

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ENTERED ON
OCT 18 2004
DOCKET

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|--------------------------|---|----------------------|
| IN THE MATTER OF: | : | CASE NUMBERS |
| | : | |
| SEEMA KAUSER AKHAWALA, | : | BANKRUPTCY CASE |
| | : | NO. 03-83502-WHD |
| Debtor. | : | |
| _____ | : | |
| | : | |
| GEORGIA LOTTERY | : | |
| CORPORATION, | : | |
| | : | |
| Plaintiff, | : | ADVERSARY PROCEEDING |
| | : | NO. 04-6079 |
| v. | : | |
| | : | |
| SEEMA KAUSER AKHAWALA, | : | |
| | : | IN PROCEEDINGS UNDER |
| | : | CHAPTER 7 OF THE |
| Defendant. | : | BANKRUPTCY CODE |

ORDER

This matter comes before the Court on the “Motion for Summary Judgment” (hereinafter the “Motion”) filed by Georgia Lottery Corporation (hereinafter the “Plaintiff”). The Motion arises in connection with an adversary proceeding initiated by the Plaintiff to determine the dischargeability of a debt owed by Seema Kauser Akhawala (hereinafter the “Defendant”). The Defendant has not responded to the Motion. Accordingly, the Court will deem the Motion unopposed. *See* BLR 7007-1(b). This matter is a core proceeding, *see* 28 U.S.C. § 157(b)(2)(I), and will be disposed of in accordance with the following reasoning.

FINDINGS OF FACT¹

1. On or about January 20, 2001, and on or about September 15, 2001, Good Luck Enterprises, Inc. (hereinafter “Good Luck”) and the Plaintiff entered into contracts (hereinafter the “Retailer Contracts”) through which Good Luck agreed to act as a lottery retailer. Plaintiff’s Statement of Uncontested Facts, ¶ 1.
2. The Defendant served as an officer of Good Luck at the time Good Luck applied to become a lottery retailer, at the time Good Luck entered into the Retailer Contracts, and at the time Good Luck activated and sold lottery tickets under the Retailer Contracts. *Id.* at ¶ 2.
3. The Defendant signed the Retailer Contracts in her capacity as the President of Good Luck. *Id.* at ¶ 3.
4. The Defendant failed to deposit into a segregated account the proceeds from the sale of lottery tickets within 24 hours of their receipt. *Id.* at ¶ 9.
5. During the accounting weeks ending April 19, 2003, October 18, 2003, October 25, 2003, November 1, 2003, and November 8, 2003, Good Luck activated and sold Georgia lottery tickets at a store known as Texaco Food Mart, but failed to deposit all of the proceeds of the sales into a segregated account, or to remit these proceeds to the Plaintiff. *Id.* at ¶ 10.
6. During the accounting weeks ending June 7, 2003, October 18, 2003, and October 25,

¹ The Defendant failed to respond to the Motion and failed to controvert the Plaintiff’s Statement of Undisputed Facts. Accordingly, the facts are deemed admitted. *See* BLR 7056-1(b)(2).

2003, Good Luck activated and sold Georgia lottery tickets at a store known as Citgo Food Mart, but failed to deposit all of the proceeds of the sales into a segregated account, or to remit these proceeds to the Plaintiff. *Id.* at ¶ 11.

7. The Defendant used proceeds from the sale of Georgia lottery tickets to fund the general business obligations of Good Luck. *Id.* at ¶ 12.

8. The total amount of proceeds from the sale of Georgia lottery tickets that the Defendant and Good Luck failed to remit to the Plaintiff is \$65,308.58. *Id.* at ¶ 13.

CONCLUSIONS OF LAW

A. Summary Judgment

In accordance with Federal Rule of Civil Procedure 56 (applicable to bankruptcy under FED. R. BANKR. P. 7056), this Court will grant summary judgment only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). A fact is material if it might affect the outcome of a proceeding under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The moving party has the burden of establishing the right of summary judgment, *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991); *Clark v. Union Mut. Life Ins. Co.*, 692 F.2d 1370, 1372 (11th Cir. 1982), and the Court will read the opposing party's pleadings liberally. *Anderson*, 477 U.S. at 249.

In determining whether a genuine issue of material fact exists, the Court must view the evidence in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Rosen v. Biscayne Yacht & Country Club, Inc.*, 766 F.2d 482, 484 (11th Cir. 1985). The moving party must identify those evidentiary materials listed in Rule 56(c) that establish the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *see also* FED. R. CIV. P. 56(e). Once the moving party makes a prima facie showing that it is entitled to judgment as a matter of law, the nonmoving party must go beyond the pleadings and demonstrate that there is a material issue of fact which precludes summary judgment. *Celotex*, 477 U.S. at 324; *Martin v. Commercial Union Ins. Co.*, 935 F.2d 235, 238 (11th Cir. 1991).

B. Standards of § 523(a)(4)

Section 523(a)(4) provides in pertinent part, a “discharge under section 727 . . . of this title does not discharge an individual from any debt . . . for fraud or defalcation while acting in a fiduciary capacity.” 11 U.S.C. § 523(a)(4). Thus, to establish nondischargeability pursuant to § 523(a)(4), the Court must find that (1) the Defendant acted as a fiduciary; and (2) that the debt at issue arose from the Defendant’s commission of an act of fraud or defalcation during the performance of her fiduciary duties.

“The Supreme Court has consistently interpreted ‘fiduciary’ in . . . a narrow and limited fashion.” *Blashke v. Standard (In re Standard)*, 123 B.R. 444, 452 (Bankr. N.D. Ga.

1991) (Bihary, J.). “Courts interpreting ‘fiduciary’ in § 523(a)(4) of the Bankruptcy Code have continued to hold that the trust on which the fiduciary relationship relies must be an express or technical trust which existed prior to the act creating the debt, not a trust *ex maleficio*, that may be imposed because of the very act of wrongdoing out of which the contested debt arose.” *Id.* at 453 (citing *Kraemer v. Crook*, 94 B.R. 207, 208 (N.D. Ga.1988), *aff’d*, 873 F.2d 1406 (11th Cir.1989)). Such a trust can be created by statute. *Id.*

In this case, Section 50-27-21(a) of the Official Code of Georgia² creates a statutory trust in favor of the Plaintiff over the proceeds from the sale of lottery tickets. *See In re Suwannee Swifty Stores, Inc.*, 266 B.R. 544 (Bankr. M.D. Ga. 2001). This statutory trust is an express trust and therefore imposes a fiduciary duty upon the retailer and its officers within the meaning of § 523(a)(4). *See In re Daniel*, 225 B.R. 249 (Bankr. N.D. Ga. 1998 (Murphy, J.). “Failure to remit lottery proceeds” constitutes a defalcation while performing this fiduciary duty. *In re Thompson*, 296 B.R. 563 (Bankr. M.D. Ga. 2003).

² O.C.G.A. § 50-27-21(a) provides:

All proceeds from the sale of the lottery tickets or shares shall constitute a trust fund until paid to the corporation either directly or through the corporation's authorized collection representative. A lottery retailer and officers of a lottery retailer's business shall have a fiduciary duty to preserve and account for lottery proceeds and lottery retailers shall be personally liable for all proceeds. Proceeds shall include unsold instant tickets received by a lottery retailer and cash proceeds of the sale of any lottery products, net of allowable sales commissions and credit for lottery prizes sold to or paid to winners by lottery retailers. Sales proceeds and unused instant tickets shall be delivered to the corporation or its authorized collection representative upon demand.

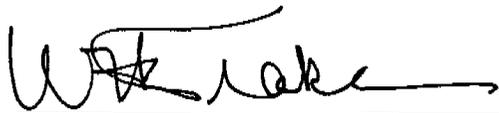
By virtue of her failure to controvert the Plaintiff's Statement of Undisputed Facts, the Defendant has admitted that she acted as an officer of a lottery retailer, that she sold and activated Georgia lottery tickets, and that she failed to remit all of the proceeds from the sale of those tickets to the Plaintiff. These admissions satisfy all of the elements necessary to establish that the debt owed by the Defendant to the Plaintiff is nondischargeable pursuant to § 523(a)(4). Accordingly, no questions of material fact remain, and it is clear that the Plaintiff is entitled to judgment as a matter of law.

CONCLUSION

For the above-stated reasons, the Court concludes that the Plaintiff's Motion for Summary Judgment must be, and hereby is, **GRANTED**. The debt owed to the Plaintiff by the Defendant is **NONDISCHARGEABLE** pursuant to § 523(a)(4). A separate judgment will be entered in favor of the Plaintiff.

IT IS SO ORDERED.

At Atlanta, Georgia, this 18 day of October 2004.



W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE