IT IS ORDERED as set forth below:

Date: April 04, 2007

James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	CASE NO. 04-96991
Gina Parker Miele,	
	CHAPTER 7
Debtor.	JUDGE MASSEY
TI Investment Management Company,	
Plaintiff,	
v.	ADVERSARY NO. 04-9216
Gina Parker Miele,	
Defendant.	

ORDER GRANTING PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT

In this adversary proceeding, Plaintiff TI Investment Management Company seeks a determination that debts allegedly owed by Debtor and Defendant Gina Miele are nondischargeable pursuant to section 523(a)(2)(A) of the Bankruptcy Code. Ms. Miele is also the

defendant in a closely related adversary proceeding under A.P. No. 04-9215, in which Aquarius Foundation is the Plaintiff.

On May 15, 2006, Plaintiff filed a motion for summary judgment. A motion for summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c), made applicable in adversary proceedings by Fed. R. Civ. P. 7056. The movant bears the burden of showing that there is no genuine issue as to any material fact. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). In deciding a motion for summary judgment, "the court must view all evidence and make all reasonable inferences in favor of the party opposing summary judgment." *Chapman v. AI Transp.*, 229 F.3d 1012, 1023 (11th Cir. 2000).

Plaintiff supported its motion with a statement of material facts not in dispute, affidavits, depositions, and numerous other documents. Defendant challenges Plaintiff's factual allegations in two responses: a general unsworn response filed on May 25, 2006 and an amended response filed on November 9, 2006. Neither of Defendant's responses cites a single point of law supporting her position that summary judgment should be denied. As the Court pointed out in an order dated September 27, 2006, Defendant's first response to the motion for summary judgment failed to create an issue of fact.

In her amended response, Defendant claims that she lacks sufficient information to affirm or deny most of Plaintiff's factual allegations. "The response that a party has insufficient knowledge to admit or deny is not an acceptable response unless the party has complied with the provisions of Rule 56(f) of the Federal Rules of Civil Procedure." B.L.R. 7056(a)(2).

The balance of Defendant's amended response does include factual statements controverting the evidence presented by Plaintiff. Defendant signed her amended response stating under oath that her statements were "true and correct to the best of [her] information and belief." This form of verification is insufficient, however, to create an issue of fact.

> Because Rule 56(e) requires that supporting and opposing affidavits be made on personal knowledge, statements in affidavits that are based, in part, upon information and belief, instead of personal knowledge alone, do not raise genuine issues of fact. *Pace v. Capobianco*, 283 F.3d 1275, 1278-79 (11th Cir. 2002). Accordingly, an affidavit stating only that the affiant "believes" a certain fact exists is insufficient to defeat summary judgment. Id. Further, unsworn statements, even from pro se parties, should not be "consider[ed] in determining the propriety of summary judgment." *Gordon v. Watson*, 622 F.2d 120, 123 (5th Cir. 1980).

Holloman v. Jacksonville Hous. Auth., 2007 WL 245555, *2 (11th Cir. 2007); *Thomas v. Atmos Energy Corp.*, 2007 WL 866709, *5 (5th Cir. 2007) (holding that a statement of an affiant's understanding of a fact in an affidavit opposing a motion of summary judgment is not sufficient to raise an issue of fact and citing *Cermetek, Inc. v. Butler Avpak, Inc.*, 573 F.2d 1370, 1377 (9th Cir.1978)).

Under Civil Rule 56(e), "[o]nce a moving party has sufficiently supported its motion for summary judgment, the non-moving party must come forward with significant, probative evidence demonstrating the existence of a triable issue of fact." *Chanel, Inc. v. Italian Activewear of Fla., Inc.*, 931 F.2d 1472, 1477 (11th Cir. 1991).

> There is a genuine issue of material fact if the nonmoving party has produced evidence upon which a reasonable factfinder could return a verdict in its favor. *Waddell v. Valley Forge Dental Assocs., Inc.*, 276 F.3d 1275, 1279 (11th Cir. 2001)." "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice." *Loren v. Sasser*, 309 F.3d 1296, 1302 (11th Cir. 2002).

Holloman, supra at *1. In summary, Defendant's statements that she lacks knowledge of Plaintiff's evidence and that she believes certain of her own allegations are true are insufficient to raise a genuine issue of material fact.

The undisputed facts, as reflected in the evidence submitted by Plaintiff, are as follows. Aquarius is a non-exempt Texas charitable trust and TI is a Texas business trust. Jackie Barnes formed Aquarius Foundation and TI. He funded TI with money made from his Dell stock options, and he handles and at all relevant times controlled the investments of both Plaintiff and Aquarius.

Mr. Barnes holds a B.A. in mathematics from Oklahoma State University and spent 25 years working in the programming and information technology divisions of IBM. In 1993, he left IBM for a position as the director of information technology at Dell. Mr. Barnes retired from Dell in 2000 and now works as a missionary in Belize. None of the work that Mr. Barnes did at IBM or Dell related to corporate investment or finance. Mr. Barnes' compensation at Dell included the stock options that enabled him to fund the Plaintiff.

In 1990, Mr. Barnes hired Defendant's husband, Barry Miele, then a stockbroker in New York, as an investment advisor. Mr. Barnes described his overall stock investments with Mr. Miele as profitable. Mr. Miele served as an investment advisor to Mr. Barnes for eight years before Mr. Barnes invested in the check cashing scheme described below. Pursuant to this relationship, Mr. Miele provided advice, due diligence, and information to Mr. Barnes concerning passive investments in the stock market.

In 1998, Mr. Miele approached Mr. Barnes about investing in the initial public offering of a company that planned to acquire and operate a chain of check cashing stores in New York and

New Jersey. Mr. Miele told Mr. Barnes that Defendant would operate the stores acquired by this company. Barnes decided to invest some of TI's funds in this IPO. In a series of transactions between October 16 and December 15, 1998, TI wired $600,000 to an account controlled by the Mieles in the name of a Delaware corporation called Old Peachtree Financial Services, Inc. ("Old Peachtree"). In December 1998, Mr. Miele informed Mr. Barnes that this IPO failed.

Mr. Miele thereafter suggested that Mr. Barnes pursue a similar investment– a business venture with himself and Defendant to acquire and operate check cashing stores. Mr. Miele presented Mr. Barnes a detailed business plan and represented that he and Defendant possessed extensive contacts in the check cashing industry and that Defendant had experience managing large administrative organizations.

Mr. Barnes had never invested in new business venture prior to that time and had no experience in the check cashing business.

The Meiles and TI entered into an arrangement whereby it would purportedly own the check cashing stores and provide financing while Defendant would run the day-to-day operations. The stores would be purchased by Old Peachtree and then sold to TI. Under the arrangement, TI purportedly held 60% of the Old Peachtree stock and Defendant held 35% of that stock.

Between 1998 and 2000, the Mieles took Mr. Barnes to various check cashing store locations in New Jersey and New York that they were purportedly considering acquiring on behalf of the venture. On these trips, the Mieles presented Mr. Barnes with detailed financial statements for each store and discussed planned renovations to these stores. Mr. Barnes agreed that TI would advance funds for the purchase of eight of the stores he visited. Between

January 4, 1999 and December 15, 2000, TI wired $5,400,000 to Old Peachtree for what Mr. Barnes thought would be the purchase of eight check cashing stores. Additionally, Mr. Barnes was under the impression that the money he put up for the IPO was used to help purchase check cashing stores for the venture. For each store, TI entered into a purchase and sale agreement with a New Jersey corporation called "Old Peachtree Financial Services Corp.," which he thought was a part of Old Peachtree Financial Services, Inc. In fact, neither Old Peachtree owned any of the stores purportedly sold to TI and Old Peachtree Financial Services, Inc. did not use the funds provided by TI to acquire any of those stores.

Mr. Barnes caught onto the scheme in late 2001 after he was summoned to New York in connection with the acquisition of stores there. On this trip, Mr. Barnes was asked to sign purchase and sale agreements for stores that he believed TI had already purchased. He then discovered that neither TI nor Old Peachtree owned any check cashing stores. He also found out that Ms. Miele withdrew the funds provided by TI and Aquarius from Old Peachtree's bank accounts. The record does not show what she did with these funds. Barnes averred he now believes that the alleged IPO, with respect to which he provided the Mieles with $600,000, never existed. The Court infers that the IPO investment was a part of the overall scheme to defraud Plaintiff, in which Defendant was a key participant.

Plaintiff contends that the debts owed to it by Defendant are nondischargeable pursuant to section 523(a)(2)(A) of the Bankruptcy Code. Section 523(a)(2)(A) excepts from discharge debts incurred by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." 11 U.S.C. § 523(a)(2)(A). Much of the case law addressing section 523(a)(2)(A) blurs the distinction between false pretenses, false

representation, and actual fraud by applying the same analysis to each type of claim. *See, e.g.*, *McClellan v. Cantrell*, 217 F.3d 890, 892 (7th Cir. 2000) (collecting cases). Accordingly,

> [c]ourts have generally interpreted § 523(a)(2)(A) to require the traditional elements of common law fraud. A creditor must prove that: (1) the debtor made a false representation to deceive the creditor, (2) the creditor relied on the misrepresentation, (3) the reliance was justified, and (4) the creditor sustained a loss as a result of the misrepresentation.

SEC v. Bilzerian (In re Bilzerian), 153 F.3d 1278, 1281 (11th Cir. 1998). The false representation may come in the form of an express misrepresentation, an implied misrepresentation, or "conduct intended to create and foster a false impression." *In re Callaway*, 2006 Bankr. LEXIS 3575, *61 (Bankr. N.D. Ga. 2006) (quoting *In re Hasan*, 287 B.R. 308 (Bankr. S.D. Ga. 2002)). Courts may infer the requisite intent to deceive from the facts and circumstances of the case. *Id*. Additionally, the debtor need not have actively participated in the fraudulent scheme or received the money directly in order for a debt to be nondischargeable under section 523(a)(2)(A). *See In re Bilzerian*, 100 F.3d 886, 890 (11th Cir. 1996). The debtor need only have benefitted from money obtained through false pretenses, a false representation, or actual fraud. *Id*.

Defendant and her husband made numerous false representations with the intent to deceive Plaintiff. Mr. Miele falsely represented to Mr. Barnes that a company named Old Peachtree was raising capital through an initial public offering. The Court infers from the circumstances that Mr. Miele made this representation in order to spark Mr. Barnes' interest in investing in this type of business and thus made it with the intent to deceive Plaintiff. The Mieles made false representations concerning their intention to form a business venture that would acquire and operate check cashing stores. They also presented a fake business plan, falsely represented Defendant's contacts and professional experience, and provided Mr. Barnes with

fake stock certificates. Defendant falsely represented that she had experience in the check cashing business. Additionally, on the trips to check cashing stores, the Mieles falsely represented financial information for each store as well as their intention to acquire these stores. Defendant also made false representations concerning her ownership of the check cashing stores that she purportedly sold to TI. Finally, the Mieles falsely represented that their check cashing "business" needed operating capital in the form of loans from Aquarius and that these funds would be used to operate check cashing stores.

These false representations reflect a calculated scheme used by Defendant and her husband to defraud Plaintiff and Aquarius by duping Mr. Barnes. Nothing in the record suggests that Plaintiff's losses were caused solely as a result of a legitimate but failed business venture. Old Peachtree was not a legitimate business but was used as a ruse by the Mieles to defraud Plaintiff. There is not a scintilla of evidence supporting Defendant's claim that the debts owed to Plaintiff constitute legitimate corporate debts. Defendant made or participated in the making of these false representations with the intent to deceive Plaintiff.

Plaintiff, through Mr. Barnes, justifiably relied on the false representations made by Defendant and her husband. Justifiable reliance, a less-exacting standard than reasonable reliance, looks to the "qualities and characteristics of the particular plaintiff, and the circumstances of the particular case." *Field v. Mans*, 516 U.S. 59, 71 (1995) (quoting Restatement (Second) of Torts, § 545A, Comment b (1976)). "Justifiable reliance is a subjective standard that takes into account the relationship of the parties." *Boyuka v. White (In re White)*, 128 Fed. Appx. 994, 1002 (4th Cir. 2005). Generally, the justifiable reliance standard does not require that the victim make an investigation of his own unless "the facts should be apparent to

one of his knowledge and intelligence from a cursory glance, or he has discovered something which should serve as a warning that he is being deceived." *Field*, 516 U.S. at 71 (quoting W. Prosser, Law of Torts § 108 p. 718 (4th ed. 1971)).

Although wealthy, Mr. Barnes, at the time that Plaintiff made its investments, had no experience or financial expertise concerning direct investments in a business. "While wealth may be an important factor [in determining investor sophistication], other criteria such as age, education, professional status, investment experience, and business background may also be relevant." *Myers v. Finkle*, 950 F.2d 165, 168 (4th Cir. 1991). His educational background is in mathematics, not business. He spent his career working in information technology and computer programing; he did not work in the finance or investment divisions of his employers. Moreover, this "venture" with the Mieles was the first time he actively participated in a business venture or invested directly in a start-up company. Thus, TI acted through Mr. Barnes, who entered into the venture with the Mieles with no special knowledge, qualities, or investor sophistication that he should have used to ferret out the falsity of the Mieles' scheme, particularly in light of the earlier relationship between Mr. Barnes and Mr. Miele. The prior relationship between Mr. Miele and Mr. Barnes gave Mr. Barnes no reason to question the investment opportunity at issue when Mr. Miele proposed it.

The Mieles went to great lengths to induce Mr. Barnes to invest in their scam, including presenting false documents and accompanying him on visits to check cashing stores. There is no evidence that Mr. Barnes discovered any red flags in his dealings with the Mieles, and Defendant has not pointed to any. Therefore, the Court concludes that Plaintiff, through Mr. Barnes,

justifiably relied on the representations made by the Mieles concerning the check cashing venture.

Plaintiff suffered a loss totaling $6,400,000 caused by the fraudulent representations made by Defendant and her husband acting in concert.

For these reasons, it is

ORDERED that TI's motion for summary judgment is GRANTED.

The Court will enter a separate judgment. The Clerk is directed to serve a copy of this Order on Plaintiff's counsel, Defendant's counsel and Defendant.

END OF ORDER