



**IT IS ORDERED as set forth below:**

**Date: July 03, 2007**

*James E. Massey*

James E. Massey  
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

\_\_\_\_\_  
IN RE:

CASE NO. 05-91543

Roy Lee Patterson,

CHAPTER 7

Debtor.

JUDGE MASSEY

\_\_\_\_\_  
Roy Lee Patterson,

Plaintiff,

v.

ADVERSARY NO. 06-9058

Georgia Department of Revenue,

Defendant.

ORDER GRANTING DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT

Plaintiff Roy Patterson, the Debtor in the above-referenced bankruptcy case, filed this adversary proceeding seeking a determination that a debt in the amount of \$52,321.47 owed to

Defendant Georgia Department of Revenue is dischargeable pursuant to section 523 of the Bankruptcy Code. In the complaint, Plaintiff failed to state the precise factual basis for the relief sought. Defendant answered the complaint denying that the debt is dischargeable. Defendant moved to dismiss the complaint, but the Court denied that motion in an order entered on October 20, 2006. On November 3, 2006, Defendant moved for summary judgment, asserting that the tax debt owed to it by Mr. Patterson with respect to the tax years in question is nondischargeable pursuant to section 523(a)(1)(B)(i) of the Bankruptcy Code. Defendant asserted that Plaintiff failed to file amendments to his tax returns for 1985 through 1987 to report additional taxable income. Although Mr. Patterson did not respond to Defendant's motion, the Court denied that motion because the facts presented by Defendant left open the possibility that Plaintiff was not required to file amendments to his state tax returns for the years in question.

Defendant quickly filed a motion seeking permission to file a second motion for summary judgment, which the Court granted, and on June 7, 2007, filed a second motion for summary judgment. Defendant did not respond to the motion.

The facts on which Defendant based its initial summary judgment motion were contained in an affidavit of Phyllis Pearson, an employee of the Georgia Department of Revenue, who stated in part:

Plaintiff filed original Georgia income tax returns for 1985, 1986, and 1987. After the filing of Plaintiff's original 1985 through 1987 Georgia income tax returns, the Internal Revenue Service revised Plaintiff's federal income tax liabilities upwards. After the revision to Plaintiff's 1985 through 1987 federal income tax liabilities, the Plaintiff did not file the amended Georgia income tax returns for these years required by O.C.G.A. § 48-7-82(e)(1). The Georgia income taxes due from Plaintiff for 1985 through 1987 result solely from the Internal Revenue Service's revision to Plaintiff's federal income tax liabilities.

Affidavit of Phyllis Pearson, Document No. 7, p. 9.

Defendant supports its latest motion for summary judgment with affidavits of Ms. Pearson and Gwyneth Zachary, who is Ms. Pearson's supervisor at the Department of Revenue. In these affidavits, the affiants assert that Plaintiff failed to file any state tax returns for the years in question. (The IRS reported to the Department of Revenue in 1993 that Plaintiff's federal income tax liabilities for 1985 through 1987 had been revised upward, which was, according to affiants, the first time that the Department of Revenue knew that Plaintiff had taxable income for those years.) In her latest affidavit, Ms. Pearson acknowledged that her statement that Plaintiff filed no state income tax return for the years 1985-1987 is contrary to the one she made in her first affidavit but avers that she bases her present testimony on a "further review of the Revenue Department's records." The affidavits of Ms. Pearson and Ms. Zachary attached to Defendant's second motion for summary judgment also show that the aggregate tax debt for the tax years 1985, 1986 and 1987 is \$9,684.00 plus accrued interest and penalties.

Under Fed.R.Civ.P. 56(c), made applicable to adversary proceedings and contested matters in bankruptcy cases by Bank. R. 7056 and 9014, summary judgment is proper "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 judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). " 'In making this determination, 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) (en banc) (citation omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

*In re Optical Technologies, Inc.*, 246 F.3d 1332, 1334 (11<sup>th</sup> Cir. 2001).

Ms. Pearson's statement in her initial affidavit that Plaintiff filed tax returns for the years at issue does not create an issue of fact on that matter in light of (1) her acknowledgment of her error in making that statement, (2) the affidavit of her supervision confirming that Plaintiff filed

no returns for those years and (3) the absence of any contention by Plaintiff that he did file those returns. Further, Plaintiff's failure to respond indicates that he has no opposition to the motion. Bankruptcy Local Rule 7007-1(b).

Defendant is entitled to summary judgment if these undisputed facts, viewed in the light most favorable to Mr. Patterson, show that this debt is nondischargeable pursuant to section 523(a)(1)(B)(i). Section 523(a)(1)(B)(i) exempts from discharge any debt

(1) for a tax or a customs duty—

...

(B) with respect to which a return, if required—

(i) was not filed.

11 U.S.C. § 523(a)(1)(B)(i). The creditor bears the burden of proving that the debt is nondischargeable. *In re Wilbert*, 262 B.R. 571, 576 (Bankr. N.D. Ga 2001).

Defendant has shown that there is no dispute that Plaintiff failed to file Georgia tax returns for the years 1985, 1986 and 1987 and that the liability of Plaintiff for those taxes totals \$9,984.00 plus accrued interest and penalties. Under the plain meaning of section 523(a)(1)(B)(i) of the Bankruptcy Code, Plaintiff's debt to Defendant for unpaid income taxes, interest and penalties for the tax years 1985, 1986 and 1987 is not dischargeable because Plaintiff never filed a Georgia income tax return for those years..

Accordingly, it is

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

\*\*\*END OF ORDER\*\*\*