

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
McKAY ENTERPRISES, INC.,	)	CASE NO. BK85-689
	)	
DEBTOR	)	A85-296
	)	
THOMAS M. LOTT,	)	
	)	
Plaintiff	)	
	)	
vs.	)	
	)	
McKAY ENTERPRISES, INC.,	)	
and FIRSTIER BANK OF OMAHA,	)	
f/k/a Omaha National Bank,	)	
	)	
Defendant	)	

MEMORANDUM

The plaintiff in this action, Thomas Lott, moves to clarify and amend judgment (Filing No. 58). On March 16, 1988, the Court ordered movant to file a brief on the legal issue raised in his pleadings within fifteen days, with a response from FirstTier Bank within fifteen days.

Mr. Lott claims the Court erred in applying the lowest intermediate balance rule contained in Section 202(j) of the Restatement, (Second) of Trusts. Mr. Lott points to several decisions including State, ex rel. Sorensen, v. Farmers State Bank, 121 Neb. 532 (1931); Perry v. Perry, 484 S.W.2d 257 (Mo. 1972) and to Section 202(l), (m) of the Restatement (Second) of Trusts to support his argument that McKay's subsequent deposits to the bank account in which Mr. Lott's proceeds had been deposited (although Mr. Lott's proceeds were later withdrawn by McKay) become restitution of Mr. Lott's funds. Thus, the Court should impose a constructive trust on these new deposits on behalf of Mr. Lott.

In Sorensen, the Court gave priority over other general creditors of an insolvent bank to an individual whose trust funds had been converted by the bank and mingled with the bank's assets. The Court finds no similarity between the facts of Sorensen and those of the present case. The facts in Perry, however, do bear a resemblance to Mr. Lott's situation. In Perry, a grandmother

appropriated life insurance proceeds that belonged to her grandchildren, commingled the proceeds in her own bank account, dissipated the proceeds and later deposited additional funds to her bank account. The Missouri Supreme Court imposed a constructive trust on the augmented account. The Court required no proof of intent of restitution by the grandmother, relying in part on Section 202 of the Restatement (Second) of Trusts. Perry, 484 S.W.2d at 259. However, the Perry court does not identify on which subsection of Section 202 of the Restatement it is relying.

In Lott v. McKay Enterprises, Inc., this Court applied the intermediate balance rule derived from subsection (j): Effect of withdrawals and subsequent additions. Mr. Lott suggests that Perry is an equitable extension of the intermediate balance rule. Mr. Lott points to both subsections (l) and (m) to support his contention.

Subsection (l), Redeposit of withdrawals, reads: "Where the amount withdrawn from the account is not dissipated but is subsequently redeposited in the account, the effect is the same as though the withdrawal had not been made, and the beneficiary's lien is not limited to the lowest intermediate balance."

At the evidentiary hearing of Lott v. McKay Enterprises, Inc., no evidence was presented by Mr. Lott to support the theory that later deposits by McKay into McKay's account were redeposits of Mr. Lott's hog proceeds. The Court finds subsection (l) not applicable.

Subsection (m), Subsequent additions by way of restitution, reads:

Where the trustee deposits trust funds in his individual account in a bank, and makes withdrawals from the deposit and dissipates the money so withdrawn, and subsequently makes additional deposits of his individual funds in the account, manifesting an intention to make restitution of the trust funds withdrawn, the beneficiary's lien upon the deposit is not limited to the lowest intermediate balance.

Where the deposit of trust funds and of his individual funds was in an account in the name of the trustee as such, and not in his individual account, and he withdraws more than the amount of his individual funds, and subsequently deposits his individual funds in the account, the beneficiary's lien upon the deposit is not limited to the lowest intermediate balance since the new deposit will be treated as made by way of restitution of the trust funds previously withdrawn.

Restatement (Second) of Trust § 202(m) (1959) (emphasis added).

According to Mr. Lott, Perry stands for an equitable extension of the intermediate balance rule, and subsection (m) supports such an extension. If additional funds are deposited by the trustee to a bank account in which trust funds have once been, it is more equitable to impose a constructive trust on these funds on behalf of the beneficiary than to allow other general creditors to benefit.

Although this may be within the equitable powers of this Court, the Court finds no precedent to so rule. A careful reading of subsection (m) clearly indicates two separate situations where restitution will prevent the application of the lowest intermediate balance rule. Either (1) the trustee must "[manifest] an intention to make restitution of the trust funds withdrawn" when an account is the trustee's general account or (2) no manifestation of an intent to make restitution is required when the account is in the name of the trustee as a trustee.

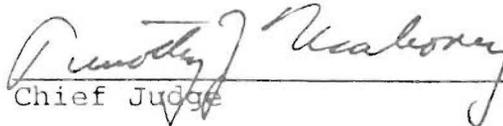
In Lott v. McKay Enterprises, Inc., the account in question was the general operating account of McKay Enterprises. The Court found no evidence to support a manifestation of an intention to make restitution by McKay even though the Court recognizes that additional funds were deposited into the McKay account after most of Mr. Lott's proceeds were withdrawn.

In fact, a later Missouri decision, Universal C.I.T. Credit Corp. v. Farmers Bank of Portageville, 358 F. Supp. 317 (E.D. Mo. 1973), applied the intermediate balance rule much as this Court did in Lott v. McKay Enterprises, Inc. The Missouri District Court clearly distinguished between a fact situation where trust funds are deposited by the trustee to a trust account and where trust funds are deposited to the trustee's personal bank account. Only in the former situation is there a presumption of restitution. The Court believes the Universal C.I.T. decision the correct interpretation of Section 202 of the Restatement and overrules the interpretation urged by Mr. Lott.

Additionally, Mr. Lott contends that equity should direct the Court to prefer a beneficiary of a trustee over a general creditor of the trustee. In this case, however, FirstTier Bank is a secured creditor with set-off rights.

DATED: April 26, 1988.

BY THE COURT:

  
Chief Judge