UNITED STATES BANKRUPTCY COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

In re:
James and Regina Hellesen, BK No. 97-11695-MWV
Debtors Chapter 13

ORDER

The Court has before it the Debtors' Motion to Avoid Judicial Liens on Exempt Property Pursuant to Section 522(f) and Family Bank F.S.B.'s two motions: (1) an Objection to Debtors' Claims of Exemption and (2) a Motion to Dismiss or to Convert Chapter 13 Case. These three motions and their responses frame the issue at the heart of this litigation: Family Bank, F.S.B. ("Family Bank") contends that certain of the Debtors' property actually belongs to Family Bank and that the Debtors cannot claim this property as property of the estate or claim exemptions on it. Specifically, Family Bank asserts that the Debtors hold assets in a constructive trust for its benefit because Regina Hellesen embezzled money from Family Bank and used that money to make payments on, or buy, certain assets. The Debtors maintain otherwise: they listed Family Bank as an unsecured creditor for $120,000 on Schedule F of their bankruptcy petition,[1] they claim certain assets, including two retirement plans, as exempt on Schedule C of their petition, and they moved to avoid the judicial liens held by Family Bank on those assets. As more specifically set out below, the Court finds that $9,898.80 plus the principal portion of the mortgage payments described in Part C herein are subject to a constructive trust in favor of Family Bank on the real estate and $5,000 is subject to a constructive trust in favor of Family Bank in the Debtors' IRA. In addition, the Court denies without prejudice Family Bank's motion to dismiss or convert and overrules Family Bank's objection to the

[1] This debt is listed as owed solely by Regina Hellesen.

Debtors' claims of exemption with respect to both of the Debtors' retirement accounts. As more fully outlined in this decision, the Court defers its ruling on the Debtors' Motion to Avoid Judicial Liens and Family Bank's Objection to the [remaining] Debtors' Claims of Exemption until it receives Family Bank's statement and amended motions.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). These matters are core proceedings to which this Court has jurisdiction in accordance with 28 U.S.C. § 157(b).

FACTS

During the course of her employment with Family Bank, Regina Hellesen was in charge of handling and maintaining retirement, IRA and Kehoe accounts for Family Bank's customers. In September 1996, Regina Hellesen was terminated from her position with Family Bank after admitting to misappropriating funds. In October 1996, Family Bank commenced a civil action against Regina Hellesen and obtained judicial liens against her and her husband's property. On August 18, 1997, Regina Hellesen pleaded guilty to embezzling funds from Family Bank and was ordered to pay $149,844.48 in restitution by the District Court for the District of Massachusetts.

The Debtors purchased their home located at 219 Oakridge Road, Plaistow, New Hampshire ("Property") on December 12, 1991, and paid $28,192.57 as a down payment. Family Bank claims the Debtors obtained $9,898.80, or 35.11% of that amount,[2] from funds Regina Hellesen embezzled from Family Bank.

James and Regina Hellesen ("Debtors") filed their Chapter 13 bankruptcy petition, including completed schedules, and a Chapter 13 plan on May 7, 1997. On Schedule C of their petition, the Debtors

[2] The remainder of the down payment, $18,293.77, was from the net proceeds from the sale of the Debtors' prior residence.

claimed a homestead exemption in their Property. On July 31, 1997, Family Bank timely filed a proof of claim in the amount of $149,844.48, the amount of its judgment for restitution ordered by the Massachusetts District Court. Shortly thereafter, the Debtors filed a Motion to Avoid Judicial Liens on Exempt Property Pursuant to Section 522(f) ("Motion to Avoid Liens"), seeking to avoid judicial liens held by Family Bank. Family Bank objected. Before the hearing could be held on the Debtors' Motion to Avoid Liens, Family Bank filed an Objection to Debtors' Claims of Exemption. Its objection claimed that, with regard to certain disputed assets traceable to funds Mrs. Hellesen embezzled from Family Bank, the Debtors hold those assets in a constructive trust for the benefit of Family Bank.

DISCUSSION

I. Family Bank's Motion to Dismiss or Convert.

The Debtors filed a general objection, alleging that their Chapter 13 plan was filed in good faith and is feasible. (Debtors' Obj. to Family Bank's Mot. to Dismiss or Convert.) Family Bank, however, asserts that the Debtors' plan was filed in bad faith for the following reasons: (1) the plan is not feasible; (2) the Debtors' expenses are understated; (3) the Debtors had an opportunity to settle with Family Bank, but did not; (4) the Debtors continued to accumulate debt, by incurring credit card debt and taking a vacation, when they knew filing bankruptcy was imminent; and (5) the Debtors did not file Chapter 7 because they wanted to forestall their creditors.

Family Bank asserts that, under the factors in In re Love, 957 F.2d 1350 (7th Cir. 1992), the Debtors' case should be dismissed for bad faith. The Court, however, denies Family Bank's motion without prejudice. First, whether the plan is feasible and whether the Debtors' expenses are understated are issues for confirmation. The Debtors have not filed an amended plan or schedules. Second, the Court in Cardillo v. Andover Bank (In re Cardillo), 169 B.R. 8 (Bankr. D.N.H. 1994), noted that it is the movant's burden to show lack of good faith, there is no presumption of bad faith, and many of the factual allegations alleged in Cardillo, as in this case, are, more properly, issues for confirmation. Id. at 10-11.

II. The Debtors' Motion to Avoid Liens.

Pursuant to Bankruptcy Code section 522(f), see 11 U.S.C.A. § 522(f) (West 1988 & Supp. 1998) (providing that a debtor may avoid a nonpossessory, nonpurchase-money security interest or judicial lien which impairs an exemption), and Bankruptcy Rules 4003(d), see FED. R. BANKR. P. 4003(d) (Bankruptcy Rule 9014 governs motions to avoid liens), and 9014 (lien avoidance is a contested matter to be requested by motion), the Debtors move to avoid seven judicial liens held by Family Bank, all recorded outside the ninety-day preference period under section 547 of the Bankruptcy Code. See 11 U.S.C.A. § 547(b) (West 1988 & Supp. 1998) (authorizing a trustee to avoid a transfer if five conditions are met, one of which is that the transfer occurred during the ninety days immediately preceding the commencement of the bankruptcy case). Those liens are as follows:

Asset	**Value**
Family Bank CD #333-0016207	$641.31
Community Bank checking account #000-2201674	$1,437.23
Community Bank checking account #000-2201593	$3,656.84
Community Bank savings account #000-6202020	$10,264.45
1987 Chevrolet Nova automobile	$400
1994 Ford Explorer automobile, subject to a purchase money security interest of $18,836.10	$20,000
219 Oakridge Road, Plaistow, NH, held by the Debtors as joint tenants, and subject to a purchase money mortgage of $141,000	$162,000

(See Debtors' Mot. to Avoid Liens.) In its response, Family Bank denied obtaining a judicial lien against property of Regina Hellesen at Family Bank. (Opposition of Family Bank, FSB to Mot. to Avoid Judicial Liens at 2.) Further, Family Bank requested an evidentiary hearing, asserting that any assets held by the Debtors in a constructive trust for the benefit of Family Bank were not property of the estate

pursuant to section 541, see 11 U.S.C.A. § 541 (West 1988 & Supp. 1998), and were not subject to lien avoidance pursuant to section 522(d) and (f), see § 522(d) and (f).

III. Family Bank's Objection to the Debtors' Claims of Exemption.

Pursuant to Bankruptcy Rule 4003, see FED. R. BANKR. P. 4003(b) ("any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors"), Family Bank timely objected to the Debtors' claims of exemption on certain disputed assets ("Disputed Assets"), alleging that some or all of these assets are held by the Debtors in a constructive trust for the benefit of Family Bank. The Debtors claimed these assets, listed below in the column "Exemption Claimed," as exempt on Schedule C of their bankruptcy petition. (See Debtors' Voluntary Pet., Schedule C.) The Disputed Assets are listed in the following table:

Disputed Asset	**Claimant**	**Scheduled Value**	**Exemption Claimed**
219 Oakridge Road, Plaistow NH	Joint	$162,000	$21,000
1994 Ford Explorer	Joint	$20,000	$1,163.90
Family Bank checking account No. 88-0076419	Joint	$288.55	$190.35
Family Bank checking account No. 022-0481	Joint	$161.05	$161.05
Family Bank checking account No. 222-061966	Joint	$231.27	$231.27
Community Bank checking account No. 000-2201674	Joint	$1,439.43	$1,439.43
Community Bank checking account No. 000-2201674	Joint	$3,662.45	$3,662.45
Community Bank savings account No. 000-6202020	Joint	$10,288.10	$10,288.10
Fleet Bank savings account No. 939-1446931	Joint	$27.23	$27.23

Family Bank savings account No. 939-1446931	Joint	$.12	$.12
Family Bank Employee Stock Ownership Plan	Wife	$48,800	$48,800
Massachusetts State Employees Retirement Plan	Husband	$35,687.21	$35,687.21

To begin, the Court holds that both the Debtors' retirement plans are fully exempt. With regard to Mrs. Hellesen's Family Bank Employee Stock Ownership Plan ("ESOP" or "retirement plan"), the Court finds that the ESOP is an ERISA-qualified plan as defined by 26 U.S.C. § 401(a),[3] see 26 U.S.C.A. § 401(a) (West 1986 & Supp. 1998) (setting forth the requirements for qualified trusts), and is not property of the bankruptcy estate. When Regina Hellesen was terminated from her position with Family Bank on October 1, 1996, she had a 100% vested interest in her retirement plan. Between the date of her termination and the date of the filing of the bankruptcy petition, Regina Hellesen made no application to Family Bank for a voluntary cash-out of her interest in the plan. Paragraph 10.6 of the plan, "Voluntary and Involuntary Cash-Outs," provides that:

> if the Participant, upon termination of Service for any reason other than retirement, death, of Total Disability, does not consent to the payment of the vested portion of the Participant's Account, and if the value of such Account exceeds $3,500 on the Valuation Date immediately following the Employee's termination of Service (or as of any prior Valuation Date),[4] the Committee shall direct the Trustee to place the then value of such Account in one (1) or more investment accounts permitted under the Plan in trust for the named Employee for distribution commencing on the Valuation date immediately following his attainment of age 65 (or death, if earlier). The Account and all accumulated interest shall be paid to the Employee at the time he attains his Normal Retirement Age.

(ESOP Document at ¶ 10.6). This Court follows its holding in In re Damast, 136 B.R. 11 (Bankr. D.N.H. 1991), in which it rejected a "control" argument, stating that "[c]ontrol of this kind [that the debtor

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[3] The plan is also tax exempt pursuant to 26 U.S.C. § 501(a) and (c). See 26 U.S.C.A. § 501(a) and (c) (West 1986 & Supp. 1998) (providing that certain organizations under subsection (c) shall be exempt under subsection (a)).

[4] Regina Hellesen's vested interest exceeded this amount.

may terminate and cash out her plan] is not tantamount to the power to assign or alienate plan benefits in contravention of ERISA's statutory restrictions." Further, although the funds are not part of the plan per se, they are not available until the Debtor until she reaches her retirement age. Therefore, the Court overrules Family Bank's objection: Regina Hellesen's retirement plan is not property of the estate and is exempt.

Regarding Mr. Hellesen's Massachusetts State Employees Retirement Plan, the Court finds that this, too, is not property of the estate and is exempt. In doing so, the Court follows the holding in In re Silviera, 186 B.R. 168 (Bankr. E.D. Mass. 1995), in which the court, citing Whetzal v. Alderson, 32 F.3d 1302 (8th Cir. 1994), found that, since the Debtor had no right to receive benefits under a state-created public employee retirement plan unless he quit his job, his benefits were not property of the estate. At the final evidentiary hearing, Family Bank agreed that Mr. Hellesen's plan contained the Massachusetts anti-alienation provision required under Chapter 32 of the Massachusetts General Laws. See MASS. GEN. LAWS ch. 32, § 16 (1998). For the same reasons as outlined above, the Court finds that Mr. Hellesen's retirement plan is exempt under the terms and provisions of ERISA, and overrules Family Bank's objection.

Regarding the remaining claims of exemption, the Court, as outlined more fully below, will defer its ruling until it receives Family Bank's amended motion.

IV. The Constructive Trust.

Family Bank asserts that the evidence presented at the evidentiary hearings establishes by a preponderance of the evidence that certain of the misappropriated sums are directly traceable to mortgage payments or down payments on the Debtors' Property. Thus, Family Bank alleges that since the Debtors hold the Property in a constructive trust for the benefit of Family Bank, it is not property of the estate and the Debtors may not claim an exemption on it. The Debtors respond that, to the extent any of their expenses exceeded their monthly disposable income, they always paid their mortgage first; thus, the Debtors hold neither all nor part of their Property in a constructive trust for the benefit of Family Bank.

Whether a constructive trust exists is a matter of state, not federal, law. In the case at bar, the

Debtors filed bankruptcy in New Hampshire, yet the misappropriations occurred in Massachusetts. Therefore, as a threshold matter, since both New Hampshire and Massachusetts have an interest in this matter, the Court must first determine which state's law applies.

A. Choice of Law.

In choice of law situations, the forum state determines what law is to be used. Therefore, New Hampshire law determines whether this Court should apply New Hampshire or Massachusetts law to the issue of whether there is a constructive trust. See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941); American Title Ins. Co. v. East West Fin. Corp., 959 F.2d 345, 348 (1st Cir. 1992).

The law of whether a constructive trust exists is substantive, since the imposition of one is an equitable remedy. See Keeton v. Hustler Magazine, Inc., 549 A.2d 1187, 1191 (N.H. 1988) (in choice of law situations, the court must first determine whether the matter is substantive or procedural). Next, the Court must determine whether the New Hampshire and Massachusetts laws on constructive trust conflict. Id. The law of New Hampshire on constructive trusts is as follows:

> Parties seeking to prove a constructive trust "take upon themselves a heavy burden of proof," Patey v. Peaslee, 101 N.H. 26, 30, 131 A.2d 433, 436 (1957), as they must demonstrate by clear and convincing evidence that a constructive trust is warranted. Clooney v. Clooney, 118 N.H. 754, 758, 394 A.2d 313, 316 (1978). The imposition of a constructive trust is appropriate when a plaintiff produces clear and convincing evidence that property has been transferred by one person to another, the transferee was in a confidential relationship with the transferor, and the transferee would be unjustly enriched were he or she allowed to retain the property. See Cornwell v. Cornwell, 116 N.H. 205, 209, 356 A.2d 683, 686 (1976); Kachanian v. Kachanian, 100 N.H. 135, 137, 121 A.2d 566, 568 (1956).

Salisbury v. Lowe, 663 A.2d 611, 612 (N.H. 1995). In comparison, Massachusetts law on this issue is as follows:

> A constructive trust is one means of making a breaching fiduciary accountable for any profits he may have obtained as a result of his breach. This mechanism is available if the property acquired through the wrongful disposition of trust property is still held by the wrongdoer and can be traced. Alternatively, if the beneficiary is simply seeking to restore the dollar value of what was taken and not seeking what was gained by the wrongdoer, the beneficiary may enforce an equitable lien upon the product of the wrongful disposition of

> trust property that may still be held by the trustee and can be traced. "The persons interested in the trust estate have the option of taking the profits, or of taking interest." Id. See also RESTATEMENT (SECOND) OF TRUSTS § 202. "A constructive trust may be said to be a device employed in equity, in the absence of any intention of the parties to create a trust, in order to avoid the unjust enrichment of one party at the expense of the other where the legal title to the property was obtained by fraud or in violation of a fiduciary relation. . . ." Barry v. Covich, 332 Mass. 338, 342 (1955). It "arises when the duty to make restitution arises," which is created at the moment title to property is wrongfully acquired. 5 AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS § 462.4 (4th ed. 1989). See also LORING: A TRUSTEE'S HANDBOOK, § 3.3(3) at 23 (7th ed. rev., Charles E. Rounds, Jr. & Eric P. Hayes 1994) ("If a person comes into possession of property as a result of fraud, . . . or some other such intentional wrong . . . he will hold the property not for himself . . . but as a constructive trustee for the person who, but for the wrong, would have received the property.").

Boston Safe Deposit and Trust Co. v. Seifert, 6 Mass. L. Rptr. 410, 1997 WL 64043, at *3 (Mass. Super. Jan. 29, 1997); see also Collins v. Guggenheim, 631 N.E.2d 1016, 1017 (Mass. 1994) ("Absent fraud, breach of a fiduciary duty or other misconduct, we shall not impose a constructive trust.") (citing Barry v. Covich, 124 N.E.2d 921 (Mass. 1955)); Fortin v. Roman Catholic Bishop of Worcester, 625 N.E.2d 1352, 1357-58 (Mass.) ("Under Massachusetts law, a court will declare a party a constructive trustee of property for the benefit of another if he acquired the property through fraud, mistake, breach of duty, or in other circumstances indicating that he would be unjustly enriched.") (citing Nessralla v. Peck, 532 N.E.2d 685 (1989)), cert. denied, 511 U.S. 1142 (1994).

The Court agrees with Judge Lavian in Kagan v. Martin that "[a]n examination of Massachusetts law and New Hampshire law, however, reveals that both states' laws are similar on the relevant issues." Kagan v. Martin (In re Tufts Elecs., Inc.), 34 B.R. 455, 457 n.2 (Bankr. D. Mass 1983). The Court also notes that the First Circuit has stated that "[w]hen a choice-of-law question has been reduced to the point where nothing turns on more precise refinement, that should be the end of the matter." Fashion House, Inc. v. K Mart Corp., 892 F.2d 1076, 1092 (1st Cir. 1989) (citing Hart Eng'g Co. v. FMC Corp., 593 F.Supp. 1471, 1477 n. 5, 1481 (D.R.I. 1984)). Therefore, the Court will apply Massachusetts law to this constructive trust issue. By doing so, the Court notes that Massachusetts is protected by the use of its laws in determining whether misappropriations that occur within its borders constitute constructive trusts. At any

rate, since the laws of New Hampshire and Massachusetts are so similar, choosing Massachusetts law imposes no real effect on New Hampshire's governmental interest that its laws be applied in this situation.

B. Constructive Trusts under Massachusetts Law.

The law on constructive trusts in Massachusetts is clear. As the following excerpts from cases illustrate, the Court may impose a constructive trust under Massachusetts law upon one who acts as a fiduciary and misappropriates traceable funds.

The Massachusetts District Court has stated that:

> A constructive trust may be said to be a device employed in equity, in the absence of any intention of the parties to create a trust, in order to avoid the unjust enrichment of one party at the expense of the other where the legal title to the property was obtained by fraud or in violation of a fiduciary relation or where information confidentially given or acquired was used to the advantage of the recipient at the expense of the one who disclosed the information. Massachusetts Wholesalers of Malt Beverages, Inc. v. Attorney General, 409 Mass. 336, 342, 567 N.E.2d 183 (1991) (quoting Barry v. Covich, 332 Mass. 338, 342, 124 N.E.2d 921 (1955)).

Federal Trade Comm'n v. American Inst. for Research and Dev., 219 B.R. 639, 645 (D. Mass. 1998); see also Branch v. Federal Deposit Ins. Corp., 825 F. Supp. 384, 411 (D. Mass. 1993) ("When property has been acquired in circumstances that the holder of the legal title may not in good conscience obtain the beneficial interest, equity converts him into a trustee.") (citing Broomfield v. Kosow, 212 N.E.2d 556 (Mass. 1965), and quoting Beatty v. Guggenheim Exploration Co., 122 N.E. 378 (N.Y. 1919) (Cardozo, J.) ("[C]onstructive trust is the formula through which the conscience of equity finds expression."). Further, the Court reiterates that "[a]bsent fraud, breach of a fiduciary duty or other misconduct," Collins, 631 N.E.2d at 1017, the Court may not impose a constructive trust. See also Feinman v. Lombardo, 214 B.R. 260, 265 (D. Mass. 1997) ("evidence of fraud, breach of fiduciary duty, or other misconduct on the part of the defendants" must be shown). Finally,

> [w]hen trust property has been mingled with the trustee's personal property, a constructive trust may be enforced on the mingled property "in such proportion as the trust

> property so mingled bears to the whole of the mingled property." Id. at comment h. See also Mickelson v. Barnet, 390 Mass. 786, 790 (1984) (embezzler of investor's funds would become "constructive trustee of the money and its traceable proceeds"); Sullivan v. Sullivan, 321 Mass. 156, 158 (1947) (refusing to trace money belonging to guardian's ward into real estate because of the lack of proof as to "what proportion of the price of Sullivan's title consisted of the plaintiff's money").

Boston Safe Deposit and Trust Co., 1997 WL 64043, at *3 (Mass. Super. Jan. 29, 1997).

In addition, section 541 is no defense to the Court's ability to apply the remedy of a constructive trust on the Property. See, e.g., 11 U.S.C.A. § 541 (West 1988 & Supp. 1998). Constructive trust property never becomes property of the estate because it belongs to someone else.

C. Misappropriated Funds.

Family Bank asserts that, where the funds are "fairly traceable" to Regina Hellesen's misappropriations, the Debtors hold the Property in a constructive trust for the benefit of Family Bank. The Court first notes that Family Bank carries the burden of proof and must prove by a preponderance of the evidence that Regina Hellesen used misappropriated funds to pay for her down payment and mortgage payments. Lewis v. Mills, 593 N.E.2d 1312, 1314 (Mass. 1992).

As a threshold matter, the Court first finds that Regina Hellesen had a confidential, fiduciary relationship with Family Bank. She possessed and controlled her own teller identification number and was responsible for handling and maintaining retirement, IRA and Kehoe accounts for Family Bank's customers.

Next, the Court finds that Regina Hellesen misappropriated $59,458.34, which may be subject to a constructive trust. Regina Hellesen allocated these funds as follows: $44,559.54 on the Hellesen's mortgage with Family Bank, $9,898.80 towards the Hellesen's down payment on their home, and $5,000 for their IRA; further, the Court finds that these monies are fairly traceable to her misappropriations.

To begin, counsel for Family Bank, after the Court's hearings on this matter, filed a memorandum outlining exactly which funds it considered traceable in Exhibit 35 submitted at the evidentiary hearing. (Mem. of Family Bank Regarding Constructive Trust at 4-6 and Exh. A.) In its memorandum, Family Bank

first alleges that Regina Hellesen misappropriated funds from a customer's account in August 1991 to produce a $5,000 down payment on her house. Second, Family Bank asserts that Regina Hellesen misappropriated an additional $7,402.27 in September 1991, which she then used at the closing on the Property in December 1991.[5] Third, Family Bank asserts that between October 1991 and September 1996, Regina Hellesen misappropriated $36,243.55 in her customers' funds which she then used to pay her mortgage. (Mem. of Family Bank Regarding Constructive Trust at 8.)

At the evidentiary hearings, Family Bank offered the testimony of Nina Calkins, the Assistant Vice President and Security Compliance Officer for Family Bank, to corroborate Exhibit 35. Exhibit 35, which is voluminous, shows various check deposits and withdrawals from September 5, 1991 through September 3, 1996. On direct examination, Ms. Calkins testified that Exhibit 35 is comprised of all the reports generated from Regina Hellesen's computer system; on cross-examination, Ms. Calkins agreed that another bank employee hypothetically could have used Regina Hellesen's teller number and system to effectuate these transfers and reports. However, the Court finds that Ms. Calkins' cross-examination testimony is insufficient to show that by some remote chance Regina Hellesen did not execute these transfers.

Based on Ms. Calkins' credible testimony,[6] Exhibits 6, 23, 24, 27, 28, 29, 30, 35 and 41, and other facts adduced at the evidentiary hearings, the Court finds that the principal portion of the following mortgage payments made on the Debtors' Property are subject to a constructive trust on behalf of Family Bank:

Date	Amount	Comments
5/29/92	$1,218.82	
9/16/92	$1,253.30	
10/16/92	$1,218.82	

[5] The Court notes that in Exhibit A of its memorandum, Family Bank listed the funds traceable to the purchase as $12,000 ($5,000 deposit plus $7,000 at the closing). (Mem. of Family Bank Regarding Constructive Trust, Exh. A at 2.) Exhibit 31 shows that a $5,000 deposit, or earnest money, was provided by the Debtors, and that an additional $23,192.57 was tendered in cash at the closing. (See Exh. 31.)

[6] Much of Mr. Hellesen's testimony was vague—he testified that Regina Hellesen handled most of the family's finances, that he was not good with figures, and that he suffered a brain aneurism which caused a memory loss between November 1996 and April 1997. Regina Hellesen was not present at the evidentiary hearings.

11/13/92	$1,218.82	
3/13/93	$1,406.55	
4/15/93	$1,406.55	
5/13/93	$1,406.55	
6/16/93	$1,406.55	
10/15/93	$1,406.55	
3/11/94	$1,000.00	The total check amount was $1,444.00, but only $1,000 in funds is fairly traceable.
4/15/94	$1,444.00	The Court finds that on 4/13/94, Regina Hellesen misappropriated a total of $8,861.64 from Herman Steckerel's Keogh account number 18101275. On that same day, $4,726.97 of the $8,861.64 was deposited into the Debtors' account and the remainder, $4,134.67,[7] was paid in the form of a treasurer's check to the Debtors' American Express charge account. (See Exhs. 23, 29 and 35.) The Court finds that $1,444.00 is fairly traceable to the Debtors' mortgage payment.
5/12/94	$1,000.00	The total check amount was $1,444.00, but only $1,000 in funds is fairly traceable.
8/12/94	$1,444.00	
9/8/94	$1,444.00	This amount was paid from a 9/1/94 deposit of $5,000 in misappropriated funds.
12/15/94	$1,444.00	
1/13/95	$1,400.00	The total check amount was $1,469.00, but only $1,400 in funds is fairly traceable.
2/15/95	$1,469.00	
5/16/95	$1,469.00	
6/19/95	$1,469.00	The Court finds that on 5/15/96, Regina Hellesen misappropriated $1,884.76 from R. Lawrence, and on 5/20/96, she misappropriated $3,851.33 from Charles Curtis. (See Exh. 23.)
7/11/95	$1,469.00	
9/14/95	$1,469.00	
10/13/95	$1,469.00	
11/7/95	$1,469.00	
12/14/95	$1,469.00	
1/12/96	$1,464.00	
2/16/96	$1,464.00	
3/4/96	$1,464.00	The Court finds that Regina Hellesen misappropriated $10,000 from account number 0180101275 and deposited $8,600 into the Debtors' account on 2/28/96. The records also show that $3,500 was withdrawn on 2/29/96, but no evidence tended to show for what purpose those monies were used—copies of checks numbered 5191 through 5222 were not provided to the Court.
4/11/96	$1,464.00	
5/8/96	$1,464.00	

[7] $4,134.67 + $4,726.97 = $8,861.64.

6/6/96 $1,464.00
6/28/96 $1,464.00

Total: $44,559.54

Since only principal amounts of the payments went into the equity on the Debtors' home,[8] the Court finds that the principal portion of the mortgage payments are subject to the constructive trust and shall be calculated by Family Bank and filed with the Court on or before January 29, 1999.

Second, with regard to misappropriated funds used towards the Hellesen's down payment on the Property and also deposited into their IRA, the Court finds that $9,898.80 is fairly traceable to the down payment. Family Bank alleged that of the down payment on the Debtors' home, anywhere from $9,898.80 to $12,000.00 derived from misappropriated funds. The proffered records show a $5,262.01 balance on October 5, 1991 after an immediate previous balance of $382.29; further, the Debtors' paid $5,000 in earnest money as a down payment on their home on or before December 5, 1991. (See Exh. 35.) In addition, Exhibit 35 shows a deposit of $7,402.27 made on September 16, 1991 when the Debtors' account balance was $40, and another unaccounted-for deposit on $267.74 on September 23, 1991. (See Exh. 35.) Also, a deposit of $22,449.27 was made on October 15, 1991, when the account balance was $382.29, and a check was written for $22,892.57 on January 15, 1991. (See Exh. 35.) As noted earlier in this decision, only $18,293.77 of the Hellesen's total $28,192.57 down payment originated from the net proceeds from the sale of the Debtors' prior residence. Based on the records before the Court, $9,898.80, or the difference from the net proceeds on their previous home and their down payment, is fairly traceable from an approximate amount of $12,000 alleged as misappropriated. The Court derives this amount from two sources: the alleged and uncontested misappropriations totaling approximately $12,000, and the un-accounted for difference in the down payment amount.

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[8] Family Bank, in its memorandum submitted after the evidentiary hearings, noted that "the bank allocated some portion of these payments to principal and some portion to interest." (Mem. of Family Bank Regarding Constructive Trust, Exh. A at 8.)

Third, the Court also finds that the Debtors hold an additional $5,000 in constructive trust for Family Bank. Regina Hellesen withdrew this amount from Herman Steckerel's Keogh account on August 9, 1991 and deposited to the her IRA account on that same day. (See Exhs. 23, 24, and 30.) Herman Steckerel was one of the customers of Regina Hellesen's at Family Bank from whose account she misappropriated funds. (See generally Exhs. 23, 24, and 30.)

The Court has scrutinized the exhibits and has reviewed carefully the testimony offered at the evidentiary hearings to reach this total. What has been adjudged fairly traceable rests on evidence pored through both at, and after, the hearings on this matter. Although the bank records were voluminous, counsels' efforts at the hearings have provided the Court with the opportunity to rest today's decision on stronger grounds than those on which other courts have applied the remedy of a constructive trust. See generally Chiu v. Wong, 16 F.3d 306 (8th Cir. 1994) (partner sufficiently traced proceeds of his converted partnership property into debtor's homestead), on remand, In re Wong, No. 4-91-4582, 1994 WL 586985 (Bankr. D. Minn. Sep. 30, 1994), appeal denied, Chiu v. Wong, 85 F.3d 633 (8th Cir. 1996).[9]

V. The Value of the Homestead.

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[9] This case is cited in an article entitled "Restitution in Bankruptcy: Reclamation and Constructive Trust." In this article, author Andrew Kull writes that:

> . . . . Courts will sometimes employ "liberal" tracing—a euphemism for abandoning the standard tracing requirement—where the interests of justice appear to be served thereby. The temptation is strongest where a defrauded claimant confronts a debtor who has acquired homestead property with untraceable funds. Because the homestead is exempt from the claims of the general creditors, the contest in such cases is strictly between the restitution claimant and the misbehaving debtor. Tracing the funds into the property defeats the homestead exemption in a case where it is felt to result in injustice. See, e.g., Chiu v. Wong, 16 F.3d 306[, 310] (8th Cir. 1994) [court shifted the burden of proof, stating that "[o]nly to the extent that Wong can differentiate her funds used to purchase the house from those wrongfully converted and commingled is the house free from the constructive trust in favor of Chiu.") (citing Petersen v. Swan, 57 N.W.2d 842, 846-47 (Minn. 1953)].

Andrew Kull, Restitution in Bankruptcy: Reclamation and Constructive Trust, 72 AM. BANKR. L. J. 265 (1998).

The Court finds that the value of the Debtors' home is $162,000, which amount shall be used by Family Bank in its calculations. Family Bank, in its closing arguments at the final evidentiary hearing, noted that Mr. Hellesen could not estimate the fair market value of his home; however, this testimony, without more, is insufficient proof against the scheduled value of the Debtors' home. Further, Family Bank, in its Opposition of Family Bank, FSB to Motion to Avoid Judicial Liens, did not contest the value of the home. Paragraph 5 of its opposition states only that "Family Bank denies the value of the real estate attachment. . . ." (Opposition of Family Bank, FSB to Mot. to Avoid Judicial Liens at 2, ¶ 5.)

VI. Continued Hearing, Statement and Amended Motions.

On or before January 29, 1999, Family Bank shall file: (1) a statement with the Court which shall outline for the Court and the Debtors the amount of the principal portion of the mortgage payments which the Court has ordered are subject to a constructive trust; and (2) amended motions on its objection to the Debtors' claim exemptions and opposition to avoid judicial liens. Family Bank's amended motion on its opposition to avoid judicial liens shall outline the formula under section 522(f)(2) of the Bankruptcy Code. The hearing on confirmation, and the amended motions, is hereby continued to February 5, 1999 at 11:30 a.m.

DATED this 11th day of January, 1999, at Manchester, New Hampshire.

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Mark W. Vaughn, Bankruptcy Judge