

## TRUSTEE PROCESS: WHEN IT'S OKAY TO "LIE" UNDER OATH

*Chang v. BankBoston, N.A.*, No. 01-P-209 (Mass. App. Ct. May 14, 2003)

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In *Chang v. BankBoston, N.A.*, No. 01-P-209 (Mass. App. Ct. May 14, 2003), the Massachusetts Court of Appeals enunciated a general rule of trustee process – “If a trustee has a right of set-off at the time the trustee process summons arrives, equal to or exceeding the amount sought to be attached, the trustee may answer, ‘no funds.’” In so doing, the Court expressly rejected a literal reading of the trustee process statute and implicitly put the onus on plaintiffs to examine the alleged trustee and its set-off rights by written interrogatories whenever an answer of “no funds” is received.

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### BACKGROUND

M.G.L. c. 246, §10 states that a person answering a trustee process summons “. . . shall disclose plainly, fully and particularly what goods,

effects or credits, if any, of the defendant were in the hands or possession of the trustee when he was served with process.” Such answer shall be signed and sworn to by the alleged trustee, subject to the pains and penalties of perjury. M.G.L. c. 246, §11. Any person summoned as trustee who knowingly and willfully swears falsely in her answer shall be liable out of her own assets for the full amount due on the judgment recovered therein. M.G.L. c. 246, §19.

Despite the undisputed fact that BankBoston (now Fleet) had deposits of more than \$16,000 when the Bank received the trustee process summons, the Bank’s answer said:

And now BANKBOSTON, summoned as trustee of the principal defendant . . . makes answer that at the time of service of Plaintiff’s Summons to Trustee upon the said BankBoston, it had not in its hands or possession any goods, effects, or credit of said defendant, and of this the said [BankBoston Representative] submits herself to examination under her oath.

That is, the Bank under M.G.L. c. 246, §10 literally lied. But that was just a technicality – one which ignores the effect of a trustee’s right of set-off under M.G.L. c. 246, §26.

The underlying action in *Chang* in-

involved a contract claim against Interstate Brake Products, Inc. by the Changs who, through trustee process, sought to attach deposits Interstate had made with the Bank by holding the Bank as trustee. After receiving the “no funds” answer, the plaintiffs exercised their right to examine the Bank by written interrogatories under M.G.L. c. 246, §12 and discovered the more than \$16,000 on deposit in an account Interstate maintained at the Bank.

Significantly, at the time of service of the trustee process summons, Interstate was not only a depositor of the Bank, but also a commercial borrower. In its borrowing capacity, Interstate had a line of credit with the Bank for \$2,000,000 and the balance of funds actually borrowed at the time of the summons stood in excess of \$1,300,000. As is commonly the case, the applicable loan agreement provided:

Any and all deposits or other sums at any time credited by or due from the Bank . . . to the Borrower shall at all times constitute security for [debts owed the Bank] and may be set-off against any [debts owed the Bank] at any time whether or not they are then due . . .

Under M.G.L. c. 246, §26 a trustee



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tee may deduct from the amounts he holds "all liquidated damages against the defendant of which, had he not been summoned as trustee, he might have availed himself upon a[t] trial or by set-off . . . ." Thus, the bases for the Bank's "no funds" answer were its security interest and right of set-off, even though neither basis was mentioned in its answer to the summons.

## ANALYSIS

Nevertheless, the failure to mention either basis and answer truthfully and "fully" did not deter the Court from affirming the trial court's summary judgment ruling in favor of the Bank. Each level of court relied on a line of cases focused on how a right of set-off by a trustee supercedes a right of attachment by a third party plaintiff. See *Laighton v. Brookline Trust Co.*, 225 Mass. 458 (1917); *Sternheimer v. Harris*, 253 Mass. 169 (1925) ("The trustee ought not be placed in a worse situation than he would be in, if the principal had sued him for the debt.") (Citation to quotation omitted.); *Jordan v. Lavin*, 319 Mass. 362 (1946); and *Grise v. White*, 351 Mass. 427 (1966). In particular, the Court discussed *Sternheimer* where the appeals court had reversed the trial court's holding that the trustee's right of set-off had to be exercised before the trustee process summons arrived. The Court explained that the reversal was because "the trustee could exercise its right of set-off before making its answer to the trustee process summons. [*Sternheimer*] at 171." In finding for the Bank, the Court implicitly adopted its own description of the *Sternheimer* rationale.<sup>†</sup> It emphasized that "money that is susceptible to attachment must be due from the trustee to the defendant 'absolutely and without any contingency.'" (Citing *Jordan* at 365.) As a result, holding the deposits as security for a debt owed to the

trustee would not be debt due from the trustee to the defendant "absolutely and without contingency."

The Court then discussed the meaning of the adjective "liquidated" before the word "demands" in M.G.L. c. 246, §26, noting its commonly accepted meaning of "settled or determined." Since the debt owed the Bank in *Chang* was on a demand note, it was "classically capable of being calculated with precision, assuming, of course, no defenses to the note by the debtor." The Court stressed that "it was always implicit in the [trustee process] cases that the trustee could not set off a claim against the debtor that was in dispute."

However, how can a plaintiff determine (1) whether the debt owed by an alleged trustee is "capable of being calculated with precision" and (2) whether the defendant might have any defenses to that debt – particularly, when the trustee need not explain its "no funds" answer to the trustee summons? The plaintiff is left to examine the trustee by written interrogatories in order, as the Court indicated, to "inquire as to the bona fides of the set-off."

## CONCLUSION

*Chang* has seemingly clarified the obligations of persons summoned as trustee who have a right of set-off. Also, to the extent not otherwise issued in the ordinary course, the ruling may have imposed an additional burden on plaintiffs to examine persons responding "no funds" by written interrogatories. However, many important questions remain unanswered.

For instance, what if a plaintiff slightly modifies Mass.R.Civ.P. Form 2A to include in its summons a request for all "goods, effects or credits, if any, in-

cluding those which might be subject to set-off, of the defendant in the hands or possession of the trustee when he was served process . . . ."? In light of the holding in *Chang*, can the trustee still respond "no funds" in that case if there is any debt owed to the defendant? Why didn't the Court in *Chang* include an analysis of the specific language of the trustee summons, which, if the plaintiffs used Form 2A,

"...the trustee could exercise its right of set-off before making its answer to the trustee process summons..."

would have included language arguably supporting the trustee's decision to respond "no funds" because the goods, effects or credits

in its possession subject to set-off could not "be taken on execution"?

Boilerplate language in the deposit account agreements banks have with their customers reserves the bank's right of set-off against any and all debts the bank might owe its customer. What if the bank has a claim against its customer for unjust enrichment in connection with a check fraud matter in which the bank paid its customer for the loss but the customer later recovered the loss in full again from the wrongdoer? If the bank receives a trustee process summons while its claim is outstanding, does it need to disclose the amount in the customer's account if the bank's claim for unjust enrichment exceeds the amount sought to be attached? Or is the claim not "capable of being calculated with precision"?

Prudent conduct may dictate that plaintiffs add language in their trustee summonses seeking information on amounts which may be subject to set-off, effectively combining the request for information which could be made in subsequent interrogatories. Conservative trustees may also wish to disclose in their answers that they are exercising a right of set-off where that right is unclear.

<sup>†</sup> Yet, interestingly, the trustee's answer to the summons appears to have disclosed that the trustee held funds on deposit for the defendant at the time of service. See *Sternheimer* at 170 ("The answer of the trustee filed on June 15, 1922, and its answers filed March 24, 1924, to interrogatories of the plaintiff, disclose that at the time of the service of process it had on deposit to the credit of defendant \$5,812.91. . . .").