



IT IS ORDERED as set forth below:

Date: July 12, 2010

Mary Grace Diehl

**Mary Grace Diehl
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

In re:	:	CHAPTER 7
	:	
	:	BANKRUPTCY CASE NUMBER
GERALD DEWAYNE OWENS,	:	09-70353-MGD
	:	
Debtor.	:	JUDGE DIEHL
	:	
CHRISTOPHER TERRY,	:	
	:	
Plaintiff,	:	
v.	:	ADVERSARY CASE NUMBER
	:	09-06417-MGD
GERALD DEWAYNE OWENS,	:	
	:	
Defendant.	:	

ORDER

This matter is before the Court on Defendant’s Motion for Judgment on the Pleadings or in the Alternative Motion to Dismiss, Cross Motions for Summary Judgment, and Plaintiff’s Motion to Strike Defendant’s Motion for Summary Judgment. (Docket Nos. 17-21). This is a core

proceeding under 28 U.S.C. § 157(b)(2), and jurisdiction and venue are proper. For the reasons set forth below, Defendant's Motion for Judgment on the Pleadings or, in the Alternative Motion to Dismiss is **DENIED**, Plaintiff's Motion for Summary Judgment is **DENIED**, Defendant's Motion for Summary Judgment is **DENIED**, and Plaintiff's Motion to Strike Defendant's Motion for Summary Judgment is **DENIED AS MOOT**.

Christopher Terry ("Plaintiff") commenced this adversary proceeding on July 27, 2009, against Debtor Gerald Dewayne Owens ("Defendant") by filing a complaint and amended complaint seeking to determine nondischargeability of a debt under 11 U.S.C. §§ 523(a)(2)(A) & (B). (Docket Nos. 1 & 4). On August 24, 2009, Defendant filed an Answer to Amended Complaint alleging an affirmative defense of Plaintiff's failure to state a claim upon which relief can be granted. (Docket No. 9). The deadline for concluding discovery was January 31, 2010, and the deadline for all dispositive motions was February 28, 2010. (Docket No. 11). On February 26, 2010, Defendant filed a Motion for Judgment on the Pleadings or, in the alternative, a Motion to Dismiss for Failure to State a Claim. (Docket No. 17). This was followed by Plaintiff's Brief in Opposition on March 12, 2010. (Docket No. 19). Plaintiff also filed his Motion for Summary Judgment on February 26, 2010, to which Defendant filed a Response and a Cross-Motion for Summary Judgment. (Docket Nos. 18 & 20) Plaintiff then filed a Motion to Strike Defendant's Cross-Motion for Summary Judgment on March 23, 2010. (Docket No. 21). A hearing on these matters was held on June 28, 2010. Present at the hearing were counsel for the Plaintiff, Dorian N. Daggs, and counsel for the Defendant, Chris Kiefer. First, the Court will address the facts as alleged in pleadings and at the hearing. Second, the Court will address Defendant's Motion for Judgment on the Pleadings or in the Alternative Motion to Dismiss. Next, the Court will address the parties' Cross Motions for

Summary Judgment. Finally, the Court will address Plaintiff's Motion to Strike Defendant's Cross Motion for Summary Judgment.

I. Facts

Defendant owned and operated G O Communications, a Georgia corporation. In May 2008, Plaintiff and Defendant began discussions concerning Plaintiff investing in G O Communications. (Docket No. 18, Plaintiff's Statement of Undisputed Material Facts). During May and June, 2008, Plaintiff alleges that he gave Defendant \$7,500 and expected a \$22,500 return on the investment. (Docket No. 18, Plaintiff's Brief in Support of Motion for Summary Judgment). After Defendant failed to pay Plaintiff, Plaintiff instituted a state court action to recover the \$22,500. *Id.* Three weeks after Defendant filed the state court action, on April 22, 2009, Defendant filed an individual Chapter 7 bankruptcy case. (Case No. 09-70353). On Debtor's Schedule F, Defendant listed a pending lawsuit by the Plaintiff in the amount of \$22,500.00. The claim was not scheduled as contingent, unliquidated, or disputed. At the hearing, Plaintiff alleged that, because the claim was not marked as disputed, Defendant admitted that the debt is an individual debt of the Defendant as an individual, as opposed to a debt of Defendant's corporation. At the hearing, Defendant alleged that Schedule F simply listed a pending lawsuit by the Plaintiff, not a debt owed to the Plaintiff.

II. Defendant's Motion for Judgment on the Pleadings, or, in the Alternative Motion to Dismiss for Failure to State a Claim

Rule 12(b)(6) of the Federal Rules of Civil Procedure, applicable to this Court pursuant to Rule 7012(b) of the Federal Rules of Bankruptcy Procedure, permits a defendant in an adversary proceeding to move for dismissal in the event that a plaintiff fails to state a claim upon which relief can be granted. When reviewing a complaint to determine whether a claim upon which relief can be granted has been stated, the Court must accept as true the factual allegations of the complaint.

See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955 (2007); *Daewoo Motor America, Inc. v. General Motors Corp.*, 459 F.3d 1249 (11th Cir. 2006). To survive a motion to dismiss, the Plaintiff's complaint must state sufficient factual allegations to infer each element of the applicable cause of action. *In re Money*, 375 B.R. 704, 707 (Bankr. N.D. Ga. 2007).

Plaintiff's complaint is to deny the dischargeability of Defendant's indebtedness under §§ 523(a)(2)(A) & (B). To prove a complaint for dischargeability pursuant to § 523(a)(2)(A), Plaintiff must show that: (1) that Defendant has a debt to Plaintiff; (2) that the debt is "for money, property, services, or an extension, renewal, or refinancing of credit"; and (3) that the money, property, services, or credit was obtained by false pretenses, a false representation, or actual fraud. 11 U.S.C. § 523(a)(2)(A). Plaintiff has alleged that Defendant was engaged in telecommunications consulting and that Plaintiff invested in said company, that Plaintiff gave Defendant \$7,500.00 for the purpose of investment, that Defendant agreed to give Plaintiff a \$22,500 return on that investment, that Defendant converted those funds to his own use, that Defendant showed Plaintiff job bids and Grady Hospital as a potential job site, that Defendant's conversion of funds and false representation of job bids and potential job sites are evidence of Defendant's intent to defraud Plaintiff, and that Defendant still owes Plaintiff \$22,500. Taking the complaint and arguments at the hearing in the light most favorable to Plaintiff, the Court finds that Plaintiff has pled sufficient facts and that Defendant has sufficient notice of the claims asserted under § 523(a)(2)(A) and the relief sought against him.

Section 523(a)(2)(B) provides that a monetary debt that is "obtained by use of a written statement (i) that is materially false; (ii) respecting the debtor's or an insider's financial condition; (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit

reasonably relied; and (iv) that the debtor caused to be or published with the intent to deceive” is nondischargeable. 11 U.S.C. § 523(a)(2)(B). Plaintiff has alleged that Defendant showed him written job bids to demonstrate that the company was operating, that Plaintiff signed a business agreement agreeing to pay Plaintiff a total amount of \$22,500, that Defendant represented to Defendant that he had the ability to pay this amount, that Plaintiff would not have given Defendant \$7,500 had Defendant not agreed to pay him \$22,500, and that Defendant knew he could not pay the money when he signed the business agreements. Taking the complaint and arguments at the hearing in the light most favorable to Plaintiff, the Court finds that Plaintiff has pled sufficient facts and that Defendant has sufficient notice of the claims asserted under § 523(a)(2)(B) and the relief sought against him. It is therefore appropriate to deny Defendant's Motion to Dismiss. The Court will now evaluate the parties' Cross Motions for Summary Judgment.

III. Cross Motions for Summary Judgment

In accordance with Rule 56 of the Federal Rules of Civil Procedure, applicable to this Court pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure, the Court will grant summary judgment only if “there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c). “Material facts” are those that might affect the outcome of a proceeding under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Further, a dispute of fact is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* Lastly, the moving party has the burden of establishing the right of summary judgment. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991); *Clark v. Union Mut. Life Ins. Co.*, 692 F.2d 1370, 1372 (11th Cir. 1982).

In determining whether a genuine issue of material fact exists, the Court must view the

evidence in the light most favorable to the nonmoving party. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Rosen v. Biscayne Yacht & Country Club, Inc.*, 766 F.2d 482, 484 (11th Cir. 1985). It remains the burden of the moving party to establish the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). At the summary judgment stage, all facts asserted by the party opposing summary judgment must be regarded as true if supported by affidavit or other evidentiary material. *Warrior Tombigbee Transp. Co., Inc. v. M/V Nan Fung*, 695 F.2d 1294, 1298 n. 2 (11th Cir. 1983). To defeat a summary judgment motion, “[a]ll that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at trial.” *BP Prods. N. Am., Inc. v. Se. Energy Group*, 282 Fed. Appx. 776, 779 (11th Cir. 2008) (internal quotations and citations omitted).

Defendant requests summary judgment in his favor on two bases: (1) he is not an individual obligor on the \$22,500 owed to Plaintiff and (2) Defendant harbored no intent to deceive Plaintiff at the time of the transaction as required under § 523(a)(2)(A). Plaintiff requests summary judgment on the grounds that Defendant obtained money from him by false pretenses, false representations or actual fraud. Presumably, both parties are seeking summary judgment only as to the claim for non-dischargeability under § 523(a)(2)(A) and not under § 523(a)(2)(B). The Court will address Defendant’s first basis for summary judgment below, followed by joint analysis on Defendant’s second basis and Plaintiff’s grounds for summary judgment.

Defendant’s request for summary judgment on the basis that he is not the obligor on the debt must be denied. Defendant’s failure to mark Plaintiff’s pending law suit as contingent, unliquidated, or disputed, “standing alone, constitutes a judicial admission that he does in fact owe a debt to the [Plaintiff].” *Matter of Musgrove*, 187 B.R. 808, 812 (Bankr.N.D.Ga. 1995) (Drake, J.). In

Musgrove, the plaintiffs filed an adversary proceeding against the debtor alleging that a judgment obtained in state court was non-dischargeable pursuant to § 523(a)(4). *Id.* at 811. The defendant filed a Motion to Dismiss or in the Alternative Motion for Summary Judgment alleging that the debtor was not an obligor on the debt because the debtor was not individually listed on the judgment. *Id.* In that case, summary judgment was denied because the debtor listed the judgment as fixed and liquidated. *Id.* at 812. Similarly, here Defendant alleges that he is not an individual obligor on the debt because it is a debt of his corporation, G O Communications. Furthermore, just like the defendant in *Musgrove*, Defendant failed to indicate in Defendant's Schedule F that the debt is disputed. At the hearing, Defendant admitted that marking the lawsuit as disputed on Schedule F would have been a simple thing to do. Therefore, summary judgment may not be granted to the Defendant on the basis that the Defendant is not the obligor on the debt.

Defendant also alleges that summary judgment should be granted to him because he never made a false statement with the intent to deceive, as required for a debt to be non-dischargeable under § 523(a)(2)(A). To establish that a debt is excepted from discharge under § 523(a)(2)(A), the creditor must prove by a preponderance of the evidence that: (1) the debtor made a false representation, other than an oral statement respecting the debtor's financial condition, with intent to deceive the creditor; (2) the creditor actually relied on the misrepresentation; (3) the creditor's reliance was justifiable; and (4) the misrepresentation caused a loss to the creditor. See *In re Bilzerian*, 100 F.3d 886, 892 (11th Cir. 1996); *In re Johannessen*, 76 F.3d 347 (11th Cir. 1996); *Grogan v. Garner*, 498 U.S. 279, 287(1991). Plaintiff maintains that Defendant misrepresented the potential for obtaining new jobs when Defendant showed him the Grady Hospital job site and other job quotes. Defendant, on the other hand, alleges that, at the time of the transaction, he

acknowledged to Plaintiff that collection on jobs was frequently a problem and that sometimes jobs did not pay. Therefore, material facts about whether Defendant made a false representation and had the requisite intent to deceive remain in dispute and summary judgment on the claim under § 523(a)(2)(A) is inappropriate for either party.

IV. PLAINTIFF'S MOTION TO STRIKE

Finally, Plaintiff filed a Motion to Strike Defendant's Cross Motion for Summary judgment on the grounds that it improperly attempts to modify the scheduling order in violation of Federal Rules of Bankruptcy Procedure 7016. (Docket No. 21). In its scheduling order, the Court ordered that the discovery period shall end January 31, 2010, and that all dispositive motions shall be filed on or before February 28, 2010. (Docket No. 11). Plaintiff alleges that Defendant violated this order when he filed his Cross Motion for Summary Judgment on March 18, 2010. In light of the Court's analysis that granting summary judgment is inappropriate due to unresolved issues of fact, denying Defendant's Motion for Summary Judgment, Plaintiff's Motion to Strike is moot. Accordingly, it is

ORDERED that the Defendant's Motion for Judgment on the Pleadings or Alternative Motion to Dismiss is **DENIED**.

It is **FURTHER ORDERED** that the Plaintiff's Motion for Summary Judgment is **DENIED**.

It is **FURTHER ORDERED** that the Defendant's Cross Motion for Summary Judgment is **DENIED**.

It is **FURTHER ORDERED** that the Plaintiff's Motion to Strike Defendant's Cross Motion for Summary Judgment is **DENIED AS MOOT**.

It is **FURTHER ORDERED** that the parties submit a consolidated pretrial order within thirty (30) days of entry of this Order.

The clerk is directed to serve a copy of this Order on the Plaintiff, counsel for the Plaintiff, Defendant, and counsel for the Defendant.

END OF DOCUMENT