

MAR 31 2006

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

|                                           |   |                      |
|-------------------------------------------|---|----------------------|
| IN THE MATTER OF:                         | : | CASE NUMBERS         |
|                                           | : |                      |
| DERRICK DEWAYNE MOSS and                  | : | BANKRUPTCY CASE      |
| LOIS MAE MOSS,                            | : | NO. 04-79701-MGD     |
|                                           | : |                      |
| Debtors,                                  | : |                      |
| <hr style="width: 40%; margin-left: 0;"/> |   |                      |
| ADVANTAGE LEASING CORP.,                  | : | ADVERSARY CASE       |
|                                           | : | NO. 05-06077         |
| Plaintiff,                                | : |                      |
|                                           | : |                      |
| V.                                        | : |                      |
|                                           | : |                      |
| DERRICK DEWAYNE MOSS and                  | : | IN PROCEEDINGS UNDER |
| LOIS MAE MOSS,                            | : | CHAPTER 7 OF THE     |
|                                           | : | BANKRUPTCY CODE      |
| Defendants.                               | : |                      |

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

This matter is before the Court on a Motion for Summary Judgment ("Motion") (Adversary Docket No. 16), filed by Advantage Leasing Corp. ("Plaintiff"). Derrick Dewayne Moss and Lois Mae Moss ("Defendants") did not file a response and therefore pursuant to BLR 7007-1(c) the motion is deemed to be unopposed. However, pursuant to Bankruptcy Rule of Procedure, Rule 7056, incorporating Federal Rule of Civil Procedure Rule 56, the Court may 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. The Court notes that the failure to file a response to a summary judgment motion does not automatically entitle the moving party to a judgment in its favor. The Federal Rules of Bankruptcy Procedure direct a court to enter summary judgment in favor of the moving party only if it is appropriate under Fed. R. Civ. P. 56(e). *Hunter v. Sowers (In re Sowers)*, 229 B.R. 151, 155-156 (Bankr. N.D. Ohio 1998) *United States v. 9638 Chicago Heights*, 27 F.3d 327, 329 n.1 (8<sup>th</sup> Cir. 1994); *Mason v.*

*Freestone Sand & Gravel (In re Underground Storage Tank Tech. Servs. Group)*, 212 B.R. 582, 583 (Bankr. E.D. Mich. 1997).

In determining whether a genuine issue of material fact exists, the Court is obligated to review the evidence in the light most favorable to the non-moving 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 (11<sup>th</sup> Cir. 1985). All inferences drawn from the underlying facts must be viewed in a light most favorable to the Defendants. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

Plaintiff commenced this adversary proceeding on February 28, 2005, by filing a complaint objecting to the discharge of the Debtors pursuant to 11 U.S.C. §§ 727(a)(2)(A) and (a)(4). Plaintiff also seeks a judgment against Defendants for the sum of \$14,257.46, plus interest. Defendants filed an answer on March 29, 2005. On or about July 18, 2005, Plaintiff served Defendants with discovery, including requests for admissions, which were not answered in a timely manner. Rule 36 of the Federal Rules of Civil Procedure, made applicable to this proceeding by Fed. R. Bankr. P. 7036, provides that a party must answer each matter for which an admission is requested within thirty days or the matter is deemed admitted.<sup>1</sup> Plaintiff's Motion for Summary Judgment is predicated on Defendants' failure to respond to Plaintiff's request for admissions.

Defendants also failed to respond to the statement of undisputed facts filed with Plaintiff's Motion for Summary Judgment. Pursuant to BLR 7056-1(b)(2), Plaintiff attached

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<sup>1</sup>Rule 36(a) states in pertinent part:

A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request....

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within shorter or longer time as the court may allow or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney....

to its Motion for Summary Judgment a statement of undisputed material facts. BLR 7056-1(a)(2) states “[a]ll material facts contained in the moving party’s statement that are not specifically controverted in respondent’s statement shall be deemed admitted.” Accordingly, Plaintiff’s statement of undisputed facts is deemed admitted. BLR 7056-1(a)(2); *Ellenberg v. Bouldin (In re Bouldin)*, 196 B.R. 202, 210-211 (Bankr. N.D. Ga. 1996) (Murphy, J.).

Accordingly, the undisputed facts are as follows: On or about June 30, 2003, Plaintiff entered into a lease agreement with an entity known as Coffee Gelato, LLC. (Plaintiff’s Statement of Undisputed Facts ¶ A). Defendant Derrick D. Moss was chief executive officer of that entity. (*Id.*). Defendants Derrick D. Moss and Lois M. Moss personally guaranteed the performance of Coffee Gelato, LLC pursuant to the lease agreement. (*Id.*, ¶ B). Defendants served as owner/managers of Coffee Gelato, LLC. (*Id.*, ¶ G). Defendants were in custody and control of the assets and leased equipment held, acquired, or obtained by Coffee Gelato, LLC. (*Id.*, ¶ H). Coffee Gelato, LLC defaulted under the terms of the lease agreement and as a result, Plaintiff made demand for payment or return of the leased property. (*Id.*, ¶ C). Defendants and Coffee Gelato, LLC defaulted and Plaintiff made demand for payment prior to November 29, 2004. (*Id.*, ¶ F). Defendants sold several items which were subject to the lease and retained the proceeds therefrom. (*Id.*, ¶ I). Defendants have not disclosed in their bankruptcy filing the sale, transfer, or repossession of these items.

After considering the record in the light most favorable to the Defendants, the Court concludes that the strict requirements for the granting of summary judgment in a discharge proceeding have not been met. Plaintiff contends that Defendants’ discharge should be denied pursuant to 11 U.S.C. §§ 727(a)(2) and 727(a)(4). A plaintiff proceeding under 11 U.S.C. § 727 bears the burden of proving that a debtor is not entitled to a discharge. Fed.R.Bankr.P. 4005. A plaintiff must prove its case by a preponderance of the evidence. *Hunerwadel v. Dulock (In re Dulock)*, 250 B.R. 147, 153 (Bankr. N.D. Ga. 2000) (*citations omitted*). The Court also recognizes that “[s]ince a general discharge facilitates a debtor’s ‘fresh start,’ one of the primary purposes of bankruptcy law, the discharge provisions must be construed liberally in favor of the debtor and strictly against the objecting creditor.” *In re Love*, 577 F.2d

344, 349 (5<sup>th</sup> Cir. 1978); *In re Adeeb*, 787 F.2d 1339, 1342 (9<sup>th</sup> Cir. 1986). A debtor should not be denied a discharge on general equitable considerations; the grounds for denial of discharge must be specifically proven. *Dulock*, 250 B.R. 147, *Rice v. Matthews*, 342 F.2d 301, 304 (5<sup>th</sup> Cir. 1965).

Section 727(a)(2) provides:

(a) The Court shall grant the debtor a discharge, unless –

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed –

(A) property of the debtor, within one year before the date of filing of the petition; or

(B) property of the estate, after the date of the filing of the petition.

“A creditor objecting to discharge under § 727(a)(2) must establish that the debtor possessed an actual intent to defraud at the time of the transfer or concealment of either the debtor’s or the estate’s property.” *Dulock*, 250 B.R. 147, *Equitable Bank v. Miller (In re Miller)*, 39 F.3d 301, 306 (11<sup>th</sup> Cir. 1994). Summary judgment is not appropriate in a § 727 action where there is an issue of actual intent. *Fogal Legwear of Switz, Inc. v. Wills (In re Wills)*, 243 B.R. 58, 65 (B.A.P. 9<sup>th</sup> Cir. 1999); *In re Stuerke*, 61 B.R. 623, 626 (B.A.P. 9<sup>th</sup> Cir. 1986) (“Fraud claims in particular are normally so attended by factual issues that summary judgment is seldom possible.”). The Court may potentially deduce fraudulent intent from all of the facts and circumstances of a case. *Novak v. Blonder (In re Blonder)*, 246 B.R. 147, 150 (Bankr. D.Conn. 2000) Plaintiff, in its brief in support of summary judgment posits that due to the Debtors’ failure to respond to discovery, the Court may reasonably infer fraudulent intent based upon the circumstantial evidence and inferences drawn from Defendants’ course of conduct. However, this is a step that the Court is not willing to take in this instance. Regarding motions for summary judgment involving allegedly fraudulent transfers, courts generally hold that a determination as to whether the property was transferred with actual intent to hinder creditors involves issues of intent and credibility that are inappropriate for summary

judgment. *Blonder*, 246 B.R. 147, *Citizens Bank of Clearwater v. Hunt*, 927 F.2d 707, 711 (2d Cir. 1991). Based upon the somewhat limited record before the Court, and the requirement that the grounds for denial of discharge be strictly proven, the Court concludes that material fact questions remain as to the element of intent. As a result, the Court is not in a position to grant summary judgment on this count.

Additionally, the Court considers there to be an issue as to whether the items sold were “property of the debtor” as required by § 727(a)(2)(A) or “property of the estate” as required by § 727(a)(2)(B). The Defendants were personal guarantors on a lease agreement entered into between Coffee Gelato, LLC and Plaintiff. The subject equipment appears to be merely leased by Coffee Gelato, LLC and therefore it is a question if it is truly property of the debtors or of their bankruptcy estate. Section 727(a)(2)(A) applies only to transfers of property in which the debtor possesses a direct proprietary interest, and does not extend to derivative interests of the debtor in his corporation’s assets. *BPS Guard Servs. v. Myrick (In re Myrick)*, 172 B.R. 633, 638 (Bankr. D. Neb. 1994). The breadth of the phrase “property of the debtor” as set forth in § 727(a)(2)(A) is subject to a split of authority among bankruptcy courts (*see In re Jones*, 97 B.R. 36, 38 (Bankr. D. Mont. 1989) and *American Gen. Fin. v. Burnside (In re Burnside)*, 209 B.R. 867, 871 (Bankr. W.D. Ohio 1997)). Ultimately, this appears to be a determination that is particularly fact intensive and not appropriate for summary judgment in this case at this juncture. As a result, this Court concludes that it is unable to grant summary judgment on the § 727(a)(2) count.

Section 727(a)(4) provides:

(a) The Court shall grant the debtor a discharge, unless –

(4) the debtor knowingly and fraudulently, in or in connection with the case –

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs.

The same issue regarding intent that prevents the Court from entering summary judgment on the § 727(a)(2) claim also hampers the § 727(a)(4) claim. In general, courts are reluctant to grant summary judgment on a cause of action under § 727(a)(4) inasmuch as the element of fraudulent intent usually involves questions of fact involving the debtor's state of mind. *First Nat'l Bank, Larned v. Davison (In re Davison)*, 296 B.R. 841, 847 (Bankr. D. Kan. 2003). As the Court was unable to infer sufficient fraudulent intent to satisfy the actual fraud component of § 727(a)(2), based upon the record currently before it, the Court cannot find that Defendants knowingly and fraudulently made a false oath in this case.

Under § 727(a)(4), a false oath must involve an intentional untruth in a matter material to the bankruptcy case. *Firststar Bank Iowa, N.A. v. Magnani (In re Magnani)*, 223 B.R. 177, 183 (Bankr. N.D. Iowa 1997) (*internal cites omitted*). The subject matter of an omission is not material unless it relates to the debtor's personal transactions. "While a debtor may be denied a discharge under § 727(a)(4) for failure to schedule his interest in a separate business entity, failure to schedule property belonging to another entity is generally not grounds for denial of discharge." *Magnani*, 223 B.R. 177. While, as Plaintiff states, Debtors filed and swore to a petition, schedules and statement of affairs which made no reference to the property repossessed by Plaintiff or any sale or proceeds of such property, to the degree said property was actually the Defendants' property, is a question the Court is unable to resolve based upon the record currently before it.

After carefully considering the record in the light most favorable to the Defendants, the Court concludes that the requirements for granting of summary judgment on the Plaintiff's objection to discharge under § 727(a)(2) and § 727(a)(4) have not been met. Additionally, Plaintiff requests that the Court enter a judgment on the subject debt. The Court will defer taking any such action until a final determination has been made in the underlying matter. Accordingly, it is

**ORDERED** that Plaintiff's Motion for Summary Judgment is **DENIED**. The parties are directed to submit a Consolidated Pre-Trial Order within thirty days of the entry of this Order.

The Clerk is directed to serve a copy of this Order to counsel for Plaintiff and counsel for Defendants.

**IT IS SO ORDERED.**

At Atlanta, Georgia, this 30<sup>th</sup> day of March, 2006.

Mary Grace Diehl  
MARY GRACE DIEHL  
UNITED STATES BANKRUPTCY COURT