Dated: August 24 2009

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 08-35508
	)	
GOE Lima, LLC,	)	Chapter 11
	)	
Debtor.	)	Adv. Pro. No. 09-3020
	)	
Smith-Boughan, Inc.,	)	Hon. Mary Ann Whipple
	)	
Plaintiff,	)	
v.	)	
	)	
SunTrust Bank, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER REGARDING MOTION TO DISMISS

This case is before the court on Defendant SunTrust Bank's ("the Bank") Motion to Dismiss ("Motion") [Doc. # 20], Plaintiff Smith-Boughan, Inc.'s opposition [Doc. # 25], and the Bank's reply [Doc. # 32]. Smith-Boughan's complaint alleges eleven counts, ten of which (counts two through eleven) are claims against the Bank relating to allegations that the Bank improperly used funds from a certain account at the Bank established by Defendant/Debtor GOE Lima, LLC ("Debtor") in order to offset a debt owed by

Debtor to the Bank. In support of its Motion, the Bank filed the affidavit of Jan Naifeh, Senior Vice President at the Bank, with certain documents attached that relate to the bank account referenced in the complaint. [Doc. # 21]. Although the Bank's motion is brought under Federal Rule of Civil Procedure 12(b)(6), which applies in this proceeding pursuant to Federal Rule of Bankruptcy Procedure 7012(b), Plaintiff agrees that the documents attached to the affidavit may properly be considered by the court.[1] *See Barrett v. NCAA,* 528 F.3d 426, 430 (6th Cir. 2008)(court may consider "exhibits attached to defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein"); *Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir. 1997) (finding that documents attached to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to the plaintiff's claims). For the reasons that follow, the Bank's Motion will be granted in part and denied in part.

BACKGROUND

The following facts are alleged in the complaint or are gleaned from the documents considered part of the pleadings that are attached to Smith-Boughan's complaint and the Naifeh affidavit.

Debtor operated an ethanol production facility in Lima, Ohio. It filed its Chapter 11 bankruptcy petition on October 14, 2008. Smith-Boughan commenced this adversary proceeding against the Bank, as an individual entity and as collateral and/or administrative agent for the prepetition secured lenders of Debtor, on January 30, 2009. In its complaint, Smith-Boughan alleges that, on or about November 17, 2006, it entered into a contract with Debtor for Smith-Boughan to provide certain mechanical services in connection with construction of the ethanol facility in Lima ("Contract"). [Doc. #1, Complaint ¶7, Ex. A]. Smith-Boughan and Debtor also entered into an agreement captioned "General Conditions of the Contract for Construction" ("General Conditions") and agreed that the Contract terms include the General Conditions. [*Id.* ¶ 8-9, Ex. B, § 1.1.1 - 1.1.2]. The Bank is not a party to either the Contract or the General Conditions. [*See id.*, Ex. A, p. 10 and Ex. B, p. 50].

The Contract required Debtor to make an initial payment to Smith-Boughan following execution of the Contract and thereafter make progress payments based upon applications for payment submitted by Smith-Boughan and calculated in accordance with a formula based upon the percentage of work completed,

[1] The Naifeh affidavit will not be considered to the extent that it includes averments that go beyond authenticating the attached documents. *Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir. 1997) ("Matters outside of the pleadings are not to be considered by a court in ruling on a 12(b)(6) motion to dismiss.").

less a ten percent retainage until the work was fifty percent complete. [*Id.,* Ex. A, § 5.1 - 5.8]. After the work was fifty percent complete, progress payments were due with respect to the remaining fifty percent of the work without reduction for any additional retainage. [*Id.* at § 5.8]. The General Conditions provide, in relevant part, as follows:

> Upon commencement of the Work, Owner's [Debtor's] lender, SunTrust Bank, shall maintain the retainage portion of each of Contractor's [Smith-Boughan's] progress payments (the "escrowed funds") in an interest bearing account (the "escrow account") for the benefit of the Contractor and the Owner, as provided herein, and will disburse such escrowed funds and the accrued interest thereon only in accordance with the terms of this Section 9.6.8.

[*Id.*, Ex. B § 9.6.8]. Section 9.6.8 also sets forth the circumstances under which Debtor could draw down a portion of the retainage to compensate it for claims it has against Smith-Boughan under the Contract and the manner in which disputes regarding such would be resolved. [*Id.*]. In addition, that section provides:

> Following Final Completion, all undisputed funds in the escrow account shall be promptly disbursed to the Contractor, together with all interest accrued thereon, and following resolution of all Claims of Owner as provided in this Section 9.6.8, all funds remaining in the escrow account, together with all interest accrued thereon, shall be disbursed to Owner or Contractor, as applicable, together with all interest accrued thereon. Contractor and Owner each acknowledge and agree that SunTrust Bank shall have no liability to either party arising out of or in connection with the administration of the escrow account, unless it is determined by a final judgment of any federal or state appellate court . . . that SunTrust Bank caused the complaining party to suffer material damages as a result of its gross negligence or willful violation of the terms of this Section 9.6.8.

[*Id.*].

Also on or about November 17, 2006, Debtor, Smith-Boughan, and the Bank entered into a Consent and Agreement ("Consent Agreement"). [*Id.* ¶ 10, Ex. C]. Pursuant to the Consent Agreement, and as "an inducement" to the Bank to extend credit, Smith-Boughan consented to Debtor granting the Bank a security interest in the Contract and acknowledged the Bank's "right, but not the obligation," to exercise all rights of Debtor in accordance with the Contract. [*Id.* Ex. C, Recitals ¶ 8 and § 1.1]. The Consent Agreement further provides that "[n]othing herein shall require [the Bank] . . . to perform under the Contract, but shall only give [the Bank] the option to do so" and that Smith-Boughan agrees that "none of the [secured lenders, including the Bank] shall have any liability or obligation under the Contract as a result of this Consent, the Senior Security Agreement . . . or otherwise. . . ." [*Id.* § 1.2 and 1.7]. The Consent Agreement contains an integration clause providing that "[t]his Consent embodies the complete agreement among the parties hereto

with respect to the matters specified herein. . . ." [*Id.* § 4.13].

In its complaint, Smith-Boughan alleges as follows:

> In accordance with the Contract and General Conditions, as recognized and agreed to by Bank in executing the Consent Agreement and through its course of conduct and dealing, GOE established a separate escrow account with Bank for holding retainage funds, or, in the alternative, GOE established a separate account with Bank that was treated by GOE as an escrow account for holding retainage funds and, upon information and belief, known by representatives of Bank to be an escrow account for holding retainage funds (jointly, "Escrow Account").

[Complaint ¶ 14].

The documents before the court indicate that nine accounts were opened by Debtor at the Bank, one of which is titled "GOE Lima LLC Retainage Account for the benefit of [the Bank]" ("the Retainage Account"). [Doc. # 21, Naefeh Aff., Ex. A p. 1, Ex. B, p. 1]. While the titles to the remaining eight accounts appear to reflect various other purposes for the accounts (i.e. operating account, senior debt service payment account, subordinated debt service payment account, debt service reserve account, loss proceeds account, construction account, and Marathon account), "for the benefit of [the Bank]" is also included in the title for each of these accounts. [*Id.* Ex. B, p. 2-9]. Also, as to each of the nine accounts, Debtor's chief financial officer signed a document entitled "ACH Fraud Control Service Schedule," a document that permits the account holder to, among other things, elect to block all incoming automated clearing house or "ACH" debit entries to an account. [*Id.* Ex. A, p. 4]. As to all nine accounts, Debtor elected to block such debit entries. [*Id.* at 5].

Smith-Boughan further alleges in its complaint that throughout its work at Debtor's facility, which began on or about November 17, 2006, and continued until September 10, 2007, Debtor made deposits of retainage funds into the Retainage Account, which Smith-Boughan characterizes as an escrow account, but failed to pay all amounts owed to Smith-Boughan under the Contract. [*Id.* ¶¶ 15-16]. In a letter dated October 1, 2007, and addressed to both Debtor and the Bank, Smith-Boughan set forth its claim for money owed by Debtor under the Contract, which amount included retainage in the amount of $836,491. [*Id.* ¶23, Ex. G, p. 2]. In addition, Smith-Boughan alleges that "[a]fter final completion of the project, the Bank did not disburse any of the funds in the Escrow Account to GOE or Smith-Boughan" but, instead, four days before Debtor filed its bankruptcy petition, "the Bank used the Escrow Account funds to pay down the debt owed by GOE to Bank." [*Id.* ¶ 30, 31; Doc. 21, Naifel Aff., ¶ 6, Ex. D]. And finally, Smith-Boughan

alleges that the Bank is a sophisticated national banking institution that has significant experience in making loans for the construction of buildings and facilities, that "[t]he Bank knew or should have known that the funds in the Escrow Account were not funds of GOE," and that the "Bank did not have a security interest in, or lien on, any funds in the Escrow Account."

In addition to a breach of contract claim against Debtor, Smith-Boughan asserts the following claims against the Bank: breach of contract, breach of implied contract, breach of express trust, breach of implied trust, invalidity of the bank's claimed security interest in the alleged escrow account, breach of fiduciary duty, breach of duty to third-party beneficiary, gross negligence in removing the alleged escrow funds, promissory estoppel and unjust enrichment. [Complaint, Counts 2 - 11].

LAW AND ANALYSIS

Defendants' Motion is brought under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. Federal Rule of Civil Procedure 8(a)(2) provides that a claim for relief must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." In deciding a Rule 12(b)(6) motion to dismiss, "the court must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the complaint 'contains enough facts to state a claim to relief that is plausible on its face.'" *United States v. Ford Motor Co.*, 532 F.3d 496, 502 (6th Cir. 2008) (quoting *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007)). While Rule 8(a)(2) does not require a complaint to set out detailed factual allegations, "conclusory allegations or legal conclusions masquerading as factual allegations will not suffice." *Bishop v. Lucent Technologies, Inc.*, 520 F.3d 516, 519 (6th Cir. 2008). Rather, "to survive a motion to dismiss, the complaint must contain either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory." *Id.*

The United States Supreme Court recently explained the "plausibility" standard first set forth in *Twombly*:

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.' "
> * * *
> Determining whether a complaint states a plausible claim for relief will . . . be a

> context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not "show[n]"-"that the pleader is entitled to relief."

Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949-50 (2009).

Smith-Boughan's claims in this adversary proceeding are, for the most part, based upon its allegations under various theories of a breach of duty owed it by the Bank regarding the Retainage Account when the Bank set off funds in that account against a debt owed by Debtor and its allegation that the Bank had no security interest in the funds in that account. In general, the Bank argues that the documents that have been made a part of the pleadings in this case show that it did not owe a duty to Smith-Boughan, contractual or otherwise, and that this court has already concluded that the Bank's liens are valid and in a position of first priority. The court discusses the parties' arguments separately as to each of Smith-Boughan's claims.

I. Breach of Contract (Count Two)

Count two of the complaint alleges that the Bank breached its contract with Smith-Boughan by using the Retainage Account to set off funds. In order for a breach of contract claim to survive a Rule 12(b)(6) motion, the complaint must include sufficient allegations of the existence of contract. "In order to declare the existence of a contract, both parties to the contract must consent to its terms." *Episcopal Retirement Home, Inc. v. Ohio Dept. of Indus. Relations*, 61 Ohio St. 3d 366, 369 (1991). Because the complaint, as transformed by Smith-Boughan in its opposition to the Bank's Motion, fails to allege facts from which a factfinder could conclude that the Bank consented to the terms of the escrow provisions of the Contract between Debtor and Smith-Boughan, the Bank's Motion will be granted as to this claim.

The complaint and documents before the court show that the Bank is not a signatory to the Contract and the General Conditions, which were executed by Debtor and Smith-Boughan only and which set forth the provisions regarding the creation of an escrow account. In addition, the Consent Agreement, which was executed by Debtor, the Bank and Smith-Boughan, expressly states that the Bank shall have no liability or obligation under the Contract as a result of the Consent Agreement or otherwise. Thus, the Bank argues that it cannot be liable for breach of contract.

Although Smith-Boughan alleges in the complaint that "[i]n executing the Consent Agreement, Bank was agreeing to the terms of the Contract and General Conditions as they applied to the Escrow Account,"

[Complaint, ¶ 12], this is a legal conclusion that is not entitled to the assumption of truth. In any event, in its opposition to the motion to dismiss, it has backed off of that assertion and concedes that the contract breached by the Bank "was not the Contract or the Consent Agreement but the agreement to only disburse funds from the Escrow Account in accordance with the agreement between Debtor and plaintiff." [Doc. # 25, Oppos., p. 13]. According to Smith-Boughan, this agreement was not an express contract but, rather, arose from a course of dealing and conduct by the Bank with Smith-Boughan and Debtor. Specifically, Smith-Boughan relies on (1) factual allegations that the Bank entered into the Consent Agreement, from which, it argues, one could infer that the Bank was aware of the escrow requirements, and (2) Bank documents showing that the Retainage Account was opened and that it was opened with a restriction on the withdrawal of funds. Smith-Boughan contends that these facts sufficiently allege "[the Bank's] contract with Smith-Boughan that [the Bank] would only allow funds to be disbursed from the Escrow Account in the manner described in the Contract." [*Id.*].

Although Smith-Boughan argues that these assertions of fact adequately allege the Bank's consent to be bound by the terms of the escrow provisions of the Contract, the court disagrees. The Bank document Smith-Boughan relies upon to show that the Bank imposed restrictions on the withdrawal of funds from the Retainage Account shows that Debtor's chief financial officer authorized the restriction rather than the Bank having imposed the restriction. Furthermore, the withdrawal of funds restriction was authorized as to all nine accounts opened by Debtor at the Bank and only restricted ACH debit entries to the accounts. It did not otherwise restrict withdrawals by Debtor. Thus, the restriction is not evidence of the Bank's consent to undertake the obligations of an escrow agent as contemplated in the Contract and General Conditions. Nor does the mere opening of an account designated in its title as a retainage account or the Bank's knowledge of the escrow provisions in the Contract and General Conditions sufficiently allege such consent. The Consent Agreement expressly states that the Bank shall have no liability under the Contract as a result of the Consent Agreement "or otherwise." [Complaint, Ex. C, ¶ 1.7].

The court finds that the factual allegations relied upon by Smith-Boughan are insufficient to allege the existence of a contract between it and the Bank and, therefore, insufficient to state a breach of contract claim against the Bank "that is plausible on its face."

II. Breach of Implied Contract (Count Three)

Count three of the complaint alleges that the Bank breached "an implied contract with Smith-Boughan to maintain the funds in the Escrow Account until the funds could be paid . . . in accordance with

the Contract." [Complaint, ¶¶ 47-48]. Ohio law recognizes two types of implied contracts – implied-in-fact and implied-in-law. As in the case of an express contract, the existence of an implied-in-fact contract hinges upon proof of all of the elements of a contract. *Dunn v. Bruzzese*, 172 Ohio App.3d 320, 330 (2007). "In a contract implied in fact, the meeting of the minds is shown by the surrounding circumstances that demonstrate that a contract exists as a matter of tacit understanding." *Spectrum Benefit Options, Inc. v. Med. Mut. of Ohio*, 174 Ohio App.3d 29, 40 (2007). By contrast, contracts implied-in-law are not true contracts. Rather, "[i]n contracts implied-in-law, civil liability attaches by operation of law upon a person who receives benefits that he is not entitled to retain." *Id.*

The complaint does not specify the type of implied contract allegedly breached. However, in its opposition, Smith-Boughan argues that the actions and dealings of the Bank confirm the existence of its agreement to maintain the funds in the account in accordance with the Contract. In other words, it contends that a contract exists as a matter of tacit understanding evidenced by the Bank's course of conduct and dealings. It is, therefore, proceeding on the theory of a contract implied-in-fact. Because it relies on allegations and documents setting forth the same course of conduct and dealing discussed above, and for the reasons discussed above, the court finds the facts relied upon by Smith-Boughan to be insufficient to allege the existence of any agreement between it and the Bank and, therefore, insufficient to state a claim for recovery under a theory of a breach of an implied-in-fact contract.

III. Breach of Express Trust (Count Four)

Under a breach of trust theory, "'[o]ne standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation.'" *Hari & Assoc. v. RNBC, Inc.*, 946 F. Supp. 531, 539 (M.D. Tenn. 1996) (quoting Restatement (Second) of Torts § 874 (1979)). A key element of this cause of action is a fiduciary or confidential relationship between the two parties. *Id.; Dejaiffe v. Keybank USA Nat'l Ass'n*, No. L-05-1191, 2006 WL 1580053, *5 (Ohio App. June 9, 2006) ("A beneficiary seeking to obtain relief for a breach of trust must plead and prove facts which show the existence of a fiduciary duty and the failure of the fiduciary to perform it."); *see Keybank Nat'l Ass'n v. Guarnieri & Secrest, P.L.L.*, No. 07CO46, 2008 WL 512462, *5-6 (Ohio App. Dec. 2, 2008).

Smith-Boughan alleges that "GOE established a separate escrow account with Bank for holding retainage funds, or, in the alternative, GOE established a separate account with Bank that was treated by GOE as an escrow account for holding retainage funds." [*Id.* ¶ 14]. In addition, Smith-Boughan alleges that "[i]n accordance with the Contract, General Conditions, and Consent Agreement, and pursuant to the

course of dealing and conduct of GOE, Smith-Boughan and the Bank, the funds in the Escrow Account were placed in trust by GOE for the benefit of Smith-Boughan," and that "the Bank breached this express trust by removing funds from the Retainage Account." [Complaint, ¶¶ 51, 52].

An escrow of funds is a type of trust. *See Squire v. Banciforti*, 131 Ohio St. 344, 354-55 (1936) (stating that an escrow depositary is an agent in so far as specific personal duties are to be performed and trustee in so far as the funds placed in his hands are concerned); *Pippin v. Kern-Ward Bldg. Co.*, 8 Ohio App. 3d 196, 198 (1982) (citing *Squire* and noting that the "very name 'escrow' gives it the earmarks of a trust"). Although Smith-Boughan refers to the Retainage Account as an escrow account, the documents considered part of the pleadings in this case indicate otherwise. For an instrument to operate as an escrow, "[the] parties must actually contract and the deposit must be absolute and beyond the control of the depositor." *Id.*; *Spaulding v. Coulson*, 104 Ohio App. 3d 62, 81 (1995). In this case, the Bank's signature card for the Retainage Account contains the signatures of Debtor's president, chief financial officer and secretary, thus demonstrating that Debtor retained control of the account. [*See* Doc. # 21, Naifeh Aff., Ex. B, p. 1].

Nevertheless, Smith-Boughan asserts in its opposition that a trust was created in which Debtor was the trustee, Smith-Boughan was the beneficiary, and the retainage funds were the trust res. To the extent that allegations in the complaint sufficiently allege such a trust, one may not infer that a fiduciary relationship existed between the Bank and Smith-Boughan as a result of such a trust. According to Smith-Boughan, Debtor was the trustee, not the Bank. The pleadings fail to allege this key element of Smith-Boughan's breach of trust claim and, as such, the claim cannot survive the Bank's Rule 12(b)(6) motion.

IV. Breach of Implied Trust (Count Five)

Smith-Boughan alleges in count five that the Bank breached an implied trust by removing funds from the Retainage account. Ohio law recognizes two types of implied trusts: constructive and resulting. *Brate v. Hurt*, 174 Ohio App. 3d 101, 108 (2007). Although the complaint does not identity the type of implied trust allegedly breached by the Bank, Smith-Boughan indicates in its opposition that it is proceeding under a constructive trust theory.[2]

"A constructive trust arises irrespective of the intention of the parties and is imposed when a person

[2] "A resulting trust arises when property is transferred under circumstances that raise an inference that the transferor, or the person who caused the transfer, did not intend the transferee to take a beneficial interest in the property." *Rodgers v. Pahoundis*, 178 Ohio App.3d 229, 240 (2008). The complaint contains no facts supporting a resulting trust theory.

holding title to property is subject to an equitable duty to convey it to another on the ground that [it]would be unjustly enriched if [it]were permitted to retain it." *Brate v. Hurt*, 174 Ohio App. 3d 101, 108 (2007). Here, Smith-Boughan argues that the Bank has been unjustly enriched by taking funds that were equitably owned by Smith-Boughan. However, unlike an express trust, a constructive trust is a remedy and does not exist until a plaintiff obtains a judicial decision finding it to be entitled to a judgment "impressing" the defendant's property with a constructive trust. *In re Omegas Group, Inc.* 16 F.3d 1443, 1451 (6th Cir. 1994). While, as discussed below, there may be sufficient allegations to support a claim of unjust enrichment such that Smith-Boughan would be entitled to a judgment "impressing" the Bank's assets with a constructive trust, there is no allegation in the complaint suggesting that such a constructive trust was imposed at the time the Bank setoff funds from the Retainage Account. Because a constructive trust cannot be breached before it even exists, the complaint fails to allege any facts from which one could find that the Bank breached a constructive trust.

V. Declaratory Judgment of Invalidity of Bank's Security Interest in Funds in Retainage Account (Count Six)

It is axiomatic that a security interest can attach only to property interests owned by the grantor of the security interest. And, in Ohio, "property held in trust for a beneficiary is not subject to the debts of the trustee because the latter has no equitable right to the enjoyment of that property." *Parker Motor Freight, Inc. v. Fifth Third Bank*, 116 F.3d 1137, 1141 (6th Cir. 1997). Thus, the equitable owner of a bank account is not subject to the debts of the legal owner. *Id.* (citing *Barrs v. Barrs Rent-A-Car Co.*, 71 Ohio App. 465 (1943)).

Smith-Boughan alleges in the complaint that the Bank "did not have a security interest in, or lien on, any funds in the Escrow Account" and that "the funds in the Escrow Account were not property of [Debtor]." [Complaint, ¶¶ 33, 60]. While the pleadings show that, as discussed above, an escrow account was not established since Debtor maintained control of the account, Smith-Boughan is proceeding on a theory that the retainage funds at issue were the trust res of a trust in which Debtor was the trustee and Smith-Boughan was a beneficiary. *See Commonwealth Land Title Co. v. Blaszak (In re Blaszak)*, 397 F.3d 386, 391 (6th Cir. 2005) (stating that "[f]our requirements are necessary to establish the existence of an express or technical trust: (1) an intent to create a trust; (2) a trustee; (3) a trust res; and (4) a definite beneficiary."). To that end, it alternatively alleges that Debtor "established a separate account with Bank that *was treated* by [Debtor] as an escrow account for holding retainage funds" and that Debtor

acknowledged that the account contained retainage funds "for Smith-Boughan." [*Id.* at ¶¶ 14, 17 (emphasis added)]. These allegations, together with Debtor's agreement set forth in the General Conditions to maintain the retainage portion of Smith-Boughan's progress payments in an interest bearing account for the benefit of Smith-Boughan and Debtor to be disbursed in accordance with the terms set forth therein, sufficiently allege the existence of a trust of which Smith-Boughan is a beneficiary and, therefore, an equitable owner.

Nevertheless, the Bank argues that the court has already concluded in Debtor's bankruptcy case that the Bank's liens are "valid, properly perfected, and in first priority position." [Doc. # 20, Motion, p. 2]. In so arguing, the Bank relies on the final cash collateral order entered in Debtor's bankruptcy case. However, that order is a matter outside of the pleadings that the court may not consider in ruling on a Rule 12(b)(6) motion. And, even if considered, the court's finding in that order, as stipulated by Debtor and the Bank, that the Bank has a first priority security interest in substantially all of Debtor's assets simply begs the question as to whether the funds in the retainage account were or were not Debtor's assets. In addition, there is no allegation or indication as to the source of the money deposited in the Retainage Account that would permit the inference of a security interest or lack thereof. Furthermore, the order specifically states that the court's finding regarding the Bank's security interest was not binding upon other parties in interest if the party in interest "timely served notice by no later than December 22, 2008, identifying any and all claims or causes of action which challenge the validity, enforceability, priority or extent of the [security interest] and filed an adversary proceeding . . . by no later than January 31, 2009. . . ," both of which Smith-Boughan did in a timely manner.

In light of the foregoing, the court finds that for pleading purposes, Smith-Boughan's claim for a declaratory judgment that the Bank's security interest in the Retainage Account was not valid survives the Bank's motion to dismiss.

VI. Breach of Fiduciary Duty/Negligence (Counts Seven and Nine)

To support a breach of fiduciary duty claim, a party must show the existence of a fiduciary relationship and failure to comply with that duty. *Strock v. Pressnell*, 38 Ohio St. 3d 207, 216 (1988). A fiduciary is one who, due to his own undertaking, has a duty to act "primarily for the benefit of another in matters connected with his undertaking." *Id.* "A claim of breach of a fiduciary duty is basically a claim of negligence, albeit involving a higher standard of care." *Id.* In order to succeed on a claim of negligence, a plaintiff must show "the existence of a duty on the part of the one sued not to subject the [plaintiff] to the

injury complained of, a failure to observe such duty, and an injury resulting proximately therefrom." *Id.*

In this case, Smith-Boughan alleges that the Bank's removal of funds from the Retainage Account breached a fiduciary duty owed to it and that such breach was the proximate cause of damages incurred by it. The Bank contends, for its part, that the complaint contains no allegations of circumstances from which any duty owed by it to Smith-Boughan can be found. The court disagrees.

The general rule is that funds deposited into a general deposit creates a debtor/creditor relationship between the bank and the depositor, and the bank is not a bailee or trustee of the money deposited. *Moore v. Central Trust Co.*, Case No. 85AP-990, 1986 WL 5574, *2, 1986 Ohio App. LEXIS 6827, *6 (Ohio App. May 13, 1986) (citing *Union Prop., Inc. v. Baldwin Bros. Co.*, 141 Ohio St. 303 (1943)). However, under certain circumstances, a bank has a duty to inquire as to the true character of funds before using them to offset the depositor's debts. *See Parker Motor Freight, Inc.*, 116 F.3d at 1141-42; *Fed. Ins. Co. v. Fifth Third Bank*, 867 F.2d 330, 335-36 (6th Cir. 1989). In *Parker Motor Freight*, a motor carrier deposited funds in the bank that it collected on behalf of another motor carrier and that the bank subsequently used to offset the depositor's debt owed to it. The court, applying Ohio law, found that the funds were held in trust for the other motor carrier and that because the loan agreement between the bank and the depositor indicated that the depositor was in the trucking industry and such collection practice, referred to as jointlining, is a common practice in that trade, the bank had notice that someone other that the depositor may have had an interest in the funds deposited such that the bank was required to inquire as to the true character of the funds. *Parker Motor Freight, Inc.*, 116 F.3d at 1141-42; *see Fed. Ins. Co.,* 867 F.2d at 335-36 (finding that the close working relationship between a bank and its depositor required the bank to inquire as to the true nature of progress payments held in trust for job creditors); *Owner Operator Indep. Drivers Assoc. Inc. v. Comerica Inc*., No. 2:05-CV-00056, 2006 WL 1339427, 2006 U.S. Dist. LEXIS 29756 (S.D. Ohio May 16, 2006) (rejecting bank's argument that no duty was owed where bank's working relationship with depositor required the bank to look into the nature of funds before withdrawing them to satisfy loan agreements of the depositor). This duty to inquire is, by its nature, owed to the equitable owner of the funds on deposit at the bank.

In this case, in addition to averments alleging the existence of a trust as discussed above, the complaint and documents that are a part of the pleadings allege that the Bank is the assignee of the Contract between Smith-Boughan and Debtor wherein the intent to create a trust with respect to retainage funds is expressed, the Bank is a sophisticated national banking institution that has significant experience in making

loans for the construction of buildings and facilities, the name of the account at issue indicates that it was a retainage account, and the Bank knew or should have known that the funds in the Retainage Account were not funds belonging to Debtor. These allegations are sufficient to withstand the Bank's motion to dismiss on the basis that it owed no duty to Smith-Boughan.

VII. Third-Party Beneficiary Claim (Count Eight)

While performance of a contract will often benefit a third person, unless the third person is an intended beneficiary, rather than merely an incidental beneficiary, no duty to him is created. *Hill v. Sonitrol of Southwestern Ohio, Inc.*, 36 Ohio St.3d 36, 40 (1988). In *Hill*, the Ohio Supreme Court set forth the test to determine if a third party is an intended or incidental beneficiary of a contract as follows:

> [I]f the promisee * * * intends that a third party should benefit from the contract, then that third party is an "intended beneficiary" who has enforceable rights under the contract. If the promisee has no intent to benefit a third party, then any third-party beneficiary to the contract is merely an "incidental beneficiary," who has no enforceable rights under the contract.
>
> [T]he mere conferring of some benefit on the supposed beneficiary by the performance of a particular promise in a contract [is] insufficient; rather, the performance of that promise must also satisfy a duty owed by the promisee to the beneficiary.

Id. (quoting *Norfolk & Western Co. v. United States*, 641 F.2d 1201, 1208 (6th Cir. 1980)).

In this case, Smith-Boughan alleges the existence of an account agreement between Debtor, the promissee, and the Bank. It further alleges that, in accordance with the Contract and General Conditions, Debtor established an account for holding retainage funds, Debtor intended for Smith-Boughan to be a third-party beneficiary of its account agreement with the Bank, the Bank knew or should have known that Smith-Boughan was the third-party beneficiary of that agreement, and the agreement was breached by the Bank when it removed funds from the account. [Complaint ¶¶ 14, 66, 67]. These allegations sufficiently allege a third-party beneficiary claim.

The failure to more specifically identify and to include the account agreement in the Complaint is not fatal to Smith-Boughan's claim at this stage of the proceeding. Rather, Smith-Boughan is entitled to conduct discovery regarding any account agreement Debtor had with the Bank and the terms of such agreement. In addition, although the name on the Retainage Account states that it is for the benefit of the Bank, the name on a bank account is not dispositive of ownership of the assets in the account. *In re Resorts Int'l, Inc.*, 199 B.R. 113, 121 (Bankr. D.N.J. 1996) ("Although title on a bank account frequently coincides

with ownership of the funds deposited therein, title is not dispositive of ownership"); *cf. Parker Motor Freight, Inc.,* 116 F.3d 1137 (concluding that although trust funds were deposited in motor carrier's bank account, motor carrier had no equitable right to the funds).

VIII. Promissory Estoppel (Count Ten)

"A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." *McCroskey v. State,* 8 Ohio St.3d 29, 30 (1983) (citing Restatement of the Law, Contracts 2d § 90 (1973). The elements of a promissory estoppel claim are (1) a clear and unambiguous promise, (2) reliance on the promise, (3) the reliance is reasonable and foreseeable, and (4) the person claiming reliance was injured as a result of the promise. *Pappas v. Ippolito*, 177 Ohio App. 3d 625, 641 (2008).

In this case, Smith-Boughan alleges that it relied to its detriment "upon the agreement by the Bank and the course of dealing between the parties that the funds in the Escrow Account would be maintained for the benefit of Smith-Boughan." [Complaint ¶ 74]. In response to the Bank's motion to dismiss, Smith-Boughan argues that the Bank, through its course of dealing and conduct, including the creation of the special Escrow Account, with full knowledge and understanding of the character and purpose of the Escrow Account, impliedly promised to plaintiff that it would not withdraw funds from the Escrow Account for its own purpose." As discussed earlier in this opinion, the facts relied upon by Smith-Boughan are insufficient to allege the existence of a promise to it, express or implied, by the Bank to comply with the terms of the escrow agreement set forth in the General Conditions. To the extent that Smith-Boughan's claim relates to an alleged account agreement between Debtor and the Bank upon which it relied, it has sufficiently alleged a promissory estoppel claim.

IX. Unjust Enrichment (Count Eleven)

Unjust enrichment of a defendant occurs "when [it] has and retains money or benefits which in justice and equity belong to another." *Hummel v. Hummel*, 133 Ohio St. 520, 528 (1938). A claim for unjust enrichment requires a plaintiff to show that "a benefit was conferred upon another party, that the other party knew of the benefit, and that it would be unjust to allow the other party to retain the benefit without paying for it." *Maverick Oil & Gas, Inc. v. Barberton City School Dist.*, 171 Ohio App. 3d 605, 615 (2007) (citing *Johnson v. Microsoft Corp.*, 106 Ohio St. 3d 278, 286 (2005)).

In its complaint, Smith-Boughan alleges that by removing the funds from the Retainage Account,

the Bank has been unjustly enriched. The Bank argues that because the Retainage Account was titled as being for the benefit of the Bank, and because the Bank is Debtor's largest creditor, there was nothing unjust about the Bank's setoff and retention of the funds in that account. However, as discussed above, the name on the account is not dispositive of ownership of assets in the account. Moreover, while a bank has a common law right of setoff, it can only apply deposits belonging to the depositor to the pre-existing indebtedness of the depositor. *Parker Motor Freight, Inc.*, 116 F.3d at 1141 (citing *Fed. Ins. Co. v. Fifth Third Bank*, 867 F.2d 330, 334 (1989)). "A bank does not have an automatic right of setoff when the funds are held by the depositor in a fiduciary capacity." *Id.* To the extent a bank has notice of another's equitable interest in the funds in an account, it is not entitled to use the funds to offset a debt owed by the depositor. *See id.* at 1142 (finding that the bank had, at minimum, inquiry notice that funds deposited included funds held in trust). And under the "equitable rule" followed in Ohio,

> [a] Bank, even though it has no knowledge, either express or implied, that another than the depositor has an interest in the funds deposited in his own name, can not apply such funds to the individual indebtedness to it of the depositor, where such lack of knowledge has not resulted in any change in the Bank's position and no superior equities have been raised in its favor.

Id. at 1141.

In this case, Smith-Boughan alleges that the Bank knew or should have known that the funds at issue were not funds belonging to Debtor. And, as discussed above, the complaint alleges facts that, if true, are sufficient to find that Smith-Boughan had an equitable interest in the funds in the Retainage Account and that the Bank had, at a minimum, inquiry notice of such interest. On this basis, Smith-Boughan's unjust enrichment claim is plausible and the Bank's motion to dismiss the claim is not well taken.

X. Conversion

In its opposition to the Bank's motion to dismiss, Smith-Boughan also argues that the Bank is liable to it based upon the Bank's conversion of funds in the Retainage Account. Conversion is not set forth by name as a separate legal theory in the specific counts of the complaint. [*Cf.* Complaint ¶ 31("Bank wrongfully and willfully removed, took and converted all funds from the Escrow Account.")]. Nevertheless, a plaintiff need only include sufficient factual allegations to show that it is entitled to relief. *Iqbal*, 129 S.Ct. at 1949; Fed. R. Civ. P. 8(a)(2). A failure to set forth a particular legal theory, despite alleging facts that, if true, would justify the relief sought, is not fatal. *Ryan v. Ill. Dept. of Children & Family Servs.*, 185 F.3d 751, 764 (7th Cir. 1999) (stating a plaintiff "cannot plead herself out of court by citing to the wrong legal

theory or failing to cite any theory at all"); *Yakubek v. Rex*, 963 F.2d 374 (Table) (6th Cir. 1992) (stating that "[l]egal theories of recovery need not be spelled out as long as the relevant issues are sufficiently implicated by the pleadings").

"Conversion is the wrongful control or exercise of dominion over property belonging to another inconsistent with or in denial of the rights of the owner." *Pappas v. Ippolito*, 177 Ohio App.3d 625, 640 (2008). The court finds that the complaint sufficiently alleges that Smith-Boughan had an equitable interest in the funds in the Retainage Account and that the Bank removed those funds, using them to offset debt owed by Debtor and knowing that they did not belong to Debtor. These allegations are sufficient to state a conversion claim that his plausible on its face.

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that the Bank's Motion to Dismiss [Doc. # 20] be, and hereby is, **GRANTED** as to Counts Two, Three, Four, and Five and **DENIED** as to all remaining Counts of the Complaint.