

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

IN RE:)
)
Virginia H. Crum-Jones,) Case No. 99-81841C-7D
)
Debtor.)
_____)
)
Michael W. Johnson, W. Boyce)
Byerly, Ellen Sease, Patrick)
J. Johnston, Yashowardhan)
Gupta, Esther Lumsdon,)
William N. Moore, Patti Sue)
Deschamps Hensley, Jon K.)
Ward, Dan Tortorici, Raymond)
P. McLaughlin and Joyce)
Wayne Sherrill,)
)
Plaintiffs,)
)
v.) Adversary No. 99-9033
)
Virginia H. Crum-Jones,)
)
Defendant.)
)

ENTERED

NOV 14 '00

U.S. Bankruptcy Court
Greensboro, NC

CPH

JUDGMENT

This adversary proceeding came before the court on October 26, 2000, for trial. Brian S. Herrle appeared on behalf of the plaintiffs and John A. Northen appeared on behalf of the defendant. Having considered the evidence offered by the parties and the arguments of counsel, the court finds and concludes as follows:

1. The plaintiffs are former employees of Persimmon IT, Inc. ("Persimmon"), a North Carolina corporation.

2. During the employment of the plaintiffs, the defendant was chief executive officer of Persimmon and also was co-trustee of a retirement plan established by Persimmon under 26 U.S.C. § 401(k) called the "Persimmon IT, Inc. 401(k) Profit Sharing Plan" ("the Plan").

3. Under the terms of the employment arrangement between the plaintiffs and Persimmon, Persimmon was to withhold a specified percentage of each employee's wages for deposit into the Plan. Under the Plan employee contributions were to be invested with Merrill Lynch on behalf of participating employees.

4. Each of the plaintiffs was a participating employee for whom an account at Merrill Lynch was established and some deposits from the Plan were made into the various accounts of the plaintiffs. However, during the latter part of 1998 and the first part of 1999, various amounts were withheld plaintiffs' wages for deposit into the Plan which were not invested in accordance with the Plan. Instead of such funds being invested with Merrill Lynch on behalf of the plaintiffs, such funds were diverted from the Plan

and utilized by Persimmon to pay its expenses, including salaries, taxes, payments to vendors and officers' salaries.

5. After Persimmon ceased operations on April 30, 1999, the Plan was terminated. After the Plan was terminated, certain contributions which Persimmons had made on behalf of other employees which had not vested prior to termination of the Plan were allocated to the plaintiffs' accounts at Merrill Lynch, rather than being refunded to Persimmon. The effect of these amounts being allocated to plaintiffs' accounts was to reduce the loss which the plaintiffs otherwise would have sustained as a result of the failure to invest the funds on behalf of the plaintiffs as required under the Plan.

6. Under § 523(a)(4) of the Bankruptcy Code, a discharge under Chapter 7 does not discharge a debt "for fraud or defalcation while acting in a fiduciary capacity. . . ." In order to prevail under this provision, plaintiffs have the burden of showing by a preponderance of the evidence that the defendant committed a "defalcation" while acting in a "fiduciary" capacity. See In re Swanson, 231 B.R. 145, 148 (Bankr. D.N.H. 1999).

7. The term "fiduciary" as used in § 523(a)(4) applies only to a fiduciary under an express or technical trust which must exist prior to, or independent of, the transaction from which the contested debt arose. See generally 4 Collier on Bankruptcy ¶ 523.10[1][c] (15th ed. rev. 2000). It is not disputed that, as a co-trustee under the Plan documents, the defendant was acting as a fiduciary within the meaning of § 523(a)(4) with respect to the sums of money which were withheld from the wages of the plaintiffs for deposit into the Plan.

8. A "defalcation" under § 523(a)(4) is a misappropriation of funds held in a fiduciary capacity or a failure to properly account for such funds, and may occur without any conduct which rises to the level of fraud, embezzlement or misappropriation. See In re Ansari, 113 F.3d 17, 20 (4th Cir. 1997). In the present case, defendant's testimony that she initially was not aware that withheld funds were not being transferred to Merrill Lynch by her co-trustee was not disputed.¹ However, defendant admitted that in

¹A trustee or other fiduciary is responsible for knowing his or her fiduciary responsibilities and is not entitled to rely upon mere ignorance as a complete defense to an objection to discharge under § 523(a)(4). See In re Hanes, 214 B.R. 786, 813 (Bankr. E.D.Va. 1997). In the present case, however, there was no evidence regarding the circumstances under which the diversion of withheld funds began or

November of 1998, she became aware that withheld funds were being diverted from the Plan and used by Persimmon to pay operating expenses and it is a fair inference from the evidence that she thereafter permitted this diversion of withheld funds from the Plan to continue. The conduct of the defendant in knowingly permitting withheld funds to be diverted from the Plan and used by Persimmon to pay operating expenses constituted a defalcation by the defendant within the meaning of § 523(a)(4) which occurred while the defendant was acting in a fiduciary capacity.

9. As a result of defendant's defalcation, the plaintiffs are entitled to recover from the defendant the net amounts which were lost by the plaintiffs as a result of funds being withheld from their wages and diverted from the Plan from and after November of 1998, which amounts are as follows:

| <u>NAME</u> | <u>NET LOSS</u> |
|----------------------------|-----------------|
| W. Boyce Byerly | 827.63 |
| Yashowardhan Gupta | \$2,545.90 |
| Patti Sue Dechamps Hensley | \$758.06 |

whether the situation was one in which the defendant could or should have been aware of what was happening with the Plan prior to November of 1998.

| | |
|-----------------------|------------|
| Michael W. Johnson | \$ 794.72 |
| Patrick J. Johnston | \$2,462.96 |
| Esther Lumsdon | \$ 756.90 |
| Raymond P. McLaughlin | \$ 221.67 |
| William N. Moore | \$ 638.54 |
| Ellen Sease | \$ 176.22 |
| Joyce Wayne Sherrill | \$1,936.64 |
| Dan Tortorici | \$2,272.13 |
| Jon K. Ward | 2,702.70 |

10. The defendant's aforesaid indebtedness to the plaintiffs is nondischargeable pursuant to § 523(a)(4) of the Bankruptcy Code because such indebtedness resulted from a defalcation by the defendant while acting in a fiduciary capacity.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

(1) That plaintiff W. Boyce Byerly have and recover of the defendant the sum of \$827.63 which is hereby adjudged to be a nondischargeable debt pursuant to § 523(a)(4) of the Bankruptcy Code;

(2) That plaintiff Yashowardhan Gupta have and recover of the defendant the sum of \$2,545.90 which is hereby adjudged to be a nondischargeable debt pursuant to § 523(a)(4) of the Bankruptcy Code;

(3) That plaintiff Patti Sue Deschamps Hensley have and recover of the defendant the sum of \$758.06 which is hereby adjudged to be a nondischargeable debt pursuant to § 523(a)(4) of the Bankruptcy Code;

(4) That plaintiff Michael W. Johnson have and recover of the defendant the sum of \$794.72 which is hereby adjudged to be a nondischargeable debt pursuant to § 523(a)(4) of the Bankruptcy Code;

(5) That plaintiff Patrick J. Johnston have and recover of the defendant the sum of \$2,462.96 which is hereby adjudged to be a nondischargeable debt pursuant to § 523(a)(4) of the Bankruptcy Code;

(6) That plaintiff Esther Lumsdon have and recover of the defendant the sum of \$756.90 which is hereby adjudged to be a nondischargeable debt pursuant to § 523(a)(4) of the Bankruptcy Code;

(7) That plaintiff Raymond P. McLaughlin have and recover of the defendant the sum of \$221.67 which is hereby adjudged to be a nondischargeable debt pursuant to § 523(a)(4) of the Bankruptcy Code;

(8) That plaintiff William N. Moore have and recover of the defendant the sum of \$638.54 which is hereby adjudged to be a nondischargeable debt pursuant to § 523(a)(4) of the Bankruptcy Code;

(9) That plaintiff Ellen Sease have and recover of the defendant the sum of \$176.22 which is hereby adjudged to be a nondischargeable debt pursuant to § 523(a)(4) of the Bankruptcy Code;

(10) That plaintiff Joyce Wayne Sherrill have and recover of the defendant the sum of \$1,936.64 which is hereby adjudged to be a nondischargeable debt pursuant to § 523(a)(4) of the Bankruptcy Code;

(11) That plaintiff Dan Tortorici have and recover of the defendant the sum of \$2,272.13 which is hereby adjudged to be a nondischargeable debt pursuant to § 523(a)(4) of the Bankruptcy Code; and

(12) That plaintiff Jon K. Ward have and recover of the defendant the sum of \$2,702.70 which is hereby adjudged to be a nondischargeable debt pursuant to § 523(a)(4) of the Bankruptcy Code.

This 8th day of November, 2000.

William E. Stocks
WILLIAM L. STOCKS
United States Bankruptcy Judge