

MAR 26 2008

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CHAPTER 7
)	
MICHAEL L. DAVENPORT,)	
DEBORAH N. DAVENPORT,)	CASE NO. 05-76748-MHM
)	
Debtors.)	
)	
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NATIONAL AIR TRAFFIC)	
CONTROLLERS ASSOCIATION,)	
BARRY BARBER,)	
DANIEL J. ELLENBERGER,)	
JIMMY DALE WRIGHT, JR.,)	
MATTHEW MURAWSKI,)	
MARK BERG, ROGER MATHIEU,)	
and THOMAS HAYS,)	
)	
Plaintiffs,)	
v.)	ADVERSARY PROCEEDING
)	NO. 05-9179
MICHAEL L. DAVENPORT,)	
DEBORAH N. DAVENPORT,)	
)	
Defendants.)	

ORDER DENYING MOTION TO ALTER OR AMEND

This adversary proceeding is before the court on Debtors' motion to alter or amend the order entered September 6, 2007 granting partial summary judgment to Plaintiffs (the "Order") (the "Motion"). Debtors challenge only one of the conclusions in the Order: "The amount seized [by the IRS] from the Dental Plan in the amount of

\$54,632.20 is nondischargeable under §523(a)(4) as to both Debtors.” Plaintiffs filed a brief in opposition to Debtors’ Motion.

STATEMENT OF FACTS

Debtors’ business, Dental Plans, Inc. (“DPI”), was engaged in the insurance brokerage business. Debtor Deborah Davenport was the sole shareholder, director, and president of DPI. Debtor Michael Davenport was DPI’s vice president and treasurer. Both Debtors were insurance agents licensed by the State of Georgia.

Plaintiff, the National Air Traffic Controllers Association (“NATCA”), is a labor union that sponsors employee benefit plans qualified under Title 29, Chapter 18, the Employee Retirement Income Security Act, 29 U.S.C. §1001 *et seq.* (“ERISA”). From 2001 to 2004, DPI provided administrative services for two ERISA-qualified employee benefit plans established for the benefit of members of NATCA, one of which was the self-funded dental benefits plan (the “Dental Plan”) relevant to Debtors’ Motion.

NATCA members who chose to participate in the Dental Plan had funds deducted from their salary and forwarded to DPI. Almost from the beginning, the Dental Plan was underfunded. Fewer than expected NATCA members chose to participate in the Dental Plan, resulting in cash flow problems that worsened as time passed with membership in the Dental Plan remaining less than optimal. Debtors show that they attempted to alleviate some of the cash flow problems in the Dental Plan by contributing funds from other sources to the Dental Plan, including some of their own commissions (\$69,415.77) and funds from a line of credit (\$10,000).

On January 5, 2004, the Internal Revenue Service ("IRS") levied on the Dental Plan's accounts and seized \$54,632.20. IRS applied the seized funds to DPI's payroll withholding tax debt, which relieved (in the amount of the funds seized) Debtors' personal liability for that tax debt.¹ Debtors presented no evidence or explanation for their failure to achieve a return of all of the funds seized by the IRS. The Dental Plan terminated and has no assets. More than \$500,000 in dental claims remain unpaid.

The Order concluded that when Debtors allowed the IRS to seize funds from the Dental Plan account, because that seizure conferred a benefit to Debtors, *i.e.*, relief from their personal liability for the unpaid payroll withholding taxes, the transfer of funds to the IRS constituted defalcation.

The Order contains a footnote regarding funds that may have been contributed by Debtors to the Dental Plan:

Debtors alleged that Michael Davenport borrowed funds to replace part or all of the funds seized by the IRS. The extent to which Debtors, from their personal resources, replaced the funds seized by the IRS would seem to negate the assertion of defalcation, but Debtors have failed to allege a specific amount that was replaced, or to present evidence of such a replacement.

In the Motion, Debtors' failure to present evidence that any (or all) specific funds were replaced by Debtors *after* the IRS seizure continues. Instead, Debtors argue that, because money is fungible, it should not matter *when* funds were contributed by

¹ Under the Internal Revenue Code, as "responsible persons," Debtors were personally liable for DPI's payroll withholding tax obligations.

Debtors, or for what purpose, but rather the principles of setoff should be applied to the amount of the IRS seizure of the Dental Plan funds.

Principles of setoff are based on "the common sense view that a [person] should not be compelled to pay one moment what he will be entitled to recover back the next," William H. Loyd, "The Development of Setoff," 64 U.PENN.L.REV. 541 (April 1916). The principles of setoff apply to mutual debts. Setoff is not simply a process of netting out payments in and payments out. If that were true, if Dental Plan participants had paid premiums in excess of the amount of claims against the Plan, then any of that excess could have been used by Debtor in contravention of their fiduciary duties under ERISA without defalcation and with no consequence. Fundamentally, to be entitled to setoff, both sides must be *entitled to recover* their mutual debts. Debtors have no right to recover from Plaintiffs any amount they voluntarily contributed to the Dental Plan, especially when such contributions were made *before* the IRS seizure occurred and with no specific intention to replace the funds seized by the IRS. Therefore, Debtors' motion to alter or amend is without merit. Accordingly, it is hereby

ORDERED that Debtors' motion to alter or amend is *denied*.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Plaintiffs' attorney, Defendants' attorney, and the Chapter 7 Trustee.

IT IS SO ORDERED, this the 25th day of March, 2008.



MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE