

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re: BKY 4-91-4582

AMY KAM-LING WONG,
Debtor.

SOU-HSIUNG JACK CHIU, ADV 4-91-396
Plaintiff,

-v.-

AMY KAM-LING WONG and FINDINGS OF FACT, CONCLUSIONS
MARGARETTEN & COMPANY, INC., OF LAW AND ORDER FOR JUDGMENT
Defendants.

At Minneapolis, Minnesota, September 30, 1994.

The above-entitled matter came on for hearing before the undersigned on the 28th day of June, 1994. Appearances were as follows: Harry T. Neimeyer for the plaintiff, Sou-Hsiung Jack Chiu ("Chiu"); and Thomas F. Miller for the defendant, Amy Kam-Ling Wong ("Debtor").

PROCEDURAL HISTORY

This case originally came on for trial on June 1 and 2, 1992. At trial, Chiu sought to impose a constructive trust on Debtor's homestead, alleging that Debtor's husband wrongfully converted Chiu's partnership property, and that the converted assets were used as a down payment for Debtor's homestead.

By Order dated October 8, 1992, I concluded that Chiu had established sufficient grounds for the imposition of a constructive trust, and had succeeded in identifying an initial trust res. I further concluded that Chiu failed to trace the trust property into either an identifiable product or an indistinguishable mass. As a

NOTICE OF ENTRY AND FILING ORDER OR JUDGMENT	
Filed and Docket Entry made on	9/30/94
Patrick G. De Wane, Clerk, By	KK

result, I held that Chiu was not entitled to the imposition of a constructive trust on the homestead.

The United States District Court for the District of Minnesota affirmed the decision. On appeal the Eighth Circuit reversed, holding that Chiu sufficiently traced the proceeds of his partnership property through Debtor's successive businesses into Debtor's homestead. See Chiu v. Wong, 16 F.3d 306, 310 (8th Cir. 1994). As such, the Eighth Circuit remanded the case to allow Debtor to establish the extent to which she purchased her home with her own property, as opposed to the assets of the businesses. The court set forth the following mandate on remand:

Only 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. See Petersen v. Swan, 57 N.W.2d 842, 846-47 (Minn. 1953).

* * *

[The bankruptcy court] should conduct a further proceeding in which Wong may seek to establish to what extent funds for the purchase of the home came from her own monies, not the assets of U-Byte Computer and the successive businesses. The bankruptcy court may take into account as Wong's own property such funds from her savings as may constitute unspent wages or salaries received for personal services rendered for these businesses.

Chiu v. Wong, 16 F.3d at 310-11.

Accordingly, the issue on remand is whether Debtor can establish that the funds used to purchase her homestead were derived from sources other than the corporate assets, with the exception of money justifiably derived from the businesses as salary or wages of the Debtor.

FINDINGS OF FACT

A. The Businesses

1. In 1983, Chiu and Debtor's husband Ken Kwok-Hung Lai ("Lai") became partners in U-Byte Computer ("U-Byte"). In February, 1986, the partnership terminated. At that point, Lai was in possession of \$78,000 of inventory and \$22,000 cash from U-Byte. Chiu subsequently obtained a judgment against Lai in the amount of \$87,500 plus costs and disbursements for the wrongful termination of the partnership. The judgment has not been satisfied.

2. After U-Byte closed down, Debtor and Lai operated a series of businesses. In May, 1986, they incorporated Best Byte Corporation ("Best Byte"). Best Byte assumed as assets the cash and inventory from U-Byte that was in Lai's possession.

3. In March, 1987, Debtor and Lai formed Computer Social Club, Inc., which was later renamed Computer Fitness Club, Inc., ("Fitness"). In August and September, 1988, Fitness purchased the assets of Best Byte, which then ceased operations. Fitness operated for three years with a slight increase in gross sales from year to year. Fitness went out of business in May, 1990.

4. Debtor claims that she periodically infused cash into Best Byte and Fitness and that these funds were derived almost entirely from members of the Debtor's family in Hong Kong. Whether these funds were characterized as gifts to Debtor or loans to her businesses, they were generally deposited into Debtor's personal accounts. Some of these funds were then transferred to the businesses, while some were retained by the Debtor.

5. Debtor also withdrew funds from Best Byte and Fitness and deposited them into her personal banking accounts. These withdrawn funds were either used to repay the funds that were advanced to her by her family, or retained by Debtor as compensation for services she provided to the companies.

B. The SCCU Account

6. At all relevant times, Debtor maintained three personal bank accounts. Two accounts were located at Twin City Federal ("TCF"). The other account, number 207893, was located at State Capital Credit Union ("the SCCU account").

7. The SCCU account consisted of four parts: a checking account, a share account, a money market account, and a certificate of deposit account. As of December 16, 1989, the SCCU account had a balance of \$53,114.39 consisting of \$9,821.31 in the checking account, \$2,619.27 in the share account, \$673.81 in the money market account and \$40,000 in a Certificate of Deposit.

8. Between December 16, 1989 and April 25, 1990, the money market account balance grew from \$673.81 to \$45,388.33. On April 25, 1990, Debtor issued a \$5,000 check to herself which was used to make an earnest money payment on the homestead. With additional deposits and withdrawals, the money market account balance as of May 29, 1990 was \$44,411.40. On that date Debtor withdrew \$43,533.12 and paid the rest of the down payment on the homestead.

9. Between December 16, 1989 and May 29, 1990, Debtor made the following deposits in the money market account:

- a. Debtor deposited \$37,880.25 from Fitness which she claims was salary owed to her.
- b. Debtor deposited \$27,000 from Fitness which she claims are repayments of loans made by her to Fitness.
- c. Debtor cashed the \$40,000 Certificate of Deposit and deposited it in the money market account.

At no time between December 16, 1989 and May 29, 1990 did the account balance drop below \$48,533.12 except in May of 1990 when it dropped to \$47,485.56.

C. The Issue on Remand

10. The factual issue before me is whether the \$48,533.12 that Debtor withdrew from the SCCU account was Debtor's personal assets or the assets of the business.

11. Determining the answer to that question is made especially difficult because Debtor's case rests almost entirely on her own mental recollection of transactions, a lack of documentation, and Debtor's conviction that her oral description of years of transactions should not be questioned. It is further complicated by the inability of counsel on both sides to clearly elucidate positions in this complex numerical exercise.

12. In order to determine whether Debtor has met her burden of establishing that the payments from the SCCU account were from personal assets, I must address whether Debtor purchased the \$40,000 Certificate of Deposit with corporate assets or with her own personal funds. I must also address whether the salary and

loan repayments she deposited in the SCCU account must be recharacterized as withdrawals of corporate assets.

D. The Certificate of Deposit

13. The Certificate of Deposit, which was purchased on February 22, 1989, was Debtor's major cash asset. The parties agree that the CD was purchased with the proceeds of the liquidation of the assets of Best Byte in the fall of 1988. Debtor testified that the \$40,000 which came from Best Byte and was used to purchase the Certificate of Deposit was her personal property, consisting of \$30,000 of past due wages from Best Byte, as well as \$10,000 in loan repayments. I find otherwise.

14. Debtor contends that the \$30,000 payment from Best Byte was past due salary owed to her for services performed in 1987 and 1988. She introduced no written records to support the claim. Debtor did not report this \$30,000 in claimed income in her individual tax returns for 1989 or any other year.¹ Accordingly, Debtor has not met her burden of proving that \$30,000 of the Best Byte assets which were deposited in the Certificate of Deposit were due her for past due wages.

15. As for the remaining \$10,000, Debtor has submitted insufficient evidence that she or a family member actually made a loan to Best Byte which was repaid. As such, she has not proven she was entitled to \$10,000 from Best Byte as a loan repayment.

¹ Debtor did report \$38,000 of income in her 1989 tax returns. However, this income was derived solely from Fitness.

16. Accordingly, the Debtor has failed to establish that the \$40,000 Certificate of Deposit in the SCCU was her personal, rather than a corporate, asset.

E. Recharacterization of the Salary Deposits

17. Debtor received no salary from Fitness between 1987 and March of 1989. Between March, 1989 and August, 1989, Debtor claims that her salary was supposed to be \$4,000 per month and that from September, 1989 until the closing of Fitness in May, 1990, Debtor's salary was supposed to be \$5,000 per month. In other words, Debtor claims she was entitled to compensation in the amount of \$40,000 for 1989 and \$25,000 for 1990, for a total pre-tax income from Fitness of \$65,000. This assertion is suspect. Debtor introduced no corporate records setting her salary. When Debtor took a comparable job with another computer company after Fitness ceased to operate, she was paid only \$2,000 per month.

18. Debtor did not receive her compensation from Fitness in a consistent, or even commonplace, manner. Instead, Debtor withdrew money from Fitness when it became available. Oftentimes, this meant that Debtor received her current wages while she simultaneously received wages for a prior year.

19. According to records provided by Debtor, Fitness made the following payments to Debtor from May, 1987 through May 31, 1990 which she claimed were for salary:

<u>Date</u>	<u>Amount</u>	<u>Bank Deposit</u>	<u>Date cashed</u>	<u>Purpose</u>
05/31/90	1,747.75			Paycheck
05/15/90	1,747.75	SCCU	05/25/90	Paycheck 5/90
04/13/90	3,415.50	TCF	04/30/90	Paycheck 4/90
03/30/90	3,415.50	SCCU	04/06/90	Paycheck 3/90
03/28/90	3,415.50	TCF	04/04/90	Paycheck /90
03/28/90	3,415.50	SCCU	04/05/90	Paycheck /90
03/27/90	3,415.50	SCCU	04/02/90	Paycheck 3/90
03/15/90	3,694.00	SCCU	03/23/90	Paycheck 7/89
03/10/90	3,694.00	SCCU	03/20/90	Paycheck 6/89
03/07/90	3,694.00	TCF	03/27/90	Paycheck 5/89
03/06/90	3,694.00	TCF	03/14/90	Paycheck 4/89
02/28/90	3,694.00	TCF	03/05/90	Paycheck 2/90
01/31/90	3,694.00	SCCU	03/05/90	Paycheck 1/90
12/15/89	7,399.20	SCCU	12/26/89	Paycheck /90
10/15/89	18,498.00	SCCU	12/28/89	Paycheck 4/88 - 3/89
03/31/89	5,000.00	TCF	06/21/89	Directory fee
03/31/89	4,550.50	SCCU	07/06/89	Paycheck 4/88 - 3/89

20. Debtor's testimony concerning her salary was often inconsistent and, at times, incredible. Debtor withdrew a suspiciously large amount of money from Fitness during the last six months of business. Nearly all salary checks were cashed after December 1989 and many of them were deposited in the SCCU account. Debtor reasoned that she only paid herself salary when funds were available. Yet, Fitness' business during the three years remained relatively stable, with perhaps a slight increase in gross sales from year to year. The slight increase, however, would not seem to warrant the enormous increase in paychecks as Fitness was winding down its business.

21. Debtor's testimony that she was entitled to all paychecks as salary for services rendered to Fitness was unpersuasive. When questioned about what periods she was entitled to back pay, Debtor was unable to formulate any conclusive answers. Further, when

Debtor did respond, her answers often contradicted other evidence. For instance, Debtor claims she received back pay from Fitness for nine months of 1988. Yet, Debtor testified that she did not draw a salary in 1988, but instead lived on the \$31,500 loan from her family.

22. Despite Debtor's less than credible testimony, there is no doubt she was entitled to some compensation for work performed at Fitness. Debtor's awkward system of compensating herself makes it difficult to ascertain how much Debtor was actually entitled in comparison to what she received.

23. It is reasonable to conclude that not all of the payments claimed as salary and deposited to the SCCU account between December 16, 1989 and May 29, 1990 were actually payments for salary. Instead, it is as likely that many of them constituted the diversion of corporate assets into her personal account. Debtor has not established whether and which of the salary payments in the SCCU account used to purchase the home were in fact salary due to her from Fitness. This conclusion stems from the fact that Debtor took virtually no salary from Fitness until late 1989, the comparatively large volume of checks she wrote to herself in late 1989 and 1990, the absence of records setting a salary, and the disparity between what she claimed she was owed as salary and what she was paid for comparable work by another company.

F. Recharacterization of the Loan Repayments

24. Between May, 1987 and April, 1990, Debtor withdrew \$93,395.33 characterized as loan repayments and interest from

Fitness. Debtor does not recall exactly which loans these payments relate to. A portion of this sum was deposited in the SCCU account between December 16, 1989 and May 29, 1990.

25. Debtor made payments totalling \$143,855 to her family between September 16, 1988 and July of 1990. Of this amount, she claims \$36,055 was for the repayment of loans; \$31,500 was for the repayment of a gift her family made to her in 1987; and \$76,000 constituted outright gifts to her family. Of the total amount, \$91,300 was paid in 1990, \$31,000 of which came out of the SCCU money market account. Debtor has submitted no evidence establishing that these gifts were derived solely from her wages. She has submitted only sketchy documentary records relating to the existence of the loans. The reasonable inference to be made is that some of these funds were unjustifiably derived from the corporate assets of Fitness.

26. The loan repayment scheme is confused by the fact that Debtor kept virtually no records of the transactions, and is further confused by the fact that Debtor does not know what portion of the funds from her family she retained and what portion she infused into her businesses. Without this information, it is virtually impossible to ascertain whether the loan repayments were justified. Debtor has not met her burden of proving that the deposits from Fitness for loan repayments were properly characterized as such. Rather it is reasonable to infer that many of them were properly characterized as transfers of the corporate assets of Fitness.

CONCLUSIONS OF LAW

1. A party seeking to impose a constructive trust must identify specific property which in equity and good conscious belongs to him. Rock v. Hennepin Broadcasting Ass'n, Inc., 359 N.W.2d 735, 739 (Minn. Ct. App. 1984). Where such property has been disposed of, the party seeking to impose the constructive trust has the burden of tracing such property into its product, or into an indistinguishable mass. Restatement of Restitution § 215 cmt. b. The party seeking to impose the trust must prove its case by clear and convincing evidence. Rock v. Hennepin, 359 N.W.2d at 740; Fredin v. Farmer's State Bank of Mountain Lake, 384 N.W.2d 532, 535 (Minn. Ct. App. 1986); Georgopolis v. George, 237 Minn. 176, 183, 54 N.W.2d 137, 141 (1952).

2. Once the property has been traced into an indistinguishable mass, the party in the wrong then has the burden of distinguishing what portion of such property is justifiably his. Petersen v. Swan, 239 Minn. 98, 105, 57 N.W.2d 842, 847 (1953). "[I]f it is impossible to make an equitable division, the whole of the converted property should be held to be that of the one who has done no wrong." Id. at 105, 57 N.W.2d at 847.

3. Chiu has sufficiently traced the proceeds of his partnership property into the Debtor's homestead. Chiu v. Wong, 16 F.3d at 310. The burden now shifts to Debtor to prove that she used her personal property, including wages she was entitled to receive, as the down payment for her home. Id.

4. Debtor has not met her burden of proving that the \$48,533.12 down payment was derived exclusively from her own personal property.

5. Debtor withdrew more than \$48,000 from Best Byte and Fitness that was not properly and justifiably considered income or loan repayments. Instead, these funds were corporate assets. While a precise number cannot be attached to the exact amount of corporate assets Debtor removed from her businesses, a constructive trust may still be imposed on Debtor's homestead. The burden was on Debtor to establish that the down payment was derived from her own personal funds, and she has failed to meet this burden.

6. Debtor contends that, even if grounds exist for a constructive trust, the trust be imposed in an amount no greater than \$20,073.92. Debtor maintains that after the Certificate of Deposit proceeds were deposited into the SCCU money market account, Debtor deposited an additional \$28,459.20 of her personal property prior to the withdrawal of the down payment. These funds, according to Debtor, were derived from wages and loan repayments.

7. This argument is without merit. As previously discussed, Debtor has not established that she was entitled to all the loan repayments and wages she received from Fitness. Just because Debtor characterized the deposits as derived from paychecks or loan repayments from Fitness does not mean they are automatically Debtor's personal property. In fact, this had been the weakness of Debtor's case. Debtor has the burden of proving that the loan

repayments and wages were in fact justified withdrawals from Fitness. She has not met this burden.

8. At the evidentiary hearing on remand, Chiu for the first time claimed that he was entitled to a constructive trust on Debtor's other personal assets and alternatively to a personal judgment against the Debtor. Chiu bases this argument on the assertion that, since 1992 Debtor has failed to pay the mortgage payments on the home and has improperly allowed the home to be foreclosed. This, according to Chiu, has dissipated the value of his constructive trust on the homestead.

9. "[W]hen acting under an appellate court's mandate, an inferior court 'cannot vary it, or examine it for any other purpose than execution; or give any other further relief; or review it, even for apparent error, upon any matter decided by appeal; or intermeddle with it, further than to settle so much as has been remanded.'" Commercial Paper Holders v. Hine (In re Beverly Hills Bancorp.), 752 F.2d 1334, 1337 (9th Cir. 1984) (quoting In re Sanford Fork & Tool Co., 160 U.S. 247, 255 (1895)). See also Borchers v. Commissioner of Internal Revenue, 943 F.2d 22, 23 (8th Cir. 1991; Bethea v. Levi Strauss & Co., 916 F.2d 453, 456 (8th Cir. 1990)). The mandate in the present case is very specific: to ascertain the extent to which the down payment was derived from Debtor's own personal funds. There is no mandate to grant the additional equitable relief or personal judgment Chiu now seeks.

10. Further, Chiu has made no request, either on remand or on appeal, to amend his complaint or fashion some sort of manner to

obtain the additional relief in light of the changed circumstances since the original trial. As such, the evidentiary hearing I conducted on remand was properly limited by the mandate from the appellate court. Therefore, no record exists that would support allowance of the relief requested.

11. Accordingly, a constructive trust shall be imposed on Debtor's homestead. Chiu's request for additional relief should be denied.

ORDER FOR JUDGMENT

ACCORDINGLY, IT IS HEREBY ORDERED THAT a constructive trust shall be imposed on Wong's real estate located at 6010 Annapolis Lane North, Plymouth, Minnesota, and legally described as Lot 5, Block 6, Lake Camelot Estates, Hennepin County, Minnesota.

LET JUDGMENT BE ENTERED ACCORDINGLY.


Nancy C. Breher
United States Bankruptcy Judge