

**United States Bankruptcy Court
District of New Mexico**

Document Verification

Case Title: National Printing and Packaging Co. v. Cynthia M. Stearns
Case Number: 02-01293
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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:

CYNTHIA M. STEARNS,
Debtor.

No. 7-02-16222 SS

NATIONAL PRINTING AND PACKAGING,
Plaintiff,

v.

Adv. No. 02-1293 S

CYNTHIA M. STEARNS,
Defendant.

**MEMORANDUM OPINION AND ORDER ON PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

This matter is before the Court on Plaintiff's Motion for Summary Judgment¹ (doc. 33) ("Motion") and accompanying documents: Memorandum Brief which contains a statement of material facts (doc. 34), Exhibits (doc. 35), Supplement (doc. 37) and Errata (doc. 38). At a status conference held on April 9, 2004², the Court ordered Defendant to file a response to the Motion by April 13, 2004 at 5:00 p.m. and authorized Defendant to file her response via facsimile to the Court's

¹Defendant's response to the Motion for Summary Judgment requests that the Court deny the Motion because it was not filed by the March 1, 2004 deadline set out in the Order Resulting from Final Pretrial Conference (doc. 32). The docket in this case indicates that the Motion was in fact filed on March 1, 2004 and was therefore timely.

²Plaintiff's certificate of service on the Motion indicates it was served on February 28, 2004. Defendant's response was due no later than 23 days after service. See NM LBR 7056-1 (response due in 20 days) and Fed.R.Bankr.P. 9006(f)(add 3 days if served by mail). Defendant's response was already overdue at the time of the status conference.

Chambers, and ordered Plaintiff to file a reply by April 15, 2004, also by facsimile. Defendant served a response to the Motion on Plaintiff's counsel but did not fax it to or file it with the Court. On April 14, 2004 Plaintiff filed a reply, and also provided the Court with a copy of Defendant's response. For the reasons that are more fully set out below, the Court finds that Plaintiff's Motion is not well taken and should be denied. This is a core proceeding in which the Bankruptcy Court can enter final orders and judgments. 28 U.S.C. § 157(b)(2)(I) and (J).

Plaintiff filed this adversary proceeding on December 6, 2002, three days before the deadline for complaints objecting to discharge or dischargeability. The complaint was titled "Complaint objecting to discharge and dischargeability" and stated as its only claim for relief "nondischargeability pursuant to 11 U.S.C. § 523(2)(B)" [sic] and the prayer for relief requested that the Court "deny Debtor's discharge" and except Plaintiff's debt from discharge. Through an error in the Bankruptcy Clerk's office, discharge was prematurely entered on December 16, 2002 and the case was closed.

Defendant filed her answer on December 30, 2002. On January 29, 2003, Plaintiff filed an "Amended Complaint Objecting to Dischargeability of Debt Pursuant to Section 523" that stated

as its only claim for relief "nondischargeability pursuant to 11 U.S.C. § 523(2)(B)" [sic] and again requested that the Court "deny Debtor's discharge" and except Plaintiff's debt from discharge.

Neither the original Complaint nor the First Amended Complaint state any grounds under which the Court could deny a discharge under 11 U.S.C. § 727. Rather, the complaints allege that defendant had provided an allegedly false financial statement to them and made misrepresentations of the going concern status of her business in connection with an extension of credit from Plaintiff to Defendant.

Plaintiff's Motion for Summary Judgment seeks to "revoke" Debtor's discharge under 11 U.S.C. § 727(d)(1) based on information it obtained during discovery relating to the Debtor's valuation of her businesses on the bankruptcy schedules filed in the case. This Summary Judgment motion is the first mention in the case of Plaintiff's theory of revocation of the discharge.

SUMMARY JUDGMENT

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Bankruptcy Rule 7056(c). In determining the facts for summary judgment purposes, the Court

may rely on affidavits made with personal knowledge that set forth specific facts otherwise admissible in evidence and sworn or certified copies of papers attached to the affidavits. Fed.R.Civ.P. 56(e). When a motion for summary judgment is made and supported by affidavits or other evidence, an adverse party may not rest upon mere allegations or denials. Id. The court does not try the case on competing affidavits or depositions; the court's function is only to determine if there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The movant must establish 1) the lack of a genuine disputed material fact, and 2) entitlement to judgment as a matter of law. The Court must also draw all legitimate inferences in the nonmovant's favor, and must not weigh the evidence. Bell v. FDIC (In re Collins Securities Corp.), 145 B.R. 277, 282 (Bankr. E.D. Ark. 1992).

Summary judgment practice in New Mexico is governed by Local Rule 7056-1, which provides in relevant part:

The memorandum in support of the motion shall set out as its opening a concise statement of all of the material facts as to which movant contends no genuine issue exists. The facts shall be numbered and shall refer with particularity to those portions of the record upon which movant relies.

A memorandum in opposition to the motion shall contain a concise statement of the material facts as to which the party contends a genuine issue does

exist. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies, and shall state the number of the movant's fact that is disputed. All material facts set forth in the statement of the movant shall be deemed admitted unless specifically controverted.

In Jaxon v. Circle K Corp., 773 F.2d 1138, 1140 (10th Cir. 1985) the Tenth Circuit addressed the issue of a pro se plaintiff's response to a motion for summary judgment. The pro se plaintiff had not understood the technical aspects of the motion, and the Court stated:

"The rights of pro se litigants require careful protection where highly technical requirements are involved, especially when enforcing those requirements might result in a loss of the opportunity to prosecute or defend a lawsuit on the merits.

"District courts must take care to insure that pro se litigants are provided with proper notice regarding the complex procedural issues involved in summary judgment proceedings."

Id. (quoting Garoux v. Pulley, 739 F.2d 437, 439 (9th Cir. 1984)). On the other hand, the Tenth Circuit has also cautioned that while a pro se litigant's pleadings are to be construed liberally and held to a less stringent standard, "we do not believe it is the proper function of the district court to assume the role of advocate for the pro se litigant." Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).

Finally, a motion for summary judgment should not be granted simply because there is no opposition, even if the

failure to oppose the motion violates a local rule. Hibernia Nat'l Bank v. Administracion Central Sociedad Anonima, 776 F.2d 1277, 1279 (5th Cir. 1985). The burden remains on the movant to establish absence of a triable fact and entitlement to judgment as a matter of law.

DISCUSSION

First, the Court will refrain from entering summary judgment on a theory of the case that has not appeared in any of the papers filed in the case up to this point. While it is not uncommon to allow amendment of the pleadings to conform to the evidence at trial, in that situation the non-movant has had an active opportunity to contest the evidence presented.

Second, and perhaps more to the point, the Court finds that the facts established by the motion for summary judgment do not clearly demonstrate Plaintiff is entitled to judgment. To prevail on its theory of § 727(d)(1) Plaintiff must establish that the discharge was procured through fraud. While proof of fraud is often circumstantial, the evidence presented in this case so far does not establish fraudulent intent on the part of the Defendant. Plaintiff established that Defendant listed the value of her business at \$1.00. The affidavit of Terry Vitale (Exhibit O) values the business, based on gross revenues alone, at \$160,000 to \$240,000. But,

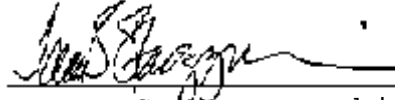
there is no evidence in the record of what the business' debts were. Common sense would indicate that if a business had significant debts it would be worth less than a company with no debts even if both had the same revenues. The Court does not believe that the discrepancy between Defendant's and Plaintiff's values establishes prima facie fraud. Also, while perhaps inartfully drafted and not in the form of an affidavit, Defendant's response to the motion questions the value attributed by Plaintiff on the petition date.

Finally, whether a debtor's discharge should be revoked necessarily raises the question of the debtor's intent in engaging in the conduct alleged to lead to a revocation. E.g., Swartz v. Spears (In re Spears), 291 B.R. 825, 828 (Bankr. C.D. Ill. 2003) ("Plaintiff must establish that the Defendant acted with a knowing intent to defraud.") (Citation omitted.) The Motion does not directly address this issue, and in any event the question of intent is much more (perhaps only, in this case) accurately determined by taking live testimony from the Debtor.

As a final note, the Court notes that the parties seem to share a considerable confusion about what it is they are intending to try at the upcoming trial. In consequence, at the beginning of the trial, Plaintiff needs to be prepared to

state succinctly what section of the Code it is proceeding under, and what relief it seeks, and Defendant needs to be prepared to say what she thinks the issues are.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Summary Judgment is denied.



James S. Starzynski
United States Bankruptcy Judge

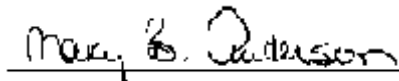
I hereby certify that on April 16, 2004, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the following:

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