

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 04-10806-JMD
Chapter 7

Timothy T. Jarvis,
Debtor

Phoebe Morse,
United States Trustee,
Plaintiff

v.

Adv. No. 04-1135-JMD

Timothy T. Jarvis,
Defendant

Ready Productions, Inc.,
Plaintiff

v.

Adv. No. 04-1137-JMD

Timothy T. Jarvis,
Defendant

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MEMORANDUM OPINION

I. INTRODUCTION

Both the United States Trustee (the “UST”) and creditor Ready Productions, Inc. (“Ready Productions”) have filed adversary proceedings against the Debtor. The UST seeks to deny the Debtor his discharge pursuant to 11 U.S.C. § 727(a)(4) or, in the alternative, to dismiss the Debtor’s case pursuant to 11 U.S.C. § 707(b). Ready Productions’ action contains three counts. It seeks to deny the Debtor his discharge pursuant to 11 U.S.C. § 727(a)(4) and to have the Debtor’s obligations to Ready Productions deemed non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) and/or (a)(6). Both the UST and Ready Productions filed motions for summary judgment (Adv. No. 04-1135-JMD, Doc. No. 26, and Adv. No. 04-1137-JMD, Doc. No. 31) to which the Debtor objected (Adv. No. 04-1135-JMD, Doc. No. 31, and Adv. No. 04-1137-JMD, Doc. No. 35). The Court held a hearing on the motions on July 12, 2005, and took the matters under advisement.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. DISCUSSION

Under Rule 56(c) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056, a summary judgment motion should be granted only when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material

fact and that the moving party is entitled to a judgment as a matter of law.” “Genuine,” in the context of Rule 56(c), “means that the evidence is such that a reasonable jury could resolve the point in favor of the nonmoving party.” Rodriguez-Pinto v. Tirado-Delgado, 982 F.2d 34, 38 (1st Cir. 1993) (quoting United States v. One Parcel of Real Prop., 960 F.2d 200, 204 (1st Cir. 1992)). “Material,” in the context of Rule 56(c), means that the fact has “the potential to affect the outcome of the suit under applicable law.” Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st Cir. 1993). Courts faced with a motion for summary judgment should read the record “in the light most flattering to the nonmovant and indulg[e] all reasonable inferences in that party’s favor.” Maldonado-Denis v. Castillo-Rodriguez, 23 F.2d 576, 581 (1st Cir. 1994).

A. Summary Judgment on the 727(a)(4) Counts

The UST and/or Ready Productions must prove that the Debtor knowingly and fraudulently, in or in connection with his case, made a false oath or account relating to a material fact. 11 U.S.C. § 727(a)(4); Desmond v. Varrasso (In re Varrasso), 37 F.3d 760, 764 (1st Cir. 1994); Smith v. Grondin (In re Grondin), 232 B.R. 274, 276 (B.A.P. 1st Cir. 1999). A discharge should not be denied under section 727(a)(4)(A) if the false statement or omission is due to mistake or inadvertence or if the mistake is technical and not real. See Gordon v. Mukerjee (In re Mukerjee), 98 B.R. 627, 629 (Bankr. D.N.H. 1989).

The UST asks the Court to infer the Debtor’s fraudulent intent under section 727(a)(4)(A) based upon the existence of several “badges of fraud.” Specifically, she states that “[t]he Debtor’s secrecy behind setting up the operation of the company known as Direct Response with his brother-in-law . . . acting as “bookkeeper,” and his childhood friend . . . , reportedly as owner, are clear badges of fraud from which this Court can infer the Debtor’s

actual fraudulent intent.” While the Court may agree that such acts may be badges of fraud, the Court does not find they clearly establish on this summary judgment record that the Debtor actually had fraudulent intent. “[S]ummary judgment is granted sparingly where . . . issues of the defendant’s intent and knowledge are raised.” Gen. Motors Acceptance Corp. v. Bartlett (In re Bartlett), 154 B.R. 827, 829 (Bankr. D.N.H. 1993). However, a court is not precluded from granting summary judgment in cases where motive or intent are at issue. See Varrasso, 37 F.3d at 764. Ready Productions’ proof of the Debtor’s fraudulent intent seems to rest on the sheer number of false statements and omissions by the Debtor. However, many of the false statements appear to relate to the bankruptcy filing of The Kelley Group Advertising & Marketing Firm, LLC, Bk. No. 04-10805-JMD. The Court notes that neither the UST nor Ready Productions has brought a count pursuant to 11 U.S.C. § 727(a)(7), which permits an interested party to seek denial of a debtor’s discharge based on a debtor’s misconduct in a substantially contemporaneous related bankruptcy case. See Lawrence P. King, 6 Collier on Bankruptcy ¶ 727.10 (15th ed. rev. 2005).

The Debtor asserts that any omissions or false statements on his petition, schedules, and statements were not fraudulent or knowing. He explains that many of the alleged omissions or misstatements were related to the finances of various corporate entities, not his own personal finances, and that any failure to make disclosures in his personal bankruptcy case was the result of innocent mistake or inadvertence because such disclosures would have been related to (1) businesses and transactions that turned no profit or (2) assets that were trivial to the Debtor’s overall financial status.

“In the absence of an admission by a debtor that schedule omissions and inaccuracies were made knowingly and with an intent to defraud, it is difficult for a party seeking summary judgment under Section 727(a)(4)(A) to prove the debtor’s state of mind and establish there is no genuine issue in that regard.” First Capital Bank. v. Thomas (In re Thomas), 2004 WL 1336310, *2, No. 03-81801, ADV. 03-8147 (Bankr. C.D. Ill. 2004). In this case, the facts would permit the Court to make an inference of deliberateness or an inference of carelessness by the Debtor; accordingly, summary judgment must be denied as the choice between those inferences cannot be made at the summary judgment stage. Santana Olmo v. Quinones Rivera (In re Quinones Rivera), 184 B.R. 178, 186 (D.P.R. 1995) (citing Desmond v. Varrasso (In re Varrasso), 37 F.3d 760, 764 (1st Cir. 1994)). Because there is a genuine issue regarding the Debtor’s intent with respect to the various omissions and misstatements on his petition, schedules, and statements, the Court must deny the UST’s motion for summary judgment and that portion of Ready Production’s motion for summary judgment dealing with Count I.

B. Summary Judgment on the 523(a)(2)(A) Count

In order to prove that the Debtor’s obligation to Ready Productions is nondischargeable under section 523(a)(2)(A), Ready Productions must prove that: (1) the Debtor made a knowingly false representation or one made in reckless disregard of the truth; (2) the Debtor intended to deceive; (3) the Debtor intended to induce Ready Productions to rely upon the false statement; (4) Ready Productions actually relied on the false statement; (5) Ready Productions’ reliance was justifiable; and (6) that the reliance caused damage. In re Aoki, 303 B.R. 803, 814 (B.A.P. 1st Cir. 2005).

Having reviewed the summary judgment record before it, the Court concludes that, even assuming the Debtor made a false representation when he signed the settlement agreement and promised not to compete with Ready Productions, Ready Productions has not established that there are no genuine issues as to the Debtor's fraudulent intentions. "[W]here there is an issue as to a person's intent, it is very difficult to determine that issue in a summary manner without the benefit of a trial where the Court can weigh the credibility of the defendant and other witnesses or parties to the proceeding." Gen. Motors Acceptance Corp. v. Bartlett (In re Bartlett), 154 B.R. 827, 830 (Bankr. D.N.H. 1993). See also A.T. & T. Universal Card Servs. v. Burns (In re Burns), 196 B.R. 11 (Bankr. W.D.N.Y. 1996) ("[I]t is almost axiomatic that fraudulent intent is uniquely not susceptible to resolution 'on papers.'") (quoted in A.T. & T. Universal Card Servs. v. Berry (In re Berry), 197 B.R. 382, 383 (Bankr. M.D. Fla. 1996)); Collum v. Redden (In re Redden), 234 B.R. 49, 51 (Bankr. D. Del. 1999). Accordingly, Ready Productions' motion with regard to Count II under section 523(a)(2)(A) is denied.

C. Summary Judgment on the 523(a)(6) Count

To prove its claim under section 523(a)(6), Ready Productions must demonstrate it has a debt that is the result of willful and malicious injury by the Debtor. In order to constitute a willful injury the act must be deliberate or intentional. Printy v. Dean Witter Reynolds, Inc., 110 F.3d 853, 859 (1st Cir. 1997). In other words, the act must be done intentionally and must necessarily cause harm or be substantially certain to cause harm. Id. However, "the word 'willful' in (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998). The malice required by section 523(a)(6)

requires an intent to cause harm; recklessness or negligence will not suffice. Brown v. Timlake (In re Timlake), 2001 BNH 017, at 6 (citing Printy, 110 F.3d at 859; Geiger, 523 U.S. at 64).

Upon review of the record before it, the Court concludes that Ready Productions has not established that it is entitled to summary judgment on Count III of its complaint. Whether the Debtor's actions were willful and malicious is a factual question. Reviewing the summary judgment record in the light most favorable to the Debtor, the Court is unable to conclude that there is no genuine issue as to whether the Debtor may have had actual intent to cause injury to Ready Productions.¹

III. CONCLUSION

For the reasons set forth above, the Court must deny the UST's and Ready Productions' motions for summary judgment. The Court will issue a separate order consistent with this opinion.

ENTERED at Manchester, New Hampshire.

Date: August 12, 2005

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge

¹ The Court takes no position at the summary judgment stage as to whether Ready Productions can even establish non-dischargeability under section 523(a)(6) as a matter of law based on the Debtor's alleged breach of the non-compete provision contained in the parties' settlement agreement.