

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA**

In re:

Case No. 03-10475-DHW
Chapter 7

WALTER LEE GAY and
WENDY GAIL GAY,

Debtors.

TEXTRON FINANCIAL
CORPORATION,

Plaintiff,

v.

Adv. Proc. No. 03-1060-DHW

WALTER LEE GAY,

Defendant.

**ORDER GRANTING DEFENDANT'S CROSS MOTION
FOR SUMMARY JUDGMENT ON § 523(a)(4) COUNT**

**ORDER DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT ON § 523(a)(2)(A) COUNT**

**ORDER CONTINUING HEARING ON PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT ON § 523(a)(2)(B) COUNT**

On November 26, 2003 the plaintiff filed a motion for summary judgment as to all counts of this adversary proceeding. On December 31, 2003 the defendant filed a response opposing plaintiff's motion for summary judgment. A hearing on the motion was held on January 14, 2004 in Dothan, Alabama. Present at the hearing were the plaintiff's counsel, Jannea S. Rogers, and the defendant's attorney, Collier H. Espy, Jr.

§ 523(a)(4) Count

Plaintiff contends that its claim against the defendant is nondischargeable because the defendant breached a fiduciary duty to the plaintiff.¹ Plaintiff further contends that defendant's fiduciary duty arose as a result of defendant's having been an officer or director of corporate entities involved in the transaction(s) with the plaintiff.

At the hearing the defendant made an oral cross motion for summary judgment with respect to the § 523(a)(4) count.

The court agrees that the defendant is entitled to summary judgment on this count. The mere fact that the defendant was a shareholder, officer, or director of corporate entities transacting business with the plaintiff does not bestow fiduciary status upon the defendant within the scope of § 523(a)(4).

Construing a similar provision of the Bankruptcy Act of 1841, the Supreme Court has narrowly defined the concept of a fiduciary to reference "technical trusts." *Chapman v. Forsyth*, 2 U.S. (How) 202, 207, 11 L. Ed. 236, 238 (1844). The trust must "arise prior to and without reference to the act creating the debt." *Angelle v. Reed*, 610 F.2d 1335, 1339 (5th Cir. 1980); *Davis v. Aetna Acceptance Co.*, 293 U.S. 328, 333, 55 S. Ct. 151, 154, 79 L. Ed. 2d 393, 397-98 (1934). Constructive trusts are, therefore, excluded. *Angelle*, 610 F.2d at 1339.

Because of the narrow construction given "fiduciary capacity" by the Supreme Court, the "general meaning of a fiduciary – a relationship involving confidence, trust and good faith – is far too broad for the purposes of section 523(a)(4)." 4 Lawrence P. King, *Collier on Bankruptcy* ¶ 523.10[1][c], at 523-73 (15th ed. rev. 1999) (quoting *In re Twitchell*, 91 B.R. 961, 964-65 (D. Utah 1988)); *Ragsdale v. Haller*, 780 F.2d 794, 796 (9th Cir. 1986); *see also Lewis v. Scott*, 97 F.3d 1182 (9th Cir. 1996). The narrow definition is consistent with the policy of the bankruptcy law to afford the debtor a "fresh start" and to

¹ 11 U.S.C. § 523(a)(4) provides:

(a) A discharge under.....this title does not discharge an individual debtor from any debt . . . (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.

limit exceptions to discharge “to those clearly expressed in the statute.” *Angelle v. Reed*, 610 F.2d at 1339.

In recent years, some courts have included within the definition of fiduciary parties on which state statutes have imposed “trust-like” obligations. *Angelle*, 610 F.2d at 1339-40. See *Quaif v. Johnson*, 4 F.3d 950 (11th Cir. 1993).

The court is not aware of nor has plaintiff argued that there existed an express or technical trust between these parties where the defendant was trustee and the plaintiff was the trust beneficiary. Neither does Alabama state law impose such a trust between a shareholder, officer, or director of a corporation and that corporation’s creditors. Hence, the court concludes that the defendant is not a fiduciary within the scope of § 523(a)(4) and is entitled to summary judgment as a matter of law on that count.

§ 523(a)(2)(A) Count

Plaintiff also contends that its claim is nondischargeable because the defendant obtained a loan from plaintiff by false pretenses.² Specifically, plaintiff alleges that the defendant forged and furnished it with his wife’s personal guaranty. While the defendant does not dispute that he forged his wife’s signature onto a personal guaranty of his corporation’s debt to plaintiff, he contends that he was invited by the plaintiff’s agents or employees to do so.

Summary judgment is appropriate 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. The movant carries the burden of establishing the absence of a genuine issue of material fact. The record and all inferences therefrom are reviewed in the light most favorable to the nonmoving party. *Jones v. City of Columbus*, 120 F.3d 248, 251 (11th Cir.

²11 U.S.C. § 523(a)(2)(A) provides:

(a) A discharge under... this title does not discharge an individual debtor from any debt—

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition.

1997).

Because summary judgment is proper only when there is no dispute of material fact, plaintiff's motion on this count cannot prevail. If the defendant was encouraged by plaintiff to sign his wife's name onto the personal guaranty, then plaintiff cannot ultimately prevail under this count for want of justifiable reliance. Viewing this count in a light most favorable to the party against whom summary judgment is sought, the court cannot conclude that there is no undisputed material fact respecting the § 523(a)(2)(A) count. Therefore, the plaintiff's motion for summary judgment on that count is due to be denied.

§ 523(a)(2)(B) Count

Plaintiff further contends that the debt is nondischargeable because the plaintiff furnished it with a false financial statement.³ The defendant concedes that his financial statement given to the plaintiff was materially false. However, he contends that the plaintiff did not reasonably rely upon the financial statements in making the loan.

At the hearing, the defendant's counsel sought additional time to depose the plaintiff's agent or employee who negotiated this loan so as to ascertain the extent of plaintiff's reliance upon these financial statements. This court, by order dated August 19, 2003 (Docket Entry #10), fixed November 30, 2003 as the date by which discovery in this proceeding must be completed. That date came and went without the defendant's request for an extension of time to complete discovery. Now, defendant's counsel represents that the defendant

³11 U.S.C. § 523(a)(2)(B) provides:

(a) A discharge under.....this title does not discharge an individual debtor from any debt—

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by —

(B) use of a statement in writing—

(i) that is materially false;

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor cause to be made or published with intent to deceive

simply lacked the necessary funds to take the needed deposition. Although not entirely pleased with this explanation, the court, pursuant to 11 U.S.C. § 105 and in the interest of justice, authorizes the defendant to take this deposition of plaintiff's agent or employee. The result is that the plaintiff's motion for summary judgment as to this count must be continued for hearing at a later time.

For these reasons, it is

ORDERED that the defendant's oral, cross motion for summary judgment as to the 11 U.S.C. § 523(a)(4) count is GRANTED, and judgment hereby enters in favor of the defendant on that count. It is further

ORDERED that the plaintiff's motion for summary judgment as to the 11 U.S.C. § 523(a)(2)(A) count is DENIED. It is further

ORDERED that the hearing on plaintiff's motion for summary judgment as to the 11 U.S.C. § 523(a)(2)(B) count is continued for hearing at the United States Courthouse, Dothan, Alabama on Friday, February 20, 2004 at 10:00 a.m.

Done this 21 day of January, 2004.

/s/ Dwight H. Williams, Jr.
United States Bankruptcy Judge

c: Jannea S. Rogers, Attorney for Plaintiff
C. H. Espy, Jr., Attorney for Defendant