

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In re

Case No. 6:02-bk-08758-ABB
Chapter 7

LARRY M. LAMMERS,

Debtor.

GRANGE MUTUAL CASUALTY CO.,

Plaintiff,

vs. Adversary No. 6:02-ap-00334-ABB

LARRY M. LAMMERS,

Defendant.

MEMORANDUM OPINION DENYING
PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT

This adversary proceeding came on for consideration, on the Motion for Summary Judgment (the "Motion") (Doc. No. 58) filed by Plaintiff, Grange Mutual Casualty, Co., the Memorandum supporting Plaintiff's Motion for Summary Judgment (Doc. No. 59) and the Exhibits in support of the Motion (Doc. Nos. 60-73, 78). The plaintiff seeks exception to discharge pursuant to 11 U.S.C. §523(a) (4) and §523(a) (6) and objects to discharge pursuant to 11 U.S.C. § 727(a) (2), §727(a) (3), and §727(a) (5). The issues are whether the debtor liquidated leased equipment without regard to the security interest, whether that constituted willful and malicious injury, whether the debtor destroyed or concealed property with intent to hinder, delay or defraud creditors of his estate, whether the debtor failed to keep adequate records from which his financial condition could be ascertained, and whether the debtor failed to satisfactorily explain loss of assets. After reviewing the pleadings, exhibits, affidavits and considering the applicable law, the plaintiff's Motion is denied.

Background. The debtor filed his Chapter 7 petition in this Court on August 14, 2002. In December 2002, former creditor and former plaintiff First National Bank of America filed this adversary proceeding. Meanwhile Grange Mutual Casualty Co. ("Grange") filed suit against Lammers and others in federal court in Kentucky, for alleged violations of the Federal Racketeer Influenced and Corrupt Organizations ("RICO") statute and other laws. Grange contends it was unaware of the bankruptcy proceeding until approximately one year later.

The debtor was once President and sole director/officer of Sigma Diagnostics, Inc. ("SDI"). SDI executed a lease of medical equipment from Equipment Leasing Specialists, Inc. ("ELS") which the debtor personally guaranteed. Plaintiff contends the guaranty was secured by a mortgage and assignment of rents on some of the debtor's real property. Plaintiff also argues SDI defaulted on the lease and was subsequently administratively dissolved. On July 19, 2001, FNBA sued the debtor and his wife on the lease agreement in state court for replevin, foreclosure and on the guaranty. On May 22, 2002, judgment was entered against SDI, the debtor and his wife for \$286,512.80 plus interest. Plaintiff contends the leased equipment was liquidated without notice to Plaintiff and with disregard to the security interest. ELS assigned its lease to First National Bank of America. In May 2004 Grange and FNBA negotiated an assignment through which Grange became FNBA's successor in interest to the bank's claims against the debtor and the party plaintiff in this adversary proceeding. (Doc. No. 37).

The debtor contends SDI entered into an arrangement with Princeton Hospital wherein the equipment and many of SDI's records would be located at Princeton Hospital primarily for SDI's usage. Princeton Hospital filed for Chapter 11 in January 1999 and continued in its Chapter 11 until May 2001. The debtor contends he notified Plaintiff that the equipment was located at Princeton Hospital and he had no access to the equipment after the filing of Princeton's Chapter 11. He contends the Chapter 11 Trustee or his agent liquidated the equipment during the pendency of Princeton Hospital's Chapter 11. Shortly after Princeton's filing, SDI ceased doing business and was administratively dissolved in 2000.

Plaintiff submitted numerous exhibits to demonstrate the debtor transferred over 600,000 shares of stock in Miracor Diagnostics, Inc. in June and July 2001. Plaintiff alleges the debtor concealed the transfer and the existence of remaining shares of

stock and the transfer was done with the intent to hinder, delay or defraud a creditor. Plaintiff also alleges the debtor made a false oath or account with regard to this stock.

On December 12, 2002, an answer to the complaint in this adversary was filed through counsel generally denying the allegations. (Doc. No. 6). On March 11, 2003, debtor's counsel filed a Motion to Withdraw (Doc. No. 12) which was granted on April 18, 2003 (Doc. No. 21). In a Motion by First National Bank of America for Continuance of Final Evidentiary Hearing (Doc. No. 25), plaintiff represented that another attorney was hired to represent the debtor. However, that attorney closed his law practice and withdrew from representation of the debtor in this adversary proceeding. The debtor is now pro se.

Summary Judgment Standard. The issues before the Court are whether the debtor liquidated leased equipment without regard to the security interest, whether that constituted willful and malicious injury, whether the debtor destroyed or concealed property with intent to hinder, delay or defraud creditors of his estate, whether the debtor failed to keep adequate records from which his financial condition could be ascertained, and whether the debtor failed to satisfactorily explain loss of assets. Pursuant to Federal Rule of Civil Procedure 56, which is applicable under the Federal Rule of Bankruptcy Procedure 7056, a court may grant summary judgment where "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P.56. The moving party has the burden of establishing the right to summary judgment. Fitzpatrick v. Schlitz (In re Schlitz), 97 B.R. 671, 672 (Bankr. N.D. Ga. 1986). In determining entitlement to summary judgment, a court must view all evidence and make reasonable inferences in favor of the party opposing the motion. Haves v. City of Miami, 52 F.3d 918, 921 (11th Cir. 1994)). Therefore, a material factual dispute precludes summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). When opposing a motion for summary judgment, a party may not simply rest on the pleadings but must demonstrate the existence of elements essential to the non-moving party's case and for which the non-moving party will bear the burden of proof at trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (*cert. denied*, Celotex Corp. v. Catrett, 484 U.S. 1066, 108 S.Ct. 1028, 98 L.Ed.2d 992 (1998)).

Section 523. In a challenge to the dischargeability of a debt, the plaintiff/creditor must prove by a preponderance of the evidence that the debt is within one of the specifically enumerated exceptions under Section 523 of the Bankruptcy Code. Grogan v. Garner, 498 U.S. 279, 287 (1991); Fed. R. Bankr. P. 4005 (2004). Without establishing the intent of the debtor, it is not possible to establish the elements necessary pursuant to 11 U.S.C. §523(a) (6). While there may be an act of conversion without the presence of a willful and malicious injury, such a conversion does not bar discharge of the debt. Davis v. Aetna Acceptance Co., 293 U.S. 328, 332 (1934); Miller v. Held (In re Held) 734 F.2d 628 (11th Cir. 1984). Similarly, fraud, defalcation, embezzlement or larceny pursuant to 11 U.S.C. §523 (a) (4) require a finding of intent. Whether the debtor was acting in a fiduciary capacity is a question of fact.

Section 727. Likewise, intent is necessary by definition pursuant to 11 U.S.C. §727(a) (2) which requires "the debtor, with *intent* to hinder, delay, or defraud a creditor..." (emphasis added). Objections to discharge pursuant to 11 U.S.C. §727 (a) (3) are not usually decided on summary judgment. Generally, they "require a fact intensive inquiry regarding the adequacy of the defendant's records." Butler v. Liu (In re Liu), 288 B.R. 155, 161 (Bankr.N.D.Ga. 2002).

The loss of assets alleged pursuant to 11 U.S.C. §727 (a) (5) cannot be decided as the court must hear the debtor's testimony at trial and allow him to introduce evidence explaining any alleged loss of assets.

Upon review of the Motion and the relevant exhibits, there are facts in dispute that preclude summary judgment. As voluminous as the exhibits are, plaintiff is asking this court to view the exhibits and make inferences as to intent and willfulness against the debtor who is unrepresented by counsel. There are factual disputes concerning the manner in which the leased equipment was liquidated. Rather than inferring the debtor's intent at the time property was transferred, assets were lost, and records were kept, the court should make a determination based upon the facts.

Accordingly, plaintiff's Motion for Summary Judgment is DENIED. A separate order consistent with this ruling shall be entered.

DONE AND ORDERED in Orlando,
Florida, on the 9th day of June, 2005.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge