

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

JUDGE PETER J. WALSH

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July 28, 2003

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Attorneys for Plaintiffs,  
Alan and Cindy Zimble

**Re: Dr. Alan Zimble and Mrs. Cindy Zimble v. Nanticoke Homes,  
Inc.  
Adv. Proc. No. 02-3148**

Dear Counsel:

This is with respect to defendant Nanticoke Homes, Inc.'s ("Nanticoke") motion for summary judgment (Doc. # 14) and plaintiffs Alan and Cindy Zimble's ("the Zimbles") cross motion for summary judgment (Doc. # 16). For the reasons set forth below, I will deny both motions.

Nanticoke asserts that a constructive trust can only be created upon the satisfaction of either the lowest intermediate balance test or the nexus test. See EBS Pension, L.L.C., v. Edison Brothers Stores, Inc., (In re Edison Brothers,

Inc.), 268 B.R. 409, 413-415 (Bankr.D.Del. 2001). Nanticoke argues that neither test has been satisfied here.

However, in its argument, Nanticoke fails to address the assertion made in the Zimbles' complaint that Nanticoke "did not recognize the Deposit Money as property of Nanticoke and, in fact, recorded deposit monies as a liability and considered them the customer's property, until earned." (Complaint ¶ 10 (Doc. # 1)). In its answer (Doc. # 4) Nanticoke admits that unearned customer deposits were recorded as a liability on its books but it denies the rest of the allegation. Thus, whether Nanticoke considered the Zimbles' deposit to be property of the Zimbles and not property of Nanticoke remains a significant and material fact in dispute that neither party has properly addressed. Simply recording the deposit as a Nanticoke liability does not prove what Nanticoke's understanding and intent was regarding ownership of the deposit. Likewise, it proves nothing about the Zimbles' understanding and intent. As this threshold fact is in dispute, I am unable to rule as a matter of law whether the deposit paid to Nanticoke constitutes money Nanticoke held in trust for the Zimbles. Indeed, the fact that Bankruptcy Code § 507(a)(6) gives such deposits, to the extent of \$2100 per individual, priority status suggest that such deposits to do

enjoy trust status.

I also find unavailing the Zimbles' argument that the deposits paid to Nanticoke should be deemed to have been held in escrow by Nanticoke. I note that the cases cited by the Zimbles have little relevance as they both involved transactions in which the parties expressly provided for funds being held in escrow. There is nothing in the record before me to suggest that the parties contemplated an escrow arrangement. Because I cannot find that the funds paid to Nanticoke were understood or intended to be in some type of escrow which could give rise to a constructive trust, I cannot conclude that the Zimbles are entitled to be subrogated to the rights of Mercantile Safe Deposit & Trust Co., thereby elevating their claim to secured status.

In conclusion, both Nanticoke's motion for summary judgment and the Zimbles' motion for summary judgment are DENIED.

Very truly yours,

Peter J. Walsh

PJW:ipm

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
NANTICOKE HOMES, INC.,	)	Case No. 02-10651(PJW)
a Delaware corporation,	)	
	)	
Debtor.	)	
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	)	
DR. ALAN ZIMBLE and	)	
MRS. CINDY ZIMBLE,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Adv. Proc. No. 02-3148
	)	
NANTICOKE HOMES, INC.,	)	
	)	
Defendant.	)	

**ORDER**

For the reasons stated in the Court's letter ruling of this date, defendant Nanticoke Homes, Inc.'s motion (Doc. # 14) for summary judgment is DENIED and plaintiffs Alan and Cindy Zimble's cross motion (Doc. # 16) for summary judgment is DENIED.

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Peter J. Walsh  
United States Bankruptcy Judge

Dated: July 28, 2003