

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CHAPTER 7
)	
SHEVAWN DENISE CARTER,)	CASE NO. 14-58360 - MHM
)	
Debtor.)	
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GEORGIA LOTTERY CORPORATION,)	
)	
Plaintiff,)	
v.)	ADVERSARY PROCEEDING
)	NO. 14-5212
SHEVAWN DENISE CARTER,)	
)	
Defendant.)	

ORDER ON MOTION FOR SUMMARY JUDGMENT

This adversary proceeding is before the court on Plaintiff's *Motion for Summary Judgment*, filed December 5, 2014 (Doc. No. 21) (the "Motion"). Plaintiff filed a complaint initiating this adversary proceeding July 8, 2014, seeking to except its claim from discharge under 11 U.S.C. § 523(a)(4) because the claim arose from Debtor's fraud or defalcation in her fiduciary capacity as an officer of a Georgia lottery retailer. Plaintiff now asserts that no material facts remain at issue, and that Plaintiff is entitled to summary judgment.

BACKGROUND

The relevant facts are undisputed, but incomplete. On September 19, 2007, Defendant—as CEO on behalf of Pashur Property Enterprise, LLC d/b/a Pashur Shell (“Pashur”)—and Plaintiff entered into a contract wherein Pashur agreed to become a Georgia lottery retailer (the “Contract”). In doing so, Pashur agreed to be bound by the Georgia Lottery for Education Act and the Georgia Lottery Retailer Rules and Regulations. Pursuant to the Contract, Pashur was authorized to sell lottery tickets at 4150 Marcella Street, Powder Springs, GA 30127 (the “Property”). Pashur established a bank account at Wells Fargo National Bank (the “Account”) into which lottery proceeds were to be deposited “not later than the close of the next banking day after the date of their collection by the retailer” pursuant to O.C.G.A. § 50-27-21(b), and authorized Plaintiff to initiate electronic funds transfers from that account to collect lottery proceeds.

During the weeks ending October 18, October 25, and November 1 of 2008, Pashur sold, activated, or settled lottery tickets. When Plaintiff attempted to withdraw proceeds from these transactions from the Account, Plaintiff found that the account had insufficient funds due to Defendant’s failure to make the daily deposits required by O.C.G.A. § 50-27-21(b). On January 10, 2013, the Superior Court of Paulding County entered a judgment against Defendant and Pashur, jointly and severally in the amount of \$13,646.55 in principal, \$1,389.66 in attorney’s fees, and \$282.00 in court costs;

however, no findings of fact with respect to that judgment have been presented of record in this case. Plaintiff alleges the judgment is for the unpaid lottery proceeds.

Defendant asserts that she was locked out of the Property October 23, 2008, and was therefore unable to deposit the lottery proceeds or access remaining lottery tickets left in the premises October 22, 2008. Defendant filed a police report blaming Defendant's landlord for the lockout. Plaintiff states, "in light of this information," Plaintiff excluded "seventeen packs of tickets" from its calculation of outstanding obligations. Plaintiff does not explain the basis for its adjusted calculations – for example, whether the excluded packs directly correspond to the tickets sold after a date certain.

CONCLUSIONS OF LAW

Pursuant to FRCP 56(c), incorporated in Bankruptcy Rule 7056, a party moving for summary judgment is entitled to prevail if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Summary judgment is precluded when issues of material fact exist that would alter the disposition of the case, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), with inferences from the underlying facts being drawn in the light most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

11 U.S.C. § 523(a)(4) prevents the discharge of a debt when it arises from fraud or defalcation while acting in a fiduciary capacity. Even in the absence of bad faith, defalcation can include conduct that the “fiduciary knows is improper but also reckless conduct of the kind that the criminal law often treats as the equivalent.” *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754, 1759 (2013). Using the same standard as the Modern Penal Code, defalcation can occur when a fiduciary “‘consciously disregards’ (or is willfully blind to) ‘a substantial and unjustifiable risk’ that his conduct will turn out to violate a fiduciary duty.” *Id.* (citing Model Penal Code § 2.02(2)(c), p. 226 (1985)).

Georgia’s lottery laws provide that a lottery retailer and its officers owe a fiduciary duty “to preserve and account for lottery proceeds and lottery retailers shall be personally liable for all proceeds” including unsold tickets and proceeds from sold tickets. Ga. Code Ann. § 50-27-21. As such, courts have found defalcation by a lottery retailer’s officer as grounds for denying a discharge of the debt under 11 U.S.C. § 523(a)(4) in an officer’s personal Chapter 7 proceedings. *See In re Premji*, 2006 WL 6584368 (Bankr. N.D. Ga. Sept. 15, 2006) (J. Massey).

DISCUSSION

Based on the existing jurisprudence and the evidence presented, a fiduciary trust was created and existed at the time Defendant is alleged to have breached her fiduciary duty. The Contract expressly created a fiduciary trust between Plaintiff and Pashur, with Pashur agreeing to be bound by the Rules and Act. It is clear from the facts that both

parties intended to create a fiduciary duty that would bind Pashur and Defendant—
Pashur’s CEO and representative—to preserve and account for lottery proceeds.

Although Defendant blames the lockout for her inability to remit proceeds to Plaintiff, Defendant’s failure to abide by O.C.G.A. § 50-27-21 began prior to the lockout. Plaintiffs assert that they were unable to withdraw proceeds of \$2,0456.74 from the week ending October 18, 2008—several days prior to the alleged lockout. Defendant has failed to account for these funds, and has not disputed her failure to deposit funds the day after their receipt, as required by O.C.G.A. § 50-27-21. The undisputed facts show that Defendant consciously disregarded a substantial and unjustifiable risk that her conduct would violate a fiduciary duty – the duty to account for and remit proceeds from the sale of the lottery tickets – by failing to comply with the deposit requirements of O.C.G.A. § 50-27-21 during the week ending October 18, 2008.

The parties dispute the amount due. Plaintiff has provided a sworn affidavit, documentation from the lottery terminal as to activity at Defendant’s location, and an order from the Superior Court of Paulding County for damages and fees totaling \$15,318.21 from the civil claim Plaintiff filed against Defendant. Defendant has raised issues of material fact as to the portion of that amount remaining unpaid due to Defendant’s conscious disregard of her fiduciary duties, and the amount due to Defendant’s physical inability to comply with her fiduciary duties.¹


¹ For example, none of the pleadings make clear whether Defendant was ever allowed to reenter the premises or how additional tickets were sold subsequent to the “lockout.”

CONCLUSION

Defendant had entered into a fiduciary relationship with Plaintiff for the sale of lottery tickets. Defendant failed to remit payment of the proceeds after having taken a substantial and unjustifiable risk with the funds she was entrusted with, but intervening events may have prevented Defendants from exercising her fiduciary duties during some portion of the time period in question. As questions of material fact remain at issue, it is hereby

ORDERED that Plaintiff's Motion is *granted in part* with respect to the \$2,456.74 debt arising from Defendants sale of lottery tickets during the week ending October 18, 2008. The Motion is *denied* in all other respects.

IT IS SO ORDERED, this the 4th day of March, 2015.



MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE