

On November 24, 2004, the Court granted the Motion to Compel Discovery, filed by Theo D. Mann (hereinafter the "Plaintiff") in the above-captioned adversary proceeding. The Court ordered defendant Huja Bradshaw (hereinafter the "Defendant") to respond fully to the Plaintiff's request for production of documents by the close of business on Friday, December 10, 2004. On December 21, 2004, the Plaintiff filed the instant motion for sanctions, in which the Plaintiff contends that Bradshaw has failed to respond as ordered. This motion arises in connection with the Plaintiff's complaint seeking the avoidance and recovery of a transfer of funds from James Clinton Bradshaw (hereinafter the "Debtor") to the Defendant. Accordingly, this matter constitutes a core proceeding, over which this Court

has subject matter jurisdiction. *See* 28 U.S.C. § 1334; 157(b)(2)(F);(H).

As a sanction for failing to comply with the Court's order, the Plaintiff requests that the Court strike the Defendant's answer, enter default judgment in favor of the Plaintiff, and award the Plaintiff judgment for the fees and expenses incurred in filing the instant motion for sanctions. The Defendant has not responded to the Plaintiff's Motion, and it is therefore deemed unopposed. *See* BLR 7007-1(b).

Pursuant to Rule 37(b)(2) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Rule 7037 of the Federal Rules of Bankruptcy Procedure, upon the failure of a party to comply with the Court's order compelling discovery, the Court may impose such sanctions as the Court finds just upon the non-performing party, including: 1) entry of an "order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order"; 2) entry of an order preventing the "disobedient party" from supporting or opposing certain claims or defenses, "or prohibiting the party from introducing designated matters in evidence"; 3) entry of an order striking the disobedient party's pleadings, staying or dismissing the proceeding, or entering judgment against the disobedient party; or 4) finding the disobedient party in contempt of court. FED. R. CIV. P. 37(b)(2).<sup>1</sup> The Court may award fees and costs incurred in filing the motion for

---

<sup>1</sup> Under separate order, the Court granted the Plaintiff's request for attorney's fees, made pursuant to Rule 37(a)(4) of the Federal Rules of Civil Procedure and Rule 7037 of the Federal Rules of Bankruptcy Procedure, and has entered judgment in the amount of the fees requested.

sanctions either as an alternative to or in addition to the sanctions outlined above.

Given the fact that the Defendant has not responded to either the Plaintiff's motion to compel or the motion for discovery sanctions, the Court finds that striking the Defendant's answer is an appropriate sanction for her failure to comply with the Court's November 24th Order. The Defendant's answer is hereby **STRICKEN** from the record. The Court will now consider the Plaintiff's request for entry of default judgment.

According to the Plaintiff's complaint, the Debtor and the Defendant owned jointly certain real property. The Debtor and the Defendant sold the real property on or about July 1, 2002. The entire proceeds of the sale were retained by the Defendant. In her answer, the Defendant contends that she retained the Debtor's portion of the proceeds as repayment for a debt owed to her by the Debtor. The Plaintiff has alleged that the Defendant received a preferential transfer.

To establish that a creditor has received a preference, the trustee must establish the elements set forth in § 547(b), which provision permits a trustee to avoid any pre-petition transfer of an interest of a debtor in property—

- (1) to or for the benefit of a creditor;
  - (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
  - (3) made while the debtor was insolvent;
  - (4) made—
    - (A) on or within 90 days before the date of the filing of the petition; or
    - (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time was an insider;
-

and  
(5) that enables such creditor to receive more than such creditor would receive if—

- (A) the case were a case under chapter 7 of this title;
- (B) the transfer had not been made; and
- (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b). The burden of proving each of the above elements falls on the Trustee.  
*See* 11 U.S.C. § 547(g).

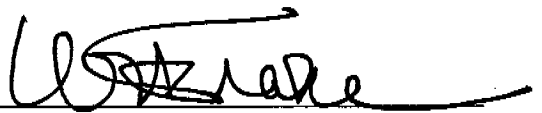
In this case, the Defendant has admitted that she was a creditor of the Debtor and that the transfer was made on account of the debt owed to her. Additionally, the Court takes judicial notice of the fact that, at the time of the transfer, the Defendant was married to the Debtor. *See* Statement of Financial Affairs, Docket Number 1, Case Number 03-11034-WHD. Accordingly, the Defendant is an "insider" within the meaning of § 101(31)(A), and the Plaintiff may seek to avoid transfers made within one year prior to the filing of the bankruptcy case. Here, the transfer of \$42,489.88 was made on July 1, 2002, and the Debtor filed his petition less than one year later on May 3, 2003. The Plaintiff's complaint alleges that the Debtor was insolvent at the time the transfer was made and that the transfer enabled the Defendant to receive more than she would have received from the liquidation of the Debtor's estate. Because the Defendant's answer has been stricken, these allegations are deemed admitted. Accordingly, the Plaintiff has satisfied the elements of § 547(b) and is entitled to entry of default judgment in the amount of \$21,244.94.

Considering the fact that the Court has already granted the Plaintiff a judgment for fees incurred in filing the original motion to compel and the fact that the relief granted to the

Plaintiff is the harshest penalty that the Court can fashion for failure to cooperate in discovery proceedings, the Court finds that an additional award of fees and costs would not be just. Accordingly, the Plaintiff's Motion for Sanctions is hereby **GRANTED** as discussed above.

**IT IS SO ORDERED.**

At Newnan, Georgia, this 10 day of January, 2005.

  
W. HOMER DRAKE, JR.  
UNITED STATES BANKRUPTCY JUDGE