

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
ODYSSEY GROUP, LLC,	)	CASE NO. 09-30111 HCD
	)	CHAPTER 7
	)	
DEBTOR.	)	
	)	
	)	
REBECCA HOYT FISCHER, TRUSTEE,	)	
	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 09-3038
	)	
COAST SPA MANUFACTURING, INC.,	)	
	)	
DEFENDANT.	)	

Appearances:

Rebecca Hoyt Fischer, Esq., counsel for plaintiff, Laderer & Fischer, P.C., 112 West Jefferson Boulevard, Suite 310, South Bend, Indiana 46601; and

Don Elkington, President of defendant, Coast Spa Manufacturing, Inc., 6315 - 202nd Street, Langley, British Columbia V2Y 1N1.

MEMORANDUM OF DECISION

At South Bend, Indiana, on February 24, 2010.

Before the court is the Motion for Summary Judgment filed by plaintiff Rebecca Hoyt Fischer, Trustee of the chapter 7 debtor Odyssey Group, LLC, against the defendant Coast Spa Manufacturing, Inc. The defendant did not file a response to the Motion. For the reasons that follow, the court grants the Trustee's Motion for Summary Judgment.<sup>1</sup>

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<sup>1</sup> The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334, 28 U.S.C. § 157(a) and (b), and Northern District of Indiana Local Rule 200.1. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(E).

### Background

The Trustee commenced this adversary proceeding by filing a Complaint for Turnover of Property of the Estate. In it, she alleged that the defendant owed \$19,355.24 to the bankruptcy estate for goods the debtor sold to the defendant. The Trustee demanded turnover of that property as property of the estate pursuant to 11 U.S.C. § 542. A copy of the debtor's account statement, verifying that sum, was attached to the Complaint.

Don Elkington filed an Answer to the Complaint on behalf of Coast Spa Manufacturing Inc. without identifying his relationship to the defendant. *See* R. 14. He challenged this court's jurisdiction and claimed a right of setoff. By its Order of August 25, 2009, the court directed the defendant to obtain counsel to represent the corporation in the case, citing the Northern District of Indiana Local Bankruptcy Rule B-9010-1. *See* R. 15. In his response to the court's Order, Mr. Elkington identified himself as President and CEO of the defendant. *See* R. 17. He explained that the defendant could not afford counsel and requested that the court "accept the fact that we have been severely harmed by Odyssey Group's bankruptcy." *Id.*

The Trustee responded to the substance of Mr. Elkington's Answer and subsequent correspondence. *See* R. 23. She argued that the court had jurisdiction over the defendant, that service on the defendant had been effected properly, and that a turnover proceeding was a core proceeding under the Bankruptcy Code. The Trustee also filed a Motion for Summary Judgment and Affidavit in Proof of Damages, setting forth the debt in the sum of \$19,355.24. *See* R. 27. The defendant's response to the Motion, due by December 18, 2009, was never filed. The court took the Motion for Summary Judgment under advisement on January 12, 2010.

### Discussion

Before the court considers the Trustee's summary judgment motion, it must focus on the "well-established rule that a corporation must be represented by counsel in bankruptcy proceedings." *In re New Concept Housing, Inc.*, 951 F.2d 932, 939-40 (8th Cir. 1991); *see also Advantage Healthplan, Inc., v. Potter*,

391 B.R. 521, 538-39 (D.D.C. 2008); *In re Tivoli Gardens, Inc.*, 1999 WL 984392 at \*1 (N.D. Ill. 1999). Indeed, “[i]t has been for the better part of two centuries . . . that a corporation may appear in the federal courts only through licensed counsel.” *Rowland v. California Men’s Colony*, 506 U.S. 194, 201-02, 113 S. Ct. 716, 121 L.Ed.2d 656 (1993).

In the bankruptcy context, Federal Rule of Bankruptcy Procedure 9010 provides that an individual may appear in Bankruptcy Court on his or her own behalf, but the comments to Rule 9010 make clear that this rule is not designed to change the general rule precluding corporations from appearing pro se.

*Terry v. Sparrow*, 328 B.R. 442, 446 (M.D.N.C. 2005); see also *In re Lucas*, 317 B.R. 195, 206 (D. Mass. 2004); *In re Hussey*, 391 B.R. 911, 915 (Bankr. S.D. Fla. 2008). In the Northern District of Indiana, this court’s Local Bankruptcy Rule B-9010-1 confirms the general rule:

In all matters and proceedings before this court, only natural persons may appear and represent themselves. All other entities shall be represented by an attorney. . . .

N.D. Ind. L.B.R. B-9010-1(g). In its Order of August 25, 2009, the court set forth this requirement and directed the defendant to obtain counsel to represent the corporation on or before September 14, 2009. Instead of obeying the court, the defendant’s President gave reasons for choosing not to comply with the directive.

This court is bound by the long established general rule and its local rule requiring a corporation to appear only through counsel. In the Northern District of Indiana, as in the Southern District of Florida, “[t]here is simply no question that a corporation cannot be represented by someone who is not an authorized attorney, even if that person is the president and sole shareholder of the corporation.” *In re Hussey*, 391 B.R. at 915. In this case, no attorney has entered an appearance on behalf of the defendant and no document has been submitted by counsel for the defendant. The filings made by the defendant’s president, without the appearance of a licensed attorney, must be disregarded and set aside by the court. See, e.g., *Advantage Health Plan, Inc. v. Potter*, 391 B.R. 521, 538-39 (D.D.C. 2008) (upholding bankruptcy court’s striking of pro se corporation’s objection); *In re Drevlow*, 221 B.R. 767, (8th Cir. B.A.P. 1998) (declaring null and void

under state law the actions taken by non-attorneys on behalf of corporation); *Terry*, 328 B.R. at 447 (dismissing appeals brought by non-attorney officer of corporation); *In re Lincoln*, 2009 WL 562612 at \*2 (Bankr. D. Mass. 2009) (rejecting request to exempt debtor, a trust, from requirements of local bankruptcy rule MLBR 9010-1(c)).

The court now considers whether the Trustee’s Motion for Summary Judgment should be granted or denied. The court renders summary judgment 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); Fed. R. Bankr. P. 7056; *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Tegtmeier v. Midwest Operating Eng’rs Pension Trust Fund*, 390 F.3d 1040, 1045 (7th Cir. 2004). The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. *See Celotex*, 477 U.S. at 323. If the moving party satisfies its initial burden, then the nonmoving party must “go beyond the pleadings and by [its] own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). The court neither weighs the evidence nor assesses the credibility of witnesses. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). 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.

In this case, the defendant did not respond to the Trustee’s summary judgment motion. Without any objection to the Motion for Summary Judgment before the court, under this court’s local rules the court deems to be admitted all the material facts set forth by the Trustee and properly supported by evidence. *See* N.D. Ind. L.B.R. B-7056-1 (“In determining the motion for summary judgment, the court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without

controversy . . . ). *see also Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 922 (7th Cir. 1994). Therefore, the Trustee's facts concerning the debt owed by the defendant to the bankruptcy estate are admitted.

Nevertheless, this court will not grant a motion for summary judgment merely because of the lack of response. The court is required to determine that, "given the undisputed facts, summary judgment is proper as a matter of law." *See* Fed. R. Civ. P. 56(e)(2) ("If the opposing party does not so respond, summary judgment should, *if appropriate*, be entered against that party.") (emphasis added); *see also LaSalle Bank Lake View v. Seguban*, 54 F.3d 387, 391-92 (7th Cir. 1995) (citing cases).

The Trustee has sought turnover of a debt owed to the debtor under § 542 of the Bankruptcy Code, which requires "an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order" to pay that debt to the trustee. 11 U.S.C. § 542(b). It is generally the obligation of any party holding property of the debtor's estate to deliver it (or its value) to the trustee. When an entity fails to do so, the trustee is obliged to enforce the duty through an adversary proceeding. *See* Fed. R. Bankr. P. 7001(1); *see also Mason v. Crosby (In re Mason)*, 386 B.R. 715, 721 (Bankr. N.D. Ill. 2008) (setting forth trustee's burden of proof in a turnover proceeding). The trustee first must demonstrate that the property at issue is "property of the estate" under § 541 – that is, that it was property in which the debtor had a legal or equitable interest at the commencement of its bankruptcy – and that it was held by the defendant. This Trustee did so by attaching the debtor's account statement listing the invoice numbers and amounts owed by the defendant for prepetition debts, in the total amount of \$19,355.24. The court finds that the Trustee has proven that the debt was property of the estate owed to the debtor at the commencement of the debtor's bankruptcy case and that it was held by the defendant, not delivered to the trustee.

The burden then shifted to the defendant; either it must comply with § 542 by delivering the property to the trustee or it must demonstrate why the turnover was not required. The defendant, by its nonresponse, has not shown that the debtor was not entitled to that payment. The court determines,

therefore, that the Trustee, as the moving party, has succeeded in her burden of proof and that the defendant, as the nonmoving party, has failed to make a showing of a genuine issue for trial. *See* Fed. R. Civ. P. 55(e); N.D. Ind. L.B.R. B-7056-1; *Adler v. Glickman*, 87 F.3d 956, 959 (7th Cir. 1996); *In re Barker*, 236 B.R. 655, 663 (Bankr. N.D. Ind. 1998). It concludes that the plaintiff is entitled to judgment in the amount of \$19,355.24 and court costs of \$250.00 as a matter of law.

#### Conclusion

For the reasons presented above, the court grants the Motion for Summary Judgment filed by the plaintiff Rebecca Hoyt Fischer, Trustee of the chapter 7 debtor Odyssey Group LLC, against the defendant Coast Spa Manufacturing, Inc. Judgment in favor of the Trustee and against the defendant is awarded in the amount of \$19,355.24 and court costs of \$250.00.

SO ORDERED.

          /s/ HARRY C. DEES, JR.  
Harry C. Dees, Jr., Judge  
United States Bankruptcy Court