UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In Re: Donn Kirk, Debtor.	Case No.: 14-10653-ABA Chapter: 7
International Brotherhood of Electrical Workers Local Union No. 98, Health & Welfare Fund, et al. Plaintiff, v. Donn Kirk Defendant.	Adv. No.: 14-1360-ABA Judge: Andrew B. Altenburg, Jr. Hearing Date: December 22, 2015

MEMORANDUM DECISION

I. INTRODUCTION

Before the court is a motion for summary judgment filed by the International Brotherhood of Electrical Workers Local Union No. 98 Health & Welfare Fund, Pension Fund, and Profit Sharing Plan, plus the Electrical Workers Joint Apprenticeship and Training Fund (collectively, "IBEW") against the debtor, Donn Kirk ("Debtor" or "Kirk"). (Doc. No. 26, "Motion for Summary Judgment"). IBEW alleges that it holds a claim against the Debtor that should not be discharged pursuant to 11 U.S.C. 523(a)(4) as the Debtor committed a defalcation while acting in a fiduciary

capacity. For the reasons that follow, the court finds that that Kirk was a fiduciary of a technical trust, and thus his debt to IBEW might be held nondischargeable provided he is found to have defalcated with the necessary culpable intent. In addition, the court notes that Kirk has suggested that some of the contributions sought by IBEW were not yet due and owing. Therefore IBEW will also need to prove what assets held by RWE were plan assets. Thus, the Motion for Summary Judgment is DENIED.

II. JURISDICTION AND VENUE

The court has jurisdiction over this contested matter under 28 U.S.C. §§ 1334(a) and 157(a) and the Standing Order of the United States District Court dated July 10, 1984, as amended October 17, 2013, referring all bankruptcy cases to the bankruptcy court. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(I), determination as to the dischargeability of particular debts. Venue is proper in this Court pursuant to 28 U.S.C. § 1408.

III. BACKGROUND

IBEW filed its nondischargeability complaint against Debtor on April 7, 2014. (Doc. No. 1, "Complaint"). In its Motion for Summary Judgment, it alleged that Rite-Way Electric, Inc. ("RWE") was a signatory to a collective bargaining agreement ("CBA") with the plaintiffs. Motion for Summary Judgment, ¶ 1. Kirk signed the Letter of Assent binding RWE to the CBA. *Id.*, ¶ 11.The CBA incorporated Trust Agreements with each of the plaintiff funds (the "Funds") requiring RWE to make certain contributions. *Id.*, ¶¶ 2-3.

It further alleges that between December 2010 and November 2011, RWE failed to pay a total of $766,167.37 in contributions to the Funds. *Id.*, ¶ 17. RWE ceased operating in December 2011 and was put into an involuntary chapter 7 bankruptcy case in the Bankruptcy Court for the Eastern District of Pennsylvania. *Id.*, 19. IBEW there recovered $96,520.35 of the amount owed. *Id.*, 20. IBEW seeks the remaining $699,647.02 from the Debtor. *Id.*, 21.

IBEW alleges that Kirk, as president and owner, had control over the funds in RWE's accounts and the power to authorize any payments on behalf of RWE. *Id.*, ¶¶ 8, 15. He oversaw the accounting department that prepared and sent the monthly remittance reports and payments to the Funds. *Id.*, ¶¶ 10, 16. It alleges that Kirk authorized RWE to make various payments during the period that IBEW went unpaid, including to other creditors, to Kirk for salary and payment of personal expenses, and to John Parks ("Parks"), RWE's co-owner. *Id.*, ¶¶ 23-34.

IBEW sued the Debtor in the District Court for the Eastern District of Pennsylvania alleging his personal liability, but before the case reached trial, the Debtor filed this bankruptcy case.

IBEW here alleges that Kirk was an ERISA fiduciary pursuant to 29 U.S.C. § 1102(21)(A)(i), as he exercised control over plan assets, and accordingly is individually liable pursuant to 29 U.S.C. § 1109(a). Motion for Summary Judgment, Doc. No. 26-2, brief in support. IBEW further alleges that this debt is nondischargeable under section 523(a)(4), as arising from a defalcation of a fiduciary duty. *Id.*

Kirk responds that he had no intent to not make payment in good faith to the funds. Doc. No. 27 ("Objection"). He argues that he is not personally liable under ERISA for the delinquency, as the amounts owed are not plan assets, either because the money never was paid to RWE and because the plan documents are ambiguous as to what are plan assets. In addition, the Debtor did not exercise sole authority or control over the assets.

Kirk further argues that he was not a fiduciary for purposes of section 523(a)(4), citing decisions holding that the obligation to contribute to the funds is contractual, and that no express trust exists prior to the act that created the debt and without reference to the debt.

If he is found to be a fiduciary under section 523(a)(4), Kirk then argues that his conduct did not amount to defalcation, as he did not prioritize payments to himself over the Funds, and in fact put money into RWE to keep it running so that it could pay its creditors.

In his certification, Kirk states that he tried to pay all creditors, paying the minimum amount possible to keep the company running; that IBEW cannot show that he had control over alleged plan assets because there was not sufficient capital to make payments to creditors; and that he put more funds into RWE than he took out (showing no intent to defalcate). Objection, Doc. No. 27-2. He also pointed out that Parks also had authority to issue corporate checks. *Id.*

IBEW responded to the Debtor's opposition (Doc. No. 28, "Response")) that the Debtor's statements in a deposition taken in connection with the case filed in the District Court for the Eastern District of Pennsylvania should be credited over the Debtor's certification filed in connection with his opposition to summary judgment. It further argues that the trust agreements provided that unpaid contributions were plan assets, that the Debtor had control over these plan assets, that the Debtor was a fiduciary of the trusts because he met the definition of a fiduciary under ERISA, and that he committed defalcation when he prioritized payments to himself.

Debtor filed a no asset chapter 7 case on January 14, 2014. He disclosed on Schedule B that he is a 35 percent owner of RWE.[1] On April 20, 2014, the trustee noticed creditors that this case is an asset case. Note that in addition to this lawsuit and a foreclosure complaint, Debtor disclosed on his Statement of Financial Affairs two lawsuits against him brought by the chapter 7 trustee representing RWE's bankruptcy estate, both pending as of the bankruptcy filing.

[1] In a deposition, Kirk stated that he and Parks each owned 35 percent of RWE, with an ESOP owning the remaining 30 percent. Motion for Summary Judgment, Ex. F, p. 14.

IV. DISCUSSION

A. Summary Judgment

Federal Rule of Bankruptcy Procedure 7056 incorporates Federal Rule of Civil Procedure 56, the summary judgment rule, into bankruptcy adversary proceedings. Summary judgment avoids the expense and delay of an unnecessary trial when no material facts are in dispute and one of the parties is entitled to prevail on the merits. *See, e.g.*, *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977).

Summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact is in dispute. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Once the movant has carried its initial burden, the nonmoving party "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Fed. R. Civ. P. 56(e)(2). The nonmoving party must present actual evidence, not mere allegations. *Anderson v. Liberty Lobby*, 477 U.S. 574, 587 (1986). The court must then only determine whether there is a genuine issue for trial, not weigh the evidence or determine the truth of the matter. Id., at 249. Material facts are those that might affect the action's outcome under the law; fact issues must be genuine, not merely some alleged factual dispute. *Born v. Monmouth Cnty. Corr. Inst.*, 2009 WL 2058837, at *3 (D.N.J. July 9, 2009).

As the Third Circuit Court of Appeals explained:

> Summary judgment is appropriate when the moving party is entitled to judgment as a matter of law and there is no genuine dispute of material fact. . . . In order to defeat "a properly supported summary judgment motion, the party opposing it must present sufficient evidence for a reasonable jury to find in its favor." Groman v. Township of Manalapan, 47 F.3d 628, 633 (3d Cir. 1995) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-52, 106 S. Ct. 2505, 2511-12, 91 L. Ed. 2d 202 (1986)). In essence, the non-moving party must demonstrate a dispute over facts that might affect the outcome of the suit. Id. Moreover, in reviewing the record, we must give the non-moving party the benefit of all reasonable inferences. . . .

Hampton v. Borough of Tinton Falls Police Dep't, 98 F.3d 107, 112 (3d Cir. 1996).

"Furthermore, even if the preponderance of the evidence should appear to lie on the moving party's side, the court's function is not to decide issues of fact, but only to determine whether any issue of fact exists to be tried." *Ness v. Marshall*, 660 F.2d 517, 519 (3d Cir. 1981).

B. Nondischargeability under section 523(a)(4)

Section 523 of the Code, which codifies exceptions to discharge, states in pertinent part:

> (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—
>
> (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny[.]

11 U.S.C. § 523(a)(4).

Thus "[t]o prevail on a complaint seeking to except a debt from discharge based on a defalcation while acting as a fiduciary, a complainant must prove by a preponderance of the evidence (1) that the debtor was acting in a fiduciary capacity and (2) that while acting in this capacity, the debtor engaged in fraud or defalcation. *In re D'Urso*, 2013 WL 3286222, at *6-*7 (Bankr. D.N.J. June 27, 2013) (citing *In re Tyson*, 450 B.R. 514, 522–523 (Bankr. E.D. Pa. 2011)).

i. Fiduciary capacity must involve an express or technical trust

For purposes of section 523(a)(4), the notion of a fiduciary relationship has been limited to situations where an express or technical trust has been established. *See, e.g.*, *In re Casini*, 307 B.R. 800, 817 (Bankr. D.N.J. 2004) (citing *In re Kaczynski*, 188 B.R. 770 (Bankr. D.N.J. 1995)); *In re Scott*, 294 B.R. 620, 630 (Bankr. W.D. Pa. 2003). The trust must not arise out of the action that created the fiduciary duty. *In re Kaplan*, 162 B.R. 684, 704 (Bankr. E.D. Pa. 1993); *In re Shervin*, 112 B.R. 724, 730-31 (Bankr. E.D. Pa. 1990). *See In re Midkiff*, 86 B.R. 239, 241 (D. Colo. 1988) ("debts alleged to be non-dischargeable must arise from breach of trustee obligations imposed by law, separate and distinct from any breach of contract.").

"To establish an express trust, three elements must be met: (1) a declaration of trust; (2) a clearly defined trust res; and (3) an intent to create a trust relationship." *In re D'Urso*, 2013 WL 3286222, at *6 (Bankr. D.N.J. June 27, 2013). *See In re Kaczynski*, 188 B.R. at 774 (same). "Accordingly, implied or constructive trusts and trusts ex maleficio are not deemed to impose fiduciary relationships under the Bankruptcy Code." *Kaczynski*, at 773; *In re Sternberg*, CIV.A 09-2514(FLW), 2010 WL 988550, at *5 (D.N.J. Mar. 12, 2010) (quoting *Kaczynski*).

A technical trust is a trust created by statute or common law, as opposed to being created by agreement (an express trust) or imposed by law (e.g. a constructive trust). *In re Kaczynski*, at 774. *See Gibson v. Gorman*, 44 N.J.L. 325, 329 (Sup. Ct. 1882) (in nondischargeability action under the Bankrupt Act of 1867, distinguishing technical trusts from "trusts as are implied by law from mere contracts of agency or bailment."). [2] To create a technical trust

[2] For the definition of a technical trust, Black's Law Dictionary refers the reader to the definition of a passive trust. The latter is defined solely as "A trust in which the trustee has no duty other than to transfer the property to the beneficiary." Black's Law Dictionary, Brian Garner (9th ed.). This does not seem applicable in this circumstance.

> a state statute must define the trust res, spell out the trustee's fiduciary duties, and impose a trust prior to and without reference to the wrong [that] created the debt. [*In re Christian*, 172 B.R. 490, 496 (Bankr. D. Mass. 1994).] "Statutorily created 'trusts' create fiduciary duties that are dependent upon the relationship between the parties, but are not created by agreement of the parties nor created ex post facto as a remedial measure to right a wrong." *Id.* To show a fiduciary capacity arising from a statutorily created trust for the purposes of § 523(a)(4), a creditor must point to an express legislative design to create a trust relationship. *Id.*

In re D'Urso, 2013 WL 3286222, at *7 (Bankr. D.N.J. June 27, 2013).

Here, IBEW alleges that the Debtor breached a fiduciary duty in connection with trusts created pursuant to ERISA.

Indeed, section 1102 declares that "Every employee benefit plan shall be established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1) (West). Section 1103 provides for management of the plan by a trustee. 29 U.S.C. 1103(a). Section 1104 sets forth a "prudent man" standard of care for fiduciaries of a plan:

> (a) Prudent man standard of care
>
> (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
> (i) providing benefits to participants and their beneficiaries; and
> (ii) defraying reasonable expenses of administering the plan;
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

29 U.S.C. § 1104(a)(1). *See Blyler v. Hemmeter (In re Hemmeter)*, 242 F.3d 1186, 1190 (9th Cir. 2001) (setting forth same steps).

In addition to responsibility for his or her own duties, a fiduciary may be liable for a breach of fiduciary responsibility of another fiduciary if:

> (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
> (2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
> (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

29 U.S.C. § 1105(a).

Not surprisingly, the fiduciary shall not "deal with the assets of the plan in his own interest or for his own account." 29 U.S.C. § 1106(b).

An ERISA fiduciary may be held personally liable for breaches of fiduciary duty.

> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.
>
> (b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

29 U.S.C. § 1109.

Here, Kirk did not contest that all of the Funds were created pursuant to ERISA.[3] This court agrees that ERISA's provisions create a technical trust, satisfying one requirement of section 523(a)(4).

[3] IBEW did not attach copies of the trust agreements to either its Complaint or its Motion for Summary Judgment, just certain amendments to those agreements. The amendment to the trust agreement for the Health and Welfare Fund states that the fund is a trust created pursuant to Section 302(c) of the Labor-Management Relations Act of 1947. That act, codified at title 29, chapter 11, is separate from ERISA, codified at title 29, chapter 18. However, the Debtor did not oppose IBEW's motion on the grounds that no trusts were created. Thus the court will not raise the issue.

ii. Is Kirk a fiduciary of the trusts?

IBEW cites *Blyler v. Hemmeter (In re Hemmeter)*, 242 F.3d 1186 (9th Cir. 2001) and *In re Fahey*, 482 B.R. 678, 682 (B.A.P. 1st Cir. 2012) for the proposition that an ERISA fiduciary is *per se* a fiduciary for purposes of section 523(a)(4).[4] ERISA does define a fiduciary broadly, as follows:

> (21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

29 U.S.C. § 1002.

But *Hemmeter* involved a plan trustee—much easier to see its fiduciary duty—while *Fahey* simply followed *Hemmeter*'s holding, though it concerned an employer's fiduciary status. *See Fahey*, at 695 (stating that *Hemmeter*'s conclusion "appears sound."). Further confusing matters, a subsequent decision of the Ninth Circuit, *Bos v. Bd. of Trustees*, 795 F.3d 1006 (9th Cir. 2015), though citing *Hemmeter* for some of its legal conclusions, determined that an employer is not a fiduciary of ERISA, and therefore not a section 523(a)(4) fiduciary, as unpaid contributions to employee benefit funds are not plan assets. *Bos*, 795 at 1009.

Moreover, in determining whether a defendant is an ERISA fiduciary, the Third Circuit directs a court to consider:

> (1) whether the unpaid contributions are "plan assets," and (2) whether the individual in question exercises authority or control over the plan assets.

In re Mushroom Transp. Co, Inc., 382 F.3d 325, 346 (3d Cir. 2004). *See also Halpin*, at 289.

[4] IBEW had also cited *Bos v. Bd. of Trustees of Carpenters Health & Welfare Trust Fund for California*, 2:12-CV-02026-MCE, 2013 WL 943520, at *1 (E.D. Cal. Mar. 11, 2013), in support of its *per se* contention. However, in the period between the parties' briefing and this court's decision, the Ninth Circuit Court of Appeals reversed that opinion in *Bos v. Bd. of Trustees*, 795 F.3d 1006 (9th Cir. 2015). The Circuit Court agreed with those courts that hold that an employer "never has sufficient control over a plan asset to make it a fiduciary for purposes of § 523(a)(4)," but instead the plan asset is the chose in action held by the plan trustees to sue for unpaid contributions. *Id.*, at 1011. This is a view that this court rejects, as explained *infra*.

A. What are plan assets?

The Third Circuit instructs courts, in its decision in *Edmonson v. Lincoln Nat. Life Ins. Co.*, 725 F.3d 406 (3d Cir. 2013), *cert. denied,* 134 S. Ct. 2291 (2014), to focus on the language of the plan documents:

> "[I]n the absence of specific statutory or regulatory guidance," as here, "the term 'plan assets' should be given its ordinary meaning, and therefore should be construed to refer to property owned by an ERISA plan." *Sec'y of Labor v. Doyle,* 675 F.3d 187, 203 (3d Cir.2012) (citing *In re Luna*, 406 F.3d 1192, 1199 (10th Cir.2005)). "This approach is also consistent with guidance provided by the Secretary [of Labor] on the meaning of 'plan assets,' which states that 'the assets of a plan generally are to be identified on the basis of ordinary notions of property rights under non-ERISA law. In general, the assets of a welfare plan would include any property, tangible or intangible, in which the plan has a beneficial ownership interest.' " *Id.* (quoting Dep't of Labor, Advisory Op. No. 93–14A, 1993 WL 188473, at *4 (May 5, 1993)).

Id., at 427. *See also Bottle Beer Drivers, Warehouseman & Helpers Teamsters Local 843 v. Anheuser Busch Inc.*, 96 F. App'x 831, 834–35 (3d Cir.2004) (non-precedential); *Einhorn v. Twentieth Century Refuse Removal Co.*, 2011 WL 6779760, *9 (D.N.J. Dec.22, 2011) (concluding that the parties' contractual obligations determined whether certain payments were plan assets).

This is where a split in decisions comes into play: some courts find unpaid employer contributions to be plan assets, while others hold that it is the ability to sue to collect unpaid employer contributions—the choses in action—that are the plan assets. This court finds the former position to be more persuasive.

Here, the Trust Agreement in relation to the Health and Welfare Fund states as follows:

> (b) **Joint Trust.** This Fund is a trust created pursuant to Section 302(c) of the Labor-Management Relations Act of 1947. **Title to all monies paid into said Fund shall be vested in the Trustees of the Fund, in trust as of the date the employer's obligation to contribute arises.** No Contributing Employer, whether signatory hereto or not, or the Union of any member thereof, or any Employee, or any person claiming by, through or under any of them, shall have any right, title or interest in or to the Fund, or any part thereof, except as provided in any Schedule of Benefits hereby adopted or hereafter amended in accordance with this Agreement.

Motion for Summary Judgment, Doc. No. 26-5, ex. B (strike through and underline of changes omitted; emphasis supplied).

The applicable trust language for the other three plaintiffs is identical, and states:

> The Trustees or such other person(s) or entity(ies) designated or appointed by the Trustees in accordance with this Article and Sections 5.6 and 5.7 of Article V are

> hereby designated as the persons to receive the payments heretofore or hereafter made to the Trust Fund by the Covered Employers and Employees. **Title to and possession of all monies which are contributions to be paid into the Fund shall be vested in the Trustees of the Fund as of the date the Covered Employer's obligation to contribute arises.**

Motion for Summary Judgment, Doc. No. 26-6, ex. C, § 4.1(d); Doc. No. 26-7, ex. D, § 3.1(d); Doc. No. 26-8, ex. E, § 4.1(d)) (emphasis supplied).

The CBA provides as to the Health and Welfare Plan, the Pension Fund, and the Apprentice Training Fund that contributions should "be made in accordance with the applicable Trust document." Motion for Summary Judgment, Doc. No. 26-4, ex. A, p. 12, § 3.10(b). It further provides that all payments "must be received by or bear a U.S. Postal Service postmark [of] the last day of the month following the month in which there was covered employment (the 'due date')." *Id.*

IBEW did not provide any of the trust agreements, only certain amendments to each of the agreements. The amendment for the Health and Welfare Fund does not include any other deadline for making payments. *See* Motion for Summary Judgment, Doc. No. 26-5, ex. B. The other three plans instruct that a "Covered Employer shall make contributions by the due date established by the Trustees unless the Collective Bargaining Agreement or Participation Agreement provides otherwise." *See* Motion for Summary Judgment, Doc. No. 26-6, ex. C, § 4.1(b); Doc. No. 26-7, ex. D, § 3.1(b); Doc. No. 26-8, ex. E, § 4.1(b)).

In a case concerning the exact same language—as the plaintiffs were the same as those here—a district court held that the "employer contributions vest and become plan assets when they are due. Unpaid employer contributions, such as those allegedly owed by LMI, are therefore plan assets." *Int'l Bhd. of Elec. Workers Local Union No. 98 Health & Welfare Fund v. LMI Elec. Inc.*, CIV.A. 15-380, 2015 WL 4389628, at *6 (E.D. Pa. July 17, 2015). The court so held despite the defendants' argument that the unpaid contributions were never in the account of the plan's trustee. *Id.*, at *5.

In *Fahey*, the trust agreement language was similar: "In addition, all contributions shall be considered and defined as plan assets including contributions that are properly due and owing but not yet paid to the Fund by Contributing Employers." *In re Fahey*, 482 B.R. 678, 682 (B.A.P. 1st Cir. 2012). The *Fahey* court, considering the plan language as an alternative to the p*er se* view, found no ambiguity in this language. *Id.*, at 691. It accordingly held that the delinquent contributions were fund assets. *Id.* Note that here the court so found "despite the fact that they remained in [the company's] possession[.]" *Id.*

Where the relevant language provided that "title to all monies paid into the funds shall be vested in the Trustees of the Fund, in trust as of the date the employer's obligation to contribute arises," the court held that the unpaid contributions were plan assets. *Local Union No. 98 Int'l Bhd. of Elec. Workers v. Riverview Elec. Const.*, CIV.A. 10-1168, 2011 WL 4948825, at *5 (E.D. Pa. Oct. 18, 2011). *Compare Hunter v. Philpott (In re Philpott)*, 373 F.3d 873, 876 (8th Cir. 2004),

(finding no fiduciary duty in part because CBA did not include a provision that the employer hold income in trust for satisfaction of liabilities to the funds).

The Debtor relied on cases that held that a failure to make employer contributions reflected a breach of contract, not a breach of fiduciary duty. For example, in *In re Bucci*, 493 F.3d 635 (6th Cir. 2007), Bucci, the president and sole shareholder of an employer of union employees, failed to make mandated contributions. *Id.*, at 637. The court held that it must look to the substance of the alleged fiduciary duty to determine whether there was a defalcation. *Id.*, at 642. In this case, the trust agreements created trusts whose assets included "funds received or due to be received by the Trustees." *Id.*, at 642. The *Bucci* court then agreed with other courts that have held that this language makes the unpaid contributions "plan assets." *Id.*, at 642. But it then stated that Bucci's status as an ERISA fiduciary did not alone create and express or technical trust for purposes of section 523(a)(4). *Id.*, at 643. Instead, it held that the act that created the debt, the failure to pay, was the exercise of control that made him an ERISA fiduciary. *Id.* Thus the trust relationship did not arise prior to the act creating the debt, and the failure to pay was a breach of contract. *Id.* The court also rejected the plaintiffs' argument that Bucci's possession of trust assets made him as ERISA fiduciary, stating that mere possession or custody over plan assets is not enough to confer fiduciary status. *Id.*

The *Halpin* case also involved a president and sole shareholder. *Rahm v. Halpin (In re Halpin)*, 566 F.3d 286 (2d Cir. 2009). Similar to the allegations here, Halpin continued to pay his own salary and other corporate debts in lieu of making full employer contributions to the ERISA plan. *Id.*, at 288. The court relied in part on a requested amicus curiae brief filed by the United States Department of Labor that stated that though it had promulgated regulations regarding when employee contributions withheld from wages became plan assets (29 C.F.R. § 2510.3-102), it had not defined when employer contributions became plan assets. *Id.*, at 289. It instead recommended looking to "'ordinary notions of property rights under non-ERISA law.'" *Id.*, at 289 (quoting U.S. Dep't of Labor, Advisory Op. No. 93-14A (May 5, 1993)). The court therefore looked to assets "'in which the plan has a beneficial ownership interest,' considering 'any contract or other legal instrument involving the plan, as well as the actions and representations of the parties involved.'" *Id.* Further, the court noted that the Department of Labor thus had taken the position that employer contributions only became plan assets once made. *Id. See also Sec'y of Labor v. Doyle*, 675 F.3d 187, 203 (3d Cir. 2012) (noting that the Department's regulations define the scope of plan assets only where an employee benefit plan invests assets by purchasing shares in a company, and where contributions to a plan are withheld by an employer from employees' wages).

This led the *Halpin* court to conclude that the employer contributions at issue were not plan assets. *Id.*, at 289. Instead, the asset was the plan's right to sue for the unpaid contributions under the applicable contract, not as a fiduciary of the fund. *Id.*, at 289. In other words, the relationship of the employer to the fund is one of debtor-creditor rather than as a fiduciary. *Id.*, at 290.

It noted that other circuits have taken this approach.

> In *In re Luna*, 406 F.3d 1192 (10th Cir. 2005), for example, the Tenth Circuit held that an employer's failure to make contributions to an ERISA plan created a creditor-debtor contractual relationship rather than a fiduciary relationship. *See id.*

> at 1198–1201; *see also In re M & S Grading, Inc.*, 541 F.3d 859, 865 (8th Cir. 2008) (concluding that when the employer "failed to make the payments to the plans, the unpaid contributions remained corporate assets and did not become assets of the plan"); *ITPE Pension Fund v. Hall*, 334 F.3d 1011, 1013 (11th Cir. 2003) (stating the rule that unpaid employer contributions are not fund assets unless the agreement clearly declares otherwise); *Cline v. Indus. Maint. Eng'g & Contracting Co.*, 200 F.3d 1223, 1234 (9th Cir. 2000) ("Until the employer pays the employer contributions over to the plan, the contributions do not become plan assets over which fiduciaries of the plan have a fiduciary obligation....").

In re Halpin, 566 F.3d 286, 291-92 (2d Cir. 2009).

But the better view is that, where a trust agreement defines funds due and owing to an ERISA fund as plan assets, then that possession or control gives rise to a fiduciary duty of the employer. This court acknowledges that the *Halpin* court criticized this approach, as resulting in an employer automatically becoming an ERISA fiduciary once it failed to make required payments. *Halpin*, at 292. The employer then would owe an undivided interest to the plan over the "competing obligations—some fiduciary—to the business, and to others such as employees, customers, shareholders and lenders, and an undifferentiated portion of the companies['] assets would be held in trust for the plan." *Id.* But the *Fahey* court pointed out that this is what the employer bargained for when agreeing to include unpaid contributions as plan assets in the trust agreements. *Fahey*, at 693-94.

> That is what the corporation and its controlling persons bargained for . . . when they agreed that unpaid contributions be deemed Fund assets. A ruling otherwise would improperly rewrite a collective bargaining agreement in a way that deprives one party, the Fund, of a useful debt collection procedure that the other party—the employer and its privies, agents, and controlling persons—freely agreed upon in a bargaining process that balanced both sides' benefits and detriments.

In re Fahey, 482 B.R. 678, 693-94 (B.A.P. 1st Cir. 2012) (quoting *NYSA–ILA Med. & Clinical Servs. Fund v. Catucci*, 60 F.Supp.2d 194, 203 (S.D.N.Y. 1999)).

The *Halpin* court even acknowledged that parties are free to contractually provide for some other result. *Halpin*, at 290. This comports with the alternative approach discussed in *Fahey*, that even if the employer was not *per se* an ERISA fiduciary, it was under the trust agreement that provided that all contributions, even those due and owing but not yet paid, were plan assets. *Fahey*, at 691.

In addition, *Halpin* ignores that where an agreement provides a deadline, for example, 15 days, within which to pay the funds over to the trust, those funds are plan assets in the hands of the employer, with the concomitant fiduciary duty to pay them over. *Halpin* would suggest that the funds would only become plan assets on Day 16, as a result of the employer's breach of contract. But this result would strain the law to hold that the plan assets are the funds on days 1-15, but then transform them into choses in action on day 16, allowing the employer to shed its fiduciary duty by not timely paying over the funds.

In the proceeding before this court, the trust agreements define plan assets as including contributions when they become due. The employer holding those assets then holds them as a trustee, with the fiduciary duty to pay them over to the plan trustees. There is nothing ambiguous about these terms, as Kirk proffered.

This court thus holds to the extent that any funds were in the possession or control of RWE that were to be paid as employer contributions, these were plan assets.[5]

B. Did Kirk have control over the plan assets, thus making him a fiduciary?

Courts deciding whether a defendant had control over plan assets have cited the following factors supporting a finding of control:

- President and sole owner of a corporation assuming "unfettered authority in all matters directly and indirectly related to company's payment of contributions to the funds. *See Fahey*, at 692-93.

- President, only board member, registered agent, and sole shareholder of corporation was responsible for signing every check for employee contributions; was the signatory on payments made; signed the collective bargaining agreement. *See Trustees of the Nat. Elevator Indus. Pension, Health Benefit, Educational, Elevator Indus. Work Preservation Funds v. Gateway Elevator Inc.*, 2011 WL 2462027, at *5 (E.D. Pa. June 21, 2011).

- President, CEO and owner of corporation "exercised power and control over the day-to-day financial and business affairs of [the corporation], including the issuance of payroll checks to employees, the deduction of dues and the distribution of portions of employees' compensation to Plaintiff Funds." Defendant signed the collective bargaining agreement on behalf of the company, and often signed the monthly contribution reports. *See Bricklayers & Allied Craftworkers Local 1 of PA/DE v. WaterControl Services, Inc.*, 2012 WL 3104437, at *5 (E.D. Pa. 2012).

- Principal of corporation had authority to bind the corporation in contract and signed the Letter of Assent binding the corporation to the agreement; and authorized and tendered the payment of contributions and withholdings to the funds, and "exercised discretionary control over the management of the financial responsibilities and business affairs" of the corporation. *Local Union No. 98 IBEW v. Riverview Electrical Construction*, 2011 WL 4948825, at *2 (E.D. Pa. Oct. 18, 2011).

[5] The Debtor has alleged that some contributions were not due and owing because the Debtor had outstanding receivables. To the extent that the Debtor was obligated to make contributions from these receivables, they would only become plan assets over which Kirk might have had a fiduciary duty once paid to RWE. The issue of how much in plan assets was held by RWE will go to damages, if any.

- Owner of corporation supervised an accounting compliance review of the corporation; and authorized and tendered the payment of contributions and withholdings to the funds, and "exercised discretionary control over the management of the financial responsibilities and business affairs" of the corporation. *Id.*

- Owner of corporation signed checks from payroll to the plan; and authorized and tendered the payment of contributions and withholdings to the funds, and "exercised discretionary control over the management of the financial responsibilities and business affairs" of the corporation. *Id.*, at *3.

- Sole owner and officer of company enough to support her discretionary control or authority over unpaid employer contributions for purposes of a motion to dismiss. *LMI Elec. Inc.*, 2015 WL 4389628, at *6.

Compare Philpott, 373 F.3d at 876-877 (holding that defendant who did not sign the CBA and was not in a position to act solely for the benefit of the funds was not an ERISA fiduciary).

IBEW alleges that Kirk, as president and owner of RWE, had control over plan assets in that he had control over the funds in RWE's accounts; had the power to authorize any payment on behalf of the company; oversaw the accounting department; signed the Letter of Assent on behalf of RWE; and allowed contribution checks to be submitted with his signature. Motion for Summary Judgment, Doc. No. 26-2, pp. 2-3. IBEW acknowledges that though often Kirk's signature on checks was affixed by employees using a signature stamp, Kirk had authorized his employees to use that stamp when preparing the checks to submit to the Funds. *Id.*, p. 3.[6]

Kirk responds that IBEW "fails to identify any instance where Kirk had sole and complete authority or control to make payments on behalf of Riteway." Opposition to Motion for Summary Judgment, Doc. No. 27-1, p. 11. He argues that IBEW did not provide any evidence that Kirk had a role in plan administration. *Id.* In addition, Kirk made decisions regarding payments with the authority of Mr. Parks. *Id.*

Kirk further argues that RWE had tax and other obligations to creditors, and that both he and Parks put money into RWE to keep it running. *Id.* He complains that had he not paid other creditors, RWE "would have been out of business over a year prior to its ceasing operations, to the detriment of Local 98's own employees." *Id.*, p. 12. In addition, Kirk states that "[i]n the last few months of the Delinquency Period, Riteway was making minimal payments to the most important creditors in order to stay in operation." *Id.*

[6] IBEW supports its allegations with portions of transcripts of depositions taken by it of Kirk in its case filed against him in the Eastern District of Pennsylvania. A party may use a deposition at trial if (1) the party was present or represented at the taking of the deposition or had reasonable notice of it, (2) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying, and (3) the use is allowed by Rule 32(a)(2) through (8). Fed. R. Civ. P. 32(a)(1) (incorporated into adversary proceedings by Fed. R. Bankr. P. 7032). Rule 32(a)(2) allows the use of a deposition "to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence." Fed. R. Civ. P. 32(a)(2). A deposition may be used for any purpose if the deponent was the officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4). Fed. R. Civ. P. 32(a)(3). Thus it appears that use of these depositions in this proceeding is proper.

Kirk supplies no authority for the proposition that, in order to be held a fiduciary, he had to have "sole and complete authority or control." In *Local Union No. 98 IBEW v. Riverview Electrical Construction*, 2011 WL 4948825, the court held several officers and owners of a corporation liable. To only find liability where just one person had control would allow many companies to evade liability by spreading responsibility across persons or a department.

That IBEW did not show that Kirk had a role in actual plan administration is of no event, as ERISA fiduciary liability arises "to the extent (i) [a person] exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets[.]" 29 U.S.C. § 1002(21)(A)(i). The latter part makes clear that discretionary control is not necessary, just any authority or control over the plan assets. As explained by the Third Circuit Court of Appeals:

> As noted earlier, however, the adjective "discretionary," so carefully selected for plan administration and management, is omitted in subsection (i) when dealing with authority or control over the management or disposition of plan "assets." "The statute treats control over the cash differently from control over administration." *IT Corp.*, 107 F.3d at 1421.
>
> That Congress established a lower threshold for fiduciary status where control of assets is at stake is not surprising, given that "[a]t common law, fiduciary duties characteristically attach to decisions about managing assets and distributing property to beneficiaries." *Pegram*, 530 U.S. at 231, 120 S.Ct. at 2155 ("[T]he common law trustee's most defining concern historically has been the payment of money in the interest of the beneficiary."). "By mandating the trust form and by transposing the duty of loyalty from trust to pension law, the drafters of ERISA were able to institute a familiar fiduciary regime to protect pension funds against internal defalcation." John H. Langbein & Bruce A. Wolk, *Pension and Employee Benefit Law*, 649 (2d ed.1995).

Bd. of Trustees of Bricklayers & Allied Craftsmen Local 6 of New Jersey Welfare Fund v. Wettlin Associates, Inc., 237 F.3d 270, 274 (3d Cir. 2001). *See also Mertens v. Hewitt Associates*, 508 U.S. 248, 262 (1993) ("ERISA, however, defines "fiduciary" not in terms of formal trusteeship, but in *functional* terms of control and authority over the plan, see 29 U.S.C. § 1002(21)(A), thus expanding the universe of persons subject to fiduciary duties—and to damages—under § 409(a).").

This court finds that the allegations of IBEW as to Kirk's control over plan assets is sufficient to find that he was a fiduciary for ERISA purposes.

C. Defalcation

This brings the court back to section 523(a)(4). Having found that Kirk was a fiduciary, it also needs to determine whether Kirk defalcated with the requisite intent for nondischargeability purposes.

The Supreme Court explained what intent is necessary to hold a debt nondischargeable under section 523(a)(4).

> The Supreme Court framed the issue as whether the "defalcation" applies "in the absence of any specific finding of ill intent or evidence of ultimate loss of trust principal." *Bullock [v. BankChampaign]*, —— U.S. ——, 133 S. Ct. [1754], 1758 (2013). The Supreme Court held that the term "defalcation" includes a culpable state of mind requirement involving knowledge of, or gross recklessness in respect to, the improper nature of fiduciary behavior. *See id.* at 1759– 1760.
>
> The Court explained that where the conduct does not involve bad faith, moral turpitude, or other immoral conduct, "defalcation" requires an intentional wrong. *Id.* at 1759. Looking to the Model Penal Code, the Court stated that intentional wrong "includes not only conduct that the fiduciary knows is improper but also reckless conduct of the kind that the criminal law often treats as the equivalent." *Id*. Furthermore, "where actual knowledge of wrongdoing is lacking, we consider conduct as equivalent if the fiduciary 'consciously disregards,' (or is willfully blind to), 'a substantial and unjustifiable risk' that his conduct will turn out to violate a fiduciary duty." *Id.*

D'urso, at *10.

IBEW argues that Kirk's decision not to pay funds was defalcation because he knew it was improper to prioritize payments to himself. Kirk argues that he did not have the requisite malicious intent because he merely made payments to other creditors to keep the company running, not to benefit himself.

Kirk's statements regarding his intent raise an issue of material fact that cannot be determined on summary judgement. "Issues such as intent and credibility are rarely suitable for summary judgment." *Wishkin v. Potter*, 476 F.3d 180, 184 (3d Cir. 2007). *See, e.g. Young v. Quinlan*, 960 F.2d 351, 360 n. 21 (3d Cir. 1992) ("When the mental state of the nonmoving party is an essential element of a claim, resolution of that claim by summary judgment is often inappropriate because a party's mental state is inherently a question of fact which turns on credibility."); *Ness v. Marshall*, 660 F.2d 517, 519 (3d Cir. 1981) ("Finally, where intent is a substantive element of the course of action generally to be inferred from the facts and conduct of the parties the principle is particularly apt that courts should not draw factual inferences in favor of the moving party and should not resolve any genuine issues of credibility."); *Ross v. Bank S., N.A.*, 885 F.2d 723, 751 n.8 (11th Cir. 1989):

> It is well-established that summary judgment is inappropriate to decide questions of scienter, knowledge and intent. *See, e.g., Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473, 82 S. Ct. 486, 491, 7 L. Ed.2d 458 (1962) ("summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot"). *See also Middleton v. Reynolds Metals Co.*, 963 F.2d 881, 882 (6th Cir. 1992) ("As a threshold matter, we note that summary judgment is likely to be inappropriate in cases where the issues involve intent.").

Though IBEW argued in court that this court should follow *In re Fahey* to find that Kirk's prioritization of payments to himself constituted defalcation with the requisite intent for purposes of section 523(a)(4), the *Fahey* court did not so hold. To the contrary, as the lower court had not reached the question of defalcation, having held that the defendant was not a fiduciary, the court remanded for findings on the issue of whether the nonpayment of contributions constituted a defalcation. *Fahey*, 482 B.R. at 696.

V. CONCLUSION

In summary, this court finds that Kirk was a fiduciary of a technical trust, and thus his debt to IBEW might be held nondischargeable provided he is found to have defalcated with the necessary culpable intent.

Accordingly, the motion for summary judgment is DENIED.

An appropriate order will be entered consistent with this decision. Trial to be scheduled on the issues of Kirk's intent.

In addition, the court notes that Kirk has suggested that some of the contributions sought by IBEW were not yet due and owing. Therefore IBEW will also need to prove what assets held by RWE were plan assets.

The court reserves the right to revise its findings of fact and conclusions of law.

/s/ Andrew B. Altenburg, Jr.
United States Bankruptcy Judge

Dated: January 7, 2016