

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

IN RE: JACK P. HOLLEMAN

CASE NO. 05-12653-DWH

U.S. TRUSTEE

PLAINTIFF

VERSUS

ADV. PROC. NO. 07-1047-DWH

JACK P. HOLLEMAN

DEFENDANT

OPINION

On consideration before the court is a motion for summary judgment filed in the above adversary proceeding by the United States Trustee for Region 5, (“UST”); no response having been filed thereto by the debtor/defendant, Jack P. Holleman, (“Holleman”); and the court, having considered said motion, finds as follows, to-wit:

I.

The court has jurisdiction of the subject matter of and 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) and (J).

II.

In this proceeding, the UST objects to the discharge of the debtor, Jack P. Holleman, who filed a voluntary petition for relief pursuant to Chapter 7 of the Bankruptcy Code on April 14, 2005.

The UST submitted the following undisputed facts, which are set forth verbatim, as having been admitted by the pleadings and discovery to which there was no objection by Holleman, to-wit:

1. On April 14, 2005, the debtor filed a voluntary petition for relief pursuant to Chapter 7 of the Bankruptcy Code. Henry J. Applewhite, Esq., was appointed as the Chapter 7 trustee. The Chapter 7 trustee has a pending objection to discharge on similar grounds.
2. The debtor provided in his bankruptcy petition that he had total tax debt owed to the IRS and to the Mississippi State Tax Commission of approximately \$250,874.44, some of which contained tax liens dating back as far as 1996.
3. On July 7, 2005, and October 7, 2005, the debtor testified under oath at his §341 meeting of creditors, that he utilized a checking account in the name of PMBMH Investments, LLC (hereinafter “PMBMH”), as his own, to avoid the reach of creditors, particularly the IRS and the State Tax Commission prior to filing bankruptcy.
4. The account utilized by the debtor in the name of PMBMH Investments, LLC, was established in December, 2000.
5. Pursuant to a June 14, 2005, letter from the debtor addressed to the Chapter 7 trustee, the subject account was owned by PMBMH Investments, LLC, and bore their tax identification number. Holleman was not a member of PMBMH. The account was afforded to the debtor through his friendship with the members as simply a means of operating under the IRS and state tax liens.
6. According to Holleman at his July 7, 2005, §341 meeting of creditors, “They (PMBMH) set up a separate one just so I could pay my personal bills.” “I use that account just like I would if I owned my own account.” There were no other funds

in the account other than the debtor's funds. PMBMH afforded the debtor the opportunity to utilize this second account for his own personal business because of the IRS lien because the debtor was afraid to put anything under his social security number. "I am not privy to their checking account...they have their own checking account...But they set me up a separate one just so I could pay my personal bills. I didn't have any way of doing it other than through cash, and there really just wasn't any way to operate. But I am not privy to their checking account. And I am not privy to what they do independent of me as their agent."

7. The disbursements from the checking account were for the debtor personally and not for PMBMH, other than a few advertising bills for which the debtor was reimbursed.
8. The address on the bank statement for the PMBMH checking account was the same as the debtor's address, 1018 North Gloster, Suite 2A7, Tupelo, MS 38804. None of the members of PMBMH has ever requested to look at the bank statements for the bank account utilized by the debtor in the name of PMBMH Investments, LLC.
9. The debtor acknowledged having "carte blanche" over the account, whatever he needs to do with the account he does. Real estate commissions made payable to Jack P. Holleman for his personal use were deposited into the account.
10. The debtor was an agent for PMBMH Investments, LLC, who represented PMBMH in real estate transactions on a commission basis. When a real estate transaction closed, a check would be written to the debtor personally representing

his commission, which in turn he would deposit to the PMBMH account for his personal use.

11. Approximately \$138,762.57 was deposited into the PMBMH Investment account within a year preceding the filing of the bankruptcy petition. The debtor was the sole signatory for disbursements from the same checking account from March 2004 through April 2005.
12. The debtor also deposited personal funds into his daughter's checking account for his personal use and benefit.

III.

Summary judgment is properly granted when pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Bankruptcy Rule 7056; Uniform Local Bankruptcy Rule 18. The court must examine each issue in a light most favorable to the nonmoving party. Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Phillips v. OKC Corp., 812 F.2d 265 (5th Cir. 1987); Putman v. Insurance Co. of North America, 673 F.Supp. 171 (N.D. Miss. 1987). The moving party must demonstrate to the court the basis on which it believes that summary judgment is justified. The nonmoving party must then show that a genuine issue of material fact arises as to that issue. Celotex Corporation v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Leonard v. Dixie Well Service & Supply, Inc., 828 F.2d 291 (5th Cir. 1987), Putman v. Insurance Co. of North America, 673 F.Supp. 171 (N.D. Miss. 1987). An issue is genuine if “there is sufficient evidence favoring the nonmoving party for a fact finder to

find for that party.” Phillips, 812 F.2d at 273. A fact is material if it would “affect the outcome of the lawsuit under the governing substantive law.” Phillips, 812 F.2d at 272.

IV.

The issue before this court is whether or not Holleman violated 11 U.S.C. §727(a)(2)(A) by concealing his property in the PMBMH Investments, LLC, account with the intent to hinder, delay, or defraud a creditor, within one year preceding the date of the filing of his bankruptcy petition.

11 U.S.C. §727(a)(2)(A) provides as follows:

- (a) The court shall grant the debtor a discharge, unless—
 - (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—
 - (A) property of the debtor, within one year before the date of the filing of the petition;...

“In order to deny discharge, the statute requires that four elements be proven: (1) a transfer of property; (2) belonging to the debtor; (3) within one year of the filing of the petition; (4) with the intent to hinder, delay, or defraud a creditor or officer of the estate.” *Matter of Chastant*, 873 F.2d 89, 90 (5th Cir. 1989); *citing In re Reed*, 18 B.R. 462 (Bankr. E.D. Tenn. 1982).

As set forth in the above listed undisputed facts to which Holleman voiced no objection, Holleman admitted each of the *Chastant* requirements, to-wit:

(a) He admitted the use of the PMBMH Investments bank account, within one year preceding the filing of the bankruptcy petition, in which there was \$138,762.57 deposited as a result of real estate commissions that he earned.

(b) He admitted that he utilized the PMBMH Investments account as his banking “alter ego” to avoid the reach of his creditors, particularly the Internal Revenue Service and the Mississippi State Tax Commission.

(c) While he admitted that he intentionally utilized the PMBMH Investments account to avoid the reach of his creditors, he did not list this account in his bankruptcy schedules, and he never amended his schedules to disclose this account.

All four of the elements necessary to prove a claim pursuant to 11 U.S.C. §727(a)(2)(A) have clearly been established.

V.

Based on the foregoing, the court concludes that there are no genuine issues of material fact remaining in dispute in regard to the UST’s complaint objecting to Holleman’s discharge. The UST, therefore, is entitled to judgment as a matter of law.

A separate judgment will be entered consistent with this opinion.

This the 27th day of August, 2008.

/s/ David W. Houston, III
DAVID W. HOUSTON, III
UNITED STATES BANKRUPTCY JUDGE