

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
FORT WAYNE DIVISION

IN RE: CASE NO. 05-16938 )  
 )  
DAVID BRYON DREW )  
TRINA KAY DREW )  
 )  
Debtors )  
 )  
 )  
MARK A. WARSCO )  
 )  
Plaintiff )  
 )  
vs. ) PROC. NO. 07-1200  
 )  
TRINA KAY DREW, ET. AL. )  
 )  
Defendants )

**DECISION ON MOTION FOR SUMMARY JUDGMENT**

At Fort Wayne, Indiana, on November 29, 2007.

This adversary proceeding involves property held in a trust of which the defendants are the trustees, and the debtor, Trina Drew, is one of several beneficiaries. The bankruptcy trustee seeks an order requiring the defendants to turnover Trina Drew’s one-third share of the trust, together with any income earned thereon, and an accounting for any income or distributions from the trust since the date of the petition, October 13, 2005. The matter is before the court on the plaintiff’s motion for summary judgment.

Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file . . . 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.” Fed. R. Bankr. P. Rule 7056(c); Fed. R. Civ. P. Rule 56(c). Thus, summary judgment is essentially an inquiry as to “whether the evidence

presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986).

The defendants have not responded to the motion within the time required by the local rules of this court. Accordingly, the court may determine the matter based upon the proposition that “the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy . . . .” See, N.D. Ind. L.B.R. B-7056-1. The court cannot, however, properly grant a motion for summary judgment merely because it is unopposed or insufficiently opposed. Instead, the court is required to go beyond the lack of opposition and “must make the further finding that given the undisputed facts, summary judgment is proper as a matter of law.” Wienco, Inc. v. Katahn Assocs. Inc., 965 F.2d 565, 568 (7th Cir. 1992). See also, Adickes v. S.H. Kress & Co., 398 U.S. 144, 161, 90 S.Ct. 1598, 1610 (1970).

The trustee seeks to have the defendants account for property held in trust and, insofar as it relates to the debtor, deliver to the trustee the debtor’s share of the trust corpus and income. Requests for turnover are based upon § 542 of the United States Bankruptcy Code, which requires an entity that was, at any time during the case, in possession, custody, or control of property of the bankruptcy estate to deliver that property to and account to the trustee for the property or its value. 11 U.S.C. § 542(a).<sup>1</sup> The section lays down a general rule that “any property of a debtor’s estate held by any entity must be turned over to the trustee . . . .” In re NWFEX, Inc., 864 F.2d 593, 596 (8th Cir. 1989), and the duty it imposes is two fold: one must both “deliver . . . and account for [the]

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<sup>1</sup>Section 542(b) creates similar obligations with regard to debts owed to the debtor and requires the obligor to pay the trustee. 11 U.S.C. § 542(b).

property... or [its] value . . . .” 11 U.S.C. § 542(a) (emphasis added). See also, In re Borchert, 143 B.R. 917, 919 (Bankr. D. N.D. 1992); In re Robertson, 105 B.R. 440, 457-58 (Bankr. N.D. Ill. 1989). This obligation is “self-operative and mandatory.” Matter of Larimer, 27 B.R. 514, 516 (Bankr. D. Idaho 1983). “There is no requirement in the Code that the trustee make demand, obtain a court order, or take any further action in order to obtain a turnover of the estate’s property.” Id. See also, In re Bidlofsky, 57 B.R. 883, 900 (Bankr. E.D. Mich. 1985); In re Lucas, 100 B.R. 969, 973 (Bankr. M.D. Tenn. 1989), rev’d on other grounds, 924 F.2d 597 (6th Cir. 1991), cert. denied, Forbes v. Holiday Corp. Savings and Retirement Plan, 500 U.S. 59, 111 S.Ct. 2275 (1991). Should someone fail in their statutory duties, the obligation may be enforced, as here, through an adversary proceeding in the bankruptcy court. Fed. R. Bankr. P. Rule 7001(1).

For a turnover action to be successful, the property in question must first constitute property of the bankruptcy estate.<sup>2</sup> That concept is defined by § 541 of the Bankruptcy Code and includes “all legal or equitable interests of the debtor in property as of the commencement of the case” – “wherever located and by whomever held.” 11 U.S.C. § 541(a)(1). The plaintiff must then prove that the defendants were “in possession, custody, or control” of that property at some time during the case. Once it has done so, the burden shifts to the defendants to either comply with the statute or to prove why the statutory duty should be excused.

The property at issue here involves a trust, established by Betty J. Osmun, of which the defendants are each trustees and beneficiaries. The defendant, Trina Drew, is one of the debtors in the underlying bankruptcy case and the beneficiary of a one-third interest in the trust. That beneficial

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<sup>2</sup>Section 542(a) actually refers to “property the trustee may use, sell, or lease under section 363” but that portion of the Bankruptcy Code gives the trustee the authority to use, sell, or lease any property of the bankruptcy estate, 11 U.S.C. § 363(b), (c), so the terms are equivalent.

interest constitutes property of the bankruptcy estate and, in their capacity as trustees, the defendants were in possession, custody or control of that property. The terms of the trust provide that, after the death of the trustor, the trustees are to distribute the principal and any undistributed or accrued income to the trust's beneficiaries, provided that the beneficiary is at least 25 years of age. Revocable Living Trust Agreement, Article 3, § 3.01, § 3.03. Those requirements have been satisfied here. The trustor passed in 2004, prior to the filing of the bankruptcy case. At the time the bankruptcy case was filed, the debtor/beneficiary, Mrs. Drew, was at least twenty-five years of age. Answer to Request for Admissions, Request for Admission No. 1. Consequently, on the date of the petition, Mrs. Drew was entitled to receive her share of the trust corpus and any undistributed income. Section 542 requires the defendant/trustees to deliver this property to the bankruptcy trustee and to account to the bankruptcy trustee for the property or its value.

There are no genuine issues of material fact and the plaintiff is entitled to judgment as a matter of law. The defendants shall deliver to the bankruptcy trustee, Mark Warsco, the debtor, Trina Drew's, one-third share of the Betty J. Osmun trust, together with all income earned thereon. Furthermore, the defendant's shall, within thirty days, account to the trustee for all income earned by the trust and any distributions made from the trust from and after October 13, 2005. Judgment will be entered accordingly.

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