IT IS ORDERED as set forth below:

Date: March 24, 2010

W. H. Drake
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBERS**
ALFREDO MEDINA-FERNANDEZ,	:	BANKRUPTCY CASE 08-11226-WHD
Debtor.	:	
HIGH GRADE MATERIALS CO., Plaintiff,	:	Adversary Proceeding 08-1051
v.	:	
ALFREDO MEDINA-FERNANDEZ, Defendant.	:	IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE

O R D E R

Before the Court is a Motion for Summary Judgment filed by Alfredo Medina-Fernandez (hereinafter the "Defendant") in the above-styled adversary proceeding. This

motion arises from a complaint to determine the dischargeability of a particular debt filed by High Grade Materials Company (hereinafter the "Plaintiff") against the Defendant. Accordingly, this matter constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(I); 28 U.S.C. § 1334.

FACTUAL BACKGROUND

The Defendant was the president and 51% shareholder of a company named Michmex Contractors, Inc., a Michigan Corporation (hereinafter "Michmex"). Michmex provided road paving and concrete finishing services, such as sidewalks, curbs, gutters, and entrance driveways. On May 13, 2008 Michmex filed a voluntary petition under Chapter 7 of the Bankruptcy Code in the Western District of Michigan.

The Plaintiff, also a Michigan corporation, supplies concrete to contractors. The Plaintiff provided concrete to Michmex for a number of construction jobs in Michigan. The Plaintiff contends that Michmex failed to pay $39,974.62 for certain materials sold by the Plaintiff to Michmex between September 2006 and October 2007. The parties dispute whether these materials were used on Michmex's public or private contracts.

While the Defendant's majority interest in Michmex is unquestioned, the parties dispute the Defendant's role in the operational management of Michmex at the time the Plaintiff provided the materials in question. The Defendant contends that he moved to Georgia in March of 2006, and thus, was not involved in the day-to-day management of

Michmex's Michigan operations. The Plaintiff, however, asserts that the Defendant retained control over Michmex, as evidenced by his salary, ownership stake, and continued status as president of the company.

The Defendant filed for Chapter 7 bankruptcy protection on May 5, 2008. On August 20, 2008, the Plaintiff filed a complaint to determine the dischargeability of the debt at issue. The Complaint relies upon both Michigan law and the Bankruptcy Code for relief. First, the Plaintiff argues that, under the Michigan Builders Trust Fund Act (hereinafter the "MBTFA"), the Defendant is personally liable to the Plaintiff for $39,974.62 that Michmex failed to pay to the Plaintiff. *See* MICH. COMP. LAWS §§ 570.151-570.153. Second, the Plaintiff asserts that, since the MBTFA imposes a trust upon monies paid to a contractor for the benefit of other contractors and places a fiduciary responsibility upon individuals such as the Defendant, the Defendant committed a defalcation while acting in a fiduciary capacity with regard to the Plaintiff by failing the pay the $39,974.62. Accordingly, the Plaintiff submits that the Defendant's obligation to the Plaintiff should be declared nondischargeable under section 523(a)(4) of the Code.

The Defendant filed the instant motion for summary judgment on October 29, 2009. The Defendant argues that, under the undisputed facts, he is not personally liable for the debt at issue because the MBFTA does not apply to him. Further, the Defendant argues that section 523(a)(4) does not render this debt nondischargeable because: 1) the MBTFA does not make the Defendant a fiduciary under section 523(a)(4); and 2) the Plaintiff has failed

to produce any evidence that the Defendant engaged in a defalcation, which requires a finding that the Defendant acted fraudulently.

LEGAL ANALYSIS

I. Summary Judgment Standard

Under Rule 56(c) of the Federal Rules of Civil Procedure, made applicable to adversary proceedings in bankruptcy cases by Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is proper "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." FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). "'In making this determination, the court must view all evidence and make all reasonable inferences in favor of the party opposing summary judgment.'" *Gray v. Manklow (In re Optical Technologies, Inc.),* 246 F.3d 1332, 1334 (11th Cir. 2001) (quoting *Chapman v. AI Transp.,* 229 F.3d 1012, 1023 (11th Cir.2000) (en banc)). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 322-23. After a movant files a properly supported summary judgment motion, the non-movant has the burden of setting forth

specific facts showing the existence of a genuine issue of fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *accord, In re Decorating Direct, Inc.*, 200 B.R. 702 (Bank. N.D. Ga. 1996).

In this case, the Defendant, as the moving party, bears the initial burden of proving that no material issue of fact exists with regard to this case. If the Defendant successfully bears this initial burden, the burden will shift to the Plaintiff to point to specific evidence to show that a material issue of fact exists for trial.

II. The Existence of a Debt

Before a debt can be declared nondischargeable, the Court must find that it exists. The Bankruptcy Code defines the term "debt" as "liability on a claim." 11 U.S.C. § 101(12). In turn, the term "claim" means:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(5). Thus, reading sections 101(12) and 101(5) together, the term "debt" encompasses any obligation capable of enforcement against the debtor. *In re Musgrove*, 187 B.R. 808, 811-12 (Bank. N.D. Ga. 1995) (Drake, J.).

Here, the Defendant has admitted in his bankruptcy schedules that he owed a debt to the Plaintiff. In Schedule F, the Defendant listed a debt to the Plaintiff in the amount of $378,465.19. On Schedule F, the Defendant stated that this debt is a "business debt" and, in the space provided for account numbers, he stated that this debt is in reference to "michmex." The Defendant did not list the debt owed to the Plaintiff as "disputed," or otherwise indicate that the Defendant challenged his personal liability for the debt. The Defendant, although entitled to do so, never amended his Schedule F to mark this debt as "disputed."

This entry in the Defendant's schedules, standing alone, constitutes a judicial admission that he owes a debt to the Plaintiff. *See Musgrove*, 187 B.R. at 811-12; *In re Standfield,* 152 B.R. 528, 531 (Bankr. N.D. Ill.1993) (verified schedules and statements may give rise to evidentiary admissions) (citations omitted); *see also In re Gervich,* 570 F.2d 247, 253 (8th Cir.1978) (schedules can create judicial admission of debt's existence); *In re Leonard,* 151 B.R. 639, 643 (Bankr. N.D.N.Y.1992) (finding that debtor's entry on schedule of debts created an admission of that debt). By failing to qualify the schedule's description to include the term “disputed,” the Defendant waived the right to contest the debt's existence. *Musgrove*, 187 B.R. at 812-13; *see also In re McMonagle,* 30 B.R. 899, 903 (Bankr. D.S.D. 1983) (holding that a debtor may avoid admitting liability for a debt by including the term “disputed” in the debt's description).

Even without relying upon the Defendant's *in judicio* admission of his personal liability for the debt owed to the Plaintiff, the Court would find, for the reasons stated below, that material questions of fact remain as to whether the Defendant is personally liable for this debt. Aside from the admission, the facts necessary to support the legal conclusion that the Defendant is personally liable for the debt to the Plaintiff are identical to the facts that must be proven to establish that the Defendant owed a fiduciary duty to the Plaintiff. *See Livonia Bldg. Materials Co. v. Harrison Constr. Co*., 276 Mich. App 514, 519-21 (2007) ("If a defendant personally misappropriates funds after they are received by the corporation, he or she can be held personally responsible under the MBTFA."); *In re Patel*, 565 F.3d 963, 968-69 (6th Cir. 2009) (holding that the principal of a corporate contractor individually owed a fiduciary obligation to the plaintiff under the MBTFA for two reasons: (1) the debtor was the president of the corporation; and (2) the debtor was directly involved in the day-to-day management of the corporation, which meant he must have participated in any diversion of trust funds that occurred). Consequently, because the Court has found, as discussed below, that disputed questions of material fact remain on the issue of whether the Defendant owed the Plaintiff a fiduciary duty, it must necessarily find the existence of such facts with regard to the question of the Defendant's personal liability.

II. Section 523(a)(4)

With the existence of a debt clearly established, dischargeability becomes the focus. While a Chapter 7 debtor receives a discharge from most unsecured debts, certain debts are nondischargeable. *See* 11 U.S.C. § 523(a). In particular, "a discharge under section 727 . . . of this title 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). "For 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); *see also Quaif v. Johnson*, 4 F.3d 950 (11th Cir. 1993).

A. Existence of a Pre-Existing Fiduciary Relationship

To establish that a debt is nondischargeable under section 523(a)(4), the creditor must first show that a fiduciary relationship existed between the debtor and the creditor at the time of the defalcation. The phrase "fiduciary relationship" is interpreted more narrowly in section 523(a)(4) than in some other contexts; section 523(a)(4) includes only fiduciary relationships imposed as the result of an "express" or "technical trust," and not as the result of a "constructive" or "resulting trust." *Davis v. Aetna Acceptance Co.,* 293 U.S. 328, 331 (1934); *Quaif*, 4 F.3d at 953; *Patel v. Shamrock Floorcovering Services, Inc. (In re Patel),* 565 F.3d 963, 968 (6th Cir. 2009).

Several attributes distinguish a technical trust from a constructive or resulting trust. First, for a trust to be characterized as a technical trust, the trust relationship must have existed prior to the act which created the debt. *See Guerra v. Fernandez-Rocha (In re Fernandez-Rocha)*, 451 F.3d 813, 816 (11th Cir. 2006); *see also Quaif*, 4 F.3d at 953. Second, the fiduciary duties must be specifically set forth so that the trust relationship is expressly and clearly imposed. *Eavenson v. Ramey*, 243 B.R. 160, 165 (N.D. Ga. 1999). Finally, some courts have also required a separately identifiable *res*. *See e.g., id.*; *In re Kelley*, 84 B.R. 225, 230 (Bank. M.D. Fla. 1988).

The Plaintiff relies upon the MBTFA to show that the Defendant owed a pre-existing fiduciary obligation in the form of a technical trust to the Defendant. The MBTFA states:

> In the building construction industry, the building contract fund paid by any person to a contractor, or by such person or contractor to a subcontractor, shall be considered by this act to be a trust fund, for the benefit of the person making the payment, contractors, laborers, subcontractors, or materialmen, and the contractor. . . shall be considered the trustee for all funds so paid to him for building construction purposes.

MICH. COMP. LAWS § 570.151. Consequently, under Michigan law, any money paid by any person to a building contractor for the purpose of satisfying a building contract is immediately considered, by statute, to be held in trust for any subcontractor who rendered services or materials which were also used in satisfaction of the building contract. *Id.* The Michigan Supreme Court, however, has limited the MBTFA, by holding that this statute applies only to private construction jobs funded by private funds. *In re Certified Question For the Eastern District of Michigan (Air Products and Chemicals, Inc. v. J.F. Cavanaugh*

Co., Inc.), 411 Mich. 727 (1981); *see also Midwest Engineering v. SWS Engineering,* 2005 WL 1459613 (Mich. App. 2005).

The Defendant argues that the MBTFA does not impose a fiduciary responsibility on a contractor within the meaning of section 523(a)(4). In support of his argument, the Defendant relies upon two cases from the Western District of Michigan, *In re Johnson*, 10 B.R. 322 (W.D. Mich. 1981), and *In re Emmert*, 11 B.R. 341 (Bank. W.D. Mich. 1981). In both of these cases, the respective courts held that a contractor within the meaning of the MBTFA is never a fiduciary of a technical trust, and thus, never a fiduciary under section 523(a)(4), because the formation of an MBTFA trust requires a finding that the contractor had the intent to defraud. *Id.* These courts based this legal conclusion upon Section 570.152 of the Michigan Compiled Laws, which states that, under the MBTFA, before a contractor can be held *criminally liable* for a breach of fiduciary duty, the contractor must exhibit an "intent to defraud." MICH. COMP. LAWS § 570.152.

Setting aside the fact that the holding of these cases was rejected by the Sixth Circuit Court of Appeals, when it reversed *In re Johnson* in *Carlisle Cashway, Inc. v. Johnson (In re Johnson)*, 691 F.2d 249, 252-53 (6th Cir. 1982), and more recently in *In re Patel*, 565 F.3d 963 (6th Cir. 2009), the Defendant's interpretation of the MBTFA in this regard is incorrect. Bankruptcy courts use state laws, such as the MBTFA, merely as a vehicle through which to find that a debtor was a fiduciary with regard to a creditor with the meaning of section 523(a)(4). Consequently, all that a plaintiff must show to support a

finding that the debtor acted as a fiduciary is the creation of an express trust. While the State of Michigan must prove that an individual had the intent to defraud a beneficiary before holding that individually *criminally liable* under the MBFTA, Michigan courts have recognized a civil remedy arising from the statute, and no such requirement exists to establish that an MBTFA trust *existed* for that purpose. *See Carlisle Cashway*, 691 F.2d at 253 ("The fiduciary relationship established by the Building Contract Fund Act arises at the time any monies are paid to the contractor or subcontractor whether or not there are any beneficiaries of the trust at that time and continues until all of the trust beneficiaries have been paid."). Consequently, a bankruptcy court need not find the existence of fraudulent intent to determine that a debtor acted in a fiduciary capacity within the meaning of section 523(a)(4).

Although the decisions rendered by the Sixth Circuit Court of Appeals in *Carlisle Cashway* and *Patel* are not binding on this Court, having considered the reasoning of these decisions in light of the Eleventh Circuit Court of Appeals' opinion in *Quaif v. Johnson*, this Court concurs with and adopts these holdings. When a contractor receives funds for the completion of a private construction contract, the contractor becomes the trustee of an MBTFA trust and owes a fiduciary duty to those who rendered services or supplied materials. As such, the MBTFA establishes a technical trust because it establishes a trust that arises before any fraudulent behavior occurs, the trust and its participants are clearly defined, and the *res* of the trust is easily identifiable. Therefore, the Court finds that the

fiduciary obligation imposed upon a contractor by MBTFA is the type of fiduciary obligation that will support a finding of nondischargeability under section 523(a)(4).

While the MBTFA clearly creates and defines the fiduciary duties imposed upon a "contractor," the statute does not define the term "contractor." *People v. Brown,* 239 Mich. App. 735, 739 n.2 (Mich. App. 2000). Under both state and federal case law, however, a general contractor, whether an individual or a business entity, becomes a "contractor" under the MBTFA when it agrees to perform or oversee certain building activities in exchange for money. *See Patel*, 565 F.3d at 968. In addition, the definition of "contractor" includes certain principals of legal entities that do business as a building contractor. *Id.* at 968-69; *People v. Brown*, 239 Mich. App. 735, 740-41 (2000). For the principal of a legal entity to be considered a "contractor" within the meaning of the MBTFA, the principal must act as a corporate officer for the defalcating legal entity and must participate in the misappropriation of funds. *Patel*, 565 F.3d at 969; *Brown*, 239 Mich. App. at 740-41.

Both parties rely heavily upon the court's decision in *Patel* to determine whether the Defendant owed a fiduciary obligation to the Plaintiff. In *Patel*, the plaintiff-subcontractor filed a complaint against the debtor, seeking a determination that a debt owed by a corporate general contractor to the plaintiff was nondischargeable under section 523(a)(4). *Patel*, 565 F.3d at 969. The debtor was a 50% shareholder and the president of the corporation. *Id.* at 966. The corporation failed to pay to the plaintiff; instead, the corporation diverted funds it received to other sources, such as the payment of its own operating expenses. *Id.* at 967.

The Sixth Circuit Court of Appeals held that the debtor individually owed a fiduciary obligation to the plaintiff for two reasons: (1) the debtor was the president of the corporation that had acted as a contractor; and (2) the debtor was directly involved in the day-to-day management of the corporation, which meant that he must have participated in any defalcation that the corporation had committed. *Id.* at 968-69.

In this case, the Defendant argues that no genuine issue of material fact exists regarding the Defendant's alleged fiduciary duty to the Plaintiff. The Defendant submits that the Plaintiff has shown no evidence to support the finding that the Defendant was involved in any of Michmex's Michigan operational decisions at the time the Plaintiff contends Michmex diverted funds from the Plaintiff. Further, the Defendant asserts that no evidence exists to support the finding that the Plaintiff provided Michmex with materials and services for use on private construction jobs.

First, with regard to the Defendant's assertion that the Defendant was not involved in any of Michmex's operational decisions during the time the Plaintiff alleges the defalcation occurred, the Defendant offers his own sworn affidavit, asserting that the Defendant had no control over Michmex's Michigan operations in either 2006 or 2007. The Defendant's affidavit states that, prior to 2006, the Defendant ceded all control over Michmex's Michigan operations to Juan Rubio, Vice President and 49% shareholder of Michmex, and explains that the transition of power within Michmex from the Defendant to Rubio coincided with the Defendant's move from Michigan to Georgia. In order to prove

that the Defendant actually moved to Georgia, the Defendant also provided a rental contract, which the Defendant entered into on March 23, 2006, for residential property in Shiloh, Georgia.

To combat the Defendant's factual assertions, the Plaintiff offers substantial evidence that the Defendant was involved in Michmex's operational decisions during the time the Plaintiff did business with Michmex. The Plaintiff, in its response to the Defendant's Motion, points to the depositions of Juan Rubio and Melissa Hulst, the office manager of Michmex. Both deponents make numerous statements indicating that the Defendant was involved in virtually all of Michmex's cash flow decisions. Both deponents indicate that the Defendant was directly involved in Michmex's decision not to pay the Plaintiff. The depositions of Rubio and Hulst, along with the conflicting sworn affidavit from the Defendant, create a material issue of fact regarding whether the Defendant was involved in Michmex's decision not to pay the Plaintiff out of funds Michmex received from various customers.

With regard to the Defendant's contention that the Plaintiff never provided Michmex with materials and services on private construction contracts, the Defendant again points to his own sworn affidavit, which states that, to the best of the Defendant's knowledge, Michmex never worked on any private construction contracts. The Defendant's affidavit, however, is contradicted by his own deposition testimony, in which he states that some of the contracts "could have been private, I'm not sure." Deposition of Alfred Medina-

Fernandez, at 33. Further, the Plaintiff offers two sworn affidavits, from Gregory Stadler and Monte Tolan, asserting that at least some of the Plaintiff's deliveries to Michmex were for private construction contracts. Based upon the apparent disparity in the evidence, the Court finds that a material question of fact also exists regarding whether the Plaintiff provided the Defendant material and supplies on private contracts.

In sum, the Court finds that at least two material questions of fact, crucial to resolving the question of whether the Defendant owed the Plaintiff a fiduciary responsibility, remain for trial. A material question of fact remains with regard to whether the Defendant was involved in Michmex's Michigan operational decisions from September 2006 to November 2007. A material question of fact also remains with regard to whether the Plaintiff provided Michmex with materials on private jobs. As a result, summary judgment is improper as to the first element under section 523(a)(4).

B. Defalcation

To establish that a debt is nondischargeable under section 523(a)(4), a creditor must also show, by a preponderance of the evidence, that the debtor committed fraud or a defalcation while acting in a fiduciary capacity with regard to the plaintiff. *Eavenson v. Ramey,* 243 B.R. 160 (N.D. Ga. 1999). 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). "Bad faith is not a necessary element of defalcation." *In re Waters,* 419

B.R. 919 (Bankr. M.D. Ga. 2009). "[A] debtor who knowingly and intentionally violated her fiduciary duties under [the MBTFA]" has committed a defalcation. *In re Tucker*, 2007 WL 1100482 (Bankr. M.D. Ga. 2007).

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 of *Quaif*, this Court concludes that, when a debtor has a fiduciary duty to pay MBTFA trust assets to subcontractors and materialmen for the services and materials provided for private construction projects, the debtor's intentional decision to use those funds for some other purpose, such as the payment of general operating expenses or payroll expenses associated with other contracts, constitutes a defalcation,

regardless of whether the debtor misappropriated the funds for his own use or otherwise personally benefitted from the funds.

In this case, the Plaintiff has pointed to sufficient evidence to support the conclusion that a material question of fact remains as to whether the Defendant used trust funds held for the Plaintiff's benefit for some other purpose. Specifically, the Plaintiff relies on the deposition testimony of Medina and Hulst to the effect that Michmex paid general operating expenses and his own salary with the funds received from Michigan construction projects, *see* Deposition of Alfred Medina-Fernandez at 38, 60; Deposition of Melissa Hulst at 26-27, as well as the Michmex payroll records submitted by the Defendant, which show that Michmex paid its Georgia employees, who most likely did not render services in connection with the Michigan construction projects at issue. The Defendant's proffered evidence does not persuade the Court that no material questions of fact remain on this issue.

C. Damages Resulting From the Defalcation

Third, to establish that a debt is nondischargeable under section 523(a)(4), the Plaintiff must ultimately show that it suffered a loss as a result of the Defendant's defalcation. In this case, the Plaintiff has provided documentation to support a finding that Michmex never paid for certain materials and services provided to Michmex. The Court has found that the Defendant admitted that he is personally liable for the debt owed to the Plaintiff for materials and services rendered, and, at the very least, there remain questions

of fact as to whether the Plaintiff's debt is related to the private contracts as to which the Plaintiff alleges that the Defendant committed a defalcation. Therefore, summary judgment is improper as to the third element of section 523(a)(4), as the Defendant offers no evidence tending to show that the debt he owes the Plaintiff did not result from the Defendant's alleged defalcation.

CONCLUSION

Material questions of fact remain with regard to every element of nondischargeability under section 523(a)(4). First, material questions of fact remain with regard to whether the Defendant owed the Plaintiff a fiduciary obligation, as, under the evidence presented, the Court could find that the Defendant was involved in Michmex's day-to-day operating decisions and that the Plaintiff provided materials in connection with private construction contracts. Second, material questions of fact remain with regard to whether the Defendant committed a defalcation, as sufficient evidence has been presented to permit a finding that the Defendant caused Michmex to use trust funds to pay expenses other than those associated with the private contracts for which the Plaintiff provided materials. Due to the myriad of unresolved material questions of fact, summary judgment is improper at this time. Accordingly, the Defendant's Motion for Summary Judgment is **DENIED.**

END OF DOCUMENT