

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Honorable Howard R. Tallman**

In re:)	
)	
TRICK TECHNOLOGIES, INC.,)	Case No. 11-24044 HRT
)	Chapter 7
Debtor.)	
_____)	
)	
DAVID V. WADSWORTH,)	Adversary No. 12-01622 HRT
)	
Plaintiff,)	
)	
v.)	
)	
HIGH SPEED AGGREGATE, INC.,)	
)	
Defendant.)	
_____)	

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

THIS MATTER comes before the Court on the cross-motions for summary judgment filed by the Plaintiff, David V. Wadsworth, Chapter 7 Trustee (the "Trustee"), and by the Defendant, High Speed Aggregate, Inc. ("High Speed"). Having reviewed the cross-motions (docket ##17, 21), and accompanying supporting documents, responses, and replies, and being advised in the premises, the Court hereby concludes as follows.

UNDISPUTED FACTS

The following facts, taken from the parties' stipulation (docket #18), motions, and responses, are undisputed. On or about October 23, 2009, William Lindsey ("Lindsey") acquired from Jeffrey Ploen ("Ploen") the sum of \$25,000.00 by theft or fraudulent means. Ploen subsequently assigned all rights and claims relating to the repayment of the \$25,000.00 to High Speed. As a result of Lindsey's fraud against Ploen/High Speed, a criminal complaint was filed against Lindsey, case number 10CR716, *People v. Lindsey* (the "Criminal Case"), in Arapahoe County District Court, one of the 18th Judicial District Courts (the "State Court"). Lindsey retained the law firm of Seawell & Buckmelter, P.C. (the "Law Firm") to represent him in the Criminal Case.

Malcolm Seawell ("Seawell"), shareholder of the Law Firm, negotiated with the State Court District Attorney to reach a plea bargain agreement to resolve the Criminal Case.

Seawell understood that payment of restitution would be one of the components of the plea agreement, and directed his assistant to contact Lindsey and provide Lindsey wire transfer instructions to send the anticipated restitution amount to the Law Firm's trust account.

On April 4, 2011, Lindsey, who was the principal of Trick Technologies, Inc. (the "Debtor"), caused the Debtor to wire \$27,853.51¹ to the Law Firm's trust account. The Law Firm's bank statement indicates that the wire was received from "Trick Technologies Inc.," but Seawell testified that he did not notice that at the time. Seawell testified that he believed the funds belonged to Lindsey.

On May 16, 2011, Lindsey and the State Court District Attorney entered into a Plea Agreement, which was accepted by the State Court. The Plea Agreement provided that Lindsey would plead guilty to theft and forgery charges, and it included a sentence agreement providing in relevant part that Lindsey would pay \$27,453.51 in restitution to the State Court.

On May 16, 2011, the Law Firm drew a check on its trust account that was made payable to the Clerk of the State Court, in the amount of \$27,453.31. The check references "William Lindsey (10CR716) – Restitution."

On or about June 15, 2011, a clerk of the State Court issued and delivered to Ploen a check, in the amount of \$27,453.51, made out to High Speed c/o Ploen. The check listed Lindsey's name and the case number of the Criminal Case, and indicated it was restitution. High Speed endorsed the check and deposited the check into its bank account. The check was honored.

On June 13, 2011, before the State Court clerk issued the check to Ploen/High Speed, Petitioning Creditor Gayle Dendinger filed an involuntary Chapter 7 case against the Debtor. This Court entered an order for relief on July 19, 2011, and the Trustee was subsequently appointed as Chapter 7 Trustee.

DISCUSSION

The Trustee seeks to recover the \$27,453.51 paid to High Speed under 11 U.S.C. § 548, as a fraudulent transfer. When a fraudulent transfer is avoided, the Bankruptcy Code allows a trustee to recover the property transferred, or its value, from:

¹ This amount is \$400 more than the amount needed for restitution. Seawell testified that the additional \$400 remains in the Law Firm's trust account.

- (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
- (2) any immediate or mediate transferee of such initial transferee.

11 U.S.C. § 550(a). The Bankruptcy Code provides a defense for immediate or mediate transferees liable under subsection (a)(2) who took for value, in good faith, without knowledge of the voidability of the transfer. *See* 11 U.S.C. § 550(b). But, the Code provides no such defense for an initial transferee. *See Rupp v. Markgraf*, 95 F.3d 936, 938 (10th Cir. 1996). The parties' cross-motions seek a determination as to whether High Speed is the initial transferee, and thus strictly liable for the transfer, which is assumed to be avoidable for purposes of the cross-motions.

The term "initial transferee" is not defined in the Bankruptcy Code, but the Tenth Circuit has adopted the "dominion and control" test, following the holding of *Bonded Financial Services, Inc. v. European American Bank*, 838 F.2d 890, 893 (7th Cir. 1988), that "the minimum requirement of status as a 'transferee' is dominion over the money or other asset, the right to put the money to one's own purposes." *See Malloy v. Citizens Bank of Sapulpa (In re First Sec. Mortgage Co.)*, 33 F.3d 42 (10th Cir. 1994). Under the dominion and control test, a party is not considered an initial transferee of a transfer received directly from a debtor unless that party gains actual dominion or control over the funds. *Bonded*, 838 F.2d at 893; *Malloy*, 33 F.3d at 43-44; *Rupp*, 95 F.3d at 939. When an intermediary party receives but does not gain actual dominion or control over the funds, that party is considered a mere conduit or agent for one of the real parties to the transaction. *Bonded*, 838 F.2d at 893; *Malloy*, 33 F.3d at 44; *Rupp*, 95 F.3d at 939.

Here, the Court concludes that neither the Law Firm nor the Clerk of the State Court had sufficient dominion or control over the transferred funds to be considered initial transferees. In order to be considered an initial transferee, a party must have "full dominion and control over them for one's own account, as opposed to receiving them in trust or as agent for someone else." *Rupp*, 95 F.3d at 942 (quoting *Richardson v. FDIC (In re M. Blackburn Mitchell Inc.)*, 164 B.R. 117, 127 (Bankr. N.D. Cal. 1994)); *Bailey v. Big Sky Motors, Ltd. (In re Ogden)*, 314 F.3d 1190, 1204 (10th Cir. 2002). Neither the Law Firm nor the Clerk of the State Court were "free to invest [the funds] in lottery tickets or uranium stocks" or any other endeavor. *Bonded*, 838 F.2d at 894. The Court is not persuaded by High Speed's argument to the contrary.

High Speed also argues that Lindsey is the initial transferee. The Tenth Circuit has rejected the argument that control over a debtor as transferor is enough to satisfy the dominion and control test, *see Rupp*, 95 F.3d at 941, but High Speed argues that Lindsey's control over the funds while they were in the Law Firm's trust account is sufficient. This

Court disagrees. The *Rupp* court quoted extensively from *Richardson*, which held that a party must actually receive funds to be considered a transferee:

The Court believes that the proper focus when analyzing who is a transferee, is the flow of funds. In order to be an initial transferee, one must be a transferee in the ordinary sense of the word. A transfer that may be avoided under applicable sections of the Bankruptcy Code takes place from the debtor to some entity. Thus, receipt of the transferred property is a necessary element for that entity to be a transferee under § 550. Simply directing a transfer, i.e., such as by directing a debtor to transfer its funds, is not enough. . . .

This Court does not disagree that in order to be a transferee one must obtain dominion and control over funds. But that does not mean that merely because one has dominion and control of funds (as principals of companies ordinarily do) that one is also a transferee. Rather, in order for there to be a transfer of the debtor's funds, the debtor must dispose of or part with them, that is, such funds must actually leave the debtor. In order to be a transferee of the debtor's funds, one must (1) actually receive the funds, and (2) have full dominion and control over them for one's own account, as opposed to receiving them in trust or as agent for someone else. . . .

Rupp, 95 F.3d at 942 (quoting *Richardson*, 164 B.R. at 126-28).

Here, the transferred funds did not initially belong to Lindsey; they belonged to the Debtor. When Lindsey caused the Debtor to wire the funds to the Law Firm, it was the Law Firm, not Lindsey, that received the Debtor's funds. Lindsey was not the payee of the checks issued by the Law Firm or the Clerk of the State Court. Under Tenth Circuit precedent, because Lindsey did not receive the funds, he cannot be considered an initial transferee.

In *Bonded*, the Seventh Circuit stated: "When A gives a check to B as agent for C, then C is the 'initial transferee'; the agent may be disregarded." 838 F.2d at 893. Of course, *Bonded* involved facts where the agent (C) received the funds. *Bonded* did not address the facts involved here, where A (Debtor, controlled by Lindsey) wired funds to B (Law Firm), which delivered a check to C (State Court), which delivered a check to D (High Speed). B may have been acting as an agent for Lindsey (X), but following the "flow of funds," see *Richardson*, 164 B.R. at 126, quoted in *Rupp*, 95 F.3d at 942, does not lead one from A to X. Following the party who controls the transfer, or the party who controls the entity who made or received the transfer, rather than following the flow of the transferred funds themselves, contradicts *Richardson* and *Rupp*.

As the Tenth Circuit held in *Bailey*, “Rather than focusing on the cause of the disputed transfer or the party that benefitted from it,” *Rupp* requires that courts focus on the party that actually received the funds and had sufficient dominion and control over them for the party’s own account. 314 F.3d at 1204. Here, the first party to actually receive the funds, with sufficient dominion and control over them to use them for its own account, was High Speed. Lindsey is the entity for whose benefit the transfer was made – a separate and, some courts have held, mutually exclusive category of liability. *See Bonded*, 383 F.2d at 895-96.

The Court is not without sympathy for High Speed’s position. As the *Bailey* court stated:

We acknowledge that, on first blush, it may seem inequitable to require Big Sky [the party held to be the initial transferee, which had received funds from the debtor by way of a conduit] to repay funds to the estate when it was Mr. Ogden’s [the debtor’s] deception that caused the funds to be released in the first place. While this turn of events is unfortunate, we note that deceptive debtors often leave parties without the benefit of the use of their assets. Indeed, Mr. Ogden’s other investors actually provided the funds in dispute in this case.

314 F.3d at 1205. Here, the Debtor, controlled by Lindsey, left parties without the benefit of the use of the Debtor’s assets, which may themselves have been obtained from other investors through fraudulent means.²

It does not appear that High Speed was aware that the funds originated from the Debtor, rather than from Lindsey himself. But, the Bankruptcy Code provides for strict liability of initial transferees. As the Tenth Circuit explained:

In most, if not all, bankruptcy cases someone is going to be injured. This is especially true when there has been a fraudulent transfer of the debtor’s funds. However, Congress has already balanced the equitable considerations under § 550 by distinguishing between initial transferees, who are strictly liable, and subsequent transferees, who are not strictly liable.

² The Debtor’s petitioning creditor alleges that the Debtor’s funds were obtained from him by fraud. That allegation has not been proven in this case, and the Court need not decide whether that allegation is true. The Court merely raises the possibility that High Speed may not be Lindsey’s only fraud victim.

Rupp, 95 F.3d at 944. An appeal to equity cannot cause this Court to ignore applicable Bankruptcy Code and Tenth Circuit precedent compelling a conclusion that High Speed, not Lindsey, is the initial transferee.

CONCLUSION

For the reasons discussed above, the Court concludes that High Speed is the initial transferee. The Trustee's Motion will be granted, and High Speed's Motion will be denied, by separate judgment.

Dated this _____ day of July, 2013.

BY THE COURT:

Howard R. Tallman, Chief Judge
United States Bankruptcy Court