UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO

In Re	)	
	)	**CHIEF JUDGE RICHARD L. SPEER**
Paul Richard Dukes, Jr.	)	
	)	Case No. 98-32382
Debtor(s)	)	
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MEMORANDUM OPINION AND DECISION

This cause comes before the Court upon the Trustee's Motion for Summary Judgment and Memorandum in Support. In opposition thereto, the Secretary of Labor, who was permitted by Order of this Court to substitute on this matter for the Debtor, submitted a Brief in opposition. The Court has now had the opportunity to review the legal arguments presented by the Parties, as well as the entire record of this case. Based upon that review, and for the following reasons, the Court finds that the Trustee's Motion for Summary Judgment should be Denied.

FACTS

The Debtor in this case, Paul R. Dukes, Jr. (hereinafter referred to as the Debtor), was the President and 49% owner of a business incorporated as Dukes Industries, Inc. On June 2, 1998, the Debtor filed in this Court a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code. Thereafter, at apparently the urging of the United States Department of Labor, the Debtor, on behalf of Dukes Industries, filed a priority proof of claim against his bankruptcy estate in the amount of Forty-seven Thousand Five Hundred Twenty-eight and 53/100 dollars ($47,528.53) for unpaid contributions to a 401(k) Plan established by Dukes Industries. In addition, the following former employees of Dukes Industries also filed proof of claims against the Debtor for, among other things, these same unpaid 401(k) contributions: Thomas Wagley; Richard Trainor; Ramon Trevino; Susan King; Paul Youngpeter; Richard Fellhauer; Randy Abbott; Ted Gutierrez; George Dunham; Robert Martin; and Mark Pacholski.

The Trustee has objected to all these proof of claims on the grounds that such claims are actually in the nature of a corporate debt, and thus such claims cannot be asserted against the Debtor in a personal capacity. In opposition thereto, the Department of Labor, on behalf of the Debtor, asserts that Dukes Industries has a valid claim against the Debtor's bankruptcy estate because the Debtor is personally liable for the unpaid balance of the 401(k) Plan established by Dukes Industries. With regards to this assertion, the operative facts of this case appear to be as follows:

In July of 1994, Duke Industries established a 401(k) Plan on behalf of its employees. At this time, in compliance with federal law, Duke Industries was named as the Plan Administrator, while the Debtor was named as one of the two plan trustees, the other plan trustee being a man by the name of Brian Orr who later resigned from the Company in July of 1996. Union Central Life Insurance Company was then named as the Custodian of the Plan (i.e., the entity responsible for actually investing the proceeds of the pension funds). With respect to the Debtor's role as a trustee for the Company's 401(k) Plan, there existed no formal allocation of responsibilities between himself and Mr. Orr. However, up until the time of Mr. Orr's

resignation, the Debtor stated, in a Declaration submitted to the Court, that Mr. Orr was appointed by the Company as the person primarily responsible for administering the plan. In this capacity, Mr. Orr's duties included: paying bills; reconciling accounts, preparing checks, overseeing enrollment, and handling loans and hardship withdrawals.

While in effect, the 401(k) Plan of Dukes Industries was funded through two sources. First, the Plan provided for voluntary employee contributions made through salary deductions. Second, the Plan provided that Duke Industries would match, up to a certain dollar amount, any contributions made by its employees. With respect to the contributions made by the employees of Dukes Industries, it became the practice of Dukes Industries to deduct such contributions from the employees' paychecks, at which time such funds, before being forwarded to the Plan, were placed in the Company's general checking account. With respect to the funds withdrawn from the employees' paychecks, Mr. Orr, in his capacity as trustee and plan administrator of the 401(k) Plan, was responsible for forwarding such funds to the custodian of the plan. However, since the Debtor was the sole person with signatory authority on the Company's checking accounts, the Debtor left Mr. Orr with blank signed checks so that he could make the necessary contributions. These checks, once negotiated, were then forwarded to the Debtor's home address so that the Debtor could keep tabs on Mr. Orr's activities.

In 1996 Duke Industries began to experience financial difficulties. At this time, Dukes Industries became delinquent in forwarding employee contributions to the Plan. However, according to the Debtor, the Company at this juncture could not readily pay the delinquent contributions given the financial trouble it was experiencing. In fact, the Debtor stated, in his Declaration to the Court, that he paid the obligations of the Company based upon the following rationale:

> After Brian Orr resigned from the Company in July 1996, with all kinds of bills coming in and limited money to pay them, I decided what bills to pay by applying the

> rational of paying off whomever yelled the loudest. Other factors included paying bills to keep the lights on and things of that nature.

After Mr. Orr's resignation, the Debtor placed the Company's bookkeeper and personnel manager, Ms. Myers, in charge of the Company's 401(k) Plan. In this capacity, the Debtor states that he directed Ms. Myers to stay current on future contributions to the Company's 401(k) Plan. However, sometime thereafter Ms. Myers was let go, after which time one Michelle Collins took over, in a limited capacity, assorted duties regarding the Company's 401(k) Plan. However, not long thereafter, the Debtor, after receiving complaints from his employees concerning missing contributions to the 401(k) Plan, completely discontinued the Plan. Employees were then notified of this decision by a memo placed in their paycheck.

DISCUSSION

The allowance or disallowance of claims against the estate are core proceedings pursuant to 28 U.S.C. § 157(b)(2)(B). Thus, this case is a core proceeding.[1]

The Secretary of Labor, through Dukes Industries, and certain former employees of Dukes Industries seek to assert a claim against the Debtor for the failure of Dukes Industries to fully fund an employees' 401(k) pension plan. The Trustee, however, asserts that any claim that the Secretary of Labor or the former

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[1] It should be noted that 29 U.S.C. § 1132 confers, with a few minor exceptions, exclusive jurisdiction over matters involving ERISA to the federal district courts. This statutory section, however, does not preclude this Court from exercising jurisdiction over this matter as bankruptcy courts derive their jurisdictional authority directly from the district courts. *See Frontier Airlines v. Inc. v. Frontier Airlines, Inc. Retirement Plan for Pilots Pension Board (In re Frontier Airlines, Inc.)*, 84 B.R. 724, 727 (Bankr. D. Colo. 1988) (order of reference is sufficient to vest a bankruptcy court with jurisdiction and authority to hear ERISA issues).

employees of Dukes Industries may have for the under-funding of the 401(k) pension fund is against Dukes Industries as a corporate entity, and not against the Debtor in his personal capacity as a shareholder and officer of Dukes Industries. In support thereof, the Trustee relies on the fundamental principle of corporate law that shareholders and officers of a company, such as the Debtor, are normally not liable for the debts of any corporation in which they may have an interest. The Secretary of Labor, however, argues that the statutory scheme known as ERISA provides an exception to this general rule.

ERISA, which stands for the Employee Retirement Income Security Act, was enacted by Congress in 1974 to stem abuses in private pension plans. *Donovan v. Dillingham*, 688 F.2d 1367, 1370 (11th Cir.1982). With respect to this goal, two of the major aims of ERISA were to ensure that enough money was set aside to pay promised pensions, and to assure that pension plans were properly managed. Stephen E. Ehlers, *ERISA and Employee Benefit Plans-An Overview for the General Practioner*, 64 OCT N.Y. St. B.J. 38, 39 (1992). To this end, ERISA imposes personal liability upon certain classes of persons with discretionary authority over an ERISA qualified pension plan. Specifically, § 1109 of ERISA provides that:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

From this language it can be garnered that any party having standing[2] to bring an action for damages under § 1109 would have a viable "claim" within the context of a bankruptcy case as a "claim" for purposes of

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[2] For a list of the persons entitled to bring a civil action under ERISA see 11 U.S.C. § 1132.

bankruptcy is simply defined as 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[.]" 11 U.S.C. § 101(5). Thus, in contravention to the Trustee's assertion, neither Dukes Industries nor the former employees of Dukes Industries are absolutely prohibited from asserting a proof of claim against the Debtor in his personal capacity as plan trustee for the retirement plan established by Dukes Industries. However, before any such claim will be found to exist, 29 U.S.C. § 1109 requires that an ERISA claimant (and therefore a bankruptcy claimant) establish the existence of two conditions: (1) the individual against whom a claim is asserted is a fiduciary with respect to the pension plan; and (2) that individual violated those fiduciary duties imposed by ERISA. 29 U.S.C. § 1109. In addressing these requirements, the Court begins with the former.

ERISA holds that a person is a fiduciary with respect to a pension plan if they:

> (1) exercise any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets;
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> (2) render investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so;
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> (3) have any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A). With respect to these definitions, certain positions have been held by their very nature to require performance of one or more of the above specified duties. In particular, the Code of Federal Regulations and pertinent case law has held that the trustee of a pension plan must, by the very nature of their position, exercise "discretionary authority or discretionary responsibility in the administration"

of the plan within the meaning of 29 U.S.C. § 1002(21)(A). 29 C.F.R. § 2509.75-8, at D-3 (1998). As a consequence, plan trustees, for purposes of ERISA, are conclusively presumed to be fiduciaries with respect to a company's pension plan. *Schmidt v. Sheet Metal Workers' Nat. Pension Fund*, 128 F.3d 541, 547 (7th Cir. 1997). Thus, in the instant case as the Debtor was clearly a plan trustee with respect to the pension plan established by Dukes Industries, the Debtor will be held to be a fiduciary with respect to the Company's pension plan, and thus will be subject to those fiduciary duties set forth under ERISA at the time the plan became underfunded. Furthermore, this result is not altered by the fact that Mr. Orr, and not the Debtor, was the individual primarily responsible for managing the plan at the time it became underfunded as a plan trustee may not, by turning a blind eye to their statutory obligations, avoid fiduciary status for purposes of ERISA. *See Jackson v. Truck Drivers' Union Local 42 Health and Welfare Fund*, 933 F.Supp. 1124, 1141 (D.Mass. 1996).

Turning now to the question of whether the Debtor violated those fiduciary duties set forth in ERISA, the Court first begins by observing that the fiduciary duties imposed by ERISA are the highest known to law. *Kuper v. Iovenko*, 66 F.3d 1447, 1453 (6th Cir.1995). In this respect, ERISA requires that each trustee of an ERISA qualified pension plan conform to the following fiduciary standards: First, the trustee must act solely in the interest of the plan and its participants and beneficiaries. Second, the plan trustee is required to discharge their duties for the exclusive purpose of providing benefits and defraying reasonable expenses of plan administration. Finally, a trustee of an ERISA plan must discharge their duties prudently–that is, with the care, skill, prudence and diligence under the circumstances that a prudent person acting in like capacity and familiar with such matters, would use in the conduct of a like enterprise with like aims. 29 U.S.C. § 1104(a)(1); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1468 (5th Cir. 1986).

In support of the Debtor's violation of these above stated statutorily imposed fiduciary duties, the Secretary of Labor charges that the Debtor, by utilizing plan assets for corporate purposes, caused the plan to become underfunded, and thereby did not act in the best interest of the plan and its participants. (Brief of the Secretary of Labor as Amicus Curiae in Support of the Claims of Dukes Industries, Inc. and Certain former Employees of Dukes Industries, Inc. pgs. 15-17). With respect to this argument, the Court fully agrees that to the extent that the Debtor permitted pension moneys to be allocated to corporate expenses, such an action, was clearly not in the best interest of the plan and its participants. For example, in a case with facts similar to that of the instant case, the district court for the Eastern District of New York stated that:

> Defendant allocated available monies to corporate expenses rather than the pension fund, thereby breaching his duty to act solely in the interests of the Plan's participants under § 1104(a)(1). Indeed, in assuming conflicting roles as a fiduciary and as an officer of a struggling corporation, defendant prevented himself from fulfilling his duty to act with complete loyalty to Plan participants.

Pension Benefit Guaranty Corp. v. Solmsen, 671 F.Supp. 938, 946 (E.D.N.Y. 1987) (internal citations omitted). *See also Whitfield v. Tomasso*, 682 F.Supp. 1287 (E.D.N.Y. 1988). Moreover, it is hard to see how the utilization of plan assets by a trustee for corporate purposes could be said to comply with ERISA's requirement that a plan trustee discharge their fiduciary duties for the exclusive purpose of providing benefits to the plan's participants. 11 U.S.C. § 1104(a)(1)(A)(i). *See also* 29 U.S.C. § 1103(c)(1) (stating that the "the assets of a plan shall never inure to the benefit of any employer.")

The Trustee, however, maintains that the Debtor did not in his capacity as a plan trustee wrongfully allocate or cause to be wrongfully allocated any pension fund assets. Instead, with regards to the underfunded pension plan of Dukes Industries, the Trustee maintains that this is simply a case of a pension

plan being underfunded as the result of a business failure. Simply put, the Trustee in his Memorandum in Support of his Motion for Summary Judgment, states:

> The Trustee can see no reason why this Court should hold, as a matter of law, that the trustee of a 401(k) plan should be held to be personally responsible for unpaid contributions under the circumstances of this case. There is no showing that Mr. Dukes was in any way responsible for the business failure which resulted in the contributions not being paid, there is no mismanagement of the assets which has been shown, no embezzlement or other misconduct, just plain and simply a case of insufficient funds being available to pay the contributions.

(Trustee's Memorandum in Support of Summary Judgment, pg. 5). However, even if the Court were to fully accept this assertion, it ignores an undisputed fact of this case: funds actually deducted from employees' paychecks for contribution to the pension plan of Dukes Industries were not actually forwarded to the custodian of the plan. The importance of this fact is that contributions to a retirement plan that are made by payroll deductions become, at the time the checks are issued, plan assets by operation of law,[3] a result which does not change merely the pension plan assets are not segregated from the general assets of the company. *See Pension Benefit Guaranty Corp. v. Solmsen*, 671 F.Supp. 938, 946 (E.D.N.Y. 1987) (holding that diversion of employee contributions before they reached investment account constituted misuse of plan assets). Thus, as ERISA's fiduciary standards clearly require that a plan trustee satisfactorily account for and protect plan assets, 29 U.S.C. § 1104(a)(1)(B), the Debtor's failure to see to it that pension funds were

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[3] Under 29 C.F.R. § 2510.3-102(a) (1989), contributions withheld from an employee's paycheck become plan assets "as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets," an event which is generally said to occur at the time when an employee receives their paychecks as this is the earliest possible time when an employee's contribution to a pension plan can be reasonably segregated from the employer's general assets. *United States v. Grizzle*, 933 F.2d 943, 947 (11th Cir. 1991) *cert. denied* 502 U.S. 897, 112 S.Ct. 271, 116 L.Ed.2d 223 (1991).

forward to the custodian of the plan, clearly constitutes a violation of the fiduciary duties imposed upon him. *See Chambers v. Kaleidoscope, Inc. Profit Sharing Plan and Trust*, 650 F.Supp. 359, 377 (N.D.Ga.1986) (finding fiduciary breached his duties by failing to protect plan assets or to ensure that the plan received the money contributed by the company). In fact, the Debtor's breach becomes all the more apparent when one considers that the Debtor alone had signatory authority over the Company's corporate accounts and as such was actually the individual responsible for remitting employee contributions to the plan in a timely manner. In addition, even assuming arguendo that this is simply a case of insufficient funds being available to fund a pension plan, 29 U.S.C. § 1082 and 26 U.S.C. § 412, which establish minimum funding standards for pension plans, make no exception for a plan not being funded based solely upon the financial condition of the plan sponsor. Instead, an employer experiencing "substantial business hardship" must apply for a funding waiver under 26 U.S.C. § 412(d), an event which clearly did not occur in this case. *Id*. at 945. Accordingly, for these reasons, this Court holds that pursuant to 29 U.S.C. § 1109, the Debtor is personally liable for the funds not forwarded to the pension plan set up by Dukes Industries, and thus the Secretary of Labor, by and through Dukes Industries, has a valid claim for Forty-seven Thousand Five Hundred Twenty-eight and 53/100 dollars ($47,528.53) against the Debtor's bankruptcy estate.

Having thus concluded that the Debtor is personally liable for the losses suffered by the 401(k) pension plan set up by Dukes Industries, the Court now turns to address two final issues raised by the Trustee's Motion for Summary Judgment; namely whether the proof of claims submitted by the former employees of Dukes Industries should be allowed, and whether and to what extent the claim(s) against the Debtor for the unpaid 401(k) contributions is entitled to priority status.

Eleven (11) former employees of Dukes Industries have filed proof of claims against the Debtor, in various amounts, based upon the unpaid pension plan contributions just discussed in this Opinion. The Trustee has objected to these claims on the grounds that even if the claim of Dukes Industries is allowed, the

claims of the former employees should be disallowed as such claims are duplicative of the claim asserted by the Debtor on behalf of Dukes Industries. With respect to this assertion, the Court fully agrees with the Trustee's position that duplicative claims should not be allowed. Supporting this position is the fact that any recovery obtained by a party for a fiduciary's violation of their duties under ERISA belongs solely to that of the plan, and not to any individual participants. *See Adcox v. Teledyne, Inc.*, 21 F.3d 1381, 1390 (6th Cir.1994); *Tregoning v. American Community Mutual Ins. Co.*, 12 F.3d 79, 83 (6th Cir.1993), *cert. denied*, 114 S.Ct. 1832 (1994)*; Richards v. General Motors Corp.*, 991 F.2d 1227, 1231 (6th Cir.1993); *Bryant v. Int'l Fruit Product Co.*, 886 F.2d 132, 135 (6th Cir.1989); *Farrell v. Automobile Club of Mich.*, 870 F.2d 1129, 1133 (6th Cir.1989). Notwithstanding, a review of the proof of claims submitted by the former employees of Dukes Industries shows that part of their claims are for other matter such as past due wages. With respect to such claims, the Trustee, like the pension plan funds, has objected to such claims on the grounds that they are not properly brought against the Debtor in a personal capacity, but instead should be asserted against the corporate entity of Dukes Industries. However without addressing the actual merits of this argument, a review of the record of this case shows that there is some question as to whether the former employees of Dukes Industries have been given a full and fair opportunity to be heard on this matter. Accordingly, the Court will permit the employees named herein to submit briefs to the Court which set forth the legal reasons as to why their non-pension claims should be allowed against the Debtor in his personal capacity.

The final issue that needs to be addressed in this case concerns whether Dukes Industries is entitled on its proof of claim against the Debtor to priority status under § 507(a)(4) of the Bankruptcy Code. The Trustee has objected to this assertion on the grounds that no showing has been made that the parameters set forth in § 507(a)(4) have been established. This section provides that:

> The following expenses and claims have priority in the following order:

> Fourth, allowed unsecured claims for contributions to an employee benefit plan–
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> > (A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only
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> > (B) for each such plan, to the extent of–
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> > > (i) the number of employees covered by each such plan multiplied by $4,000;[4] less
> > >
> > > (ii) the aggregate amount paid to such employees under paragraph (3) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

The Court, however, at this time has insufficient evidence before it to reach a decision on this matter. Accordingly, in the interest of expediting this case, the Trustee, subject to the other rulings made in this Opinion, will be required to submit a proposed plan of distribution at which time the Court will, if need be, entertain any objections thereto.

In reaching the conclusions found herein, the Court has considered all of the evidence, exhibits and arguments of counsel, regardless of whether or not they are specifically referred to in this Opinion.

Accordingly, it is

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[4] This dollar amount is subject to adjustment under 11 U.S.C. § 104

ORDERED that the Summary Judgment Motion submitted by the Trustee, Louis Yoppolo, be, and is hereby, DENIED.

It is ***FURTHER ORDERED*** that the proof of claim submitted by the Debtor, on behalf of Dukes Industries, in the amount of Forty-seven Thousand Five Hundred Twenty-eight and 53/100 dollars ($47,528.53) be, and is hereby, ALLOWED. However, any distribution eventually made on this proof of claim shall be deemed to be held by the Debtor in a constructive trust until such a time that the Trustee is able to forward that distribution to the Custodian of the Plan, Union Central Life Insurance Company.

It is ***FURTHER ORDERED*** that the proof of claims submitted by: Thomas Wagley; Richard Trainor; Ramon Trevino; Susan King; Paul Youngpeter; Richard Fellhauer; Randy Abbott; Ted Gutierrez; George Dunham; Robert Martin; and Mark Pacholski, be, and are hereby, DISALLOWED to the extent that such claims are for unpaid 401(k) contributions.

It is ***FURTHER ORDERED*** that the persons named in the above order be given thirty (30) days from the entry of this Order to file with the Court a brief setting forth the legal reasons why their non-pension claims should be allowed against the Debtor in his personal capacity. The Trustee is then given twenty-one (21) days, commencing from the expiration of this time period, to file a response thereto. Failure by the persons named herein to file the required brief may result in their proof of claim against the Debtor being disallowed without further notice from the Court.

It is ***FURTHER ORDERED*** that the Trustee, Louis Yoppolo, submit, in conformance with the decisions reached in this Opinion, a proposed plan of distribution of the Debtor's assets. Such a plan shall be filed within Thirty (30) days from the time the status of the herein stated employees' proof of claims have been decided. All parties in interest are thereafter given twenty-one (21) days, commencing from the date the Trustee's proposed plan of distribution is filed with the Court, to interpose an objection thereto.

Dated:

Richard L. Speer
Chief Bankruptcy Judge