United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Steven H. Silverman

Bankruptcy No. 98 B 37764

Adversary Caption: Steven H. Silverman v. Elie Merce and Inland Real Estate Sales, Inc.

Adversary No. 98 A 02064

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Judge: John H. Squires

Appearance of Counsel:

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: STEVEN H. SILVERMAN, Debtor.	)	Chapter 11 Bankruptcy No. 98 B 37764 Judge John H. Squires
STEVEN H. SILVERMAN, Plaintiff, v. ELIE MERCE and INLAND REAL ESTATE SALES, INC., an Illinois corporation, Defendants.	)	Adversary No. 98 A 02064

MEMORANDUM OPINION

These matters come before the Court on the motion of the Debtor, Steven H. Silverman, for summary judgment and on the motion of Elie Merce ("Merce") to strike the Debtor's motion for summary judgment. For the reasons set forth herein, the Court hereby denies the motion to strike and grants the Debtor's motion for summary judgment. The earnest money deposit in the amount of $126,250.00, plus accrued interest, being held by Inland Real Estate Sales, Inc., constitutes property of the Debtor's estate pursuant to 11 U.S.C. § 541 and should be turned over to the Debtor under 11 U.S.C. § 542. The issues raised by the co-defendant, Inland Real Estate Sales, Inc., in its counterclaim and cross claims in the nature of interpleader against Merce are not ripe for determination at this time.

Because the Court is concurrently dismissing the Chapter 11 bankruptcy case, the Court also dismisses this adversary proceeding.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain these matters pursuant to 28 U.S.C. § 1334 and General Rule 2.33(A) of the United States District Court for the Northern District of Illinois. These matters constitute core proceedings under 28 U.S.C. § 157(b)(2)(A), (E) and (O).

II. APPLICABLE STANDARDS

A. Motion for Summary Judgment

In order to prevail on a motion for summary judgment, the movant must meet the statutory criteria set forth in Rule 56 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7056. Rule 56(c) reads in part:

> [T]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). See also Dugan v. Smerwick Sewerage Co., 142 F.3d 398, 402 (7th Cir. 1998). The primary purpose for granting a summary judgment motion is to avoid unnecessary trials when there is no genuine issue of material fact in dispute. Trautvetter v. Quick, 916 F.2d 1140, 1147 (7th Cir. 1990); Farries v. Stanadyne/Chicago Div., 832 F.2d 374, 378 (7th Cir. 1987) (quoting Wainwright Bank & Trust Co. v. Railroadmen's Federal

Sav. & Loan Ass'n of Indianapolis, 806 F.2d 146, 149 (7th Cir. 1986)). Where the material facts are not in dispute, the sole issue is whether the moving party is entitled to a judgment as a matter of law. ANR Advance Transp. Co. v. International Bhd. of Teamsters, Local 710, 153 F.3d 774, 777 (7th Cir. 1998).

In 1986, the United States Supreme Court decided a trilogy of cases which encourage the use of summary judgment as a means to dispose of factually unsupported claims. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The burden is on the moving party to show that no genuine issue of material fact is in dispute. Anderson, 477 U.S. at 248; Matsushita, 475 U.S. at 585-86; Celotex, 477 U.S. at 322.

All reasonable inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. Parkins v. Civil Constructors of Ill., Inc., 163 F.3d 1027, 1032 (7th Cir. 1998). The existence of a material factual dispute is sufficient only if the disputed fact is determinative of the outcome under applicable law. Anderson, 477 U.S. at 248; Frey v. Fraser Yachts, 29 F.3d 1153, 1156 (7th Cir. 1994). "Summary judgment is not an appropriate occasion for weighing the evidence; rather the inquiry is limited to determining if there is a genuine issue for trial." Lohorn v. Michal, 913 F.2d 327, 331 (7th Cir. 1990).

Rule 56(d) provides for the situation when judgment is not rendered upon the whole case, but only a portion thereof. The relief sought pursuant to subsection (d) is styled partial summary judgment. Particularly pertinent here is the point that partial summary judgment

is available only to dispose of one or more counts of the complaint in their entirety. Commonwealth Ins. Co. v. O. Henry Tent & Awning Co., 266 F.2d 200, 201 (7th Cir. 1959); Biggins v. Oltmer Iron Works, 154 F.2d 214, 216-17 (7th Cir. 1946); Quintana v. Byrd, 669 F.Supp. 849, 850 (N.D. Ill. 1987); Arado v. General Fire Extinguisher Corp., 626 F.Supp. 506, 509 (N.D. Ill. 1985); Capitol Records, Inc. v. Progress Record Distributing, Inc., 106 F.R.D. 25, 28 (N.D. Ill. 1985); In re Network 90°, Inc., 98 B.R. 821, 823 (Bankr. N.D. Ill. 1989); Strandell v. Jackson County, 648 F.Supp. 126, 136 (S.D. Ill. 1986). Rule 56(d) provides a method whereby a court can narrow issues and facts for trial after denying in whole or in part a motion properly brought under Rule 56. Capitol Records, 106 F.R.D. at 29. The Court notes that this motion for summary judgment does not deal with the issues raised by the co-defendant, Inland Real Estate Sales, Inc. in its counterclaim and cross claims.

Local Rule 402.M of the Bankruptcy Rules adopted for the Northern District of Illinois requires the party moving for summary judgment to file a detailed statement ("402.M statement") of material facts that the movant believes are uncontested. Local Bankr. R. 402.M. The 402.M statement "shall consist of short numbered paragraphs, including, within each paragraph specific references to the affidavits, parts of the record, and other supporting materials relied upon to support the facts set forth in that paragraph. Failure to submit such a statement constitutes grounds for denial of the motion." Id.

The Debtor filed a 402.M statement that complied substantially with the requirements of Rule 402.M. It contained numbered paragraphs setting out assertedly uncontested facts.

The party opposing a summary judgment motion is required by Local Rule 402.N to respond ("402.N statement") to the movant's 402.M statement, paragraph by paragraph, and to set forth any material facts that would require denial of summary judgment, specifically referring to the record for support of each denial of fact. Local Bankr. R. 402.N. The opposing party is required to respond "to each numbered paragraph in the moving party's statement" and make "specific references to the affidavits, parts of the record, and other supporting materials relied upon." Local Bankr. R. 402.N(3)(a). Most importantly, "[a]ll material facts set forth in the [402.M] statement required of the moving party will be deemed admitted unless controverted by the statement of the opposing party." Local Bankr. R. 402.N(3)(b).

Merce has not complied with Rule 402.N. The Seventh Circuit has upheld strict application of local rules regarding motions for summary judgment. See Dade v. Sherwin-Williams Co., 128 F.3d 1135, 1140 (7th Cir. 1997); Feliberty v. Kemper Corp., 98 F.3d 274, 277-78 (7th Cir. 1996); Bourne Co. v. Hunter Country Club, Inc., 990 F.2d 934, 938 (7th Cir.), cert. denied, 510 U.S. 916 (1993); Schulz v. Serfilco, Ltd., 965 F.2d 516, 519 (7th Cir. 1992); Maksym v. Loesch, 937 F.2d 1237, 1240-41 (7th Cir. 1991). This omission is fatal to Merce on this dispositive motion. Because Merce failed to file the Rule 402.N statement within the requested and allotted time, the facts set forth in the Debtor's Rule 402.M statement are deemed admitted.

B. Motion to Strike

Federal Rule of Bankruptcy Procedure 7012(b) provides that Federal Rule of Civil Procedure 12(b)-(h) applies in adversary proceedings. Rule 12(f) provides:

> Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

Fed. R. Civ. P. 12(f).

A motion to strike should be made by a party before responding to the pleading containing the challenged matter, or within twenty days after the pleading has been served if the pleading is one to which no responsive pleading is pemitted. A court has authority to consider a motion to strike even though it was not made within the time limits established by Rule 12(f). Go-Tane Service Stations, Inc. v. Ashland Oil, Inc., 508 F.Supp. 200, 201-02 n.2 (N.D. Ill. 1981); Lunsford v. United States, 570 F.2d 221, 227 n.11 (8th Cir. 1977).

The grounds contained in Rule 12(f) are not mutually exclusive and somewhat overlap. The criteria for Rule 12(f) motions are strikingly similar to those under Rule 12(b)(6). A motion under Rule 12(f) to strike portions of a responsive pleading serves the limited purpose of excluding irrelevant material from pending litigation. Issues that are raised in a responsive pleading which are not, in fact, responsive to the plaintiff's cause of action need not be allowed to complicate and impede the progress of pretrial discovery.

Motions to strike are not favored, and are not ordinarily granted unless the language in the pleading at issue both has no possible relation to the controversy and is clearly prejudicial. Lirtzman v. Spiegel, Inc., 493 F.Supp. 1029, 1031 (N.D. Ill. 1980). Before a motion to strike can be granted, the Court must instead "be convinced that there are no questions of fact, that any questions of law are clear and not in dispute, and that under no set

of circumstances could the defense succeed." Id. (quotation omitted). A motion to strike will ordinarily be denied where the allegations under attack are of such a character that their sufficiency should not be determined summarily, but should be decided only after a hearing or decision on the merits. Gibbs v. Buck, 307 U.S. 66 (1939).

III. FACTS AND BACKGROUND

The following are a recitation of the deemed admitted facts pursuant to Rule 402.N(3)(b) in this matter. The Debtor and Merce entered into a real estate sales contract dated June 2, 1998, for the purchase of property located at 2001-2015 West Howard Street, Evanston, Illinois. The Debtor deposited the sum of $126,250.00 as an earnest money deposit with Inland Real Estate Sales, Inc. ("Inland") toward the purchase of the property. Inland is currently holding the deposit and any accrued interest.

The Debtor's correspondence dated September 11, 1998 requested the following information regarding the property: (1) rent increases since January 1, 1998 by unit and rental agreement; (2) justification of the water bill and any major usage or leaks; (3) 1998 real estate tax increase and any protest filed to lower the tax assessment; and (4) documentation of the water bill for the property. See Exhibit A to the Complaint. The only correspondence sent by Merce to the Debtor in response to the Debtor's September 11, 1998 request was the correspondence dated September 18, 1998.

Merce did not furnish the Debtor with the information concerning rent increases in connection with the property since January 1, 1998; copies of the water billing information; any evidence of proposed real estate tax increases; a deed for the property; nor any

documentation concerning real estate tax protests, if any, filed by Merce. Merce did furnish the Debtor with differing information concerning rental income generated by the property.

The Debtor's declarations of default dated September 11, 1998, September 23, 1998, October 23, 1998, November 2, 1998 and November 20, 1998 preceded any alleged declaration of default by Merce. See Exhibits A and B to the Complaint. Merce did not institute any legal proceedings to recover the deposit prior to the Debtor filing the Chapter 11 petition. There has been no judicial determination of the respective rights of Merce and the Debtor in the funds held by Inland.

The Debtor filed a Chapter 11 petition on November 23, 1998. Thereafter, on December 8, 1998, the Debtor filed the instant adversary proceeding against Merce and Inland to recover the earnest money deposit. The Debtor alleges that the funds constitute property of the estate pursuant to 11 U.S.C. § 541. The Debtor seeks turnover of those funds under 11 U.S.C. §§ 542 and 544. The gist of the complaint is that Merce has defaulted under the terms of the real estate sales contact for her failure to comply with certain requests for information, and has therefore forfeited any right to the earnest money.

IV. DISCUSSION

A. Motion to Strike the Motion for Summary Judgment

Merce seeks to strike the Debtor's motion for summary judgment on the basis that the motion relies on certain admissions made by Merce for failing to timely respond to the Debtor's request to admit. Merce alleges that this request to admit was not served upon Merce until "a date uncertain after February 15, 1999." Attached as Exhibit A to the motion

for summary judgment is the Debtor's first request to admit. The certificate of service, which is in proper form, shows that the request to admit was mailed to Merce and attorney on February 1, 1999. Merce contends that the certificate of service does not constitute a true and correct copy.

Merce has failed to produce any evidence to support the allegation that the Debtor's attorney did not serve the request to admit on February 1, 1999. A return of service executed by counsel for a plaintiff is prima facie evidence of valid service and can only be overcome by strong and convincing evidence. Trustees of Local Union No. 727 Pension Fund v. Perfect Parking, Inc., 126 F.R.D. 48, 52 (N.D. Ill. 1989). Moreover, Federal Rule of Bankruptcy Procedure 9006(e) expressly provides that "[s]ervice of process and service of any paper other than process or of notice by mail is complete on mailing." Fed. R. Bankr. P. 9006(e). Thus, the required time to respond to the request to admit begins to run commencing the day after mailing, not the day of or after receipt of the request by the party upon whom the request is made. Even if the Court were to agree with Merce's argument that Merce did not receive the request to admit until February 15, 1999, Merce still did not timely respond thereto.

Rule 36(a) of the Federal Rules of Civil Procedure and Federal Rule of Bankruptcy Procedure 7036, provide that a party must answer each matter for which an admission is requested within thirty days or the matter is deemed admitted. Fed. R. Bankr. P. 7036 and Fed. R. Civ. P. 36(a) and (b).[1] The Seventh Circuit has held that a defendant's failure to

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[1] Rule 36(a), in pertinent part, provides that "[e]ach matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after

answer a request for admission constitutes admission of each matter for which admission was sought, and can serve as the factual predicate for summary judgment. United States v. Kasuboski, 834 F.2d 1345, 1350 (7th Cir. 1987). Accord Central States, Southeast and Southwest Areas Pension Fund v. GL & B Leasing Co., Inc., 874 F.Supp. 217, 218 n.1 (N.D. Ill. 1995) (citing Kasuboski); Donovan v. Carls Drug Co., 703 F.2d 650, 651 (2d Cir. 1983) (admissions made because defendant failed to answer request for admission "may be used for Rule 56 summary judgment"); Hartwig Poultry, Inc. v. American Eagle Poultry (In re Hartwig Poultry, Inc.), 54 B.R. 37, 39 (Bankr. N.D. Ohio 1985) (party's failure to answer request for admission resulted in facts stated therein being deemed true, and may be used as the basis for summary judgment).

Merce failed to answer the request to admit within the thirty-day period either from February 1, 1999 or February 15, 1999. Moreover, Merce has not sought and obtained permission from the Court to withdraw or amend the deemed admissions. Consequently, all matters contained in the Debtor's request to admit are hereby deemed admitted pursuant to Rule 36(a). Moreover, under Local Rule 402.M, the Debtor has supported his motion for summary judgment with a statement of undisputed material facts. Such facts and documents

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service of the request, or within such shorter or longer time as the court may allow . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection. . . ." Rule 36(b) states in part that "[a]ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." No such motion was made by Merce and no such order was entered by the Court.

now deemed admitted by Merce via Rule 36 and via Local Rule 402.N(3)(b) establish that Merce was in default under the contract.

Merce has failed to demonstrate that the motion for summary judgment contains any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. Thus, the Court hereby denies Merce's motion to strike the Debtor's motion for summary judgment.

Unfortunately, the Court must address some of the allegations in Merce's motion to strike. According to counsel for Merce, he and counsel for the Debtor are "unable to cooperate" and all telephone conversations have "quickly degenerate[d] into childish behavior." Further, counsel for Merce alleges that counsel for the Debtor telephoned his office between twenty and thirty times in one day in an effort to harass counsel for Merce. Additionally, and most troubling, counsel for Merce contends that on at least two occasions, counsel for the Debtor threatened physical violence against him by stating he would "come over there and beat the crap out of [counsel for Merce]" and would "come over and see [counsel for Merce]." In his reply to the motion for summary judgment, counsel for the Debtor contends that these statements are "outrageous, untrue and potentially defamatory."

The pending motions are not the appropriate procedural mechanism to decide the truth or falsity of such allegations. The Court is both disheartened by and disgusted with the level to which the professional relationship between opposing counsel has degenerated. While the Court makes no findings at this time regarding the truth or falsity of such allegations in the motion to strike, the mere fact that these allegations were even made demonstrates the lack of civility that has too often permeated the legal profession over the

years, and in particular, that has infected this adversary proceeding. The Court reminds both attorneys that the Standards for Professional Conduct within the Seventh Federal Judicial Circuit, adopted on December 14, 1992, are applied in this Court. The Court advises that both attorneys carefully read and follow same. This Court will not tolerate members of the bar threatening physical violence against one another, nor any further uncivil behavior either before the Court or in papers filed in this matter. Both parties' attorneys are expressly required by the Standards for Professional Conduct to act in a professional and civil manner when dealing with one another. Enough said on this point.

B. Motion for Summary Judgment

The Debtor predicates his motion for summary judgment on Merce's failure to timely respond to the Debtor's request to admit. Merce's failure to timely respond to the Debtor's request to admit warrants the imposition of summary judgment in this matter as there are no disputed issues of material fact, and the Debtor is entitled to judgment as a matter of law. Notwithstanding the denials in Merce's answer to various allegations in the Debtor's complaint, the facts, which are deemed admitted by Merce's failure to timely respond to the request to admit, as well as some of the undisputed allegations in the complaint, establish that the deposited funds constitute property of the bankruptcy estate under 11 U.S.C. § 541 and that said funds should be turned over to the Debtor under 11 U.S.C. § 542.[2]

The Bankruptcy Code statutory provision for turnover contained in 11 U.S.C. § 542(a) deals with property of the estate to be turned over to the case trustee or debtor-in-possession. Turnover is not intended as a remedy to determine disputed rights of parties to

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[2] The Illinois case law cited by Merce is inapposite and not controlling in this matter.

property. Rather, it is intended as the remedy to obtain what is acknowledged to be property of the bankruptcy estate. Marlow v. Oakland Gin Co., Inc. (In re Julien Co.), 128 B.R. 987, 993 (Bankr. W.D. Tenn. 1991). Relief under § 542(a) is most frequently afforded to case trustees or debtors against creditors who are in actual or constructive possession of the subject collateral at the time the bankruptcy petition is filed and who do not voluntarily surrender it. See Pileckas v. Marcucio, 156 B.R. 721 (N.D. N.Y. 1993). Thus, the burden is usually on the trustee or debtor seeking turnover, Groupe v. Hill (In re Hill), 156 B.R. 998, 1006 (Bankr. N.D. Ill. 1993), and the evidence must show that the asset in question is part of the bankruptcy estate. Mather v. Tailored Fabrics, Inc. (In re Himes), 179 B.R. 279, 282 (Bankr. E.D. Okla. 1995). Only property in which the debtor has an interest becomes part of the bankruptcy estate and can be made the subject of an order for turnover under § 542(a). Cates-Harman v. Stage (In re Stage), 85 B.R. 880, 881 (Bankr. M.D. Fla. 1988). It follows that if the debtor does not have the right to possess or use property at the commencement of a case, a turnover action cannot be a tool to acquire such rights. Creative Data Forms, Inc. v. Pennsylvania Minority Bus. Dev. Auth. (In re Creative Data Forms, Inc.), 41 B.R. 334, 336 (Bankr. E.D. Pa. 1984), aff'd, 72 B.R. 619 (E.D. Pa. 1985), aff'd, 800 F.2d 1132 (3d Cir. 1986).

It is undisputed that notwithstanding the Debtor's repeated declarations of default, none were cured by Merce. Paragraph 5 of the underlying contract furnished with Inland's cross claims provides that if the seller (Merce) defaults, the earnest money shall be refunded to the purchaser (the Debtor). A Chapter 11 debtor purchaser of real property retains legal title in funds deposited by a debtor in escrow. See In re Shapiro, 124 B.R. 974, 980-81

(Bankr. E.D. Pa. 1991). Consequently, the deposit held by Inland constitutes property of the Debtor's estate under § 541. As a result of the defaults under the contract by Merce, the Debtor is entitled to turnover of the deposit.

V. CONCLUSION

For the foregoing reasons, the Court denies the motion to strike the motion for summary judgment and grants the motion for summary judgment. The earnest money deposit in the amount of $126,250.00, plus accrued interest, being held by Inland, constitutes property of the Debtor's estate pursuant to § 541 and should be turned over to the Debtor under § 542. The issues raised by the co-defendant, Inland, in its counterclaim and cross claims in the nature of interpleader against Merce are not ripe for determination at this time. Because the Court is concurrently dismissing the Chapter 11 bankruptcy case, the Court also dismisses this adversary proceeding.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

DATE: _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List