

Entered 9/18/09 Doc. No. 18

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

IN RE:	)	CHAPTER 7
	)	
PEGGY LORESE OSAGIE,	)	CASE NO. 08-67352 - MHM
	)	
Debtor.	)	
	)	
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REDIA B. ORR,	)	
	)	
Plaintiff,	)	
	)	
v.	)	<b>ADVERSARY PROCEEDING</b>
	)	<b>NO. 08-9043</b>
PEGGY LORESE OSAGIE,	)	
	)	
Defendant.	)	

**ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff filed this adversary proceeding seeking denial of Debtor's discharge on the ground that Debtor fraudulently transferred property within one year before the date of filing her main Chapter 7 bankruptcy case. Debtor filed a motion for summary judgment, but failed to comply with BLR 7056, which provides that a motion for summary judgment must be accompanied by

...a separate and concise statement of the material facts, numbered separately, as to which the movant contends no genuine issue exists to be tried. Statements in the form of issues or legal conclusions (rather than material

facts) will not be considered by the Bankruptcy Court. Affidavits and the introductory portions of briefs do not constitute a statement of material facts.

Plaintiff filed a response opposing entry of summary judgment for Debtor. For the reasons set forth below, Debtor's motion for summary judgment is denied.

The facts set forth in the pleadings, the parties' motions, and in the records of Debtor's two bankruptcy cases show that Debtor filed a prior Chapter 13 case August 20, 2004, Case No. 04-96257-MHM. On Schedule A with her Chapter 13 petition, Debtor showed that she owned real property located at 3699 Micah Ct., Ellenwood, Georgia (the "Property"), which she valued at \$165,900. The mortgagee filed a proof of claim in the amount of \$170,973.43. Debtor did not list Plaintiff as a creditor in her Chapter 13 case, and Debtor's Chapter 13 plan did not propose any treatment of Plaintiff's claim.<sup>1</sup>

On August 25, 2007,<sup>2</sup> following a jury trial, Plaintiff obtained a judgment against Debtor in the amount of \$5,000 for harassment and infliction of emotional distress. Apparently the judgment arose from the relationship between Debtor and Plaintiff's husband, Larry Orr; Plaintiff describes Debtor as her husband's girlfriend. The pleadings provide no information about the date Plaintiff's claim against Debtor arose.

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<sup>1</sup> Therefore, pursuant to §1328, Plaintiff's claim was not discharged in Debtor's prior case.

<sup>2</sup> The trial took place while the prior case was pending and apparently in violation of the automatic stay. While Plaintiff's violation of the stay was not willful, as she had no notice of the case, arguably the judgment obtained is void. *Roberts v. C.I.R.*, 175 F. 3d 889 (11<sup>th</sup> Cir. 1999); *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306 (11<sup>th</sup> Cir. 1982). While the judgment may be void, Plaintiff's claim, even as a contingent or unliquidated claim, accords her standing in this adversary proceeding.

By order entered December 20, 2006, in the prior case, the mortgagee secured by the Property obtained relief from the automatic stay. On July 29, 2007, Debtor filed a motion to sell the Property to Larry Orr, Plaintiff's husband. The motion to sell identified Mr. Orr as an "uninterested" party. The motion did not disclose any personal relationship between Debtor and Mr. Orr. On September 18, 2007, a consent order signed by Debtor's attorney, the mortgagee and the Chapter 13 Trustee was entered allowing the sale of the Property to Larry Orr. The sale closed September 21, 2007. The was apparently a "short sale" and rendered no proceeds for Debtor or the estate. On March 5, 2009, Debtor received a discharge in her Chapter 13 case.

On April 21, 2008, Debtor filed her Chapter 7 case. The Chapter 7 petition shows the address of the Property as Debtor's residence address. Debtor lists Plaintiff's claim on Schedule F. In the instant adversary proceeding objecting to Debtor's discharge, Plaintiff asserts that Debtor and Mr. Orr conspired to deceive the court, the lender and the Chapter 13 Trustee regarding the transfer of the Property. Plaintiff alleges Debtor's transfer of the Property was accomplished with actual fraudulent intent.

Pursuant to FRCP 56(c), incorporated in Bankruptcy Rule 7056, a party moving for summary judgment is entitled to prevail if no genuine issue of any material fact exists and the moving party is entitled to judgment as a matter of law. The burden of proof is on the moving party to establish that a genuine issue of material fact is absent. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Clark v. Coats & Clark, Inc.*, 929 F. 2d 604 (11th Cir.

1991). Evidence is to be construed in the light most favorable to the nonmoving party. *Id.*; *Rollins v. TechSouth, Inc.*, 833 F. 2d 1525 (11th Cir. 1987). When the nonmoving party bears the burden of proof at trial, the moving party in a summary judgment motion must show that the nonmoving party has no evidence to support its case or present affirmative evidence demonstrating that the nonmoving party will be unable to prove its case at trial. *Hammer v. Slater*, 20 F. 3d 1137 (11th Cir. 1994). Once the moving party has met its initial burden by negating an essential element of the nonmoving party's case, the burden shifts to the nonmoving party to show existence of a genuine issue of material fact. *Id.* Unless the moving party satisfies its burden to show an absence of a genuine issue of material fact, no burden of going forward arises for the opposing party to show that a genuine issue of material fact exists. *Adickes*, 398 U.S. at 157; *Clark*, 929 F. 2d at 607. This is so regardless of which party has the burden of proof at trial. *Id.* Motive or intent is not readily susceptible to resolution on motion for summary judgment. *Richards v. Nielsen Freight Lines*, 602 F. Supp. 1224 (D.C. Cal. 1985).

Under §727(a)(2), a debtor's discharge may be denied if it is shown that the debtor fraudulently transferred property within one year before the petition date. In an objection to discharge based upon §727(a)(2), the party objecting to a debtor's discharge must show the debtor's conduct was motivated by actual fraudulent intent. *Future Time, Inc. v. Yates*, 26 B.R. 1006 (M.D. Ga. 1983). Such intent may be inferred from the facts and circumstances surrounding the debtor's conduct. *Id.* A deliberate, material omission will support a denial

of discharge just as an explicitly false statement will. *Chalik v. Moorefield*, 748 F. 2d 616, 618 (11th Cir. 1984).

In the instant case, the burden is upon Defendant, as the moving party, to show the facts are undisputed and to show that Plaintiff has no evidence to support her claim or that Plaintiff will be unable to prove her case at trial. Defendant has failed to do so. The record shows that, in connection with the motion to sell the Property in her prior case, Debtor failed to disclose her personal relationship with the purchaser of the Property. That relationship is a critical fact in determining whether Debtor's transfer of the Property was accomplished with actual fraudulent intent. Accordingly, it is hereby

ORDERED that Defendant's motion for summary judgment is *denied*.

**The Clerk, U.S. Bankruptcy Court, is directed to serve** a copy of this order upon Plaintiff's attorney, Defendant's attorney, and the Chapter 7 Trustee.

IT IS SO ORDERED, this the \_\_\_\_ day of October, 2009.

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MARGARET H. MURPHY  
UNITED STATES BANKRUPTCY JUDGE