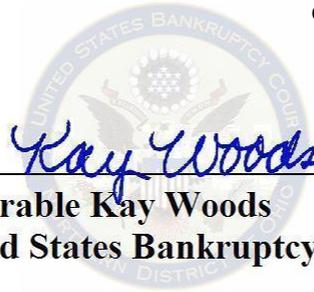


IT IS SO ORDERED.



Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

EDWARD DUANE BARNES,

Debtor.

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* CASE NUMBER 07-42429
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* CHAPTER 13
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* HONORABLE KAY WOODS
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MEMORANDUM OPINION REGARDING DEBTOR'S OBJECTION TO CLAIM NO. 13
Not Intended for National Publication

The following Memorandum Opinion is not intended for national publication and carries limited precedential value. The availability of this opinion by any source other than www.ohnb.uscourts.gov is not the result of direct submission by this Court. The opinion is available through electronic citation at www.ohnb.uscourts.gov pursuant to the E-Government Act of 2002 (Pub. L. No. 107-347).

This cause is before the Court on Objection to Proof of Claim No. 13 of Sheet Metal Workers Local No. 33 Youngstown District Collection and Administration Agency, Inc. (\$19,758.12) filed 02/11/2008 ("Objection to Claim") filed by Edward Duane Barnes ("Debtor") on February 20, 2008. Sheet Metal Workers Local No. 33 Youngstown District Collection and Administration Agency, Inc. ("Local 33")¹ filed Response of Sheet Metal Workers No.33 [sic] Youngstown District Collection and Administration Agency, Inc. to Objection of Debtor Edward Duane Barnes to Claim Number 13 ("Response") on March 19, 2008.

On June 3, 2008, the Court conducted an evidentiary hearing ("Hearing") on the Objection to Claim. Debtor was present and represented by James A. Malone, Esq. Local 33 was represented by Joseph D. Kondela, Esq. The Court received the testimony of: (i) Debtor, and (ii) Dave Patton, Business Representative for Local 33 ("Patton"). The parties submitted Stipulations at the Hearing, which were read into the record and accepted by the Court as undisputed facts. The Stipulations were filed immediately after the conclusion of the Hearing (Doc. # 62). In addition to the testimony of Debtor and Patton, the Court considered the entire record in this case, as well as all pleadings, arguments, exhibits and stipulations, even if not specifically mentioned in this decision.

¹This term encompasses the collection agency as well as both the Sheet Metal Workers International Association and Local Union No. 33 Youngstown District.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. 157(b)(2)(B). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

I. FACTUAL BACKGROUND

On September 27, 2007, Debtor filed a voluntary petition pursuant to chapter 13 of the Bankruptcy Code. Debtor was the sole shareholder and controlling officer of Ed Barnes AC Services, Inc. ("EBAC Inc.") (Stip. ¶ 8.) On October 24, 2007, EBAC Inc. filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code, Case No. 07-42709 ("Corporate Case"), and thereafter ceased operations.

On February 11, 2008, Local 33 filed Claim No. 13 ("Claim 13") in the instant case for unpaid fringe benefit contributions and liquidated damages in the amount of \$19,758.12. In support of Claim 13, Local 33 submitted copies of payroll records and fringe benefit contribution reports submitted by EBAC Inc.² On February 28, 2008, Local 33 filed a proof of claim in the Corporate Case, denominated Claim No. 3, which is identical to Claim 13. Both claims arise from a collective bargaining agreement ("Agreement") dated June 1, 2002,

²These documents were admitted at the Hearing as Joint Exhibit F.

to May 31, 2007.³ Debtor does not dispute that the contributions have not been paid. The amount of the unpaid contributions is also not in dispute.

Debtor objects to Claim 13 on the basis that it reflects a debt of EBAC Inc. for which he has no personal liability. (Obj. to Claim at 1.) In its Response, Local 33 argues that:

(1) Debtor is a signatory in his individual capacity to [the Agreement] and is therefore personally liable for payment of fringe benefit contributions and liquidated damages; (2) Debtor, as the sole shareholder and controlling corporate officer of [EBAC Inc.] is personally liable for fringe benefit contributions and liquidated damages; and (3) Debtor acted in a fiduciary capacity with respect to the management and control [of] fringe benefit contributions and failed to exercise his fiduciary duty for the exclusive benefit of providing fringe benefits for participants in the [Agreement].

(Resp. at 2.) At the Hearing, the parties focused on Local 33's first argument, *i.e.* whether Debtor signed the Agreement on behalf of EBAC Inc. in his representative capacity or as an individual employer. Local 33 drafted the Agreement, which is a form agreement that it uses with numerous other unnamed employers. The Agreement's cover bears the title, "Agreement Between Sheet Metal Workers' Local Union No. 33 International Association Agreement by and Between The Sheet Metal and Roofing Chapter of Eastern Ohio and Western Pennsylvania and Local Union No. 33 Youngstown District[.]" The

³An unsigned copy of the collective bargaining agreement was admitted at the Hearing as Joint Exhibit A.

Agreement fails to identify the name(s) of any employer as party to the Agreement. As Local 33 pointed out at the Hearing, the Agreement makes no reference to EBAC Inc.

II. ANALYSIS

The Agreement is divided into five sections, as follows: Preamble and Articles I through XII; Addendums A through O; Industrial Addendum; Residential Addendum; and Service Tech Addendum. (See Jt. Ex. A.) Four of the five sections described above are followed by signature lines.⁴ Following the Industrial Addendum at page 56, the Residential Addendum at page 61, and the Service Tech Addendum at page 65 are lines for the signatures of (i) an employer or an authorized representative, and (ii) a representative of Local 33.⁵ Following Article XII at page 18, however, the signature line section is substantially different in

⁴Neither party explained at the Hearing why the section comprising Addendums A through O did not require signatures. (See Jt. Ex. A at 50.)

⁵The appearance of the signature line section is substantially similar to the following:

By: _____
(Name of Employer)

By: _____
(Authorized Representative)

Date: _____

LOCAL UNION NO. 33 - YOUNGSTOWN DISTRICT OF SHEET METAL
WORKERS' INTERNATIONAL ASSOCIATION

By: _____
(Authorized Representative)

(Title) _____

Date: _____

that it contains only one line for the employer to sign, which is captioned "(Signature of Officer or Representative)[.]"⁶

Joint Exhibits B through E are copies of pages 18, 56, 61 and 65 of the Agreement, respectively, signed by Debtor on October 9, 2003, and by Patton on March 3, 2004. In support of its position, Local 33 relies wholly on Joint Exhibit C, which is signed by Debtor on the first line appearing in the signature block above "Name of Employer." Local 33 argued that this is proof Debtor signed the Agreement as an employer in his individual capacity rather than as a representative of EBAC Inc.

Debtor testified that he mistakenly signed the Agreement at page 56 on the line for an employer, when it was his intention to sign as a representative for EBAC Inc. Debtor explained that because it was the top line, he overlooked the fact that it was denominated as an employer's signature rather than the signature of a representative. He testified that the Agreement "was signed there accidentally. That should have been crossed off and re-signed, but it wasn't."

⁶It appears substantially as follows:

By: _____
(Signature of Officer or Representative)

Date: _____

LOCAL UNION No. 33 - YOUNGSTOWN DISTRICT OF SHEET METAL
WORKERS' INTERNATIONAL ASSOCIATION

By: _____
(Signature of Officer or Representative)

Date: _____

The fact that the Agreement was signed by Debtor in the space for an employer one out of four times does not compel a finding that the Agreement was by and between Local 33 and Debtor.⁷ The majority of evidence, as well as the testimony of Debtor and Patton, all support Debtor's contention that the Agreement was with EBAC Inc. rather than Debtor himself. As set forth above, the Agreement was prepared by Local 33 and does not (other than the cover sheet) identify the parties to it. Indeed, Local 33's own records indicate that EBAC Inc., not Debtor, is the contracting party. Both Debtor and Patton testified that each month Local 33 sends Sheet Metal Workers' Uniform Fringe Benefit Remittance Reports ("Remittance Reports") to employers who are signatories to the Agreement ("Signatories") in order to track the amounts to be submitted on behalf of union members based on hours worked. Patton testified that these forms, when sent to Signatories, contain certain pre-printed employer information that is garnered from union records.

Joint Exhibit F consists of copies of fifteen (15) Remittance Reports from March 2007 through August 2007 (excepting July 2007).⁸ Each of these Remittance Forms contains pre-printed

⁷Indeed, the cover page of the Agreement suggests that the only parties to the Agreement are the Sheet Metal Workers in the capacity of International Association Roofing Chapter of Eastern Ohio and Western Pennsylvania, and Local 33 Youngstown District.

⁸No explanation was provided why these months were chosen, or why the reports for July 2007 were not included.

information that the employer is EBAC Inc., not Debtor. In fact, Debtor's name does not appear anywhere on these reports. Patton testified that not only are these Remittance Reports addressed to EBAC Inc., but they contain its Employer Identification Number as well. Patton admitted it would be fair to assume, therefore, that the employer name on record with Local 33 is EBAC Inc. Patton also testified on cross examination that, to his knowledge, EBAC Inc., not Debtor, was the party to the Agreement.⁹

In light of (i) Debtor's testimony that he intended to sign the Agreement in his representative capacity for EBAC Inc., (ii) Debtor's signatures in three of four places as a representative of EBAC Inc., (iii) Local 33's own records indicating that the Agreement was with EBAC Inc., and (iv) Patton's admission that EBAC Inc. was the signatory to the Agreement, the Court finds that the Agreement was made by and between Local 33 and EBAC Inc., not Debtor.¹⁰

Local 33's second argument for imposition of liability on Debtor is based on alleged fraud. "Federal case law establishes that a controlling corporate officer who defrauds fringe benefit

⁹Local 33 filed Claim No. 3 in the Corporate Case based on this same liability. This is another indication that Local 33 acknowledges EBAC Inc. as the employer party to the Agreement.

¹⁰Furthermore, the Court notes that while each subsequent signature block in the Agreement has separate lines for an employer and a representative of an employer, the first such block contains only one line for the signature of an "Officer or Representative." (See Jt. Exs. B - E.) The Court can understand how this change might cause confusion or error, particularly in the immediately following signature block.

funds of required contributions is personally liable for the delinquencies." (Response at unnumbered 3.) Local 33 postulates that "[t]here can be no question that Debtor was defrauding the Agency and the fringe benefit funds[,] " and that "Debtor clearly retained monies due the Agency[.]" (Response at unnumbered 4.) Despite these bald assertions in the Response, Local 33 failed to adduce any evidence of fraudulent conduct on the part of Debtor. As a consequence, this argument fails.

"A fundamental rule of corporate law is that . . . shareholders, officers, and directors are not liable for the debts of the corporation[]" unless some level of fraudulent conduct is proven. *Belvedere Condo. Unit Owners' Assoc. v. R.E. Roark Cos., Inc.*, 67 Ohio St. 3d 274, 287 (1993). Debtor, as sole shareholder and controlling corporate officer of EBAC Inc. would only be individually liable for unpaid fringe benefit contributions if he "'defrauded or conspired to defraud [the] fund[s] of required contributions.'" *Bricklayers and Allied Craftworkers Local 2, Albany, New York, AFL-CIO v. C.G. Yantch, Inc.*, 316 F. Supp. 2d 130, 144-45 (N.D.N.Y. 2003) (quoting *Leddy v. Standard Drywall, Inc.*, 875 F.2d 383 (2d Cir. 1989) (alterations in original)). Accordingly, more than proof of Debtor's status as the sole shareholder and controlling corporate officer of EBAC Inc. is required to hold Debtor personally liable for unpaid fringe benefit contributions. See *Scarborough v. Perez*, 870 F.2d 1079, 1083-84 (6th Cir. 1989)

("without a showing of fraud or injustice separate and apart from the corporation's failure to pay its debt . . . the owner-executive may not be held personally answerable for the corporation's delinquent contributions.") and *Sasso v. Cervoni*, 985 F.2d 49, 50 (2d Cir. 1993) ("an individual is not liable for corporate ERISA obligations solely by virtue of his role as officer, shareholder, or manager.").

In order to prove Debtor engaged in fraudulent conduct with respect to the unpaid fringe benefit contributions, Local 33 had to prove more than mere failure to make those contributions. The record reflects that EBAC Inc. was unable to pay all of its creditors, not that Debtor chose to defraud Local 33 of fringe benefit contributions owed. Debtor testified that although it was the policy of EBAC Inc. to bid work in sufficient amount to cover fringe benefit contributions due under the Agreement, circumstances sometimes forced him to choose between paying employees and paying bills.¹¹ These unpaid bills included amounts owing to Local 33 for employee fringe benefit contributions. Debtor testified that EBAC Inc. could not pay the required contributions because (i) competition drove down bid pricing for work, and (ii) customers' failure to pay. This testimony was both credible and sufficient to counter Local 33's unsupported argument that the failure to pay

¹¹Debtor testified that EBAC Inc.'s employees were always paid on time and in full.

fringe benefit contributions was the result of fraud.

Finally, Local 33 argued that Debtor is personally liable for unpaid fringe benefit contributions based upon breach of his fiduciary duty under the Agreement. According to Local 33, Debtor was an ERISA fiduciary and "Debtor is personally liable since he had control of plan assets." (Response at unnumbered 4-5.) This argument fails because Local 33 failed to present any evidence that: (i) the Agreement is an ERISA qualified employee benefit plan;¹² (ii) Debtor was an ERISA fiduciary; and/or (iii) Debtor had control of plan assets. As a consequence, Local 33 has not shown that Debtor was acting as an ERISA fiduciary and/or that Debtor breached his fiduciary responsibility. Accordingly, the Court cannot find in favor of Local 33 on this issue.

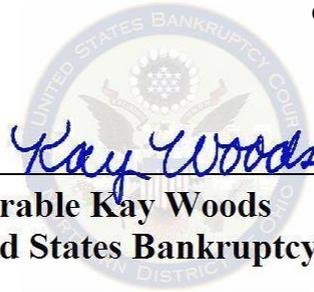
III. CONCLUSION

Because Debtor was not a party to the Agreement, he has no individual liability for unpaid fringe benefit contributions. Local 33 proved no facts to establish that Debtor has personal liability for the debt based on fraud or breach of duty as an ERISA fiduciary. Accordingly, Debtor's Objection to Claim is sustained; Claim 13 will be disallowed. An appropriate order will follow.

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¹²"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 title shall be personally liable to make to such plan any losses . . . resulting from each such breach" 29 U.S.C. § 1109 (LexisNexis 2008).

IT IS SO ORDERED.



Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

EDWARD DUANE BARNES,

Debtor.

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* CASE NUMBER 07-42429
*
* CHAPTER 13
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* HONORABLE KAY WOODS
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ORDER DISALLOWING CLAIM NO. 13

For the reasons set forth in this Court's Memorandum Opinion entered on this date, the Court sustains Debtor's Objection to the proof of claim of Sheet Metal Worker's Local No. 33 Youngstown District Collection and Administration Agency, Inc. Accordingly, Claim No. 13 is disallowed.