

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

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| IN THE MATTER OF |) | |
| |) | |
| TIMOTHY LEE O'BRIEN, |) | CASE NO. 05-34600 HCD |
| |) | CHAPTER 7 |
| |) | |
| DEBTOR. |) | |
| |) | |
| |) | |
| SANDRA FURLONG and |) | |
| NATHAN FURLONG, |) | |
| PLAINTIFFS, |) | |
| vs. |) | PROC. NO. 06-3018 |
| |) | |
| TIMOTHY LEE O'BRIEN, |) | |
| |) | |
| DEFENDANT. |) | |

Appearances:

Cassandra Hine, Esq., attorney for the plaintiffs, 52 West Lake Street, Knox, Indiana 46534; and

Duane W. Hartman, Esq., and Patrick Lyp, Esq., attorneys for the defendant, Blachly, Tabor, Bozik & Hartman, 56 South Washington Street, Suite 401, Valparaiso, Indiana 46383.

MEMORANDUM OF DECISION

At South Bend, Indiana, on March 14, 2007.

Before the court is the Plaintiffs' Motion for Summary Judgment, filed by the plaintiffs Sandra Furlong and Nathan Furlong on September 12, 2006. The motion seeks summary judgment on the plaintiffs' "Complaint under [§] 523(c) of the Bankruptcy Code to Determine the Dischargeability of a Debt," based on the plaintiffs' assertion that the defendant failed to respond to the plaintiffs' Requests for Admission. Timothy Lee O'Brien, chapter 7 debtor and the defendant in this adversary proceeding, filed a Response to the summary judgment motion in which he insisted that he had answered the Requests for Admission. After reviewing the record herein and the arguments of counsel, the court denies the Plaintiffs' Motion for Summary Judgment.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(I) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

Timothy Lee O'Brien filed his chapter 7 bankruptcy petition on August 17, 2005. The plaintiffs Sandra and Nathan Furlong, mother and son, timely filed a Complaint¹ against the defendant under 11 U.S.C. § 523(a)(6), alleging that he "did willfully and maliciously injure Sandra's and Nathan's property and deprive them of all use thereof."² R. 1, ¶ 2. According to the Complaint, the plaintiffs lived with the defendant in a home in Knox, Indiana, for 2 years and 8 months. The plaintiffs alleged in the Complaint that, after they moved out of the home in October 2003, the defendant did not allow Sandra Furlong to retrieve her personal property, which she valued at \$12,418. They also claimed, without reference to a subsection of § 523, that "[t]he debt owed to Sandra and Nathan should also be excepted [from discharge] as relating to their interest in personal property and in real property held by Debtor/Defendant under a mortgage that he has reaffirmed under the instant proceedings." *Id.* ¶ 3. The defendant's Answer to the Complaint denied the allegations. *See* R. 6, ¶ 3.

¹ The court granted the plaintiffs' request for enlargement of time in which to file their complaint. *See* R. 31.

² The Complaint stated that the facts upon which it relied were set out in Exhibit A, the state court Verified Complaint the plaintiffs filed in the Starke Circuit Court in Knox, Indiana, on July 12, 2005. However, the plaintiffs failed to attach Exhibit A to the Complaint in this adversary proceeding.

On September 12, 2006, the plaintiffs filed a Motion for Summary Judgment, insisting that no material issue of genuine fact existed and that they were entitled to judgment as a matter of law.³ They argued in their supporting brief that the defendant violated Indiana Code 35-43-4-1 by “knowingly and intentionally exert[ing] unauthorized control over her personal property valued at \$12,418.00,” and claiming entitlement to treble damages. They also contended that the defendant breached a contract made in October 1996 with Sandra Furlong to purchase real estate in Knox, Indiana, thereby depriving the plaintiffs of their interest in that property and damaging them in the amount of \$48,181.00. Because the defendant failed to respond “in any way” to the plaintiffs’ Requests for Admission, they argued, he has admitted all the facts therein. R. 23 at 3. They asserted that the defendant’s admission that he willfully and maliciously injured plaintiffs and their property or interests must lead the court to conclude that the plaintiffs are entitled to judgment as a matter of law.

Two days later, the defendant filed his response. He insisted that the material facts were highly disputed. He stated that the parties were living together and that the plaintiffs moved out, taking what they wanted and abandoning the rest. He also insisted that there never was an agreement regarding the real estate and that the plaintiffs did not pay any part of the down payment. Two affidavits were filed with the response: The affidavit of Timothy Lee O’Brien, the defendant, and of Duane W. Hartman, his attorney. The attorney affirmed that, on August 29, 2006, he mailed to plaintiffs’ counsel the debtor’s responses to the Request for Admissions and Answers to Interrogatories. Attached to the affidavit was a copy of the letter he sent to the plaintiffs’ attorney and the debtor’s responses enclosed with the letter. The defendant, in his affidavit, declared that he alone purchased the real estate in question and paid the down payment. He also stated that, when Sandra Furlong left, she took her own property, along with some of his, and then abandoned the worthless property. In addition, he said, the plaintiffs “stole approximately \$700 from my checking account and stuck me with an orthodontics bill for her children’s braces.” R. 25, Affidavit of Timothy Lee O’Brien.

³ The plaintiffs successfully attached to their brief in support of summary judgment the Verified Complaint they filed against the defendant in the Starke Circuit Court.

DISCUSSION

The plaintiffs can prevail on their summary judgment motion only if they meet the criteria for summary judgment. Under Rule 56(c) of the Federal Rules of Civil Procedure, made applicable in this court by Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is proper “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 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). In order to avoid trial, the moving party bears the burden of showing that no genuine issue of material fact is in dispute. See *Anderson*, 477 U.S. at 256; *Celotex*, 477 U.S. at 322. “To avoid summary judgment . . . the nonmoving party [is] required to set forth ‘specific facts showing that there is a genuine issue for trial,’ Fed. R. Civ. P. 56(e), and, further [has] to produce more than a scintilla of evidence in support of his position.” *Silk v. City of Chicago*, 194 F.3d 788, 798 (7th Cir. 1999). In order to demonstrate that real factual disputes exist, the nonmovant must produce evidence of the disputes rather than relying solely on the allegations or denials in its pleadings. See *Barber v. United States (In re Barber)*, 236 B.R. 655, 659 (Bankr. N.D. Ind. 1998); N.D. Ind. L.B.R. B-7056-1. Summary judgment must be granted “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322.

The plaintiffs herein, as the moving party, based their claim that there was no genuine issue of material fact on their assertion that the defendant failed to respond to their Requests for Admission and thereby admitted all the facts therein. However, the defendant, as the nonmoving party, responded that the plaintiffs’ alleged facts were clearly controverted and that there were genuine issues for trial. The defendant presented evidence, verified by counsel with a notarized signature, demonstrating that he had responded to the discovery documents on August 29, 2006, two weeks before the plaintiffs’ summary judgment motion was filed.

It is well established that a court may grant summary judgment based on a party's failure to respond to requests for admission. *See United States v. Kasuboski*, 834 F.2d 1345, 1350 (7th Cir. 1987). Federal Rule of Civil Procedure 36(a), made applicable in adversary proceedings by Federal Rule of Bankruptcy Procedure 7036, states that if a party fails to respond to a request for an admission within 30 days, the matter is deemed admitted. *See Fed. R. Civ. P. 36(a); Kasuboski*, 834 F.2d at 1350; *Hasbrook v. Citibank (In re Hasbrook)*, 289 B.R. 375, 378 (Bankr. N.D. Ind. 2002). In this case, however, the court has no reason to doubt the truth of the unchallenged affidavit by the defendant's counsel affirming that the defendant did in fact respond to the plaintiffs' discovery documents. Plaintiffs' attorney has not denied receipt of the documents or questioned their veracity. *See Hilton v. Hongisto (In re Hongisto)*, 293 B.R. 45, 49-50 (N.D. Cal. 2003) (finding that mere denial of receipt was insufficient to rebut presumption of receipt). The court therefore finds that the defendant, by counsel, submitted his responses to the Request for Admissions and Answers to Interrogatories to plaintiffs' counsel on August 29, 2006.

Nevertheless, there is an issue concerning the timeliness of the responses to the Request for Admissions and Answers to Interrogatories. The court originally entered a scheduling order on February 17, 2006, directing that discovery be completed by April 18, 2006. The court later approved the parties' stipulated scheduling agreement, which set completion of discovery on July 1, 2006 and the filing of a joint proposed pre-trial order on August 1, 2006. *See* R. 13, Order of March 9, 2006. On August 1, 2006, the parties timely submitted their pre-trial order. It stated that discovery was complete "except that Defendant has not yet supplied Responses to Plaintiffs' Interrogatories and Requests for Production [*sic*]." R. 16, ¶ 5. The defendant submitted those responses, according to defendant's counsel, on August 29, 2006, 28 days after the filing of the pre-trial order.

Pre-trial discovery typically is conducted by the parties, in accordance with the scheduling order of the court. The plaintiffs in this case did not file their discovery requests with the court or notify the court of the date on which they served them on the defendant. Nor did they file a motion to compel discovery. On the other hand, the defendant did not ask the court to toll the 30-day response period, and the parties did not file any formal

agreement concerning a later response date. It is clear to the court that, at the time the parties submitted their joint pre-trial order, the plaintiffs did not object to the defendant's tardy responses to their interrogatories and requests for admission. It appears that the parties themselves agreed to extend the response period. In light of the plaintiffs' tacit acceptance that the responses would be tardy, the court finds that the plaintiffs were neither misled nor prejudiced by the belated submission. After considering the relevance of the defendant's responses, the lack of objection to them by the plaintiffs, and the fundamental fairness of considering the circumstances on the merits, the court in its discretion excuses the tardiness of the belated discovery responses by the defendant. *See Walters Constr., Inc. v. Cook (In re Cook)*, 347 B.R. 527, 531 (Bankr. N.D.W.Va. 2006) ("The 30-day deadline for responding to requests for admission is not rigid and a court, in its discretion, may enlarge the allowed response time.") (citing cases). The court therefore treats the defendant's response to the plaintiffs' Request for Admissions and Answers to Interrogatories as timely served. *See id.* In light of that determination, the court finds that the plaintiffs' summary judgment motion cannot succeed when based upon its argument that the defendant failed to file his responses to their Request for Admission and Answers to Interrogatories.

The plaintiffs still may be entitled to summary judgment on the issue of dischargeability of debt, nevertheless, if they have shown that there is no genuine issue of material fact concerning the defendant's conduct pursuant to 11 U.S.C. § 523(a)(6). Section 523(a)(6) of the Bankruptcy Code excepts from discharge any debt "for willful and malicious injury by the debtor to another entity or the property of another entity." *See, e.g., Kawaauhau v. Geiger*, 523 U.S. 57, 118 S. Ct. 974, 140 L.Ed.2d 90 (1998); *see also Berkson v. Gulevsky (In re Gulevsky)*, 362 F.3d 961 (7th Cir. 2004); *In re Thirtyacre*, 36 F.3d 697, 700 (7th Cir. 1994). Exceptions to discharge are construed narrowly. *In re Gulevsky*, 362 F.3d at 963. A plaintiff therefore must demonstrate that its claim comes squarely within an exception enumerated in § 523. *See UmbrellaBank, FSB v. Michel (In re Michel)*, 304 B.R. 33, 37 (Bankr. D.N.H. 2004).

The plaintiffs have alleged willful and malicious injury by the defendant to them and their property. The defendant has denied those allegations and has given his own account of the circumstances concerning the plaintiffs and their property after the plaintiffs moved out of the house. The court finds that the defendant set

forth specific facts showing that there are genuine issues for trial. Because material facts are in dispute, therefore, the plaintiffs are not entitled to summary judgment as a matter of law under Federal Rule of Civil Procedure 56 and Federal Rule of Bankruptcy Procedure 7056.

Conclusion

For the reasons presented above, the court denies the Plaintiffs' Motion for Summary Judgment filed by Sandra Furlong and Nathan Furlong. Trial on the Complaint will be scheduled by separate order.

SO ORDERED.

/s/ Harry C. Dees, Jr.
HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT