IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 01-33131

HARRISON W. SMITH
d/b/a MEADOWVIEW BUILDERS
d/b/a MEADOWVIEW CABINETS
IRENE CODY SMITH

Debtors

RANDAL A. WARNER and wife,
ANGELA D. WARNER

Plaintiffs

v. Adv. Proc. No. 01-3153

HARRISON W. SMITH and
IRENE CODY SMITH
d/b/a MEADOWVIEW BUILDERS

Defendants

MEMORANDUM ON PLAINTIFFS' MOTION TO ALTER OR AMEND

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

On September 24, 2001, the Plaintiffs filed a ?Complaint to Determine Non-Dischargeability of a Debt and for Judgment" (Complaint) pursuant to 11 U.S.C.A. § 523(a)(2), (4), and (6) (West 1993 & Supp. 2001).[1] The Defendants then filed, on March 27, 2002, their ?Irene Cody Smith Motion for Summary Judgment" and their ?Harrison Smith Motion for Partial Summary Judgment." Because the Plaintiffs did not respond to either summary judgment motion within the time required by E.D. Tenn. LBR 7007-1, the motions were unopposed.[2] Finding from the record presented by the Defendants in support of their summary judgment motions that there

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[1] The material portions of § 523(a) provide:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
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> . . . .
>
> (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;
>
> . . . .
>
> . . . .
>
> (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;
>
> . . . .
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity[.]

11 U.S.C.A. § 523(a)(2)(A), (4), (6) (West 1993 & Supp. 2001).

[2] Local Rule 7007-1 provides, in material part, that ?[u]nless the court directs otherwise, the opposing party shall respond within twenty days after the date of filing of the motion. . . . A failure to respond shall be construed by the court to mean that the respondent does not oppose the relief requested by the motion." On April 18, 2002, (two days after the response deadline), the Plaintiffs responded to each summary judgment motion by the filing of their ?Plaintiffs Response with Supporting Memorandum to the Motion for Partial Summary Judgment of Harrison Smith" and their ?Plaintiffs Response with Supporting Memorandum to the Motion for Summary Judgment of Irene Cody Smith" (collectively, ?Responses"). The Responses were not considered by the court because they were not timely filed. *See Warner v. Smith (In re Smith)*, Ch. 11 Case No. 01-33131, Adv. No. 01-3153, slip op. at 2 n.1 (Bankr. E.D. Tenn. Apr. 22, 2002).

was no genuine issue as to any material fact, the court granted the motions and dismissed the Complaint in its entirety as to Defendant Irene Cody Smith. As to Defendant Harrison W. Smith, the Complaint was dismissed to the extent of the Plaintiffs' claim under 11 U.S.C.A. § 523(a)(4) (West 1993). Now before the court is the Plaintiffs' "Motion to Alter or Amend Memorandum and Order Dated April 22, 2002" (Motion to Alter or Amend) filed April 29, 2002, through which the Plaintiffs argue that their Responses were in fact timely filed.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(I) (West 1993).

I

The Plaintiffs base their Motion to Alter or Amend on FED. R. BANKR. P. 9006(f), which provides that "[w]hen there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail, three days shall be added to the prescribed period." FED. R. BANKR. P. 9006(f); *see also* FED. R. CIV. P. 6(e) (containing nearly identical wording). The Plaintiffs contend that their Responses were in fact timely because the summary judgment motions were served by mail, thereby extending the response deadline by three days under Rule 9006(f). The Plaintiffs are incorrect.

Rules 9006(f) and (6)(e) apply only to those time periods commencing "after service." *See McKay v. Dutton*, No. 86-6282, 1987 WL 36795, at *1 (6th Cir. Mar. 16, 1987); *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 566 (5th Cir. 1995); *Paciorek v. Michigan Consol. Gas Co.*, 179 F.R.D. 216, 219 (E.D. Mich. 1998); *see also FHC Equities. L.L.C. v.*

MBL Life Assurance Corp., 188 F.3d 678, 682 n.3 (6th Cir. 1999). Conversely, Rules 9006(f) and 6(e) do not extend those periods not triggered by the date of service. The E.D. Tenn. LBR 7007-1 response period is tied to the *filing* of a motion, not the *service* of a motion. Rule 9006(f) of the Federal Rules of Bankruptcy Procedure therefore has no application to Local Rule 7007-1. The Plaintiffs' Responses were not timely filed and were therefore properly disregarded by the court.[3]

II

Nonetheless, it is within the court's discretion to set aside a prior judgment on the grounds of, *inter alia*, a "technical error" by the movant's counsel. *See Miller v. Owsianowski (In re Salem Mortgage Co.)*, 791 F.2d 456, 459-60 (6th Cir. 1986) ("Doubt should be resolved in favor of a judicial decision of the merits of a case, and a technical error or a slight mistake by plaintiff's attorney should not deprive plaintiff of an opportunity to present the true merits of his claims.") (quoting *Blois v. Friday*, 612 F.2d 938, 940 (5th Cir. 1980)); *But cf. Rice v. Consolidated Rail Corp.*, No. 94-3963, 1995 WL 570911, at *4 (6th Cir. Sept. 27, 1995) ("An attorney is charged with knowing and understanding the rules of the courts in which he practices."). The court may alter or amend a prior judgment where the movant shows: (1) entitlement to relief under FED. R. CIV. P. 60(b) (as incorporated by FED. R. BANKR. P. 9024); and (2) the presence of a meritorious defense. *See Salem Mortgage*, 791 F.2d at 459-60. The "technical error" by the Plaintiffs' counsel qualifies as "mistake . . . or excusable neglect" under FED. R. CIV. P. 60(b)(1).

[3] The Sixth Circuit cases cited by the Plaintiffs do not dictate a different result. Each involves Rule 6(e)'s application to a notice period commencing on the date of service. *See Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1047 n.3 (6th Cir. 2001) (involving the Eastern District of Kentucky's Local Rule 7.1(c)(1), which requires the filing of a response "within fifteen (15) days of service of the motion"); *First Tenn. Bank v. Aycoth*, No. 83-5839, 1985 WL 12842, at *1 (6th Cir. Jan. 21, 1985) (At issue was the former E.D. TN. LR 12(b), which required a response "within five days after service.").

See id. The court will accordingly amend its April 22, 2002 Memorandum and Order to the extent that the Plaintiffs can demonstrate a ?meritorious defense" to the underlying summary judgment motions.

III

The Plaintiffs allege damages resulting from the construction of their home by Meadowview Builders (Meadowview). The Complaint seeks a nondischargeable judgment against both Defendants, alleging that both were involved in the subject transaction as principals of Meadowview. The summary judgment motions request dismissal of the entire Complaint as to Defendant Irene Smith but dismissal of only the § 523(a)(4) claim against Defendant Harrison Smith.

In support of their ?Irene Cody Smith Motion for Summary Judgment," the Defendants each submitted an affidavit stating that Mrs. Smith has never been involved in Meadowview's business operations. Attached to the Plaintiffs' late-filed Responses, however, are affidavits by each Plaintiff stating that Mrs. Smith was in fact active in both the present transaction and past dealings of Meadowview. Viewing these affidavits in the light most favorable to the Plaintiffs, *see Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356 (1986), there exists a ?genuine issue of material fact" relating to Mrs. Smith's potential liability. *See* FED. R. CIV. P. 56(c); FED. R. BANKR. P.7056. She is therefore not entitled to full summary judgment. *See id*. The court will accordingly vacate the portion of its April 22, 2002 Memorandum and Order that dismisses the § 523(a)(2) and (a)(6) claims against Defendant Irene Smith.

IV

As for the Plaintiffs' § 523(a)(4) claim, however, the court will leave the ruling set forth in its April 22, 2002 Memorandum and Order undisturbed. The Plaintiffs proceed only under the ?fraud or defalcation while acting in a fiduciary capacity" language of § 523(a)(4) and do not allege embezzlement or larceny. The Sixth Circuit construes the ?fiduciary capacity" provision narrowly, applying it only to those situations involving ?an express or technical trust." *See, e.g., R.E. America, Inc. v. Garver (In re Garver)*, 116 F.3d 176, 179 (6th Cir. 1997); *accord* 4 KING, COLLIER ON BANKRUPTCY ¶ 523.10[1][c], at 523-72 (15th ed. rev. 2002).

The Complaint alleges misapplication of construction contract payments paid by the Plaintiffs. The Defendants are purported to have held those funds in a fiduciary capacity because, under Tennessee law, construction contract moneys allegedly become a trust fund once paid to the builder or contractor. *See* TENN. CODE ANN. § 66-11-138 (1993) (criminal statute addressing ?[m]isapplication of contract payments");[4] *Daugherty v. Tennessee*, 393 S.W.2d 739, 741 (Tenn. 1965) (Payments held by a contractor ?constitute[] a trust fund.") (dicta addressing prior version of § 66-11-138).

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[4]

> Any contractor, subcontractor, or other person who, with intent to defraud, uses the proceeds of any payment made to that person on account of improving certain real property for any other purpose than to pay for labor performed on, or materials furnished by that person's order for, this specific improvement, while any amount for which such person may be or become liable for such labor or materials remains unpaid, commits a Class E felony.

TENN. CODE ANN. § 66-11-138 (1993).

The Plaintiffs' trust fund argument is without merit. *See Sequatchie Concrete Serv., Inc. v. Cutter Labs.*, 616 S.W.2d 162, 166 (Tenn. Ct. App. 1980) (After reviewing the predecessor to § 66-11-138, ?this Court is unable to find [Tennessee] authority establishing a construction fund trust in the absence of an explicit state builders trust fund statute[.]"). Federal courts have consistently found § 66-11-138 and *Daugherty* insufficient to create the express or technical trust contemplated by § 523(a)(4). *See, e.g., Burleson Constr. Co. v. White (In re White)*, 106 B.R. 501, 506-07 (Bankr. E.D. Tenn. 1989); *Wilson v. Mettetal (In re Mettetal)*, 41 B.R. 80, 88 (Bankr. E.D. Tenn. 1984); *Witt Bldg. Material Co., Inc. v. Barker (In re Barker)*, 14 B.R. 852, 855-57 (Bankr. E.D. Tenn. 1981); *see also In re Null's Serv., Inc.*, 109 B.R. 301, 305 (Bankr. W.D. Tenn. 1990) (The state statute ?should no longer be given the effect of impressing a trust on funds that would be recognizable in bankruptcy proceedings."); *Noland Co. v. Edmondson (In re Cedar City Elevator & Refrigeration Co.)*, 14 B.R. 623, 628 (Bankr. M.D. Tenn. 1981) (?[T]he trust created by [§ 66-11-138's predecessor] is a trust ex maleficio and not a traditional trust.").

The court need not rehash the analysis of the above cases. Suffice it to say that the construction trust fund created under Tennessee law - if a trust is in fact created at all - is an *ex maleficio* trust[5] rather than the ?express or technical trust" contemplated by § 523(a)(4). The Plaintiffs have therefore failed to state a claim for ?fraud or defalcation while acting in a fiduciary capacity." Their § 523(a)(4) claim was properly dismissed by the court's prior Memorandum and Order as to both Defendants. To the extent that they now ask the court to undo that dismissal, the Plaintiffs' Motion to Alter or Amend must be denied.

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[5] A trust *ex maleficio* comes into existence upon an act of wrongdoing by the ?fiduciary." *Barker*, 14 B.R. at 856.

For the sake of clarity, the court will vacate its April 22, 2002 Memorandum and Order and will enter a separate order on the Defendants' summary judgment motions.

FILED: May 16, 2002

BY THE COURT

/s/

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

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IRENE CODY SMITH
d/b/a MEADOWVIEW BUILDERS

Defendants

O R D E R

For the reasons stated in the Memorandum on Plaintiffs' Motion to Alter or Amend filed this date, the court directs the following:

1. The Motion to Alter or Amend Memorandum and Order Dated April 22, 2002, filed by the Plaintiffs on April 29, 2002, is GRANTED in part and DENIED in part.

2. The court's Memorandum and Order entered on April 22, 2002, is VACATED.

3. The court will by separate Order dispose of the Defendant Irene Cody Smith's Motion for Summary Judgment and the Defendant Harrison W. Smith's Motion for Partial Summary Judgment both filed on March 27, 2002.

SO ORDERED.

ENTER: May 16, 2002

BY THE COURT

/s/

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

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d/b/a MEADOWVIEW BUILDERS

Defendants

O R D E R

On consideration of the Defendants' ?Irene Cody Smith Motion for Summary Judgment" and ?Harrison Smith Motion for Partial Summary Judgment" both filed on March 27, 2002, the court, for the reasons stated in the Memorandum on Plaintiffs' Motion to Alter or Amend filed this date, directs the following:

1. The Plaintiffs' Complaint to Determine Non-Dischargeability of a Debt and for Judgment filed September 24, 2001, is DISMISSED as to both Defendants to the extent of the Plaintiffs' claim under 11 U.S.C.A. § 523(a)(4) (West 1993).

2. The Plaintiffs' action will proceed to trial on all remaining issues on August 5, 2002, pursuant to the Pretrial Order entered on January 22, 2002.

SO ORDERED.

ENTER: May 16, 2002

BY THE COURT

/s/

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE