UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBERS**
EDDIE RAY PERRINE SANDRA MICHELLE PERRINE,	:	BANKRUPTCY CASE 05-10816-WHD
DEBTOR.	:	
COLLINS BROTHERS CORP. dba COLLINS BROTHERS PRODUCE,	:	ADVERSARY PROCEEDING NO. 05-1118
Plaintiff,	:	
v.	:	
EDDIE RAY PERRINE,	:	
	:	IN PROCEEDINGS UNDER CHAPTER 7 OF THE
Defendant.	:	BANKRUPTCY CODE

ORDER

Before the Court is a Motion for Summary Judgment, filed by Collins Brothers Corporation (hereinafter the "Plaintiff"). The motion is opposed by Eddie Ray Perrine (hereinafter the "Debtor"). As this matter arises from a complaint to determine the dischargeability of a particular debt, it constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(I); § 1334.

FINDINGS OF FACT

As required by Bankruptcy Local Rule 7056-1(a)(2), the Plaintiff has attached to

its Motion a "separate and concise statement of the material facts, numbered separately, as to which the movant contends no genuine issue exists to be tried." BLR 7056-1(a)(2). Under the local rule, the respondent is required to "attach to the response a separate and concise statement of material facts, numbered separately, as to which the respondent contends a genuine issue exists to be tried" and "response should be made to each of the movant's numbered material facts." BLR 7056-1(a)(2). If the respondent fails to do so, "[a]ll material facts contained in the moving party's statement that are not specifically controverted in respondent's statement shall be deemed admitted." *Id.*

The Debtor has failed to comply with the local rule because he has failed to attach a separate numbered statement contesting the Plaintiff's statement of material facts. Accordingly, the Court shall deem the Plaintiff's statement of material facts to be admitted. In making its finding of facts, the Court, in accordance with the local rule, has not considered any statements of issues or conclusions of law made by the Plaintiff. *See* BLR 7056-1(a)(2). The Court makes the following finding of facts:

1. The Plaintiff is in the business of buying and selling wholesale quantities of perishable agricultural commodities. Plaintiff's Statement of Material Facts, ¶ 1.

2. EMB Distributors, Inc. (hereinafter "EMB") is also in the business of buying and selling wholesale quantities of perishable agricultural commodities. Plaintiff's Statement of Material Facts, ¶ 2.

3. The Debtor, at all times relevant to this matter, was an officer of EMB and the sole

shareholder of EMB, managed the operations of EMB, and had signature authority over the account from which EMB purchased goods from the Plaintiff. Plaintiff's Statement of Material Facts, ¶ 3.

4. The Plaintiff sold goods to EMB on credit and delivered the goods to EMB. Plaintiff's Statement of Material Facts, ¶ 4.

5. EMB failed to pay the Plaintiff for goods purchased. Plaintiff's Statement of Material Facts, ¶ 6; Affidavit of William Michael Collins, ¶ 7; Supplemental Affidavit of William Michael Collins.

6. On April 1, 2004, the Plaintiff sent a timely notice of its intention to preserve trust benefits provided by Section 5(c) of the Perishable Agricultural Commodities Act (hereinafter "PACA"). Plaintiff's Statement of Material Facts, ¶ 8.

7. The Plaintiff sued EMB and the Debtor in the District Court for the Northern District of Georgia under PACA. Plaintiff's Statement of Material Facts, ¶ 9.

8. On October 13, 2004, the District Court entered judgment against EMB and the Debtor, jointly and severally, in the amount of $98,369.57. Plaintiff's Statement of Material Facts, ¶ 10.

9. On March 4, 2005, the Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code.

10. On June 20, 2005, the Plaintiff filed a complaint, pursuant to section 523(a)(4) of the Code, objecting to the dischargeability of the judgment debt owed by the Debtor. The

Plaintiff seeks summary judgment as to this claim.

The Debtor contends that a question of fact remains as to the amount of the debt. The Debtor filed his own affidavit, in which he contests the amount stated as owed in the Plaintiff's statement of material facts. The Debtor also stated that the business records of EMB show that payments in the amount of $108,300 were made to the Plaintiff from December 31, 2003 through May 20, 2004. The Debtor questioned whether these payments had been credited to EMB's account. In response, the Plaintiff filed a supplemental affidavit of William Michael Collins, in which Collins acknowledges that the Debtor made $108,300 in payments, but avers that these payments were in fact reduced from the total balance prior to arriving at the amount sought by the Plaintiff in district court. The affidavit is also accompanied by copies of statements showing how the checks received were credited to EMB's account. However, whereas the Debtor states that a payment of $5,000 was made on February 19, 2004, the Plaintiff's records show receipt of a check for only $3,000 on February 19, 2004. Accordingly, it appears that there is at least a $2,000 discrepancy between the amount shown as having been paid in the business records of EMB and those maintained by the Plaintiff.

The parties have not addressed the issue of whether this Court has any authority to determine the amount owed in light of the fact that the district court previously entered a judgment for an amount certain. Because re-litigation of the amount of the debt may be foreclosed by doctrines of claim or issue preclusion, and, in light of the discrepancy

between the amounts provided by the parties, the Court will not make a determination as to the amount of the unpaid balance. For purpose of this Motion, the Court will assume that some amount remains unpaid. If the parties cannot stipulate as to the amount owed, the Court will, at some point, either conclude that the Debtor is precluded from re-litigating the amount or will determine an amount at trial.

CONCLUSIONS OF LAW

I. *Summary Judgment Standard*

In accordance with Rule 56 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Rule 7056 of the Federal Rules of Bankruptcy Procedure, a party moving for summary judgment is entitled to prevail only 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 judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322. The moving party bears the initial burden of establishing that no genuine factual issue exists. *See Celotex*, 477 U.S. at 323; *Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir.1991). The movant must point to the pleadings, discovery responses, or supporting affidavits that tend to show the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The Court must construe this evidence in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

249 (1986); *Rollins v. TechSouth, Inc.,* 833 F.2d 1525 (11th Cir.1987). If the moving party satisfies its burden to show an absence of a genuine issue of material fact, no burden of going forward arises for the opposing party. *Clark,* 929 F.2d at 608. If the moving party satisfies its burden, the non-moving party must designate "specific facts showing that there is a genuine issue for trial." *Celotex,* 477 U.S. at 324.

II. *Analysis*

The Plaintiff asserts that, pursuant to PACA, the Debtor is personally liable for unpaid amounts owed for produce sold by the Plaintiff to EMB, a corporation solely owned and operated by the Debtor. The Debtor has argued that he is not liable under PACA for these amounts because he did not personally guarantee any of the corporation's debts and he did not engage in any misappropriation of funds or otherwise benefit personally from the corporation's funds or the proceeds of the sale of the produce purchased from the Plaintiff. The Plaintiff also contends that the debt created by PACA is excepted from discharge by section 523(a)(4) as a debt arising from the Debtor's fraud or defalcation while acting in a fiduciary capacity. In response, the Debtor submits that PACA does not create an express trust or impose fiduciary duties upon a debtor within the meaning of section 523(a)(4) and, even if it did, the Plaintiff has presented no evidence to support a finding that the Debtor committed a defalcation.

A. *PACA Trust*

PACA provides for the creation of a nonsegregated, floating trust, under which a "dealer" who receives "perishable agricultural commodities" holds these commodities or the proceeds of their sale as a fiduciary until the seller has been paid in full. *See* 7 U.S.C. § 499e(c)(1). "The trust automatically arises in favor of a produce seller upon delivery of produce." *Frio Ice, S.A. v. Sunfruit, Inc.*, 918 F.2d 154, 156 (Cir. 1990) (citing 7 U.S.C. § 499(e)(c)(2)). To preserve the benefit of the trust, the seller must file with the buyer and the United States Department of Agriculture written notice of its intent to preserve its rights. *See* 7 U.S.C. § 499e(c)(3).

PACA creates such a trust only when a "dealer" receives perishable agricultural commodities. PACA defines a dealer as "any person engaged in the business of buying . . . in wholesale . . . quantities, as defined by the Secretary, any perishable agricultural commodity in interstate or foreign commerce, except that (A) no producer shall be considered as a "dealer" in respect to sales of any such commodity of his own raising; (B) no person buying any such commodity solely for sale at retail shall be considered as a "dealer" until the invoice cost of his purchases of perishable agricultural commodities in any calendar year are in excess of $230,000; and (C) no person buying any commodity other than potatoes for canning and/or processing within the State where grown shall be considered a "dealer" whether or not the canned or processed product is to be shipped in interstate or foreign commerce, unless such product is frozen or packed in ice, or consists

of cherries in brine, within the meaning of paragraph (4) of this section." 7 U.S.C. § 499a(b)(6).

The Debtor has not disputed the Plaintiff's contention, which the Plaintiff appears to have made previously in the district court, that EMB was a "dealer" within the meaning of PACA and that EMB received "perishable agricultural commodities" from the Plaintiff. Notwithstanding the Debtor's failure to raise the issue, the Plaintiff has failed to present sufficient admissible evidence to support a finding that EMB was a dealer. The Plaintiff's statement of undisputed facts states only that EMB is "engaged in the business of selling wholesale perishable agricultural commodities as that term is defined under PACA." Whether EMB was a dealer within the meaning of PACA is a legal conclusion, as it requires the Court to consider the facts to determine whether EMB engages in certain conduct and that it does not engage in other types of conduct that would preclude it from meeting the statutory definition of a dealer. In its statement of undisputed facts, the Plaintiff states that EMB was engaged in the business of selling wholesale perishable commodities, but does not allege any facts that would establish that EMB does not meet one of the stated exceptions. Similarly, the statement that EMB was subject to PACA and the regulations promulgated thereunder is a legal conclusion, which cannot be deemed admitted. The only other evidence submitted in support of a finding of EMB's dealer status is found in the affidavit of William Michael Collins. The affidavit suffers from the same deficiency as the statement of undisputed facts.

The burden of producing evidence to refute the legal conclusion that EMB was a dealer has not yet shifted to the Debtor. *See Cambridge Electronics Corp. v. MGA Electronics, Inc.*, 227 F.R.D. 313, 327 (C.D. Cal. 2004) (where plaintiff had not submitted admissible evidence to support finding that defendant was the alter ego of his corporation, defendant "need not offer facts that *disprove*" this legal conclusion). Accordingly, the Court finds that, because the Plaintiff has not submitted evidence to establish facts that would support the legal conclusion that EMB was a dealer within the meaning of PACA, the Court cannot yet hold that EMB received and held perishable goods and the proceeds of their sale in trust for the Plaintiff's benefit.[1]

In the event the Court finds that EMB was a dealer, the Plaintiff has submitted sufficient evidence to establish that the Plaintiff perfected its right to have the goods and their proceeds held in trust by EMB. Nonetheless, the Debtor contests the Plaintiff's position that the Debtor, as an officer and sole shareholder of EMB, also owed a fiduciary duty to the Plaintiff. The Debtor argues that, absent a showing that the corporate veil of EMB should be pierced, the Debtor cannot be held personally liable for EMB's breach of the PACA trust.[2] As the Plaintiff has argued, however, "[a]n individual who is in the

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[1] It may be that the district court's judgment has conclusively determined that EMB was a "dealer." As noted above, however, the parties have not yet had an opportunity to brief the issue of whether the default judgment entered by the district court is entitled to preclusive effect.

[2] Again, the Court notes that the district court's judgment, which was rendered against the Debtor personally, may preclude the Debtor from arguing that he is not personally liable for the debt.

position to control the trust assets and who does not preserve them for the beneficiaries has breached a fiduciary duty, and is personally liable for that tortuous act." *Hereford Haven, Inc. v. Stevens*, 1999 WL 155707, * 2 (N.D. Tex. 1999); *see also Weis-Buy Services, Inc. v. Paglia,* 411 F.3d 415, 421 (3d Cir. 2005); *Golman-Hayden Co., Inc. v. Fresh Source Produce, Inc.*, 217 F.3d 348, 351 (5th Cir. 2000) (citing *Sunkist Growers, Inc. v. Fisher*, 104 F.3d 280 (9th Cir. 1997); *In re Steinberg,* 307 B.R. 310 (Bankr. S.D. Fla. 2003); *Morris Okun, Inc. v. Harry Zimmerman, Inc.*, 814 F. Supp. 346, 348 (S.D.N.Y. 1993); *In re Harper*, 150 B.R. 416, 419 (Bankr. E.D. Tenn. 1993). *But see Farm-Wey Produce, Inc. v. Wayne L. Bowman Co., Inc.*, 973 F. Supp. 778 (E.D. Tenn. 1997) (PACA does not create personal liability on shareholders, directors, officers, or employees of a licensed, corporate produce seller). In such a situation, the plaintiff is not required to pierce the corporate veil in order to hold a controlling individual personally liable. *See Golman-Hayden*, 217 F.3d at 351 n.18; *Paglia,* 411 F.3d at 421; *Red's Market v. Cape Canaveral Cruise Line, Inc.*, 181 F. Supp.2d 1339, 1344 (M.D. Fla. 2002), *affirmed, Red's Market v. Cape Canaveral Cruise Line, Inc.*, 48 Fed. Appx., 328 (11th Cir. 2002); *In re Nix*, 1992 WL 119143 (M.D. Ga. 1992); *In Harper*, 150 B.R. 416, 419 (Bankr. E.D. Tenn. 1993).

Use of the trust assets for any purpose other than paying the produce seller, including the payment of legitimate business expenses, is a violation of the individual's fiduciary duties under PACA. *See Red's Market,* 181 F. Supp.2d at 1344. In *Red's*

Market, a corporation had purchased perishable commodities from the plaintiff, but failed to and was not able to pay for the goods. The plaintiff sued the corporation and several individuals, who were officers and directors of the corporation during the applicable time period. The individuals stipulated to the fact that they were "in positions of control over the PACA trust assets and were responsible for all aspects of [the corporation's] business, which included directing payments to be made to [the corporation's] creditors." *Id.* at 1341. The individual defendants argued that PACA did not impose liability on officers or directors of the corporation and that, if it did, no liability could be imposed without evidence that they did not "effectively execute their corporate responsibilities to" the corporation. *Id.* at 1344. The district court held that PACA does in fact create individual liability and that such liability attaches to "a trustee, whether a corporation or a controlling person of that corporation, who uses the trust assets for any purpose other than repayment of the supplier." The court further noted that "this includes the use of the proceeds from the sale of perishables for legitimate business expenditures, such as the payment of rent, payroll, or utilities.'" *Id.* The court held the individuals liable, notwithstanding the lack of any evidence of misappropriation or bad faith, concluding that a "simple finding that they failed to account for the trust assets is sufficient." *Id.* This opinion was later affirmed by the Eleventh Circuit Court of Appeals, which apparently rejected the individual defendant's renewed argument that PACA does not impose liability on individual officers and directors absent some showing of wrongdoing.

See Red's Market v. Cape Canaveral Cruise Line, Inc., 48 Fed. Appx. 328 (11th Cir. 2002).

Here, the Debtor has not contested the fact that, during the period in which the Plaintiff sold perishable commodities to EMB, he was an officer and the sole shareholder of EMB, managed the operations of EMB, and had signature authority over the account from which EMB purchased goods. The Plaintiff also submitted evidence to support a finding that the Debtor personally handled the transactions between EMB and the Plaintiff, including the placing of orders, picking up orders, and communicating with the Plaintiff's representative about payment. The Debtor has pointed to no evidence to create a genuine issue of material fact as to whether the Debtor was responsible for EMB's business operations, including the management of funds and the payment of EMB's creditors. Accordingly, the Court concludes that the Debtor was a controlling person and is personally liable for any debt arising from the failure of EMB to pay the Plaintiff for the goods.

B. *A Trust Imposed by PACA Creates an Express Trust for Purposes of Section 523(a)(4)*

Section 523(a)(4) of the Bankruptcy Code provides that "a discharge . . . does not discharge an individual Debtor from any debt . . . for fraud or defalcation while acting in a fiduciary capacity." 11 U.S.C. § 523(a)(4). For a debt to fall within this exception to discharge, the debtor must have acted as a fiduciary within the meaning of section

523(a)(4). Not all fiduciary duties will satisfy this requirement. "The Supreme Court has consistently held that the term 'fiduciary' is not to be construed expansively, but instead is intended to refer to 'technical' trusts." *Quaif v. Johnson,* 4 F.3d 950, 953 (11th Cir.1993) (citing *Davis v. Aetna Acceptance Co.,* 293 U.S. 328 (1934)); *see also In re Fernandez-Rocha*, No. 06-10159, __ F.3d __ (11th Cir. June 12, 2006). Courts have recognized three characteristics of a technical trust. *See Eavenson v. Ramey*, 243 B.R. 160 (N.D. Ga. 1999). First, a technical trust "must exist prior to the act creating the debt and without reference to that act." *Id.* at 165; *see also Blashke v. Standard (In re Standard),* 123 B.R. 444, 453 (Bankr. N.D. Ga. 1991) (Bihary, J.). Second, the fiduciary duties associated with the trust must be specifically set forth so that the trust relationship is expressly and clearly stated. *See id.* Third, the trust must have a "separately identifiable res." *Id.*; *see also Matter of Snyder*, 184 B.R. 473 (D. Md. 1995) (citing *In re Baird,* 114 B.R. 198, 202 (9th Cir. BAP 1990)).

The majority of courts to have considered the issue have concluded that PACA creates a technical trust and imposes fiduciary duties upon the buyer that fall within section 523(a)(4)'s requirements. *See In re Masdea,* 307 B.R. 466, 474 (Bankr. W.D. Pa. 2004); *Matter of Snyder*, 184 B.R. 473, 474 (D. Md. 1995); *In re Harper*, 150 B.R. 416, 419 (Bankr. E.D. Tenn. 1993); *In re Nix*, 1992 WL 119143 (M.D. Ga. 1992); *In re Stout*, 123 B.R. 412 (Bankr. W.D. Okla. 1990). In *Matter of Snyder*, the district court reversed the bankruptcy court's determination that a PACA trust was not an express trust, noting

that a PACA trust satisfies all of the elements of an express trust, including having an identifiable res, spelling out the duties of the trustee, and imposing "'a trust prior to and without reference to the wrong which created the debt.'" *Matter of Snyder*, 184 B.R. at 474. However, one court has held that a PACA trust is not an express trust because it is not a segregated trust and, therefore, there is no identifiable res. *See In re McCue*, 324 B.R. 389, 393 (Bankr. M.D. Fla. 2005).

Having considered both views in light of the Eleventh Circuit Court of Appeals' opinion in *Quaif v. Johnson*, this Court concurs with and adopts the majority view. The majority view recognizes that PACA creates a trust over produce upon its delivery. The trustees, whether they be the corporation or those individuals in control of the corporation, owe a fiduciary duty to preserve the trust assets that exist prior to the failure of the buyer to pay for the produce promptly, as required by PACA, and it is the breach of the fiduciary duty to preserve the assets that creates the resulting debt, especially in the case of the controlling individual, who may or may not have been personally liable for payment of the goods prior to the breach of the fiduciary duty. Additionally, the Court agrees with the majority view that PACA clearly states the fiduciary duties and identifies the res of the trust as the produce and the proceeds of its sale. Therefore, the Court holds that a debt arising from a defalcation committed while acting as a fiduciary of a trust imposed by PACA is nondischargeable under section 523(a)(4).

In the event the Court concludes that EMB was a dealer under PACA and that

EMB failed to pay for all of the goods received from the Plaintiff, the Court would find, as a matter of law, that the Debtor owed a fiduciary duty to the Plaintiff to maintain the PACA trust assets. In order to find the resulting debt nondischargeable, the Court would be required to determine that the Debtor committed fraud or a defalcation by failing to do so. In the Eleventh Circuit, the term "defalcation refers to a failure to produce funds entrusted to a fiduciary." *Quaif v. Johnson*, 4 F.3d 950, 955 (11th Cir. 1993). In *Quaif*, the debtor was an insurance agent, who received funds for the payment of insurance premiums. By statute, the debtor was required to hold the premiums in trust for the benefit of the insurance company. The debtor failed to remit the premiums to the insurance company and instead used the funds for operating and payroll expenses. The court recognized that, although a defalcation may not result from a purely innocent mistake that results in a fiduciary's inability to produce entrusted funds, "a 'defalcation' for purposes of [section 523(a)(4)] does not have to rise to the level of 'fraud,' 'embezzlement,' or even 'misappropriation.'" *Id.* at 955. The court concluded that the debtor's use of the trust funds for payment of operating expenses was not due to mistake or negligence, but was instead intentional. Accordingly, the debtor's inability to remit the trust funds to the insurance company, constituted a defalcation within the meaning of section 523(a)(4).

In accordance with the holding in *Quaif*, this Court concludes that the failure of a debtor who has a fiduciary duty to protect PACA trust assets to pay the seller for the

perishable commodities constitutes a defalcation, regardless of whether the debtor misappropriated the funds for his own use or otherwise personally benefitted from the funds. The Court's holding is consistent with other bankruptcy court decisions on the issue of whether payment of business expenses with PACA trust funds constitutes a defalcation. For example, in *In re Zois*, 201 B.R. 501 (Bankr. N.D. Ill. 1996), the bankruptcy court held that the debtors, individual officers of a corporation, had committed a defalcation within the meaning of section 523(a)(4) when they failed to use PACA trust assets to pay for produce. The court stated that the debtors' contentions that they had made a good faith effort to pay were irrelevant, as "bad faith or intent to breach PACA is not necessary for such breach to constitute defalcation under § 523(a)(4)." *Id.* at 507; *see also In re Harper*, 150 B.R. 416, (Bankr. E.D. Tenn. 1993) (holding that "defalcation . . . encompasses embezzlement, the misappropriation of trust funds held in any fiduciary capacity, and the failure to properly account for such funds"; because the debtor failed to pay for produce, the debtor had committed a defalcation).

For this reason, the Debtor's argument that he did not commit a defalcation because the Plaintiff has presented no evidence that he personally benefitted from the trust assets or their proceeds must fail. However, the Court leaves open the possibility that the EMB's failure to pay for the produce may have been the result of an innocent mistake or negligence. Because the Court cannot grant summary judgment in favor of the Plaintiff at this time because of remaining questions of fact as to EMB's status as a

dealer, the Court will make no conclusion at this time as to whether the Debtor committed a defalcation. The Court notes, however, that the only evidence before the Court at this time supports a finding that EMB failed to pay the Plaintiff for goods received and neither EMB nor the Debtor accounted for the produce or the proceeds of its sale. If no further evidence is submitted to establish that EMB's failure to pay was the result of mistake or neglect, the Court will be required to find that the Plaintiff submitted sufficient evidence to support the conclusion that EMB's failure to pay was a defalcation within the meaning of section 523(a)(4).

CONCLUSION

Because the Court has determined that questions of material fact remain as to the amount of the debt and whether EMB was a "dealer" within the meaning of PACA, the Plaintiff's Motion for Summary Judgment must be, and hereby is, **DENIED.**

IT IS SO ORDERED.

At Newnan, Georgia, this 8 day of August, 2006.

W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE