

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:)
)
GLEN E. GEPHART, JR.,) Bankruptcy Case No. 99-60992
)
Debtor.)
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)
CARL NIEMERG,)
)
Plaintiff,)
)
vs.) Adversary Case No. 00-6005
)
GLEN E. GEPHART, JR.,)
)
Defendant.)

OPINION

This matter having come before the Court on a Motion for Summary Judgment Pursuant to Rule 7056 filed by the Defendant, Glen E. Gephart, Jr., on May 26, 2000, and a Memorandum in Opposition to Motion for Summary Judgment filed by the Plaintiff, Carl Niemerg, on June 5, 2000; the Court, having reviewed the written memoranda, having heard arguments of counsel, and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

In order to prevail on a motion for summary judgment, the movant must meet the statutory criteria set forth in Rule 56 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Federal Rule of Bankruptcy procedure 7056. Rule 56(c) reads in part:

(T)he judgment sought shall be rendered forthwith if 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 judgment as a matter of law.

Fed.R.Civ.P. 56(c); See Donald v. Polk County, 836 F.2d 376, 378-379 (7th Cir. 1988).

The United States Supreme Court has issued a series of cases which encourage the use of summary judgment as a means of disposing of factually unsupported claims. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348 (1986). "The primary purpose for granting a summary judgment motion is to avoid unnecessary trials when there is no genuine issue of material fact in dispute." Farries v. Stanadyne/Chicago Div., 832 F.2d 374, 378 (7th Cir. 1987) (quoting Wainwright Bank & Trust Co. v. Railroadmens Federal Savings & Loan Ass'n, 806 F.2d 146, 149 (7th Cir. 1986)). The burden is on the moving party to show that no genuine issue of material fact is in dispute. Anderson, 477 U.S. at 256, 106 S.Ct. at 2514. There is no genuine issue for trial if the record, taken as a whole, does not lead a rational trier of fact to find for the non-moving party. Matsushita, 475 U.S. at 587, 106 S.Ct. at 1356. "If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249-250, 106 S.Ct. at 2511.

The instant adversary proceeding was initiated by the filing of a Complaint to Determine Dischargeability by the Plaintiff, Carl Niemerg, on February 7, 2000. The Complaint alleges, in pertinent part, that:

From at least 1995 through 1999, Defendant willfully, intentionally, and maliciously engaged in a course of conduct in order to deprive Plaintiff of the love, devotion, and affection of his spouse Colleen Niemerg, as well as her companionship, care, and support; committed adultery with Plaintiff's spouse Colleen Niemerg in that he engaged in sexual intercourse with her while she was married to Plaintiff; and destroyed Plaintiff's marriage to Colleen Niemerg, thereby causing Plaintiff damages in an amount in excess of \$50,000.00 to be determined by the Circuit Court of Effingham County, Illinois, for which Defendant is or will become indebted to Plaintiff. Plaintiff has a suit pending against Defendant for the intentional tort of alienation of affection in Effingham County, Illinois, No. 99-L-14.

The pending suit in Effingham County, Illinois, is currently on hold awaiting the outcome of Plaintiff's Complaint in this proceeding, and the Plaintiff herein requests this Court to determine that any judgment that might be entered in Case No. 99-L-14, in Effingham County, Illinois, be determined to be non-dischargeable in bankruptcy pursuant to 11 U.S.C. § 523(a)(6).

In support of his Motion for Summary Judgment Pursuant to Rule 7056, the Defendant has submitted a Memorandum in Support of Motion for Summary Judgment Pursuant to Rule 7056, together with Affidavits of the Defendant and of the Plaintiff's ex-wife, Colleen Niemerg. In response, the Plaintiff has filed no affidavits which would controvert

the affidavits filed by the Defendant, nor has the Plaintiff filed any discovery materials tending to dispute the facts as set out in the Defendant's Motion and Affidavits in support thereof. Rather, the Plaintiff relies upon the allegations of his Complaint to Determine Dischargeability of debt and his argument that this Court should find that the judgment not yet rendered in the State Court proceeding is non-dischargeable pursuant to 11 U.S.C. § 523(a)(6), simply because it would be based upon the intentional tort of alienation of affections if judgment were rendered in favor of the Plaintiff.

Cases cited by the Plaintiff in support of his opposition to the Motion for Summary Judgment Pursuant to Rule 7056 are clearly distinguishable from the case at bar in that all of the cases cited by the Plaintiff involve fact situations where judgments had already been rendered in a State Court proceeding prior to the filing of an adversary proceeding in bankruptcy. Here there is no State Court judgment for the Plaintiff to rely on, and the Plaintiff has presented no facts in dispute of the sworn Affidavits filed by the Defendant in support of his Motion for Summary Judgment Pursuant to Rule 7056.

In support of his Motion for Summary Judgment Pursuant to Rule 7056, the Defendant aptly cites the case of Sayre v. City of Cleveland, 493 F.2d 64 (6th Cir. 1974), in which the Court of Appeals for the Sixth Circuit held that, where a motion for summary judgment is filed by a defendant, supported by affidavits, showing that there is no

genuine issue of material fact with no counter affidavits or other materials being filed by the plaintiff, summary judgment should be granted. In this case, the undisputed facts submitted in support of the Defendant's Motion for Summary Judgment Pursuant to Rule 7056 clearly indicate that there is no genuine issue of material fact for trial. As such, summary judgment in favor of the Defendant, Glen E. Gephart, Jr., must be granted.

ENTERED: June 30, 2000.

/s/ GERALD D. FINES
United States Bankruptcy Judge