UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

THOMAS C. MILLER and DENISE M. MILLER,

Debtors.
_____/

Case No. DT 08-01545
Hon. Scott W. Dales
Chapter 7

IRWIN SOLOMON and IRWIN SOLOMON ROTH IRA,

Plaintiffs,

v.

THOMAS C. MILLER and DENISE M. MILLER,

Defendants.
_____/

Adversary Pro. No. 08-80222

ORDER REGARDING DEFENDANTS' MOTION TO WITHDRAW DEEMED ADMISSIONS AND PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

PRESENT: HONORABLE SCOTT W. DALES
United States Bankruptcy Judge

On September 26, 2009, Plaintiffs Irwin Solomon ("Solomon") and the Irwin Solomon Roth IRA (collectively the "Plaintiffs") filed a Motion to Deem Admitted Plaintiffs' Requests to Admit (DN 31, the "Plaintiffs' Motion"). Thomas and Denise Miller (the "Defendants") filed Debtor/Defendants' Motion to Withdraw Deemed Admissions (DN 43, "Defendants' Motion") one week before trial. The Plaintiffs also filed a Motion for Summary Judgment (DN 29, the "Summary Judgment Motion") on September 25, 2009, which the Defendants opposed by filing their response on October 12, 2009.

On October 13, 2009, the court issued an order denying the Plaintiffs' Motion as unnecessary under Fed. R. Civ. P. 36 because the rule is self-effectuating. In order to resolve the Defendants' Motion, however, the court invoked Fed. R. Civ. P. 43 and required the Plaintiffs to file an affidavit or declaration on or before October 15, 2009, explaining what prejudice, if any, they will suffer if the court grants the Defendants' Motion. The Plaintiffs' attorney timely complied and based on the Declaration of Joseph R. Sgroi dated October 15, 2009 (DN 49-1), the court readily finds that the Plaintiffs would suffer prejudice if the court were to permit the Defendants to withdraw the admissions. Specifically, the Sgroi Declaration establishes that, in reliance on the deemed admissions, the Plaintiffs did not depose the Defendants on the crucial issue of intent, and refrained from deposing numerous third-party witnesses on a variety of other enumerated issues established by the admissions. Counsel's solemn declaration also notes that Solomon's deteriorating health would make it nearly impossible to rearrange his trial preparation on the eve of trial, were he not permitted to continue relying on the Defendants' admissions that have been of record since July 15, 2009.

Plaintiffs' brief in opposition to the Defendants' Motion makes the obvious but nevertheless compelling observation that, "[i]f this does not constitute prejudice under Rule 36(b), it is difficult to imagine what would." See Plaintiffs' Response to Debtors'/Defendants' Motion to Withdraw Deemed Admissions (DN 49) at p. 5. Consequently, the Defendants' Motion is denied and their deemed admissions will have the effect prescribed in Fed. R. Civ. P. 36(b).

The facts deemed admitted involve certain failed real estate transactions and several related financing agreements (the "Agreements")[1] among the parties. In regard to all the

[1] Specifically, the Agreements include: the Miller Debt and Term Agreement, the Miller Solomon Modified Agreement, the Snider Payment Agreement, and the Miller Solomon Consulting Agreement.

Agreements, the Defendants have admitted that the Agreements attached to the discovery requests are true and accurate copies.

As to the Miller Debt and Term Agreement, the Defendants have admitted that: (1) they entered into the agreement on June 18, 2001; (2) they owe the Plaintiffs $3,957,827.00 through July 31, 2001; (3) they were personal guarantors; (4) they agreed to pay $3,957,827.00 plus interest; (5) when the Defendants entered into the agreement, they did not have the ability to pay; (6) when they signed the agreement, the Defendants did not intend to pay; and (7) they have not paid the amounts owed or any portion thereof.

In regard to the Miller Solomon Modified Agreement, the Defendants have admitted that: (1) they entered into the agreement on June 18, 2001; (2) they owe the Plaintiffs $912,252.00 through July 31, 2001; (3) they agreed to convey to the Plaintiffs an interest in real property in the Governor's Collection (a project in Okemos, Michigan); (4) when the Defendants entered into the agreement, they did not have the ability to pay or convey the real property; (5) when they signed the agreement, the Defendants did not intend to pay or convey the real property; (6) they have not paid the amounts owed or conveyed the real property or any portion thereof; (7) they knew that the source of the loans was Solomon's pension or IRA account; (8) they knew Solomon would incur tax penalties if the Defendants did not timely repay the loans; and (9) Solomon requested repayment several times.

Regarding the Snider Payment Agreement, the Defendants have admitted that: (1) they verbally represented to Solomon that he would not have to repay Snider for any loans Snider advanced to the Defendants or any entity in which they held an interest; (2) Solomon obtained a loan from Snider and guaranteed its repayment on behalf of the Defendants or an entity in which they held an interest; (3) Snider sued Solomon seeking repayment of the loan; (4) the Defendants

entered into the agreement on September 22, 2005; (5) they agreed to repay the loan from Snider; (5) when the Defendants entered into the agreement, they did not have the ability to pay; (6) when they signed the agreement, the Defendants did not intend to pay; (7) they told Solomon they would pay him some or all of the proceeds from the sale of their residence in Gross Pointe, Michigan and/or grant him a mortgage on a house in Charlevoix, Michigan if he would discharge two mortgages on the residence; (8) at the time Solomon discharged the two mortgages, on August 24, 2001, the Defendants did not intend to pay Solomon the proceeds from the sale of the residence or grant him a mortgage on the house in Charlevoix; (9) they have not paid Solomon the proceeds from the sale of the residence or granted a mortgage on the house in Charlevoix.

Finally, under the Miller Solomon Consulting Agreement, the Defendants have admitted: (1) they entered into the agreement on April 27, 1995; (2) they agreed to assign Solomon a 25% beneficial ownership interest in certain real estate ventures and the entities formed to pursue those ventures; (3) when they entered into the agreement, they did not intend to convey an ownership interest in anything; (4) they have not assigned Solomon an interest in any real estate venture, property, or any entity formed to pursue real estate ventures.

In the Summary Judgment Motion, the Plaintiffs argue that the admissions fully satisfy all factual and legal proofs necessary for the entry of a judgment as to the Defendants' liability and nondischargeability pursuant to 11 U.S.C. §§ 523(a)(2)(A), 523(a)(2)(B) and 523(a)(6). The court disagrees.

The court may grant summary judgment if the pleadings show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. However, the court must draw all inferences in favor of the non-moving party, here the Defendants. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). The Summary

Judgment Motion depends upon the court's willingness to draw several inferences in Plaintiffs' favor, inferences that may be appropriate at next week's trial, but not under Fed. R. Civ. P. 56.

In order to except a debt from discharge under § 523(a)(2)(A), a creditor must prove the following elements: (1) the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably relied on the false representation; and (4) its reliance was the proximate cause of loss. Rembert v. AT&T Universal Card Services, Inc. (In re Rembert) 141 F.3d 277 (6th Cir. 1998); Longo v. McLaren (In re McLaren), 3 F.3d 958, 961 (6th Cir.1993).

Because the court is unable to draw inferences against the non-moving party, it finds that all elements of 11 U.S.C. § 523(a)(2)(A) have been satisfied through the Defendants' Rule 36 admissions, as to the Miller Debt and Term Agreement, the Miller Solomon Modified Agreement and the Miller Solomon Consulting Agreement, except the Defendants' intent to deceive[2] and the Plaintiffs' justifiable reliance. As for the Snider Payment Agreement, in addition to these two elements, the court is unable to infer the causation element without further evidence that Solomon actually paid the debt. Therefore, at trial on October 20, 2009, the court will consider evidence as to Count I of the Plaintiffs' Complaint on these elements only.

As for Count II, the Plaintiffs must show: (1) the Defendants' used a statement in writing; (2) that was materially false; (3) respecting their financial condition; (3) on which the Plaintiffs reasonably relied; and (4) the Defendants intended to deceive. Through the Rule 36

[2] It is tempting to infer the *intent to deceive* from Defendants' admissions that they lacked the *intent to perform*, yet the cases instruct the court not to draw inferences on a motion for summary judgment, however tempting or expeditious such inferences may seem in a particular case. Even a more meticulously drawn request to admit would probably not have resulted in a summary judgment because resolving the crucial issue of the Defendants' intent to deceive without hearing directly from the Defendants would be anathema to the court. Summary judgment, after all, "should" be granted only "if appropriate." Fed. R. Civ. P. 56(e)(2). Trial courts evidently enjoy some discretion in deciding to withhold such relief.

admissions, the Plaintiffs have shown there was a statement in writing that was materially false, but have failed to show that any of the Agreements constituted a writing respecting the Defendants' financial condition. Having failed to offer any evidence on this element, summary judgment is not appropriate on Count II. Consequently, at trial on October 20, 2009, the court will consider evidence regarding these non-admitted elements of Count II.

Pursuant to 11 U.S.C. § 523(a)(6), the Plaintiffs must show that the Defendants' debt should not be discharged because it derives from a willful and malicious injury to the Plaintiffs or their property. The court is unable to infer from the Defendants' deemed admissions that their acts were willful and malicious, and the admissions, which were tailored more to Plaintiffs' fraud theory, leave considerable doubt about whether the Plaintiffs can establish other elements of this aspect of their case. As such, the court will consider evidence on Count III of Plaintiffs' Complaint regarding all the elements necessary to relief under 11 U.S.C. § 523(a)(6).

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

1. The Defendants' Motion to Withdraw Deemed Admissions is DENIED;

2. The Plaintiffs' Motion for Summary Judgment is DENIED IN PART AND GRANTED IN PART;

3. Trial will be held on October 20, 2009 at 9:00 a.m. in Traverse City, Michigan where evidence shall be presented on:

   a. the Defendants' intent to deceive and the Plaintiffs' justifiable reliance on the representations made in connection with the Miller Debt and Term Agreement, the Miller Solomon Modified Agreement and the Miller Solomon Consulting Agreement under 11 U.S.C. § 523(a)(2)(A);

   b. the elements of a case under 11 U.S.C. § 523(a)(2)(B);

c. the Defendants' intent to deceive, the Plaintiffs' justifiable reliance and the causation element regarding the Snider Payment Agreement; and

d. the elements of a case under 11 U.S.C. § 523(a)(6).

IT IS FURTHER ORDERED that pursuant to LBR 5005-4 and Fed. R. Bankr. P. 9022, the Clerk shall serve this order upon Wallace Tuttle, Esq., Lawrence P. Hanson, and Joseph R. Sgroi, Esq.

END OF ORDER