

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

In re

Case No. 00-30531

DONALD A. TANGWALL

Debtor

MEMORANDUM ON MOTION FOR SUMMARY JUDGMENT

APPEARANCES: DONALD A. TANGWALL
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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

Now before the court is Patrick Stapleton's Motion for Summary Judgment (Summary Judgment Motion) filed on February 6, 2002. Stapleton contends that the Debtor's January 4, 2002 "Verified Motion for Contempt on Patrick Stapleton" (Verified Contempt Motion) fails to state a claim upon which relief can be granted.

Each party has filed supporting affidavits. The court has before it the affidavits of the Debtor, Stapleton, Afton Chamberlain, David Chamberlain, and Thomas E. Hatcher. Stapleton also filed on February 28, 2002, a Motion to Strike Debtor's Opposing Affidavits.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A), (E) (West 1993).

I

Stapleton, an attorney, formerly represented Mark and Linda Ploe (the Ploes). The Debtor and the Ploes share a contentious and prolonged litigation history spanning the local and federal courts of at least two states.

Stapleton and the Ploes are the subjects of a "Motion to Find Attorney Patrick Stapleton, interested party Mark Ploe and Lynn [sic] Ploe in contempt of court, damages, and for return of property per Bankruptcy rule 4001(a)(3)" (Initial Contempt Motion) filed in this court by the Debtor on September 14, 2001.¹ In his subsequent Verified Contempt Motion, the Debtor accuses

¹ On February 7, 2002, the Debtor filed a document entitled "Notice of Settlement in Full With Creditors Mark Ploe and Lynn [sic] Ploe." Appended to this "Notice" is a Settlement Agreement and General Release executed by the Debtor and the Ploes on January 22, 2002, by which the parties mutually release each other from all claims. Although the Initial Contempt Motion has not been dismissed as to the Ploes, it appears that Stapleton is now the only remaining respondent to that Motion.

Stapleton of tampering with the Debtor's witness David Chamberlain (whose testimony is purportedly relevant to the Initial Contempt Motion) by lying to David Chamberlain regarding the Debtor's alleged criminal background.²

II

Pursuant to FED. R. CIV. P. 56(c) and FED. R. BANKR. P. 7056 and upon proper motion, summary judgment

shall be rendered forthwith 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.

To survive a summary judgment motion, the nonmoving party must demonstrate the existence of a genuine issue for trial. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356 (1986) (citing FED. R. CIV. P. 56(e)). The facts, and all resulting inferences, must be viewed in the light most favorable to the nonmovant. *See Matsushita*, 106 S. Ct. at 1356. The court must then decide whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2512 (1986).

² The Verified Contempt Motion specifically alleges as follows:

Patrick Stapleton has told David Chamberlain that Donald Tangwall is a 2 time convicted felon. Such a statement is an absolute [sic] lie design [sic] to change David Chamberlain's testimony.

In response, Stapleton has produced evidence of several criminal convictions and charges against the Debtor. For the purpose of resolving the present controversy, however, the court need not determine whether the Debtor is in fact a 2 time convicted felon."

Evidence that is “merely colorable” or “not significantly probative” is insufficient to defeat a motion for summary judgment. *See id.* at 2511. Further, supporting affidavits must be based on personal knowledge and must be otherwise admissible as evidence. *See* FED. R. CIV. P. 56(e). Therefore, “[a]ffidavits composed of hearsay and opinion evidence do not satisfy Rule 56(e) and must be disregarded.” *State Mut. Life Assurance Co. of Am. v. Deer Creek Park*, 612 F.2d 259, 264 (6th Cir. 1979).

III

As noted, the court has before it a total of five affidavits. The relevance and admissibility of each has been evaluated in light of the only question presently at issue: whether Stapleton engaged in misleading conduct toward David Chamberlain with the intent to prevent, influence, or delay David Chamberlain’s testimony. *See* 18 U.S.C.A. § 1512(b)(1) (West 2000) (criminal statute defining elements of witness tampering).³

³ Section 1512(b) provides:

(b) Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been
(continued...)

Stapleton submitted the Affidavit of Thomas E. Hatcher on March 19, 2002, in response to the Debtor's affidavit. The testimony contained within Hatcher's affidavit is in no way relevant to the issue before the court and therefore will not be considered. See FED. R. EVID. 402; FED. R. CIV. P. 56(e).

The Debtor's supporting affidavits consist of his own and that of Afton Chamberlain, who is David Chamberlain's mother. Each of these instruments consists primarily of irrelevant testimony. See *id.* To the extent that portions of these affidavits might arguably be relevant, they are based wholly upon hearsay and, in some cases, hearsay piled upon hearsay. Stapleton's Motion to Strike Debtor's Opposing Affidavits will therefore be granted. See FED. R. EVID. 402, 802, 805; FED. R. CIV. P. 56(e); *Deer Creek Park*, 612 F.2d at 264.

The remaining affidavits - those of Stapleton and David Chamberlain⁴ - consist of relevant and admissible statements based upon those affiants' personal knowledge. The court finds these affidavits credible and consistent, together establishing that:

³(...continued)

summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings; shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C.A. § 1512(b) (West 2000).

⁴ The Debtor incorrectly alleges that the Affidavit of David Chamberlain is in improper form because it does not bear a notary's seal. The instrument reads that it was executed in the county of Greenville, South Carolina, and is authenticated by the signature of "Terry Gambrell" as "Notary Public." Under South Carolina law, the affidavit is not invalidated by the absence of a notary's seal. See S.C. CODE ANN. § 26-1-60 (Law Co-op 1976) ("[T]he absence of such seal . . . shall not render his acts invalid if his official title be affixed thereto."); see also *Carroll v. Cash Mills*, 118 S.E. 290, 300 (S.C. 1923) ("The notary public affixed his official title, and the probate was therefore valid.").

1. Stapleton did not initiate contact with David Chamberlain;
2. Neither affiant considered David Chamberlain a potential witness at the time of their conversation;
3. Stapleton did not make misleading statements relating to the Debtor's criminal background; and
4. Stapleton did not act with the intent of delaying, influencing, or preventing David Chamberlain's testimony.

Because he has not produced any admissible evidence controverting these two affidavits, the Debtor has failed to demonstrate the existence of a genuine issue for trial regarding the purported witness tampering. *See Matsushita*, 106 S. Ct. at 1356; FED. R. CIV. P. 56(e). The evidence before the court, even when viewed in the light most favorable to the Debtor, leads to only one reasonable conclusion - that no witness tampering occurred.

Patrick Stapleton's Motion for Summary Judgment will therefore be granted and the Debtor's Verified Motion for Contempt on Patrick Stapleton will be dismissed. The court will also direct that the costs of this contested matter be taxed to the Debtor. *See* FED. R. BANKR. P. 9014, 7054(b). An appropriate order will be entered.

FILED: March 28, 2002

BY THE COURT

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

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

In re

Case No. 00-30531

DONALD A. TANGWALL

Debtor

ORDER

For the reasons stated in the Memorandum on Motion for Summary Judgment filed this date, the court directs the following:

1. Patrick Stapleton's Motion to Strike Debtor's Opposing Affidavits filed February 28, 2002, is GRANTED.

2. The Affidavit of the Debtor contained within the document filed by the Debtor on February 26, 2002, entitled "Supplement to Debtor's Response to Patrick Stapleton's Motion for Summary Judgment in Regards to Contested Matters <Verified Motion for Contempt on Patrick Stapleton," and the Affidavit of Afton Chamberlain attached to the document entitled "Debtor's Response to Patrick Stapleton's Motion for Summary Judgment in Regards to Contested Matters <Verified Motion for Contempt on Patrick Stapleton'" also filed February 26, 2002, are stricken.

3. Patrick Stapleton's Motion for Summary Judgment filed February 6, 2002, is GRANTED.

4. The Debtor's Verified Motion for Contempt on Patrick Stapleton filed January 4, 2002, is DENIED.

5. Patrick Stapleton is allowed to recover his costs from the Debtor in this contested matter.

SO ORDERED.

ENTER: March 28, 2002

BY THE COURT

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE