



IT IS ORDERED as set forth below:

Date: June 17, 2011

A handwritten signature in black ink, appearing to read "W. H. Drake", is written over a horizontal line.

**W. H. Drake
U.S. Bankruptcy Court Judge**

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

IN THE MATTER OF:	:	CASE NUMBERS
	:	
JANET M. OPPERMAN,	:	BANKRUPTCY CASE
	:	NO. 08-10960-WHD
Debtor.	:	
_____	:	
	:	
EDDIE MARVIN FORD,	:	
	:	
Plaintiff,	:	ADVERSARY PROCEEDING
	:	NO. 08-1702
v.	:	
	:	
JANET M. OPPERMAN,	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Defendant.	:	BANKRUPTCY CODE

ORDER

Before the Court is the Motion for Summary Judgment filed by Eddie Marvin Ford (hereinafter the "Plaintiff") in the above-captioned adversary proceeding. Also

pending is a Motion to Dismiss, filed by Janet M. Opperman (hereinafter the “Defendant”). The motions arise in connection with a complaint to determine the dischargeability of a particular debt. Accordingly, this matter constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(I); § 1334.

FACTS AND PROCEDURAL HISTORY

The Defendant is the sole owner of Real Home Solutions, LLC. Plaintiff’s Statement of Undisputed, Material Facts, ¶ 10; Defendant’s Response to Plaintiff’s Statement of Undisputed, Material Facts, ¶ 10. The Defendant or her business borrowed \$69,900 from the Plaintiff. Affidavit of Eddie Ford, ¶ 9. The Defendant had a close relationship with Edward Pejack, who was involved with the loans made by the Plaintiff. Plaintiff’s Statement of Undisputed, Material Facts, ¶ 6; Defendant’s Response to Plaintiff’s Statement of Undisputed, Material Facts, ¶ 6.

The Plaintiff contends that the Defendant was “the head” of this real estate transaction “scheme” and that she promised to repay the loan made by the Plaintiff along with a 15% return on his investment. The Defendant asserts that Pejack, who was at one time her boyfriend, was in charge of “selling and arranging loans” and that, although she was the owner of Real Home Solutions, LLC and may have been

the “nominal” borrower of the funds, Pejack arranged the loans, which were “to be for him or for the business.” Affidavit of Janet Opperman, ¶ 7. The Plaintiff alleges that the Defendant promised him the borrowed funds would be invested in real estate and that his investment would be secured by real estate. Affidavit of Eddie Ford, ¶¶ 6-7. The Defendant admits this, but contends that she believed this statement to be true at the time she made it. Affidavit of Janet Opperman, ¶ 10. The parties disagree as to whether the Defendant used the funds for personal expenses or business expenses related to the investment made by the Plaintiff. Affidavit of Stacy Cronan, ¶ 7; Affidavit of Eddie Ford, ¶ 17; Affidavit of Janet Opperman, ¶¶ 9, 11; Defendant’s Response to Plaintiff’s Statement of Undisputed Facts, ¶ 2. The Defendant failed to repay all of the funds borrowed from the Plaintiff. Affidavit of Eddie Ford, ¶ 10.

On April 8, 2008, the Defendant filed a voluntary petition under Chapter 7 of the Bankruptcy Code. On July 28, 2008, the Plaintiff filed a complaint to determine the dischargeability of the debts owed to the Plaintiff. The Defendant filed her answer on August 21, 2008 and responded to the Plaintiff’s discovery request on March 5, 2009. On March 19, 2009, the parties agreed to a discovery plan, which called for discovery to conclude by March 31, 2009. No motion to extend the discovery period was filed by either side, and the Plaintiff never filed a motion to

compel the Defendant to comply with the Plaintiff's discovery requests.

On March 4, 2010, the Court issued an order directing the Plaintiff to file a status report within twenty days. The Plaintiff filed a status report on March 24, 2010, which indicated that the Plaintiff was awaiting discovery responses from the Defendant and had received a promise from the Defendant of a settlement offer. The report also indicated that the Plaintiff was preparing a motion for summary judgment and intended to "file it shortly." A year later, no motion for summary judgment had been filed. Consequently, on March 24, 2011, the Court issued a second order directing the Plaintiff to file a status report within twenty days. On April 11, 2011, the Plaintiff filed a second status report, which was identical to that filed in March 2010.

On April 12, 2011, the Defendant filed a motion to dismiss the complaint and an objection to the Plaintiff's status report. In the Defendant's motion and objection, the Defendant's counsel stated that he had not received any communication from the Plaintiff's counsel for well over one year. The Defendant refuted the Plaintiff's statement to the Court that the Defendant had not fully responded to the discovery propounded by the Plaintiff and noted that the discovery period had long since closed. The Defendant seeks dismissal of the complaint or, in the alternative, indicates that she is ready to proceed to trial.

The Plaintiff filed the instant motion for summary judgment on April 25, 2011. On April 26, 2011, the Plaintiff responded to the Defendant's motion to dismiss, asserting that the motion for summary judgment was timely filed and that the Defendant was not cooperative during the discovery period. The Plaintiff contends that the Defendant failed to provide full responses to the Plaintiff's interrogatories and requests for production of documents. The Defendant opposes the Plaintiff's Motion for Summary Judgment.

CONCLUSIONS OF LAW

In accordance with Bankruptcy Rule 7056, 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. *Gray v. Manklow (In re Optical Techs., Inc.)*, 246 F.3d 1332, 1334 (11th Cir.2001). "Material facts" are those which might affect the outcome of a proceeding under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Furthermore, a dispute of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The moving party has the burden of establishing the right to summary judgment. *Clark v. Coats, 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). The moving party has the burden to establish the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *see also* FED. R. CIV. P. 56(e). Once the movant has made a *prima facie* showing of its right to judgment as a matter of law, the nonmoving party must go beyond the pleadings and demonstrate that there is a material issue of fact which precludes summary judgment. *Celotex*, 477 U.S. at 324; *Martin v. Commercial Union Ins. Co.*, 935 F.2d 235, 238 (11th Cir.1991).

The Plaintiff contends that summary judgment is appropriate because, as a matter of law, the undisputed facts have established all of the essential elements of a claim for nondischargeability under sections 523(a)(2), 523(a)(4), and 523(a)(6). The Court disagrees that granting the motion is warranted as a substantive matter and also notes that, as a matter of procedure, the motion is untimely. *See* BLR 7056-1(b) ("Motions for summary judgment shall be filed as soon as possible, but, unless otherwise ordered by the Bankruptcy Court, not later than 21 days after the close of discovery, as established by the expiration of the original or extended discovery

period or by written notice of all counsel, filed with the Bankruptcy Court, indicating that discovery was completed earlier.").

Section 523(a) of the Code provides:

(a) A discharge under section 722, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor of any debt—

* * * *

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

* * * *

(4) any debt . . . for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;”

* * * *

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity

11 U.S.C. §§ 523(a)(2); 523(a)(4); 523(a)(6).

The provisions of sections 523(a)(2), (a)(4), and (a)(6) warrant narrow construction. *See Gleason v. Thaw*, 236 U.S. 558, 562 (1915); *Schweig v. Hunter (In re Hunter)*, 780 F.2d 1577, 1579 (11th Cir. 1986). The plaintiff bears the burden

of establishing nondischargeability under sections 523(a). *Hunter*, 780 F.2d at 1579.

This case is not ripe for a summary resolution. The Plaintiff submits that the Defendant and Pejack conspired to defraud him of his money. The Defendant contends that she was also duped by Pejack and believed all that she told the Plaintiff. Disputed questions of fact remain as to whether the Defendant made misrepresentations or false promises to the Plaintiff in order to entice him into loaning her money. Similarly, the Court cannot find from the undisputed facts in this case that the Defendant engaged in larceny or embezzlement, as required by section 523(a)(4), or that she knew or should have known that Pejack's conduct would result in the loss of the Plaintiff's property, as required by section 523(a)(6). These are simply matters that must await trial to enable the Court to hear additional evidence and weigh the credibility of the witnesses.

The Court must decline to accept the Defendant's invitation to dismiss this case, however. Although it does not appear that the Plaintiff has been diligent in prosecuting the complaint, the complaint certainly states a cause of action against the Defendant. The Court will provide the Plaintiff an opportunity to present evidence.

CONCLUSION

For the reasons stated above, the Plaintiff's Motion for Summary Judgment is **DENIED** and the Defendant's Motion to Dismiss is **DENIED**.

In preparation for the case to proceed to trial, the Court will hold a pre-trial conference on **August 12, 2011 at 2:00 p.m.** in Chambers Second Floor, 18 Greenville Street, Newnan, Georgia.

The parties are hereby **ORDERED** to submit a proposed consolidated pre-trial order to the Court on or before **August 5, 2011**.

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