

FILED

at ___ O'clock & ___ min. PM

DEC 15 2003

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

BRENDA K. ARGOE, CLERK
United States Bankruptcy Court
Columbia, South Carolina (2)

IN RE:)
Florence Ingram,) Case No.: 03-02823-JW
Debtor.) Adversary Proceeding
No.: 03-80347-W
Martin Shumpert and)
Jennifer Nuovo,)
Plaintiffs,) JUDGMENT
v.)
Florence Ingram,)
Defendant.)

Based upon the findings of fact and conclusions of law as cited in the attached Order of the Court, the Plaintiffs' Motion for Summary Judgment is granted and the indebtedness by debtor to the Richland County Probate Court is excepted from discharge pursuant to 11 U.S.C. Section 523 (A) (4).



JOHN E. WAITES
United States Bankruptcy Judge

Columbia, South Carolina
December 15, 2003

ENTERED

DEC 15 2003

C.H.B.

FILED

DEC 1 5 2003

UNITED STATES BANKRUPTCY COURT

DEC 1 5 2003

FOR THE DISTRICT OF SOUTH CAROLINA

BRENDA K. ARGOE, CLERK
United States Bankruptcy Court
Columbia, South Carolina

IN RE:

Florence Ingram,

Debtor.

Martin Shumpert and
Jennifer Nuovo,

Plaintiffs,
v.

Florence Ingram,

Defendant.

)
) Case No: 03-02823-JW
)
) Adversary Proceeding
) No: 03-~~8~~0347-W

)
)
)
)
) ORDER GRANTING SUMMARY JUDGMENT
) TO THE PLAINTIFFS
)
)
)

ENTERED
DEC 1 5 2003
C.H.B.

This matter comes before the Court upon the Motion for Summary Judgment filed by the Plaintiffs, Martin Shumpert and Jennifer Nuovo, pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure arising out of an adversary proceeding seeking a determination that the debt to the Richland County Probate Court is non-dischargeable pursuant to 11 U.S.C. Section 523(A)(2), (A)(4), and (A)(6). Based upon the written and oral presentations made by counsel for the Plaintiffs and counsel for the Defendant/Debtor, and the pleadings and documents filed and presented to the Court in conjunction with the arguments and motions, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Debtor/Defendant Ingram serving as Personal Representative of the Estate of Ella W. Carter, was prevented by Order of the Richland County Probate Court dated July 17, 2000 from spending Estate funds except to maintain the residence and personal property of the Decedent according to an attached budget. Debtor/Defendant, as Personal Representative of the Probate Estate, had a fiduciary duty to the beneficiaries of the Probate Estate to preserve all assets for the beneficiaries. After presentation of a detailed accounting of spending, Ingram was found by the Probate Court in an Order dated January 30, 2001 to have spent all of the cash in the Estate account (approximately \$163,932.83) including a large majority of it on improper expenditures for herself. She was removed as Personal Representative for violating her fiduciary duty. The January 30, 2001 Order was not appealed.

2. By that same Order of January 30, 2001, Debtor/Defendant was expressly restrained and expressly directed not to encumber or put any kind of lien or mortgage on her own personal residence (which was paid off with Estate funds) until the missing funds were replaced. The Probate Court found by Order dated and filed February 10, 2003 that Ms. Ingram was in civil contempt for making

expenditures in violation of the July 17, 2000 and January 30, 2001 Orders and cited its previous finding that she violated her fiduciary duty as Personal Representative. Debtor/Defendant was ordered to repay the Estate \$105,075.90.

3. Debtor/Defendant then further violated the Probate Court's Order by encumbering her home with a "reverse mortgage" on her personal residence from which she received approximately \$83,000.00. A Probate Court jury found in favor of the Plaintiff Martin Shumpert and against the Debtor/Defendant on four (4) separate grounds (mistake, lack of capacity, undue influence, and improper execution) concerning the Will Ms. Ingram filed to be named Personal Representative, thereby negating that Will. Plaintiff/Petitioner Shumpert is a beneficiary of the Estate through the previous Will. Debtor/Defendant has appealed that verdict though Plaintiff's position is that such appeal is not meritorious and has not been properly perfected. Plaintiff Jennifer Nuovo is a claimant against the Estate, claiming as co-ownership of joint accounts with the Decedent prior to a Court finding of mental incapacity.

4. The unappealed January 30, 2001 Richland County Probate Court Order is a binding Order.

5. The claim of Jennifer Nuovo, as a creditor of the

Estate, is a claim separate from the claim of Martin Shumpert as beneficiary of a Will by Decedent. Any appeal from the jury trial verdict in favor of Mr. Shumpert does not negate Ms. Nuovo's pending claim.

CONCLUSIONS OF LAW

Summary judgment should be granted if "there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Rule 7056(c) of the Federal Rules of Bankruptcy Procedure. "At the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. At 249. On a Motion for Summary Judgment, evidence and inferences must be viewed and drawn in a light most favorable to the non-moving party. D.L. Auld Co. Chroma Graphics Corp., 714 F.2d 1144 (Fed. Cir., 1983).

In the Complaint before the Court, the Plaintiffs allege that the Defendant committed fraud and defalcation within the meaning of § 523(a)(2), received funds under false pretenses and representations within the meaning of § 523(a)(4) and committed malicious and willful acts against the Plaintiff and the Plaintiff's property pursuant to § 523(a)(6).

COLLATERAL ESTOPPEL

Debtor/Defendant can not re-litigate the Probate Court finding that she breached her fiduciary duty as Personal Representative of the Estate by improperly spending the Estate funds on herself, creating the debt she seeks to discharge. "Generally, a bankruptcy court may give collateral estoppel effect to those elements of a claim that are identical to the elements required for discharge and which were 'actually litigated and determined in the prior action'." Grogan v. Garner, 498 U.S. 279, 284 n. 11, 111 S.Ct. 654, 658 n. 11, 112 L.Ed.2d 755 (1991). Collateral estoppel is defined as:

Prior judgment between same parties on different causes of action is an estoppel as those matters in issue or points controverted, on determination of which finding or verdict was rendered. E.I. duPont de Nemours & Co. v. Union Carbide Corp., D.C. Ill., 250 F.Supp. 816, 819. When an issue of ultimate fact has been determined by a valid judgment, that issue cannot be again litigated between the same parties in future litigation. City of St. Joseph v. Johnson, Mo. App., 539 S.W.2d 784, 785.

Blacks Law Dictionary 237 (5th Ed. 1979).

In In re Ward, 194 B.R.53 (Bkrtcy. D.S.C. 1995), this Court, in declining to apply collateral estoppel to a default judgment, followed the reasoning and rationale of M&M Transmission, Inc. v. Raynor, 992 F.2d 1146 (4th Cir. 1991) which adhered to the proposition that in order to invoke collateral estoppel the issues presented "must have

been both litigated and determined." It is clear that the issue of breach of fiduciary duty was litigated and determined and that breach of fiduciary duty is the basis of the debt owed the Probate Court. Even if the January 31, 2001 Order was appealed and there was a split in the law as to when a judgment is final, as asserted by Defendant/Debtor, the Debtor should not benefit from her own wrongdoing.

In order to determine if the Orders can be given collateral estoppel effect, this Court must look to the elements of §§ 523(a)(2), (4) and (6).

The provisions of 11 U.S.C. § 523(a)(2), (4), and (6) provide that "(a) a discharge under § 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt -

(2) for money, property, services, or extension, renewal, or refinancing of credit, to the extent obtained by

(A) false pretenses, false representation, or actual fraud . . .

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny;

(6) for wilful and malicious injury by the debtor to another entity or to the property of another entity."

The Richland County Probate Court Order dated January

31, 2001 finds that Ms. Ingram had taken personal control of and spent approximately \$113,000.00 in cash from the Estate despite a previous Probate Court Order filed July 17, 2000 that restricted her to only pay necessary expenses as outlined by an attached budget. This Order was filed after the Will naming Debtor/Defendant Personal Representative was contested on the grounds of undue influence, incapacity, mistake, improper execution by Plaintiff Shumpert, sole beneficiary of the previous Will. The Probate Court specifically found that Ms. Ingram had used Estate funds committed for the proper beneficiary to: (1) pay off the mortgage of \$45,384.01 on her personal residence; (2) pay \$17,000.00 as a down payment on a car titled in her name; (3) pay \$1,000.00 to an individual for non Estate purposes; (4) pay \$338.00 to a friend for non Estate purposes; and (5) pay approximately \$53,000.00 to attorneys from the Estate funds. The Richland County Probate Court immediately removed Ms. Ingram as Personal Representative and further restrained the Debtor from encumbering her personal residence or any other real property in which she had an interest, or from taking out any mortgage or equity loan. Defendant/Debtor subsequently violated the Court Order by taking out the reverse mortgage on her personal home that was to be held lien free, guaranteeing the debt to the

Probate Court. Debtor/Defendant received the mortgage loan proceeds in lump sum and promptly spent all the money.

Section 523(a) (4)

Section 523(a) (4) requires the Plaintiff to prove two elements. First, a showing that the Defendant acted in a fiduciary capacity. Second, a showing that the Defendant committed fraud or defalcation while acting in a fiduciary capacity. Debtor/Defendant's fiduciary capacity is not questioned.

The Bankruptcy Code does not define the term defalcation. An opinion from the Bankruptcy Court for the Northern District of Oklahoma conducted an exhaustive review of the case law and chose to follow the definition supplied by Judge Learned Hand that defalcation "implies some moral dereliction" citing Central Hanover Bank & Trust Co. v. Herbst, 93 F.2d 510 (2d Cir. 1937).

Unlike the case law under the Bankruptcy Act, the courts interpreting the scope of defalcation under the Bankruptcy Code are in agreement on several points. First, defalcation is the failure to account for money or property that has been entrusted to one. See, In re Wolfington, 48 B.R. 920, 923 (Bkrtcy. E.D.Pa. 1985); In re Owens, 54 B.R. 162 [(Bkrtcy. D.S.C. 1984)]; In re Cowley, 35 B.R. 526 (Bkrtcy. D.Kan. 1983); In re Waters, 20 B.R. 277 (Bkrtcy. W.D.Tex. 1982). Second, defalcation is a broader term than either embezzlement or misappropriation. See In re Wolfington, supra; In re Weaver, 41 B.R. 649 (Bkrtcy. W.D.Okla. 1984); In re Cowley, supra; In re Waters, supra. Third, defalcation is evaluated by an objective standard and no

element of intent or bad faith need be shown. See In re Gonzales, 22 B.R. 58 (Bkrtcy. 9th Cir. 1982); American Ins. Co. v. Lucas, 41 B.R. 923 (D.W.D. Pa. 1984); Martino v. Brown, 34 B.R. 116 (D.N.M. 1983); In re Petersen, 51 B.R. 486 (Bkrtcy, D. Kan. 1985); In re Gagliano, 44 B.R. 259 (Bkrtcy N.D. Ill. E.D. 1984); In re Waters, supra.

In re Turner, 134 B.R. 646 (Bkrtcy. N.D. Okl. 1991).

A breach of fiduciary duty constitutes a "defalcation while acting in a fiduciary capacity" and consequently is excepted from discharge under Section 523(a)(4). The term defalcation as it is used in Section 523 is very broad and includes a breach. This Court, in In re Owens, 54 B.R. 162 (Bankr. D.S.C. 1984) gave a detailed explanation of the meaning of defalcation.

The case law interpreting the term "defalcation" has given it a broad definition. "Generally, defalcation is a failure to account for money or property that has been entrusted to one." American Metals Corp. v. Cowley (In re Cowley), 35 B.R. 526, 529 (Bankr. D. Kan. 1983). Treacher v. Duttenhofer (In re Duttenhofer), 12 B.R. 926, 7 B.C.D. 1187 (Bankr. C.D.Cal. 1981); See Kansas State Bank and Trust Co. v. Vickers (In re Vickers), 577 F.2d 683 (10th Cir. 1978). A mere deficit resulting from the debtor's misconduct, even if the debtor's conduct does not benefit him, may be "defalcation." In re Cowley, 35 B.R. at 529; Aetna Insurance Co. v. Byrd (In re Byrd), 15 B.R. 154, 8 B.C.D. 436 (Bankr. E.D.Pa. 1981). "Defalcation" is the slightest misconduct, and it need not be intentional misconduct; negligence or ignorance may be "defalcation." In re Cowley, 35 B.R. at 529. See, In re Duttenhofer, supra; Baugh v. Matheson (In re Matheson), 10 B.R. 652, 7 B.C.D. 643 (Bankr. S.D.Ala. 1981).

At a minimum defalcation requires some degree of

misconduct, negligence or ignorance. The Probate Judge's Order relieving Debtor as Personal Representative for improperly spending Estate funds resulted in her debt to the Estate through the Probate Court. The January 30, 2001 Order constitutes a finding that the Debtor committed at least a defalcation while acting in a fiduciary capacity, and in actuality a fraud resulting in her being held in contempt of court. The breach of fiduciary duty raised in the January 30, 2001 Order was not appealed so Defendant/Debtor may not now re-litigate the issue. The debt is not dischargeable under Section 523(a)(4).

Debtor/Defendant concedes in her Brief that collateral estoppel is the only issue to be decided, and that the only element of collateral estoppel to be decided is that the prior judgment must be final and valid. Defendant/Debtor claims that the judgment is on appeal. The jury verdict finding the Will presented by Debtor/Defendant to be the product of undue influence, incapacity, mistake and lack of proper execution is on appeal, but this verdict has no bearing on the Richland County Probate Court's prior determination that Debtor/Defendant breached her fiduciary duty. Matters of the Estate go on. The funds were ordered repaid. The Estate remains open pending the appeal and requires funds for its operation. In addition, Plaintiff

Jennifer Nuovo's claim is separate from the Will contest and must be separately adjudicated even if Ms. Ingram would prevail on all four (4) issues on appeal and then win all four (4) at re-trial. The pending appeal of the jury verdict is not applicable to Debtor/Defendant's violation of fiduciary duty, which resulted in the Order requiring her to repay the Estate amounts improperly spent. The Richland County Probate Court, in its Order dated March 2, 2001, denied the Motion to Alter or Amend the Order of January 31, 2001 as being untimely filed. The Court rejects that the argument that the cash in the Estate was "her property," as Debtor/Defendant was specifically given control of the funds in a fiduciary capacity, and violated her fiduciary duties, leading to her removal as Personal Representative and creating her debt to the Estate.

Having determined the subject indebtedness is not to be discharged, the Court need not address at this time the arguments pursuant to 11 U.S.C. § 523(a)(2) and (a)(6).

CONCLUSION

Even viewed in the light most favorable to the Debtor/Defendant the facts clearly show that Debtor/Defendant Florence Ingram was removed as Personal Representative of the Estate of Ella W. Carter for breach of

fiduciary duty and required to repay the Estate the amounts improperly spent by her. This Order was not appealed, so Defendant/Debtor is collaterally estopped from attacking its validity.

This is a classic case of violation of 11 U.S.C. § 523 (a)(4). These provisions preventing discharge are exactly on point. Ms. Florence Ingram was removed as Personal Representative for violation of her fiduciary duty and spent Estate cash assets for her own use after agreeing only to spend assets according to a Court approved budget. She was on notice as to the competing claims for Estate assets when she spent the more than \$100,000.00 in violation of the Probate Court's Order. Ms. Ingram was aware of the challenge to the Will naming her Personal Representative and beneficiary on the grounds of undue influence, duress, mistake and lack of proper execution, and that Mr. Shumpert presented a previous Will naming him beneficiary, and that Ms. Nuovo had made a claim to the cash assets.

For the reasons stated within it is therefore:

ORDERED that the Plaintiff's Motion for Summary Judgment is granted and;

ORDERED THAT any debt owed by Debtor/Defendant Florence Ingram to the Richland County Probate Court is excepted from discharge pursuant to 11 U.S.C. 523(a)(4).

A handwritten signature in cursive script, appearing to read "John E. Waites", written over a horizontal line.

JOHN E. WAITES,
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
December 15, 2003