

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
Eastern Division**

<b>IN RE:</b>	<b>IN PROCEEDINGS UNDER CHAPTER 7</b>
<b>RICHARD D. GOLDBERG,</b>	<b>CASE NO. 01-11595</b>
<b>Debtors.</b>	<b>ADVERSARY PROCEEDING NO. 03-1035</b>
	<b>JUDGE RANDOLPH BAXTER</b>

---

**ANNE PIERO SILAGY, TRUSTEE,**  
**Plaintiff,**

**v.**

**NATIONAL CITY BANK, et al.,**  
**Defendants.**

**MEMORANDUM OF OPINION AND ORDER**

The matters before the Court are cross motions for summary judgment filed by Anne Piero Silagy, Chapter 7 Trustee and by co-defendant National City Bank (National City). The Court acquires core matter jurisdiction over this proceeding under 28 U.S.C. 157 (b)(2)(J) and General Order No. 84 of this District. Upon a hearing and an examination of the parties' respective briefs and supporting documentation, the following findings of fact and conclusions of law are made pursuant to Rules 7052 and 7056 of the Federal Rules of Bankruptcy Procedure:

\*

On January 30, 2001, Richard Goldberg (Debtor) filed for voluntary relief under Chapter 11 of the Bankruptcy Code. Prepetition, Debtor was a practicing attorney in Youngstown, Ohio.

Debtor maintained various bank accounts with Defendants, National City Bank, or National City Bank, N.E. or John Doe Bank(s)(collectively known as National City). National City was successor-in-interest to the Dollar Savings and Trust Company. Debtor maintained two alleged trust accounts, with account numbers 010087759 and 561187750 (the Accounts). At issue is National City's Account No. 561187750, which was Dollar Bank's Account No. 010087759 before National City acquired Dollar Bank's interest therein.

The Trustee's underlying adversary complaint seeks to avoid and recover alleged fraudulent and preferential transfers made by the Debtor in favor of National City. The parties stipulated to dismissal of Counts 2 through 6 of the Complaint. Thusly, the remaining counts are Counts I (avoidable preferential and fraudulent transfers, knowledge of transfers, breach of good faith), VII (equitable subordination), and VIII (negligence). The Trustee's motion for summary judgment seeks relief only on the first cause of action (Count I of the Complaint), and a hearing on damages at a later date.

\*\*

Summary judgment is proper if there is no genuine issue of material fact, and 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, 322-323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Rule 56 made applicable to these proceedings under Rule 7056 provides, in part:

(c) Judgment sought shall be rendered forthwith 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.

---

(e) When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial....

Fed. R. Bankr. P. 7056 (c), (e). A fact is material if it would affect the determination of the underlying action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Tennessee Dep't of Mental Health & Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996). An issue of material fact is genuine where a rational fact-finder could find in favor of either party on the issue. *Anderson*, supra, at 248-249, 106 S.Ct. 2505; *Structurlite Plastics Corp. v. Griffith (In re Griffith)*, 224 B.R. 27 (B.A.P. 6th Cir. 1998).

In a motion for summary judgment, the initial burden is on the movant to establish an absence of evidence to support the nonmoving party's case. *Celotex*, supra, at 322; *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195, 198 (B.A.P. 6th Cir 1998). The burden then shifts to the nonmoving party to demonstrate the existence of a genuine dispute. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). In other words, as to issues on which the nonmovant has the burden of proof, the movant need do no more than aver "an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. The burden of production then shifts to the nonmovant, who, to avoid summary judgment, must establish the existence of at least one question of fact that is both "genuine" and "material." See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248.

\*\*\*

The Trustee alleges that Debtor and National City had a debtor-creditor relationship and that the Debtor borrowed funds from National City from time to time pursuant to various loans

or credit facilities extended by National City. National City purportedly utilized the accounts as collateral and/or a compensating balance against the various personal loans and credit facilities extended to Debtor. The Trustee also alleges the Debtor routinely deposited checks into the “Trust Accounts”, which represented the proceeds from the settlement of various lawsuits and claims pursued by Debtor as counsel for various clients including significant portions of those proceeds representing legal fees and expenses earned and incurred during the course of his professional engagement. The Trustee further alleges that National City had actual knowledge that the Trust Accounts were trust accounts within the meaning of the Uniform Fiduciary Act, O.R.C. §1339.09.

Trustee contends that Debtor exerted total dominion and control over the funds in the “Trust Accounts” and caused and/or directed transfers of the funds from the “Trust Accounts” to be paid, transferred, or delivered to Debtor’s creditors and/or for the personal use or benefit of Debtor, including the payment or transfer of funds to National City in whole or partial satisfaction of Debtor’s personal obligations to National City.

The Trustee also contends that National City breached its duty of good faith imposed under O.R.C. § 1304.03<sup>1</sup> because it had actual knowledge that the Debtor was drawing checks

---

<sup>1</sup>(A) The effect of the provisions of this chapter may be varied by agreement, but the parties to the agreement cannot disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure. However, the parties may determine by agreement the standards by which the bank's responsibility is to be measured if those standards are not manifestly unreasonable.(B) Federal Reserve regulations and operating circulars, clearing house rules, and similar regulations, documents, and rules have the effect of agreements under division (A) of this section, whether or not specifically assented to by all parties interested in items handled.

(C) Action or non-action approved by sections 1304.01 to 1304.40 of the Revised Code or pursuant to Federal Reserve regulations or operating circulars is the exercise of ordinary care,

from the “Trust Accounts” for personal obligations. National City’s knowledge of such facts and its payment of checks drawn on the “Trust Accounts” allegedly amounts to a violation of state law. Trustee further asserts that National City’s wrongful conduct was a direct and proximate cause of loss to creditors and the Debtors’ estate in the sum of at least \$1,000,000.00. The proceeds represented by such transfers are allegedly avoidable under 11 U.S.C. § 544 and O.R.C. §§ 1304.03 and 1339.09.

Trustee also alleges that the subject transfers were made on or within one (1) year before the petition filing date and such transfers were made with the actual intent to hinder, delay or defraud creditors, in violation of 11 U.S.C § 548 and O.R.C. § 1336.04. Lastly, Trustee alleges that any claims and/or liens securing claims held by Bank should be subordinated to the claims of all other creditors under the principles of equitable subordination pursuant to 11 U.S.C. § 510(c).

---

and, in the absence of special instructions, action or non-action consistent with clearing house rules and similar rules or with a general banking usage not disapproved by sections 1304.01 to 1304.40 of the Revised Code is prima facie the exercise of ordinary care.

(D) The specification or approval of certain procedures by sections 1304.01 to 1304.40 of the Revised Code is not disapproval of other procedures that may be reasonable under the circumstances.

(E) The measure of damages for failure to exercise ordinary care in handling an item is the amount of the item reduced by an amount that could not have been realized by the exercise of ordinary care. If there also is bad faith, the measure of damages includes any other damages the party suffered as a proximate consequence.

O.R.C. §§ 1304.03 (A-E).

Trustee moves for summary judgment arguing that there is no genuine issue of material fact that from 1990 through 1999, Debtor wrote at least 250 checks written from a purported trust account -Account No. 561187750 - totaling \$792,704.66 and that all the withdrawals were for debtor's personal benefit and done so with National City's knowledge. Trustee contends that at the same time, Debtor had outstanding loans with National City which was secured by the "trust account". Trustee further asserts that National City turned a blind eye to the misuse of the "trust account" because its loans were being paid back with the account funds.

The Trustee alleges that Debtor used his clients' trust funds which were kept in Account No. 561187750 for his personal obligations, including loan obligations owing to National City. Undisputedly, this account was not an attorney's IOLTA account. The account is characterized as a "trust account" by the Trustee and a "business checking account" by National City.

National City contends, in its cross motion for summary judgment and related papers, that the Trustee's Motion for Summary Judgment is without merit on three grounds and that it (National City) should be granted summary judgment because: (1) Trustee lacks standing to recover from National City monies that Debtor embezzled from clients pursuant to the Uniform Fiduciaries Act, codified in Ohio under O.R.C. §1339.03 et seq. (2) Neither National City nor Goldberg understood Acct. No. 561187750 to be a trust account. It was a business checking account; and (3) The UFA and Ohio law mandate that the principal be a customer of the bank – not an unknown third party to bring a cognizable claim.

National City also contends that Sixth Circuit case law is clear that misappropriated funds that did not belong to the debtor cannot be recovered by the Trustee under her avoidance powers. It further asserts that Account No. 561187750 was not a trust account as that term is defined by

Ohio law. The account, which is actually a business checking account, lacks the three elements of a trust: (1) intent to create a trust, (2) transfer of property, and (3) a beneficiary must be designated. Exhibit A, affidavit of Dennis Galvin, purports to establish that there was no creation of a trust account; and there was no designated beneficiary. Exhibit B, monthly statement received by Goldberg, is captioned "Business Checking Account".

National City also asserts that: 1) under the UFA, it does not owe a fiduciary duty to its own customers let alone unknown and unforeseen persons who are not its customers since there was no trust account; 2) Under ORC § 4705.09, banks are shielded from liability; and 3). Public Policy does not favor forcing a bank to create procedures to monitor IOLTA accounts – much less ordinary business checking accounts of their attorney customers.

\*\*\*\*\*

The dispositive issue is whether, under Rule 7056, there exists a genuine issue of material fact in dispute.

\*\*\*\*\*

Under 11 U.S.C. § 548(a)(1), the trustee "may avoid any transfer of an interest of the debtor in property" made within one year before the debtor files a petition for bankruptcy. Section 541(a)(1) provides that the "property of the estate" includes "all legal or equitable interests of the debtor in property as of the commencement of the case." Section 541(d) further provides:

Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest ... becomes property of the estate under subsection (a) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

11 U.S.C. 541(d). The Supreme Court has interpreted these statutes as including in a debtor's estate "that property that would have been part of the estate had it not been transferred before the commencement of the bankruptcy proceedings." *Begier v. IRS*, 496 U.S. 53, 58, 110 S.Ct. 2258, 110 L.Ed.2d 46 (1990). However, "[b]ecause the debtor does not own an equitable interest in property he holds in trust for another, that interest is not 'property of the estate.'" *Id.* at 59, 110 S.Ct. 2258.

State law determines whether funds held in escrow constitute an express trust excluded from the debtor's estate. *Barnhill v. Johnson*, 503 U.S. 393, 398, 112 S.Ct. 1386, 118 L.Ed.2d 39 (1992) (noting that under the Bankruptcy Code " 'property' and 'interests in property' are creatures of state law") (citing *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 370, 65 S.Ct. 405, 89 L.Ed. 305 (1945), and *Butner v. United States*, 440 U.S. 48, 54, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979)).

Fundamental to a determination of this matter is the Court's determination whether Account No. 561187750 is a trust account as that term is defined under Ohio law. If the account is a trust, then the Court must determine whether the Trustee has standing to maintain her claims that National City had a duty imposed under the Uniform Fiduciary Act (codified in Ohio at ORC. §1339.09 et seq.) to monitor debtor's activities with respect to such account.

In the seminal case, *Ulmer v. Fulton*, the Ohio Supreme Court articulated the critical elements needed to prove the existence of an express trust by its proponent:

'While its elements have been variously stated to constitute an express trust there must be an explicit declaration of trust, or circumstances which show ... that a trust was intended to be created, accompanied with an intention to create a trust, followed by an actual conveyance or transfer of lawful, definite property or estate or interest, made by a



person capable of making a transfer thereof, for a definite term, vesting the legal title presently in a person capable of holding it, to hold as trustee for the benefit of a cestui que trust or purpose to which the trust fund is to be applied; or a retention of title by the owner under circumstances which clearly and unequivocally disclose an intent to hold for the use of another.' While it is undoubtedly true that the settlor and trustee may be one and the same person, his words and acts must clearly and unmistakably denote an intention to hold certain property thenceforth as trustee for the benefit of another; the essentials of a trust must exist. *Ulmer v. Fulton*, 129 Ohio St. 323, 339-40, 195 N.E. 557, 564 (1935) (quoting 65 C.J. *Trusts* § 21 (1933)).

The Sixth Circuit also opined:

[A]t a minimum, there must be a grantor or settlor who *intends* to create a trust; a corpus (the subject property); a trustee; and a beneficiary. The trustee holds legal title and in that sense, owns the property, holding it for the benefit of the beneficiary who owns the equitable title. While the grantor may retain either of these interests, no one may solely hold both as the purpose of separating the two would be defeated. *In re Cannon*, 277 F.3d 838, 849 -850 (6th Cir. 2002).

Trustee attaches exhibits representing sworn testimony of Debtor Richard Goldberg and his assistant, Kacey Morell, both of whom attest that the subject account was a trust account (See Exhibits 1 and 2). Trustee also attaches affidavits of Debtor's accountant Robert Elias (See Exhibit B) and purportedly several IRS documents that demonstrate the account is a trust account. National City attaches an affidavit of Dennis Galvin, who is a senior vice president for automated solutions who attests that Debtor never maintained any trust account or IOLTA account after 1993 (See National City's Exhibit A).

Based on the conflicting exhibits presented by the parties as to whether the subject account is or is not a "trust account", there exists a genuine issue of material fact in dispute which renders inappropriate a grant of summary judgment herein. The resolution of whether the account is a trust account is central to a determination of whether the Trustee has standing to

prosecute the complaint and whether National City owed a duty of good faith as to the “trust account”. *See Stevenson, Trustee v. J.C. Bradford & Co. et al., (In re Cannon III)*, 277 F.3d 838 (6th Cir. 2002)(“Because Cannon (a debtor’s attorney) held the funds deposited into his escrow account in express trust for his clients, we hold that these monies are not part of his estate in bankruptcy, and so not subject to the trustee’s avoidance power under § 548).

Accordingly, both motions for summary judgment are hereby denied. The trial will proceed as scheduled. Each party is to bear its respective costs.

IT IS SO ORDERED.

Dated this 7<sup>th</sup> day of  
March, 2005

/s/ Randolph Baxter

---

RANDOLPH BAXTER  
CHIEF JUDGE  
UNITED STATES BANKRUPTCY COURT

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
Eastern Division

IN RE:

IN PROCEEDINGS UNDER CHAPTER 7

RICHARD D. GOLDBERG,

CASE NO. 01-11595

ADVERSARY PROCEEDING NO. 03-1035

Debtors.

JUDGE RANDOLPH BAXTER

---

ANNE PIERO SILAGY, TRUSTEE,

Plaintiff,

v.

NATIONAL CITY BANK, et al.,

Defendants.

JUDGMENT

At Cleveland, in said District, on this 7<sup>th</sup> day of March, 2005.

A Memorandum Of Opinion And Order having been rendered by the Court in this matter,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that both motions for summary judgment are hereby denied. Each party is to bear its respective costs.

IT IS SO ORDERED.

/s/ Randolph Baxter

---

RANDOLPH BAXTER  
CHIEF JUDGE  
UNITED STATES BANKRUPTCY COURT