UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

IN RE:

JUAN F. EVANS, Case No.: 04-31769

Debtor

JUAN F. EVANS,

Plaintiff

v. Adv. No.: 05-03017

CODILIS & STAWIARSKI, P.A.,
WELLS FARGO BANK MINNESOTA, N.A.
as trustee for Option One Mortgage Corporation,
and OPTION ONE MORTGAGE CORPORATION

Defendants

ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

Juan F. Evans, Debtor
Christine L. Herendeen, Echevarria, Codilis & Stawiarski, P.A., Attorney for Defendants, Tampa, FL

This matter came before the Court on defendants' motion for judgment on the pleadings. 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 is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and the Court has authority to enter a final order. For the reasons indicated below, the Court is granting the defendants' motion, treating the motion for judgment on the pleadings as a motion for summary judgment.

FACTS

The facts included in this Court's order on December 21, 2005, denying Juan F. Evans's motion for summary judgment are incorporated into this opinion by reference. There is no need to restate them.

LAW

The defendants filed a motion for judgment on the pleadings. Federal Rule of Civil Procedure 12(c), incorporated by reference in bankruptcy proceedings under Bankruptcy Rule 7012(b), states that any party may move for judgment on the pleadings "[a]fter the pleadings are closed." Pleadings are not closed until an answer has been filed. *See Season-All Indus., Inc. v. Turkiye Sise Ve Cam Fabrikalari, A.S.*, 425 F.2d 34, 36 (3d Cir. 1970); *Knight v. Storex Sys., Inc.*, 739 F. Supp. 739, 743 (N.D.N.Y. 1990); *Williams v. Walnut Park Plaza, Inc.*, 68 F. Supp. 957, 958 (E.D. Pa. 1946); *Edelman v. Locker*, 6 F.R.D. 272, 274 (E.D. Pa. 1946). "[T]herefore, a Rule 12(c) motion may not be made by a defendant until after he has answered." *New York State United Teachers v. Thompson*, 459 F. Supp. 677, 680 (N.D.N.Y. 1978); *See also Nguyen v. Van Quach (In re Van Quach),* 187 B.R. 615, 618 (Bankr. N.D. Ill. 1995) ("A motion for judgment on the pleadings cannot be filed until the pleadings are closed."). Since the defendants did not file an answer to the plaintiff's initial complaint, they may not move for a judgment on the pleadings.

However, "[i]n such a case it is within the court's discretion whether to treat the motion as one to dismiss or as one for summary judgment." *Knight*, 739 F. Supp. at 743; *See Williams*, 68 F. Supp. at 959. This case is set for trial of the issues on September 15, 2006. Since the facts stated in the plaintiff's complaint will be taken as true at the trial because the defendants did not

answer, there is no reason not to do the same in conjunction with the defendants' motion for judgment on the pleadings. It will save the Court and the parties the time and expense of a trial day in Pensacola. Therefore, the Court, in its discretion, to save time and money for all parties, will deal with the issues raised in this posture.

Under Federal Rule of Civil Procedure 56(b), which is incorporated by reference in bankruptcy proceedings under Bankruptcy Rule 7056, a "party against whom a claim … is asserted … may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." Federal Rule of Civil Procedure 56(c) further provides that the "motion shall be served at least 10 days before the time fixed for the hearing." The hearing in this case is set on September 15, 2006. The defendants served the plaintiff with their motion on August 15, 2006. Since the defendants served their motion more than 10 days before the date set for hearing, they have followed proper summary judgment procedure. *See* Fed. R. Civ. P. 56(c). The plaintiff responded to the motion. As such, the Court, in its allowable discretion, will treat the defendants' motion for judgment on the pleadings as a summary judgment motion.

Summary judgment should be rendered for the movant "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." Fed. R. Civ. P. 56(c); *Brooks v. County Comm'n of Jefferson County, Alabama*, 446 F.3d 1160, 1162 (11th Cir. 2006). The defendants do not contest the factual allegations in the plaintiff's complaint. As such, there is no "genuine issue as to any material fact…." Fed. R. Civ. P. 56(c). Instead, the defendants allege in their motion that

despite the truth of the plaintiff's facts, his legal reasoning is misplaced. Plaintiff argues that the defendants' attempts to foreclose on his home violate the discharge injunction he received when his Chapter 7 case was discharged on December 3, 2004. The plaintiff also argues that the defendants' actions violate the Fair Debt Collection Practices Act, the Florida Consumer Collection Practices Act, and constitutes tortious interference with a business relationship. However, for the reasons this Court articulated in denying the plaintiff's motion for summary judgment in regard to the same allegations on December 21, 2005, the Court finds that, even accepting the plaintiff's facts as true, he nonetheless has failed to present the Court with any legal authority that will help provide him relief. As such, the defendants are entitled to judgment as a matter of law.

THEREFORE IT IS ORDERED AND ADJUDGED:

1. The defendants' motion for judgment on the pleadings is treated as a motion for summary judgment and is GRANTED.

2. The trial of this case set on September 15, 2006, is CANCELLED.

Dated: September 5, 2006

Margaret A. Mahoney

MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE