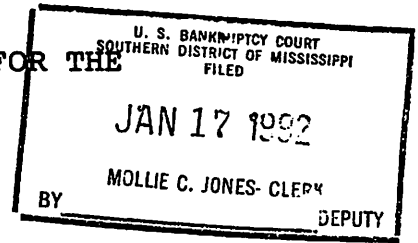


IN THE UNITED STATES BANKRUPTCY COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION



IN RE:

BOBBY K. KILLEBREW

CASE NO. 8900774JC

THE ESTATE OF SARAH R. McLAURIN

PLAINTIFF

VS.

ADVERSARY NO. 890120JC

BOBBY K. KILLEBREW

DEFENDANT

Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION

This is an adversary proceeding in which the Estate of Sarah R. McLaurin, Deceased, is seeking a Summary Judgment declaring a certain Judgment rendered on September 20, 1988, in the Chancery Court of Holmes County, Mississippi, Civil Action No. 16,740, against the debtor, Bobby K. Killebrew, to be excepted from discharge under 11 U.S.C. §523(a)(4). It is the opinion of this Court that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On March 6, 1989, the debtor filed a petition for relief pursuant to Chapter 11 of the Bankruptcy Code.¹ On August 21, 1990, an order was entered confirming the debtor's Chapter 11 Plan of Reorganization. More recently, on motion of the debtor an order

¹ 11 U.S.C. §101, et seq.

was entered on December 4, 1991, converting this case to a case under Chapter 7 of the Code.

This adversary was filed on June 5, 1989. The debtor filed an answer and the matter was held in abeyance while the state court judgment that is the subject of this adversary was appealed to the Supreme Court of the State of Mississippi. The judgment was affirmed by a Memorandum Opinion entered on August 7, 1991. Killebrew v. Killebrew, 583 So.2d 212 (Miss. 1991).

The general discharge provision for debtors in a Chapter 7 is 11 U.S.C. §727. The Code section on which the Estate bases its objection to discharge of the judgment is 11 U.S.C. §523(a)(4) which provides as follows:

11 USC §523

§523. Exceptions to discharge.

(a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt--

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

On November 6, 1991, the plaintiff/movant filed its "Motion for Summary Judgment" and "Memorandum in Support of Plaintiff's Motion for Summary Judgment" pursuant to Uniform Local Bankruptcy Rule 18 and Federal Rules of Bankruptcy Procedure, Rule 7056. The defendant filed no response or brief.

The opinion of the state court chancellor, Honorable Edward G. Cortright, entered on August 31, 1988, in the Chancery Court of Holmes County, is attached to the Motion for Summary Judgment. This opinion is the basis for the judgment entered

against the debtor which was subsequently affirmed by the Mississippi Supreme Court. The opinion is 15 pages in length and makes very detailed findings about the relationship between the debtor/defendant, Bobby K. Killebrew, and his deceased aunt, Sarah R. McLaurin. The opinion clearly establishes that a fiduciary relationship existed between the debtor and Sarah R. McLaurin and establishes precisely the amounts of money which the debtor obtained by defalcation while acting in a fiduciary capacity. There was nothing offered by the debtor in this adversary to controvert the findings.

This Court concludes that there is no genuine issue as to any material fact; that the Estate of Sarah R. McLaurin, Deceased, is entitled to a judgment in its favor as a matter of law; and, that the aforesaid judgment entered against Bobby K. Killebrew in the Chancery Court of Holmes County, Mississippi, is excepted from discharge under the provisions of 11 U.S.C. §523(a)(4).

The Court further notes that pursuant to Miss. Code Ann. § 11-3-23 (1972), the Mississippi Supreme Court awarded a 15% penalty in favor of the plaintiff in its affirmance of the chancery court judgement. Miss. Code Ann. § 11-3-23 (1972) provides in pertinent part as follows:

§11-3-23. Judgment for damages against appellant on affirmance of judgment or on failure to prosecute appeal; computation.

In case the judgment or decree of the court below be affirmed, or the appellant fails to prosecute his appeal to effect, the supreme court shall render judgment against the appellant for damages, at the rate of fifteen percent (15%), as

follows: If the judgment or decree affirmed be for a sum of money, the damages shall be upon such sum.

Although the plaintiff requested in the Motion for Summary Judgment that the 15% penalty also be excepted from discharge, counsel for the plaintiff has not provided the Court with any authority in support of its position. This Court is of the opinion that the penalty is not a debt arising under 11 U.S.C. § 523(a)(4), but rather is a separate debt falling within the provisions of 11 U.S.C. § 727, and therefore is dischargeable.

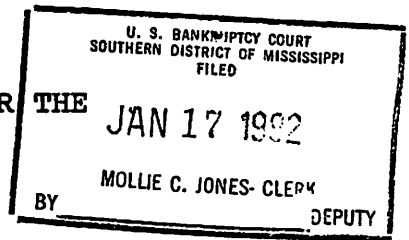
A separate judgment consistent with this opinion will be entered in accordance with Federal Rules of Bankruptcy Procedure, Rules 7054 and 9021.

Dated this the 17th day of January, 1992.



U. S. BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
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CASE NO. 8900774JC

THE ESTATE OF SARAH R. McLAURIN

PLAINTIFF

VS.

ADVERSARY NO. 890120JC

BOBBY K. KILLEBREW

DEFENDANT

FINAL JUDGMENT

Consistent with the opinion dated contemporaneously herewith, it is hereby ordered and adjudged that:

1. The judgment entered on September 20, 1988, in the Chancery Court of Holmes County, Mississippi, Civil Action No. 16,740, against the debtor, Bobby K. Killebrew, together with legal interest thereon, is excepted from discharge under the provisions of 11 U.S.C. §523(a)(4).

2. Damages awarded on appeal pursuant to Miss. Code Ann. § 11-3-23 (1972) are not excepted from discharge under the provisions of 11 U.S.C. §523.

3. This a final judgment for the purposes of Federal Rules of Bankruptcy Procedure, Rules 7054 and 9021.

ORDERED AND ADJUDGED this the 17th day of January, 1992.


UNITED STATES BANKRUPTCY JUDGE