

NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION



In re:	)	Case No. 05-93363
	)	(jointly administered)
THE AUSTIN COMPANY, et al.,	)	
	)	Chapter 11
Debtors.	)	
_____	)	Judge Pat E. Morgenstern-Clarren
	)	
SEABOARD SURETY COMPANY nka	)	Adversary Proceeding No. 06-1153
ST. PAUL TRAVELERS COMPANIES, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	<b><u>MEMORANDUM OF OPINION</u></b>
	)	<b><u>ON CROSS MOTIONS FOR</u></b>
THE AUSTIN COMPANY, et al.,	)	<b><u>SUMMARY JUDGMENT</u></b>
	)	(NOT FOR COMMERCIAL PUBLICATION)
Defendants.	)	

Seaboard Surety Company (St. Paul) asks in count four of its amended complaint<sup>1</sup> for a declaratory judgment that certain funds are not property of the debtors' chapter 11 estates. Specifically, St. Paul asks the court to find that approximately \$2.6 million received by the debtors prepetition on contracts bonded by St. Paul was assigned prepetition to St. Paul and is the property of St. Paul, together with all of its other money and property. Each party requests

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<sup>1</sup> The plaintiff is also known as St. Paul Travelers Companies, Inc. The court gave St. Paul leave to file the amended complaint to assert an assignment claim in a February 27, 2007 memorandum of opinion and order addressing the parties' previous motions for summary judgment. *See* docket 48, 49.

summary judgment on this count.<sup>2</sup> For the reasons stated below, St. Paul's motion is denied and the debtors' motion is granted.<sup>3</sup>

## **I. JURISDICTION**

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2).<sup>4</sup>

## **II. FACTS**<sup>5</sup>

Austin Co., Austin Holdings, Inc., and RB of PA, Inc.<sup>6</sup> provided architectural, engineering, design-build, and construction management services. St. Paul issued performance and payment bonds in favor of Austin and RB of PA on several construction projects. Austin and Austin Holdings executed indemnity agreements in favor of St. Paul as indemnitee. The

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<sup>2</sup> See docket 59, 61, 63, 64, 65, 68, 69.

<sup>3</sup> The debtors' chapter 11 cases were filed before the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), which is generally effective October 17, 2005. See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. No. 109-8, § 1501(b)(1), 119 Stat. 23, 216 (stating that, unless otherwise provided, the amendments do not apply to cases commenced under title 11 before the effective date of BAPCPA). Therefore, all references to the bankruptcy code in this opinion are to the pre-BAPCPA version.

<sup>4</sup> In the court's view, the value of this opinion is solely to decide the dispute between the parties, rather than to add anything to the general bankruptcy jurisprudence. For that reason, the opinion is not intended for commercial publication, whether print or electronic.

<sup>5</sup> Neither party argues that there is a disputed issue of material fact. The court draws these facts from the stipulations, pleadings, and the evidence submitted with the motions. Additional undisputed facts are set forth in this court's previous memorandum of opinion regarding cross-motions for summary judgment on the other counts and will not be repeated here. See docket 48.

<sup>6</sup> RB of PA, Inc. is also known as Ragnar Bensen, Inc.

indemnity agreements include this provision:

In the event the Contractor shall breach,<sup>7</sup> or default in or delay the performance of, any Bonded Contract, or fail promptly to discharge all obligations which might be claimable under any Bond executed in connection therewith or which might give rise to a lien or charge upon any unpaid contract balance or the property of the Oblige named in any such Bond, or in the event of any breach of the terms of this instrument, the Undersigned, and each of them, hereby assign and set over unto the Surety, as of the date hereof, their right, title and interests in and to: (a) All of the deferred payments and retained percentages, and all monies and properties that may be, and that thereafter may become payable to the Contractor on account of and all claims and actions and causes of action relating to such contract, or on account of or relating to extra work or materials supplied in connection therewith, as well as all other monies or properties of the Contractor, hereby agreeing that such money and the proceeds of such payments, properties, claims, actions and causes of action shall be the sole property of the Surety to be by it credited upon any sum due or to become due it under the terms of this instrument . . . .

(the assignment provision).<sup>8</sup>

The debtors filed their chapter 11 cases on October 14, 2005. In the prepetition period from September 1, 2005 through October 12, 2005, the debtors received payments totaling \$2,601,163.30 on these five projects bonded by St. Paul (collectively, the prepetition payments): GSA (\$895,000.00 on 10/12/05 and \$160,423.00 on 9/1/05); University of California-Los Alamos (\$943,002.81 on 9/20/05); Greater Kelly Development Authority (\$399,932.00 on 9/13/05); Village of Niles (\$63,137.50 on 10/7/05); and Whitfield County Board of Education (\$139,668.00 on 9/7/05). The debtors handled these payments in the same manner in which they

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<sup>7</sup> Although the provision refers to any breach, default, delay, or failure to discharge obligations promptly, for ease of reading the court will use the term “default” to mean these conditions, collectively.

<sup>8</sup> St. Paul exhs. 1 and 2 at para. 12.

handled payments from non-bonded projects. This meant that the debtors deposited each check in a bank near one of their five regional offices, after which time the funds were swept into a Cleveland account. The funds then moved to an investment account before they went into a disbursing account used to pay subcontractors and suppliers. At no time prepetition did St. Paul ask the debtors to segregate the funds they received on any bonded project into a separate bank account.<sup>9</sup>

Before the debtors received the prepetition payments, they had defaulted on three of the projects on which the payments were received: University of California-Los Alamos (St. Paul received a bond claim on March 21, 2004 and the debtors were declared to be in default by letter dated August 4, 2005); Greater Kelly Development Authority (St. Paul received bond claims on November 26, 2004 and May 3, 2005); and GSA (St. Paul received two bond claims on January 19, 2005).<sup>10</sup>

### **III. SUMMARY JUDGMENT STANDARD**

Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c) (made applicable by FED. R. BANKR. P. 7056); *see also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The party seeking summary judgment has the initial burden of asserting that there is no genuine issue of material fact based on “the pleadings,

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<sup>9</sup> Joint pretrial statement, docket 15, and affidavit of M. Glenn Hobratchk in support of debtors’ motion, docket 61.

<sup>10</sup> Affidavit of Mary Alice McNamara in support of St. Paul’s motion, docket 59.

depositions, answers to interrogatories, and admissions on file, together with the affidavits.” FED. R. CIV. P. 56(c). The movant must initially demonstrate the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323. The burden is then on the non-moving party to show the existence of a material fact which must be tried. *Id.* The non-moving party may oppose a proper summary judgment motion “by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves. . . .” *Id.* at 324. “[T]he nonmoving party has an affirmative duty to direct the court’s attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact.” *Poss v. Morris (In re Morris)*, 260 F.3d 654, 665 (6th Cir. 2001) (internal citation and quotation marks omitted).

Summary judgment may be granted “when the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.” *Northland Ins. Co. v. Guardsman Prods., Inc.*, 141 F.3d 612, 616 (6th Cir. 1998) (internal quotation marks and citation omitted). All reasonable inferences drawn from the evidence must be viewed in the light most favorable to the party opposing the motion. *Hanover Ins. Co. v. Am. Eng’g Co.*, 33 F.3d 727, 730 (6th Cir. 1994). Where multiple parties file summary judgment motions, the court must evaluate each motion on its merits and “draw all reasonable inferences against the party whose motion is under consideration.” *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994) (internal quotation marks and citation omitted).

Because neither party identifies a disputed issue of material fact, the question here becomes whether either party is “entitled to a judgment as a matter of law.” FED. R. CIV. P. 56(c).

#### **IV. ISSUE**

The issue is whether the assignment provision effected a prepetition transfer to St. Paul of the debtors' interest in either (a) the prepetition payments; or (b) all of the debtors' money and property, that placed those sums outside of the chapter 11 estates.

#### **V. THE POSITIONS OF THE PARTIES**

St. Paul argues that (1) the assignment provision created a valid prepetition assignment to St. Paul under Ohio law; (2) the debtors' breach(es) triggered the assignment prepetition; (3) the provision assigned to St. Paul all of the debtors' money and property, regardless of its connection to the bonded projects; and (4) those monies, or at least the prepetition payments, belong to St. Paul under a constructive trust. Alternatively, St. Paul argues that the prepetition payments are its cash collateral and it is entitled to adequate protection. Because St. Paul makes no legal argument in support of the cash collateral point, the court deems it waived and will not address it further.

The debtors argue that the assignment provision is unenforceable because it is a contract to assign in the future rather than a valid prepetition assignment. Alternatively, they argue that even if the assignment is valid, the assignment did not extend to all of the debtors' money and property. And they contend further that the monies are still property of the estates because (a) St. Paul had to finish the projects at issue before the assignment was effective; and (b) the remedy of a constructive trust is not available to St. Paul. Additionally, the debtors contend that St. Paul waived its rights under the assignment provision. The legal consequence, the debtors argue, is that these monies are part of the chapter 11 estates.

## VI. DISCUSSION

The parties agree that Ohio law determines the validity and effect that the assignment provision has on their property interests in the debtors' funds prepetition. *See Butner v. United States*, 440 U.S. 48, 55 (1979). The rules generally applied to the construction and interpretation of contracts are applied to assignments. 6 OHIO JUR. 3d *Assignments* §34 (2007).

### A. The Assignment Provision

#### 1. Ohio Law<sup>11</sup>

Under Ohio law, “[a]n assignment is a transfer to another of all or part of one’s property in exchange for valuable consideration.” *Hsu v. Parker*, 688 N.E.2d 1099, 1101 (Ohio Ct. App. 1996) (citations omitted). “No particular words are required to create an assignment. ‘Rather, [a]ny word or transaction which shows an intention on the one side to assign and on the other to receive, if there is a valuable consideration, will operate [to create an assignment].’” *Id.* (quoting *Grogan Chrysler-Plymouth, Inc. v. Gottfried*, 392 N.E.2d 1283, 1286 (Ohio Ct. App. 1978)) (alteration in original). And “[i]t is established in Ohio, and by the weight of authority elsewhere, that money due and to become due under an existing contract is subject to assignment[.]” *Gen. Excavator Co. v. Judkins*, 190 N.E. 389, 391 (Ohio 1934). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 321(1)(2007) (“Except as otherwise provided by statute, an assignment of a right to payment expected to arise out of an existing employment or

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<sup>11</sup> To the extent the Ohio Supreme Court has not decided the applicable law, this court must ascertain the state law from relevant sources including state supreme court dicta and appellate court decisions, the restatements of law, law review commentaries, and the majority rule among other states. *Corzin v. Decker, Vonau, Sybert & Lackey, Co., L.P.A. (In re Simms Constr. Servs. Co.)*, 311 B.R. 479, 484 (B.A.P. 6th Cir. 2004) (citing *Garden City Osteopathic Hosp. v. HBE Corp.*, 55 F.3d 1126, 1130 (6th Cir.1995)).

other continuing business relationship is effective in the same way as an assignment of an existing right.”).

The indemnity provision states that the debtors “hereby assign and set over unto the Surety, as of the date hereof, their right, title and interests . . . .” This language expresses the debtors’ unambiguous intent to make a present assignment to St. Paul. The debtors argue that this is not a present assignment because the assignment is conditioned on the debtors’ default under its contracts, thus creating a contract to assign in the future, rather than a present assignment.

The law does distinguish between a present assignment and a contract to make an assignment in the future. *See* RESTATEMENT (SECOND) OF CONTRACTS § 330(1)(2007) (“A contract to make a future assignment of a right, or to transfer proceeds to be received in the future by the promisor, is not an assignment.”). The inclusion of a condition of default does not, however, preclude a present assignment. *See generally*, RESTATEMENT (SECOND) OF CONTRACTS § 331 (2007) (“An assignment may be conditional, revocable, or voidable by the assignor . . . .”). Ohio law recognizes conditional assignments, and the Sixth Circuit (applying Ohio law) has determined that an assignment of a contractor’s right to receive payments under its contracts which was conditioned upon the contractor’s default was a present assignment of those payments made at the time the assignment was made. *See Barnett v. Maryland Cas. Co. (In re Allied Prods., Inc.)*, 134 F.2d 725, 727 (6th Cir. 1943). The assignment provision is, therefore, a valid assignment to St. Paul of a present legal right subject to the condition of default.



## **2. What Property Interest Did the Debtors Assign?**

The parties disagree as to what the debtors assigned. St. Paul argues that the debtors assigned it an interest in *all* of the debtors' "monies or properties" regardless of whether those monies are connected to a defaulted St. Paul bonded project. The debtors argue that the assignment provision is far narrower than this because it does not provide for cross-defaults and limits what is being assigned to the proceeds of the particular contract on which the debtors defaulted.

The debtors have the better side of this argument. The assignment provision conditions the assignment on the debtors' default under "any Bonded Contract," their failure to discharge obligations claimable under a bond, or their breach of the indemnity agreement. Once triggered with respect to a specific bonded contract, the agreement provides for an assignment to St. Paul of the debtors' right, title, and interests in deferred payments, retained percentages, and all monies and properties that may be payable to the debtors' "relating to such contract . . . ." These terms clearly and specifically provide for the transfer of the debtors' rights to payments, retained percentages and other monies, property claims, and causes of action related to any contract in default.

The parties' dispute focuses on the meaning of the additional reference in the provision to "all other monies or properties of the [debtors]." St. Paul argues that once the assignment was triggered, this language served to transfer all of the debtors' other monies and property to St. Paul without regard to whether the debtors had defaulted on the contract which generated them or even whether St. Paul had any potential liability at all under the contract. This reading of the additional language is far too broad, however. First, it conflicts with the more specific language which limits the assignment to the amounts payable with respect to a defaulted contract. Second,

under St. Paul's interpretation, it would sweep in all of the debtors' money and property regardless of its source. The language used in the assignment provision does not adequately show the debtors' intention to make such an overarching assignment.

Based on this interpretation, the debtors' default under a bond triggered the assignment to St. Paul of the debtors' right to receive payments related to that particular contract. The evidence submitted by St. Paul shows that the assignment was triggered with respect to three contracts related to the prepetition payments: Greater Kelly Development Authority, University of California–Los Alamos, and GSA. The debtors had defaulted on these three contracts before they received the prepetition payments. As a result, the debtors' interest in the prepetition payments related to those contracts transferred to St. Paul under the assignment (the three are referred to as the assigned payments).

### **3. Does General Surety Law Change this Result?**

The debtors argue that surety law requires St. Paul to pay on a bond or complete a project before the assignment takes effect. Assignments, however, are interpreted in the same way as other contracts and the assignment provision does not require St. Paul to pay on a bond or complete a project as a condition to the assignment.

The surety law discussed in the three cases cited by the debtors deals with different issues and does not support the conclusion urged by them. Two of the cases deal with a surety's subrogation rights, rather than assignment. *See In re V. Pangori & Sons, Inc.*, 53 B.R. 711, 715–16 (Bankr. E.D. Mich. 1985); *Mid-Continent Cas. Co. v. First Nat'l Bank & Trust Co. of Chickasha*, 531 P.2d 1370 (Okla. 1975). A surety's rights under an assignment, however, are contractual and differ from those under equitable subrogation because they “can arise upon a declaration of default or the mere receipt of a payment claim . . . [and] may give the surety rights

to contract funds which are superior to, and may arise earlier than, those rights provided under the equitable doctrine of subrogation which requires that the surety actually pay a claim or even all claims before such rights arise.” Armen Shahinian, *The General Agreement of Indemnity*, in *THE LAW OF SURETYSHIP* 487, 518–19 (Edward G. Gallagher ed., 2d ed. 2000). The third case cited discusses the circumstances in which an assignment of accounts receivable creates a consensual security interest, which is not an issue here. *See In re Kuhn Constr. Co.*, 11 B.R. 746 (Bankr. S.D. W.Va. 1981).

### **B. Property of the Estate**

To recap, the assignment provision is a valid conditional assignment under Ohio law and the prepetition payments related to the GSA, University of California–Los Alamos, and Greater Kelly Development Authority projects were assigned to St. Paul under it. The next question is whether the assignment of those payments put them outside of the debtors’ chapter 11 estates. St. Paul argues that a constructive trust arose in its favor that placed the funds outside of the estates;<sup>12</sup> the debtors deny this.

The chapter 11 estates include “all legal or equitable interests of the debtor[s] in property as of the commencement of the case.” 11 U.S.C. § 541(a)(1). The debtors’ property rights are defined by state law. *See Butner*, 440 U.S. at 55. If the debtors had an interest in the assigned payments under Ohio law, the federal bankruptcy law determines whether that interest is included in the debtors’ chapter 11 estates. *Tidewater Fin. Co. v. Curry (In re Curry)*, 347 B.R. 596, 600 (B.A.P. 6th Cir. 2006) (citing *Butner*, 440 U.S. at 54–55 and *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 (1983)).

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<sup>12</sup> St. Paul’s brief in opposition to the debtors’ motion for summary judgment at 8, docket 65.

### **1. Did the Debtors Have an Interest in the Prepetition Funds at Filing?**

If, prepetition, a debtor makes an absolute assignment of property or of a right, that divests the debtor of an interest in the thing assigned and serves to place it outside the bankruptcy estate. *See, for example, Webber v. Comm. Credit Plan Consumer Dis. Co. (In re Webber)*, 248 B.R. 268 (Bankr. M.D. Pa. 2000). One hallmark of an unconditional assignment is that only the assignee can recover on the assigned right. *See* RESTATEMENT (SECOND) OF CONTRACTS § 331, cmt. a (2007). When an assignment is limited by a condition, however, the assignment “does not wholly extinguish the assignor’s right until the condition occurs[.]” *Id.* at cmt. b. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 338 (indicating that an assignor generally retains the power to modify or discharge the duty of the obligor to the extent the obligor performs or otherwise gives value until the obligor receives notice of the assignment and that performance is to be rendered to the assignee). The assignment in this case was not absolute because it was subject to a condition and the assignor (debtors) retained powers with respect to the property that was assigned, specifically, the right to continue to collect contract payments and proceeds.

At the point the condition of the assignment was met, St. Paul could have given notice of the assignment to the debtors’ obligors on the contracts and the obligors would have been required to pay St. Paul rather than the debtors. *See Hsu*, 688 N.E.2d at 1102; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 338(1). St. Paul did not do that, however, and the debtors received the assigned payments. The debtors, therefore, had an interest in the funds at the filing. As a result, federal bankruptcy law controls whether those funds are property of the estates.

## **2. Are the Assigned Payments Subject to a Constructive Trust?**

The debtors claim that they hold both legal and equitable title to the assigned payments. St. Paul argues that the debtors hold only legal title because the funds are subject to a constructive trust in its favor. Under bankruptcy code § 541(d), “property in which the debtor holds legal but not equitable title as of the commencement of the case—for example, property impressed with a constructive trust under state law—is property of the estate only to the extent of the debtor’s legal title.” *Amedisys, Inc. v. Nat’l Century Fin. Enters., Inc. (In re Nat’l Century Fin. Enters., Inc.)*, 423 F.3d 567, 575 (6th Cir. 2005) (citations omitted). The Sixth Circuit has, however, “criticized constructive trust claims in the bankruptcy context as a backdoor means for a creditor to avoid waiting for ratable distribution of the estate, by characterizing common contract claims as fraud.” *Id.* at 576 n.6. To prevent the transformation of a run of the mill contract claim into a trust fund, the Circuit law is that § 541(d) only excludes property from the estate based on a creditor’s claim of entitlement to a constructive trust if the creditor obtained a prepetition judgment imposing a constructive trust or if state law clearly gave the creditor, prepetition, a right to conveyance of the property. *Id.* In other words, it is not enough for St. Paul to claim now that it is entitled to have the assigned funds set aside in a constructive trust; “section 541(d) only operates to the extent that state law has impressed property with a constructive trust prior to [the debtors’] entry into bankruptcy.” *Poss v. Morris (In re Morris)*, 260 F.3d 654, 666 (6th Cir. 2001). Therefore, if the funds were not impressed with a constructive trust in St. Paul’s favor at filing, they are property of the estate.

Ohio law provides that:

A constructive trust is a “trust by operation of law which arises contrary to intention and in invitum, against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct,

artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy. It is raised by equity to satisfy the demands of justice . . . *Ferguson v. Owens* (1984), 9 Ohio St.3d 223, 225, 9 OBR 565, 459 N.E.2d 1293, quoting 76 American Jurisprudence 2d (1975) 446, Trusts, Section 221. A constructive trust is considered a trust because “[w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.” *Id.* at 225, 9 OBR 565, 459 N.E.2d 1293, quoting *Beatty v. Guggenheim Exploration Co.* (1919), 225 N.Y. 380, 386, 389, 122 N.E. 378.

*Estate of Cowling v. Estate of Cowling*, 847 N.E.2d 405, 411 (Ohio 2006). Under certain circumstances, Ohio law imposes a constructive trust on funds collected by an assignor. *See* 6 OHIO JUR. 3D *Assignments* § 41 (2007) and 91 OHIO JUR. 3D *Trusts* § 20 (2007) (noting that an assignor that collects an assigned claim is the trustee of the proceeds for the assignee pursuant to a constructive trust), *see also* RESTATEMENT (THIRD) OF TRUSTS § 5 cmt. j (2007) (“[T]he assignor of a chose in action has no active duties to the assignee, the assignor’s only duties being negative, namely, not to enforce the claim . . . [and] [a]n assignor who does nevertheless enforce the assigned claim holds the proceeds upon constructive trust for the assignee[.]”); *Olympic Title Ins. Co. v. Fifth Third Bank*, Nos. 19324, 19319, 2002 WL 31398652, at \*3 (Ohio Ct. App. Oct. 25, 2002) (“In general, when A owes money to B and B assigns that indebtedness to C, A’s subsequent payment of the debt to B does not extinguish C’s rights as an assignee, because B holds A’s payment of the debt in constructive trust for C’s benefit.”). An assignment gives the assignee a property right in the assigned property and the constructive trust is imposed to enforce that property right. *See Pittsburg, C., C. & St. L. Ry. Co. v. Volkert*, 50 N.E. 924, 925–26 (Ohio 1898) (noting that an assignment gives “the assignee a property right in the thing assigned,—a right which is cognizable by and enforceable in a court of equity.”). Ohio law imposes a tracing

requirement as “a necessary predicate to the imposition of a constructive trust[.]” *Estate of Cowling*, 847 N.E.2d at 412.

As the party seeking to exclude the assigned payments from the debtors’ estates under the constructive trust theory, St. Paul bears the burden of identifying the monies to which it is entitled and “must identify the trust fund in its original or substituted form.” *First Fed. of Mich. v. Barrow*, 878 F.2d 912, 915 (6th Cir. 1989). Stated differently, St. Paul must either identify its property or trace its proceeds to establish its right to a constructive trust. To the extent St. Paul is unable to identify the trust property in its original or substituted form, it is merely a creditor of the debtors’ estates. *Id.*

St. Paul claims that the debtors were in possession of the assigned payments when their cases were filed; however, the undisputed facts do not support that claim. The debtors did not segregate the assigned payments or any other part of the prepetition payments. They received the payments and commingled them with other funds, all with St. Paul’s knowledge. Each check was deposited in a bank near one of the debtors’ five regional offices, after which time the funds were swept into a Cleveland account. The funds then moved to an investment account before they went into a disbursing account used to pay subcontractors and suppliers. St. Paul, therefore, did not identify the assigned property in its original form. Neither has it offered any evidence to suggest that the debtors had cash on hand at filing which is traceable to the assigned payments and, therefore, subject to a constructive trust. Consequently, St. Paul’s motion for summary judgment on count 4 must be denied. Conversely, the debtors are entitled to summary judgment on count 4 because the undisputed facts viewed in the light most favorable to St. Paul show that

no constructive trust existed in favor of St. Paul prepetition and the debtors are entitled to judgment as a matter of law.<sup>13</sup>

**CONCLUSION**

For the reasons stated, St. Paul's motion for summary judgment on count four is denied and the debtors' motion for summary judgment on that count is granted. A separate order reflecting this decision will be entered.



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Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

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<sup>13</sup> The debtors' alternative argument that St. Paul waived its assignment rights is mooted by this decision.



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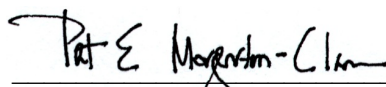
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	)	
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	)	
v.	)	
	)	<b>JUDGMENT</b>
THE AUSTIN COMPANY, et al.,	)	(NOT FOR COMMERCIAL PUBLICATION)
	)	
Defendants.	)	

For the reasons stated in the memorandum of opinion entered this same date, the assignment clause included in the parties' indemnity agreements did not prevent the disputed prepetition payments from becoming part of the debtors' bankruptcy estates. The debtors' motion for summary judgment on count 4 of the amended complaint is, therefore, granted and the motion of plaintiff Seaboard Surety Company for summary judgment on count 4 is denied. (Docket 59, 61).

IT IS SO ORDERED.

  
 Pat E. Morgenstern-Clarren  
 United States Bankruptcy Judge