



IT IS ORDERED as set forth below:

Date: December 29, 2009

Mary Grace Diehl

**Mary Grace Diehl
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

In re:	:	CHAPTER 7
	:	
	:	BANKRUPTCY CASE NUMBER
STEVEN MARK HORNYAK,	:	08-70254-MGD
	:	
Debtor.	:	JUDGE DIEHL
	:	
ELLIS ASTIN GRADING CO., INC.,	:	
	:	
Plaintiff,	:	
v.	:	ADVERSARY CASE NUMBER
	:	08-06495-MGD
STEVEN MARK HORNYAK,	:	
	:	
Defendant.	:	

**ORDER DENYING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT AND
GRANTING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

This matter is before the Court on cross motions for summary judgment. (Docket Nos. 24, 25, 29 & 30). This is a core proceeding under 28 U.S.C. § 157(b)(2), and jurisdiction and venue are proper. For the reasons set forth below, Plaintiff’s Motion for Summary Judgment is **DENIED**, and

Defendant's Motion for Summary Judgment is **GRANTED**.

Ellis Astin Grading Co., Inc. ("Plaintiff") commenced this adversary proceeding by filing a three-count complaint seeking to determine dischargeability of debt under 11 U.S.C. § 523(a)(4) and objecting to discharge pursuant to 11 U.S.C. §§ 727(a)(4) and (a)(5). Counts II & III of the complaint, the objections to discharge, were dismissed on May 13, 2009, following the parties' consensual motion and notice as required by Rule 7041 of the Federal Rules of Bankruptcy Procedure. (Docket No. 22). A joint stipulation of Statement of Material Facts as to Which There is No Genuine Issue in Dispute was filed on April 13, 2009. (Docket No. 19). Plaintiff filed its Motion for Summary Judgment and brief in support thereof on June 30, 2009, and Defendant filed a response to Plaintiff's Motion for Summary Judgment and his own Motion for Summary Judgment with brief in support on August 28, 2009.¹

In accordance with Rule 56 of the Federal Rules of Civil Procedure, applicable to this Court pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure, the 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). "Material facts" are those which might affect the outcome of a proceeding under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Further, a dispute of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* Lastly, 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).

¹ A consent order extended the deadline for defendant's response to August 28, 2009. (Docket No. 27).

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). It remains the burden of the moving party to establish the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

I. FACTS

The material facts are undisputed in this matter; therefore, summary judgment is appropriate. Steven Mark Hornyak (“Defendant”) served as a co-owner and co-manager in Riverbrooke Capital Partners, LLC (“RCP”). RCP was in the business of real estate development. RCP created single purpose LLCs for each of its development projects. The projects at issue are Majors Roads LLC (“Majors Road”) and Oconee Parkside Development Partners, LLC (“Oconee”).

A. Majors Road Project

Majors Road entered into a loan agreement with Gainesville Bank & Trust (“GB&T”) in April 2006 for the acquisition and development of the project. Majors Road had the capacity to borrow up to \$12,108,000.00 under the loan agreement (“Majors Road Loan”). RCP acted as a centralized management for Majors Road, processing credit draws and payments for each LLC. Defendant and RCP co-owner, George F. Chandler (“Chandler”), provided personal guarantees on the Majors Road Loan.

The terms of the Majors Road Loan controlled how the funds were to be distributed. Article VI provided that Majors Road “covenanted and agreed with Lender to use the proceeds of the Loan pursuant to the Loan Documents solely for the purpose of paying the cost of the Development and such incidental costs relative to the Development as many be approved from time to time in writing

by Lender; and in no event to use any of the proceeds of the Loan for person, family or household purposes.” Article VII provides for the method of disbursements under the Majors Road Loan. Article VII appears under the heading “Methods and Conditions of Disbursement of Loan Proceeds” and is titled “Deposit of Funds Advanced.” Article VII states: “Borrower will immediately Deposit all loan advanced by Lender in a separate and exclusive account, to be withdrawn and used solely for the payment of bills and labor and materials used in the development of the Property, and will promptly furnish Lender with evidence thereof.”

RCP hired Plaintiff to perform grading work on the Majors Road Project. Plaintiff’s work qualified as a cost of development under Article VI. Plaintiff submitted pay applications to RCP for work performed on the Majors Road Project during the period of November 2006 to March 2007. The total amount due to Plaintiff for work on the Majors Road Project was \$549,473.22. RCP presented Plaintiff’s pay applications and invoices to obtain construction draws from GB&T. RCP received funds in the amount of \$121,299.42 from GB&T based on Plaintiff’s payment applications that were not subsequently paid to Plaintiff. The money obtained by RCP from GB&T was used to pay other business debts of RCP and its affiliated business entities. The decision not to pay Plaintiff the full amount of its pay applications was made exclusively by Defendant Hornyak and Chandler. Plaintiff filed a materialman’s lien on the Majors Road Project on February 22, 2007, which was subsequently amended on March 22, 2007.

B. Oconee Project

Oconee entered into a loan agreement with United Community Bank (“UCB”) on July 2006. Under the loan agreement, Oconee could borrow over \$16 million for the acquisition and development of the Oconee Project. Defendant and Chandler, personally guaranteed the loan.

Covenants under the loan agreement included the following in Article 3.03: “Borrower will use the proceeds described on the Cost Breakdown and such incidental costs relative to such construction as may be approved from time to time in writing by Lender. In no event shall Borrower use any of the proceeds of the Loan for personal, family or household purposes.” The method of disbursement under the loan agreement was prescribed by Article 5.03: “Borrower will immediately deposit all proceeds of the Development Loan advanced by Lender to Borrower in a separate and exclusive account at the main office of Lender, and all such proceeds shall be withdrawn and used solely for the purposes specified in the Draw Request, and Borrower shall upon Lender’s request promptly furnish Lender with evidence of such deposit and use.”

RCP hired Plaintiff to perform grading work at the Oconee Project. Plaintiff’s work was included in the Cost Breakdown under Article 3.03 of the loan agreement. Plaintiff submitted pay applications to RCP during the period from December 2006 to March 2007. Plaintiff’s work on the Oconee Project totaled \$2,062,170.69. RCP presented Plaintiff’s pay applications and invoices to UCB to obtain the construction draws. RCP received \$1,717,041.07 from UCB based on Plaintiff’s pay applications that was not paid to Plaintiff. The funds received by RCP and not paid over to Plaintiff were used to pay other business debts owed by RCP and its affiliated business entities. The decision not to pay Plaintiff the full amount of its pay applications was made exclusively by Defendant and Chandler. Plaintiff filed a materialman’s lien on the Oconee Project on February 13, 2007, which was subsequently amended on March 8, 2007.

II. DISCHARGEABILITY PURSUANT TO 11 U.S.C. § 523(a)(4)

A central purpose of the Bankruptcy Code is to provide an opportunity for certain debtors to discharge their debts and enjoy a fresh start. *See Grogan v. Garner*, 498 U.S. 279, 284-85 (1991);

Quaif v. Johnson, 4 F.3d 950, 952 (11th Cir. 1993). Congress created some exclusions to the general policy of discharging debts. Section 523(a)(4) of the Bankruptcy Code provides several of these exceptions. It states that a discharge under § 727 does not discharge an individual debtor from any debt “for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.” 11 U.S.C. § 523(a)(4). Here, the issue is limited to whether the debt owing to Plaintiff was a debt for defalcation while acting in a fiduciary capacity. Plaintiff, the creditor bears the burden of proving nondischargeability by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. at 288.

In assessing § 523(a)(4) claims, “the Court must first determine whether a fiduciary relationship exists, and then whether a defalcation occurred in the course of that fiduciary capacity.” *In re Jenkins*, 110 B.R. 74, 76 (Bankr. M.D. Fla. 1990) (internal quotations and citations omitted).

The term “fiduciary” is not to be construed expansively. *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 333 (1934); *Guerra v. Fernandez-Rocha (In re Fernandez-Rocha)*, 451 F.3d 813, 816 (11th Cir. 2006). The question of who qualifies as a fiduciary for purposes of § 523(a)(4) is one of federal law. *In re Khalif*, 308 B.R. 614, 622 (Bankr. N.D. Ga. 2003). Within the context of § 523(a)(4), the trust on which the fiduciary relationship relies must be an express or technical trust. *In re Standard*, 123 B.R. 444, 453 (Bankr. N.D. Ga. 1991). To establish a technical trust, the following requirements must be satisfied.² “First, a technical trust relationship must exist prior to the act creating the debt and without reference to that act.” *Eavenson v. Raimey*, 243 B.R. 160, 165 (N.D. Ga. 1999). “Second, the fiduciary duties must be specifically set forth so that a trust relationship is expressly and clearly imposed.” *Id.*

² Although it remains an open issues, “some cases have also found that a separate identifiable res is essential to a trust.” *Eavenson v. Raimey*, 243 B.R. 160, 165 (N.D. Ga. 1999).

Plaintiff asserts that a technical trust was created for its benefit by the loan agreements between GB&T and Majors Road and between UCB and Oconee. Plaintiff relies on the language of the loan agreements to support its position that a technical trust was applicable to funds obtained by Majors Road and Oconee as a result of Plaintiff's pay application. Plaintiff further asserts that this purported technical trust creates a fiduciary duty running from RCP to Plaintiff. Under the Plaintiff's legal theory, Defendant's undisputed control of RCP and the undisputed subsequent use of funds results in personal liability for Defendant under § 523(a)(4). Defendant argues that he was not acting in a fiduciary capacity with Plaintiff when the subject debt was incurred; therefore, § 523(a)(4) is inapplicable, and the debt owing to Plaintiff is dischargeable. This is specifically true between a contractor and subcontractor, like Defendant and Plaintiff. *Matter of Cross*, 666 F.2d 873, 880-81 (5th Cir. [Unit B] 1982).

Setting aside the issue of Defendant's potential personal liability resulting from his actions through RCP, the undisputed facts before the Court do not support a finding that RCP, Majors Road, or Oconee had any fiduciary duty to Plaintiff. The strictures on fiduciary duty are clear, and ordinary commercial relationships do not impose a fiduciary duty on either party. *See Farmers & Merchants Bank v. Brinsfield (In re Brinsfield)*, 78 B.R. 364, 369 (Bankr. M.D. Ga. 1987).

Plaintiff asserts the provisions of the GB&T and UCB loan documents create a technical trust between RCP and Plaintiff. However, the fiduciary relationship required under § 523(a)(4) is "not one implied by contract or by the factual situation of the parties and the law, nor does it encompass ordinary commercial relationships such as debtor-creditor or principal-agent." *Id.* Specifically, Plaintiff argues that Article VI, governing application of proceeds, and Article VII, providing for the conditions of disbursement, in the loan agreement between GB&T and Majors Road create a

technical trust with Plaintiff as the beneficiary. Similarly, Plaintiff avers that Article 3.03, governing the application of loan proceeds, and Article 5.03, providing for the method of disbursement of proceeds, in the loan agreement between UCB and Oconee create a technical trust.

These facts fail to establish that RCP owes Plaintiff a fiduciary duty. The loan documents, to which Plaintiff is not a party, do not create a technical trust with Plaintiff as the beneficiary. In assessing whether an agreement between parties creates a trust or fiduciary relationship, “the language must create a trust, establish a trust corpus, and show an intent by the parties to create a fiduciary relationship.” *In re Jenkins*, 110 B.R. 74, 76 (Bankr. M.D. Fla. 1990) (citing *NesSmith Elec. Co., Inc. v. Kelley (In re Kelley)*, 84 B.R. 225 (Bankr. M.D. Fla. 1988); *Pioneer Gen. Ins. Co. v. Midkiff (In re Midkiff)*, 86 B.R. 239 (Bankr. Colo. 1988)). Plaintiff is not even mentioned in the loan documents. It is apparent that the documents were structured and created for the protection of the lenders, not Plaintiff.

Although Plaintiff argues that the limitations imposed by the provisions in the loan documents for use and application of loan proceeds create a technical trust, this assertion fails to acknowledge the applicable requirements for creating a trust. Whether a debtor stands in a “fiduciary capacity” to a creditor for purposes of § 523(a)(4), is a question of federal law; state law, however, is important in determining whether a trust obligation existed. *Gupta v. E. Idaho Tumor Inst., Inc.*, 394 F. 3d 347 (5th Cir. 2005). Plaintiff provides no support for its technical trust theory except for quoting select provisions of the respective loan agreements. Yet, noncompliance with contract provisions is not a basis for imposing a fiduciary duty. *See In re Brinsfield*, 78 B.R. at 369.

Article VI in the GB&T loan agreement and Article 3.03 in the UCB loan agreement provide that proceeds of the loan should be used to cover development or construction costs on the respective

projects. Plaintiff highlights that Article VI from the GB&T loan specifically notes the funds should be “solely” used for the cost of development. With or without the use of the word “solely,” the language of the provisions does not expressly establish a trust for Plaintiff’s benefit, nor do the provisions impose a fiduciary duty on Majors Road, Oconee, or RCP. Additionally, there is no plausible interpretation or inference based on the language of the contract or from the intent of the contracting parties that a trust or a fiduciary duty is created. The application of payment provision in Article VII with GB&T loan document requires that advances under the loan to be deposited in a separate account and used solely for the payment of bills, labor, and materials used in development of the project. Article 5.03 of the UCB loan agreement provides that funds advanced under the loan will also be deposited in a separate account and that the proceeds should be used solely for the purposes specified in the draw request. Similarly, these provisions fail to expressly or impliedly create a technical trust for Plaintiff’s benefit or impose a fiduciary duty on Majors Road, Oconee, or RCP.

As a basis for comparison, the bankruptcy court in *In re Jenkins* found the following language in the indemnity agreement between debtor and the other contracting party to be sufficient to create a fiduciary relationship between the parties :

The Undersigned and their successors, executors and administrators agree to hold all money or other proceeds of a Contract, however received, *as a trust for the benefit of Surety* and to use such money or other proceeds for the purpose of performing the Contract and discharging the obligations of the Bond, and for no other purpose until the Bond is completely exonerated.

In re Jenkins, 110 B.R. 74, 76 (Bankr. M.D. Fla. 1990) (emphasis added); *see also In re Thompson*, 296 B.R. 563 (Bankr. M.D. Fla. 1990) (holding that failure to remit lottery proceeds satisfies the defalcation while acting in a fiduciary capacity requirements of § 523(a)(4) based on the statutory

language that imposes a fiduciary duty on lottery retailers and officers of lottery retailer's businesses). Here, neither the provisions set forth by Plaintiff nor the loan documents, in total, are sufficient to create a trust for Plaintiff's benefit.

Even if the language contained in the loan documents was sufficient to create a trust for Plaintiff's benefit, Plaintiff is still not entitled to judgment as a matter of law. Plaintiff cannot establish that Plaintiff and RCP, Majors Road, or Oconee had any preexisting fiduciary relationship prior to Majors Road and Oconee withholding loan proceeds from Plaintiff's pay applications. One requirement of establishing a technical trust is that "a technical trust relationship must exist prior to the act creating the debt and without reference to that act." *Eavenson v. Raimey*, 243 B.R. 160, 165 (N.D. Ga. 1999). The failure to pay Plaintiff's pay applications in full is the act Plaintiff sets forth as creating the debt and that serves as the alleged defalcation. Yet, this theory of recovery is explicitly prevented by the preexisting fiduciary duty requirement for technical trusts. Plaintiff concurrently relies upon the loan documents as a basis to impose a fiduciary duty and to establish the debt. As a matter of law, this legal theory fails. "It is insufficient if the act which creates the debt simultaneously creates the trust relationship." *Id.* (citing *Quaif v. Johnson*, 4 F.3d 950, 953 (11th Cir. 1993)).

Without establishing a technical trust, there is no basis to impose a fiduciary duty on RCP or Defendant. The absence of a fiduciary duty eliminates any possibility of Defendant's liability under § 523(a)(4). Therefore, Defendant is entitled to judgment as a matter of law. Accordingly, it is

ORDERED that Plaintiff's Motion for Summary Judgement is hereby **DENIED**.

It is **FURTHER ORDERED** that Defendant's Motion Summary Judgment is hereby

GRANTED. Judgment for Defendant will be entered accordingly.

The Clerk is directed to serve a copy of this Order on Plaintiff, Defendant, and their respective counsel.

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