

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

IN RE:	)	
	)	
MICHAEL C. HILTON,	)	Case No. 02-15369
	)	Chapter 7
	)	
Debtor.	)	
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	)	
SHERRY J. HILTON, DAVID B. HILTON,	)	
and DUANE E. HILTON,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Adversary No. 03-5141
	)	
MICHAEL C. HILTON,	)	
	)	
	)	
Defendant.	)	
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**ORDER DENYING DEFENDANT’S MOTION FOR JUDGMENT ON AND/OR  
TO DISMISS COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT  
AND DEFENDANT’S MOTION TO STRIKE AMENDED COMPLAINT AND  
PLAINTIFFS’ RESPONSE TO MOTION TO DISMISS**

Before the Court are two motions filed by defendant Michael Hilton: (1) a motion to dismiss this adversary proceeding under Fed. R. Civ. P. 12(b)(1) and (b)(6) and Rule 12(c);<sup>1</sup> and (2) a motion to strike plaintiffs’ amended complaint as well as plaintiffs’ alleged late-filed response to the motion to dismiss.<sup>2</sup>

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<sup>1</sup> Dkt. 4.

<sup>2</sup> Dkt. 16.

Plaintiffs Sherry, David and Duane Hilton (“Plaintiffs”) are three heirs of the Harold Hilton Estate (“Estate”). Defendant Michael Hilton (“Hilton”) was one of two former executors of the Estate.<sup>3</sup> In 2000, after Hilton’s removal as executor of the Estate, Plaintiffs obtained judgment against Hilton in the pending state court probate case for breach of fiduciary duty and for misappropriation of estate assets (“Probate Case”).<sup>4</sup> Although the probate court found that these misdeeds were the result of Hilton having inadequate legal counsel from his then-lawyer, Lynn Perkins, the judgment was entered against Hilton and not against his lawyer. At the time the judgment was entered in the Probate Case, Hilton was represented by his current bankruptcy counsel. On October 25, 2002, Hilton filed his chapter 7 bankruptcy. On April 23, 2003, the Plaintiffs filed this adversary proceeding to have the judgment entered against Hilton in the Probate Case held non-dischargeable under 11 U.S.C. § 523(a)(4) (fiduciary fraud) and § 523(a)(6) (willful and malicious injury).<sup>5</sup>

For his motion to dismiss, Hilton argues that the adversary complaint filed by the Plaintiffs was filed out of time, thereby depriving this Court of jurisdiction of the matter. The deadline for filing exceptions or objections to discharge was originally January 24, 2003 and was twice extended on the motion of these heirs, the final extension to April 24, 2003 being granted by the Court on April 4, 2003,<sup>6</sup> *with the consent of defendant’s counsel*. Hilton now complains that (1) the “estate” sought the extension, not the individual heirs, making the extension of the discharge exception deadline

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<sup>3</sup> After Hilton was removed as executor of the Estate, Plaintiffs were appointed co-executors of the Estate.

<sup>4</sup> *In the Matter of the Estate of Harold Hilton*, Case No. 90 P 65, District Court of Greenwood County, Kansas.

<sup>5</sup> See Journal Entry of Final Settlement entered March 27, 2000 in the Probate Case, attached to Plaintiffs’ Complaint to Determine Dischargeability of Debt.

<sup>6</sup> Case No. 02-15369, Dkt. 41.

applicable only to the Estate; and (2) that the running of the deadline as to the individual heirs deprives this Court of jurisdiction. Neither argument is well-taken. The motions for extension of the deadline were brought by “the heirs, legatees and devisees,” not the Estate. Defense counsel consented to the extensions. Moreover, Fed. R. Bankr. P. 4007's deadline for bringing discharge exceptions under § 523(c) is a claims-processing rule, not a congressional mandate which defines or proscribes this Court’s jurisdiction.<sup>7</sup> Hilton’s motion to dismiss on jurisdictional grounds is DENIED.

The balance of Hilton’s motion to dismiss is brought under Fed. R. Civ. P. 12(b)(6). Hilton argues that the complaint fails to state a claim upon which relief can be granted. He asserts that the Probate Case judgment providing the basis for Plaintiffs’ complaint places all responsibility for the misdeeds of Hilton on his then-probate lawyer, Lynn Perkins. In addition, Hilton argues that the complaint may only be properly brought by the executor of the Estate upon authority of the probate court. Finally, Hilton denies that his acts were willful and malicious or that he intended to harm the heirs. These contentions under Rule 12(b)(6) will be addressed later below.

Hilton seeks to have the Plaintiffs’ response to the motion to dismiss filed on October 14, 2003 stricken as being out-of-time.<sup>8</sup> Hilton’s motion to dismiss was filed on May 23, 2003 and set to the June 12, 2003 motion docket. When the matter was called on June 12, both Plaintiffs’ and Hilton’s counsel appeared and requested the matter be set to a scheduling conference.<sup>9</sup> The matter was set over to September 18, 2003 for a scheduling conference. The Court conducted the scheduling conference at which time it noted the Plaintiffs’ failure to file any response to the motion to dismiss. The Court

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<sup>7</sup> See *Kontrick v. Ryan*, 124 S.Ct. 906 (2004) (Sixty-day deadline in Fed. R. Bankr. P. 4004(a) for filing a complaint objecting to discharge under 11 U.S.C. § 727 is not jurisdictional).

<sup>8</sup> Dkt. 14.

<sup>9</sup> See Dkt. 6.

recalls that Plaintiffs' counsel, Mr. Zimmerman, requested a brief additional period in which to file a response. The Court ordered the response to be filed within 20 days of September 18. On the same day, the Clerk's office issued a letter to counsel advising that the deadline for response was 21 days from September 18, or October 9, 2003. October 9 was a Thursday. Plaintiffs were served notice of this response deadline by mail and, as such, could avail themselves of three additional days for response that are accorded by Fed. R. Bankr. P. 9006(f). The third day after October 9 was Sunday, October 12. This Courthouse was closed for Columbus Day, Monday, October 13. The next business day on which the Plaintiffs' response could have been filed was October 14. Plaintiffs' response was filed on October 14 and was therefore timely. Hilton's motion to strike Plaintiffs' response to the motion to dismiss is DENIED.

Hilton also requests the Court to strike Plaintiffs' amended complaint, filed October 14, 2003<sup>10</sup> asserting that Plaintiffs failed to obtain leave of court to amend under Fed. R. Civ. P. 15. By the time of the September 18 scheduling conference, Hilton had already filed his motion to dismiss. As an alternative to dismissal, Hilton sought a more definite statement of the averments against him. At the September 18 conference, this Court suggested to Plaintiffs that a more definite statement of defendant's conduct might well be in order and that an amended complaint could be filed. Plaintiffs did so, including in the amended complaint a copy of the petition for final settlement filed in the probate court which sets out the numerous ways in which they believe defendant committed fraud while acting as a fiduciary and willful and malicious injury. Having requested a more definite statement, Hilton now has one. Plaintiffs proceeded as the Court had suggested and, notwithstanding a technical departure from Rule 15's amendment procedure there is no prejudice to Hilton; the motion

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<sup>10</sup> Dkt. 13.

to strike Plaintiffs' amended complaint will be DENIED.

This brings us to the merits of Hilton's Rule 12(b)(6) motion to dismiss. Because the parties refer to papers outside the pleadings, the Court disposes of this motion as one for summary judgment under Fed. R. Civ. P. 56.<sup>11</sup> Summary judgment properly lies only when there is no dispute as to the underlying facts and the movant is entitled to judgment as a matter of law. In determining whether any genuine issues of material fact exist, the Court must construe the record liberally in favor of the party opposing the summary judgment.<sup>12</sup> An issue is "genuine" if sufficient evidence exists on each side "so that a rational trier of fact could resolve the issue either way" and "[a]n issue is 'material' if under the substantive law it is essential to the proper disposition of the claim."<sup>13</sup>

Hilton's argument that the Probate Case judgment makes attorney Perkins, not Hilton, responsible for the wrongdoing is troubling at best. Viewing the scant record in a light most favorable to the Plaintiffs, it is difficult for this Court to understand how anyone actively engaged in spending Estate moneys and using Estate assets for his own benefit would need a lawyer to tell him those actions contravened his fiduciary duties. The Probate Case judgment clearly suggests that Hilton got bad legal advice. It does not indicate (and neither does Hilton) whether Hilton asked for any advice before invading the Estate's assets and accounts.

Hilton's second argument that this action can only be brought by the executor of the Estate is little more than pettifoggery. Certainly defense counsel is well-aware that the Estate has been closed

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<sup>11</sup> See Fed. R. Civ. P. 12(b) and (c).

<sup>12</sup> *McKibben v. Chubb*, 840 F.2d 1525, 1528 (10<sup>th</sup> Cir. 1988) (citation omitted).

<sup>13</sup> *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10<sup>th</sup> Cir. 1998).

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF KANSAS  
In re: Michael C. Hilton; Case No. 02-15369-7; Adv. No. 03-5141; **Order Denying Defendant's Motion For Judgment On And/Or To Dismiss Complaint To Determine Dischargeability Of Debt And Defendant's Motion To Strike Amended Complaint And Plaintiffs' Response To Motion To Dismiss**

– he signed the journal entry closing it.<sup>14</sup> With its closing, the official capacity of any executor would have terminated. Paragraph 11 of the decree clearly distributes to the heirs all of the residue of the Estate, including, presumably, a cause of action against Hilton for his conduct. This argument borders on the frivolous.

Finally, Hilton pleads that he intended no harm to Plaintiffs, his relatives and the heirs, and that all the harm is the result of Perkins' poor counseling. While this may indeed be found to be the case at trial, it is hardly grounds to grant summary judgment at this time. The Probate Case pleadings in the record suggest that Hilton took substantial liberties with Estate assets and did so for his own benefit. While Hilton may ultimately prevail at trial, he cannot prevail on this motion; the Court must draw all reasonable inferences in favor of Plaintiffs. The motion to dismiss under Rule 12(b)(6) is DENIED.

The parties will adhere to the scheduling minute order entered in this case on September 18, 2003.<sup>15</sup> The Court strongly encourages counsel and the parties to concentrate on the substantive aspects of bringing this matter to trial so that the Court may decide this adversary proceeding on the merits, not on technicalities.

Dated this 20th day of February, 2004.

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<sup>14</sup> The Probate Case was closed in March of 2000 with the Journal Entry of Final Settlement, approximately two and one-half years before Hilton filed his bankruptcy case.

<sup>15</sup> Dkt. 11.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF KANSAS

In re: Michael C. Hilton; Case No. 02-15369-7; Adv. No. 03-5141; **Order Denying Defendant's Motion For Judgment On And/Or To Dismiss Complaint To Determine Dischargeability Of Debt And Defendant's Motion To Strike Amended Complaint And Plaintiffs' Response To Motion To Dismiss**

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ROBERT E. NUGENT  
CHIEF BANKRUPTCY JUDGE  
UNITED STATES BANKRUPTCY COURT  
DISTRICT OF KANSAS

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF KANSAS  
In re: Michael C. Hilton; Case No. 02-15369-7; Adv. No. 03-5141; **Order Denying Defendant's Motion For Judgment On And/Or To Dismiss Complaint To Determine Dischargeability Of Debt And Defendant's Motion To Strike Amended Complaint And Plaintiffs' Response To Motion To Dismiss**

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the **Order Denying Defendant's Motion For Judgment On And/Or To Dismiss Complaint To Determine Dischargeability Of Debt And Defendant's Motion To Strike Amended Complaint And Plaintiffs' Response To Motion To Dismiss** was deposited in the United States mail, postage prepaid on this 20th day of February, 2004, to the following:

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Janet Swonger,  
Judicial Assistant to  
The Honorable Robert E. Nugent