

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

MARSHALL C. HUDSON,

Debtor.

Case No. DG 09-04984
Hon. Scott W. Dales

**ORDER GRANTING DEBTOR'S MOTION FOR SUMMARY JUDGMENT
AND DENYING CREDITOR'S MOTION TO DISMISS**

PRESENT: HONORABLE SCOTT W. DALES
United States Bankruptcy Judge

The Estate of Jennifer Malley, Deceased (the "Malley Estate" or "Creditor"), filed a motion to dismiss this bankruptcy case pursuant to 11 U.S.C. § 707(a) (the "Motion to Dismiss," DN 19), and Debtor Marshall C. Hudson ("Mr. Hudson" or the "Debtor") filed his opposition. After holding a pretrial conference, the court issued a Pretrial Order dated September 12, 2009 (the "Pretrial Order," DN 26), which framed the issues and announced the court's intention to treat the Motion to Dismiss as a contested matter under Fed. R. Bankr. P. 9014. The Pretrial Order afforded the parties an opportunity for discovery, and set various deadlines, including a deadline for filing summary judgment motions. The parties agreed that the court should conduct an evidentiary hearing, absent resolution on pretrial motion.

In the Pretrial Order, the court framed the issues on the Motion to Dismiss as follows:
"1. Whether the Creditor can establish that the Debtor filed the petition in bad faith; [and] 2. Whether cause exists to dismiss the case under 11 U.S.C. § 707(a)." See Pretrial Order at p. 2.
A motion to dismiss under 11 U.S.C. § 707(a) ordinarily requires the court to consider the

totality of the circumstances surrounding the Debtor's case. In its Pretrial Order, the court said it would view the circumstances in the record with the guidance of In Re Spagnolia, 199 B.R. 362 (Bankr. W.D. Ky. 1995) and In Re Zick, 931 F.2d 1124 (6th Cir. 1991).

After discovery closed, the Debtor timely filed a summary judgment motion and brief under Fed. R. Civ. P. 56 (the "Rule 56 Motion," DN 39 & 40), made applicable in this contested matter by Fed. R. Bankr. P. 9014(c). The Malley Estate, as the party seeking dismissal, bears the burden of proving by a preponderance of the evidence that cause exists under 11 U.S.C. § 707(a). In re Cohara, 324 B.R. 24, 27 (6th Cir. BAP 2005) ("party moving to dismiss, bears burden of showing 'cause' for dismissal"). By filing the Rule 56 Motion, Mr. Hudson is putting the Malley Estate to its burden.

This Rule 56 Motion requires the court to consider "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). After adequate time for discovery and upon motion, Rule 56(c) indicates that summary judgment against a party may be appropriate when that party fails to establish the existence of an element essential to its case and on which it bears the burden of proof at trial. Celotex Corp. v Catrett, 477 U.S. 317, 322 (1986). To demonstrate a genuine issue, in this case the Malley Estate must present sufficient evidence which the court, as the fact finder, could reasonably find in support of dismissal. Liberty Lobby, 477 U.S. at 252.

Although the Debtor had no obligation to come forward with evidence in support of the Rule 56 Motion, he nevertheless supplied various tax and pension documents supporting his assertion that he does not live a lavish lifestyle. He argues, without contradiction, that the Malley Estate's claim is a tort judgment, admittedly arising from a horrific and fatal accident, but

not for a debt within the discharge exceptions prescribed in 11 U.S.C. § 523(a). He describes his bankruptcy case as his effort to get out from underneath a state court wage earner receivership that, given his nearly \$2,000,000.00 in tort liability, promised to follow the 61 year-old Debtor for the rest of his life.

The Sixth Circuit recognizes that dismissal of a debtor's bankruptcy case may be appropriate in some circumstances amounting to "cause," but has described such a remedy as the exception, available only in "egregious" cases. See In Re Charfoos, 979 F. 2d 360 (6th Cir. 1992), and In Re Zick, 931 F.2d 1124 (6th Cir. 1991). Even where, as here, the debtor arguably seeks bankruptcy protection to discharge a single large debt, the Sixth Circuit suggests that dismissal is appropriate only where the debtor's conduct is "akin to fraud, misconduct or gross negligence." Charfoos, 979 F.2d at 393. Because the Malley Estate bears the burden of proof on its Motion to Dismiss, in response to the Rule 56 Motion it was incumbent upon the Creditor to offer evidence -- not merely argument -- tending to establish such "egregious" circumstances or conduct "akin to fraud, misconduct or gross negligence" in connection with the case that might warrant the court to exercise its discretion, after trial, in favor of dismissal. The Creditor's response to the Debtor's Rule 56 Motion offered nothing of the sort.

Instead of meeting its summary judgment burden as one bearing the burden of proof at trial, the Malley Estate says, in conclusory fashion without any evidentiary submission, that there are disputed issues of fact on a number of dismissal factors. A party opposing a Rule 56 motion cannot simply rest on its initial assertions, as the Creditor did in response to the Rule 56 Motion here. In addition, the Malley Estate makes the following two points:

- B. Even if there is no genuine issue of material fact, Debtor is not entitled to summary judgment as a matter of law for the reason that the Court

cannot determine as a matter of law, without factual development, whether the totality of the circumstances support a finding that cause exists to dismiss the Debtor's petition pursuant to 11 U.S.C. 707(a).

- C. Summary Judgment pursuant to Rule 56 is not applicable to a motion to dismiss under 11 U.S.C. 707(a) in a bankruptcy action.

See Estate of Jennifer Malley, Deceased Response to Debtor's Motion for Summary Judgment (DN 42) at p. 2.

As to point "B," the inherently factual and discretionary nature of the court's inquiry under 11 U.S.C. § 707(b) does not excuse the Malley Estate from having to make an evidentiary showing in order to justify trial. See Fed. R. Civ. P. 56(e)(2). As to point "C," the text of Fed. R. Bankr. P. 9014(c) and the court's Pretrial Order provide sufficient answer to the argument.

Even though the Malley Estate's claim does not fall within 11 U.S.C. § 523(a), as a practical matter it is seeking to except its claim from discharge. Likewise, although the Malley Estate only offered argument without evidentiary support that the Debtor's bankruptcy case presents "egregious" circumstances warranting the extraordinary relief of dismissal, it seeks to have the court deny the Debtor any discharge at all, without any showing under 11 U.S.C. § 727(a). The court makes these observations not because the Creditor has relied on 11 U.S.C. §§ 523 or 727 -- it has not -- but rather to emphasize by analogy the seriousness of the relief the Creditor seeks on this Motion. Having had ample opportunity for discovery, the Malley Estate was required to come forward with evidence in support of its position. Fed. R. Civ. P. 56(e)(2). It failed to do so, and the court shall therefore deny the Motion to Dismiss. Id.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Debtor's Rule 56 Motion (DN 39 & 40) is GRANTED.

IT IS FURTHER ORDERED that the Creditor's Motion to Dismiss (DN 19) is DENIED.

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 William R. Farley, Esq., Attorney for Debtor and John W. Lewis, Esq., Attorney for the Estate of Jennifer Malley, Deceased.

END OF ORDER

IT IS SO ORDERED.





Scott W. Dales
United States Bankruptcy Judge

Dated: January 04, 2010