to NYBCL § 720, he is entitled to bring this proceeding both in his individual capacity and acting for the Corporations. The Plaintiff points out that as President of STM and University Inn, the Debtor owed a fiduciary duty to the Corporations, its officers and shareholders. Additionally, the Plaintiff contends that as partners in the Real Estate, the Debtor owed a fiduciary obligation to the Plaintiff. Therefore, the Plaintiff argues that the

fiduciary element of Code § 523(a)(4) is satisfied. The Plaintiff further asserts that the Complaint alleges facts falling within embezzlement and larceny for which no fiduciary requirement is necessary pursuant to Code § 523(a)(4). The Plaintiff points out that the claim of $600,000 is for a fifty percent loss of equity in the Real Estate due to the foreclosure sale commenced by the Bank. Plaintiff alleges that the Debtor as President of the Corporations had exclusive control over the income and disbursements pertaining to the payments on the first mortgage and that rather than paying for the mortgage, the Debtor stole the money causing a default on the mortgage.

DISCUSSION

Summary judgment is granted pursuant to Fed.R.Civ.P. 56(c), as incorporated by reference in Fed.R.Bankr.P. 7056, when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." *Alexander & Alexander Services, Inc. v. These Certain Underwriters,* 136 F.3d 82, 86 (2d Cir. 1998) (citations omitted). In deciding a motion for summary judgment, a court must initially determine whether there are any issues of material fact to be tried by drawing all inferences and ambiguities in favor of the nonmoving party. *See LaFond v. General Physics Services Corp*., 50 F.3d 165, 171 (2d Cir. 1995). The Debtor seeks summary judgment on the grounds that the Plaintiff has failed to state a cause of action pursuant to Code § 523(a)(4) with respect to his claim for damage to the Corporations in the amount of $350,000 and his claim for individual damage in the amount of

$600,000 for a loss of equity.[7]

A debt is nondischargeable pursuant to Code § 523(a)(4) "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4) (1996). In order to effectuate the fresh start purpose of the Code, exceptions to discharge are narrowly construed in favor of the debtor and against the creditor. *See National Union Fire Ins. Co. v. Bonnanzio* (*In re Bonnanzio*), 91 F.3d 296, 300 (2d Cir. 1996). A creditor must establish by a preponderance of the evidence that his claim is nondischargeable. *See Grogan v. Garner*, 498 U.S. 279, 291, 111 S. Ct. 654, 661, 112 L. Ed. 2d 755 (1991).

The Court will address the Plaintiff's claims separately. While not specified in his Complaint, the Plaintiff indicated that his cause of action in the amount of $350,000 for injury to the Corporations is based upon NYBCL § 720.[8] *See* Plaintiff's Memorandum of Law, filed April 2, 1998, at 2, 6. Pursuant to NYBCL § 720 (McKinney 1986 & Supp. 1998), the Plaintiff

---

[7]The Court notes that the Plaintiff failed to specify a provision of Code § 523(a) in his Complaint with respect to both of his causes of action. Based upon the allegations of defalcation, fraud, embezzlement and larceny in the Complaint, the Court finds that Code § 523(a)(4) is the source of the Plaintiff's claim for $350,000 in damage to the Corporations. It is not as clear from the language of the Complaint which provision of Code § 523(a) the Plaintiff relies on for his claim for a loss of equity in the amount of $600,000. The Debtor maintained in memoranda of law submitted to the Court and at the Hearing that Code § 523(a)(4) was the basis of relief. *See*, *e.g.*, Debtor's Memorandum of Law, filed March 3, 1998, at pt. III. The Plaintiff did not indicate to the Court that the Debtor's interpretation was incorrect. Therefore, the Court finds that Code § 523(a)(4) is also the source of the Plaintiff's claim for $600,000.

[8]Originally, the Debtor sought summary judgment on the Plaintiff's claim for $350,000 on the grounds that the Plaintiff lacked standing and was not a proper party in interest. *See* Affidavit of David M. Capriotti, filed March 3, 1998, at ¶¶ 3, 6-7. It is evident that the Debtor conceded that the Plaintiff has standing and is the proper party in interest pursuant to NYBCL § 720 based upon both oral argument at the Hearing and his memoranda of law submitted to the Court. *See* Debtor's Supplemental Memorandum of Law, filed April 9, 1998, at 6. Although not in dispute, the Court notes that "a properly pleaded claim in federal court need not specify under which law it arises." *Ghebreselassie v. Coleman Sec. Serv.*, 829 F.2d 892, 895 (9th Cir. 1987).

as a corporate officer/director can individually maintain a cause of action against a fellow officer/director, the Debtor, for his alleged misconduct.[9] *See Bertoni v. Catucci*, 117 A.D.2d 892, 894, 498 N.Y.S.2d 903, 904 (N.Y. App. Div. 2d Dept. 1986) (noting that "an officer or director may sue in his own name" pursuant to NYBCL § 720 as his cause of action is original and not derivative). The Debtor argues that there is no fiduciary relationship between the parties and therefore, the Plaintiff has no cause of action pursuant to Code § 523(a)(4) for fraud/defalcation and embezzlement/larceny in the amount of $350,000. While a debt for fraud or defalcation requires a finding that the debtor was acting as a fiduciary, debts for larceny and embezzlement require no fiduciary element. *See OnBank & Trust Co. v. Siddell* (*In re Siddell*), 191 B.R. 544, 551 (Bankr. N.D.N.Y. 1996). Whether there is a fiduciary relationship between the parties has no impact on the Plaintiff's claim for embezzlement and larceny. Therefore, the Debtor's motion for summary judgment for failure to state a claim on the grounds of a lack of the fiduciary element only relates to the portion of the Plaintiff's claim for $350,000 alleging a debt based upon fraud or defalcation, in other words, the "fiduciary debts" of Code § 523(a)(4).[10]

---

[9]An officer or director of a corporation, or a shareholder "under section 626," are among the parties entitled to bring a cause of action against an officer or director of the corporation for misconduct. NYBCL § 720(b) (McKinney 1986). The Court notes that the Plaintiff is also a shareholder of the Corporations. However, a shareholder must assert a cause of action pursuant to NYBCL § 720 against a corporate director/officer in a derivative action under NYBCL § 626 (McKinney 1986). *See id*; *see also Abrams v. Donati,* 66 N.Y.2d 951, 953, 489 N.E.2d 751, 752, 498 N.Y.S.2d 782, 783 (1985) ("[A]llegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually."). Therefore, as a shareholder, the Plaintiff cannot individually sue the Debtor pursuant to NYBCL § 720.

[10]There remains a question of fact as to whether the Debtor took money from the Corporations as the Debtor has denied all facts surrounding the alleged embezzlement and larceny. *See* Answer at ¶ 3.

Federal law defines the meaning of "fiduciary" pursuant to Code § 523(a)(4). *See Lewis v. Scott* (*In re Lewis*), 97 F.3d 1182, 1185 (9th Cir. 1996)*; In re Siddell*, 191 B.R. at 551. The Supreme Court determined that "fiduciary" refers to "technical trusts" as opposed to trusts implied from contract and applies "only to a debt created by a person who was already a fiduciary when the debt was created." *Davis v. Aetna Acceptance Co*., 293 U.S. 328, 333, 55 S. Ct. 151, 153-54, 79 L. Ed. 393 (1934) (citation omitted) (interpreting § 17(a)(4) of the Bankruptcy Act, 11 U.S.C. § 35(4)).[11] Fiduciary pursuant to federal law means a relationship arising from an express or technical trust which does not cover all relationships where a general fiduciary duty of confidence, trust, loyalty and good faith exists. *See In re Lewis*, 97 F.3d at 1185 (9th Cir. 1996)*; Fowler Brothers v. Young* (*In re Young*), 91 F.3d 1367, 1372 (10th Cir. 1996); *see also R.E. America, Inc. v. Garver* (*In re Garver*), 116 F.3d 176, 178 (6th Cir. 1997) (holding that an attorney-client relationship without more does not constitute a "fiduciary" relationship pursuant to Code § 523(a)(4)). *But see Tudor Oaks Ltd. Partnership v. Cochrane* (*In re Cochrane*), 124 F.3d 978, 984 (8th Cir. 1997) (holding that an attorney-client relationship satisfied Code § 523(a)(4)), *cert. denied*, 118 S. Ct. 1044, 140 L. Ed. 2d 109 (1998). "The 'technical' or 'express' trust requirement is not limited to trusts that arise by virtue of a formal trust agreement, but includes relationships in which trust-type obligations are imposed pursuant to statute or common law." *LSP Inv. Partnership v. Bennett* (*In re Bennett*), 989 F.2d 779, 784-85 (5th Cir. 1993); *see also In re Lewis*, 97 F.3d at 1186 (holding that the fiduciary duty among partners to act in good

[11]At the time of the Supreme Court's decision, there existed voluntary trusts or "express" trusts created by contract and constructive or resulting trusts which arise by operation of law. *See Quaif v. Johnson*, 4 F.3d 950, 953 (11th Cir. 1993). Subsequent to *Davis*, statutory trusts came into existence. *See id*. at 953-54.

faith is similar to a trustee's obligations and falls within the meaning of Code § 523(a)(4)); *cf. In re Young*, 91 F.3d at 1371 (holding that a fiduciary relationship means that "the money or property on which the debt at issue was based was entrusted to the debtor"). "State law is important in determining whether or not a trust obligation exists." *In re Bennett*, 989 F.2d at 784.

The Debtor contends that a director owes no fiduciary duty to a fellow director and therefore, there is no fiduciary relationship between the parties. Code § 523(a)(4) requires a fiduciary relationship between the debtor and the creditor. *See Smallwood v. Howell* (*In re Howell*), 178 B.R. 730, 732 (Bankr. W.D. Tenn. 1995). An officer/director asserting a cause of action in his own name against a fellow officer/director pursuant to NYBCL § 720 "does so as a representative of the corporation, and the right of recovery and cause of action belong to the corporation." *Bertoni,* 117 A.D.2d at 894, 498 N.Y.S.2d at 904 ("Any money obtained . . . would belong to the corporation and not to the individual officer or director."); *see also Conant v. Schnall*, 33 A.D.2d 326, 328, 307 N.Y.S.2d 902, 905 (N.Y. App. Div. 3rd Dept. 1970) (noting that an officer/director suing under NYBCL § 720 "effectively possesses the corporate cause of action in his own right"). While the named parties before the Court are the officers/directors of the Corporations, the Plaintiff is essentially seeking to have a debt to the Corporations determined nondischargeable. The situation before the Court is similar to one in which a trustee is the named party seeking relief on behalf of a debtor. As such, the Court needs to determine whether there is a fiduciary relationship between the Corporations and the Debtor, as an officer/director. *See Moreno v. Ashworth* (*In re Moreno*), 892 F.2d 417, 418, 421 (5th Cir. 1990) (involving a chapter 11 trustee seeking relief on behalf of debtor corporation pursuant to Code § 523(a)(4) where the requisite fiduciary relationship was between the corporation and the debtor, an officer).

It is necessary to examine New York law to determine whether it imposes a fiduciary obligation upon corporate officers/directors as the Corporations were established there. *See Miramar Resources, Inc. v. Shultz* (*In re Shultz*), 205 B.R. 952, 958 (Bankr. D.N.M. 1997). In New York, the officers and directors of a corporation owe a fiduciary obligation to the corporation. *See* NYBCL §§ 715, 717 (McKinney 1986 & Supp. 1998). "An officer or director of a corporation stands in a fiduciary relationship to it, and thus must discharge his duties diligently and in good faith." *Plotnik v. Greenberg* (*In re Greenberg*), 206 A.D.2d 963, 964, 614 N.Y.S.2d 825, 826 (N.Y. App. Div. 4th Dept. 1994) (citing NYBCL § 717). "Because the power to manage the affairs of a corporation is vested in the directors . . . they are cast in the fiduciary role of 'guardians of the corporate welfare.'" *Albert v. 28 Williams St. Corp*., 63 N.Y.2d 557, 568, 473 N.E.2d 19, 25, 483 N.Y.S.2d 667, 673 (1984) (citation omitted); *see also* NYBCL § 701 (McKinney 1986). Officers of a corporation have authority and perform duties in the management of the corporation as provided in the by-laws or by the board of directors. *See id*. § 715(g) .[12]

After determining that corporate officers and directors owe a fiduciary duty to the corporation imposed by state law, the question becomes whether that fiduciary obligation rises to the level required by Code § 523(a)(4). *See In re Bennett*, 989 F.2d at 785. In the case *In re Sullivan*, the court examined whether a technical trust existed between the corporate officer and the corporation. *M-R Sullivan Mfg. Co. v. Sullivan* (*In re Sullivan*), 217 B.R. 670, 675 (Bankr.

[12]The Plaintiff alleged that the Debtor committed acts of fraud and defalcation in his fiduciary role as president of the Corporations. The Court was not provided with the by-laws or any resolutions of a board of directors outlining the specific responsibilities of the Debtor as president of the Corporations.

D. Mass. 1998). The court in *Sullivan* found that pursuant to Arizona law, a corporate officer or director owes a fiduciary duty to the corporation. *Id*. This fiduciary duty means that the officer/director must "act only in the corporation's best interests." *Id*. at 675-76. Also, the court in *Sullivan* found that the "duty is in the nature of a trust relationship, (citation omitted) and forbids the doing of any act by which the assets of the corporation are wrongfully diverted from corporate purposes." *Id*. The court in *Sullivan* held that the fiduciary duty a corporate officer/director owed the corporation satisfied Code § 523(a)(4)). *Id; see also In re Moreno*, 892 F.2d at 421 (holding that a corporate officer's fiduciary duty to the corporation satisfied Code § 523(a)(4)); *In re Shultz*, 205 B.R. at 959 (holding that the fiduciary obligation imposed by state law on officers of a corporation to manage the corporation and its assets constitutes the *res* of a technical trust thereby satisfying Code § 523(a)(4)). The Court finds that both New York common law and statutes impose trust obligations upon directors and officers to manage the assets of the corporation and discharge their duties in good faith similar to Arizona law. Therefore, the fiduciary duty a corporate director or officer owes the corporation under New York law satisfies Code § 523(a)(4). However, there remains a question of fact as to whether the Debtor was acting in his capacity as an officer/director as well as whether fraud/defalcation occurred.

Turning to the Plaintiff's second cause of action for $600,000, the Debtor asserts that a claim for a loss of equity does not satisfy any of the elements of Code § 523(a)(4). It is the Debtor's position that he owes no fiduciary duty to the Plaintiff as an individual. In opposition, the Plaintiff alleges that the Debtor owed a fiduciary duty to him as a partner in the Real Estate

which satisfies Code § 523(a)(4).[13] Additionally, the Plaintiff asserts that the Debtor committed defalcation by failing to make the mortgage payments with respect to the Real Estate. *See* Plaintiff's Affidavit, at ¶ 9. As the Plaintiff asserts a "fiduciary debt," it is necessary to first determine whether there is a fiduciary relationship between the parties. It is undisputed that the parties owned the Real Estate operated as the Motel by the Corporations. The Debtor contends that there is no partnership between the parties resulting from the mere ownership of property. The Plaintiff asserts that the parties were partners in the Real Estate and the profit to the partnership was the rent due from the Corporations which was applied to reduce the mortgage. *See* Plaintiff's Supplemental Affidavit, filed April 2, 1998, at ¶ 4. Additionally, the Plaintiff indicates that the parties owed the Real Estate individually for the tax advantage. *See* Plaintiff's Memorandum of Law, filed April 2, 1998, at 4. According to New York law, "[a] partnership is an association of two or more persons to carry on as co-owners a business for profit." New York Partnership Law ("NYPL") § 10(1) (McKinney Supp. 1998). Whether or not a partnership exists is a question of fact. *See Olson, M.D. v. Smithtown Med. Specialists, P.C.*, 197 A.D.2d 564, 565, 602 N.Y.S.2d 649, 650 (N.Y. App. Div. 2d Dept. 1993). The burden of proving the existence of the partnership is on the party asserting its existence. *See ACLI Gov't Sec., Inc*., *v Rhoades*, 813 F. Supp. 255, 256 (S.D.N.Y. 1993) (applying New York law), *aff'd,* 14 F.3d 591 (2d Cir. 1993). In determining whether a partnership exists, courts examine the following factors: (1) sharing of profits/losses; (2) ownership of partnership assets; (3) joint management

[13]The Plaintiff alleges damage to himself individually for a loss of equity in the Real Estate owned by the parties individually. The Real Estate is not an asset of the Corporations and therefore, the relationships of the parties as officers, directors, and shareholders is not relevant to this cause of action.

and control; (4) joint liability to creditors; (5) the intention of the parties; (6) compensation; (7) capital contribution; and (8) loans to the organization. *See Brodsky v. Stadlen*, 138 A.D.2d 662, 663, 526 N.Y.S.2d 478, 479 (N.Y. App. Div. 2d Dept. 1988) ("No one characteristic of a business relationship is determinative in finding the existence of a partnership."); *ACLI*, 813 F. Supp. at 256-57 (noting that the party seeking to establish a partnership must satisfy a sufficient number of these factors). The Plaintiff has alleged two of the factors: that the parties jointly owned the Real Estate and that there was a profit to the partnership in the form of rent. The Court agrees that the mere joint ownership of property does not constitute a partnership. *See* NYPL § 11(2) (McKinney 1988). While the receipt of a profit is prima facie evidence of a partnership, no inference is drawn if the profits were received "as . . . rent to a landlord." *Id*. § 11(4)(b). "Summary judgment must be entered 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Reeves v. Johnson Controls World Services, Inc*., 140 F.3d 144, 149 (2d Cir. 1998) (citation omitted). The Plaintiff has the burden of establishing a partnership and has not set forth sufficient facts to meet that burden as a matter of law. Thus, the Plaintiff has failed to make out a prima facie case as to the existence of a partnership. *See Bereck v. Meyer*, 222 A.D.2d 243, 244, 635 N.Y.S.2d 15, 16 (N.Y. App. Div. 1st Dept. 1995) (noting that summary judgment was appropriate where the party seeking to establish the existence of a partnership failed to show a share in losses, joint control over operations, or a capital contribution). Therefore, the Court finds that there is no partnership as a matter of law.[14] The

[14]Upon a finding that there is no fiduciary relationship between the parties, the Court need not reach the issue of whether there was defalcation.

Court finds that with regard to the Plaintiff's claim for a loss of equity, he has failed to state a cause of action pursuant to Code § 523(a)(4).[15]

Based upon the foregoing, it is hereby,

ORDERED that the Debtor's motion for summary judgment with respect to the Plaintiff's claim for $350,000 is denied; and it is further

ORDERED that the Debtor's motion for summary judgment in regard to the Plaintiff's claim in the amount of $600,000 for a loss of equity is granted, and it is finally

ORDERED that the parties shall complete all discovery by September 11, 1998, any additional motions shall be served and filed so as to be heard not later than October 6,1998 and this adversary proceeding shall be scheduled for trial on October 28, 1998 commencing at 9:00 A.M. at the U.S. Courthouse, 10 Broad Street, Utica, New York.

Dated at Utica, New York

this 31st day of July 1998

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

[15]The Plaintiff has not asserted that the Debtor embezzled or stole $600,000 from the Plaintiff. The Court notes that 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." *Siddell*, 191 B.R. at 552 (citation omitted). Larceny is the "wrongful taking or carrying away of the property of another with intent to convert such property to his use without the consent of the owner." *Id*. Therefore, the Court finds that the Plaintiff's claim of a loss of equity does not fall under the "nonfiduciary debts" of Code § 523(a)(4) .