

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:

Martin T. Fletcher, Sr., Esq., attorney for plaintiff, 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 October 14, 2011.

Before the court is the second Motion for Summary Judgment filed in this adversary proceeding by the plaintiff Raymond Dever against the defendant Gary Miller, chapter 7 debtor. The underlying Complaint requested that the court determine that the defendant's debt to the plaintiff was nondischargeable pursuant to 11 U.S.C. § 523(a)(19). However, the court found that the plaintiff failed to prove one requirement of § 523(a)(19). It therefore denied the first Motion for Summary Judgment. Now, with both requirements fulfilled, the court took the plaintiff's second summary judgment motion under advisement.¹

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).

BACKGROUND

The plaintiff's Complaint in this adversary alleged that a state court complaint had been pending in the Circuit Court of Noble County, Indiana, when the defendant filed his bankruptcy petition. The plaintiff 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 defendant filed an Answer of general denial. The plaintiff then responded with his summary judgment motion, based upon § 523(a)(19), which excepts from a debtor's discharge those debts that arose from securities law violations.

Section 523(a)(19) states that 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). The plaintiff must show 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).

In this case, no decision was rendered in the state court proceeding before the defendant filed his bankruptcy petition. This court found that, without a written determination of liability from another tribunal, subparagraph (B) of the statute had not been met. It therefore denied the plaintiff's Motion. After a telephonic status conference, the court lifted the automatic stay, so that the state circuit court case could proceed, and continued the adversary proceeding pending the outcome of the state court litigation.

On March 25, 2011, a bench trial was held in the Circuit Court of Noble County, Indiana, Cause No. 57C01-0810-PL-024. The plaintiff appeared in person and by counsel; the defendant appeared only by counsel.² After hearing evidence and the arguments of counsel, the state court issued its Judgment on April 12, 2011. It granted judgment in favor of the plaintiffs and against the defendants on Count I (the Indiana Securities Act claims) and Count III of the state court amended complaint, and charged the costs of the action against the defendants. *See* R. 33, Ex. A, Judgment of Court.

On July 8, 2011, the defendant filed an Answer in this court, denying "any allegations of fraudulent activity or any other activity on his part that would result in non-dischargeability of the judgments received by Devers in the Noble Circuit Court." R. 30. On July 12, 2011, the plaintiff filed his second Motion for Summary Judgment, with supporting memorandum and evidence. *See* R. 31-34. The plaintiff filed no response to the Motion. The court took the matter under advisement on August 25, 2011.

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

² In the state court action, plaintiffs Raymond and Betty Dever filed suit against this defendant, Gary Miller, and two other individuals, Scott Linville and Jennifer Vandiver Green, and the corporation Sidekick R.V., Inc. At the trial, however, only plaintiff Raymond Dever and counsel appeared for the plaintiffs, and only the counsel of record for Gary Miller and Scott Linville appeared for the defendants. *See* R. 33, Ex. 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 defendant failed to make any showing; 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 respond is a sufficient reason for entering summary judgment against him as a matter of law.

Section 523(a)(19) first requires evidence that the debt at issue arose as a result of a violation of securities laws, federal or state. The court finds, based upon the undisputed evidence, that the debt at issue arose as a result of the defendant’s violation of Indiana securities laws. The statute also requires evidence

that the debt resulted from a settlement agreement or a judicial or administrative decision. The court finds the undisputed evidence of the Judgment of the Circuit Court of Noble County, Indiana. The state court ruled that the defendant was liable to the plaintiff under Count I, based on the Indiana Securities Act, Indiana Code § 23-2-1-19, in the amount of \$40,602.41, as of the date of the judgment. That Judgment was the type of determination required under the second condition of § 523(a)(19). The parties had litigated the merits of the plaintiff's claim in the nonbankruptcy forum, and the state court concluded that the defendant owed the plaintiff a debt based upon violations of provisions of the Indiana Securities Act.

Now that the liability has been imposed by the state court in its Judgment, this court determines that the plaintiff has successfully demonstrated both requisite elements of § 523(a)(19). Moreover, the defendant has filed no challenge to the plaintiff's Motion for Summary Judgment. The court concludes that the plaintiff has proven that the defendant's debt to the plaintiff is nondischargeable under § 523(a)(19) as a matter of law.

CONCLUSION

For the reasons set forth in this Memorandum of Decision, the court grants the second Motion for Summary Judgment filed by the plaintiff Raymond Dever against the defendant Gary Miller and holds that the debt owed by the defendant to the plaintiff is nondischargeable pursuant to 11 U.S.C. § 523(a)(19).

SO ORDERED.

/s/ HARRY C. DEES, JR.
HARRY C. DEES, JR., JUDGE
UNITED STATES BANKRUPTCY COURT