In the United States Bankruptcy Court

for the Southern District of Iowa

WENDEL RAY HOLLIDAY and JANET MAY HOLLIDAY *Debtor(s).*	Bankruptcy No. 03-00946 Chapter 7
UNITED STATES OF AMERICA FSA *Plaintiff(s)* vs. WENDEL RAY HOLLIDAY and JANET MAY HOLLIDAY *Defendant(s)*	Adversary No. 05-30051-wle
DOUGLAS WENDEL HOLLIDAY and JODIE ANN HOLLIDAY *Debtor(s).*	Bankruptcy No. 03-00947 Chapter 7
UNITED STATES OF AMERICA FSA *Plaintiff(s)* vs. DOUGLAS WENDEL HOLLIDAY and JODIE ANN HOLLIDAY *Defendant(s)*	Adversary No. 05-30052-wle

ORDER RE APPLICATION FOR ATTORNEY FEES AND EXPENSES

On August 7, 2007, the court issued its order after final trial of these proceedings. Judgment entered against Douglas Holliday that the claim of the United States in the amount of $9,559.00 is excepted from his discharge pursuant to 11 U.S.C. § 523(a)(2)(A). The claims against the remaining defendants were dismissed. Defendants now apply for attorney fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. The court concludes that the application should be denied. Defendants' application is made under 28 U.S.C. § 2412(d)(1)(A), which provides:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A) (emphasis added).

"Except to the extent it has waived its immunity, the Government is immune from claims for attorney's fees." Ruckelshaus v. Sierra Club, 463 U.S. 680, 685, 103 S.Ct. 3274, 3278 (1983). The EAJA is a partial waiver of sovereign

immunity. As such, it must be construed strictly in favor of the United States. Ardestani v. INS, 502 U.S. 129, 137, 112 S.Ct. 515, 520 (1991); Sierra Club, 463 U.S. at 685, 103 S.Ct. at 3278.

The attorney fees authorized by § 2412(d)(1)(A) are not available in "cases sounding in tort." The Eighth Circuit denied an attorney fee request on this basis in McLarty v. United States, 6 F.3d 545, 549 (8th Cir. 1993). The court observed that plaintiff's claim for wrongful disclosure of tax information was a "case sounding in tort." Id. The tort exception applies regardless of whether the action sounding in tort is brought by or against the United States. Resolution Trust Corp. v. Gaudet, 192 F.3d 485, 487 (5th Cir. 1999).

A case that "sounds" in tort is actionable in tort. Black's Law Dictionary (8th ed. 2004); Garner, Dictionary of Modern Legal Usage 818 (2d ed. 1995). Courts often use the phrase "sounding in tort" to distinguish a claim from one "sounding in contract." The distinction may affect such issues as remedies, statutes of limitations, or choice of law. See, e.g., Federated Rural Electric Ins. Exchange v. R.D. Moody & Assoc., Inc., 468 F.3d 1322, 1325-26 (11th Cir. 2006) (subrogation claim sounded in tort rather than contract for choice of law analysis); Pennsylvania Nat'l Mut. Cas. Ins. Co. v. City of Pine Bluff, 354 F.3d 945, 954 (8th Cir. 2004) (duty under bond arose from contract; suit was not one for negligence against which city would be immune).

If the United States had brought its claims against Hollidays in another court, there would be no question that the claims sounded in tort. The government claimed that Hollidays obtained money from it by false representation or actual fraud. The nature of the case was not changed by raising the claims in a § 523 proceeding. Success under § 523(a)(2)(A) requires proof of the common law elements of one of the named intentional torts. Field v. Mans, 516 U.S. 59, 69, 116 S.Ct. 437, 443 (1995); Merchants National Bank of Winona v. Moen (In re Moen), 238 B.R. 785, 790-91 (B.A.P. 8th Cir. 1999).

Hollidays argue that the government's claims "sounded in bankruptcy." This phrase does not appear to be a term of art. Some courts have used the phrase in a general way to mean that a claim is a core proceeding or is based on a statute under the Bankruptcy Code. See, e.g., Carolin Corp. v. Miller, 886 F.2d 693, 695 (4th Cir. 1989) (case "sound[ing] in bankruptcy" was "fundamentally a dispute over the fate of valuable property;" Chapter 11 case dismissed for want of good faith); Connecticut General Life Ins. Co. v. Universal Ins. Co., 838 F.2d 612, 616 (1st Cir. 1988) (insurance company had not pleaded a "cause of action sounding in bankruptcy law" against trustee); Kalamazoo Realty Venture Ltd. P'ship v. Blockbuster Entertainment Corp., 249 B.R. 879, 886 (N.D. Ill. 2000) (objection to allowance of claims is "issue specifically sounding in bankruptcy"); Union Carbide Corp. v. Viskase Corp. (In re Envirodyne Industries, Inc.), 1994 WL 654662 at *1 (N.D. Ill. 1994) (in motion to withdraw reference, defenses including effect of confirmed Chapter 11 plan "sound[ed] in bankruptcy"). The phrase "sounding in bankruptcy" does not describe the specific nature of a claim.

The court must construe EAJA's limited waiver of sovereign immunity strictly in favor of the United States. Therefore, considering the underlying nature of these proceedings, the court concludes that the government's claims are claims sounding in tort. Hollidays may not seek an award of attorney fees or expenses under 28 U.S.C. § 2412(d)(1)(A).

IT IS ORDERED that the application is denied.

DATED AND ENTERED December 6, 2007

William L. Edmonds
Bankruptcy Judge