

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ENTERED ON
SEP 17 2008
DOCKET

IN RE:

THOMAS C. GIORDANO and
MARY GIORDANO,

Debtors.

THOMAS C. GIORDANO,

Plaintiff,

v.

AMERICAN WEALTH MANAGEMENT, INC.,
MARY N. GIORDANO, ANGELA GIORDANO,
(GREGORY N. GIORDANO, POA),

Defendants.

CASE NO. A01-83528-REB

ADVERSARY PROCEEDING
NO. 05-6543

CHAPTER 7

JUDGE BRIZENDINE

**ORDER DENYING MOTION FOR SUMMARY JUDGMENT AND
MOTION TO STRIKE AS FILED BY AMERICAN WEALTH MANAGEMENT, INC.
AND GRANTING SUMMARY JUDGMENT FOR THOMAS C. GIORDANO**

Before the Court is the motion of Co-Defendant American Wealth Management, Inc. ("AWM") for summary judgment filed on November 7, 2006. AWM has also filed a motion to strike discovery responses of Plaintiff Co-Debtor Thomas C. Giordano on December 22, 2006. Plaintiff commenced this adversary proceeding through the filing of a complaint on November 29, 2005 to determine dischargeability of a certain obligation as owed to Co-Defendants Mary N. Giordano and Angela Giordano. More specifically, having received a discharge herein under 11 U.S.C. § 727, Plaintiff challenges post-petition efforts by AWM to collect this debt as a purported

assignee of same.¹ Based on the following reasons, both motions of AWM will be denied and summary judgment will be granted in favor of Plaintiff.

The following facts are not disputed. Plaintiff Thomas Giordano was employed by AWM between August 1995 and February 2001 prior to the filing of the above-named bankruptcy case on June 25, 2001. During this time, Plaintiff managed the assets of his mother, Mary N. Giordano, as well as those of his aunt Angela Giordano. Following issuance of his bankruptcy discharge, during 2003 and 2004 Mary N. Giordano, Angela Giordano, and apparently other family members and related entities went through arbitration with the National Association of Securities Dealers ("NASD") regarding various claims as asserted against both Plaintiff and AWM for alleged improprieties in connection with the management of their accounts. Although Plaintiff was served with a copy of the Statement of Claim, he chose not to appear and defend himself in this matter.

On October 15, 2004, Mary N. Giordano and Angela Giordano received an arbitration award for damages against Plaintiff herein and Defendant AWM, jointly and severally, with Mary Giordano receiving an award of \$130,000.00 and Angela Giordano an award of \$45,000.00. This award arose from misconduct including breach of fiduciary duty occurring between August 1995 and February 2001. *See* Exhibit "3," as attached to AWM's motion for summary judgment. Thereafter, on January 10, 2005, the United States District Court for the District of New Jersey

¹ Notwithstanding AWM's statement that they are holders of the claim of Mary N. Giordano and Angela Giordano as assignee, the record herein contains no copy of an assignment.

Debtors received a discharge on October 24, 2001. The case was reopened by Consent Order entered on November 15, 2005 and reflects signatures by counsel for Plaintiff Co-Debtor and counsel for AWM. In the Order, the garnishment action against Plaintiff is suspended pending determination of the dischargeability of AWM's judgment as assignee as discussed further herein. AWM's rights to res judicata were also preserved in this Order. The Court finds this matter to be a core proceeding.

entered a default judgment on the award, differing in its terms from the arbitrator's decision, solely against Plaintiff herein in the combined amount of \$175,000.00, as well as \$50,000.00 in attorney's fees and interest jointly in favor of Mary Giordano and Angela Giordano. *See* Exhibit "4."² Mary N. Giordano and Angela Giordano apparently assigned their awards and/or judgment to AWM who began collection efforts against Thomas Giordano.³ On June 16, 2005, the Superior Court of Gwinnett County, Georgia entered an order enforcing the New Jersey default judgment, and a garnishment was entered against Thomas Giordano in an attempt to collect the judgment on September 6, 2005. As noted above, this bankruptcy case was reopened to consider these matters on November 15, 2005.

The parties dispute whether Mary Giordano and Angela Giordano had knowledge of Plaintiff's bankruptcy case at the time of the arbitration proceedings.⁴ As mentioned, Plaintiff filed the above-styled bankruptcy case on June 25, 2001 and Plaintiff admits neither Mary Giordano nor Angela Giordano were scheduled as creditors. Plaintiff asserts through pleadings filed herein, however, that he had conversations with his family about the bankruptcy filing. Plaintiff also claims that although he did not appear in any out-of-state action, he did send letters to counsel making them aware of his bankruptcy discharge. Further, the bankruptcy schedules reflect that

² Although it appears that Mary Giordano and Angela Giordano petitioned the district court for purposes of making their individual arbitration awards the judgment of the court, and whereas the awards had been entered separately against Plaintiff and AWM on a joint and several basis in the amounts of \$130,000.00 and \$45,000.00, respectively, contrary to the arbitration award the default judgment was entered solely against Plaintiff in an increased amount resulting in a combined award of \$225,000.00.

³ The record does not reflect whether AWM has completely paid for the assigned judgment and if so, the amount so paid.

⁴ As set forth below, this particular issue does not need to be resolved by the Court for the disposition of this matter.

AWM was listed as a creditor in this case on Schedule F though in relation to another claim.

In its motion for summary judgment, AWM argues under 11 U.S.C. § 523(a)(3)(B) that Plaintiff's failure to list the claim of Mary Giordano and Angela Giordano, which AWM now holds as assignee, excepts that debt from discharge "unless such creditor had notice or actual knowledge of the case."⁵ AWM contends that neither Mary Giordano nor Angela Giordano had such notice.⁶ Citing the authority of *Gagan v. American Cablevision, Inc.*, 77 F.3d 951 (7th Cir. 1996), AWM asserts that as assignee of the Giordanos' claim, it benefits from their lack of knowledge or notice of Plaintiff's bankruptcy case and moreover, Plaintiff has failed to even create an issue of fact on the question of notice. Hence, on these indisputable facts AWM contends that the judgment it holds was not subject to Debtors' discharge herein, and therefore, it may proceed to enforce collection on this assigned obligation against Plaintiff.

Summary judgment may be granted pursuant to Federal Rule of Civil Procedure 56, applicable herein by and through Federal Rule of Bankruptcy Procedure 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

⁵ AWM's arguments are summarized as follows: (1) because Plaintiff failed to list the Giordanos' claim now held by AWM, this claim is excepted from discharge under Section 523(a)(3); (2) there is no credible evidence to suggest the Giordanos had notice of this bankruptcy case in time to challenge the dischargeability of their claim; (3) Plaintiff's evidence is insufficient to create a dispute with regard to the knowledge or lack thereof of the Giordanos; (4) Plaintiff's failure to assert his discharge as an affirmative defense in the New Jersey default suit is a waiver of said defense under Fed.R.Civ.P. 8(c); and finally, (5) Plaintiff should not be allowed to inherit default judgment proceeds from his mother's future estate as AWM would in effect be paying the wrongdoer in violation of simple justice.

⁶ Moreover, in its motion to strike AWM argues that Plaintiff's purported evidence in rebuttal as filed herein on December 20, 2006 is deficient to even raise a fact issue on the matter. In the motion to strike, AWM challenges the evidentiary basis and credibility of the responses as tendered by Plaintiff on behalf of Mary Giordano and Angela Giordano.

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). 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.

Based on this rule and cited case authority, the Court cannot decide disputed issues of fact, weigh the evidence, or determine matters of credibility, and the existence of fact questions precludes entry of summary judgment. In addition, as the party moving for summary judgment, but who does not bear the burden of proof, AWM must show that there is “an absence of evidence to support the nonmoving party’s [Plaintiff’s] case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). It is insufficient, however, to obtain relief on a motion for summary judgment “without supporting the motion in any way or with [only] a conclusory assertion that the plaintiff has no evidence to prove his case.” 477 U.S. at 328, 106 S.Ct. at 2555 (White, J., concurring).

Here, AWM has elected not to pursue further discovery and instead relies on its challenges to the sufficiency of Plaintiff’s evidence as to the lack of knowledge by the Giordanos. As reflected in the record, Plaintiff has put forth certain evidence in support of his complaint herein. The discovery responses in question are certified in the case of Mary N. Giordano, and submitted under

authority of Gregory G. Giordano as power of attorney in the case of Angela Giordano.⁷

As noted above, AWM contends the Giordanos' claim which it now holds as assignee is excepted from discharge because it was not listed in Plaintiff's bankruptcy schedules. In response, Plaintiff asserts that such claims did not need to be listed because his case was a no-asset Chapter 7 case. *See In re Brewer*, 2005 Bankr. LEXIS 977 (Bankr. N.D.Ga. April 4, 2005). Further, under Section 524, a discharge operates to "void any judgment at *any* time obtained...whether or not discharge of such debt is waived," and enjoins "continuation of an action...to collect any debt...whether or not discharge of such debt is waived." In addition to asserting that the Giordanos did have knowledge of his bankruptcy case, Plaintiff contends that AWM itself had notice by virtue of the fact that it was listed on the bankruptcy schedules. AWM simply ignored the discharge and proceeded with its collection efforts against Plaintiff.

Plaintiff also argues that AWM's case authority (*Bauers v. Board of Regents*, 33 Fed.Appx. 812, 2002 WL 486062 (7th Cir. 2002) (unpublished order)), is inapplicable because as contrasted with this case, in the *Bauers* decision no notice of the discharge was given during the pendency of the law suit in question. Further, the issue at stake herein is dischargeability and the court in *Bauers* offered no opinion on that point.⁸ Finally, Plaintiff states that the injustice of the matter lies

⁷ The Court notes that the contested discovery responses of Plaintiff, consisting of statements by Mary Giordano and Angela Giordano, may not be in a form admissible at a trial (as possibly containing hearsay for example). The facts supported thereby, however, may still be presented at trial through witness testimony or other competent evidence. *See generally Offshore Aviation v. Transcon Lines*, 831 F.2d 1013, 1015 (11th Cir. 1987); *Property Mgmt. & Invs. v. Lewis*, 752 F.2d 599, 604 n. 4 (11th Cir. 1985). *But see Corwin v. Walt Disney Co.*, 475 F.3d 1239, 1249-50 (11th Cir. 2007).

⁸ This Court observes that in accordance with the Local Rules of the Seventh U.S. Circuit Court of Appeals, it is doubtful that this opinion in any event can be cited as precedent herein. *See* Local Rule 53(e) and (b)(2)(iv). Rule 53(e) provides as follows:

in allowing AWM, as a party with notice, to benefit from the Giordanos' alleged lack of knowledge of the bankruptcy filing even after seeing the arbitration proceedings go forward, taking an assignment of the obligation in question, and then seeking to collect same from Plaintiff notwithstanding the discharge entered herein.

Based on the present record, the Court concludes AWM has not established a basis for relief on either of its motions. The Court further concludes that in any event, notwithstanding AWM's other arguments herein, the matter of notice or knowledge in connection with Mary N. Giordano and Angela Giordano need not be determined for purposes of deciding AWM's motion for summary judgment.

The Court observes as previously noted, that it is somewhat confusing how the arbitration award, entered against both Plaintiff and AWM as joint tortfeasors, emerged into a default judgment solely against Plaintiff, especially in light of the fact that the action in the federal district court in New Jersey bears the case style of *Mary Giordano and Angela Giordano v. American Wealth Management, Inc. and Thomas C. Giordano*. Further, it appears that the arbitration awards entered specifically in favor of Mary Giordano and Angela Giordano, individually, became in the

Citation of Unpublished Opinions or Orders. Except to the purposes set forth in Circuit Rule 53(b)(2)(iv), no unpublished opinion or order of any court may be cited in the Seventh Circuit if citation is prohibited in the rendering court.

Rule 53(b)(2)(iv) states that regarding any unpublished order:

- (iv) Except to support a claim of res judicata, collateral estoppel or law of the case, shall not be cited or used as precedent
 - (a) in any federal court within the circuit in any written document or in oral argument; or
 - (b) by any such court for any purpose.

Seventh Circuit, Local Rule 53.

default judgment a single, combined award in their joint favor. Adding to this curious state of affairs, the case style of the Gwinnett County, Georgia Superior Court action also reflects two separate plaintiffs and two separate defendants as in the arbitration proceedings and the federal court suit. *See* Exhibits “3,” “4,” and “5,” attached to AWM’s motion for summary judgment.

In fact, counsel for AWM’s own comments during a deposition in a state court on this matter suit similarly reflects an understanding that Plaintiff and AWM were jointly liable to Mary Giordano and Angela Giordano with respect to their separate awards. For example, in questioning Plaintiff counsel for AWM stated as follows:

Okay. Well, Mr. Giordano, I’ll represent to you that the style of that [default] judgment is Mary Giordano and Angela Giordano vs. American Wealth Management and yourself, and it’s a judgment of \$225,000 against yourself and American Wealth Management and that your mother and your aunt have assigned the rights to that judgment to American Wealth Management.

Deposition of Thomas C. Giordano, page 12, lines 5-11, attached to motion of summary judgment as Exhibit “5.” In a later exchange, counsel operated on the same assumption when he asked Plaintiff, “Were you aware that she [Plaintiff’s mother] had obtained a judgment against you [Plaintiff] and American Wealth Management?” Deposition, page 18, lines 11-12.

Given the procedural posture of this matter and the state of the record, the Court concludes that even if the Giordanos had actual knowledge of the bankruptcy case, AWM is not entitled to summary judgment. Based on the record presented, if AWM is a joint tortfeasor with Plaintiff as it appears based on the arbitration award as discussed above, then its rights against Plaintiff are subject to the discharge as entered in the above case. Whether or not the Giordanos knew of the bankruptcy filing, AWM was on notice of such filing by virtue of its own identification as a creditor in the schedules and service list. If AWM holds a claim for a right of contribution as a

joint tortfeasor against Plaintiff, then said claim was discharged under 11 U.S.C. § 727(b). This result follows because the claim would have existed as of the date of the filing of the bankruptcy petition herein inasmuch as the operative facts that form the basis of AWM's claim arose before the filing of this case and the entry of the order for relief. *See also* 11 U.S.C. §§ 523(c)(1) and 523(a)(3)(B); § 524(a)(1) & (2).

Moreover, the purchase and purported assignment of the judgment from the Giordanos to AWM does not act to somehow sanitize AWM's position by purging it of its own notice of the bankruptcy case. AWM offers no persuasive legal authority, and the Court has located none, for a rule that a *lack* of knowledge by an assignor can be imputed to an assignee *with* knowledge in a situation as confronted herein. Instead, AWM, as a party with notice, chose to proceed in enforcing the assigned claim without ever moving to reopen the case and first obtaining a determination regarding the dischargeability of that claim in view of Debtors' discharge.

As a joint tortfeasor or as an assignee, either way AWM is not entitled to collect on its claim against this Debtor. Based on the record presented, the Court further concludes that not only should the motion of AWM for summary judgment be denied, but also that summary judgment should be granted in favor of Plaintiff on the Court's own motion.⁹

Accordingly, based on the foregoing, it is

ORDERED that the motion of Co-Defendant American Wealth Management, Inc. for summary judgment be, and hereby is, **denied**. It is

FURTHER ORDERED that the motion of Co-Defendant American Wealth Management, Inc. to strike discovery responses be, and the same hereby is, **denied**.

⁹ *See generally In re Allegheny Health, Educ., and Research Found.*, 321 B.R. 776, 801 (Bankr. W.D.Pa. 2005).

Finally, pursuant to the Court's own motion, it is

FURTHER ORDERED that summary judgment be, and the same hereby is, **granted** in favor of Plaintiff-Debtor Thomas C. Giordano and that the obligation against him as set forth in the arbitration award and default judgment as referenced herein is dischargeable.

The Clerk is directed to serve a copy of this Order upon Plaintiff Co-Debtor, counsel for Plaintiff-Debtor, counsel for Co-Defendant American Wealth Management, Inc., the remaining Co-Defendants herein, the Chapter 7 Trustee, and the United States Trustee.

IT IS SO ORDERED.

At Atlanta, Georgia this 15th day of September, 2008.



ROBERT E. BRIZENDINE
UNITED STATES BANKRUPTCY JUDGE