

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT**

**In Re:
Donald Claude Robinson,
Debtor.**

**Chapter 7 Case
#96-10069**

**John C. Canney, III, Trustee
Plaintiff,**

v.

**Adversary Proceeding
99-01048**

**Richard Gates Hoffman & Clay,
Temple Plumbing,
Leader Home Center,
Derrig Excavating,
and Sandra Sellers
Defendants.**

*Appearances: John C. Canney, III, Esq., on behalf of the trustee
Kevin Purcell, Esq., on behalf of the Office of U.S. Trustee
Nancy Creswell, Esq., on behalf of the Internal Revenue Service
Donald S. Harry, Esq., for defendant Richard, Gates, Hoffman and Clay, Inc.
Christopher S. Dugan, Esq., Mark L. Zwicker, P.C., for defendant
Leader Home Center
Timothy J. O'Connor, Jr., Esq. for defendants Temple Plumbing, Derrig
Excavating and Sandra Sellers*

**MEMORANDUM OF DECISION
GRANTING PLAINTIFF AND INTERVENOR’S MOTIONS FOR SUMMARY JUDGMENT**

The matters before the Court are the Plaintiff’s Motion for Summary Judgment [Dkt. # 54-1] and the Motion for Summary Judgment by Internal Revenue Service [Dkt. #59-1]. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334. For the reasons set forth below, the motions are granted.

BACKGROUND

The chapter 7 trustee, John C. Canney, III, filed a complaint in this action seeking turnover of funds from five unsecured creditors, Richard Gates Hoffman & Clay, Temple Plumbing, Leader Home Center, Derrig Excavating, and Sandra Sellers, under 11 U.S.C. §§ 502(j) and 549. The trustee alleges that certain funds previously distributed to these creditors are now due and owing to the debtor's estate because he disbursed them to these unsecured creditors in error. The record reflects that the trustee's distribution to these defendants did not take into account payments due to the Internal Revenue Service and the Vermont Department of Taxes based upon proofs of claims as originally filed and amended, and subsequently ordered by this Court to be re-filed.¹ Each defendant has filed an Answer to the complaint essentially admitting receipt and retention of their disbursement, but denying that the trustee is entitled to reimbursement absent a legally sufficient explanation or an order of this Court. No counterclaims or affirmative defenses have been interposed on behalf of any of the defendants.

The plaintiff and defendants have each previously filed motions for summary judgement. The prior motions were denied. On February 20, 2001, the trustee filed the instant Motion for Summary Judgment [Dkt. # 54-1], seeking an order requiring these creditors to refund certain excess distributions to the trustee as a matter of law based upon the record. The trustee's motion was accompanied by an Affidavit of Trustee [Dkt. #55-1] and Statement of Material Facts [Dkt. #56-1]. The motion contends that each defendant erroneously received a dividend from the debtor's estate as follows: Richard Gates (\$2,331.70); Temple Plumbing (\$2,210.32); Leader Home Center (\$1,912.32); Derrig Excavating (\$5,803.04); and Sandra Sellers (\$13,099.20). On February 23, 2001, the Internal

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On December 28, 2000, this Court issued its *Sua Sponte* Order Vacating Order Disallowing Claims vacating the Order on Trustee's Omnibus Objection to Claims entered on December 1, 1998 (Conrad, J.), which had sustained the trustee's claims objections against claim number 5 by the Internal Revenue Service and claim number 12 by the Vermont Department of Taxes. After a review of the entire record, argument of counsel at a duly scheduled hearing on December 19, 2000, and finding good and sufficient cause for relief, this Court vacated the prior Order due to the "failure of proper notice." This Court ordered the IRS and Vermont Department of Taxes to file amended claims not later than January 5, 2001. The amended claims were filed timely, no objections have been filed in response, and they are therefore deemed allowed in this case.

Revenue Service, as an undisputed Intervenor, filed its Motion for Summary Judgment [Dkt. #59-1] joining in the trustee's request for relief.

The defendants jointly filed their Answer in Opposition to Motion for Summary Judgment [Dkt. #61-1] and Defendants' Statement of Disputed Facts [Dkt. #70-1] admitting the amounts received by each defendant, but contending that they were entitled to the amounts received, respectively, and that the payments, if erroneous, occurred because the trustee "acted negligently, mistakenly and failed to exercise due care and diligence in administering the bankruptcy estate." The defendants admitted that they were requested to return their disbursements and that priority claims exist in favor of the Internal Revenue Service ("IRS") in the amount of \$25,141.13 and the Vermont Department of Taxes in the amount of \$1,023.51, respectively. The defendants also do not dispute that, if warranted, each defendant would be required to return certain sums in order to accommodate a corrected distribution with each defendant returning funds as follows: Richard Gates (\$1,410.68); Temple Plumbing (\$1,337.25); Leader Home Center (\$1,156.95); Derrig Excavating (\$3,510.84); and Sandra Sellers (\$7,925.02).

In opposing summary judgment, the defendants also state that the plaintiff failed to assert any legal basis for the return of their fund in his demand for the funds and that he had asserted that this Court had ordered return of the funds but never provided the defendants with a copy of any such order issued by the Court. Defendants state that the subject funds are not "readily available" for return and otherwise request that this Court consider the equities and either deny the requested relief or "permit under Rule 2010(b) a proceeding to be brought either by the Debtor and/or the unsecured creditors on the Trustee's bond" based upon his purported failure to perform his administrative duties properly. No counter-affidavit or other evidence has been filed by the defendants in support of their defenses to the summary judgment motions.

On April 20, 2001, the IRS filed its Reply to Defendants' Statement of Disputed Facts [Dkt. #71-1] essentially contending that the defendants' response fails to raise a genuine issue of material fact and raises only

“ancillary issues” in response to the pending summary judgment motions, such as the trustee’s purported negligence, whether the IRS and State of Vermont were entitled to payment of any claim at the time of disbursement, and the form or content of the trustee’s demand. On April 24, 2001, the trustee filed his Reply to Defendants’ Statement of Disputed Facts [Dkt. #72-1] adopting the reply filed by the IRS.

ISSUE

The issue presented is whether a genuine issue of material facts exists that would preclude the Court from ordering each of the defendants to return the funds that were previously disbursed to them by the trustee in error.

DISCUSSION

1. Summary Judgment Standard

Summary judgment is proper only if the record reflects that there is no genuine issue as to any material fact and if so, that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Bankr. R. 7056. A genuine issue exists only when “the evidence is such that a reasonable [trier of fact] could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *see also* Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)(movant need only illustrate by reference to record opponent’s failure to introduce evidence in support of essential element of claim). “The substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” Liberty Lobby, 477 U.S. at 247, 106 S.Ct. at 2509. Furthermore, materiality is determined by assessing whether the fact in dispute, if proven, would satisfy a legal element under the theory alleged or otherwise affect the outcome of the case. Id. In making its determination, the court’s sole function is to determine whether there is any material dispute of fact that requires

a trial. See Waldrige v. American Hoechst Corp., 24 F.3d 918 (7th Cir. 1994). Credibility determinations, weighing evidence, and drawing reasonable inferences are jury functions, not those of a judge deciding a summary judgment motion. Liberty Lobby, 477 U.S. at 255, 106 S.Ct. 2513-14. Accordingly, a genuine issue of material fact precludes summary judgment relief.

2. The Trustee's Entitlement to Recover on Behalf of the Estate Excess Payments Made to Creditors

In pertinent part, 11 U.S.C. Section 502(j) provides:

A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case... This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.

The trustee relies upon the foregoing provision and various case law determining a trustee's entitlement to recover excess funds disbursed to creditors in error. In particular, the trustee cites In re R & W Enterprises, 181 B.R. 624 (Bankr. N.D. Fla 1994) for the proposition that §502(j) provides the trustee with authority to "recover from a creditor any excess payment or transfer made to such creditor." Id., at 636. In re R & W Enterprises is informative because it not only addresses an action by a trustee to reclaim excess funds disbursed to a creditor, but discusses the requested relief in the context of a dispute where there is an issue raised regarding the potential liability of the trustee for the erroneous distribution. Although In re R & W Enterprises involves a somewhat different fact pattern, it does address the legal issue before this Court and its decision is compelling to this Court's analysis. In granting the trustee's request to recover certain excess dividends disbursed erroneously to the IRS in order to pay a greater priority claim, In re R & W Enterprises states:

For purposes of this case, deciding what may be the liability of this Trustee is unnecessary to determine the issues in this case. Whether this Trustee was mistaken in his legal judgment, made a factual mistake, was simply negligent or was willful and deliberate in violation of his duties is unimportant in this case where an error was made which, although originating with the Trustee, appears to have slipped through every crack imaginable.

In re R & W Enterprises, 181 B.R. at 634, fn. 7. Absent a showing of evil or malicious intent on the part of the trustee, the In re R & W Enterprises court determined that the reason why the disbursement was made erroneously was “unimportant” to the issue of the trustee’s right to recover the funds for the benefit of other creditors with greater priority.

This Court is mindful of the defendants’ request that they be permitted to pursue an action against the trustee’s bond pursuant to Rule 2010(b) based upon his purported failure to properly perform his duties as trustee. However, neither the issue of the trustee’s liability to these creditors or the viability of any potential proceedings against the trustee is properly before the Court at this time and accordingly this Court is not at liberty to render a determination in this regard. See In re James E. O’Connell Co., Inc., 82 B.R. 118 (N.D. Cal. 1988)(proceeding against bankruptcy trustee’s fidelity bond may only be filed as an adversary proceeding and not by motion); In re American Solar King, 142 B.R. 772 (Bankr. W.D.Tex. 1992)(adversary proceeding must be brought for recovery against trustee’s bond). Nor have the defendants presented evidence by affidavit or otherwise in opposition to the summary judgment motions to show that the subject funds are not available for redistribution, that these defendants have in some fashion detrimentally relied upon the trustee’s action or inaction, or demonstrated other culpable conduct on the part of the trustee that would render the recovery of these excess funds inequitable.

Based upon the pleadings filed herein, the trustee and the IRS have demonstrated an entitlement to recover the excess funds from these defendants and the defendants have failed to show any genuine issue of material fact that would preclude the requested relief.

The Court is also cognizant of the case of In re Vick, 75 B.R. 248 (Bankr. E.D.Va. 1987), wherein a contrary result was reached. However, the In re Vick case is distinguishable from the facts in this case. First, in that case the trustee waited five years to recover funds, in sharp contrast to the relatively short time delay in this case. Second, the In re Vicks court relied upon the doctrine of equitable estoppel in favoring the creditors based upon a

showing that the creditors had detrimentally relied upon the actions of the trustee. As indicated above, the defendants in this case have not put forth any facts that would demonstrate that they have changed their position to their detriment as a result of the mistaken distribution sufficient to warrant a denial of summary judgment on equitable grounds.

CONCLUSION

It is most unfortunate that an inaccurate distribution was made to these unsecured creditors. However, there is no question that they received a distribution greater than they are entitled to under the Bankruptcy Code. Thus, the defendants must disgorge the excess distribution. In reaching its conclusion, this Court does not render any determination as to the potential fault or liability of any party, or the viability of any claim for damages resulting from such fault or liability. Accordingly, in the interest of justice and pursuant to the authorities cited above, the motions for summary judgment filed by the trustee and the IRS are granted and judgment shall be entered against the defendants for the sums sought in the motion. Movants are directed to submit a Judgment forthwith implementing the terms of this decision.

May 22, 2001
Rutland, Vermont

/s/ Colleen A. Brown
Colleen A. Brown
United States Bankruptcy Judge