SIGNED this 28 day of October, 2011.

JAMES P. SMITH
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

In the Matter of:	:	Chapter 7
	:	
TOMMY L. GRIFFIN, JR.,	:	
	:	
Debtor	:	Case No. 11-51603 JPS
	:	
	:	
THE CINCINNATI INSURANCE COMPANY,	:	
	:	
Plaintiff	:	
	:	
v.	:	
	:	
TOMMY L. GRIFFIN, JR.,	:	Adversary proceeding No. 11-5090
Defendant	:	

BEFORE

JAMES P. SMITH
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For Plaintiff:

DeWitte Thompson
Jeff B. Slagle
Thompson & Slagle, LLC
12000 Findley Road, Suite 250
Duluth, Georgia 30097

Jarrod W. Stone
Jeffrey S. Price
Manier & Herod
One Nashville Place, Suite 2200
150 Fourth Avenue North
Nashville, Tennessee 37219

For Defendant:

Robert M. Matson
Akin, Webster & Matson, P.C.
P.O. Box 1773
Macon, Georgia 31202

ORDER

This matter comes to the Court on Debtor-Defendant's ("Debtor") motion to dismiss.

Debtor Tommy L. Griffin, Jr. filed this voluntary Chapter 7 case on May 23, 2011. The Cincinnati Insurance Company, Plaintiff ("Cincinnati"), filed a complaint to determine the dischargeability of its claim against Debtor. In his answer, Debtor generally denied the allegations of the complaint.

Pursuant to F. R. Civ. P. 12(b)(6), incorporated into this adversary proceeding by Bankruptcy Rule 7012(b), Debtor seeks dismissal of Cincinnati's complaint on the grounds that the complaint fails to state a claim upon which relief can be granted. In Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L.Ed.2d 1929 (2007) and Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009), the Supreme Court revised the standards upon which a motion to dismiss should be considered. In Ashcroft, the Court held:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." Id., at 570, 127 S. Ct. 1955. A claim has factual plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Id., at 556, 127 S. Ct. 1955. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawful. Ibid. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" Id., at 557, 127 S. Ct. 1955 ("[omitted]").

556 U.S. at ____, 129 S. Ct. at 1949.

Assuming the facts asserted in the complaint are true, the following facts are relevant

to this motion. At all relevant times, Debtor was the president of Tommy L. Griffin Plumbing and Heating Company ("Company"). On or about February 26, 2008, Debtor (as president of the Company and individually as an "Indemnitor") and others signed an "AGREEMENT OF INDEMNITY" as an inducement of Cincinnati's issuance of surety bonds on behalf of Company. That Agreement provides, in pertinent part:

> TRUST FUND
>
> FOURTH: The [Company] and Indemnitors agree and hereby expressly declare that all funds due or to become due under any contract covered by a Bond are Trust Funds, whether in the possession of the [Company] or another, for the benefit and payment of all persons to whom the [Company] incurs obligations in the performance of such contract, for which [Cincinnati] would be liable under the Bond. If [Cincinnati] discharges any such obligation, it shall be entitled to assert the claim of such person to the Trust Funds. [Company] shall, upon demand of [Cincinnati] and in implementation of the Trust or Trusts herein created, open an account or accounts with a bank or similar depository designated by [Company] and approved by [Cincinnati], which account or accounts shall be designated as a Trust Account or Accounts for the deposit of such Trust Funds, and shall deposit therein all monies received pursuant to said contract or contracts. Withdrawals from such account or accounts shall be by check or similar instrument signed by [Company] and must be countersigned by a representative of [Cincinnati]. Said Trust or Trusts shall terminate on the payment by [Company] of all the contractual obligations for the payment of which the Trust or Trusts are hereby created or upon expiration of twenty (20) years from the date hereof, whichever shall first occur.

Thereafter, Cincinnati issued bonds on a number of projects on which Company was working. It is alleged that Debtor (individually and on behalf of Company) received funds under these contacts but failed to use some or all of those funds to pay the obligations Company incurred in performance of the contracts. It is further alleged that

> "Debtor individually and on behalf of the [Company] converted, improperly diverted, possibly embezzled or otherwise misappropriated portions of the Trust Funds for uses other than payment of persons/entities to whom the [Company] incurred obligations in the performance [of] the contracts covered by the Bonds. . ."

Complaint, Para. 11. It is further alleged that Debtor admitted, at the meeting of creditors, "that, at minimum, he improperly converted such funds." Complaint, Para. 11.

Cincinnati contends that, as a result of Debtor's failure to use the trust funds to pay claims on contacts covered by the bonds, Cincinnati paid over 50 claims totaling in excess of $3,219,277.29, for which Debtor is liable under the Indemnity Agreement. Cincinnati contends that this claim arises as a result of Debtor's "fraud or defalcation while acting in a fiduciary capacity" and is therefore nondischargeable under 11 U.S.C. § 523(a)(4).

As this Court has previously held:

> To prevail on a nondischargeablity claim under section 523(a)(4) "for fraud or defalcation while acting in a fiduciary capacity", the plaintiff must prove the existence of a technical trust that was created voluntarily by contract, often referred to as an express trust, or a trust created by statute that imposes fiduciary duties. The trust relationship must arise prior to the fraudulent act. The term "fiduciary" is not construed expansively. Involuntary trusts such as constructive or resulting trusts do not satisfy section 523(a)(4) because the act which created the debt simultaneously created the trust relationship. Guerra v. Fernandez-Rocha (In re Frenandez-Rocha), 451 F.3d 813, 816 (11th Cir. 2006); Quaif v. Johnson, 4 F.3d 950, 953-54 (11th Cir. 1993); Karl v. Stalnaker (In re Stalnaker), 408 B.R. 440, 446 (Bank. M.D. Ga. 2009), aff'd 2010 WL 1258018 (M.D. Ga., Mar. 26, 2010).
>
> While federal law determines whether a fiduciary relationship exists, reference to state law is relevant to determine whether a trust obligation exists. Schwager v. Fallas (In re Schwager), 121 F.3d 177, 186 (5th Cir. 1997); Blashke v. Standard (In re Standard), 123 B.R. 444, 453 (Bankr. N.D. Ga. 1991); Betz v. Gay (In re Gay), 117 B.R. 753, 754 (Bankr. M.D. Ga. 1989).

Davis v. Conner (In re Conner), 2010 WL 1709168 (Bankr. M.D. Ga., Apr. 23, 2010).

Further, in Fernandez-Rocha, the Eleventh Circuit, citing Quaif, explained:

> Even if the fiduciary relationship exists prior to the act that created the

> debt, the next question under §523(a)(4) is whether there was a "defalcation" while acting in a fiduciary capacity. In Quaif, this Court further explained that " '[d]efalcation' refers to a failure to produce funds entrusted to a fiduciary," but that "the precise meaning of 'defalcation' for purposes of § 523 (a)(4) has never been entirely clear." Id. at 955. Quaif observed that the best analysis of "defalcation" is that of Judge Learned Hand in Central Hanover Bank v. Herbst, 93 F.2d 510 (2d Cir. 1937), in which "Judge Hand concluded that while a purely innocent mistake by the fiduciary may be dischargeable, a 'defalcation' for purposes of this statute does not have to rise to the level of 'fraud,' 'embezzlement,' or even 'misappropriation.'" Quaif, 4 F.3d at 955 (citing Central Hanover, 93 F.2d at 512). Indeed, "[s]ome cases have read the term even more broadly, stating that even a purely innocent party may be deemed to have committed a defalcation for purposes of § 523 (a)(4)." Id.

451 F.3d at 817.

In his motion, Debtor does not dispute that an express trust was created by the fourth paragraph of the Agreement. Rather, Debtor argues that he is not a fiduciary under the trust because the Agreement imposes no fiduciary obligations on him. He argues that the Agreement imposes the fiduciary duties only on the Company. Specifically, he points to the fact that the fourth paragraph of the Agreement imposes only on the Company the obligation to open a bank account to hold the trust funds and to execute checks or instruments to disburse the funds.

In support of his argument, Debtor relies on the case of SureTec Ins. Co. v. Munson (In re Munson), 2011 WL 845846 (Bankr. C.D. Cal. Mar. 9, 2011). In that case, the debtors and their plumbing company had signed an indemnity agreement which contained a provision establishing a trust for monies due under plumbing contracts covered by bonds issued by SureTec. When the plumbing company failed, SureTec was forced to pay claims under the bonds. The debtors filed bankruptcy and SureTec sought to have its claim declared

nondischargeable under section 523(a)(4).

Although the debtors had signed an indemnity agreement which contained language creating a trust for the funds paid on the relevant contracts, the Munson court, without explanation, held that the agreement did not impose fiduciary duties upon the individual debtors. The court also rejected the argument that the debtors were fiduciaries because they were alter egos of their company, recognizing that section 523(a)(4) requires an express trust, as opposed to a trust *ex maleficio*. This Court declines to follow the Munson decision as it relates to the finding that the language of the agreement did not impose fiduciary duties.

Under Georgia law:

> '[T]he cardinal rule in construing a trust instrument . . . is to discern the intent of the settlor and to effectuate that intent within the language used and within what the law will permit. [Cits.]' Miller v. Walker, 270 Ga. 811, 815, 514 S.E.2d 22 (1999).

Smith v. Hallum, 286 Ga. 834, 691 S.E.2d 848, 849 (2010). The language of the Agreement makes it clear that the parties intended Company and each of the Indemnitors, including Debtor, individually, to be charged with ensuring that the receipts under the contacts would be properly used. In the paragraph creating the trust, Debtor, as an Indemnitor, specifically agreed and declared that the funds due under the contracts were trust funds to be held for payment of claims arising under the contracts. In cases where, in the paragraph of the agreement creating the trust, the debtor, by name, agrees to the creation of the trust, courts have unanimously found that a fiduciary relationship arose. See Mountbatten Sur. Co. v. McCormick (In re McCormick), 283 B.R. 680 (Bankr. W.D. Pa. 2002); Int'l Fidelity Ins. Co. v. Fox (In re Fox), 357 B.R. 770 (Bankr. E.D. Ark. 2006); Favre v. Lyndon Property Ins. Co.,

2008 WL 3271100 (S.D. Miss. Aug,. 6, 2008), aff'd 342 Fed. Appx. 5 (2009); The Cincinnati Ins. Co. v. Foy (In re Foy), 2010 WL 2584193 (Bankr. D. Kan. June. 21, 2010).

By expressly agreeing that the funds were trust funds to be used only for payment of claims arising under the contacts covered by the bonds, Debtor assumed the fiduciary duty of ensuring that the funds were used for that purpose only. The fact that Company, and not Debtor, was required to open an account to hold the funds and to write checks was nothing more than a practical recognition that the funds should be held and disbursed by one party. The delegation of those duties to Company did not detract from Debtor's independent fiduciary duty to ensure that the funds were properly used.

Cincinnati's complaint alleges that Debtor, individually, was involved in the conversion, improper diversion, possible embezzlement or otherwise misappropriation of the funds. If proven, such activity would certainly constitute a "defalcation" and Cincinnati's nondischargebility claim would be sustained. Accordingly, Cincinnati has stated a claim for which relief may be granted and Debtor's motion to dismiss is denied.

** END OF DOCUMENT **