

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE : BANKRUPTCY NO. 01-12514
: CHAPTER 7
JAMES N. MCCORMICK, DEBTOR :
:
RICHARD F. KLINE, INC., Plaintiff : ADVERSARY NO. 02-1024
VS. : MOTION NO. WGJ-1
JAMES N. MCCORMICK, Defendant :

APPEARANCES:

GARY V. SKIBA, ESQ. AND WAYNE G. JOHNSON, ESQ., ERIE, PA, ATTORNEYS FOR DEBTOR

JOHN L. SPIEGEL, ESQ. AND WILLIAM J. LABOVITZ, ESQ., PITTSBURGH, PA,
ATTORNEYS FOR RICHARD F. KLINE, INC.
UNITED STATES TRUSTEE, PITTSBURGH, PA

BENTZ, WARREN W., U.S. BANKRUPTCY JUDGE

SEPTEMBER 20, 2002

OPINION

Introduction

James N. McCormick ("Debtor") filed a voluntary Petition under Chapter 7 of the Bankruptcy Code on December 21, 2001. The first date fixed for the first meeting of creditors pursuant to 11 U.S.C. §341 was February 20, 2002. Richard F. Kline, Inc. ("Kline") filed the within Complaint to Determine Nondischargeability of Debt and Objection to Discharge under Section 523 ("Complaint"). The Clerk's Office received the Complaint by facsimile transmission on April 22, 2002. It was entered on the docket on the same date. A copy of the Complaint was received in the Clerk's Office by mail on April 23, 2002. Presently before the Court is Debtor's Motion to Dismiss the Complaint. Debtor asserts that the Complaint fails to state a claim upon which relief can be granted and that it was untimely filed.

Timeliness

A Complaint to determine nondischargeability must be filed "no later than 60 days after the first date set for the meeting of creditors under §341(a)." Fed.R.Bankr. 4007(c). In this case, the 60th day fell on Sunday, April 21, 2002. When the last day to perform an act falls on a Saturday or Sunday or legal holiday, "the period runs until the end of the next day which is not one of the aforementioned days." Fed.R.Bankr.P. 9006(a). A filing on Monday, April 22, 2002 would thus be timely.

Debtor's counsel made inquiry to the Clerk's Office as to whether a filing of the Complaint by facsimile was acceptable. After being advised that the procedure was acceptable, Debtor's counsel faxed the Complaint to the Clerk, which was not only delivered into the actual custody of the Clerk, but was also entered on the docket on April 22, 2002.

Fed.R.Bankr.P. 7005(e) authorizes the Clerk to accept papers for filing by electronic means when permitted by local rule. Our practice has been to permit filings by facsimile when necessary, although no formal local rule has been enacted. Debtor directs our attention to McIntosh v. Antonino, 71 F.3d 29, 35 (1st Cir. 1995) where the court determined that "absent a local rule authorizing filing by facsimile, such filings are null." In McIntosh, the facsimile transmission was incomplete and even the partial transmission was not sent until after the close of business on the last day of the deadline. Unlike the situation in McIntosh, a complete transmission of the entire Complaint was received and docketed by our Clerk during normal business hours on April 22, 2002.

Rule 7005(e) goes on to state that "[t]he clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by

these rules or any local rules or practices." In compliance with this directive, the Complaint presented to the Clerk for filing by facsimile transmission was entered on the docket.

We hold that filing takes place when the documents are delivered to the Clerk. See In re Toler, 999 F.2d 140 (6th Cir. 1993); In re Hochhauser III, 2002 WL 1232933 (Bank. WD TN June 5, 2002). The Complaint was timely delivered to the Clerk on April 22, 2002.

Failure to State a Claim

Kline alleges that the Debtor was the principal officer, managing agent, and/or Director of Maranson Development Company, Inc. ("Maranson") and that from 1993 through 1996, Maranson used Kline as a subcontractor on construction projects in the state of Maryland. Kline alleges that the Debtor, as a principal of Maranson, was required to hold monies received for Kline's work in trust for the purpose of paying Kline and that Debtor knowingly and intentionally retained the funds that were to be held in trust and/or diverted funds for other construction projects. Kline alleges that, as a result of Debtor's violation of his fiduciary duty in the capacity as trustee under Maryland Construction Trust Fund Statute, Md. Code Ann., Real Prop. §9-201 et. seq. ("Trust Fund Statute"), it is owed at least \$130,916.12 by the Debtor and such obligation is nondischargeable as Debtor's actions constitute a violation of §523(a)(4) of the Bankruptcy Code.

The Trust Fund Statute provides, in pertinent part:

(a) For the purposes of this subtitle, "managing agent" means an employee of a contractor or subcontractor who is responsible for the direction over or control of money held in trust by the contractor or subcontractor under subsection (b) of this section.

(b) (1) Any moneys paid under a contract by an owner to a contractor, or by the

owner or contractor to a subcontractor for work done or materials furnished, or both, for or about a building by any subcontractor, shall be held in trust by the contractor or subcontractor, as trustee, for those subcontractors who did work or furnished materials, or both, for or about the building, for purposes of paying those subcontractors.

(2) An officer, director, or managing agent of a contractor or subcontractor who has direction over or control of money held in trust by a contractor or subcontractor under paragraph (1) of this subsection is a trustee for the purpose of paying the money to the subcontractors who are entitled to it.

Trust Fund Statute, §9-201.

11 U.S.C. §523(a)(4) excepts from discharge any debt arising out of "fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny." 11 U.S.C. §523(a)(4). To prevail under this exception, plaintiff must show that: (1) debtor was acting in a fiduciary capacity; and (2) debtor committed fraud or defalcation while acting in that capacity. In re Verrone, 277 BR 66, 71 (Bankr. WD PA 2002); In re McDade, ____ BR ____, 2002 WL 1993951 (Bankr. ND IL Aug. 28, 2002).

Section 523(a)(4), as with all other exceptions to discharge, is narrowly construed to further the fundamental purpose of the Bankruptcy Code to grant a debtor a fresh start. In re Delisle, 281 BR 457, 466 (Bankr. D Mass, 2002); In re Verrone, 277 BR 66 (Bankr. WD PA 2002) citing In re Cohn, 54 F3d 1108, 1113 (3rd Cir. 1995).

Federal law controls who is a fiduciary for purposes of §523(a)(4). In re Delisle, 281 BR at 466; In re Baird, 114 BR 198, 202 (9th Cir. BAP 1990). To be a fiduciary for dischargeability purposes, the debtor must be a trustee under an "express" or "technical" trust. In re Runge, 226 BR 298, 304 (Bankr. D NH 1998) citing Davis v. Aetna Acceptance Co., 293 US 328, 333 (1934). Although the concept of "fiduciary" in the dischargeability context is a narrowly defined question of federal law, courts look to state law to determine whether the requisite trust

relationship exists. In re Baird at 202; In re Verrone at 72.

A technical trust is "a trust that is imposed by law and may arise either by statute or common law." In re Runge, 226 B.R. at 305. If a state statute is at issue, the statute "must define the trust res, spell out the trustee's fiduciary duties and impose a trust prior to and without reference to the wrong which created the debt." Santa v. Lebner (In re Lebner), 197 B.R. 180, 190 (Bankr. D. Mass. 1996) (citation omitted). In determining whether a technical trust relationship exists, courts have consistently considered state law relevant in determining whether a debtor was acting as a fiduciary under the Bankruptcy Code. "Statutorily created 'trusts' create fiduciary duties that are dependent upon the relationship between the parties, but are not created by agreement of the parties nor created ex post facto as a remedial measure to right a wrong." Brixius v. Christian (In re Christian), 172 B.R. 490, 495 (Bankr. D. Mass. 1994) (abrogated on other grounds) (citations omitted).

In re Delisle, 281 BR at 466.

The Trust Fund Statute creates a trust in favor of those subcontractors who furnish labor and materials for which payment is made to an owner or contractor for purposes of paying those subcontractors. In re McGee, 258 BR 139, 142 (Bankr. D. MD 2001). Section 9-201(b)(2) of the Trust Fund Statute expressly provides that "an officer, director, or managing agent. . . is a trustee for the purpose of paying the money to the subcontractors who are entitled to it."

Maryland bankruptcy cases are split on the issue of whether the Trust Fund Statute is sufficient to create a fiduciary relationship within the meaning of §523(a)(4). One line of cases expressly holds that the Trust Fund Statute creates an express trust. In re Marino, 115 BR 863 (Bankr. D MD 1990); see also In re Piercy, 140 BR 108 (Bankr. D MD 1992). In the case of In re Holmes, the Trust Fund Statute was held to be implied in law and hence did not fulfill the requisite "technical" or "express" trust requirement. In re Holmes, 117 BR 848 (Bankr. D MD 1990).

Many courts have concluded that statutes like the Trust Fund Statute create a fiduciary duty on those to whom the trust duties are assigned. In re Kriegesh, 275 BR 838 (ED MI 2002);

In re Baird, 114 BR 198 (9th Civ. BAP 1990); In re Chambers, 226 BR 915 (Bankr. ND OK 1998); In re Marino, 115 BR 863 (Bankr. D MD 1990). We find that the Trust Fund Statute is sufficient to create a fiduciary duty.

The remaining issue is whether the Debtor acted in a manner that constitutes a defalcation for the purposes of §523(a)(4).

"Defalcation is 'the failure to meet an obligation' or 'a nonfraudulent default.'" In re Uwimana, 274 F.3d 806, 811 (4th Cir. 2001) quoting Black's Law Dictionary, 427 (7th ed. 1999). "To be defalcation for purposes of 11 U.S.C. §523(a)(4), an act need not 'rise to the level of . . . embezzlement' or even 'misappropriation.'" Uwimana at 811 quoting In re Ansari, 113 F.3d 17, 20 (4th Cir. 1997). See also Central Hanover Bank & Trust Co. v. Herbst, 93 F.2d 510, 512 (2nd Cir. 1937); In re Specialty Plastics, Inc., 113 BR 915, 923 (Bankr. WD PA 1990), vacated in part on other grounds, 127 BR 945 (WD PA 1991) aff'd, 952 F.2d 1391 (3rd Cir. 1991). Thus, negligence or even an innocent mistake which results in misappropriation or failure to account is sufficient." Uwimana at 811.

Thus, by alleging that Debtor has breached his fiduciary duty by failing to maintain in trust payments due Kline and/or diverting such funds to other construction projects, Kline has alleged a viable claim for relief.

Debtor's Motion to Dismiss will be refused. An appropriate Order will be entered.

_____/s/_____
Warren W. Bentz
United States Bankruptcy Judge

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ORDER

This 20 day of September, 2002, in accordance with the accompanying Order, it shall be, and hereby is, ORDERED as follows:

1. The Motion to Dismiss filed by Debtor at Motion No. WGJ-1 is REFUSED.
2. The Motion For Leave to Amend Complaint filed by Richard F. Kline, Inc. is GRANTED.
3. The Amended Complaint shall be filed within 10 days.
4. Debtor shall file an Answer to the Amended Complaint within 20 days after receipt of service.
5. Discovery is open.

6. A status conference to consider a schedule for dispositive motions and/or trial is fixed for , November 18, 2002 at 10:20 a.m. in the Bankruptcy Courtroom, 717 State Street, 7th Floor, Erie, Pennsylvania. Only 10 minutes have been reserved on the Court's calendar; no witnesses will be heard. All parties may participate by telephone pursuant to the attached instructions.

_____/s/_____
Warren W. Bentz
United States Bankruptcy Judge

c: Gary V. Skiba, Esq.
Wayne G. Johnson, Esq.
John L. Spiegel, Esq.
William J. Labovitz, Esq.
U.S. Trustee