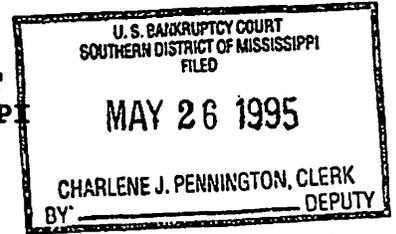


IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION



IN RE:

CHAPTER 7

MACK L. KILLEBREW
DELORES KILLEBREW

CASE NO. 8500309JC

Mack L. Killebrew
1405C Spring Cypress Road
Spring, TX 77373

Debtor

Delores B. Killebrew
1517 Tracewood Drive
Jackson, MS 39211

Debtor

Hon. Eileen S. Bailey
P. O. Box 1177
Jackson, MS 39215-1177

Chapter 7 Trustee

Hon. David N. Usry
Assistant U. S. Attorney
188 E. Capitol St. Ste. 500
Jackson, MS 39201

Attorney for I.R.S.

Edward Ellington, Judge

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Court on the *Debtor's Motion for Determination of Tax Liability of Estate and Debtors Under 11 U.S.C. §505; Debtor's Objection to Closing the Estate and Request for Determination of Tax Liability Requested Under Pending Motion; the Debtor's Supplemental Pleading in Support of Debtor's Motion for Determination of Tax Liability and Objection to Closing Estate; and the Trustee's Final Report of Administration*

of Estate, Report of Receipts and Disbursements, Application For Compensation and Reimbursement of Expenses and Notice of Proposed Distribution (Final Accounting). After considering the pleadings filed with the Court and the relevant evidence submitted at the trial, the Court finds that the Debtors' motions and objection are not well taken and that a judgment pursuant to Federal Rule of Bankruptcy Procedure 7052(c) should be granted and that the Debtors' motions and objection should be denied. The Court will not rule on the *Final Accounting* as the Chapter 7 Trustee, Eileen Shaffer Bailey, announced to the Court that she wished to withdraw the *Final Accounting* and that she would be filing a supplemental final accounting at a later date.

FINDINGS OF FACT

On February 22, 1985, Mack L. Killebrew and Delores B. Killebrew filed for relief under Chapter 7 of the United States Bankruptcy Code. Charles A. Brewer was appointed the Chapter 7 Trustee. The assets of the bankruptcy estate consisted of a necklace and Mack Killebrew's interest in a testamentary trust established in the Last Will and Testament of John Arthur Killebrew, Sr. (testamentary trust). Mr. Brewer liquidated the assets of the bankruptcy estate. See Killebrew v. Brewer (In the Matter of Killebrew), 888 F.2d 1516 (5th Cir. 1989).

On December 31, 1992, Charles A. Brewer resigned from his appointment as Chapter 7 Trustee. On January 4, 1993, Eileen Shaffer Bailey (Trustee) was appointed the successor trustee.

The Trustee filed her *Final Accounting* with the Court on August 3, 1993. The *Final Accounting* reflected how all funds being held in the bankruptcy estate were to be disbursed to the Killebrews' creditors.

In response to the notice of the *Final Accounting*, Mack Killebrew filed three (3) separate pleadings: *Debtor's Motion for Determination of Tax Liability of Estate and Debtors Under 11 U.S.C. §505*; *Debtor's Objection to Closing the Estate and Request for Determination of Tax Liability Requested Under Pending Motion*; and *Debtor's Supplemental Pleading in Support of Debtor's Motion for Determination of Tax Liability and Objection to Closing Estate*. Subsequent to these pleadings being filed, Delores Killebrew advised the Court that the pleadings were not filed on her behalf.

A trial was held on May 4, 1995, on the various pleadings filed by Mack Killebrew and the Trustee's *Final Accounting*. Mack Killebrew proceeded pro se. Delores Killebrew was present at the trial, but she did not participate in the trial. Mack Killebrew presented arguments in support of his pleadings from the podium, however, he did not have an accountant testify nor did he submit any relevant documentary proof in support of his arguments. Mack Killebrew did not object to the Trustee's calculations or disbursements in the *Final Accounting*. Rather, the common thread in all of Mack Killebrew's pleadings and arguments revolves around issues relating to the testamentary trust and the taxes which were subsequently assessed to him.

The problem with the testamentary trust and the taxes owed on it arose early in this bankruptcy proceeding. Billy Killebrew, Mack Killebrew's cousin, was the trustee of the testamentary trust which was liquidated by Mr. Brewer in this bankruptcy proceeding. In his capacity as trustee of the testamentary trust, Billy Killebrew had issued an Internal Revenue Service Form 1041 Schedule K-1 to Mack Killebrew. According to Billy Killebrew, this K-1 form was derived from the disbursement of the funds from the testamentary trust to the bankruptcy estate. Again, according to Billy Killebrew, this disbursement resulted in Mack Killebrew being personally assessed for the taxes owed on the testamentary trust. Mack Killebrew and Delores Killebrew reported these taxes in their joint tax return for 1987. This tax was subsequently paid.

When the bankruptcy estate's tax returns were filed, the Trustee was unaware that the Debtors had also paid taxes on the disbursement from the trust. By the time the Trustee discovered that the Debtors had erroneously paid taxes on the trust, the Debtors were barred from requesting a refund for the taxes they had paid because the statute of limitations had expired. After numerous pre-trial conferences on Mack Killebrew's pleadings, the attorney for Mack Killebrew and the Trustee announced to the Court, on June 28, 1994, that a settlement had been reached. The settlement was based on the Trustee requesting a refund from the Internal Revenue Service for the taxes the estate had paid on the testamentary trust. The settlement also contemplated that the

Trustee would then pay into the registry of the Court the sum of \$3,938 and that the claims of Mack Killebrew and Delores Killebrew would attach to the money. However at the conference held before the start of the trial, Mack Killebrew stated to the Court that his attorney did not have the authority to enter into the settlement. In addition, Mack Killebrew terminated his attorney's services.

At the May 4, 1995, trial on Mack Killebrew's pleadings and the *Final Accounting*, the attorney for the Internal Revenue Service, David N. Usry, announced that Mack Killebrew did not owe the Internal Revenue Service any prepetition indebtedness. Mr. Usry also announced that the bankruptcy estate did not owe any money to the Internal Revenue Service.

As stated previously, Mack Killebrew proceeded pro se at the May 4, 1995, trial. Mack Killebrew did not submit any relevant evidence in support of *Debtor's Motion for Determination of Tax Liability of Estate and Debtors Under 11 U.S.C. §505; Debtor's Objection to Closing the Estate and Request for Determination of Tax Liability Requested Under Pending Motion; or Debtor's Supplemental Pleading in Support of Debtor's Motion for Determination of Tax Liability and Objection to Closing Estate*. At the close of Mack Killebrew's arguments, the Trustee moved for a judgment pursuant to Federal Rule of Bankruptcy Procedure Rule 7052(c)¹

¹Hereafter, all rules refer to the Federal Rules of Bankruptcy Procedure unless specifically noted otherwise.

CONCLUSIONS OF LAW

I.

This Court has jurisdiction of the subject matter and of the parties to this proceeding pursuant to 28 U.S.C. §1334 and 28 U.S.C. § 157. This is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(A), (B) and (O).

II.

At the May 4, 1995, trial, Mack Killebrew did not submit any relevant evidence in support of his *Debtor's Motion for Determination of Tax Liability of Estate and Debtors Under 11 U.S.C. §505; Debtor's Objection to Closing the Estate and Request for Determination of Tax Liability Requested Under Pending Motion; and the Debtor's Supplemental Pleading in Support of Debtor's Motion for Determination of Tax Liability and Objection to Closing Estate*. After Mack Killebrew had rested, the Trustee then requested that the Court enter a judgment for the Trustee pursuant to Rule 7052(c)².

Federal Rule of Civil Procedure 52(c) states:

Rule 52. Findings by the Court; Judgment on Partial Findings.

(c) Judgment on Partial Findings. If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a

²Rule 7052 states that "Rule 52 FR Civ P applies in adversary proceedings."

favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

"Subdivision (c) authorizes the court to enter judgment against . . . a plaintiff . . . if, after that party's evidence on an issue has been fully heard, the court finds against that party on any factual issue that is dispositive of a claim . . . asserted by that party." 9 L. King, Collier on Bankruptcy, ¶ 7052.06 at 7052-9 to 7052-10 (15th ed. 1995). As stated previously, Mack Killebrew failed to submit any admissible evidence in support of his motions. Since the Internal Revenue Service does not have a claim against Mack Killebrew for prepetition taxes or against the bankruptcy estate for taxes, there is no tax determination to be made by this Court. Consequently, the Court granted the Trustee's motion pursuant to Rule 7052(c).

CONCLUSION

Based upon the clear wording of Rule 7052(c), the Trustee's motion for a judgment on the pleadings should be granted, and Mack Killebrew's motions should be denied.

The Trustee shall disburse the tax refund of \$3,938 equally to Mack L. Killebrew and Delores B. Killebrew, being a disbursement of \$1,969 each.

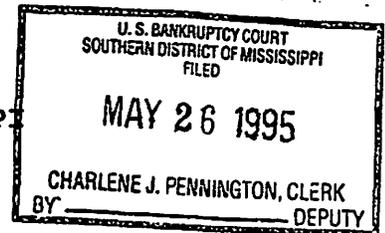
A separate judgment consistent with this opinion will be entered in accordance with Federal Rules of Bankruptcy Procedure 7054 and 9021.

SO ORDERED this the 26th of May, 1995.



UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION



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Chapter 7 Trustee

Hon. David N. Usry
Assistant U. S. Attorney
188 E. Capitol St. Ste. 500
Jackson, MS 39201

Attorney for I.R.S.

Edward Ellington, Judge

FINAL JUDGMENT

Consistent with the opinion dated contemporaneously
herewith:

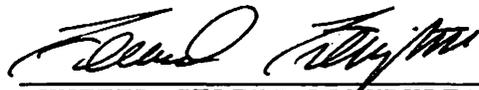
IT IS HEREBY ORDERED AND ADJUDGED that the Chapter 7
Trustee's motion for a judgment pursuant to Federal Rule of
Bankruptcy Procedure 7052(c) is granted and the *Debtor's Motion
for Determination of Tax Liability of Estate and Debtors Under 11
U.S.C. §505, Debtor's Objection to Closing Estate and Request for
Determination of Tax Liability Requested Under Pending Motion,*
and the *Debtor's Supplemental Pleading in Support of Debtor's*

Motion for Determination of Tax Liability and Objection to Closing Estate are denied.

IT IS FURTHER ORDERED that the Trustee's Final Report of Administration of Estate, Report of Receipts and Disbursements, Application For Compensation and Reimbursement of Expenses and Notice of Proposed Distribution is withdrawn.

IT IS FURTHER ORDERED that the Trustee shall disburse the \$3,938 tax refund equally to Mack L. Killebrew and Delores B. Killebrew, that is, \$1,969 each.

SO ORDERED this the 26th day of May, 1995.


UNITED STATES BANKRUPTCY JUDGE