

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re

ROBERT M. GRIFFITH, JR.,

Debtor.

No. 94-21581
Chapter 7

MARGARET B. FUGATE,
TRUSTEE,

Plaintiff,

v.

MARK GROSECLOSE,

Defendant.

Adv. Pro. No. 95-2042

M E M O R A N D U M

APPEARANCES :

MARGARET B. FUGATE, ESQ.
ANDERSON, FUGATE, GIVENS, COUNTS & BELISLE
114 E. Market Street
Johnson City, TN 37604
Attorneys for Margaret B. Fugate, Trustee

MARK GROSECLOSE
500 Sherwood Drive
Marion, VA 24354
Pro Se

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This is an action by the chapter 7 trustee, Margaret B. Fugate (the "Trustee"), pursuant to 11 U.S.C. § 547(b), seeking the avoidance and recovery of an alleged preferential transfer to the defendant, Mark Groseclose. The Trustee has moved for summary judgment, asserting that there are no genuine issues of material fact in dispute and that she is entitled to judgment as a matter of law. To support the motion for summary judgment, the Trustee relies extensively upon exhibits attached to the motion which appear to be a copy of the defendant's handwritten response to the Trustee's request for production of documents and interrogatories along with copies of the documents produced, including purported correspondence from the defendant to the debtor and the Trustee. Neither the defendant's answers to the Trustee's interrogatories nor his response to the request for production of documents was filed with the court* and it appears that the defendant, who is appearing *pro se* in this proceeding, simply mailed his responses to the discovery requests directly to the Trustee. The defendant's answers to the interrogatories were not made under oath or signed by the defendant as required

*Local Bankr. R. 10(a) provides that discovery documents such as interrogatories, requests for documents, requests for admissions, and responses or answers thereto shall not be filed with the clerk except by order of the court although relevant portions of these discovery documents may be filed in support of or in opposition to motions and for use at trial.

by Fed. R. Civ. P. 33(b)(1) and (2), which is made applicable to this proceeding by Fed. R. Bankr. P. 7033. Nor have the defendant's responses to the Trustee's discovery requests been presented by affidavit.

Under Fed. R. Civ. P. 56(c), as incorporated by Fed. R. Bankr. 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 a judgment as a matter of law." *Nolla Morell v. Riefkohl*, 651 F. Supp. 134, 139 (D.P.R. 1986). Thus, Rule 56(c) clearly contemplates that the court may consider answers to interrogatories in making a determination as to the existence of a genuine issue of material fact. In order for answers to interrogatories to constitute competent summary judgment evidence, however, the discovery responses must satisfy the other requirements in Rule 56 and contain admissible evidence. 10A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE § 2722 (1983).

Answers to interrogatories which are unsworn and unverified as required by Fed. R. Civ. P. 33(b)(1) and (2) are not competent evidence in ruling on a motion for summary judgment. See *Brady v. Blue Cross and Blue Shield of Texas, Inc.*, 767 F.

Supp. 131, 135 (N.D. Tex. 1991). For the unsworn responses to be admissible and considered by this court, the defendant's correspondence to the Trustee in which the responses were included must be authenticated by and attached to an affidavit meeting the requirements of Fed. R. Civ. P. 56(e) and the affidavit must be made by a person through whom the exhibits could be admitted into evidence. See CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY K. KANE, FEDERAL PRACTICE AND PROCEDURE § 2722 (1983); *Nolla Morell v. Riefkohl*, 651 F. Supp. at 139-140; *Hood v. Burnett*, 51 F.R.D. 477, 478 (N.D. Ga. 1971)(where documents attached to the defendant's brief were neither certified nor supported by appropriate affidavit, they may not be properly considered by the court as a basis for a grant of summary judgment).

The Trustee relies upon the defendant's unverified responses to interrogatories and the other unsworn documents to establish several of the various elements of a § 547 preferential transfer. However, because these responses and documents were neither sworn to nor accompanied by an affidavit attesting to their validity, these documents are inadmissible under Fed. R. Civ. P. 56(e) and Fed. R. Evid. 901. Therefore, they do not provide competent evidence in support of the Trustee's motion for summary judgment. Since there is no other evidence before the court to conclude that all the elements of 11 U.S.C. §

547(b) have been met, the court must deny the Trustee's motion for summary judgment. An order will be entered in accordance with this memorandum opinion.

FILED: February 5, 1996

BY THE COURT

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE