

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
GARY MILLER,)	CASE NO. 08-34558 HCD
)	CHAPTER 7
DEBTOR.)	
)	
)	
RAYMOND DEVER,)	
PLAINTIFF,)	
vs.)	PROC. NO. 09-3029
)	
GARY MILLER,)	
DEFENDANT.)	

Appearances:

Patrick L. Proctor, Esq., attorney for plaintiff, Eilbacher Fletcher, LLP, 803 South Calhoun Street, Suite 400, Fort Wayne, Indiana 46802; and

Joseph C. Lehman, Esq., attorney for defendant, 204 West Clinton Street, Goshen, Indiana 46526.

MEMORANDUM OF DECISION

At South Bend, Indiana, on August 26, 2010.

Before the court is the Motion for Summary Judgment filed by the plaintiff Raymond Dever against the defendant Gary Miller, chapter 7 debtor. The underlying Complaint to Determine Dischargeability requested a determination by the court that the defendant's debt to the plaintiff was nondischargeable pursuant to 11 U.S.C. § 523(a)(19). The defendant answered the Complaint but filed no response to the Motion for Summary Judgment. Despite the defendant's lack of response, for the reasons that follow the court denies the plaintiff's summary judgment motion.¹

BACKGROUND

¹ The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

The debtor filed a voluntary chapter 7 petition on December 30, 2008. On Schedule F, he listed the plaintiff as a creditor holding an unsecured nonpriority claim in an unknown amount. The Trustee determined that there was no non-exempt property available for distribution from the estate, and the court entered the Order discharging the debtor on July 2, 2009. The case was closed on August 20, 2009.

The plaintiff timely commenced this adversary case by filing a Complaint on March 30, 2009. In it, he referred the bankruptcy court to the state court complaint that was pending in the Circuit Court of Noble County, Indiana, when the defendant filed his bankruptcy petition. He claimed that the defendant, by his conduct, violated provisions of the Indiana Securities Act, Ind. Code § 23-2-1-1 *et seq.*, and owed the plaintiff a nondischargeable debt of \$52,000 plus interest, fees and costs, under 11 U.S.C. § 523(a)(19).

The plaintiff's Motion for Summary Judgment and supporting Brief focused on the nondischargeability of the defendant's debt to the plaintiff under § 523(a)(19). After the deadline had passed without a response being filed, the court took the uncontested Motion under advisement.

DISCUSSION

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 a real factual dispute exists, the nonmovant must produce evidence of the dispute 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.

In this case, the nonmovant defendant produced no evidence of a dispute; indeed, he did not file any response to the summary judgment motion. When there is no response by the nonmovant, “summary judgment should, if appropriate, be entered against that party.” Fed. R. Civ. P. 56(e)(2). Nevertheless, summary judgment is appropriate only when both prongs of the Rule 56(c) test are met: The moving party also must be entitled to a judgment as a matter of law. *See Johnson v. Gudmondsson*, 35 F.3d 1104, 1112 (7th Cir 1994) (“even where many or all of the material facts are undisputed, the court still must ascertain that judgment is proper ‘as a matter of governing law’”). Therefore, the court considers whether the defendant’s failure to file a response to a summary judgment motion is a sufficient reason for entering summary judgment against him as a matter of law.

The plaintiff’s summary judgment claim is based upon § 523(a)(19), which excepts from a debtor’s discharge those debts that arose from securities law violations. A debt is not dischargeable under this subsection if the debt –

(A) is for –

(I) the violation of any of the federal securities laws . . . , any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or

(ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and

(B) results, before, on, or after the date on which the petition was filed, from –

(I) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;

(ii) any settlement agreement entered into by the debtor; or

(iii) any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.

11 U.S.C. § 523(a)(19). Under this provision, therefore, a plaintiff first must present evidence that the debt at issue arose as a result of a violation of securities laws (federal or state) or of common law fraud associated with the sale or purchase of a security. He also must demonstrate that the debt resulted from a settlement agreement or decision – judgment, order, etc. – in a judicial or administrative proceeding. Both requirements must be met. *See Faris v. Jafari (In re Jafari)*, 401 B.R. 494, 496 (Bankr. D. Colo. 2009); *see also Peterman v. Whitcomb (In re Whitcomb)*, 303 B.R. 806, 810 (Bankr. N.D. Ill. 2004) (finding both conditions of § 523(a)(19) met, granting judgment).

The plaintiff alleged, with evidence, that the debt at issue arose as a result of the defendant’s violation of Indiana securities laws. However, he also admitted that no decision was rendered on his state court complaint before the defendant filed his bankruptcy petition. He acknowledged, therefore, that the debt did not “result” from the type of determination required under the second condition of § 523(a)(19). Nevertheless, the plaintiff asserted, “that is of no moment. . . . The issues before this Court presently are simply whether Gary Miller has a liability to Raymond Dever based upon the State of Indiana’s securities laws [and, if] so, [whether] such is non-dischargeable.” R. 16 at 4. He argued that the statute “expressly renders a securities law liability non-dischargeable whether the judgment is rendered before, on, or after the petition in bankruptcy is filed.” *Id.*

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) amended § 523(a)(19) by adding to § 523(a)(19)(B) the phrase “before, on, or after the date on which the petition was filed.” By including that language in the statute, “[t]he 2005 amendments eliminated any requirement that a prepetition judgment exist before the section 523(a)(19) exception to discharge may be applied.” 4 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 523.27 at 523-130 (16th ed. 2010). The bankruptcy treatise summarized the approaches taken by courts when no prepetition decision had issued:

In those circumstances, some courts proceed to try the section 523(a)(19) claim . . . on the merits. Other courts have interpreted the requirement in subparagraph (B) of section 523(a)(19), that there be a judgment or settlement agreement, to reflect Congress’s intent that the liability determination under the common law or federal or state securities laws be made in a nonbankruptcy forum. Under this view, the bankruptcy court should decline to determine nondischargeability under section 523(a)(19) and abstain from deciding the issue or grant relief from the automatic stay and place the adversary proceeding in suspense while the parties litigate the merits of the creditor’s claim in the nonbankruptcy forum.

4 *Collier*, ¶ 523.27 at 523-131, 523-132 (footnote citations omitted).

Courts have recognized the confusion created by BAPCPA’s inserted phrase.² When a pre-bankruptcy judgment does not exist – that is, when a debtor files bankruptcy before the securities fraud litigation in another forum has been filed or concluded – subparagraph (B) suggests that a debt based upon securities law violations still may be found nondischargeable in a bankruptcy court. However, subparagraph (B) also mandates that the debt *result* from a judicial or administrative decision or settlement agreement. A thoughtful analysis of this language has been presented by the Colorado bankruptcy court:

When the words “before, on, or after the date on which the petition was filed” were inserted by BAPCPA to eliminate the temporal requirement, it invited debate as to whether § 523(a)(19) now allows a bankruptcy court to render its own determination of liability for securities law violations or fraud or whether the liability determination must still be made outside of the bankruptcy court.

In re Jafari, 401 B.R. at 496. Agreeing in part with *In re Chan*, 355 B.R. 494 (Bankr. E.D. Pa. 2006), the *Jafari* court determined that bankruptcy and non-bankruptcy courts share concurrent jurisdiction to determine the dischargeability of a § 523(a)(19) claim. Nevertheless,

whichever court makes the *dischargeability* determination, and regardless of when the *liability* determination is made, the court must find that both requirements of the statute have been satisfied. Thus, the issue is not which court decides dischargeability, nor when the liability decision occurs[;] it is a question of how the Subsection B requirement can be satisfied.

Id. at 497. The *Jafari* court, after comparing the language of § 523(a)(19) with other § 523 provisions and reviewing the legislative history, concluded that the securities fraud debt must be established in an order or agreement outside the bankruptcy case.

² See, e.g., *Cutcliff v. Reuter (In re Reuter)*, 427 B.R. 727, 759-61 (Bankr. W.D. Mo. 2010) (discussing the debate created as a result of the BAPCPA amendment, noting the different results in cases, finding it unnecessary to resolve the issues in light of the unique circumstances of the case before it).

[A]bsent a settlement agreement or other consensual determination of liability, Subsection B evidences a conscious choice to have *the liability determination* occur outside of the bankruptcy forum, whether it occurs pre- or post-bankruptcy. Once liability has been imposed, then either a bankruptcy court or a non-bankruptcy court may determine the application of this nondischargeability statute.

Id. at 499-500.

This court finds persuasive the thoughtful reasoning set forth in *Jafari*. In this case, as in *Jafari*, there was no written determination of liability from another tribunal and no settlement agreement between the parties. The plaintiff's state court complaint alleged that the defendant, by his conduct, violated provisions of the Indiana Securities Act, Ind. Code § 23-2-1-1 *et seq.*, and in particular Ind. Code. § 23-2-1-19; however, the lawsuit was stayed by the defendant's bankruptcy filing. The plaintiff's Complaint to Determine Dischargeability in this adversary proceeding re-alleged that the defendant's debt to the plaintiff arose from the defendant's violations of the Indiana Securities Act; it then additionally charged that the debt was nondischargeable under § 523(a)(19). The court finds that the claims of the defendant's violations of the Indiana Securities Act are governed solely by state law. State court therefore is the proper forum to determine the liability issues of the plaintiff's claim under state law.

The plaintiff has requested a summary judgment that the defendant's debt be declared nondischargeable under § 523(a)(19). However, to be successful he must prove that the debt *resulted* from a state or federal judgment or administrative order or settlement agreement under subparagraph (B). This debt has not resulted from a settlement or a decision of a state or federal court or administrative body. Nor will this bankruptcy court's decision create the proper resultant debt. *See In re Thiele*, 2010 WL 1026972 at *8 (Bankr. E.D. Tenn. March 17, 2010) ("Section 523(a)(19) requires that the debt 'result' from a judicial or administrative order or settlement agreement. An order by this court on nondischargeability is a determination that a debt already in existence is excepted from discharge; the debt does not 'result' from the dischargeability determination."). The plaintiff did not ask this court to determine the securities fraud liability; in fact, he set the amount of the debt at \$52,000. He then asked this court to determine whether the

debt that the defendant now owes to the plaintiff (a debt listed in the defendant's bankruptcy schedules) is nondischargeable. The court determines that, because the plaintiff has not shown both requirements of § 523(a)(19), he is not entitled to a judgment as a matter of law.

The court therefore denies the plaintiff's Motion for Summary Judgment.

In light of this ruling, the court now directs the parties to participate in a status conference to determine the future course of this proceeding.³

CONCLUSION

For the reasons set forth in this Memorandum of Decision, the court denies the Motion for Summary Judgment filed by the plaintiff Raymond Dever against the defendant Gary Miller pursuant to 11 U.S.C. § 523(a)(19). A status conference on the matter will be set by separate order.

SO ORDERED.

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

³ See, e.g., 4 *Collier on Bankruptcy* ¶ 523.27; *In re Jafari*, 401 B.R. at 500; *Holland v. Zimmerman (In re Zimmerman)*, 341 B.R. 77, 80-81 (Bankr. N.D. Ga. 2006), discussing the determinations of other courts that have declined to determine nondischargeability issues under § 523(a)(19) when a non-bankruptcy forum has not rendered a liability decision on the plaintiff's claim of securities fraud violations.