

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF WISCONSIN

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In re

Case No. 02-22055

RICHARD J. FISHER and  
BARBARA S. FISHER,

Chapter 7

Debtors.

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MONROE EQUIPMENT, INC.,

Plaintiff,

v.

RICHARD J. FISHER and  
BARBARA S. FISHER,

Adversary No. 02-2196

Defendants and  
Third-Party Plaintiffs,

v.

MILWAUKEE WESTERN BANK,

Third-Party Defendant.

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MEMORANDUM DECISION ON THIRD-PARTY DEFENDANT'S MOTION TO DISMISS  
OR, ALTERNATIVELY, FOR JUDGMENT ON THE PLEADINGS

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This matter came before the court upon the third-party defendant's motion to dismiss the third-party complaint or, alternatively, for judgment on the pleadings. This court has jurisdiction over the plaintiff and defendant in this proceeding, and this is a core proceeding as to them. The court also has jurisdiction to determine whether it has jurisdiction over the third-party defendant, and it holds that it does not. Therefore, the third-party defendant's motion for judgment on the

pleadings dismissing the complaint is granted. The following constitutes the court's findings of fact and conclusions of law in accordance with Fed. R. Bankr. P. 7052.

### BACKGROUND

The debtor, Richard Fisher, was the sole owner, director, shareholder, president and chief executive officer of S.J. Contracting, Inc., f/k/a S.J. Mechanical, Inc. The corporation was engaged in the repair, replacement and installation of new heating, ventilating and air conditioning units in residential dwellings and in commercial establishments.

On or about May 21, 2002, Monroe Equipment, Inc., a creditor of S.J. Contracting, brought an adversary proceeding under 11 U.S.C. § 523(a)(2)(A), (a)(4), and (a)(6) against the debtors, alleging they were personally liable under Wis. Stats. § 779.02(5) for the amount that S.J. Contracting owed Monroe Equipment, and that such liability was excepted from their discharge.

Between April 1, 2001, and November 1, 2001, Monroe Equipment had sold S.J. Contracting heating and air conditioning equipment and related accessories for numerous projects undertaken by S.J. Contracting. Those units were then installed by S.J. Contracting at various residential and commercial locations throughout southeastern Wisconsin. After installation of the equipment, the complaint alleged that S.J. Contracting obtained payment from its customers for the materials, supplies and accessories furnished by Monroe Equipment, but the funds were used for purposes other than payment for those goods. Monroe Equipment alleges those funds were trust funds in the hands of the debtors as persons in control of S.J. Contracting and were misappropriated by the debtors for their own personal and other business uses.

The debtors denied culpability under 11 U.S.C. § 523 and Wis. Stats. § 779.02(5), and filed a third-party complaint against Milwaukee Western Bank, the subject of this motion. The debtors' claim against Milwaukee Western arises from a Business/Manager Agreement<sup>1</sup> entered into on November 8, 2000, between the bank and S.J. Contracting. Under that agreement, Milwaukee Western Bank agreed to purchase from S.J. Contracting certain accounts receivable arising from the sales or services to customers of S.J. Contracting. After delivery to the bank of acceptable invoices to S.J. Contracting's customers, the bank paid the purchase price for the relevant receivable by crediting the net amount, less a reserve, to S.J. Contracting's primary

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<sup>1</sup>The Business/Manager Agreement provided the following:

The Bank hereby purchases from the Business, and the Business hereby assigns and sells to the Bank, as absolute owner, the Business's entire interest in such of its currently outstanding Receivables ..., as well as its future Receivables represented by Invoices the Business delivers to the Bank. ... The Business and the Bank agree that : (a) the Business will submit to the Bank all Invoices representing receivables arising from all sales of goods or rendering of services to Customers for the Bank's determination of acceptability as Receivables; (b) the transactions contemplated by this Agreement are account purchase transactions; (c) the Receivables are purchased by the Bank from the Business at a discount; (d) the purchase and sale of the Receivables vests absolute right, title and ownership of such Receivables together with all benefits of such Receivables together ... with all benefits of ownership, including servicing rights and rights to verify Receivables with Customers, in the Bank; and (e) the Business has no right to re-acquire, redeem or otherwise obtain title to the Receivables or any proceeds thereof. The Business further sells and assigns to the Bank all of the Business's rights as an unpaid vendor, lienor, or lien holder, all of its related rights of stoppage in transit, replevin and reclamation and rights against third parties (all of which will constitute part of the Receivables), and agrees to cooperate with the Bank in its exercise of these rights. ...

(Business/Manager Agreement § 2.1).

The parties' Agreement further provided:

The Business represents and warrants that ... its Receivables are currently and were at the time of their creation, bona fide and existing obligations of Customers of Business arising out of its sales or services, free and clear of all security interests, liens, and claims whatsoever of third parties... .

(Business/Manager Agreement § 4.1).

account with the bank. At the same time, it credited the portion of payment allocated to the reserve to S.J. Contracting's reserve account. (*See Business/Manager Agreement § 2.2*) S.J. Contracting and Richard Fisher were also indebted to the Bank for loans made in connection with the business.<sup>2</sup>

According to the debtors, invoices showing amounts due from S.J. Contracting customers who received products furnished by Monroe Equipment were among those purchased by the bank. Pursuant to the Business/Manager Agreement, S.J. Contracting would in some instances collect third-party checks and deposit the net amount described above into the operating account at the bank. Alternatively, the bank's senior vice president, Jeffrey A. Reimer, could and did take possession of certain unendorsed checks pursuant to the Agreement, thereby bypassing S.J. Contracting in connection with collecting funds due it from customers.

Before the bankruptcy filing, the bank setoff the operating account, which held funds obtained from sale of the receivables, and applied the balance to loans made by the bank to S.J. Contracting. The debtors alleged in their third-party complaint that the bank took possession of certain checks or setoff against S.J. Contracting's account knowing that the monies represented by the checks or deposits were trust funds, and knowing that said trust funds were intended for the payment of materials, equipment, supplies and/or services obtained from suppliers for use in

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<sup>2</sup>Milwaukee Western Bank filed a claim in the Fishers' case in the amount of \$103,433.12, as of the petition date. S.J. Contracting is obligated to the bank pursuant to a Small Business Administration Note in the face amount of \$65,000, dated January 6, 2000, and the Business/ Manager Agreement, dated November 8, 2000. Richard Fisher is also personally liable to the bank for a Small Business Note dated January 6, 2000, in the original face amount of \$85,000. Richard Fisher entered into guarantees with the bank for the obligations of S.J. Contracting on January 22, 1998, January 6, 2000, November 8, 2000, September 20, 2001. The bank's claim is purportedly secured against the debtors' homestead, or the proceeds thereof, in the amount of \$94,296.15, and unsecured in the amount of \$9,136.97.

S.J. Contracting's projects. According to the debtors, the actions of the bank in sweeping the account to satisfy S.J. Contracting's obligation to the bank amounted to conversion and unjust enrichment, and the debtors are entitled to contribution or indemnification.

The bank answered the third-party complaint and moved to dismiss the third-party complaint or, alternatively, for judgment on the pleadings, and the parties fully briefed the matter.

### ARGUMENTS

The bank contends the debtors failed to plead the appropriate elements of conversion (first claim), unjust enrichment (second claim), and contribution or indemnification (third claim), and the debtors are prevented from bringing such actions on account of the parties' agreement.<sup>3</sup>

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<sup>3</sup> Pursuant to the terms of the Business/Manager Agreement, S.J. Contracting covenants "the Receivable will not be subject to any deduction, offset, defense, or counterclaim, [and] the Business will reimburse and indemnify the Bank for all loss, damage and expenses, including reasonable attorneys' fees, incurred in defending such transactions as absolute sales of Receivables, or as a result of the recharacterization of such transactions." (Business/Manager Agreement § 4.2).

The Agreement further provided:

Except for a breach by the Bank of this Agreement, the Business releases, discharges, and acquits the Bank, its officers, directors, employees, participants, agents, successors and assigns from any and all claims, demands, losses, and liability of any nature which the Business ever had, now or later can, will or may have in connection with, or arising out of, the transactions described in this Agreement and the documentation thereof. The Bank will not be liable for any indirect, special or consequential damages, such as loss of anticipated revenues or economic loss in connection with, or arising out of, any default in performance or other matter arising under this Agreement. Nor will the Bank be liable for any errors of judgment or mistake of fact when acting as the Business's attorney-in-fact ... The Business indemnifies and holds the Bank ... harmless from ... any loss or claim involving breach of warranty or representation by the Business, any claim or liability sustained by virtue of acting in reliance upon data or information furnished by the Business to the Bank, and any loss or claim by any Customer relating to goods and/or services (or the manner or type of their sale or provision) giving rise to Receivables purchased by the Bank hereunder.

(Business/Manager Agreement § 9).

In addition, the debtors lack standing to sue on behalf of trust fund beneficiaries because the relevant statute confers no authority to conduct a lawsuit on behalf of the beneficiaries; therefore, the debtors have failed to allege sufficient facts to support the claims the debtors intend to collect for those parties. Alternatively, the bank seeks judgment on the pleadings dismissing all claims, because the debtors' own allegations prove they are not entitled to the relief sought.

The debtors assert they have adequately plead the elements of conversion, unjust enrichment and contribution/indemnification. In support of their third-party complaint, the debtors primarily state that claims of Wis. Stat. § 779.02(5), trust fund beneficiaries should trump claims of secured creditors over the same property. Furthermore, under the Uniform Commercial Code, a drawee bank is presumptively liable to its customer, the drawer, for paying an item that is not "properly payable." Wis. Stat. § 404.401. Because the bank seized or paid itself with funds not properly available to it, the debtors assert that the bank, not the debtors, is responsible to Monroe Equipment for the shortfall.

## DISCUSSION

A Rule 12(c) motion for judgment on the pleadings<sup>4</sup> is properly granted only if "it appears beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief." *Northern Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 452 (7<sup>th</sup> Cir. 1998); *Gustafson v. Jones*, 117 F.3d 1015, 1017 (7<sup>th</sup> Cir. 1997). In evaluating the motion, the court accepts all well-pleaded allegations in the complaint as true, drawing all reasonable

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<sup>4</sup>Because the bank has filed an answer to the third-party complaint, the court will consider its motion under the alternative, as a motion for judgment on the pleadings. *See* Fed. R. Civ. P. 12(c).

inferences in favor of the plaintiff. *Forseth v. Village of Sussex*, 199 F.3d 363, 368 (7<sup>th</sup> Cir. 2000); *Gustafson*, 117 F.3d at 1017.

In its reply brief, the bank argues that this court does not have jurisdiction over the debtors' third-party complaint, asserting that the third-party complaint is neither a core proceeding nor a matter "arising under" Title 11. Essentially, because the debtors claim that any recovery they receive is not part of their bankruptcy estate, but rather for the beneficiaries of a trust, the court does not have subject matter jurisdiction over the third-party complaint. The court is persuaded that the bank is correct.

Section 1334 of 28 U.S.C. provides that the district court, which has referred such matters to the bankruptcy court, has exclusive jurisdiction of all cases under Title 11. 28 U.S.C. §§ 1334(a), 157(a). This is the original case commenced by the debtors in filing their petition. Once a case has been filed, the bankruptcy court has jurisdiction over proceedings that arise under Title 11, that arise in a case under Title 11, or that are related to a case under Title 11. 28 U.S.C. § 1334(b). Obviously, the debtors' claim against the bank does not arise under Title 11; it is grounded in Wis. Stat. §§ 779.02(5) and 404.401. The claim did not arise in a case under Title 11 as it arose prepetition, before there was a case. Finally, the claim is not related to a case under Title 11, because the result, even if the debtors prevail, would have no impact on the debtors' case. Funds recovered would not belong to the debtors or the debtors' estate and would not be available for distribution to creditors of the debtors. *Matter of Xonics*, 813 F.2d 127, 131 (7<sup>th</sup> Cir. 1986) (holding bankruptcy court has no jurisdiction when property in dispute was no longer in estate). Indeed, the debtors have never had a personal interest in these funds as they belonged to S.J. Contracting before being swept by the bank.

The debtors' claim against the bank is also not a core proceeding which would allow the matter to be heard by the bankruptcy court. *See* 28 U.S.C. § 157(b)(2). Although the underlying matter is a core proceeding in that it relates to Monroe Equipment's action to except its claim from the debtors' discharge, attempting to pass liability on to a third party is not only not a core proceeding, it is a different cause of action entirely. The third party is not in bankruptcy, so no claim against it can be a core proceeding. What's more, if the act of a third party could be a defense to an action to except a debt from discharge, the debtor could raise it without having the third party as a defendant in the proceeding.

This court's lack of "related to" jurisdiction is only strengthened by the debtors' contention that they, and not the trustee or S.J. Contracting, are the appropriate parties to maintain their claim under any theory, because they acknowledge that any recovery from the bank is not included as estate property. Section 541(b)(1) of the Bankruptcy Code excludes from estate property "any power that the debtor may exercise solely for the benefit of an entity other than the debtor." 11 U.S.C. § 541(b)(1). The debtors argue that Wis. Stat. § 779.02(5) gives them actual or constructive power to bring suit or defend a claim on behalf of the beneficiaries of the trust fund established by that statute. Perhaps it does; we will not opine on that position as it has no bearing the result here.

If the debtors believe they have a separate cause of action against the bank, independent of whether the debtors' debt to Monroe is excepted from the discharge (which is the logical conclusion if the debtors' arguments for the third-party complaint are followed), they must bring it in another jurisdiction.



## CONCLUSION

For the reasons stated in this opinion, the bank's motion for judgment on the pleadings is granted, and the third-party complaint is dismissed. A separate order consistent with the opinion will be entered.

Dated at Milwaukee, Wisconsin, May 30, 2003.

BY THE COURT

\_\_\_\_\_/s/\_\_\_\_\_  
Honorable Margaret Dee McGarity  
United States Bankruptcy Judge