United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy No. 01 B 12075

Adversary Caption: Harris Bank Oakbrook Terrace v. William D. Corrigan, Jr.

Adversary No.01 A 00755

Date of Issuance: October 1, 2002

Judge: John H. Squires

Appearance of Counsel:

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: WILLIAM D. CORRIGAN, JR., Debtor.	)	Chapter 7 Bankruptcy No. 01 B 12705 Judge John H. Squires
HARRIS BANK OAKBROOK TERRACE, Plaintiff, v. WILLIAM D. CORRIGAN, JR., Defendant.	)	Adversary No. 01 A 00755

MEMORANDUM OPINION

This matter comes before the Court on the amended motion of William D. Corrigan, Jr. (the "Debtor") for summary judgment pursuant to Federal Rule of Civil Procedure 56 and Federal Rule of Bankruptcy Procedure 7056 on the complaint filed by Harris Bank Oakbrook Terrace (the "Creditor") against the Debtor to determine the dischargeability of a debt under 11 U.S.C. § 523(a)(2)(A) and (a)(2)(B). For the reasons set forth herein, the Court denies the amended 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 July 23, 2001, the Creditor filed this adversary proceeding against the Debtor. In its complaint, the Creditor alleges that a debt owed to it by the Debtor was procured by fraud, and thus is non-dischargeable under 11 U.S.C. § 523(a)(2)(A) and (a)(2)(B). On January 18, 2002, the Court entered a default judgment in favor of the Creditor and against the Debtor. Subsequently, on the Debtor's motion, the Court vacated the default judgment on the condition that the Debtor file an answer to the complaint. On February 15, 2002, the Debtor filed his answer. On March 1, 2002, the Court entered its Preliminary Pretrial Order setting this matter for pretrial conference on June 28, 2002. On June 26, 2002, two days before the pretrial conference, the Debtor filed his first motion for summary judgment, which was scheduled to be presented before the Court on July 12, 2002. At the pretrial conference, the Court entered its Final Pretrial Order setting this matter for trial beginning on October 7, 2002; struck the July 12, 2002 hearing date on the motion for summary judgment; and set a briefing schedule regarding the motion for summary judgment.

On July 18, 2002, the Court issued a Memorandum Opinion and Order denying the Debtor's motion for summary judgment for failure to comply with Local Bankruptcy Rule 402.M. See Harris Bank Oakbrook Terrace v. Corrigan (In re Corrigan), Ch. 7 Case No. 01 B 12705, Adv. No. 01 A 00755, 2002 WL 1608241 (Bankr. N.D. Ill. July 18, 2002). Thereafter, on August 6, 2002, the Debtor filed the instant amended motion for summary judgment. On August 16, 2002, the Court set a briefing schedule on the motion and reset the trial for November 18 and 19, 2002. The Creditor failed to timely file a response to the motion. The Creditor's motion for an extension of time was belatedly and untimely filed

after its response to the motion for summary judgment was due. Hence, it was denied because this Opinion was substantially drafted and the matter was under advisement.

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:

> [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 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); 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). 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, 231 F.3d 1060 (7th Cir. 2000); Szymanski v. Rite-way, 231 F.3d 360 (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 affidavits, if any," which it believes demonstrates 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, 564-566 (7th Cir. 1990). 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 by either 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, 212-13 (Bankr. N.D. Ill. 1993) (citation omitted).

Local Bankruptcy Rule 402.M of the Local Bankruptcy Rules for the United States Bankruptcy Court for the Northern District of Illinois, which deals with summary judgment motions, was modeled after LR56.1 of the Local Rules of the United States District Court for the Northern District of Illinois. Hence, the case law construing LR56.1 and its predecessor Local Rule 12(M) applies to Local Bankruptcy Rule 402.M.

Pursuant to Local Bankruptcy Rule 402, a motion for summary judgment imposes special procedural burdens on the parties. Specifically, Rule 402.M requires the moving party to supplement its motion and supporting memorandum with a statement of undisputed material facts ("402.M statement"). 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 did not comply with the requirements of Rule 402.M. It contained numbered paragraphs setting out some of the allegations contained in the complaint with reference to certain paragraphs of the complaint. This 402.M statement did not set forth the undisputed facts. Rather, it merely recited allegations contained in the Creditor's complaint. For example, the allegations contain statements that the Debtor misrepresented to the Creditor that an entity, Gilcor Enterprises, Inc. ("Gilcor") in which the Debtor was the president and sole shareholder, owned assets that it did not own; that the value of such assets owned was greater than the actual value thereof; that the Debtor failed to reveal to the Creditor that an employee embezzled over $200,000.00 from Gilcor; that financial statements submitted by the Debtor to the Creditor included assets not owned by either the Debtor or Gilcor; those financial statements overstated the value of assets owned; and that motor vehicles listed as owned by Gilcor were leased and not owned by either the Debtor or Gilcor. Such allegations, which are deemed facts under Rule 402.M, tend to support the Creditor's underlying claim that the debt should be found non-dischargeable. Such facts under Rule 402.M do not undercut the Creditor's case, but rather, support it on some of the required elements it must prove under § 523(a)(2)(A) and/or § 523(a)(2)(B). This is wholly insufficient for purposes of Rule 402.M and effectively serves to defeat the motion at bar because under Rule 402.M, all such allegations are deemed to be material undisputed 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 to be admitted unless controverted by the statement of the opposing party." Local Bankr. R. 402.N(3)(b). As noted above, none of the facts deemed admitted under Rule 402.M serves to negate any one or more of the required elements under § 523(a)(2). In fact, the Rule 402.M statement facts supports the Creditor's theories of recovery.

The Creditor has not filed a Rule 402.N statement. 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).

Local Bankruptcy Rules 402.M and 402.N are patterned after and substantially similar to Local District Court Rules 56.1(a) and 56.1(b). The precedents decided about the latter are instructive and applicable to the former. Compliance with Local Rules 402.M and 402.N is not a mere technicality. Courts rely greatly upon the information presented in these statements in separating the facts about which there is a genuine dispute from those about

which there is none. American Ins. Co. v. Meyer Steel Drum, Inc., 1990 WL 92882 at *7 (N.D. Ill. June 27, 1990). The statements required by Rule 402 are not merely superfluous abstracts of evidence. Rather, they "are intended to alert the court to precisely what factual questions are in dispute and point the court to specific evidence in the record that supports a party's position on each of these questions. They are, in short, roadmaps, and without them the court should not have to proceed further, regardless of how readily it might be able to distill the relevant information on its own." Waldridge v. American Hoechst Corp., 24 F.3d 918, 921 (7th Cir. 1994).

Because the Creditor failed to comply with Rule 402.N, all material facts set forth in the Debtor's 402.M statement should be deemed admitted. Unfortunately, however, the Debtor's 402.M statement failed to set forth any material facts that aid the Debtor. Rather, the Debtor set forth the allegations contained in the Creditor's complaint and made reference to the particular paragraphs of the complaint. Under the Rule, this serves only to aid the Creditor, not the Debtor. The 402.M statement is wholly insufficient as an effective defensive motion for summary judgment. The purpose of the 402.M statement is to separate the facts about which there is a genuine dispute from those about which there is none. It does not alert the Court to what factual questions are in dispute nor does it point the Court to specific evidence in the record that supports the Debtor's position.

The Debtor filed three affidavits along with the instant motion. First, Milton C. Donald states in his affidavit that from May 1999 through November 2000, he was employed by Gilcor. See Affidavit of Milton C. Donald at ¶ 2. Further, he states that on October 25, 2000, when he entered the offices of Gilcor, he saw a DuPage County sheriff there with an

eviction order, as well as movers and the landlord. Id. at ¶ 3. Additionally, he states that all furniture, computers and files were removed from the offices by the movers, who treated the property with careless disregard. Id. at ¶ 4. Finally, Mr. Donald avers that most of the property never made it to the loading dock, and what property did arrive at the loading dock, was gone by morning before Gilcor employees could get a truck to pick it up. Id.

Second, Thomas E. Toepper states in his affidavit that he was employed by Gilcor from June 1999 through November 2000 as a bookkeeper/accountant. See Affidavit of Thomas E. Toepper at ¶ 2. He states that when Gilcor applied for a loan from the Creditor, he accompanied the Debtor and met with Ms. Lori Beshears, a loan officer for the Creditor. Id. at ¶ 3. In addition, he states that he brought with him all current financial data of Gilcor, as well as copies of the police reports and other information pertaining to the theft from Gilcor by a previous employee. Id. Mr. Toepper states that when Gilcor applied for the loan from the Creditor, he anticipated a theft totaling more than $100,000.00. Id. at ¶ 4. Further, he states that he never attempted to mislead the loan officer or the Creditor about the assets or accounts receivable of Gilcor. Id. at ¶ 5. He contends that at that time, the representations made to Ms. Beshears were a true and accurate accounting of Gilcor. Id. Finally, he states that as the accountant for Gilcor, he helped prepare a business plan with financial statements, and actively sought venture funding and financial partners from July 1, 2000 through October, 2000. Id. at ¶ 6.

A third affidavit was submitted by the Debtor. He states that from July 1, 1982 through April 10, 2001, he was the president and sole shareholder of Gilcor. See Affidavit of William D. Corrigan, Jr. at ¶ 2. Moreover, the Debtor states that on December 24, 1999,

Gilcor secured a $200,000.00 line of credit from the Creditor, following the alleged embezzlement of approximately $250,000.00 from Gilcor by a former employee. Id. at ¶ 4. He also maintains that the Creditor's loan officer, Ms. Lori Beshears, was made fully aware of Gilcor's security concerns following the embezzlement. Id. at ¶ 5. The Debtor further states that loan closing took place on December 24, 1999 because the Creditor wanted the 1999 financial statements of Gilcor to reflect the adjustments for the alleged theft. Id. at ¶ 7. In addition, he states that an accounting firm prepared the financial statements for Gilcor using generally accepted accounting principles and depreciation schedules. Id. at ¶ 8. Further, the Debtor contends that the financial statements for Gilcor showed computer equipment valued at $101,125.60 and consisted of: a Gateway computer network, server, and eight workstations valued at $65,000.00; another Gateway computer used for software development valued at $14,000.00; and an IBM RISC 6000 network system consisting of a server and four workstations, valued at $22,500.00. Id. at ¶ 9. Finally, the Debtor states that with respect to the value of motor vehicles shown at $7,994.02, this was an old accounting entry that was made by a previous accountant for a vehicle that was owned by Gilcor and was not reversed by the subsequent accountant after it was traded in for a leased vehicle. Id. at ¶ 10.

Collectively, these affidavits raise the factual issues of whether the Creditor was made aware of a prior theft from Gilcor by a previous employee, and whether certain Gilcor property was stolen during an eviction proceeding. However, these affidavits coupled with the 402.M statement do not effectively negate any essential elements of the Creditor's

claims. Thus, the Court denies the Debtor's motion for summary judgment. The Debtor has had two bites at the summary judgment apple–no more will be allowed. This matter will proceed to trial beginning on November 18, 2002.

IV. CONCLUSION

For the foregoing reasons, the Court denies the Debtor's amended motion for summary judgment. The Court's Final Pretrial Order remains in full force and effect. This matter is scheduled for trial beginning on November 18, 2002.

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:	)	
WILLIAM D. CORRIGAN, JR.,	)	Chapter 7
	)	Bankruptcy No. 01 B 12705
Debtor.	)	Judge John H. Squires
	)	
	)	
HARRIS BANK OAKBROOK TERRACE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 01 A 00755
	)	
WILLIAM D. CORRIGAN, JR.,	)	
	)	
Defendant.	)	

O R D E R

For the reasons set forth in a Memorandum Opinion the 1st day of October, 2002, the Court denies the amended motion for summary judgment filed by William D. Corrigan, Jr.

This matter will proceed to trial on November 18, 2002.

ENTERED:

DATE:_____ _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List