UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	CASE NO. 01-74588
Dilip M. Kataria,	CHAPTER 7
Debtor.	JUDGE MASSEY
Paul H. Anderson, Jr., Trustee,	
Plaintiff,	
v.	ADVERSARY NO. 05-6082
Timaki Patel, et al.,	
Defendants.	

ORDER GRANTING DEFENDANT DARRYL R. MOSS'S
MOTION FOR SUMMARY JUDGMENT

Dilip Kataria, the Debtor, filed bankruptcy on November 21, 2001, and the United States Trustee appointed Paul M. Anderson, Jr. to be the Chapter 7 Trustee. In Schedule B, Debtor disclosed that he owned 50% of the stock of Madison Square, Inc. ("MSI"), which he claimed had no value. MSI is a Georgia corporation that was administratively dissolved in 1998 by the Georgia Secretary of State. Complaint, ¶ 15. Notwithstanding his sworn statement on Schedule B, Kataria repeatedly told the Trustee that Vishnu Patel was the majority shareholder of MSI. Complaint ¶ 13. There is no indication in the record that the Trustee undertook an investigation of this discrepancy. MSI owned real property in Bartow County, Georgia on which a grocery

business was operated. Kataria informed the Trustee that the real property was subject to a mortgage debt of $330,000, that Vishnu Patel operated the grocery store, and that he and Patel had been trying to sell the business for some time without success. The Trustee instructed Kataria that if he found a buyer for the business, he should tell either the Trustee or his own bankruptcy attorney.

On March 12, 2003, while he was still a debtor in an open bankruptcy case, Dilip Kataria employed Darryl L. Moss, an attorney, to represent him and MSI in connection with a sale of MSI's assets to four individuals. Moss had not previously represented Kataria. Kataria told Moss that he was the sole shareholder and sole director of MSI but did not inform Moss that he was in bankruptcy. Moss reviewed MSI's corporate book, which contained general corporate documents and a share certificate showing that Kataria owned 500 shares of MSI's common stock. (Affidavit of Darryl Moss, ¶ 5 (document no. 50, attachment 3)). The share certificate had been executed by Kataria as president and Vishnu Patel as secretary. The general corporate documents reviewed by Moss included, to the best of his recollection, articles of incorporation; Moss also reviewed additional documents "relating to MSI ownership and agreement to sell the subject piece of property"; and Moss examined the Secretary of State's website, verified that MSI had been administratively dissolved and discussed that fact with Kataria. (Answers to Plaintiff's Second Interrogatories, Exhibit 12, pages 2-4 (document no. 65)). Among the documents Moss reviewed was an initial draft of a purchase contract dated December 21, 2002, between MSI and Rasik B. Patel for the sale of the real property and inventory of MSI for $425,000. That contract had been signed by Kataria and Vishnu Patel for MSI without any indication of office.

Kataria decided that he did not wish to attend the closing of the sale and signed on behalf of MSI a limited power of attorney to enable Moss to execute documents for MSI at the closing. Kataria also signed a document entitled "ACTION OF THE SOLE DIRECTOR OF MADISON SQUARE, INC. TAKEN BY ACTION IN LIEU OF A MEETING," which was dated March 18, 2003. That document stated that Kataria was the sole director of MSI, it authorized the sale of MSI's assets, and it assigned the net proceeds of the sale to Kataria. (Ex. 4 to Affidavit of Darryl Moss, (document no. 50, attachment 3)).

The closing was held on March 19, 2003. Vishnu Patel appeared briefly at the office where the closing was to be held, spoke to Moss and left before the closing began. There is no evidence to show that Moss knew prior to the closing that Kataria was a debtor in an open bankruptcy case or that Vishnu Patel claimed an ownership interest in MSI.

Moss in his capacity as attorney in fact for MSI executed the sale contract, which was identical to the contract dated December 21, 2002 that Kataria and Vishnu Patel had signed for MSI, except that the date was changed to March 19, 2003, the name of Rasik B. Patel was scratched out and the names of four purchasers, one of whom was "Raskilal Patel," were handwritten on the first page as the purchasers, and the warranty deed to be delivered was changed from a general to a limited warranty deed. Like the December 2002 contract, the contract provided for the sale of the real property and inventory for $425,000. Moss stated in his affidavit in support of the motion that he had been instructed to have checks for the net proceeds made payable to Kataria. Moss received at the closing a check for $86,454.83 and a check for $1,035.76, both payable to Debtor's order, and a promissory note of one of the purchasers also payable to Debtor for $25,000, all of which he promptly delivered to Kataria.

In 2005, the Trustee learned of the sale from an attorney for Vishnu Patel, who in an affidavit sworn to in December 2005 (document no. 62) claims that he is an officer and "co-owner" of MSI and that Debtor cheated him out of a portion of the proceeds of the sale of assets of MSI. The Trustee filed his own affidavit (document no. 63) in which he states, "Attached hereto as Exhibit "N" is a true copy of a "Shareholders Subordination Agreement" furnished to me by Suda and appearing to show that Vishnu Patel was a shareholder of Madison Square, Inc." Suda is Vishnu Patel's attorney. The document attached as Exhibit N purports to be a shareholders' subordination agreement dated July 8, 1997 between MSI and AT&T Small Business Lending Corporation signed by Dilip Kataria and Vishnu Patel as "shareholders" and officers of MSI. This document has not been authenticated. The statement that Exhibit N "appears" to show that Vishnu Patel "was" a shareholder of MSI is mere speculation based on hearsay and has no probative value as to the interests of either Patel or Kataria in MSI in March 2003.

On March 3, 2005, the Trustee brought this adversary proceeding against the four buyers of MSI's assets, North Georgia National Bank, which financed the transaction, Debtor, Debtor's wife, Debtor's daughter, and Darryl Moss. Plaintiff has dismissed the complaint against the Bank and has reached a nominal settlement with the four purchasers.

Darryl Moss now moves for summary judgment. The Court heard oral argument on the motion on March 21, 2006. Based on the evidence presented by the parties in connection with the motion for summary judgment, the foregoing facts are all of the material facts concerning the claim for relief asserted against Moss in the complaint, and they are undisputed.

In Count I of the complaint, Plaintiff sought a judgment declaring the transfer of MSI's property to be null and void ab initio and that MSI's property vested in Plaintiff subject to a security deed executed at the closing to North Georgia National Bank. Count I does not specifically state that it applies to Moss, and it does not apply to him because he claims no interest in that property.

Count II of the complaint seeks damages against Debtor, Lopa Kataria, Hemal Kataria and Moss on different causes of action for all of the proceeds of the sale of assets of MSI. The claims against Moss are contained in paragraphs 31 and 32, which are a part of Count II. Paragraph 31 states:

> 31. Upon information and belief, although the Debtor employed Defendant Darryl R. Moss to represent him individually, in accepting his purported appointment as attorney in fact for Madison Square, Inc., he owed the corporation a fiduciary duty to determine the status of the corporation, the ownership interest of the Debtor therein and the authority for the purported assignment of the sale proceeds to the Debtor individually, which duties were breached by his negligent failure to question the Debtor or to investigate the matters, which questioning and investigation would have revealed the following:
>
> a. That the Debtor was a debtor in a pending Chapter 7 bankruptcy case.
>
> b. That Madison Square, Inc. had held no shareholders or directors meetings since its incorporation in 1997.
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> c. That the Debtor was not in possession of any books or records of the corporation, nor was he in possession of the corporate seal.
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> d. That Madison Square, Inc. had never filed state or federal income tax returns.
>
> e. That Vishnu Patel claimed an interest in the corporation and in the Property.

Plaintiff alleges in paragraph 32:

> 32. Had it not been for Moss' negligent assumption of flawed authority to act on behalf of Madison Square, Inc. and breaches of his fiduciary obligations of Madison Square, Inc., both in causing the sale to be closed and in turning over the net proceeds to the Debtor, neither of which would have occurred, and as a result of this negligence and

these breaches the Plaintiff and the bankruptcy estate have been damaged in the amount of $112,490.59.

In addition to the allegations of specific omissions of Moss described in paragraph 31 of the complaint, Plaintiff listed other "negligent, improper and wrongful acts or omissions" of Moss in his answers to Moss's First Interrogatories. There, Plaintiff contended that Moss failed to investigate Kataria's ownership of the stock of MSI, he failed "entirely" to investigate Kataria's representations concerning his authority to act on behalf of MSI, he accepted the appointment of attorney in fact for MSI based solely on unsubstantiated representations of Kataria, he ignored the fact that Vishnu Patel had signed the initial agreement to sell and had appeared at the closing, he failed to notice that he brought to the closing a corporate seal belonging to another corporation, and he turned over the net proceeds of the sale to Kataria.

Moss asserts several grounds on which he should be granted summary judgment. First, he points out that he claims no interest in property of MSI. Second, he argues that he had no duty to Plaintiff. Third, he says that Plaintiff has offered no evidence to show that he breached any duty. Fourth, he contends that his own affidavit disproves the allegation of negligence. Finally, he asserts that Plaintiff cannot prove any damages because there has been no contention that the value of the assets sold were any greater than what Kataria received, citing *Jones v. Harrell*, 858 F.2d 667 (11th Cir. 1988). Moss assumes from the words used in the complaint that Plaintiff is contending he committed malpractice. At the hearing held on March 21, 2006, however, Plaintiff stated that he is not asserting a malpractice claim against Moss in his capacity as an attorney but instead is asserting the claim for a breach of a fiduciary duty against Moss in his capacity as an agent for MSI in closing the sale.

Plaintiff's case against Moss fails for five distinct reasons. First, the alleged claim for breach of a fiduciary duty owed to MSI is not property of Kataria's bankruptcy estate, and consequently Plaintiff lacks standing to sue Moss for the alleged breach. Second, Plaintiff has failed to show that Moss had a fiduciary duty to MSI other than closing the sale. Third, Plaintiff has failed to show that Moss breached any duty to MSI or was otherwise negligent. Fourth, Plaintiff has failed to show that any act or omission of Moss damaged either MSI or the bankruptcy estate. Fifth, to the extent that Plaintiff is now asserting that Moss was a party to fraudulent activity, he has not made such a claim in the complaint and cannot raise such a claim in opposition to the motion for summary judgment.

Plaintiff has asserted alternative theories as to the nature of Kataria's interest in MSI and its assets. In Count I of the complaint and in opposing the motion for summary judgment, Plaintiff has contended that the assets of MSI were property of Kataria's bankruptcy estate. In Count II, he seeks damages allegedly resulting from a negligent breach of a fiduciary duty owed to MSI. Hence, the first inquiry concerns the nature of the interest of the bankruptcy estate in MSI's assets in general and in the alleged cause of action of MSI against Moss in particular

"A debtor's estate in bankruptcy consists of 'all legal and equitable interests of the debtor in property as of the commencement of the case.' 11 U.S.C.A. § 541(a)(1) (1979) (emphasis added). The extent and validity of the debtor's interest in property is a question of state law. *See In re Livingston*, 804 F.2d 1219, 1221 (11th Cir.1986)." *T & B Scottdale Contractors, Inc. v. U.S.*, 866 F.2d 1372, 1376 (11th Cir. 1989).

Under Georgia law, a corporation's assets are not the property of the corporation's shareholder, as the Supreme Court held in *Shelby Ins. Co. v. Ford*, 265 Ga. 232, 454 S.E.2d 464 (1995):

> We granted certiorari to review that holding, posing the following question: "Whether the Court of Appeals was correct in equating ownership of a corporate entity which operates a business with ownership of the business." The essence of the holding of the Court of Appeals in this case is that the owner of a corporation is necessarily the owner of the business operated by the corporation. That holding ignores both the language of the insurance policy and the basic premise of law pertaining to corporations, that they are entities distinct from their owners. The courts of this state have said many times that a corporation and its owner, even a sole owner, are separate and distinct.

Id., 265 Ga. at 233, 454 S.E.2d at 465.

In *Acree v. McMahan*, 574 S.E.2d 567, 570-71 (Ga. App. 2002), the Georgia Court of Appeals opined:

> The concept of piercing the corporate veil is applied in Georgia to remedy injustices which arise where a party has overextended his privilege in the use of a corporate entity in order to defeat justice, perpetrate fraud or to evade contractual or tort responsibility. Because the cardinal rule of corporate law is that a corporation possesses a legal existence separate and apart from that of its officers and shareholders, the mere operation of corporate business does not render one personally liable for corporate acts. Sole ownership of a corporation by one person or another corporation is not a factor, and neither is the fact that the sole owner uses and controls it to promote his ends. There must be evidence of abuse of the corporate form. Plaintiff must show that the defendant disregarded the separateness of legal entities by commingling on an interchangeable or joint basis or confusing the otherwise separate properties, records or control. In deciding this enumeration of error, we are confronted with two maxims that sometimes conflict. On the one hand, we are mindful that great caution should be exercised by the court in disregarding the corporate entity. On the other, it is axiomatic that when litigated, the issue of piercing the corporate veil is for the jury, unless there is no evidence sufficient to justify disregarding the corporate form. (Citations and punctuation omitted.) *Soerries v. Dancause*, 248 Ga.App. 374, 375, 546 S.E.2d 356 (2001).

Thus, under Georgia law, Kataria had a legal or equitable interest in the assets of MSI as of the petition date only if the corporate form of MSI is disregarded. Plaintiff has neither alleged in

the complaint nor otherwise shown that Kataria abused the corporate form of MSI. Failing to maintain all corporate records or to file tax returns is not alone evidence of abuse of the corporate form. Rather, Plaintiff had to allege and show that Kataria "disregarded the separateness of legal entities by commingling on an interchangeable or joint basis or confusing the otherwise separate properties, records or control." *Soerries v. Dancause,* 248 Ga.App. 374, 375, 546 S.E.2d 356, 358 (Ga.App. 2001). He has not done so.

Nor did the administrative dissolution of a corporation by the Georgia Secretary of State automatically transfer title to MSI's assets to its shareholder or shareholders. Administrative dissolution is governed by Ga. Code Ann. § 14-2-1421, which provides:

> (a) If the Secretary of State determines that one or more grounds exist under Code Section 14-2-1420 for dissolving a corporation, he shall provide the corporation with written notice of his determination by mailing a copy of the notice, first-class mail, to the corporation at the last known address of its principal office or to the registered agent.
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> (b) If the corporation does not correct each ground for dissolution or demonstrate to the reasonable satisfaction of the Secretary of State that each ground determined by the Secretary of State does not exist within 60 days after notice is provided to the corporation, the Secretary of State shall administratively dissolve the corporation by signing a certificate of dissolution that recites the ground or grounds for dissolution and its effective date. The Secretary of State shall file the original of the certificate.
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> (c) A corporation administratively dissolved continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs under Code Section 14-2-1405. Winding up the business of a corporation administratively dissolved may include the corporation's proceeding, at any time after the effective date of the administrative dissolution, (1) in accordance with Code Section 14-2-1406 to notify known claimants, and (2) to mail or deliver, with accompanying payment of the cost of publication, a notice containing the information specified in subsection (b) of Code Section 14-2-1407 for publication in accordance with subsection (b) of Code Section 14-2-1403.1. Upon such notice, claims against the administratively dissolved corporation will be limited as specified in Code Sections 14-2-1406 and 14-2-1407, respectively.
>
> (d) The administrative dissolution of a corporation does not terminate the authority of its registered agent.

Ga. Code Ann. § 14-2-1421.

To the extent that MSI operated the grocery business in the ordinary course after being administratively dissolved, it possibly exceeded its authority under section 14-3-1421(c). But the statute could hardly be clearer that even though a corporation is dissolved, it continues its corporate existence. Nothing in this statute or any other Georgia law provides that a shareholder of a corporation obtains any interest whatsoever in the property of an administratively dissolved corporation, except to the extent that the corporation distributes its property to its shareholders. For example, in *Exclusive Properties, Inc. v. Jones*, 218 Ga.App. 229, 230, 460 S.E.2d 562, 564 (Ga. App.1995), a corporation sued its attorneys for malpractice for allowing it to become administratively dissolved by the Secretary of State. The shareholders sought to be substituted as plaintiffs in place of the dissolved corporation, and the trial court denied their motion. The Court of Appeals affirmed, holding that

> EPI's cause of action against defendants is not a corporate asset to which EPI's former shareholders became legally entitled upon EPI's administrative dissolution. *See Gas Pump v. General Cinema Beverages, etc.*, 12 F.3d 181 (11th Cir.1994); *Hutson v. Fulgham Indus.*, 869 F.2d 1457, 1461 (11th Cir.1989).

Id., 218 Ga.App. at 230, 460 S.E.2d at 564.

As provided in Ga. Code Ann. § 14-2-1421(c), an administratively dissolved corporation has only the power "to wind up and liquidate its business and affairs under Code Section 14-2-1405." Section 1405 provides:

> A corporation that has filed a notice of intent to dissolve continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs, including:
>
> (1) Collecting its assets;
> (2) Disposing of its properties that will not be distributed in kind to its shareholders;
> (3) Discharging or making provision for discharging its liabilities;

(4) Distributing its remaining property among its shareholders according to their interests; and
(5) Doing every other act necessary to wind up and liquidate its business and affairs.

Ga. Code Ann. § 14-2-1405. Thus, section 1405 also confirms that the dissolution of a corporation does not cause the property of the corporation to be distributed to the shareholders as an automatic consequence of dissolution. Under Ga. Code Ann. §§ 14-2-1421(c) and 1405, MSI, even though administratively dissolved, had the power to dispose of its properties.

Plaintiff relies on *Smith v. Firskney (In re Friskney)*, 282 B.R. 250 (Bankr. M.D. Fla. 2002) in asserting that property of a corporation wholly owned by a debtor belongs to that debtor's bankruptcy estate. This case is inapposite for several reasons. First, in *Friskney*, the Court found that the property in question held by a corporation wholly owned by the debtor was not property of that corporation. The statement in that decision suggesting that property of a corporation owned by a debtor might be property of that debtor's bankruptcy estate was, therefore, merely dictum.

Second, neither *Friskney* nor the cases that it cited provide a convincing legal analysis for the proposition that a corporation's assets are the property of the bankruptcy estate of an individual who owns the corporation. Third, *Friskney* did not involve a corporation governed by Georgia law.

And fourth, *Friskney* involved a debtor who owned all of the corporation's equity. Here, Plaintiff has not alleged or otherwise shown that Debtor owns all of the stock of MSI. Plaintiff has alleged only what Kataria has told him, which is that Kataria owned half, less than half and all of MSI. In an effort to hedge his bet and to avoid alleging precisely what Debtor owned, Plaintiff asserts in the complaint that "Vishnu Patel, through his attorney, has authorized Plaintiff to seek turnover of the net sale proceeds to the extent of any interest he may have therein." Complaint, ¶

29. That procedure would not have worked, because Plaintiff has no authority under section 704 of the Bankruptcy Code, describing the scope of a Chapter 7 Trustee's duties, to sue on behalf of a co-owner of property in which the estate has a possible interest.

If Kataria does not own all of MSI, then MSI's assets would not have been property of the estate even if *Friskney's* dictum applied in Georgia, in which case Plaintiff lacks standing. On the other hand, even if Kataria owns all of the stock of MSI and somehow Plaintiff had standing to assert the claim, Moss could not have breached a fiduciary duty by failing to investigate a true representation of stock ownership. Either way, Plaintiff's theory of Moss's liability to the estate is a dead-end without merit.

Further, Plaintiff's theory as to the ownership of MSI's assets has another hole in it. The assets of MSI as of the petition date might have belonged to Kataria's bankruptcy estate only if he had a legal or equitable interest in those assets as a result of abuse of the corporate form. If, however, the corporate form of MSI is disregarded so that its property is in fact Kataria's property, a cause of action that first arises postpetition would by definition also be Kataria's property. But property that a Chapter 7 debtor acquires after the petition date, with limited exceptions not relevant here, is not property of the estate. *In re Boone*, 52 F.3d 958, 960 (11th Cir. 1995) ("The conduct giving rise to the claim occurred after the petition in bankruptcy, and therefore the cause of action is not property of the estate. See 11 U.S.C. § 541(a)."). Hence, the theory that MSI's assets were those of Kataria on the petition date does not advance Plaintiff's case.

Based on the foregoing analysis, the Court holds that the assets of MSI have never been property of Kataria's bankruptcy estate. Any claim that MSI might have against Moss for a breach of a fiduciary duty belongs solely to MSI and not to the bankruptcy estate of Dilip Kataria,

regardless of whether Kataria owns all of the stock of MSI. For these reasons, Plaintiff lacks standing to pursue the claim against Moss he makes in paragraphs 31 and 32 of the complaint.

The second reason that Plaintiff has no claim against Moss is that he has not shown that Moss owed any fiduciary duty to MSI based on his actions in closing the sale pursuant to the limited power of attorney. (Recall that Plaintiff has abandoned any contention that Moss committed malpractice, which would also have been a claim arising postpetition that Plaintiff would have no standing to pursue.) The power of attorney was limited to closing the sale. Moss closed the sale in accordance with the contract. Under these circumstances, the power of attorney did not give rise to a fiduciary duty to discover anything about Kataria's authority or about the bankruptcy case that Kataria concealed from Moss. *Gill Plumbing Co. v. Imperial Premium Finance Co., Inc.*, 213 Ga.App. 754, 757, 445 S.E.2d 840, 843 (Ga.App. 1994). In the *Gill Plumbing* case, the Georgia Court of Appeals rejected the contention that the holder of a limited power of attorney thereby becomes a fiduciary, stating:

> The extent of the power of attorney on which Gill Plumbing relies is severely limited by its express terms and is otherwise controlled by the procedure for cancellation mandated in OCGA § 33-22-13. As limited by statute, the power of attorney granted Imperial does not render it a fiduciary to Gill Plumbing. Rather, the proper view of Imperial's relationship to Gill Plumbing is found in OCGA § 10-6-21: "The agent shall act within the authority granted to him, reasonably interpreted; if he shall exceed or violate his instructions, he does it at his own risk, the principal having the privilege of affirming or dissenting, as his interest may dictate. In cases where the power is coupled with an interest in the agent, unreasonable instructions, detrimental to the agent's interest, may be disregarded."

The third reason Plaintiff's case is without merit is that he has not offered any proof that Moss breached any duty to MSI or was otherwise negligent. The duty Plaintiff says Moss breached was a duty to discover the true ownership of MSI and hence the authority of Kataria to act so as to prevent the sale. An issue as to Kataria's authority could have existed, however, only

if Vishnu Patel was a shareholder and opposed the sale. Whether or not Patel was a shareholder, it is undisputed that he wanted the sale to occur. Patel is not complaining that Kataria was not authorized to cause MSI to close the sale but rather that Kataria did not pay him a portion of the proceeds. Because the only two persons who might have been shareholders of MSI were in favor of the sale, inquiry into Kataria's ownership was not necessary, and the failure to make such an inquiry could not have been a breach of Moss's duty to MSI, which was limited to closing the sale.

MSI did not need Plaintiff's approval to sell its assets because the estate's only interest in MSI was Kataria's interest in its stock. To control MSI, Plaintiff had to oust the director or directors, a course he did not undertake. Plaintiff's instructions to Kataria, if interpreted as telling Kataria not to conduct a sale of MSI's assets, were not binding on Kataria. "The trustee is a creature of statute and has only those powers conferred thereby. *Cissell v. American Home Assur. Co.*, 521 F.2d 790 (6th Cir.1975), cert. denied, 423 U.S. 1074, 96 S.Ct. 857, 47 L.Ed.2d 83 (1976)." *In re Benny*, 29 B.R. 754, 760 (D.C. Cal. 1983). Section 704 of the Bankruptcy Code defines a chapter 7 trustee's duties and other sections of the Bankruptcy Code describe powers of a trustee, but none of these sections empowers a trustee to require a debtor to do an act or refrain from doing an act solely because of the trustee's instructions. A trustee can explain what a debtor's duties are and can demand that a debtor do his duty, but he has no power to create a duty of a debtor. Kataria was free to cause MSI to sell its assets because those assets were not property of his bankruptcy estate.

For these reasons, Plaintiff's premise that Kataria had no authority to authorize Moss to close the sale is false. Moss obviously had no duty to discover an allegation of Plaintiff that is untrue. Hence, even if he had standing to sue on behalf of MSI, Plaintiff cannot succeed on a

theory that Moss breached a duty to MSI by closing the sale or by not further investigating Kataria's claim to own all of the stock of MSI.

The fourth reason Plaintiff's case fails is that Plaintiff cannot show that any act or omission of Moss was the proximate cause of any damage to MSI or to the bankruptcy estate of Kataria. The sale merely substituted the value of the net proceeds for the value of the real estate and inventory less the debt secured by those assets. Plaintiff makes no contention that the sale of MSI's assets brought less than those assets were worth. Hence, Moss's participation in the sale did not reduce the value of MSI. So MSI and the bankruptcy estate suffered no damage caused by the sale.

Moss delivered the sale proceeds to Kataria, but that act did not cause the bankruptcy estate to suffer damages. MSI was free to declare and deliver a dividend to its shareholder or shareholders. Kataria had a duty, however, to turn over to Plaintiff his share of the proceeds, which constituted a dividend in respect of his stock in MSI. Plaintiff does not allege in the complaint or otherwise contend that Moss induced or caused Kataria to retain the proceeds of the sale of MSI's assets. Therefore, Moss's act in delivering the proceeds to Kataria was not the proximate cause of any damage the estate has or may sustain.

The fifth and final reason that Plaintiff has no case concerns Plaintiff's belated effort to paint Moss as a participant in a fraudulent scheme. At the hearing on the motion, Plaintiff argued in effect that Moss should have reported the sale to Plaintiff in early April 2003 because according to Vishnu Patel's affidavit, Patel told Moss three weeks after the closing that Kataria used Moss to avoid accepting the proceeds of the sale at the closing because he [Kataria] was in bankruptcy.

Plaintiff argued that had Moss informed him about the sale, Plaintiff could have then recovered the proceeds of the sale.

To the extent that Plaintiff is now contending that Moss was a participant in a fraudulent scheme to cover up Kataria's receipt of the proceeds of the sale of assets of MSI, see 18 U.S.C. § 152(1), such a contention comes too late. "At the summary judgment stage, the proper procedure for plaintiffs to assert a new claim is to amend the complaint in accordance with Fed.R.Civ.P. 15(a). A plaintiff may not amend her complaint through argument in a brief opposing summary judgment. *Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir.1996)." *Gilmour v. Gates, McDonald and Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004). The complaint alleges only that Moss breached a fiduciary duty to MSI and that is the only claim against Moss before the Court.

For these reasons, it is

ORDERED that Defendant Darryl R. Moss's motion for summary judgment is GRANTED. The Court will enter a separate judgment.

Dated: April 5, 2006.

JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE