

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	CASE NO. A05-82001-REB
	:	
YOO SUN CHI,	:	
	:	
Debtor.	:	
	:	
	:	
	:	
	:	
S. GREGORY HAYS, Chapter 7 Trustee	:	ADVERSARY PROCEEDING
for the Estate of Yoo Sun Chi,	:	NO. 06-9069
	:	
Plaintiff,	:	
	:	
v.	:	CHAPTER 7
	:	
YOO SUN CHI,	:	
	:	
	:	JUDGE BRIZENDINE
Defendant.	:	

**ORDER GRANTING PLAINTIFF-TRUSTEE'S
MOTION FOR SUMMARY JUDGMENT**

Before the Court is the motion of Plaintiff Chapter 7 Trustee for summary judgment against Defendant-Debtor as filed on April 18, 2008. Plaintiff commenced this matter by filing a complaint against Debtor on August 18, 2006 objecting to discharge in this case under 11 U.S.C. § 727(a)(2), (a)(3), (a)(4), and/or (a)(5). Although Debtor filed an answer on September 18, 2006, Debtor has not responded to the Trustee's motion. Based upon a review of the record, including Trustee's motion, brief, and deposition transcripts, the Court concludes that the Trustee's motion should be granted on the grounds set forth herein.

In the motion, Trustee contends that he is entitled to summary judgment on the allegations in the complaint with respect to the proceeds received by Debtor from the sale of her

coin laundry business two days before she filed her bankruptcy petition on October 13, 2005, from which proceeds she then repaid certain personal loan obligations. Debtor does not dispute that she paid Han Mo Chung the total sum of \$150,000.00 from these proceeds on a purported note due Chung that is not evidenced by any written agreement. In her answer Debtor does deny, however, allegations in Trustee's complaint that Debtor's characterization of this transaction as a loan repayment is false. She further denies that Chung cashed two cashier's checks received from her in the total sum of \$150,000.00, prior to returning to Debtor the sum of \$56,000.00, and later, the sum of \$34,000.00. As testified by Chung during his deposition, however, which testimony Debtor has not disputed in pleadings or by other evidence, Debtor was in fact not indebted to Chung in any amount whatsoever.

According to Chung, Debtor asked him to hold these monies "as she was going to slowly send these funds, bit by bit, or partially, each time, to Korea." (Deposition of Ho Man Chung, June 28, 2007; 9:6-9:9). In addition, Chung stated that Debtor told him to tell an attorney that he "received these funds, the \$150,000, for something that – it was for something that I was owed, something that I needed to be paid for." (Deposition, 11:12-11:15). As he further testified, "...I was just holding on to the money, and later on I found out, you know, I was being used. She was using me in order to get the money disbursed." (16:22-16:25).

In the uncontested affidavit of Chung, attached as Exhibit "A" to the Trustee's motion to compromise and settle with Chung filed on September 21, 2006, Chung states Debtor approached him on October 11, 2005 through a mutual acquaintance and offered to lend him \$150,000.00, but at no time indicated to Chung she was considering filing for bankruptcy relief. According to Chung, after she paid him the money and took back \$56,000.00, Debtor held two

of his checks totaling \$94,000.00 that she never appears to have cashed, though later she “directed [him] to pay her an additional \$34,000.00 from the monies she had lent” to Chung. Regarding Chung’s payments to Debtor, he states that he remitted the sum of \$50,000.00 and \$34,000.00 to Debtor in cash, and wired the sum of \$6,000.00 to Debtor’s father in Korea. (Deposition, 19:21-19:23). In sum, Trustee contends that based on Chung’s unchallenged testimony, Chung remitted back to Debtor the total amount of \$90,000.00 from the amount she supposedly lent to Chung. By Order entered on October 24, 2006, the Court approved a compromise between Chung and the Trustee. Chung has remitted the amount of \$60,000.00 to the Trustee pursuant to the settlement, accounting for the balance of funds Chung was allegedly holding for Debtor.

Debtor also paid Jung Lyui Lee the amount of \$25,000.00 from the sale proceeds mentioned above in satisfaction of a corporate debt of Debtor’s business, but denies Trustee’s contention that Debtor was not actually indebted to Lee and that Debtor’s statement regarding same is false. This transfer was voided by Order entered on January 18, 2008 in Adversary Proceeding No. 06-9089 as a preferential transfer. Further, Debtor admits she paid Young Rock Prayer Garden Church \$8,000.00 in cash as a charitable contribution two days after she commenced this bankruptcy case. She denies receiving a loan from Young Rock two days later in the amount of \$7,000.00. Debtor’s statement of financial affairs lists both the payment to Chung and to Lee as payments to creditors.

Summary judgment may be granted pursuant to Fed. R. Civ. P. 56, applicable herein by and through Fed. R. Bankr. P. 7056, if “there is no genuine issue as to any material fact and...the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). In deciding

a motion for summary judgment, the court “is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 212 (1986). Further, all reasonable doubts should be resolved in favor of the non-moving party, and “if reasonable minds could differ on any inferences arising from undisputed facts, summary judgment should be denied.” *Twiss v. Kury*, 25 F.3d 1551, 1555 (11th Cir. 1994), citing *Mercantile Bank & Trust Co. v. Fidelity & Deposit Co.*, 750 F.2d 838, 841 (11th Cir. 1985). Presumptions or disputed inferences drawn from a limited factual record cannot support entry of summary judgment under Fed. R. Civ. P. 56(c), applicable herein through Fed. R. Bankr. P. 7056. The court cannot weigh the evidence or choose between competing inferences. *See Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997); *Raney v. Vinson Guard Serv., Inc.*, 120 F.3d 1192, 1196 (11th Cir. 1997).

Once the party moving for summary judgment has identified those materials demonstrating the absence of a genuine issue of material fact, the non-moving party cannot rest on mere denials or conclusory allegations, but must go beyond the pleadings and designate, through proper evidence, specific facts showing the existence of a genuine issue for trial. *See* Fed. R. Civ. P. 56(e); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Johnson v. Fleet Finance, Inc.*, 4 F.3d 946, 948-49 (11th Cir. 1993); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112 (11th Cir. 1993). As recited above, in the present case Debtor has not responded to the motion. Even if a summary judgment motion is deemed unopposed, however, the Court must still evaluate the propriety of the relief requested. *See Dunlap v. Transamerica Occidental Life Ins. Co.*, 858 F.2d 629 (11th Cir. 1988).

Accordingly, the Court must review the Trustee's uncontested allegations and evidence submitted herein to determine whether they are sufficient to support the entry of summary judgment on the counts of his complaint.

Trustee's first ground for objecting to discharge is made under Section 727(a)(2)(A) which states that a discharge shall not be granted if a debtor "with intent to hinder, delay, or defraud a creditor...has transferred, removed, destroyed, mutilated, or concealed -- ... (A) property of the debtor, within one year before the date of the filing of the petition...." As mentioned above, the undisputed evidence shows that transfers of property in which Defendant had an interest occurred prior to bankruptcy. No direct evidence has been presented by Debtor to controvert Chung's sworn statements in his deposition or his affidavit and along with Debtor's own statements at the meeting of creditors, it appears Trustee is relying on such evidence to prove the requisite intent under Section 727(a)(2)(A).

Trustee also claims relief under Section 727(a)(3). This subsection provides that a discharge will be denied if a debtor "has concealed, destroyed, mutilated, falsified, or failed to keep or preserve" sufficient recorded information from which his financial condition or business transactions might be ascertained, unless the failure to do so was justified. Trustee's third ground for objection to discharge is based on Section 727(a)(4) which prevents a discharge when a debtor knowingly and fraudulently, in or in connection with the case, makes a false oath or account as to a material fact relating to a debtor's business transactions or the existence and disposition of assets or the discovery thereof. *See Chalik v. Moorefield (In re Chalik)*, 748 F.2d 616 (11th Cir. 1984).

Each of the foregoing causes of action as put forward by the Trustee under Sections 727(a)(2), (a)(3), and (a)(4) requires evidence of intent and although such intent may be shown

by circumstantial evidence in proper settings, the Court concludes it would not be appropriate to make such finding on the present record. Given the harshness of the remedy sought herein, and the nature of ascertaining subjective intent and its general unsuitability to summary disposition, the Court must hear Debtor's testimony and observe her demeanor before making any findings concerning whether the transactions in question were made fraudulently and knowingly within the meaning of the aforesaid statutory provisions. Thus, even though the Debtor has not responded to the motion, the Court concludes summary judgment must be denied with respect to the relief requested under Sections 727(a)(2), (a)(3), and (a)(4) as set forth in the complaint.

The Court does find merit, however, regarding Trustee's contention for relief by motion under Section 727(a)(5), which precludes a discharge when a debtor "has failed to explain satisfactorily...any loss of assets or deficiency of assets to meet the debtor's liabilities." Once it is established that a debtor owned specific property that is no longer available for paying the claims of creditors, the burden of proof shifts to the debtor to offer a satisfactory explanation. *See Hawley v. Cement Indus., Inc. (In re Hawley)*, 51 F.3d 246 (11th Cir. 1995); *Chalik*, 748 F.2d at 619; *In re Pilcher*, _ B.R. _ , 2008 WL 2682858 (Bankr. C.D.Ill. June 25, 2008). In the present case, Trustee has established the existence of certain assets of the Debtor prior to bankruptcy that are now unavailable to creditors. In response, Debtor has failed to present an explanation supported by competent evidence accounting for the transactions and payments in issue and to show that there is a genuine issue for trial. In fact, other than the denials in her answer, Debtor has failed to present any explanation whatsoever to address the contentions of Trustee in the complaint or dispute the evidence offered in support of his motion concerning the propriety of her disposition of certain funds in which she held an interest.

Debtors seeking relief in this Court cannot merely stand by and fail to respond to credible allegations in litigation challenging entitlement to discharge. Lack of opposition is not a sufficient reason to grant summary judgment, but once the moving party has set forth a basis for relief under this provision as Trustee has done in this case, a debtor must make some accounting of the property at issue. Based on a review of the record and Debtor's responses herein, the Court finds no adequate explanation has been offered by Debtor. Debtor has brought to the attention of this Court no evidence whatsoever to put in issue the Trustee's claim that she has failed to provide a satisfactory explanation for the loss of certain assets. Whereas the sufficiency of an explanation under this subsection is typically a question of fact, Debtor's failure to present any evidence supports the conclusion that the Trustee is entitled to relief on this claim as a matter of law. For these reasons, summary judgment is granted under Section 727(a)(5).

In sum, upon review of the record, the evidence presented, and the argument and citation of set forth in pleadings, the Court concludes Plaintiff-Trustee has established grounds for relief herein as a matter of law, and thus entry of summary judgment against Debtor under Section 727(a)(5) is appropriate.

Accordingly, it is

ORDERED that the motion of the Plaintiff-Chapter 7 Trustee for summary judgment herein on his complaint be, and hereby is, **granted** as set forth herein; and it is

FURTHER ORDERED that Debtor's discharge in this case be, and is hereby **denied**, under 11 U.S.C. § 727(a)(5).

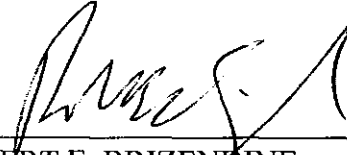
Judgment is entered contemporaneously herewith.

The Clerk is directed to serve a copy of this Order upon the Chapter 7 Trustee, the

Debtor, the United States Trustee, and all creditors and parties in interest herein.

IT IS SO ORDERED.

At Atlanta, Georgia this 28th day of August, 2008.

A handwritten signature in black ink, appearing to read 'R. Brizendine', is written over a horizontal line.

ROBERT E. BRIZENDINE
UNITED STATES BANKRUPTCY JUDGE