

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN RE: CASE NO. 06-10389)
)
WAYNE JAMES FRY)
)
Debtor)
)
)
YVETTE GAFF KLEVEN)
)
Plaintiff)
)
vs.) PROC. NO. 06-1302
)
)
KATRINA FRY AND)
JACK E. ROEBEL)
)
Defendants)

DECISION ON MOTION FOR SUMMARY JUDGMENT

At Fort Wayne, Indiana, on October 25, 2006.

The trustee initiated this adversary proceeding seeking to avoid what she characterizes as a fraudulent transfer, see, 11 U.S.C. § 548(a)(1)(B), involving \$4,000, which may be recovered not only from the initial transferee but also from any subsequent transferees to whom the property may have been later transferred. 11 U.S.C. § 550(a). The defendant Katrina Fry is the initial transferee and the defendant Jack Roebel is the subsequent transferee. Mr. Roebel has filed a motion for summary judgment, together with materials and a brief in support thereof, see, N.D. Ind. L.B.R. B-7056-1, and it is that motion which is presently before the court for a decision. The motion advances several arguments, only one of which, the last, needs to be considered. That argument is that Mr. Roebel does not constitute any kind of transferee because he received the money in issue, in trust, as the attorney for one of his clients, Preferred Auto.

There has been no response to the motion within the time required by the local rules of this court. See, N.D. Ind. L.B.R. B-7007-1(a). Consequently, the court may decide the motion based upon the proposition that “the facts as claimed and supported by admissible evidence . . . exist without controversy” N.D. Ind. L.B.R. B-7056-1. This does not mean, however, that the motion should be granted merely because it is unopposed. “[T]he party moving for summary judgment has the burden to show that he is entitled to judgment under established principles; and, if he does not discharge that burden, he is not entitled to judgment.” Adickes v. S.H. Kress and Co., 398 U.S. 144, 161, 90 S. Ct. 1598, 1610 (1970). Thus, an unopposed motion cannot be granted automatically. Instead, the court is required to go beyond the lack of opposition and make the further finding that given the undisputed facts, summary judgment is proper as a matter of law. Weinco, Inc. v. Katahn Associates, Inc., 965 F.2d at 565, 568 (7th Cir. 1992).

The term “transferee” is not defined in the Bankruptcy Code, but it is generally accepted to mean one who has dominion and control over the property transferred. Bonded Financial Services, Inc. v. European American Bank, 838 F.2d 890, 893 (7th Cir. 1988). A transferee is to be distinguished from a mere conduit who, although they may receive money or property, does so on behalf of someone else. A conduit is not a transferee. In re Bullion Reserve of North America, 922 F.2d 544 (9th Cir. 1991). The critical fact that determines whether an entity will be characterized as a conduit or a transferee is whether it had the ability to put the property at issue to its own uses. In re Pony Express Delivery Services, Inc., 440 F.3d 1296, 1300 (11th Cir. 2006); Security First National Bank v. Brunson, 984 F.2d 138, 140-41 (5th Cir. 1993); Bonded Financial Services, Inc. v. European American Bank, 838 F.2d 890, 893 (7th Cir. 1988). If it did not, it will qualify as a conduit and cannot be the object of any recovery. Nonetheless, if the recipient did have the right to

put the property transferred to its own uses, it is not a conduit but is, instead, a transferee. Id.

In this situation, Mr. Roebel was simply a conduit acting on behalf of his client. He was retained by Preferred Auto to collect a debt from Ms. Fry which he successfully did. The \$4,000 cashier's check at issue was issued to and deposited into his trust account, indicating that he received the funds in a fiduciary capacity. See, Security First National Bank v. Brunson, 984 F.2d 138, 140-41 (5th Cir. 1993). At no point could Mr. Roebel legally put the money he collected to his own use. It was collected for the benefit of his client and belonged to his client. Mr. Roebel was a conduit for the funds, not a transferee, and the trustee cannot recover from him.

There is no genuine issue of material fact, and Mr. Roebel is entitled to judgment in his favor as a matter of law. In accordance with Rule 54(b) of the Federal Rules of Civil Procedure, there is no just reason for delay and a judgment of dismissal may be entered as to Mr. Roebel.

/s/ Robert E. Grant
Judge, United States Bankruptcy Court