

In the United States Bankruptcy Court

for the Northern District of Iowa

MARK WILLIAM KAUFMAN
Debtor.

Bankruptcy No. 94-20551KD
Chapter 7

CUMIS INSURANCE SOCIETY, INC.
Plaintiff

Adversary No. 94-2070KD

vs.

MARK WILLIAM KAUFMAN
Defendant.

RULING ON MOTION FOR SUMMARY JUDGMENT

On March 24, 1995, the above-captioned matter came on for hearing pursuant to assignment. Hearing was held by telephone conference call. Plaintiff was represented by Attorney Chad Leitch. Attorneys Robert Klauer and James Reynolds represented the interests of the Defendant-Debtor. The Court will discuss this representation more fully subsequently in this ruling. The matter was argued to the Court after which the Court took the matter under advisement.

The file reflects that Defendant-Debtor Mark William Kaufman filed a Chapter 7 Petition in Bankruptcy Court on April 7, 1994. The present adversary proceeding arises out of that Chapter 7 Petition seeking denial of an obligation allegedly owed to Plaintiff Cumis Insurance Society, Inc. Plaintiff filed the present complaint to determine dischargeability on June 16, 1994. Plaintiff seeks denial of dischargeability under the provisions of 523(a)(2).

The complaint to determine dischargeability asserts that Defendant was involved in a check kiting scheme in which East Dubuque Savings Bank ultimately was held responsible for certain losses. Apparently, Cumis Insurance Society was the insurance carrier who covered the losses and became subrogated to any claim against this Defendant. It is alleged that a lawsuit was commenced against Defendant by Cumis Insurance Society, Inc. in Shelby County, Tennessee seeking reimbursement on their subrogated claim. A default judgment was entered against this Defendant in Tennessee on April 8, 1994 in a total amount of \$31,539.72. Plaintiff now seeks to have this Court determine that this judgment is nondischargeable as arising from fraud or misrepresentation under 523(a)(2).

Discovery has been completed in this matter and the matter is presently set for trial. On January 20, 1995, Plaintiff filed a Motion for Summary Judgment which was argued by telephone conference call on March 24, 1995. Plaintiff has filed a Memorandum of Law in support of Plaintiff's Motion for Summary Judgment. At the time of hearing, Defendant had not filed any resistance to this Motion. Subsequent to the hearing on March 24, 1995, Attorney James Reynolds filed a pleading entitled Resistance to Motion for Summary Judgment. This resistance was dated March 27, 1995 and filed April 4, 1995.

Plaintiff has moved for summary judgment, asserting that no facts are in dispute and that Defendant has alleged no material facts to refute Plaintiff's claim. It argues that the paper transactions and the depositions which have been taken in this matter conclusively establish that Debtor made false representations which he knew to be false with the intention of deceiving creditor East Dubuque Savings Bank. It further asserts that the Bank relied upon these representations and thereby suffered damages which are reflected in the ultimate judgment of \$31,539.72.

The resistance, orally and in writing as of April 4, 1995, asserts that Defendant did not intend to deceive and that this series of transactions was nothing more than a failed business transaction which should not be held to be nondischargeable. Defendant argues that the issue of fraudulent intent is ultimately a fact issue and is in dispute in this case. It asserts that Defendant's intent to deceive may not be adjudicated in this Motion for Summary Judgment.

Plaintiff must show the absence of any genuine issue of material fact in order to succeed in its motion for summary judgment under Bankruptcy Rule 7056 (Fed. R. Civ. P. 56), In re Earhart, 68 B.R. 14, 15 (Bankr. N.D. Iowa 1986). In considering a motion for summary judgment, the Court must view the facts in the light most favorable to the party opposing the motion, giving that party the benefit of all reasonable inferences to be drawn from the facts. United States v. One 1989 Jeep Wagoneer, 976 F.2d 1172, 1176 (8th Cir. 1992). Where mental state or intent is at issue, summary judgment must be granted with caution, as usually such issues raise questions for determination by a factfinder. Id.

In order to hold a debt nondischargeable under sec. 523(a)(2)(A), "the court must find that (1) the debtor knowingly made a false representation; (2) the debtor intended to deceive the creditor; and (3) the creditor relied upon the false representation." In re Stewart, 91 B.R. 489, 494 (Bankr. S.D. Iowa 1988). Sec. 523(a)(2)(A) invokes the common law elements of fraud. Earhart, 68 B.R. at 16. Fraud is not generally susceptible to summary judgment. In re Shelnett, 150 B.R. 436, 438 (Bankr. E.D. Ark. 1992) (considering debtor's motion for summary judgment on adversary complaint under sec. 523(a)(2)(A) and (B)). "[T]he trial judge must accept as true the nonmovant's evidence, must draw all legitimate inferences in the nonmovant's favor, and must not weigh the evidence on the credibility of witnesses. . . . Were the Court simply to accept the assertions in the defendant's affidavit, that he committed no fraud, the Court would be improperly weighing the credibility of the witness." Id. (citations omitted). This Court noted in Earhart that it is "highly unlikely that a situation would ever arise under which summary judgment would be appropriate in adversary proceedings brought under section 523(a)(2)." Earhart, 68 B.R. at 17.

Plaintiff argues that the circumstances surrounding this debt prove an intent to deceive. Defendant argues that these same circumstances do not establish fraudulent intent. Thus, the parties dispute a genuine issue of material fact and summary judgment is not appropriate. Plaintiff's motion must be denied.

A secondary issue relates to the procedural posture of this case. The Federal Rules of Procedure require a responsive pleading to a motion for summary judgment. No responsive pleading was filed to Plaintiff's Motion for Summary Judgment until well after the hearing was held based on a request for an explanation by the Court as to the failure to file a responsive pleading. Defendant-Debtor's Resistance to Motion for Summary Judgment requests permission to allow this late filed pleading "for the reason that due to the change of counsel, he was unaware that the Motion for Summary Judgment would be heard at the same time as the pretrial conference". Nevertheless, this Motion for Summary Judgment has been on file since January 20, 1995. Additionally, this case does not reflect that there has been a formal change of counsel. Attorney Robert Klauer became counsel of record when he filed an Answer on July 13, 1994. The first indication that Attorney Reynolds may be representing this

Defendant occurred at the time of the hearing on March 24, 1995 when he took part in the hearing held in this matter. However, Attorney Klauer has not filed a Motion to Withdraw as Counsel nor has an order been entered allowing him to do so. Attorney Reynolds has not filed a formal appearance in this case.

The point the Court is making is that there appears to be confusion in this case as to who will be representing this Defendant. However, whatever confusion exists, does not constitute grounds for a late filed pleading in this case since the Defendant has been represented by counsel at all times since the filing of the Motion for Summary Judgment. The Court anticipates that whichever counsel will be representing Defendant in these proceedings will be prepared for trial and will clear up any problems which exist in this file as to representation well prior to that time. At the same time, there is no legitimate excuse for filing a Resistance to Motion for Summary Judgment after the time of hearing on the Motion. Even so, if the Court were to consider granting the summary judgment based upon a failure to file a resistance, such rulings have not found significant favor with Appellate Courts who ultimately favor hearings on the merits. Therefore, while this Court looks with considerable disfavor upon the posture of these pleadings in this case, any sanction imposed should not be visited upon Defendant. As such, the Court does not consider an appropriate sanction for these filings to be a granting of the Motion for Summary Judgment.

For all the reasons set forth in this record, the Court finds that the issue of intent ultimately becomes one of fact to be presented at trial. The question of intent is rarely susceptible to summary judgment and there is nothing in this record to establish to this Court's satisfaction that intent can be gleaned from the record with sufficient specificity to preclude a trial on the merits.

WHEREFORE, Debtors' Motion for Summary Judgment is DENIED.

FURTHER, counsel for Defendant are directed to clarify their status within 10 days of the date of this Order.

FURTHER, trial remains as set.

SO ORDERED this 6th day of April, 1995.

Paul J. Kilburg
U.S. Bankruptcy Judge