

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

In re

ELLIS R. BARNES, JR.,

Debtor.

No. 01-23333
Chapter 7

EASTMAN CREDIT UNION,

Plaintiff,

vs.

ELLIS R. BARNES, JR.,

Defendant.

Adv. Pro. No. 01-2078

M E M O R A N D U M

APPEARANCES:

O. PICKARD TAYLOR, ESQ.
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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This nondischargeability action is before the court on plaintiff Eastman Credit Union's motion for summary judgment. Eastman seeks a judgment against debtor Ellis R. Barnes, Jr. for the balance of two loan advances which it made to him and for a determination of nondischargeability under 11 U.S.C. § 523(a)(2) or (6). All the elements of § 523(a)(2)(A) having been established by the affidavits submitted in support by Eastman, the motion will be granted. This is a core proceeding. See 28 U.S.C. § 157(b)(2)(I).

I.

On June 18, 1997, a "LOANLINER" open-end credit plan with Eastman was established which allowed the debtor to obtain advances from time to time. The debtor requested and was granted two such advances in the amounts of \$35,245 and \$14,775 on October 16, 2000. The proceeds were respectively used to refinance a 1999 Dodge 4x4 truck and to purchase a 2000 Kaufman car hauler. Although security interests in both were granted to secure the advances, Eastman failed to perfect those interests. The debtor commenced his chapter 7 case on September 28, 2001, and the appointed trustee thereafter sold the collateral in the process of administering the estate.

Eastman filed its complaint instituting this action on

December 26, 2001. Eastman alleges that in connection with obtaining the two advances, the debtor represented his monthly income to be \$6,500 and when he was asked to substantiate that income, furnished Eastman with his unsigned 1999 individual federal tax return indicating adjusted gross annual income of \$256,050; a 1998 federal unemployment tax return from his company, Barnes Express, evidencing taxable wages for the year of \$240,000; and Barnes Express payroll slips for August 2000 listing \$3,000 in wages each for the debtor and his wife. Eastman avers that upon receiving the documents, it then asked the debtor to obtain a letter from his accountant confirming the financial information which had been provided. After the debtor furnished Eastman with a letter verifying the financial information dated October 13, 2000, purportedly from Tommy Jones, a certified public accountant with CPA Associates, the advances were made. Eastman alleges that it has now determined that the letter was bogus as the accountant who signed it was fictitious. Accordingly, Eastman requests that the debts be declared nondischargeable and for a judgment against the debtor "for the amount of its debt, plus interest and attorneys fees."

In answer to the complaint, the debtor denies making any misrepresentations and that the amounts alleged to be owing on the advances are correct. As an affirmative defense, the debtor

alleges "[t]hat any falsifications or misrepresentations ... were made by the employees of the [debtor] without [his] consent or authorization." The debtor further claims that Eastman "was negligent in relying upon an unsigned U.S. Individual Income return and "upon a copy of a letter from a non-existent CPA firm" which "has increased [Eastman's] alleged damages." Finally, the debtor avers that Eastman "was negligent in not perfecting [its] security interest in vehicles purchased by [the debtor] with the proceeds of said loans and ... thereby failed to mitigate ... damages."

Eastman filed the present motion on September 26, 2002, along with the affidavit of its counsel, Andrew T. Wampler, the affidavits of Eastman employees Gary Tucker and Steven Alison, and the affidavit of Sheila Emory, president of CPA Associates, P.C. Mr. Wampler states in his affidavit that he attended the initial and adjourned 11 U.S.C. § 341(a) meeting of creditors wherein the debtor stated that his income for 1999 was approximately \$20,000 and therefore the 1999 income tax return and 1998 unemployment tax return as submitted to Eastman were incorrect. In their affidavits, Mr. Tucker, a vice-president with Eastman, and Mr. Alison, the loan officer with Eastman who dealt with the debtor in connection with making the two advances, confirm the allegations in the complaint concerning

the financial information which the debtor furnished. More specifically, Mr. Tucker states that he instructed Mr. Alison to "have Mr. Barnes provide a letter from an accountant verifying or confirming his financial records before the loans requested at the time would be approved." Mr. Alison testifies that "I made the request to [the debtor], and he provided me with a letter dated October 13, 2000, from CPA Associates signed by Tommy Jones." Mr. Alison further states that the "loans were approved on factors that were dependant on [the debtor's] income and the financial information he provided to [Eastman]. Without the documentation regarding his income, [Eastman] would not have made these loans to him." Finally, Ms. Emory testifies that "CPA Associates, P.C., did not employ a certified public accountant named Tommy Jones on October 13, 2000 and has not done so at any other time" and that "[t]o the extent that an individual has attempted to state that the letter originated with CPA Associates, P.C., of Johnson City, Tennessee, that representation is false."

The debtor has not responded to the summary judgment motion although the time for doing so as specified in the court's May 20, 2002 order has expired. Under E.D. Tenn. LBR 7007-1, "[a] failure to respond shall be construed by the court to mean that the respondent does not oppose the relief requested by the

motion."

II.

Rule 56 of the Federal Rules of Civil Procedure, as incorporated by Fed. R. Bankr. P. 7056, mandates the entry of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." "When reviewing a motion for summary judgment, the evidence, all facts, and any inferences that may be drawn from the facts must be viewed in the light most favorable to the nonmoving party." *Poss v. Morris (In re Morris)*, 260 F.3d 654, 665 (6th Cir. 2001)(citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). To prevail, the nonmovant must show sufficient evidence to create a genuine issue of material fact and from which the court could reasonably find for the nonmovant. *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). "Entry of summary judgment is appropriate '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.'" *Id.*

(quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, (1986)). In other words, a nonmoving party has the affirmative duty to direct the court's attention to specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *Id.* See also *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989).

Due to the debtor's lack of response to Eastman's summary judgment motion, this court accepts the factual statements set forth in the affidavits as undisputed. Therefore, the only issue is whether these facts entitle the defendant to judgment as a matter of law. See Fed. R. Civ. P. 56(e) ("If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."); *Guarino v. Brookfield Township Trs.*, 980 F.2d 399, 404 n.5 (6th Cir. 1992)(citing *Littlejohn v. Larson*, 891 F.2d 291 (6th Cir. Dec. 6, 1989)(summary judgment was proper where plaintiff failed to respond to defendant's motion for summary judgment and therefore no genuine issue of material fact existed)).

III.

Section 523(a)(2)(A) of the Bankruptcy Code provides an exception to discharge for "any debt ... for money, property, services, or an extension, renewal, or refinancing of credit, to

the extent obtained by ... false pretenses, a false representation, or actual fraud...." Under this section, "the creditor must prove (1) the debtor made a material misrepresentation, (2) the debtor knew the representation was false at the time of making it, or made the representation with gross recklessness as to the truth, (3) the debtor made the representation with the intention of deceiving the creditor, (4) the creditor justifiably relied upon such representation, and (5) the creditor sustained loss and damage as the proximate result of the representations." *Commercial Bank & Trust Co. v. McCoy (In re McCoy)*, 269 B.R. 193, 198 (Bankr. W.D. Tenn. 2001)(citing *In re McLaren*, 3 F.3d 958 (6th Cir. 1993) and *Boyd v. McAllister*, 101 F.3d 1165, 1172 (6th Cir. 1996)).

The evidence before the court establishes all these elements. The fact that the debtor misrepresented his income in order to induce Eastman to make the two advances at issue is without question. The debtor's knowledge that the income information which he supplied was false and his intent to deceive Eastman in this regard is evident from the fictional accountant letter which the debtor furnished in order to substantiate the correctness of financial information he had previously supplied. The testimony by Eastman's representatives indicates that Eastman justifiably relied upon the information

the debtor supplied and that it sustained loss as a proximate result.

IV.

As the debtor has failed to come forward with any evidence to contradict that of Eastman or to establish the debtor's affirmative defenses as pled in his answer, an order will be entered in accordance with this memorandum opinion declaring nondischargeable the two advances in the amounts of \$35,245 and \$14,775 which Eastman made to the debtor. Because the balance owing on those advances was disputed by the debtor in his answer and no evidence in this regard was offered by Eastman in connection with its motion for summary judgment, the only remaining issue for trial is the amount of judgment to be awarded Eastman.

FILED:

BY THE COURT

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE