

In the United States Bankruptcy Court

for the Northern District of Iowa

BRADLEY JAMES EMERSON
KIMBERLY ANN EMERSON

Bankruptcy No. 01-00446-C

Debtor(s).

Chapter 7

KIMBERLY M. ASHBY

Adversary No. 01-9151-C

Plaintiff(s)

vs.

BRADLEY JAMES EMERSON
KIMBERLY ANN EMERSON

Defendant(s)

ORDER RE MOTION FOR SUMMARY JUDGMENT

This matter came before the undersigned on November 30, 2001 for telephonic hearing. Attorney Kimberly Ashby appeared pro se as Plaintiff. Attorney William Olinger appeared for Debtors/Defendants Bradley and Kimberly Emerson. After hearing arguments of counsel, the Court took the matter under advisement. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I) and (J).

STATEMENT OF THE CASE

Plaintiff's complaint and recast complaint seek a determination that her claim is excepted from discharge for fraud under 11 U.S.C. §523(a)(2)(A) or willful and malicious injury under §523(a)(6). Plaintiff's claim arises from Debtor Bradley Emerson's painting at Plaintiff's home and his retention of Plaintiff's \$450 down payment on the project which he bid at \$920. The recast complaint also seeks denial of Debtors' discharge under §727(a)(2)(A), (a)(3) and (a)(4), alleging Debtors misrepresented debts on their schedules, concealed assets, made false oaths, and failed to keep or preserve records. Debtors filed "Resistances" to Plaintiff's complaint and recast complaint, stating "It is denied that Debtors/Defendants engaged in this conduct as alleged in Plaintiff's complaint."

Debtors filed their Chapter 7 petition on February 22, 2001. Plaintiff filed a small claims action in Linn County on January 16, 2001 which is subject to the automatic stay. In small claims court, Plaintiff seeks a judgment of \$1,042.50 against Debtor Brad Emerson.

Plaintiff moves for summary judgment on all the counts of her complaint, arguing Debtors failed to deny the factual allegations of her complaint. She asserts Debtors thus are deemed to have admitted the facts underlying her complaint and she is entitled to summary judgment as a matter of law. Plaintiff also relies on her affidavit, her small claims action, the record in an unrelated Linn County Small Claims action which resulted in a judgment against Debtor Bradley Emerson for defendant Bill Kilburg, Mr. Kilburg's affidavit, and credit bureau reports concerning Debtors.

In response, Debtors seek summary judgment in their favor, relying on their own affidavit and various exhibits concerning their financial condition. They also move to strike the affidavit of Mr. Kilburg, the record of the small claims actions and the credit reports Plaintiff included in her Motion for Summary Judgment. In response, Plaintiff objects to Debtor's exhibits. Plaintiff argues Debtors' failure to deny facts asserted in her complaint bars them from presenting evidence controverting those facts. She also argues Debtors' business records are inadmissible and lack foundation.

SUMMARY JUDGMENT STANDARD

The Eighth Circuit recognizes "that summary judgment is a drastic remedy and must be exercised with extreme care." Wabun-Inini v. Sessions, 900 F.2d 1234, 1238 (8th Cir. 1990). The Eighth Circuit has also recognized that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Wabun-Inini, 900 F.2d at 1238 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986)). In considering a motion for summary judgment, the Court must determine whether the record, viewed in a light most favorable to the nonmoving party, shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. In re Cochrane, 124 F.3d 978, 981-82 (8th Cir. 1997).

After the moving party points out the absence of evidence to support the nonmoving party's case, the nonmoving party "must advance specific facts to create a genuine issue of material fact for trial." A genuine issue of material fact exists if the evidence is sufficient to allow a reasonable [factfinder] to return a verdict for the nonmoving party. However, the mere existence of a scintilla of evidence in favor of the nonmoving party's position is insufficient to create a genuine issue of material fact.

Rabushka v. Crane Co., 122 F.3d 559, 562 (8th Cir. 1997) (citations omitted).

Summary judgment must be granted with caution when a party's mental state or intent is at issue, as usually such issues raise questions for determination by a factfinder. United States v. One 1989 Jeep Wagoneer, 976 F.2d 1172, 1176 (8th Cir. 1992). Questions involving a person's state of mind are generally factual issues inappropriate for resolution by summary judgment. In re Fishman, 215 B.R. 733, 735 (Bankr. E.D. Ark. 1997) (denying summary judgment for causes of action under §727(a)); In re Earhart, 68 B.R. 14, 17 (Bankr. N.D. Iowa 1986) (surmising it is highly unlikely summary judgment in a §523(a)(2) action would ever be appropriate).

DEEMED ADMISSIONS

Plaintiff relies on Federal Rule of Civil Procedure 8(d), applicable to this proceeding pursuant to Fed. R. Bankr. P. 7008, as partial support for her motion for summary judgment. Rule 8(d) provides that the failure to deny averments in a complaint constitutes an admission of the facts alleged. In certain circumstances, such "deemed admissions" may be binding and sufficient to support a motion for summary judgment. Missouri Hous. Dev. Comm'n v. Brice, 919 F.2d 1306, 1314-15 (8th Cir. 1990). However, a general denial answer can adequately address the allegations of a complaint to survive summary judgment. Stringfellow v. Perry, 869 F.2d 1140, 1143 (8th Cir. 1989).

CONCLUSIONS

The Court concludes summary judgment is not appropriate in this case. Debtors' responses to Plaintiff's complaints constitute general denials. Such general denials are not the most favored form

for pleadings. See Fed. R. Civ. P. 10(b). They are sufficient, however, to deny Plaintiff's factual averments and survive summary judgment. Thus, Debtors are not deemed to have admitted the facts supporting Plaintiff's causes of action for purposes of these summary judgment motions.

Without deemed admissions by Debtors, the record merely contains dueling affidavits. Part of Plaintiff's burden under §523(a) and §727(a) requires proof of Debtors' intent. The parties' affidavits put intent in issue. Therefore, summary judgment is not appropriate. Genuine issues of material fact preclude summary judgment for any party to this action.

As to the parties' objections to each others exhibits, the Court need not rule on the matter at this time. The Court will not disregard Debtors' affidavit in ruling on summary judgment. Debtors filed a general denial to Plaintiff's claims and are not precluded from further denying her factual averments by affidavit. Whether the Court considers or ignores the remainder of the exhibits both parties have proffered in determining whether summary judgment is appropriate, the result is the same. Issues of fact preclude summary judgment.

The Court is aware that the parties place importance on their positions in this discharge litigation. It is also aware that this matter arises out of a debt of somewhere between \$450 and \$1,042.50, much like a state court small claims action. Plaintiff filed her complaint July 2, 2001. Nearly six months has passed without noticeable progress in this action. In these circumstances, the Court prefers to promptly proceed to final disposition of this matter on an expedited basis.

Pursuant to the Court's order filed October 31, 2001, the parties' joint pretrial statement shall be filed no later than January 10, 2002. A status conference wherein the Court will schedule final trial at the earliest possible date is set for

January 11, 2001 at 9:30 a.m.

by **TELEPHONIC CONFERENCE. ATTORNEY FOR PLAINTIFF IS TO INITIATE THE TELEPHONE CALL.** Parties should be ready and available to accept said call. The telephone number for Judge Kilburg's chambers is **(319) 286-2230. NOTE: THIS HEARING WILL BE TAPED ON ELECTRONIC RECORDING EQUIPMENT.**

WHEREFORE, the Motions for Summary Judgment filed by Plaintiff and by Debtors are DENIED.

FURTHER, the parties' objections to exhibits are denied without prejudice.

SO ORDERED this 14th day of December, 20

Paul J. Kilburg
Chief Bankruptcy Judge