UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

IN RE	:	CASE NUMBERS
ALVIN LAMAR McKIBBEN,	:	BANKRUPTCY CASE NO. 04-40788-MGD
Debtor.	:	
GEORGIA LOTTERY CORPORATION,	:	ADVERSARY CASE NO. 04-04037
Plaintiff,	:	
v.	:	IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE
ALVIN LAMAR McKIBBEN,	:	
Defendant.	:	

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This adversary proceeding is before the Court on Georgia Lottery Corporation's ("Plaintiff") Motion for Summary Judgment (Adversary Proceeding Docket No. 8) filed November 9, 2004. Alvin Lamar McKibben ("Debtor" or "Defendant") filed a response to the motion on November 30, 2004. This matter is a core proceeding pursuant to 28 U.S.C. § 157 (B)(2)(I). The Court has jurisdiction over the matter pursuant to 28 U.S.C. § 157 (b)(1) and 28 U.S.C. § 1334. The Court has reviewed the record in the case, the Motion for Summary Judgment and Debtor's response and applicable law. For the reasons set forth below, Plaintiff's Motion for Summary Judgment is **GRANTED**.

The Plaintiff commenced this adversary proceeding on June 4, 2004, by filing a complaint contending that the debt owed to Plaintiff by Defendant is non-dischargeable pursuant to 11 U.S.C. § 523(a)(4). Defendant filed his answer on July 22, 2004. On August 2, 2004, Plaintiff served Defendant, through counsel, with discovery, including requests for admissions, which were not answered in a timely manner. Rule 36 of the Federal Rules of

Civil Procedure, made applicable to this proceeding by Fed. R. Bankr. P. 7036, provides that a party must answer each matter for which an admission is requested within thirty days or the matter is deemed admitted.[1] Plaintiff's Motion for Summary Judgment is predicated in part on Defendant's failure to respond to Plaintiff's request for admissions.

Defendant also failed to respond to the statement of undisputed facts filed with Plaintiff's Motion for Summary Judgment. Pursuant to the requirements of BLR 7056-1(b)(2), Plaintiff attached to its Motion for Summary Judgment a statement of undisputed material facts. BLR 7056-1(b)(2) states "[a]ll material facts contained in the moving party's statement which are not specifically controverted in respondent's statement shall be deemed admitted." In his one page response to Plaintiff's Motion for Summary Judgment, Defendant states that he been unable to schedule time to meet with his attorney to respond to the discovery served upon him, and "that there are issues which remain that need to be tried before this Court." (Defendant's Response to Plaintiff's Motion for Summary Judgment ¶¶ 1-2). Defendant does not articulate what genuine issues of material fact exist and never specifically controverts the statement of undisputed material facts attached to Plaintiff's Motion for Summary Judgment. Accordingly, Plaintiff's statement of undisputed facts is all deemed admitted. BLR 7056-1(b)(2), *also see Ellenberg v. Bouldin (In re Bouldin)*, 196 B.R. 202, 210-211 (Bankr. N.D. Ga 1996) (Murphy, J.).

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[1]Rule 36(a) states in pertinent part:

> A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request....
>
> Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within shorter or longer time as the court may allow or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney....

FACTS

The undisputed facts are as follows: On or about July 13, 1993, Defendant and Plaintiff entered into a contract, known as an "Instant Ticket Retailer Contract," and on July 16, 1994, Defendant and Plaintiff entered into a contract, known as an "On-Line Retailer Contract," wherein Defendant agreed to become a Georgia lottery retailer. (Plaintiff's Statement of Undisputed Facts at ¶ 1). The contracts provide that Defendant agreed to sell lottery tickets and deposit the proceeds into a dedicated bank account for collection via electronic funds transfer by Plaintiff. (*Id.* at ¶ 2). The contracts, the law in Georgia, and the rules of regulations of the Defendant provide that proceeds from the sale of lottery tickets constitute a trust fund paid to Defendant; that lottery retailers have a fiduciary duty to preserve and account for lottery proceeds collected; and that lottery retailers are personally liable for all proceeds. (*Id.* at ¶ 3). Defendant, as a lottery retailer, was obligated by law, and by Defendant's rules and regulations, to establish a separate bank account for lottery proceeds and this account was not to be commingled with any other funds or assets. (*Id.* at ¶ 4). Defendant, as a lottery retailer, was obligated to deposit the lottery proceeds into the segregated bank account within 24 hours of the collection of the proceeds. (*Id.* at ¶ 5). Defendant did not make the deposits into the separate bank account within 24 hours of the collection of the proceeds. (*Id.* at ¶ 6). Defendant sold and activated Georgia lottery tickets, but failed to deposit all of the proceeds into a segregated bank account, and, despite demand from Plaintiff, refused to remit all sums due to Plaintiff. (*Id.* at ¶ 7). Defendant failed to preserve and account for the lottery ticket proceeds. (*Id.* at ¶ 8). On July 20, 1998, Plaintiff obtained a judgment against Defendant in the Superior Court of Polk County, in the amount of $11,147.77, plus interest of one-percent per month as allowed under Georgia law. (*Id.* at ¶ 9). Since the date of the judgment, Plaintiff has received no payments from Defendant and the debt remains $11,147.77, plus interest. (*Id.* at ¶¶ 10-11).

CONCLUSIONS OF LAW

A. SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure, applicable herein by Rule 7056 of the Federal Rules of Bankruptcy Procedure, provides that summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See also, Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986); *Maniccia v. Brown*, 171 F.3d 1364, 1367 (11th Cir. 1999). In reviewing a motion for summary judgment, the court must view the record and all inferences therefrom in a light most favorable to the non-moving party. *See WSB-TV v. Lee*, 842 F.2d 1266, 1270 (11th Cir. 1988). "The party seeking summary judgment bears the initial burden to demonstrate to the [trial] court the basis for its motion for summary judgment and identify those portions of the pleadings, depositions, answers to interrogatories, and admissions which it believes show an absence of any genuine issue of material fact . . .. If the movant successfully discharges its burden, the burden then shifts to the non-movant to establish, by going through the pleadings, that there exist genuine issues of material fact." *Hairston v. Gainesville Sun Publ'g Co.*, 9 F.3d 913, 918 (11th Cir. 1993), *reh'g denied*, 16 F.3d 1233 (11th Cir. 1994). The non-movant may not simply rest on his pleadings, but must show, by reference to affidavits or other evidence, that a material issue of fact remains. Fed. R. Civ. P. 56.

B. STANDARDS OF § 523(a)(4)

Section 523(a) of the Bankruptcy Code provides for various exceptions to discharge. Section 523(a)(4) states that a discharge under section 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). The creditor bears the burden of proving nondischargeability by a preponderance of evidence. *Grogan v. Garner*, 498 U.S. 279, 112 L.Ed.2d 755, 111 S.Ct. 654 (1991).

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 his fiduciary duties. In order to demonstrate liability under Section 523(a)(4), the Debtor must have stood in a fiduciary relationship with the creditor and the fiduciary relationship must pre-date the debt. The debt must have resulted from an act of either fraud or defalcation by the Debtor.

The first question is whether a fiduciary relationship existed between Plaintiff and Defendant. In a case decided under § 17(a)(4) of the Bankruptcy Act, *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 55 S. Ct. 151, 79 L. Ed. 393 (1934),[2] the United States Supreme Court articulated a narrow definition of "fiduciary," holding that the trust upon which the fiduciary relationship relies must be an express or technical trust. *Quaif v. Johnson*, 4 F.3d 950, 953 (11th Cir. 1993); *Georgia Lottery Corp. v. Daniel (In re Daniel)*, 225 B. R. 249, 250 (Bankr. N.D. Ga. 1998) (Murphy, J.).

In this case, O.C.G.A. 50-27-21(a)[3] of the Official Code of Georgia creates a statutory trust in favor of Plaintiff over the proceeds from the sale of lottery tickets. *Georgia Lottery Corporation v. Akhawala*, No. 04-6079, slip op. at 5 (Bankr. N.D.Ga. October 18, 2004) (Drake, J.). *See Suwannee Swifty Stores, Inc. v. Ga. Lottery Corp. (In re Suwannee Swifty Stores)*, 266 B.R. 544, 549-550 (Bankr. M.D. Ga. 2001). In *New Jersey v. Kaczynski (In re Kaczynski)*, 188 B.R. 770, 777 (Bankr. D.N.J. 1995), the Court listed the elements of a technical trust created by statute. As articulated in *Daniel*, O.C.G.A. § 50-27-21 comports with the requisite elements of a technical trust. *Id.* at 251-252. Here the Georgia statute (1) defines

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2 While the *Davis* case was decided under the Bankruptcy Act, Section 523(a)(4) of the Code is virtually identical to Section 17(a)(4) of the Act.

3 Section 50-27-21(a) of the Georgia Code provides, in part:
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.

the trust *res*; (2) identifies the fiduciary's fund management duties and authority; (3) imposes duties upon the fiduciary prior to any wrongdoing; and (4) expresses a legislative design to create a trust. Therefore, clearly a fiduciary obligation existed between the parties.

O.C.G.A. § 50-27-21, which sets forth an express trust for the lottery proceeds was enacted in 1992, prior to the contractual relationship between the parties. By entering into the contract, a relationship was created whereby Defendant had a fiduciary duty to preserve and account for the lottery proceeds. The undisputed facts establish that a fiduciary relationship existed between the Plaintiff and Defendant prior to the creation of the debt. *Accord see Daniel* at 250-252; *Georgia Lottery Corp. v. Lien Sun*, No. 04-06107, slip op. (Bankr. N.D.Ga. September 27, 2004) (Massey, J.); *Georgia Lottery Corp. v. Aamir Farhan*, No. 03-05043; slip op. at 5 (Bankr. N.D.Ga. October 18, 2004) (Bonapfel, J.); and *Akhawala* at 5.

After it is established that the parties had a fiduciary relationship which predated the obligation, a finding of nondischargeability under § 523(a)(4) requires "defalcation" of the fiduciary duty. Courts have wrestled with the degree of intent necessary to establish defalcation under § 523(a)(4). In *Quaif v. Johnson*, the 11th Circuit found that a purely innocent mistake by a fiduciary may be deemed dischargeable, a defalcation for purposes of § 523(a)(4) does not have to reach the level of intent required for a finding of fraud, embezzlement or misappropriation. *Quaif v. Johnson*, 4 F.3d at 955, *Central Hanover Bank & Trust Co. v. Herbst*, 93 F.2d 510 (2d Cir. 1937). In this case, there is no dispute that Defendant failed to account for $11,147.77 in lottery proceeds held in trust for Plaintiff. Defendant has not articulated any alternate theories to explain his failure to remit to Plaintiff the funds that were to be held in trust. Due to the uncontroverted fact that Defendant has failed to produce a large amount of money entrusted to Plaintiff, the Court imputes a level of intent that transcends mere negligence. As a result, the Court determines that Defendant has committed defalcation while acting in a fiduciary capacity. *See Georgia Lottery Corp. v.*

Thompson (In re Thompson), 296 B.R. 563, 566 (Bankr. M.D. Ga 2003); *Daniel*, 225 B.R. at 252; *and Sun* at 6-7.

CONCLUSION

Based on the foregoing, the Court finds that no material facts are in dispute and Plaintiff is entitled to entry of judgment on its § 523(a)(4) claim as a matter of law. Therefore it is

ORDERED that Plaintiff's Motion for Summary Judgment is **GRANTED**. The debt owed by Alvin Lamar McKibben to Georgia Lottery Corporation in the amount of $11,147.77 is nondischargeable pursuant to 11 U.S.C. § 523(a)(4). A separate judgment shall be entered contemporaneously herewith.

The Clerk is directed to serve copies of this Order on the persons on the attached distribution list.

IT IS SO ORDERED.

This the 4th day of January, 2005.

Mary Grace Diehl

MARY GRACE DIEHL
UNITED STATES BANKRUPTCY JUDGE

DISTRIBUTION LIST

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