IT IS ORDERED as set forth below:

Date: August 24, 2010

C. Ray Mullins

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U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: WILLIAM MORRISON LYON, Debtor.	CASE NO. 09-61118-CRM CHAPTER 7
WILLIAM MORRISON LYON, Plaintiff, v. UNITED STATES INTERNAL REVENUE SERVICE, Defendant.	ADVERSARY PROCEEDING NO. 09-09024

ORDER

THIS MATTER is before the Court on the Motion for Summary Judgment (the "Motion") filed by the Defendant. The Debtor initiated this adversary proceeding by filing the

Complaint to Determine the Dischargeability of Debt. The Debtor asserts that his tax liabilities arising from his failure to pay taxes between 1999 and 2002, are dischargeable. The Defendant contends that tax liability should not be discharged because the Debtor willfully evaded payment pursuant to 11 U.S.C. 523(a)(1)(C).

Standard of Review

In accordance with Rule 56 of the Federal Rules of Civil Procedure, applicable herein by Rule 7056 of the Federal Rules of Bankruptcy Procedure, 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." The moving party has the initial burden to establish the absence of a genuine issue of material fact using "pleadings, depositions, answers to interrogatories, admissions on file, or affidavits." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

A dispute concerning facts that are not "material" to the final decision will not defeat a motion for summary judgment. *Hickson Corp. v. Northern Crossarm Co., Inc.*, 357 F.3d 1256, 1259 (11th Cir. 2004). A fact is "material" if it will affect the outcome of a proceeding under the governing substantive law. *Id.*

Summary judgment is not appropriate if there is a "genuine" dispute concerning a material fact. The court does not sit as a finder of fact, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, the nonmoving party can not defeat a motion for summary judgment by offering evidence that is "merely colorable" or "not significantly probative." *Id.* at 249; *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990). Self-serving affidavits without factual support in the record or statements that contradict prior deposition testimony may be disregarded by the court. *Anderson*, 477 U.S., 256-257; *Buie v. Quad/Graphics, Inc.*, 366 F.3d 496, 504 (7th Cir. 2004); *Mayo v. Allstate Ins. Co.*, 311 F. Supp. 2d 1329, 1334 (M.D. Ala. 2004). The "threshold inquiry" is whether "there are any

genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson,* 477 U.S., at 249.

Undisputed Facts

The Debtor was a "self-employed" salesperson for Ideal Chemical Products ("Ideal") between 1999 and 2002. During this time, the Debtor earned $289,758.00 but only paid $8,000.00 in taxes, which included three estimated tax payments of $1,500.00 in 1999 and seven payments of $500.00 between 2002 and 2003. After leaving Ideal in 2004, the Debtor became president of Chem-Teck, Inc. ("Chem-Teck"). The Debtor's wife is the sole shareholder of Chem-Teck but she does not play an active role in the management of the company. The Debtor admits that Chem-Teck paid $84,000 of his personal expenses between 2004 and 2008, including medical costs and bankruptcy fees. Further, the company has paid $63,576 to the Debtor's wife and is paying for two vehicles used by the Debtor and his wife.

Relevant Law

A debtor is generally granted a discharge of all pre-petition debts. *United States v. Fretz*, 244 F.3d 1323, 1326 (11th Cir. 2001). However, the purpose of this "fresh start" is to protect "honest but unfortunate" debtors. *Id.* A tax liability is nondischargeable if the debtor "made a fraudulent return or willfully attempted in any manner to evade or defeat such tax". 11 U.S.C. 523(a)(1)(C). The Eleventh Circuit has held that the tax authority must prove two elements, conduct and mental state, by a "preponderance of the evidence." *Fretz*, 244 F.3d, at 1327. The conduct requirement can be satisfied by an "affirmative act" or "culpable omission" by the debtor to avoid the payment of taxes. *In re Jacobs*, 490 F.3d 913, 922 (11th Cir. 2007). The mental state element, "willfulness", requires that the tax authority prove: "(1) the debtor had a duty under the law, (2) the debtor knew he had that duty, and (3) the debtor voluntarily and intentionally violated that duty." *In re Griffith*, 206 F.3d 1389, 1396 (11th Cir. 2000). The mere failure to pay taxes does not establish willfulness. *Id.* at 1395. The mental state requirement

"'prevents the application of the exception to debtors who make inadvertent mistakes.'" *Fretz*, 244 F.3d at 1330 (quoting *In re Birkenstock*, 87 F.3d 947, 952 (7th Cir. 1996)). On the other hand, the taxing authority does not need to prove that the debtor committed actual fraud only that his acts were "knowing and deliberate." *Jacobs*, 490 F.3d, at 924-925.

Courts look to the totality of the circumstances to determine whether a debtor willfully evaded payment of a tax liability. *Peterson v. United States*, 317 B.R. 556, 562 (Bankr. N.D. Ga. 2004) (Diehl, J.). The following are examples of conduct that evidence a willful evasion of tax liabilities:

a. A repeated failure to file taxes or to file taxes on a timely basis;

b. Causing a controlled entity to characterize compensation so as to avoid withholding and the failure to pay estimated taxes;

c. Causing a controlled entity to pay personal expenses or purchase vehicles for personal use; and

d. Transfers of assets from the debtor, or an entity controlled by the debtor, to related entities without adequate consideration or documentation.

See e.g. Id. at 562-565; *Jacobs*, 490 F.3d, at 916-920.

Legal Analysis

The Defendant contends that the Debtor willfully evaded the payment of taxes because he repeatedly failed to file tax returns and caused a controlled entity, Chem-Teck, to pay his personal expenses, purchase vehicles, and make payments to his wife while only making nominal tax payments.

The Debtor contends that he filed his tax returns on time but he relied on Ideal to pay his taxes based on his employment agreement. According to the Debtor, his employment agreement provided that Ideal would give him a check to pay his taxes after he filed his tax return. The Debtor did not withhold taxes or save any money to pay his taxes because he only learned that

Ideal had stopped paying his taxes in 2001. Thereafter, he relied on promises by Ideal to abide by the employment agreement. The only evidence on record contradicts the Debtor's statements. First, the Defendant provided copies of the Debtor's tax returns. According to the time stamps on the tax returns, the Defendant received the 1999-2001 tax returns in January of 2003 and the 2002 tax return was not received until December 5, 2003. The 2001 and 2002 tax returns were signed and dated by the Debtor on January 7, 2003 and December 2, 2003.[1] Second, if Ideal was required to give the Debtor a check to pay his taxes, he must have known his employer would not pay his 1999 taxes as early as 2000, not 2001. Finally, the Debtor admits he paid estimated taxes for the first three quarters of 1999 and initiated a payment plan with the Defendant in 2002. The Debtor's payment of taxes in 1999 and 2002 is inconsistent with his contention that he relied on Ideal to pay his taxes for two of the four years.

The Debtor contends that Chem-Teck's payment of his personal expenses were actually "loans". The Debtor uses his personal credit card for business and personal expenses because Chem-Teck can not obtain its own credit card. Chem-Teck pays the entire credit card balance and any personal expenses are considered "loans" to the Debtor. According to shareholder resolutions (the "Shareholder Resolutions"), these loans will continue until Chem-Teck can afford to pay him a salary commensurate with his position as president. Further, the Debtor was required to repay the loan starting on January 1, 2010; however, he has not made any payments because Chem-Teck has not paid him a salary. The Debtor characterizes the payments to his wife as "interest" payments. However, his wife never loaned Chem-Teck any money; instead, she allows the company to use a $100,000 certificate of deposit as collateral for a revolving line of credit. Finally, he says that the vehicles are company vehicles that the Debtor and his wife use in a manner consistent with their positions as executives of Chem-Teck.

The only evidence in support of these statements are the Shareholder Resolutions that

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[1]The 1999 and 2000 tax returns were signed but not dated.

were executed by the Debtor and his wife during the discovery phase of this proceeding. Although the Debtor claims the Shareholder Resolutions merely memorialized past practices, they are inconsistent with other evidence on record. Chem-Teck's tax returns do not show any obligations to his wife or loans to the Debtor and the vehicles are titled in the Debtor's name, not the company's name.

In conclusion, the Defendant has established that the Debtor repeatedly failed to file tax returns and caused a controlled entity to pay his personal expenses, make payments to his wife, and purchase vehicles for his use. The Debtor's only evidence is a self-serving affidavit and the Shareholder Resolutions, which were enacted during the discovery phase of this proceeding. This evidence is inconsistent with the Debtor's tax returns, Chem-Teck's tax returns, and other evidence on record. The Court finds that the Debtor has failed to satisfy his burden to produce evidence that raises a genuine issue of material fact. Accordingly,

IT IS ORDERED that Motion be and is hereby **GRANTED**.

Judgment shall be entered for the Defendant by separate order. The Clerk's Office is directed to serve a copy of this Order upon all interested parties.

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