

**FILED**

Lucinda B. Rauback, Clerk  
United States Bankruptcy Court  
Augusta, Georgia  
By jpayton at 10:02 am, Oct 25, 2013

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA  
Augusta Division

IN RE:	)	Chapter 7 Case
	)	Number <u>12-11122</u>
STACY C. DAVIS,	)	
	)	
Debtor	)	
_____	)	

ORDER

Before the Court is a Motion for Partial Summary Judgment filed by the United States Trustee ("Trustee") seeking a determination of the threshold issue of whether the debts of Stacy C. Davis ("Debtor") are primarily consumer debts and therefore subject to his §707(b) Motion to Dismiss. Debtor argues the debts are primarily business debts and therefore not subject to §707(b). The Trustee also filed a Motion to Strike the Affidavit of Debtor contending it is a "sham affidavit." This is a core proceeding pursuant to 28 U.S.C. §157(b)(2) and the Court has jurisdiction under 28 U.S.C. §1334. For the following reasons, the Trustee's Motion for Summary Judgment and his Motion to Strike the Affidavit are denied.

UNDISPUTED FACTS

Debtor is a pediatrician. Dep. of Debtor, Dckt. No. 74, Ex. 1, 4:13. Prior to construction of Debtor's current home, Debtor

and her former husband Reginald Davis ("Mr. Davis") and their minor child were living with Debtor's sister. Id. at 6-7:25-4. Debtor stated that living with her sister was cramped and so when Debtor became pregnant with her second child, the couple looked to buy a home, but ultimately decided to build a home. Id. at 7:16-23. Mr. Davis served as the general contractor even though he had no prior experience. Id. at 6:4-7. In 2005, Debtor first obtained a construction loan from First Bank. Id. at 9:3-8. The loan was subsequently transferred to SunTrust Mortgage, Inc. ("SunTrust"). The construction loan with SunTrust was in the amount of \$650,000. Id. The SunTrust security deed has an occupancy clause which states:

6. Occupancy. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

Dckt. No. 83, Ex. 1. Debtor and Mr. Davis built the home on Heggies Ridge Drive in Appling, Georgia. Cost overruns caused the construction loan to be exhausted prior to completion of the home. To fund the completion of the home, Debtor contends her ex-husband

diverted funds from her medical practice without her knowledge. As a result of Mr. Davis's actions, Debtor incurred large tax obligations. Dckt. No. 74, Ex. 2, Response to Interrogatories, p. 1.

Debtor filed a chapter 13 bankruptcy petition on June 26, 2012 and checked the box indicating that her debts were primarily consumer debts. Dckt. No. 1, at 1. Debtor also completed a means test. Dckt. No. 1 at 40-46. Debtor's debts exceeded the statutory debt limits for a chapter 13, as a result confirmation was denied and Debtor was given 14 days to convert or the case would be dismissed. Dckt. No. 26. Debtor converted her case to a chapter 7 case and filed an amended petition and chapter 7 means test now declaring for the first time that her debts are not primarily consumer debts. Dckt. Nos. 27, 34 and 40. With the exception of declaring the presumption of abuse does not arise and that the debts are non-consumer debts, Debtor did not fully complete the amended means test form.<sup>1</sup> Dckt. No. 40. At the request of the Trustee, Debtor filed an amended chapter 7 means test. Dckt. No. 49. This amended means test does not declare the debts are non-consumer debts. Dckt. No. 49. In her reply brief, Debtor asserts that even

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<sup>1</sup> As discussed in the Conclusions of Law section, if the debts are not primarily consumer debts, Debtor is not required to complete the means test.

though she completed a chapter 7 means test form at the request of the Trustee, she did not abandon her position regarding the nature of her debts and the purpose of the construction loan. Dckt. No. 79, at 2.

The Trustee filed a motion to dismiss pursuant to 11 U.S.C. §707(b), and is seeking a partial summary judgment on whether Debtor's debts are primarily consumer debts. The parties agree that the determination turns on whether Debtor's debt to SunTrust is a consumer debt.

At her deposition, when questioned about the purpose of building the home, Debtor stated, "[W]e were looking at hopefully building a house lower than the amount that we could get the loan for, and utilize that money to -- as business purposes." Dep. of Debtor, Dckt. No. 74, Ex. 1, 6:8-10. When questioned about the business purpose, Debtor explained, "[W]e're looking at that perhaps the house could be flipped for business purposes, and then be able to utilize those funds to pay back monies that were -- that were due for other, I guess -- let me make sure I'm answering the question that you asked." Id. at 9:18-22. Debtor further explained, "[W]e needed a place to stay. But then we felt like maybe if we built a house that did not cost the amount to construct the home, then we would have equity in it, and then be able to have a different place

to live. So it was kind of a business -- it was a business venture to be able to try to get equity, maybe have a home that we can either sell or flip, and then be able to get to have a place that we could stay." Id. at 11:1-7.

When questioned on whether Debtor always intended to move into the home once it was built, Debtor stated that they did not intend to move in until they realized that the debt was going to exceed the value of the home because construction costs had increased. Id. at 11:8-18. It was at that point that they decided to reside in the home, when they realized they would not be able to sell it for a profit. Id. at 11:8-18. The Trustee asked, "And that was the home you intended to live in?" Id. at 12:6. Debtor replied, "or flip, or to be able to, you know, get equity in the home, and perhaps live in a different place." Id. at 12:7-8. The Trustee then stated, "would it be fair to say, and I don't want to put words in your mouth, correct me if I am wrong -- would it be fair to say that you constructed the home to live in and build equity in, and perhaps sell for a profit later?" Id. at 12:9-12. Debtor replied, "yes." Id. at 12:13-15.

In Debtor's response to Request for Admissions, Debtor states, "[T]he house and lot located at [] Heggies Court go back to the years 2005 and 2006 in the heyday of the real estate boom and

the concept of flipping. The purpose of constructing the house, which was supposed to be worth about \$650,000, was that it would be built for less than \$500,000 and there would be either \$120,000 to be used as a second mortgage to pay off Internal Revenue Service debt or it would be flipped and the Debtor would make a profit. . . . Obviously, the crux of the case as to whether this is consumer or business is a mortgage of \$620,000. Debtor states that the purpose of this construction was not for building a residential property that she could live in, but for flipping to generate additional income." Dckt. No. 74, Ex. 3, p. 1-2.

#### CONCLUSIONS OF LAW

Summary judgment is appropriate when "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);<sup>2</sup> see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

[A] party seeking summary judgment always bears the initial responsibility of informing the . . . court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and

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<sup>2</sup> Pursuant to Federal Rule of Bankruptcy Procedure 7056, Rule 56 of the Federal Rules of Civil Procedure is applicable in bankruptcy adversary proceedings.

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 (internal quotations omitted). Once the moving party has properly supported its motion with such evidence, the party opposing the motion "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); First Nat'l Bank of Arizona v. Cities Servs. Co., 391 U.S. 253, 288-89 (1968); Fed. R. Civ. P. 56(e). "In determining whether the movant has met its burden, the reviewing court must examine the evidence in a light most favorable to the opponent of the motion. All reasonable doubts and inferences should be resolved in favor of the opponent." Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1502 (11th Cir. 1985) (citations omitted).

The issue in this case is whether the debt owed to SunTrust is a consumer debt. If it is then, Debtor's debts in this case are "primarily consumer debts" and subject to a §707 motion to dismiss. The Trustee argues it is a consumer debt because Debtor incurred the loan with the intent of living in the home hoping to build equity and sell it some day for a profit which is the desire of most homeowners. Conversely, Debtor argues that at the time the

loan was incurred Debtor and Mr. Davis intended to build the home as an investment. She contends they intended to construct the home at a cost well below its value and then to "flip" or sell the house for a profit. Debtor further contends that when this did not occur and when Debtor recognized they could not sell the house for a profit, they decided to live in the home.

Pursuant to 11 U.S.C. §707(b)(1), "after notice and a hearing, the court, on its own motion or on a motion by the United States Trustee, trustee . . . or any party in interest may dismiss a case filed by an individual debtor under this chapter whose debts are *primarily consumer debts*." 11 U.S.C. §707(b)(1). A "consumer debt" is a "debt incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. §101(8). If the debts are not "primarily consumer debts" then a debtor is not required to complete the means test. In re Woodard, 2009 WL 1651234 \*2 (Bankr. M.D.N.C. June 10, 2009). "With respect to debt secured by real property, if the debtor's purpose in incurring the debt is to purchase a home or make improvements to it, the debt is clearly for family or household purposes and fits squarely within the definition of a consumer debt under §101(8)." In re Cox, 315 B.R. 850, 855 (B.A.P. 8th Cir. 2004) citing Zolq v. Kelly (In re Kelly), 841 F.2d 908, 913 (9th Cir. 1988). The proper inquiry is to examine the

debtor's purpose at the time the debt is incurred to determine whether the debt is a consumer debt. Id. The Trustee as the movant bears the burden of proof to establish that Debtor's debts are primarily consumer debts. In re Ades, 2009 WL 6498520 \*4 (Bankr. N.D. Ga. July 2, 2009) ("Movant had the burden of proving that more than half of Debtors's debts are consumer debts."); see also In re Johnson, 318 B.R. 907, 914 (Bankr. N.D. Ga. 2005) (finding the trustee had established the first prerequisite that the debtor's debt was primarily "consumer debt").

The Trustee contends Debtor's deposition unambiguously shows Debtor's intent when she purchased the loan. At the deposition the Trustee asked, "would it be fair to say, and I don't want to put words in your mouth, correct me if I am wrong-would it be fair to say that you constructed the home to live in and build equity in, and perhaps sell for a profit later?" Dep. of Debtor, Dckt. No. 74, Ex. 1, 12:9-12. Debtor replied, "yes", that was her intention. Id. at 12:13-15. However, upon review of the entire deposition and Debtor's discovery responses, the testimony is not unambiguous. Several times during the course of her deposition as well as in her discovery responses, Debtor states she intended to "flip" the house and did not intend to move into the home until they realized the costs to construct the home exceeded the value. Dep.

of Debtor, Dckt. No. 74, Ex. 1, 6:8-10, pp. 11-12; Dckt. No. 74, Ex. 2; Dckt. No. 74, Ex. 3, p. 1-2.

"As a general rule, a party's state of mind (such as knowledge or intent) is a question of fact for the factfinder, to be determined after trial." Chanel, Inc. v. Italian Activewear of Florida, Inc., 931 F.2d 1472, 1476 (11th Cir. 1991) citing Morissette v. United States, 342 U.S. 246, 274 (1952). Courts must be "exceptionally cautious" in granting summary judgment when the movant bears the burden of proof on the non-movants state of mind. In re Varrasso, 37 F.3d 760, 764 (1st Cir. 1994). The evidence submitted by the Trustee in his motion for partial summary judgment is not so one-sided that reasonable minds could not differ. See In re Okan's Foods, Inc., 217 B.R. 739, 755 (Bankr. E.D. Pa. 1998) (granting summary judgment where intent could be inferred where the evidence was so one-sided that reasonable minds could not differ as to the only rational outcome). At this point in the proceedings, due to the conflicting evidence, the Court finds a question of fact remains.

#### Motion to Strike

The Trustee also has moved to strike Debtor's affidavit submitted in response to his motion for partial summary judgment. The Trustee contends the post-deposition affidavit is a "sham

affidavit" and only executed to attempt to create a dispute of material facts.

Under the sham affidavit rule, '[a]n affidavit may be stricken as a sham 'when a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact ... [and that party attempts] thereafter [to] create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.' Tippens v. Celotex Corp., 805 F.2d 949, 954 (11th Cir. 1986) (citations omitted). The court making this determination must be careful to distinguish 'between discrepancies which create transparent shams and discrepancies which create an issue of credibility or go to the weight of the evidence.' Id. at 953.

Rodriguez v. Jones Boat Yard, Inc., 435 F. App'x 885, 887 (11th Cir. July 26, 2011). As stated this rule applies when "when a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact." Id. As previously discussed, Debtor's deposition testimony is not so unambiguous as to negate a genuine issue of material fact. Debtor's deposition and answers to discovery requests leave a genuine issue of material fact even without considering the affidavit. For these reasons, I find the use of the "sham affidavit rule" is not appropriate under the facts of this case and deny the Trustee's Motion to Strike.

For the foregoing reasons, the Trustee's Motion for Partial Summary Judgment is ORDERED denied. It is FURTHER ORDERED that the Trustee's Motion to Strike is ORDERED denied.



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SUSAN D. BARRETT  
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia  
this 25<sup>th</sup> day of October, 2013.