

UNITED STATES BANKRUPTCY COURT
 NORTHERN DISTRICT OF INDIANA
 HAMMOND DIVISION AT HAMMOND

IN RE: CASE NO. 05-62769)	
STEPHANIE APONTE)	
)	
Debtor)	
*****)	
STATE FARM MUTUAL)	
AUTOMOBILE COMPANY AS)	
SUBROGEE OF FLOYD R. WALLACE,)	
FRANK VALDEZ, AND MICHAEL)	
ECHTERLING)	
Plaintiffs)	
v.)	ADVERSARY PROCEEDING
STEPHANIE APONTE)	NO. 05-6095
)	
Defendant)	

MEMORANDUM OPINION AND ORDER
ON AMENDED MOTION FOR SUMMARY
JUDGMENT BY PLAINTIFF

I

STATEMENT OF PROCEEDINGS

This Adversary Proceeding came before the Court on an Amended Motion for Summary Judgment filed by the Plaintiff, State Farm Mutual Auto Insurance Company, (hereinafter: "State Farm") on December 1, 2006.

A Response or Answer to said Motion for Summary Judgment was filed by the Defendant and Chapter 13 Debtor Stephanie Aponte ("Debtor") on December 29, 2006.

A Reply to the Debtor's Response was filed by State Farm on January 10, 2007.

The Complaint of State Farm filed on June 16, 2006 alleges, in part, as follows:

3. That Defendant was the proximate cause of an automobile collision which resulted in personal injuries and property damage to Floyd R. Wallace, Frank Valdez and property damage to Michael Echterling.

4. That Plaintiff became subrogated to the extent of the right of recovery of Floyd R. Wallace, Frank Valdez and Michael Echterling against the Defendant pursuant to valid contracts of automobile insurance policies.

5. Defendant was operating a motor vehicle while intoxicated when this collision occurred rendering her debt to the Plaintiff non-dischargeable under 11 USC 523. [a][9].

6. Plaintiff became subrogated to the extent of the right of recovery of Floyd R. Wallace (\$9,872.70), Frank Valdez (\$5,225.95), and, Michael Echterling (\$1,769.62 balance due) against the Defendant arising out of said collision in the sum of \$16,867.92.

The Complaint does not state whether the Debtor was “intoxicated” based on the use of alcohol, a controlled substance, a drug other than a controlled substance, or a combination thereof, so that there was an impaired condition of thought or actions and the loss of normal control of her faculties. See. I. C. 9-13-2-86 defining “intoxication”, as discussed Infra.

The Debtor filed an Answer on September 27, 2005 which was in substance a general denial.

No affirmative defense was plead by the Debtor.

II
Conclusions of Law and Discussion
A
Jurisdiction

No objections were made by the parties to the subject- matter jurisdiction of this Court, and the Court concludes that it has subject matter jurisdiction over this Proceeding pursuant to 28 U.S.C. §1334(b). The Court further concludes that this Proceeding is a Core Proceeding pursuant to 28 U.S.C. §157(b)(2)(I).

B
General Principles Relating to Summary Judgment

Under Rule 56(c) Fed. R. Civ. P., as made applicable by Fed. R. Bk. P. 7056, 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 judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S. Ct. 2505, 2509-10, 91 L. Ed. 2d 202 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86, 106 S. Ct. 1348, 1355, 89 L. Ed. 2d 538 (1986). The inquiry that the court must make is whether the evidence presents a sufficient disagreement to require trial or whether one party must prevail as a matter of law. Anderson, 477 U.S. at 251-252, 106 S. Ct. at 2511-12.

In deciding a Motion for Summary Judgment, the Court should not "weight the evidence." Anderson, 477 U.S. at 249, 106 S. Ct. at 2510-11; Illinois Bell Telephone Co. v. Haines and Co., Inc., 905 F.2d 1081, 1087 (7th Cir. 1990). However, "if evidence opposing a summary judgment is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249-50, 106 S. Ct. at 2511; Trautvetter v. Quick, 916 F.2d 1140, 1147 (7th Cir. 1990).

The moving party bears the burden of showing that there is an absence of evidence to support the nonmovant's case. Celotex Corp. v. Catrett, 106 S. Ct. at 2554, supra. Stated differently, the moving party, in making a motion for summary judgment, "has the burden of establishing the lack of genuine issue of material fact." Big O Tire Dealers, Inc., v. Big O Warehouse, 741 F.2d 160, 163 (7th Cir. 1984); Korf v. Ball State University, 726 F.2d 122, 1226 (7th Cir. 1984).

When ruling on a motion for summary judgment, inferences to be drawn from underlying facts contained in such materials as attached exhibits, and depositions must be viewed in a light most favorable to the party opposing the motion. United States v. Diebold, Inc., 369 U.S. 654, 655, 8 L. Ed.2d 176, 82 S. Ct. 993, 994 (1962); See also, Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 106 S. Ct. at 1356, supra, (all inferences to be drawn from the underlying facts must be viewed in a light most favorable to the nonmoving party); Yorger v. Pittsburgh Corning Corp., 733 F.2d 1215, 1218 (7th Cir. 1984); Marine Bank Nat. Ass'n. v. Meat Counter, Inc., 826 F.2d 1577, 1579 (7th Cir. 1987).

C.

Discussion

State Farm filed its initial Motion for Summary Judgment on March 9, 2006, and by Order and Judgment dated October 24, 2006, the court granted State Farm's Motion. The Debtor on October 30, 2006 filed a Motion for Relief from said Order and Judgment on the grounds that State Farm did not serve on the Debtor a complete copy of the Probable Cause Affidavit of the arresting Officer filed by State Farm as a part of the materials in support of its Motion, although the same has been filed with the Court and considered by the Court in granting State Farm's Motion.

State Farm stipulated that it did not serve the Debtor with a complete copy of said Affidavit, and that the Order and Judgment dated October 24, 2006 should be set aside. (See Docket Entry Order October 14, 2006 (No. 42)). The Court then Ordered that any Amended Motion for Summary Judgment be filed by State Farm on or before December 15, 2006, and State Farm filed its Amended Motion on December 11, 2006 which is presently before the Court.

The Amended Motion by State Farm, together with its supporting Memorandum and Materials, is identical to the initial Motion filed by State Farm, and again includes the Probable Cause Affidavit of the arresting Officer. The Court in its original Order and Judgment granting State Farm's initial Motion found that based on the Probable Cause Affidavit of the arresting Office filed by State Farm it was entitled to a summary judgment in that the Debtor had not filed any materials containing competent evidence whereby the Court could find that a genuine issue of material fact existed requiring a trial on the merits.

However, in her Response to State Farm's Amended Motion, the Debtor filed the following Affidavit:

1. I am the debtor in this case.

2. On December 29, 2001 I was involved in an automobile accident in Hammond, Indiana at approximately 9:40 .A.M.
3. I was not intoxicated at the time of this accident.
4. I was not under the influence of any drug or alcohol at this time.
5. While I did have in my possession prescription drugs, but (sic) I was not under the influence of these drugs at the time of the accident. I had a valid prescription for these drugs.
6. While my behavior at the accident may have been unusual, I submit that any change in my behavior was the result of having been involved in a serious accident. I was finished with work at the Horseshoe Casino in Hammond, Indiana at 7:30 A.M. I was tired and injured from the accident, but I was not intoxicated.
7. I was never convicted of any offense as the result of this accident. The charges against me were dismissed without any court appearance.
8. I swear or affirm under the penalties of perjury that the foregoing representations are true and accurate to the best of my knowledge and belief.

The Court would note that the allegations in the Adversary Proceeding Complaint by State Farm sound in the nature of a tort claim and that tort actions are generally not disposed of by summary judgment, because they typically involve a myriad of factual issues. Aldeman-Tremblay v. Jewll Co., Inc., 859 F.2d 517, 518 (7th Cir. 1988) (citing, Gracyalmy v. Westinghouse Electric Corp., 723 F.2d 1311, 1316 (7th Cir. 1983), and Iva C. Wright, A. Miller, and M. Kane, Federal Practice and Procedure, §2727 (1983)).

To the extent that State Farm's Complaint alleges wrongful motive, intent, or state of mind it obviously raises highly disputed and factually material issues based on the credibility of witnesses, genuine and material issues as to state of mind, and other subjective matters peculiarly within the knowledge of the opposing parties which the Court may have to weigh in a context where conflicting versions of the facts are often presented. Due to the difficulty of proving a subjective state of mind, cases involving motivation and intent are usually not appropriate for summary judgment. Lac Du Flambeau Bank of Lake Superior Chippewa Indians v. Stop-Treaty Abuse - Wisconsin, Inc., 991 F.2d

1249, 1258 (7th Cir. 1993); Kincaid v. Vail, 969 F.2d 594, 602 (7th Cir. 1992), cert. denied sub nom. Sceifers v. Vail, - -U.S. - -, 113 S. Ct. 1002, 122 L. Ed. 2d 152 (1993); Adler v. Madigan, 939 F.2d 476, 479 (7th Cir. 1991); Rakovich v. Wade, 850 F.2d 1180, 1205 n. 17 (7th Cir. 1988); Egger v. Phillips, 669 F.2d 497, 502 (7th Cir. 1982), Reh'g granted on other grounds, 710 F.2d 292 (7th Cir), cert. denied, 464 U.S. 918, 104 S. Ct. 284, 78 L. Ed. 2d 262 (1983). Askew v. Bloemaker, 548 F.2d 673, 679 (7th Cir. 1976). See e.g., Matter of Seiler, 29 B.R. 33, 35 (Bankr. N. D. Ind. 1983); In re Proof of Pudding, Inc., 10 B.R. 459, 460 (Bankr. S.D.N.Y. 1981) (citing, Freidman v. Meyers, 482 F.2d 435, 439 (2nd Cir. 1973)). Summary judgment is not appropriate where a trial, with its opportunity for cross-examination and testing credibility of the witnesses might disclose a picture substantially different from that given by affidavits. United States v. Perry, 431 F.2d 1020, 1022, 19 A.L.R. Fed. 537 (7th cir. 1970).

"On summary judgment a court may not make credibility determinations, weigh the facts, or decide which inferences to draw from the facts; these are jobs for a factfinder." Payne v. Pauley, 337 F.3d 767, 770 (7th Cir. 2003) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)). However implausible the Debtor's account might seem, it is not the Court's place to decide who is telling the truth. "Where the parties present two vastly different stories-as they do here-it is almost certain that there are genuine issues of material fact in dispute." Payne, 337 F.3d at 770; see also Qwian v. Kautz, 168 F.3d 949, 953 (7th Cir. 1999) ("[S]ummary judgment is only appropriate when there is no room for a difference of opinion concerning the facts or the reasonable inferences to be drawn from them."). Viewing the facts in the light most favorable to the Debtor, the Debtor by her Affidavit in Opposition to State Farm's Motion has alleged sufficient facts for a jury to find that she was not intoxicated while operating a motor vehicle which caused personal injuries.

Summary judgment is not appropriate when the facts are disputed as they are here by virtue of the Debtor's Affidavit in Opposition to State Farm's Motion as set out above. While the Affidavit is

somewhat self-serving and somewhat conclusory in nature, it does have factual support and it is not so defective that it must be disregarded as matter of law in deciding State Farm's Motion. The Debtor's Affidavit is based on her first-hand personal knowledge which would be admissible as evidence, and thus may be considered by the Court. Pfeil v. Rogers, 757 f.2d 850,860 (7th Cir. 1985). Cert. den. 106 S. Ct. 1515; Visser v. Packer Engineering. Associates, Inc., 924 F.2d 655, 659 (7th Cir. 1991) (en banc). "[I]f the question of probable cause arises in a damages suit, it is a proper issue for the jury if there is room for a difference of opinion concerning the facts or the reasonable inferences to be drawn from them." Maxwell, 998 F.2d at 434; see also, Moore v. Market-Place Rest., Inc., 754 F.2d 1336, 1347 (7th Cir. 1985); Lester v. City of Chicago, 830 F.2d 706, 715 (7th Cir. 1987). Since the Court is not in a position to "resolve swearing contests between litigants," the Court must deny State Farm's Motion for Summary Judgment. Payne, 337 F.3d at 770. It is therefore,

ORDERED, ADJUDGED, AND DECREED, That the Amended Motion for Summary Judgment State Farm should be and is hereby **DENIED**. And it is further,

ORDERED, that this Adversary Proceeding is hereby set down for a Status Conference on the

9 day of May, 2007 at 1:30 o'clock P.M.

April 18, 2007



JUDGE, U. S. BANKRUPTCY COURT

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