



IT IS ORDERED as set forth below:

Date: August 24, 2012

**Paul W. Bonapfel
U.S. Bankruptcy Court Judge**

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

IN THE MATTER OF:	:	CASE NUMBER: 10-44959-PWB
	:	
VAN HAMILTON GILSTRAP,	:	
	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Debtor.	:	BANKRUPTCY CODE
	:	
	:	
NOLAND COMPANY,	:	
	:	
Plaintiff	:	
	:	
v.	:	ADVERSARY PROCEEDING
	:	NO. 11-4019
VAN HAMILTON GILSTRAP,	:	
	:	
Defendant.	:	

**ORDER DENYING MOTION TO DISMISS
AND NOTICE OF STATUS CONFERENCE**

The Plaintiff seeks denial of the Debtor's discharge pursuant to 11 U.S.C. § 727(a)(2)(A), (a)(3), (a)(4), and (a)(5) and an award of attorney's fees pursuant to FED. R.

BANKR. P. 9011. The Debtor seeks dismissal of the Plaintiff's complaint objecting to his discharge on the grounds that (1) the Plaintiff has failed to prosecute the complaint; and (2) as a matter of fact and law, no basis exists for the denial of his discharge. For the reasons stated below, the motion is denied.

Bankruptcy Local Rule 7041-1(a)(3) provides that the bankruptcy court may dismiss an adversary proceeding for want of prosecution if it has been pending "for more than six months without any substantial proceedings of record having been taken, as shown by the record docket or other manner."

The Debtor contends that dismissal is appropriate because discovery has expired and the last docket event was a notice of deposition filed on July 20, 2011. The Plaintiff asserts that it has diligently conducted discovery and is ready for trial.

Dismissal for want of prosecution is in the discretion of the Court. It is not the custom of the Court to dismiss an adversary proceeding for want of prosecution without first giving the parties an opportunity to ready the case for trial. To that end, if an adversary proceeding has been pending for more than six months without any activity, the Court typically will issue an order for the attorneys to appear and "show cause" why it should not be dismissed for want of prosecution.

The issuance of such an order regularly results in discussions between the parties and the preparation of a consolidated pretrial order. While dismissal would be appropriate if a plaintiff failed to appear at the show cause hearing, dismissal of an action for want of prosecution is not the preferred result.

The Plaintiff in this action has indicated a willingness and readiness to bring this case to trial. Had the Court scheduled a "show cause" hearing in this proceeding, the Plaintiff's

assertion that it was prepared to go to trial would have prevented the dismissal of the action.

Accordingly, the motion to dismiss for want of prosecution is denied.

The Court also declines to dismiss the action on the merits. The Debtor contests the factual and legal assertions that serve as a basis for the complaint and contends that there is no evidence to support the objection to discharge. This is plainly a factual dispute. The Debtor's unverified assertions in the motion explaining various omissions or mistakes are not evidence. And even if an affidavit of the Debtor or other admissible evidence supported the assertions and the motion otherwise complied with the requirements of a motion for summary judgment, clear disputes exist as to the facts underlying the § 727(a)(2)(A), (a)(3), (a)(4), and (a)(5) claims. As such, dismissal is not appropriate.

Finally, the Debtor seeks an award of attorney's fees pursuant to FED. R. BANKR. P. 9011. Such a request is procedurally deficient pursuant to FED. R. BANKR. P. 9011(c)(1) and premature in light of the denial of the motion to dismiss. Accordingly, it is

ORDERED that the motion to dismiss [Doc. 14] is denied. It is

FURTHER ORDERED that the request for attorney's fees is denied.

FURTHER ORDERED AND NOTICE IS HEREBY GIVEN that the Court shall hold a status and scheduling conference on **September 19, 2012**, at **9:25 a.m.**, in Courtroom 342, U.S. Courthouse, 600 East First Street, Rome, Georgia.

End of Order

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