UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	
	CASE NO. 05-81005-JB
BRIAN K. MASK, SR.	
	CHAPTER 7
Debtor.	
ROYSTER-CLARK AGRIBUSINESS, INC.,	
Plaintiff	
v.	ADVERSARY NO. 06-6085
BRIAN K. MASK, SR.,	
Defendant	

ORDER

This adversary proceeding is before the Court on plaintiff Royster-Clark Agribusiness, Inc.'s ("RCAB") motion for partial summary judgment (Docket #18). Plaintiff filed a complaint objecting to the dischargeability of a judgment entered in its favor against debtor defendant Brian K. Mask, Sr. by the Superior Court of Newton County, Georgia, on the grounds that the debt is nondischargeable under 11 U.S.C. § 523(a)(2)(A) and (a)(4). Plaintiff's motion for summary judgment is based solely on the § 523(a)(4) claim that the debt arises from the debtor's fraud or defalcation while acting in a fiduciary capacity. Defendant filed a brief response requesting a dismissal of plaintiff's entire complaint to which plaintiff filed a reply. This is a core proceeding under 28 U.S.C. § 157 (b)(2)(I). After carefully considering the matter, the Court concludes that Plaintiff is not entitled to summary judgment on its § 523(a)(4) claim.

Defendant does not dispute the facts as set forth by Plaintiff in its Statement of Undisputed Material Facts. Brian K. Mask, Inc. ("Mask, Inc."), through its president Mr. Mask, and IMC Agribusiness, Inc., predecessor in interest to RCAB, entered into a Warehouse Agreement in 1997 under which Mask, Inc. purchased, on consignment, certain fertilizer and other products from RCAB and sold them at retail. Mask, Inc. was required to pay RCAB as it sold these products. The Warehouse Agreement contained the following provision:

> All products and other evidences of the deliver [sic] of IMC products shall at all times be and remain the absolute property of IMC and the products shall at all times be kept separate and apart from all other merchandise of the Warehouseman.

Warehouse Agreement, ¶4. In connection with the Warehouse Agreement, Mask, Inc. also signed a security agreement in favor of RCAB, and Mr. Mask signed a personal guaranty.

RCAB shipped products to Mask, Inc. which paid RCAB when it blended and sold the products at retail. The parties performed a monthly accounting of the inventory RCAB shipped to Mask, Inc. and all inventory sold at retail by Mask, Inc. in order to determine what proceeds were due to RCAB. RCAB would physically inspect Mask, Inc.'s inventory to estimate what remained on-site and subtract this amount from the amount shipped to determine what Mask, Inc. had sold. Mask, Inc. and Mr. Mask did not keep records of what Mask, Inc. sold in terms of tonnage it received from RCAB. Annually, the parties would actually measure the inventory to account for any discrepancies in RCAB's records. Based on inspections in June and September of 2000, the parties found that the actual inventory did not match inventory records. Mr. Mask admitted that the missing products were his responsibility, that Mask, Inc. had breached its agreement to compensate RCAB for the sale of its products, and that the sale of RCAB's products were out of trust.

RCAB sued Mask, Inc. and Mr. Mask in the Superior Court of Newton County. On September 13, 2004, the Superior Court entered a summary judgment against Mask, Inc. for breach of contract and against Mr. Mask pursuant to his personal guaranty. The Order granted RCAB a judgment in the principal amount of $222,780.64, plus interest, and reserved the issue of attorney's fees pursuant to O.C.G.A. § 13-1-11, to permit plaintiff time to submit an exhibit. On October 13, 2004, the Superior Court entered a supplemental Order, granting RCAB attorney's fees against Mask, Inc. and Mr. Mask, individually, in the amount of $37,145.15.

A court will only grant summary judgment when there is "no genuine issue as to any material fact and the moving party is entitled to summary judgment as a matter of law." Fed. R. Civ. P. 56(c), made applicable by Fed. R. Bankr. P. 7056. *Lusk v. Williams* (*In re Williams*), 282 B.R. 267, 271 (Bankr. N.D. Ga. 2002) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). The movant bears the burden of going forward and ultimately of proving all elements of the cause of action. *Williams,* 282 B.R. at 271 (citing *Celotex*, 447 U.S. at 322). Courts must review all facts and inferences in the light most favorable to the non-moving party." *Bridge Capital Investors, II v. Susquehanna Radio Corp.,* 458 F.3d 1212, 1215 (11th Cir. 2006); *Samples on Behalf of Samples v. Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988).

Plaintiff advances two arguments to support its motion for summary judgment. First, Plaintiff argues that the doctrine of collateral estoppel or issue preclusion applies and that all the elements of a § 523(a)(4) dischargeability objection were decided by the Superior Court. Second, Plaintiff argues that the undisputed facts establish a defalcation while acting in a fiduciary capacity. Neither argument is supported by the facts in the record or the law.

Section § 523(a)(4) of the Bankruptcy Code provides as follows:

> (a) A discharge under section 727... of this title does not discharge an individual debtor from any debt–
>
> ....
>
> (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny[.]

In order for a debt to be nondischargeable under this section of the Bankruptcy Code, the plaintiff must first prove that a fiduciary relationship existed between the creditor and the debtor and then that fraud or defalcation occurred while the fiduciary relationship existed. The term "fiduciary" is not defined in the Bankruptcy Code, but the Supreme Court held, in a pair of frequently cited cases interpreting earlier versions of § 523(a)(4), that the term 'fiduciary' is to be construed narrowly and is intended to refer to a 'technical' trust. *Davis v. Aetna Acceptance Company*, 293 U.S. 328, 333, 55 S.Ct. 151, 153, 79 L.Ed. 393 (1934); *Chapman v. Forsyth*, 43 U.S. 202, 208, 2 How. 202, 11 L.Ed. 236 (1844); *Quaif v. Johnson*, 4 F.3d 950, 953 (11th Cir. 1993); *see also* 4 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 523.10[1][a]-[c] at 727-70 to 727-75 (15th ed. Rev. 2005). Such a trust must have existed prior to the act which created the debt and does not include one implied by contract or created by operation of law, e.g., a constructive or resulting trust. *Quaif*, 4 F.3d at 953. Courts have recognized that a technical trust may sometimes be created by statute. *Id.* at 953-55.

The doctrine of collateral estoppel, or issue preclusion, prohibits the relitigation of issues that have been adjudicated in a prior lawsuit, and collateral estoppel principles apply to dischargeability proceedings. *Morris v. Cunningham* (*In re Cunningham*), 355 B.R. 913, 917-18 (Bankr. N.D.Ga. 2006) (*citing Grogan v. Garner*, 498 U.S. 279, 284 n.11, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991)). When determining the preclusive effect of state court judgments, bankruptcy courts apply the collateral estoppel law of that state. U.S. Const. art. IV, § 1; 28 U.S.C. § 1738 (2006); *Allen v. McCurry*, 449 U.S. 90, 96, 101 S.Ct. 411, 66 L. Ed.2d 308 (1980); *St. Laurent v. Ambrose* (*In St. Laurent*), 991 F.2d, 675-76 (11th Cir. 1993). Under Georgia law, the following elements must be established before

collateral estoppel may be invoked: (1) there must be an identity of issues between the first and second actions; (2) the duplicated issue must have been actually and necessarily litigated in the prior court proceeding; (3) determination of the issue must have been essential to the prior judgment; and (4) the party to be estopped must have had a full and fair opportunity to litigate the issue in the course of the earlier proceeding. *Barger v. City of Cartersville*, 348 F.3d 1289,1293 (11th Cir. 2003).

The Superior Court Order upon which plaintiff relies for its collateral estoppel argument does not contain any finding that there was an express trust between RCAB and Mr. Mask, nor does it contain any finding that Mr. Mask was acting in a fiduciary capacity, or that he committed fraud or defalcation. Rather, the Superior Court found that Mask, Inc. breached the Warehouse Agreement because it did not make payments for all the products it received from RCAB and that Mr. Mask was liable for Mask, Inc.'s obligations based on his personal guaranty. While the Superior Court found Mask, Inc. and Mr. Mask liable in the principal amount of $222,780.64 plus interest and attorney's fees, this liability was predicated on contractual breaches. A determination of the issues necessary for a judgment based on § 523(a)(4) of the Bankruptcy Code was not an essential part of the Superior Court judgment, and the principles of collateral estoppel do not preclude the debtor from contesting plaintiff's claim that its debt should not be discharged under§ 523(a)(4).

Plaintiff's argument that the undisputed material facts entitle it to a summary judgment on the § 523(a)(4) claim is also without merit. While a technical trust may be created by agreement or by statute, here the plaintiff asserts that the trust was established by the terms of the Warehouse Agreement. However, a reading of the Warehouse Agreement between RCAB and Mask, Inc. reveals that it is a type of commercial contract that normally creates a debtor/creditor relationship, not a fiduciary relationship. RCAB may have retained title to the products, as consignor, and delivered the products to Mask, Inc., as consignee, so that Mask, Inc. could sell and remit payment to RCAB, but the agreement

does not create the type of trust required under § 523(a)(4). *In re Morales Travel Agency*, 667 F.2d 1069, 1071 (1st Cir. 1981) (interpreting previous version of § 523(a)(4)); *Smallwood v. Howell* (*In re Howell*), 178 B.R. 730, 733 (Bankr. W.D. Tenn. 1995); *Bacon v. Hyers* (*In re Hyers*), 70 B.R. 764, 771 (Bankr. M.D. Fla. 1987); *Snap-on Tools Corp. v. Rigsby* (*In re Rigsby*), 18 B.R. 518, 520 (Bankr. E.D. Va. 1982); *Gen. Elec. Credit Corp. v. Graham* (*In re Graham*), 7 B.R. 5, 7 (Bankr. D. Nev. 1980). Moreover, for a fiduciary relationship to be established in the context of a consignment agreement, the proceeds of the consignment sales must be segregated and must not be available for the general use of the consignee. *Howell*, 178 B.R. at 733; *Hyers*, 70 B.R. at 767 (no fiduciary relationship where agreement is silent as to any duty to segregate any of the proceeds obtained from sales); *Graham*, 7 B.R. at 7.

Paragraph 4 of the Warehouse Agreement only requires that the products be kept separate and apart from other merchandise, not that the proceeds from the sale of the products be segregated. Nor does the Warehouse Agreement place any restrictions on Mask, Inc.'s use of the proceeds or prevent Mask, Inc. from commingling the proceeds. While Mask, Inc. breached the Warehouse Agreement with RCAB and Mr. Mask breached his personal guaranty, these breaches do not support a summary judgment determination under § 523(a)(4).

The cases cited by plaintiff are distinguishable and do not support plaintiff's position. Plaintiff cites several cases on the issue of what constitutes a defalcation within the meaning of § 523(a)(4). But defalcation without a fiduciary relationship does not establish a claim under § 523(a)(4). None of these cases involved a consignment or warehouse agreement, and the determinations in these cases that a fiduciary relationship existed and defalcation occurred have no relevance here. In *Baugh v. Matheson* (*In re Matheson*), 10 B.R. 652, 655 (Bankr. S.D. Ala. 1981), the fiduciary relationship was created by federal statute, the Packers and Stockyards Act. In *Besroi*

Construction v. Kawczynski (*In re Kawczynski*), 442 F. Supp. 413 (W.D. N.Y. 1977) and *Carey Lumber Co. v. Bell*, 615 F.2d 370, 376 (5th Cir. 1980), the fiduciary relationship was created by state mechanics' lien laws. In *Central Hanover Bank & Trust v. Herbst*, 93 F.2d 510 (2d Cir. 1937), the debtor, Mr.Herbst, was a fiduciary by virtue of being a receiver.

Plaintiff has also failed to establish as a matter of law how Mr. Mask, as opposed to Mask, Inc., could be held to be a fiduciary with respect to RCAB. RCAB cites *Delange v. Tsikouris (In re Tskiouris),* 340 B.R. 604 (Bankr. N.D. Ind. 2006), and *In re Frain*, 230 F.3d 1014 (7th Cir. 2000), for the proposition that courts have "extended" the fiduciary relationship from a corporation to an officer in control. Neither of these cases stands for such a proposition. In *Tsikouris,* the debtor operated as a sole proprietorship and employed union employees. The debtor contracted to make certain payments to ERISA-qualified union employee benefit plans, but failed to make them. The Court found that the debtor was not acting in a fiduciary capacity and the debt was not excepted from discharge under § 523(a)(4). Nothing in *Tsikouris* would support a finding that Mr. Mask was a fiduciary of RCAB. In *Frain,* the Court found that a 50% shareholder had a fiduciary relationship with two 25% shareholders, since the 50% owner had a "position of ascendancy" over the other two shareholders. In the instant case, Mask, Inc. and RCAB are two separate corporations. Mr. Mask was not in an "ascendant" position over RCAB, and nothing in *Frain* supports a finding that the owner of a corporation is a fiduciary to a supplier or consignor. Each of the cases cited by Plaintiff is factually inapplicable to the instant circumstances and does not support plaintiff's claim that Mr. Mask had a fiduciary relationship with RCAB within the meaning of § 523(a)(4).

In accordance with the above reasoning, plaintiff's motion for summary judgment is denied. The Court notes that in defendant's short response to plaintiff's motion for summary judgment, defendant "requests" a dismissal of the complaint. This request cannot be granted. The request is not

made in proper motion form and is not accompanied by a memorandum of law. BLR 7007-1(a), NDGa. (2005). In addition, the request is not accompanied by any law or facts that would allow the Court to dismiss the complaint in its entirety. As noted at the outset of this opinion, plaintiff's complaint is pled both under § 523(a)(2)(A) and (a)(4) of the Bankruptcy Code, and the motion for summary judgment was limited solely to the (a)(4) claim. The Court will set this adversary proceeding for trial on Plaintiff's § 523(a)(2)(A) claim by separate order.

IT IS SO ORDERED, this 16th day of March, 2007.

JOYCE BIHARY
UNITED STATES BANKRUPTCY JUDGE

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