

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

In re:	:	Case No. 03-64789
Team America, Inc., et al.,	:	Chapter 11
Debtor.	:	Judge Caldwell
Excel Association Management, Inc.,	:	
Fangman & Company, Linco-Electromatic,	:	
Inc., and G & W Products, Inc.,	:	
Plaintiffs,	:	Adversary No. 03-2509
v.	:	
The Huntington National Bank, N.A.,	:	
Defendant.	:	

**MEMORANDUM OPINION AND ORDER REGARDING
THE AMENDED COMPLAINT FOR DECLARATORY JUDGMENT OF
EXCEL ASSOCIATION MANAGEMENT, INC., FANGMAN & COMPANY,
LINCO-ELECTROMATIC, INC., AND G & W PRODUCTS, INC., (NO. 32)**

This Memorandum Opinion and Order serves as the Court's findings of fact and conclusions of law in the above-captioned adversary proceeding. It was commenced by the Plaintiffs, Excel Association Management, Inc. ("Excel"), Fangman & Company ("Fangman"), G & W Products, Inc. ("G&W") and Linco-Electromatic, Inc. ("Linco"). The Plaintiffs seek a declaratory judgment against The Huntington National Bank, N.A. ("Defendant") to recover \$290,001.69 they transmitted to Team America, Inc. ("Debtor"). In addition they seek pre judgment interest, attorney's fees and punitive damages.

It is asserted that these funds, that were wired into the Debtor's Concentration Account at the Defendant bank, were for the Plaintiffs' payroll obligations, and on this basis did not constitute property of the Debtor's estate. Rather, it is claimed that the funds belonged to the Plaintiffs, and were held in constructive trust for their benefit.

The Court has determined that the Plaintiffs have failed to sustain their burden, and that the Defendant is entitled to judgment. While there is an exhaustive record, the most significant facts are subject to the parties' stipulations, and are few in number. On these bases, the Court will only discuss those that are most relevant. The related claims of Preferred Option Leasing, Inc. (04-2599) have been previously addressed.

The dispute emanates from the nature of the Debtor's business as a co-employer, commonly referred to as a professional employer organization and/or employee leasing company. This arrangement allowed its customers to outsource significant personnel functions, including the hiring, firing, discipline, direction and control of the co-employees, and the establishment of human resource policies and procedures. The Debtor also maintained employment records, paid wages and payroll taxes, and provided employee benefits. The relative obligations between the co-employers were described in a Client Service Agreement ("CSA"). According to the stipulations, the CSA governed the relationship between the Debtor and the Plaintiffs.

Under the CSA, the Plaintiffs retained responsibility for the direction of the co-employees, control over the goods or services they provided to their customers, and full authority over business operations. The Plaintiffs were required by the CSA to wire to the Debtor sufficient guaranteed funds to cover wages, benefits and insurance for the co-employees. In exchange, the Debtor would

receive a fee. According to the stipulations, however, the CSA did not: a. condition the Debtor's issuance of payroll upon receiving the guaranteed funds; b. require the Debtor to segregate the Plaintiffs' funds; c. dictate the use of specific sums for payroll; or, d. establish an express trust for the benefit of the Plaintiffs.

The CSA does not refer to the Defendant. Instead, it's involvement with the parties is solely as a lender to the Debtor with a lien upon all assets, including bank deposits. This lending relationship included participation by National City Bank, that is the successor by merger to the Provident Bank ("National City"). According to the terms of the financing agreement, the Defendant had setoff rights.

The Debtor began experiencing financial difficulties in 2003, and commenced merger/acquisition negotiations with VSource. In view of its significant secured position, the Defendant appears to have been knowledgeable regarding the nature of the Debtor's business, its financial difficulties and the discussions with VSource. Specifically, it has been stipulated that the Defendant was involved in several conversations concerning requests to loan more funds and/or extend repayment terms to facilitate the VSource transaction. On September 10 2003, the Defendant gave the Debtor written notice that overdrafts would no longer be permitted, commencing on September 22, 2003. Also, the Defendant notified the Debtor on September 19, 2003, that checks would only be honored if sufficient funds were on deposit, effective September 22, 2003.

The Plaintiffs were drawn into these difficulties between September 15 and 25, 2003, when they wired funds into the Debtor's Concentration Account at the Defendant Bank as stipulated:

-	Fangman:	September 15, 2003	\$ 7,492.25
-	Linco:	September 23, 2003	\$143,221.21

-	Linco:	September 23, 2003	\$41,683.65
-	G & W:	September 24, 2003	\$65,617.60
-	Excel:	September 25, 2003	\$31,986.98
Total Deposits =			\$290,001.69

According to the bank statements, even after issuance of the overdraft prohibition, the Defendant allowed the Debtor to continue to make expenditures from its accounts. These transactions included: a. \$1,986,987.12 on September 22, 2003; b. \$337,416.40 on September 23, 2003; c. \$42,078.75 on September 24, 2003; and, d. \$1,669.84 on September 25, 2003, for a total of \$2,368,152.00. During this period the Defendant generally received daily cash flow forecasts from the Debtor, and would have been keenly aware of the amount of funds available. It has been stipulated that the Concentration Account had a negative balance on various days after the Fangman deposit on September 15, 2003.

Due to the Debtor's continued financial deterioration, the discussions with VSource collapsed, and on or about September 23, 2003, the Debtor's Chairman and CEO resigned. Also, around this same time board members tendered their resignations. On September 24, 2003, at 5:32 p.m. National City gave the Debtor fax notice that a default had been declared, the obligations accelerated, and that its collateral should be preserved. Five minutes later, at 5:37 p.m., National City also gave the Defendant fax instructions to take all actions required to preserve the collateral, including bank deposits. Two days later, on the morning of September 26, 2003, the Defendant

executed a setoff on the Debtor's Concentration and Zero Balance Accounts in the total amount of \$1,446,950.74. The balance due to the Defendant at the time was \$11,973,799.08. At 3:53 p.m. on that same day the instant chapter 11 proceeding was filed.

Essentially, the Plaintiffs assert that the Defendant was aware that the Debtor, as part of its operations, routinely received the funds of third parties. Even though it has been stipulated that the Defendant had a security interest in the Debtor's bank accounts and that the CSA did not establish an express trust, the Plaintiffs allege that the Defendant's setoff was improper. It is argued that the funds belonged to the Plaintiffs, and that they had a claim superior to the Defendant's secured position. Recovery is premised on the imposition of a constructive trust to right the alleged wrong committed by the Defendant, upon exercising its contractual setoff rights.

Turning to whether this Court should now act to compensate the Plaintiffs for their substantial losses, constructive trusts may only be imposed where property has been obtained, "...by fraud,...by duress or abuse of confidence,...or by any form of unconscionable conduct ..." *Ferguson v. Owens et al.*, 9 Ohio St. 3d 223, 226, 459 N.E. 2d 1293, 1295 (Ohio 1984); *Amedisys, Inc., et al. v. JP Morgan Chase Manhattan Bank, as Trustees, et al. (In re National Century Financial Enterprises, Inc.)*, 310 B.R. 580, 598 (Bankr. S.D. Oh. 2004). The applicable burden of proof is clear and convincing evidence, that requires the Plaintiffs to establish that there is no other reasonable explanation for the actions. *University Hospitals of Cleveland v. Lynch*, 96 Ohio St.3d 118,129, 772 N.E. 2d 105, 116 (2002).

When considering the imposition of constructive trusts to right perceived wrongs, care must be taken not to exceed the limits of this Court's equitable powers. *In re Tudor*, 342 B.R. 540, 568-569 (Bankr. S.D. Oh. 2005). This is especially true in the case of secured creditors, such as the

Defendant, who can not be deemed as having engaged in wrongful conduct, for constructive purposes, by merely exercising their contractual lien rights. *Novartis Crop Protection, Inc. v. American Crop Services Inc. et al (In re American Crop Services, Inc.)*, 258 B.R. 699, 706-707 (Bankr. W.D. Tn. 2001).

Applying these principles to the instant case, the Court finds and concludes that the Plaintiffs have failed to establish that they retained any property interest in the funds once deposited in the Debtor's accounts at the Defendant bank. The CSA did not: **a.** provide for the retention of any interests by the Plaintiffs; **b.** require the segregation of the funds or otherwise require that payroll obligations be made from specific customer funds; and, **c.** there has been no claim that the Plaintiffs perfected security interests.

Mr. Patrick Clark, who owns Excel and Mr. Wade Hunter, who is the president of G & W, both acknowledged that there were no arrangements made with the Debtor to prohibit the commingling of their funds with those of the Debtor's other customers. Similar testimony was provided by the Debtor's former chief executive officer, Mr. S. Cash Nickerson and its former general counsel, Mr. Jay Strauss. Indeed, Mr. Nickerson's testimony indicates that it would have been extremely difficult if not impossible to segregate the funds, since the Debtor had approximately 1,000 clients. Mr. Duane Fangman failed to appear at the trial and provide testimony regarding his relationship with the Debtor.

The CSA treats the Debtor and Plaintiffs as co-employers, and does not suggest an intent on the part of the Debtor and the Plaintiffs to create a fiduciary relationship. *Hoyt v. Nationwide Mutual Insurance Co.*, 2005 WL 3220192 (Ohio App. 10th Dist. 2005). This is especially true given the stipulation that the CSA did not condition the fulfillment of Debtor's payroll obligations upon

receiving the requisite funds from its customers. There is no indication in the CSA that the Plaintiffs retained any control over the payroll functions of the Debtor once funds were transferred. Such control by a principal over an agent is essential to establishing an agency. *Amerifirst Savings Bank of Xenia v. Krug*, 136 Ohio App.3d 468, 483-484, 737 N.E. 2d 68, 78-79 (Ohio App. 2nd Dist. 1999). The fact that the Debtor described in their 10-K filed with the Securities and Exchange Commission that they acted as an agent, merely refers to an accounting treatment, and can not be construed as establishing an agency relationship, in fact.

Regarding the requisite element of improper actions by the Defendant, there is no dispute that it monitored the Debtor's cash position in the days prior to the setoff. Also, there is no doubt that the Defendant was aware of the Debtor's deteriorating financial condition, and that the merger efforts were faltering. There is, however, no inherent misconduct in such monitoring or the execution of a setoff by a secured lender holding a lien on bank deposits.

On the other hand, the Debtor had the same or a superior level of knowledge, and could have taken steps to notify its customers before additional funds were wired into its accounts at the Defendant bank. During the critical four days before the bankruptcy filing on September 26, 2003, the Defendant allowed the sum of \$2,368,152.00 to be paid from the Debtor's accounts. Such behavior is not consistent with the allegation that the Defendant acted improperly to protect its interests to the detriment of others.

The Debtor's chief executive officer and board members could have remained involved during the critical days leading to the shutdown. Certainly, their continued presence could have ensured that there was some sort of orderly process and procedures in place for contacting customers to prevent further deposits. This courtesy would have allowed their clients to make alternative

arrangements for critical payroll and other personnel functions, and prevented their substantial losses. Indeed, the Debtor's general counsel represented to the Defendant on September 24, 2003, (two critical days prior to the setoff) that the customers would be notified of the eminent cessation of business operations.

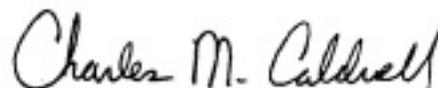
Further, with reference to Fangman, this Court finds and concludes that its claims are also barred by the fact, as stipulated, that its funds were placed in the Concentration Account, and that this account was overdrawn prior to the setoff. *First Federal of Michigan, et al. v. Thomas J. Barrow*, 878 F.2d 912, 915-916 (6th Cir. 1989); *In re National Century Financial Enterprises, Inc.*, 310 B.R. at 599-600. The harsh reality is that the Fangman funds were lost prior to the setoff, and the remaining account balances consisted of deposits made by other customers of the Debtor. On this additional basis, Fangman has failed to establish entitlement to any recovery.

Finally, the Defendant is correct that the Plaintiff's request for attorneys fees is barred by the American Rule, under which parties are generally required to bear their own litigation costs, absent an express statutory provision. *State ex rel Durkin v. Ungaro*, 39 Ohio St. 3d 191, 193, 529 N.E. 2d 1268, 1270 (Ohio 1988).

Accordingly, Judgment is granted in favor of the Defendant.

IT IS SO ORDERED.

Dated: February 17, 2008



Charles M. Caldwell
United States Bankruptcy Judge

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**UNITED STATES BANKRUPTCY COURT
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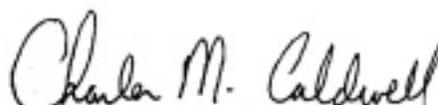
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v.	:	
The Huntington National Bank, N.A.,	:	
Defendant.	:	

JUDGMENT ORDER

In accordance with a Memorandum Opinion and Order entered on even date, judgment is rendered in favor of the Defendant and against the Plaintiffs.

IT IS SO ORDERED.

Dated: February 17, 2008



Charles M. Caldwell
United States Bankruptcy Judge

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