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**SEP 15 2006**

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

\_\_\_\_\_  
IN RE:

CASE NO. 05-80931

Mehmood Akberali Premji and Karima  
Mehmood Premji

CHAPTER 7

Debtor.

JUDGE MASSEY

\_\_\_\_\_  
Georgia Lottery Corporation,

Plaintiff,

v.

ADVERSARY NO. 05-6588

Mehmood Akberali Premji,

Defendant.

**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

The Georgia Lottery Corporation ("GLC") filed a complaint against Mehmood Premji to determine the dischargeability of debt in Mr. Premji's Chapter 7 case. GLC moves for summary judgment. For the reasons set out below, the Court concludes that there is no genuine issue of material fact and that Plaintiff is entitled to judgment determining that the debt is nondischargeable under 11 U.S.C. § 523(a)(4).

Jurisdiction is proper in this Court under 28 U.S.C. § 1334(b), which grants the district courts original jurisdiction in all civil proceedings arising under Title 11. A proceeding arises under Title 11 when it invokes "a substantive right created by the Bankruptcy Code." *In Re*

*Toledo*, 170 F.3d 1340, 1345 (11th Cir. 1999). This proceeding involves a substantive right created by 11 U.S.C. § 523(a)(4). This proceeding constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(I), which includes “determinations as to the dischargeability of particular debts.”

Under Fed. R. Civ. P. 56, made applicable in adversary proceedings by Fed. R. Bankr. P. 7056, a motion for summary judgment should be granted “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.” The movant bears the burden of showing that there is no genuine issue as to any material fact. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). In deciding a motion for summary judgment, “the court must view all evidence and make all reasonable inferences in favor of the party opposing summary judgment.” *Chapman v. AI Transp.*, 229 F.3d 1012, 1023 (11th Cir. 2000). The relevant substantive law determines the material facts. *Id.*

On July 6, 2006, GLC moved for summary judgment. In support of its motion, GLC filed an affidavit of Sharman Lomax, one of its vice presidents, and a Statement of Uncontested Facts. GLC contends that Mr. Premji is indebted to it for lottery proceeds totaling \$41,364.22. According to GLC, 11 U.S.C. § 523(a)(4) excepts this debt from discharge because Mr. Premji’s failure to deposit funds and withdrawal of funds from the trust account constituted defalcation of a fiduciary duty created by Ga. Code Ann. § 50-27-21. Mr. Premji has not responded to the motion, which is deemed unopposed under BLR 7007-1(c). Additionally, Mr. Premji has not filed a response to GLC’s Statement of Uncontested Facts, which is deemed admitted in its entirety under BLR 7056(a)(2). Mr. Premji denied GLC’s allegations with respect to these issues

in his answer and his response to the GLC's request for admission but he does not offer any alternative contentions.

The undisputed facts in this case are as follows. GLC, a public corporation created by statute, operates the Georgia Lottery. *See* Ga. Code Ann. § 50-27-4 et seq. At all times relevant to this case, Mr. Premji served as president and sole owner of Marks Trading Enterprises, Inc. ("Marks"), a corporation that operates convenience stores.

In his capacity as president of Marks, Mr. Premji entered into contracts with GLC known as retailer contracts. These retailer contracts authorize the sale of lottery tickets at stores operated by Marks. In December of 1996, Mr. Premji entered into a retailer contract for a Marks store known as Wesley Chapel Exxon. In May of 2002, Mr. Premji entered into a retailer contract for a Marks store known as Memorial Drive Mobil.

The retailer contracts for the Wesley Chapel Exxon and Memorial Drive Mobil stores provide that the retailer "shall have a fiduciary duty to preserve and account for all proceeds from the sale of lottery tickets." Additionally, these contracts stipulate that such proceeds constitute a trust fund for GLC. The contracts also require the retailer to maintain a separate bank account in which to deposit proceeds from the sale of lottery tickets at its locations on a daily basis. For this purpose, Marks maintained an account at Citizens Trust Bank under the name "Marks Trading Enterprise, Inc. in Trust for Georgia Lottery." On April 15, 2003, Mr. Premji contractually authorized GLC to draw from this account by electronic funds transfer.

Computer terminals located within Marks stores report all lottery transactions to GLC. These computer terminals report that Marks sold, activated, and settled lottery tickets at its Memorial Drive Mobil store during the weeks ending October 9, December 18, and 25, 2004.

GLC attempted to collect these proceeds by electronic fund transfer from the trust account but was unable due to insufficient funds. According to a GLC accounting statement filed with the motion, Marks failed to account for lottery proceeds totaling \$7,270.10<sup>1</sup> from its Memorial Drive Mobil store. Likewise, Marks sold, activated, and settled lottery tickets at its Wesley Chapel Exxon store during the weeks ending November 20, December 11, 18, and 25, 2004. GLC attempted to collect proceeds from these transactions by electronic fund transfer from the trust account but was unable due to insufficient funds. According to a GLC accounting statement, Marks has failed to account for lottery proceeds totaling \$34,094.12<sup>2</sup> from the Wesley Chapel Exxon store.

Bank statements indicate that withdrawals and electronic transfers totaling \$10,349.03 were made from the Marks trust account during September, October, and November of 2004. These statements do not indicate the person making these withdrawals and transfers; nor do they indicate the recipient. Mr. Premji has not offered any explanation for these withdrawals and transfers.

On January 11, 2005, the GLC terminated its contracts with Marks for, *inter alia*, failure to deposit funds from the sale of lottery tickets into the trust account. In total, Marks has not accounted for \$41,364.22 in net lottery proceeds. Neither Marks nor Mr. Premji have paid this sum to GLC.

### **ANALYSIS**

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<sup>1</sup> This total represents net proceeds, which equals total sales plus fees minus cashes, commissions, bonuses, and payments.

<sup>2</sup> This total represents net proceeds, which equals total sales plus fees minus cashes, commissions, bonuses, and payments.

The Bankruptcy Code excepts from discharge debts for “fraud or defalcation while acting in a fiduciary capacity.” 11 U.S.C. § 523(a)(4). Accordingly, “[f]or a debt to be non-dischargeable under 11 U.S.C. § 523(a)(4), the bankruptcy court must find that the debtor acted as a fiduciary and that, in the course of performing his fiduciary duties, he committed an act of fraud or defalcation.” *Eavenson v. Ramey*, 243 B.R. 160, 164 (N.D. Ga. 1999).

### **I. Fiduciary capacity**

Mr. Premji acted in a fiduciary capacity created by Ga. Code Ann. § 50-27-21(a). As used in 11 U.S.C. § 523(a)(4), “[t]he 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). Technical trusts include voluntary, express trusts created by contract. *Id.* at 953. A statute may also impose fiduciary duties sufficient to create a technical trust. *Id.* at 954.

The Eleventh Circuit has not set forth the elements required to establish a technical trust by statute. *See generally id.* In *Eavenson*, the Northern District of Georgia outlined three consistent principles courts have applied in determining whether a technical trust exists. 243 B.R. at 165. First, the trust relationship must exist prior to the act creating the debt. *Id.* “Second, the fiduciary duties must be specifically set forth so that the trust relationship is expressly and clearly imposed.” *Id.* Third, there must be a separately identifiable trust res. *Id.*

In *Quaif*, the Eleventh Circuit held that a statutory trust could create the fiduciary capacity required for nondischargeability under 11 U.S.C. § 523(a)(4). *Id.* at 954. The court found that a provision of the Georgia Insurance Code, Ga. Code Ann. § 33-23-79, created fiduciary duties in

an insurance agent sufficient to create a technical trust over premium funds. *Id.* at 954. The statute imposed duties on the agent to account for premium funds to the principal, keep records of premium funds, and avoid commingling premium funds with operating funds. *Id.* at 953. These statutory requirements established fiduciary duties in the agent prior to the act which created the debt. *Id.* Accordingly, the Eleventh Circuit determined that the agent acted in the fiduciary capacity required for nondischargeability under 11 U.S.C. § 523(a)(4).

In this case, Ga. Code Ann. § 50-27-21 expressly imposed a fiduciary duty on Mr. Premji, as an officer of Marks, to preserve and account for lottery proceeds. Ga. Code Ann. § 50-27-21(a) provides in relevant part that:

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.

(emphasis added). Ga. Code Ann. § 50-27-21(b) further requires retailers to maintain separate bank accounts for lottery proceeds. Such proceeds must be deposited into the trust account on a daily basis. Ga. Code Ann. § 50-27-21(b).

It is undisputed that Mr. Premji entered into retailer contracts with the GLC in his capacity as an officer of Marks. When he entered into these retailer contracts, Mr. Premji undertook the fiduciary duties imposed by Ga. Code Ann. § 50-27-21. This statute imposes fiduciary duties sufficient to create a technical trust under *Quaif* and *Eavenson*. First, the statute established a trust relationship at the time Mr. Premji entered into the retailer contracts. The debt was not created until Mr. Premji later failed to account for lottery proceeds to the GLC. Second, the statute specifically sets forth fiduciary duties to account for lottery proceeds, to maintain lottery

proceeds in a separate account, and make daily deposits in the trust account. The delineation of these duties, along with the express language of the statute, which purports to create a trust over lottery proceeds, impose a trust relationship over lottery proceeds. Moreover, similar requirements were found sufficient to support a fiduciary capacity in *Quaif*. See 4 F.3d at 953. Finally, the trust res, lottery proceeds, are separately identifiable as computers within Marks stores report these proceeds to the GLC.

By creating a technical trust, the fiduciary duties imposed by this statute create the fiduciary capacity required for nondischargeability under 11 U.S.C. § 523(a)(6). See, e.g., *Ga. Lottery Corp. v. Daniel (In re Daniel)*, 225 B.R. 249, 251 (Bankr. N.D. Ga. 1998) (Murphy, J.) (“O.C.G.A. § 50-27-21 sets forth all the elements of a technical trust.”).

## **II. Defalcation**

Mr. Premji’s failure to deposit lottery proceeds into the trust account and withdrawal of funds from this account constitute a defalcation. “‘Defalcation’ refers to a failure to produce funds entrusted to a fiduciary.” *Quaif*, 4 F.3d at 955. Although courts have not precisely defined the term, “a ‘defalcation’ for purposes of [11 U.S.C. § 523(a)(4)] does not have to rise to the level of ‘fraud,’ ‘embezzlement,’ or even ‘misappropriation.’” *Id.* However, the minimum level of conduct that constitutes defalcation is unclear. The *Quaif* court mentioned that some courts have found a defalcation in the conduct of a purely innocent party in dicta. *Id.* However, the court did not need rule on this issue since it found a defalcation in the intentional failure to remit insurance premiums. *Id.*

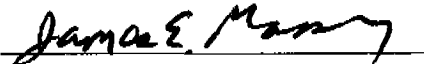
This Court has found conduct constituting a defalcation where the debtor failed to account for funds held in trust. In *Daniel*, the debtor's inability to explain a deficiency of \$9,830.26 in a lottery trust account constituted a defalcation. 225 B.R. at 252.

In this case, Mr. Premji undertook a fiduciary duty to account for lottery proceeds on a daily basis. However, he failed to ensure that adequate funds were deposited into the trust account for three consecutive weeks. As the sole owner and president of Marks, Mr. Premji knew or should have known that these deposits were not being made. He offered no explanation for the failure to account for these funds. Moreover, withdrawals and electronic transfers were made from the trust account on several occasions. Since Mr. Premji offered no explanation for these withdrawals and transfers, it is a fair inference that they occurred with his consent, if not at his direction. By failing to account for the funds held in trust for the GLC for a period of three weeks and allowing the withdrawal and transfer of such funds, leading to a deficiency of \$41,364.22, Mr. Premji's conduct constituted a defalcation under 11 U.S.C. 523(a)(4).

For these reasons, it is

ORDERED that Plaintiff Georgia Lottery Corporation's Motion for Summary Judgment is GRANTED. The Court will enter a separate judgment.

Dated: September 14, 2006.

  
JAMES E. MASSEY  
U.S. BANKRUPTCY JUDGE