

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CHAPTER 13
)	
VERONICA G. WILBURN,)	CASE NO. 13-76978 - MHM
)	
Debtor.)	
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)	
AMERICAN CONTRACTORS,)	
INDEMNITY,)	
Plaintiff,)	ADVERSARY PROCEEDING
v.)	NO. 14-5078
)	
VERONICA G. WILBURN,)	
)	
Defendant.)	

ORDER GRANTING SUMMARY JUDGMENT

This adversary proceeding is before the court on Plaintiff's *Motion for Summary Judgment*, filed August 25, 2014 (Doc. No. 16) (the "Motion"). Plaintiff filed a complaint initiating this adversary proceeding March 14, 2014, asserting that certain of Debtor's debts to Plaintiff should be excepted from discharge pursuant to 11 U.S.C. § 523(a)(4). Debtor filed an answer April 8, 2014 (Doc. No. 6). Plaintiff now asserts that the undisputed facts entitle Plaintiff to judgment as a matter of law. For the reasons set forth below, the Motion will be granted.

STATEMENT OF FACTS

With the Motion, Plaintiff submitted its *Statement of Material Facts as to Which There Is No Dispute* (Doc. No. 16 – 2) ("Plaintiff's Fact Statement"). Debtor's *Response*

to Plaintiff's Motion for Summary Judgment (Doc. No. 21) (the "Response") includes Responses to Plaintiff's Statement of Undisputed Material Facts, in which Debtor admits each of the facts alleged by Plaintiff.

In May 2007, Debtor was appointed administrator of the Estate of Ruth Wilburn ("Decedent's Estate"). Plaintiff issued a surety bond in the amount of \$387,500.00 (the "Surety Bond") to the State of California in connection with Debtor's service as administrator. The Surety Bond was conditioned on Debtor's "faithful execution of her duties as Administrator."

The Superior Court of San Diego County, California (the "California Court") entered an order March 20, 2009, directing that "Hari Wilburn's distributive share shall not be distributed, but shall be held by the administrator pending further order of this court...." Hari Wilburn's distributive share of Decedent's Estate was \$35,426.23.

However, as of December 2010, no funds remained in the Decedent's Estate's accounts. On December 3, 2010, the California Court directed Debtor to distribute the sum of \$35,426.23 to Cathy Tate. Debtor appealed that order, but the order was affirmed by the California Court of Appeal.

The California Court issued a surcharge against Debtor February 6, 2013, in the amount of \$42,780 (the "Surcharge Order"). In the Surcharge Order, which is attached to the Motion, the California Court found that Debtor "has knowingly and willfully breached her fiduciary duties" (Doc. No. 16-10). Plaintiff paid Cathy Tate \$37,919.50 February 7, 2013, in full satisfaction of the surcharge. On June 18, 2013, the California Court issued a judgment against Debtor in favor of Plaintiff, in the amount of \$37,919.50 in principal and \$7,572.08 in attorneys' fees.

DISCUSSION

Federal Rule of Civil Procedure 56(a), made applicable to this adversary proceeding by Bankruptcy Rule 7056, provides that a party moving for summary judgment is entitled to prevail if no issue of material fact exists and the moving party is entitled to judgment as a matter of law. Plaintiff has the burden of showing the absence of genuine issues of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). Evidence is to be construed in the light most favorable to the nonmoving party. *Id.* Summary judgment is usually inappropriate where contradictory inferences may be drawn from the undisputed facts. *Nunez v. Superior Oil Co.*, 572 F.2d 1119 (5th Cir. 1978).¹

Plaintiff argues that its claim against Debtor arises from Debtor's breach of her fiduciary duties as administrator of the estate of Ruth Wilburn, and should therefore be excepted from discharge under § 523(a)(4). That section provides, "a discharge under section 727 ... does not discharge an individual debtor from any debt ... for fraud or defalcation while acting in a fiduciary capacity[.]" Debtor argues that summary judgment is inappropriate because material questions of fact exist as to Debtor's state of mind, preventing a finding of defalcation without adjudication of the facts.

"Defalcation refers to a failure to produce funds entrusted to a fiduciary." *Quaif v. Johnson*, 4 F.3d 950, 955 (11th Cir. 1993). The term may "not involve bad faith, moral turpitude, or other immoral conduct," but in such cases a finding of defalcation "requires an intentional wrong." *Bullock v. BankChampaign, N.A.*, 133 S.Ct. 1754, 1759 (2013). However, "intentional" includes "reckless conduct of the kind set forth in the Model

¹ Decisions of the Fifth Circuit issued prior to September 30, 1981, constitute binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981).

Penal Code”; a fiduciary has committed defalcation if she “‘consciously disregards’ (or is willfully blind to) ‘a substantial and unjustifiable risk’ that [her] conduct will turn out to violate a fiduciary duty.” *Id.* (quoting the Model Penal Code § 2.02(2)(c), p.226 (1985)). To find that type of “substantial and unjustifiable risk,” the conduct, “considering the nature and purpose of the actor’s conduct and the circumstances known to him,” must represent “a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.” *Id.* and “may be used to refer to nonfraudulent breaches of fiduciary duty.” *Id.* at 1760 (emphasis omitted).

The undisputed facts in this case show that Debtor committed a defalcation by disobeying the California Court’s order to hold Hari Wilburn’s distributive share of Decedent’s Estate until further order of the court. The California court found that Debtor did breach her fiduciary duties to Decedent’s Estate. Debtor’s breach of fiduciary duties was done knowingly or recklessly, because Debtor’s failure to obey the California Court’s order constitutes a “gross deviation from the standard of conduct that a law-abiding person would observe in the [Debtor’s] situation.” It was plainly Debtor’s duty to carry out the California Court’s order. *See, e.g., Harm v. Frasher*, 181 Cal. App. 2d 405 (Cal. App. 1960) (executors’ failure to comply with court order was a “neglect of duty”); *Melone v. Davis*, 67 Cal. 279 (1885) (it “was the plain duty of [the administrator] to carry out the decree [of distribution]” and the administrator’s failure to do so was a breach of such duty); *St. Mary’s Hospital v. Perry*, 152 Cal. 338 (1907) (same). No law abiding person in Debtor’s situation would act otherwise.

Debtor does not dispute that she disobeyed the California Court’s order; instead, she argues that her disobedience was justified because the California Court’s orders were

based on false claims of Cathy Tate. This Court does not have the power to review the California Court's decisions, and cannot sanction Debtor's noncompliance with the California Court's orders. Accordingly, it is hereby

ORDERED that the Motion is **granted**: Debtor's debts to Plaintiff are **nondischargeable** pursuant to 11 U.S.C. § 523(a)(4).

IT IS SO ORDERED, this the 14th day of November, 2014.



MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE