

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

DAVID P. JACKSON

Case No. 91-12228 K

Debtor

STATE OF NEW YORK

Plaintiff

-vs-

AP 93-1019 K

DAVID P. JACKSON

Defendant

The current Motion and Cross Motion for Summary Judgment squarely present the issue of the dischargeability of certain unremitted hunting and fishing license fees under 11 U.S.C. § 523(a)(4).

David Jackson is a Chapter 7 debtor. He and his brother Paul Jackson owned Wilson Bait and Tackle Shop, as partners. In 1984, Paul had asked to be approved by the State of New York to issue hunting and fishing licenses -- a "License Issuing Officer." At the same time, he asked that David (who was apparently not yet a co-owner) be approved as an "Assistant Licensing Officer." After a background investigation, each was approved for the capacity he sought -- Paul as "license issuing officer" and the debtor as Paul's "assistant."

At the time of the bankruptcy of the partnership and of David in 1991 and after partial recovery from the bait shop's bonding company, the State is owed \$20,014.29 in unremitted license

fees, plus interest thereupon.

The State claims that David's failure to make certain that these fees were remitted to the State violated a fiduciary duty owed by David to the State, such that that balance is a nondischargeable obligation of David's under 11 U.S.C. § 523(a)(4). The State bases its claim solely upon David's status as an Assistant License Issuing Officer.

This is not a question merely of whether David Jackson might be indebted to the State by virtue of his status either as an Assistant License Issuing Officer or as his brother's partner. Rather, the State complains that David Jackson is indeed liable to the State, and that that liability arises out of breach of fiduciary duty, so that the liability is non-dischargeable under 11 U.S.C. § 523(a)(4).

The State's position fails for at least two reasons. First, neither the language of the pertinent statute (N.Y. Envtl. Conserv. Law § 11-0713. 1a,(4)) nor regulations (6 N.Y. Code of Rules & Regulations Part 183) imposes any duty on Assistant License Issuing Officers to insure that their "employers"¹ duly remit collected fees. The State argues that since amendment in 1983, 6 NYCRR 183.5 includes "Assistants" with the term "license issuing

¹Under 6 N.Y.C.R.R. 183.3(a), only an "employee" of a License Issuer Officer, employed by such officer at his or her place of business, may be nominated to be an Assistant License Issuing Officer.

officer" when it prohibits such persons from "fail[ing] to comply with applicable ... instruction concerning methods of a remittance of fees," and failing "to submit in a timely manner all ... remittances to the department and sign them properly."

The State's argument is patently without merit. Its requested interpretation would create a crazy-quilt of impossible and overlapping responsibilities. The Court does not know how many persons worked at Wilson Bait and Tackle. It perhaps consisted of only David and Paul. But New York State fishing and hunting licenses are also sold at large tackle shops, gun shops, marinas, and even department stores and discount department stores. Even if only two assistants are authorized to each "license issuing officer" (and no such limitation appears in the regulations or the affidavits), the State's interpretation would make an assistant responsible for the conduct of his or her co-worker, as well as his or her boss. Ideally (by the State's reasoning), the State would receive separate accountings from each of the several "officers" at each establishment.

The Court holds that the regulations in question do not impose a fiduciary duty on "assistant" license issuing officers.

Furthermore, the regulations in question do not pass the muster of the cogent analyses of this subject offered by Bankruptcy Judges Shelly² and Lindquist,³ and by District Judges Mercer⁴ and

²*In re Myers*, 52 B.R. 901 (Bankr. E.D. Va. 1985).

Wright⁵. These regulations do not impose trust duties; do not require segregation of funds; and do not clearly manifest an intent to create a trust. No fiduciary duty is created for purposes of 11 U.S.C. § 523(a)(4), even as to the "license issuing officers" themselves.

Finally, even if these regulations were found to apply to "assistants" and were to impose trust duties, it is by no means clear that § 11-0713 and 6 NYCRR Part 183 constitute a sufficient legislative (as opposed to administrative) directive as to constitute a "statutory" trust or otherwise to impose the requisite "duty." (The Court does not today decide this last point.)

[Curiously, "assistants" do not affix their signature to anything in connection with their application as such. Thus, they surely are not trustees by "express trust," for they do not consent thereto. The final category of trust -- constructive trust -- is usually not material to U.S.C. § 523(a)(4) since constructive trusts typically are ex maleficio trusts.]⁶

³*In Re Littel*, 109 B.R. 874 (Bankr N.D. In. 1989).

⁴*American Ins. Co. v. Lucas*, 41 B.R. 923 (W.D. Pa. 1984).

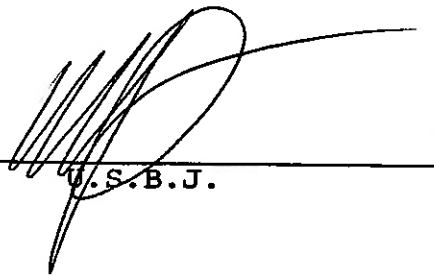
⁵*In re Schnitz*, 52 B.R. 951 (W.D. Mo. 1985).

⁶*Davis v. Aetna Acceptance Co.*, 293 U.S. 328 (1934).

Judgment shall be entered for the debtor as follows:
"The complaint is dismissed on the merits and the claim of the State of New York for unremitted proceeds of the sale of sporting licenses is discharged."

SO ORDERED.

Dated: Buffalo, New York
May 6, 1993



U.S.B.J.