

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE EASTERN DISTRICT OF TENNESSEE

IN RE)
SOUTHERN INDUSTRIAL BANKING) NO. 83-00372
CORPORATION)
Debtor) Chapter 11

THOMAS E. DuVOISIN,)
Liquidating Trustee)
Plaintiff)
v.) ADV. 3-85-0448
JOHN E. COKER, Administrator)
for ESTATE OF JOHN CARTER)
DANIELS, Deceased)

[ENTERED: 1-8-92]

M E M O R A N D U M

This adversary proceeding came to be heard upon the defendant's motion for relief from judgment based upon alleged newly-discovered evidence. Having considered the evidence presented at the hearing, and having considered the arguments and briefs of the parties, the court concludes the motion should be denied.

The current defendant in this proceeding is John E. Coker in his role as administrator for the estate of the original defendant, John C. Daniels. Mr. Daniels died during the course of this proceeding and Mr. Coker was substituted as the defendant.

In this adversary proceeding, the trustee is seeking to recover moneys allegedly withdrawn by John C. Daniels from Southern Industrial Banking Corporation ("SIBC") within ninety days of SIBC's bankruptcy. Summary judgment was entered in favor of the plaintiff on October 11, 1989. The court held the plaintiff could recover from the defendant on the grounds that the moneys withdrawn from SIBC constituted a preferential transfer. After the defendant appealed the judgment to the district court, the district court found the record on appeal incomplete and ordered the parties to supplement it. Later, the court

ordered the parties to indicate whether the record was complete. In response to the order, the defendant claimed he had newly-discovered evidence that he requested be made a part of the record; the defendant also claimed the newly-discovered evidence would entitle him to an order vacating the judgment. The court treated this response as a motion for relief from the judgment and remanded the proceeding to this court to determine whether the evidence relied upon by the defendant is newly discovered within the meaning of Rule 60(b)(2) of the Federal Rules of Civil Procedure and, if it is, whether it justifies granting relief from the judgment.

The defendant contends that after the judgment was rendered in this proceeding, he discovered an original duplicate of a cashier's check issued to John C. Daniels by the City and County Bank of Knox County ("C & C Bank") which proves the antecedent debt owed by SIBC to Mr. Daniels was satisfied out of a third party's funds as opposed to a transfer of an interest in the property of SIBC.

Rule 60(b) of the Federal Rules of Civil Procedure made applicable to adversary proceedings by Bankruptcy Rule 7060 provides in relevant part that "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)[.]" 11 U.S.C.A. § 60(b), (2) (1982 & Supp. 1991).

Relief under Rule 60(b)(2) is available only when the following requirements have been met:

(1) The proffered evidence is actually "newly discovered" that is, it was discovered subsequent to the trial;

(2) The evidence was not discoverable with due diligence in time to move for a new hearing or trial;

(3) The evidence is material, that is, it is sufficient to change the result of the previous judgment.

Harris Trust & Sav. Bank v. Edelson (In re Wildman), 859 F.2d 553 (7th Cir. 1988); *Yachts Am., Inc. v. United States*, 779 F.2d 656 (Fed. Cir. 1985); *Pierce v. United Mine Workers*, 770 F.2d 449 (6th Cir. 1985); *cert. denied*, 474 U.S. 1104 (1986).

The proof introduced at the hearing established that the copy of the cashier's check drawn on C & C Bank was in the possession of John C. Daniels during the course of these proceedings. In fact, John Coker found the check among Mr. Daniels' records in Mr. Daniels' residence after summary judgment had been entered and after Coker was substituted as party defendant following Mr. Daniels' death. Under these circumstances, the court cannot conclude the check is newly-discovered evidence that could not have been discovered through due diligence. See *Taylor v. Texgas Corp.*, 831 F.2d 255 (11th Cir. 1987). Therefore, the defendant would not be entitled to relief under Rule 60(b)(2).

In addition, as the plaintiff points out, the answer filed by Mr. Daniels in this proceeding admits there was a transfer of an interest in SIBC's property to Daniels. Stipulations and admissions in pleadings are generally binding on the parties and the court. *Ferguson v. Neighborhood Hous. Servs.*, 780 F.2d 549, 550-51 (6th Cir. 1986). The court sees no reason to depart from this general rule, especially since the existence of the cashier's check does not lead to a conclusion that SIBC's debt to Mr. Daniels was achieved through something less than a transfer of an interest in SIBC's property. It appears from the evidence presented at the hearing that Mr. Daniels received a check dated February 17, 1983, drawn on an SIBC account, for the amount owed to him. The cashier's check issued to Mr. Daniels by C & C Bank for the same amount as the SIBC check is dated February 18, 1983. The records thus suggest that Mr. Daniels used the SIBC check to purchase a cashier's check from C & C Bank. Whether the SIBC check was presented to C & C Bank for cash or to purchase a cashier's check,

there would have been a transfer of an interest in SIBC's property to Mr. Daniels. See generally *DuVoisin v. Avery (In re Southern Indus. Banking Corp.)*, 120 B.R. 921 (Bankr. E.D. Tenn. 1989), *aff'd per curiam*, 917 F.2d 24 (6th Cir. 1990) (copy attached to the plaintiff's response to the defendant's motion for relief from judgment).

For all of the foregoing reasons, the defendant's motion for relief from judgment is denied. An order will enter.

JOHN C. COOK
United States Bankruptcy Judge