UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

In Re

EMORY SHELLEY and
DANA JO SHELLEY,

Case No. 03-42947-PNS3

Debtors.

FIRST NATIONAL BANK ALASKA

Plaintiff.

vs.

Adv. No. 04-03007

EMORY SHELLEY and
DANA JO SHELLEY

Defendants.

ORDER PARTIALLY GRANTING AND PARTIALLY DENYING DEBTORS' MOTION FOR SUMMARY JUDGMENT

John E. Venn, Jr., Attorney for Debtors, Pensacola, FL
Michael G. Gillion, Attorney for Plaintiff, Mobile, AL

This case is before the Court on the motion of the debtors for summary judgment. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. § § 157 and 1334 and the Order of Reference of the District Court. This motion is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and the Court has the authority to enter a final order. For the reasons indicated below, the Court is partially granting and partially denying the debtors' motion for summary judgment.

FACTS

The debtors, Emory and Dana Jo Shelley, were previously the principals of Easy Street Auto, Inc., an Alaska corporation and ABC Enterprises, LLC, an Alaskan limited liability company. As the principals of Easy Street, the Shelleys sold used cars. The inventory for Easy

Street was financed through First National Bank Alaska. The Shelleys executed a promissory note on behalf of Easy Street in favor of First National and also executed a personal guaranty on the debt secured by the note. Under that note, the Shelleys were required to pay off the debt under the note as the inventory was sold to customers. The Shelleys failed to pay the amount due under the note and First National filed a lawsuit against the debtors, Easy Street, and ABC in the Superior Court of the State of Alaska for the Third Judicial District, case no. 3 AN-02-8919 CI. That Court entered a default judgment in favor of First National and against the debtors, Easy Street, and ABC in the amount of $898,702. After crediting property recovered, the Shelleys owe $484,944.48 on the judgment. At some point, the Shelleys moved from Alaska to Florida and in April 2003 they purchased real property legally described as: "Lot 63, Block C, of COUNTRY BREEZE ESTATES PHASE II, according the plat thereof as recorded in Plat Book F, Page 50, of the Public Records of Santa Rosa County, Florida." Since April 2003 the Shelleys have resided at such location and the property is their homestead.

On October 14, 2003, First National domesticated the Alaska judgment in the Circuit Court in and for Santa Rosa County, Florida, case no. 03-849-CA. On October 22, 2003, First National filed a judgment lien certificate with the Florida Secretary of State, certificate no. J039000013576, in accordance with Florida law. The Shelleys then filed this Chapter 7 bankruptcy on October 24, 2003. On December 4, 2003, the debtors filed a motion in their Chapter 7 case to avoid First National's judgment lien upon their homestead. On or about January 5, 2004, First National filed an objection to the debtors' motion to avoid the judgment lien. On February 26, 2004, First National filed a complaint objecting to discharge and the dischargeability of their claim. In the complaint First National first objected to discharge under

11 U.S.C. 727(a)(4) alleging a false oath. First National alleges that the Shelleys do not own Lot 63 of Country Breeze Estates Phase II, which the debtors have claimed as their homestead, and/or that the Shelleys do have an interest in Lot 81 of such subdivision, which debtor Dana Jo Shelley purchased the property as Attorney in Fact for Stephanie Roxanne Shelley. On March 30, 2004, Judge Killian entered an order denying First National's objection and avoiding the judgment lien. First National alternatively alleges that the Shelleys' debt to it, on their personal guarantee, is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) & (B), (a)(4), and (a)(11).

In the Shelley's answer to First National's complaint they allege that the complaint should be dismissed because it was filed after the deadline for filing complaints objecting to discharge and dischargeability, which was February 9, 2004. On July 23, 2004, this Court, in an oral decision, found that First National's response to the debtors' motion to avoid the lien was sufficient as an extension motion because it provided fair notice to the debtors of First National's claim and the grounds thereof. With that determination, the Court allowed the complaint to proceed. However, the Court held that First National's amended complaint did not relate back to the original complaint and therefore refused to allow the amendment. Therefore First National was allowed to go forward, but only with its original complaint and the facts and allegations set forth therein.

Now before the Court is the debtors' motion for summary judgment. The Shelleys assert that Count I of First National's complaint, the false oath claim, must be decided in the debtors favor because Judge Killian already found that the Shelleys' statements were true. In Count II, the Shelleys assert that except for the claim under § 523(a)(11), all the claims under § 523 were not timely filed and should be dismissed. As for the § 523(a)(11) claim, the debtors assert that

they are not now, nor were they ever fiduciaries of First National and therefore the debtors must prevail on that cause of action also.

LAW

Motions for summary judgment are controlled by Rule 56 of the Federal Rules of Civil Procedure, which has been made applicable to bankruptcy proceedings pursuant to Fed. R. Bankr. P. 7056. A court shall grant summary judgment to a party when the movant shows that "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Bankr. P. 7056(c). In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), the Supreme Court found that a judge's function is not to determine the truth of the matter asserted or weight of the evidence presented, but to determine whether or not the factual disputes raise genuine issues for trial. *Anderson*, at 2510, 2511. All inferences are resolved in favor of the party defending against each motion. *Comer v. City of Palm Bay, Fla.*, 265 F.3d 1186 (11th Cir. 2001); *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 177 F.3d 1278, 1285 (11th Cir. 1997).

The first cause of action in First National's complaint alleges that the Shelleys have made a false oath or account in the Chapter 7 case and have withheld from the Court their rights to possession of real property. First National asserts that such actions by the debtors requires a revocation of their discharge under 11 U.S.C. § 727. The Court finds there is no genuine issue of material fact on this issue because Judge Killian has already determined that the Shelleys' oath and account were true when he issued his order avoiding the lien on the debtors homestead. Therefore summary judgment will be granted in favor of the debtors on the first cause of action.

The second cause of action alleged in First National's complaint claims that the Shelleys'

debt to the bank is nondischargeable under four separate subparts of 11 U.S.C. § 523. The debtors, in their motion for summary judgment argued the allegations under § 523, except for the subsection (a)(11) claim, were not timely filed, and therefore summary judgment should be granted. However, the debtors filed their motion for summary judgment before the Court made its oral ruling allowing First National to proceed with its complaint. Since the debtors present no other facts or evidence in support of their motion, there are genuine issues of material fact concerning these claims. Therefore, summary judgment must be denied as to the claims based on § 523(a)(2)(A), § 523(a)(2)(B), and § 523(a)(4).

The remaining claim before the Court is a nondischargeability claim based on § 523(a)(11). Section 523(a)(11) excepts from discharge any debt "arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution . . ." 11 U.S.C. § 523(a)(11). Debtor, Emory Shelley, in his sworn affidavit stated under oath that neither he, nor co-debtor, Dana Jo Shelley, have ever been an officer, director, manager, or employee of First National. Mr. Shelley also swore that he had never acted in any fiduciary capacity for First National. First National responded to the summary judgment motion with a repetition of its previous allegation, but did not submit any affidavits or other facts to support its claims. Although factual disputes preclude summary judgment, the "mere possibility that factual disputes may exist, without more, is not sufficient to overcome a convincing presentation by the party seeking summary judgment." *See Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980). When a party's response consists of "nothing more than a repetition of his conclusional allegations," summary judgment is not only proper, but it is required. *In re Paramount Citrus, Inc.*, 268 B.R. 620 (M.D.Fla. 2001)(quoting

Morris v. Ross, 663 F.2d 1032, 1034 (11th Cir. 1981)). Because there is no genuine issue of material fact regarding the lack of fiduciary capacity of the debtors, summary judgment is proper on this count.

THEREFORE IT IS ORDERED:

1. The debtors' motion for summary judgment is GRANTED as to the claims alleged under 11 U.S.C. § 727 and § 523(a)(11).

2. The debtors' motion for summary judgment is DENIED as to the claims alleged under 11 U.S.C. § 523(a)(2)(A), § 523(a)(2)(B), and § 523(a)(4).

Dated: September 7, 2004

Margaret A. Mahoney
MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE