

**United States Bankruptcy Court
Northern District of Illinois
Eastern Division**

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Bankruptcy Caption: In re Michael J. Riley

Bankruptcy No. 03 B 40263

Adversary Caption: Misty Dillon and Helen Cummins v. Michael J. Riley

Adversary No. 03 A 04838

Date of Issuance: August 2, 2004

Judge: John H. Squires

Appearance of Counsel:

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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

IN RE:)	Bankruptcy No. 03 B 40263
)	Chapter 7
MICHAEL J. RILEY,)	Judge John H. Squires
)	
Debtor.)	
<hr/>		
MISTY DILLON and HELEN)	Adv. No. 03 A 04838
CUMMINS,)	
)	
Plaintiffs,)	
)	
v.)	
)	
MICHAEL J. RILEY)	
)	
Defendant.)	

MEMORANDUM OPINION

This matter comes before the Court on the motion of Misty Dillon and Helen Cummins (collectively “Plaintiffs” and individually “Misty” and “Helen”) for summary judgment pursuant to Federal Rule of Bankruptcy Procedure 7056 and Federal Rule of Civil Procedure 56 on their complaint against Michael J. Riley (“Debtor”) which seeks to except a debt owed by Debtor to Plaintiffs from discharge pursuant to 11 U.S.C. §§ 523(a)(2), (a)(4) and (a)(6). For the reasons set forth herein, the Court denies the motion.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. It is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

II. FACTS AND BACKGROUND

On December 30, 2003, Plaintiffs filed a single-count complaint wherein they allege that the debt owed them by the Debtor is non-dischargeable under 11 U.S.C. § 523(a)(2), (a)(4) and (a)(6). Specifically, the complaint alleges that Plaintiffs and Kazue Tashiro (“Kazue”), Helen’s mother, met the Debtor in the late 1980s. Compl. at ¶ 2. Kazue died in 1990, leaving Helen as her sole legatee. *Id.* According to Plaintiffs, Debtor represented to them that he was in the investment business and could invest their money at a substantial return. *Id.* at ¶ 3. From April 1989 through June 1989, Kazue gave Debtor \$236,587.61 for the purpose of investing. *Id.* at ¶ 4. At the time Kazue invested with Debtor, she was 88 years old. *Id.* From November 1988 through April 1991, Misty invested \$72,230.00 with Debtor. *Id.* at ¶ 5.

Plaintiffs allege that Debtor made false representations to them and Kazue, including that the investments were for the following reasons: purchase of a home in Naperville, Illinois to be owned on behalf of the investors for the purpose of resale and profit; formation of a mortgage company; a loan to be made to Debtor; the acquisition of a bar in Elmhurst, Illinois, known as Riley’s Gathering Place; the acquisition of a limousine service; the acquisition of a home in Apple Canyon in Galena, Illinois; the acquisition of vacant properties located near O’Hare Airport in Chicago, Illinois; the acquisition of a car detail company; the acquisition of a bar in Oak Brook, Illinois known as Riley’s; and the acquisition of a bar in Lombard, Illinois known as Riley’s. *Id.* at ¶ 6. According to Plaintiffs, Debtor obtained the funds through false pretenses or representations he either knew to be false, or made with such reckless disregard for the truth to constitute willful misrepresentations. *Id.* at ¶ 7. Further, Plaintiffs contend that Debtor

intended to deceive them and that they justifiably relied on his misrepresentations to their detriment. *Id.* at ¶s 8 and 9.

Additionally, Plaintiffs allege that from 1990 through August 2000, Debtor made small payments to them that purportedly pertained to the investments that Plaintiffs had with Debtor. *Id.* at ¶ 10. Plaintiffs contend that Debtor breached his duty of loyalty to Plaintiffs by misappropriating and/or mismanaging assets that Plaintiffs and Kazue invested with him. *Id.* at ¶ 11. Specifically, Plaintiffs allege that Debtor transferred some of the investments and failed to disclose such transfers; he fraudulently concealed that those investments were transferred; and he failed to account to Plaintiffs for those investments. *Id.* at ¶s 18-20. Plaintiffs maintain that they reposed in Debtor confidence to honestly invest their finances and that Debtor owed them a duty of undivided loyalty, and as such, a fiduciary relationship existed between Debtor, Plaintiffs and Kazue. *Id.* at ¶s 12 and 13. Further, they state that Debtor's failure to provide an accounting, repay Plaintiffs their investments and reveal his breach of fiduciary duties resulted in a fraud at law. *Id.* at ¶s 14-17. Moreover, Plaintiffs allege that Debtor's actions constitute fraud or defalcation while acting in a fiduciary capacity, and such actions were willful and malicious injury to Plaintiffs. *Id.* at ¶s 22 and 23.

Plaintiffs further allege in their complaint that on May 28, 2003, they filed an action against Debtor for an accounting, money damages and other relief in the state court. *Id.* at ¶ 24. According to Plaintiffs, on August 15, 2003, default judgment was entered on that complaint in favor of Misty in the sum of \$127,982.48, which included prejudgment interest at the rate of five percent per annum, and in favor of Helen in the amount of \$390,175.94, which also included prejudgment interest at the same rate. *Id.* Plaintiffs conclude their complaint with an allegation

that Debtor's actions entitle them to a determination that the debts owed them by Debtor are non-dischargeable under 11 U.S.C. §§ 523(a)(2), (a)(4) and (a)(6). *Id.* at ¶ 26.

On June 8, 2004, Plaintiffs filed the instant motion for summary judgment. The motion seeks a find that the debt is non-dischargeable only under § 523(a)(4).

III. APPLICABLE STANDARDS

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:

The 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 Estate of Allen v. City of Rockford*, 349 F.3d 1015, 1019 (7th Cir. 2003).

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/Chi. Div.*, 832 F.2d 374, 378 (7th Cir. 1987) (quoting *Wainwright Bank & Trust Co. v. Railroadmen's Fed. Savs. & 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. Int'l Bhd. of Teamsters, Local 710*, 153 F.3d 774, 777 (7th Cir. 1998)

(citation omitted). On a motion for summary judgment, “the court has one task and one task only: to decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial.” *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003) (internal quotation omitted).

In 1986, the United States Supreme Court decided a trilogy of cases which encourages the use of summary judgment as a means to dispose of factually unsupported claims. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (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; *Celotex*, 477 U.S. at 322; *Matsushita*, 475 U.S. at 585-86.

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) (citation omitted). 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) (citation omitted). “[S]ummary 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) (citation omitted). The Seventh Circuit has noted that trial courts must remain sensitive to fact issues where they are actually demonstrated to warrant denial of summary judgment. *Opp v. Wheaton Van Lines, Inc.*, 231 F.3d 1060, 1065-66 (7th Cir. 2000); *Szymanski v. Rite-Way Lawn Maint. Co., Inc.*, 231 F.3d 360, 364 (7th Cir. 2000).

The party seeking summary judgment always bears the initial responsibility of informing

the court of the basis for its motion, identifying those portions of the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,” which it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once the motion is supported by a prima facie showing that the moving party is entitled to judgment as a matter of law, a party opposing the motion may not rest upon the mere allegations or denials in its pleadings; rather, its response must show that there is a genuine issue for trial. *Anderson*, 477 U.S. at 248; *Celotex*, 477 U.S. at 323; *Matsushita*, 475 U.S. at 587; *Patrick v. Jasper County*, 901 F.2d 561, 565 (7th Cir. 1990) (citations omitted). The manner in which this showing can be made depends upon which party will bear the burden of persuasion at trial. If the burden of persuasion at trial would be on the non-moving party, the party moving for summary judgment may satisfy Rule 56’s burden of production either by submitting affirmative evidence that negates an essential element of the non-moving party’s claim or by demonstrating that the non-moving party’s evidence is insufficient to establish an essential element of the non-moving party’s claim. *See Union Nat’l Bank of Marseilles v. Leigh (In re Leigh)*, 165 B.R. 203, 213 (Bankr. N.D. Ill. 1993) (citation omitted).

While not styled as such, the instant motion seeks partial summary judgment because the relief sought by Plaintiffs is only under § 523(a)(4) and not under the alternate § 523(a)(2) and § 523(a)(6) theories set forth in the complaint. 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. Partial summary judgment is available to dispose of only one or more counts of the complaint or claims in their entirety. *Commonwealth Ins. Co. of N.Y. 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); *Ambre v. Joe Madden Ford*, 881 F. Supp. 1187, 1193 (N.D. Ill. 1995); *Quintana v. Byrd*, 669 F. Supp. 849, 850 (N.D. Ill. 1987); *Arado v. Gen. Fire Extinguisher Corp.*, 626 F. Supp. 506, 509 (N.D. Ill. 1985); *Capitol Records, Inc. v. Progress Record Distrib. Inc.*, 106 F.R.D. 25, 28 (N.D. Ill. 1985); *Strandell v. Jackson County, Ill.*, 648 F. Supp. 126, 136 (S.D. Ill. 1986); *In re Network 90 Degrees, Inc.*, 98 B.R. 821, 831 (Bankr. N.D. Ill. 1989). 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.

IV. DISCUSSION

Plaintiffs seek partial summary judgment as their motion relates only to the § 523(a)(4) relief sought in their complaint. Unfortunately, the relief sought in the instant motion is prohibited because it would not dispose of the entire complaint or an entire count of the complaint. Accordingly, the Court must deny the motion on this procedural basis. At first blush, Plaintiffs' request for partial summary judgment appears to be a reasonable way to proceed, as well as an avenue sanctioned by Rule 56. Indeed, Rule 56(b) permits "[a] party against whom a claim . . . is asserted" to move for summary judgment "as to all or *any part thereof*." Fed. R. Civ. P. 56(b) (emphasis supplied). In this matter, Plaintiffs seek summary judgment under the § 523(a)(4) theory espoused in their single-count complaint. Moreover, Rule 56(d) arguably contains additional support for Plaintiffs' motion, holding out the possibility that a judgment might be rendered upon something other than "the whole case or for all the relief asked. . . ." Fed. R. Civ. P. 56(d).

The Seventh Circuit Court of Appeals, however, has made it clear that summary judgment is not available on “part” of a single claim. *See Commonwealth Ins. Co. of N.Y.*, 266 F.2d at 201; *Biggins*, 154 F.2d at 216-17. The Court is bound by those decisions. Additionally, federal practice in the Northern District of Illinois does not permit a motion for partial summary judgment on fewer than all issues in a claim. *See, e.g., Ambre*, 881 F. Supp. at 1193; *Quintana*, 699 F. Supp. at 850; *Capitol Records*, 106 F.R.D. at 28. These decisions reason that Rule 56 contemplates entry of a judgment, and Rule 54(a) defines a judgment as an order that can be appealed. *See Fed. R. Civ. P. 54(a)*. An order disposing of fewer than all claims in a case is appealable, *see Fed. R. Civ. P. 54(b)*; an order disposing of fewer than all issues in a claim is not appealable. *See generally Capitol Records*, 106 F.R.D. at 28-29. While the Court does not disagree with the assertion that resolution of the issue of the dischargeability of the debt under § 523(a)(4) will greatly clarify what factual issues need to be addressed at trial, the Court is duty bound to follow the rulings of the Seventh Circuit. Consequently, the Court must deny Plaintiffs’ motion for summary judgment on this procedural point. Moreover, Debtor has denied certain material facts alleged in the motion, including any breach of fiduciary duties, that he committed any misappropriation or mismanagement, the amount of Plaintiffs’ claims against him and other matters of material fact.

V. CONCLUSION

For the foregoing reasons, the Court denies Plaintiffs' motion for summary judgment.

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

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

IN RE:)	Bankruptcy No. 03 B 40263
)	Chapter 7
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Debtor.)	
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)	Adv. No. 03 A 04838
MISTY DILLON and HELEN CUMMINS,)	
)	
Plaintiffs,)	
)	
v.)	
)	
MICHAEL J. RILEY)	
)	
Defendant.)	

ORDER

For the reasons set forth in a Memorandum Opinion dated the 2nd day of August, 2004, the Court denies the motion of Misty Dillon and Helen Cummins for summary judgment.

ENTERED:

DATE: _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List