

**UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN**

In re:

SCOTT C. HARDY,

Debtor.

Case No. DT 10-00222

Hon. Scott W. Dales

Chapter 7

FERGUSON ENTERPRISES, INC.,

Plaintiff,

v.

SCOTT C. HARDY,

Defendant.

Adversary Pro. No. 10-80085

ORDER REGARDING MOTION FOR SUMMARY JUDGMENT

PRESENT: HONORABLE SCOTT W. DALES
United States Bankruptcy Judge

Plaintiff Ferguson Enterprises, Inc. (“Ferguson”) filed a complaint against Debtor-Defendant Scott C. Hardy on March 1, 2010 seeking an order excepting its claim from discharge under 11 U.S.C. § 523(a)(4) and the Michigan Building Contract Fund Act (“MBCFA”), M.C.L. § 570.151 *et seq.* Before Mr. Hardy’s deadline for answering the complaint and before any formal discovery has taken place, Ferguson filed a motion for summary judgment (the “Motion,” DN 3). The court has determined to rule on the Motion without oral argument.

Mr. Hardy responded, with an unsworn document, entitled “Affidavit of Scott C. Hardy,” explaining that Mr. Hardy’s defense depends upon access to the books and records of his former company, Arms & Cole, Inc. (“Arms & Cole”), which is itself a debtor in bankruptcy. These

crucial books and records are in the custody of Arms & Cole's bankruptcy trustee, or perhaps its principal secured creditor. In any event, the records are not in Mr. Hardy's custody. Nevertheless, Mr. Hardy believes the books and records would show that Arms & Cole is not indebted to Ferguson, and therefore Ferguson does not have a claim against him as a fiduciary under the MBCFA.

Federal Rule of Civil Procedure 56, as amended effective December 1, 2009, no longer bars a plaintiff from moving for summary judgment during the twenty-days following commencement of the action, yet the court nevertheless retains considerable control over the timing of such motions. Because the Motion appears to be properly supported with documents and an affidavit, Rule 56 requires Mr. Hardy to respond by affidavit or otherwise as provided in the rule setting forth specific facts showing a genuine issue of material fact warranting trial. Fed. R. Civ. P. 56(e)(2). If the responding party is unable to respond in this fashion, he may prepare an affidavit in accordance with Rule 56(f).

If Mr. Hardy's supposed "affidavit" had actually been subscribed under oath before a notary, or if it had included the special language prescribed in 28 U.S.C. § 1746 for treating an unsworn declaration as an affidavit, the court would not hesitate to treat the document as an affidavit under Rule 56(f), and to deny the Motion on the grounds that Mr. Hardy requires discovery.

By filing an unsworn statement, Mr. Hardy's response falls technically short of what Rule 56 requires.¹ When a summary judgment motion is supported and not opposed in the manner in which Rule 56 provides, "summary judgment *should, if appropriate*, be entered against that party." Fed. R. Civ. P. 56(e) (emphasis added). The italicized phrase, however,

¹ The nature of the oversight is such that, if called to counsel's attention, it could be easily remedied. The court, however, is not at liberty to engage in *ex parte* communication.

recognizes that the court retains discretion in granting or withholding summary judgment. In the present case, the court believes that granting the Motion at this early stage of the case would be hasty and ill-considered. Perhaps if Mr. Hardy had been afforded a meaningful opportunity for discovery, and the Plaintiff moved for summary judgment after months of litigation, the court might be inclined to adhere strictly to Rule 56(f) and its affidavit requirement. But, because the case is barely in its third week, the court finds that summary judgment is not “appropriate” and should not be entered at this time. The court, therefore, will deny the Motion without prejudice to renewal at a more appropriate point in this litigation.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Motion (DN 3) is DENIED without prejudice.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order pursuant to Fed. R. Bankr. P. 9022 and LBR 5005-4 upon Michael W. Donovan, Esq. and Mel R. Partovich, Esq.

IT IS SO ORDERED.





Scott W. Dales
United States Bankruptcy Judge

Dated: March 25, 2010