

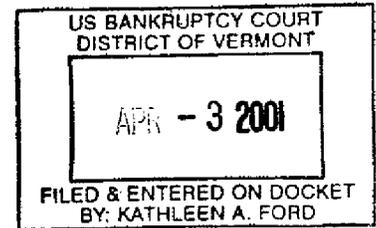
**UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT**

In Re:

**ROBERT C. NORTHUP,
Debtor**

**Chapter 7 Case
#00-10976**

**SCOTT HUMINSKI, DANA HUMINSKI,
EASTERN EQUIPMENT AND SERVICES CORP.,
and SCOTT HUMINSKI As Owner of the Litigious
Rights of EASTERN EQUIPMENT AND
SERVICES CORP.**



Plaintiffs,

v.

**ROBERT C. NORTHUP,
Defendant.**

**Adversary Proceeding
#00-01066 cab**

#401

*Appearances of Counsel: Bruce Hesselbach, Esq.
Brattleboro, VT
Attorney for Debtor/Defendant*

*Scott Huminski, Pro se
Dana Huminski, Pro se
Eastern Equipment & Services
Corp., Pro se
Bennington, VT*

**CORRECTED MEMORANDUM OF DECISION
GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
AND DISMISSING COMPLAINT¹**

THIS CAUSE is before the Court pursuant to the Motion for Summary Judgment and the Memorandum of Law and Statement of Undisputed Facts, both filed by defendant Robert C. Northup on December 21, 2000. Plaintiff Scott Huminski filed the "Affidavit of Scott Huminski, #2" on January 8, 2001 (herein "Huminski Affidavit"), apparently though not specifically in response to the pending summary judgment motion. The defendant subsequently filed an Affidavit in further

¹ Only change is a correction of typographical error in case caption.

support of his summary judgment motion on January 18, 2001 (herein "Northup Affidavit"). On January 23, 2001, this Court granted Plaintiff's Motion for Enlargement of Time to Respond to Defendant's Motion for Summary Judgment extending the time for further response by plaintiffs to February 23, 2001. Other than the Huminski Affidavit, plaintiffs failed to answer or otherwise respond to the Defendant's Motion for Summary Judgment and Statement of Undisputed Facts.

On March 1, 2001, this Court *sua sponte* issued an Order to Show Cause finding that the plaintiffs had failed to file any further response to the pending meritorious summary judgment motion and directing the plaintiffs to submit any opposition not later than March 12, 2001, and expressly stating that "failure of any Plaintiff to file papers timely and sufficient to demonstrate a genuine issue of material fact in compliance with Bankruptcy Rule 7056 shall constitute grounds for entering summary judgment against such Plaintiff without further hearing or notice." Again, plaintiffs failed to respond further to the pending motion for summary judgment.

This court has jurisdiction over this proceeding pursuant to 28 U.S.C. §§157 and 1334.

Based upon the foregoing and a careful review of the record, the Defendant's Motion for Summary Judgment is granted.

ISSUE

The issue presented is whether the record shows that there is no genuine issue as to any material fact regarding the various claims of non-dischargeability pursuant to 11 U.S.C. 523(a)(6) or of denial of discharge pursuant to 11 U.S.C. §727(a) asserted by the plaintiffs against the defendant, and whether the moving party is entitled to judgment as a matter of law pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 7056 of the Federal Rules of Bankruptcy Procedure.

SUMMARY JUDGMENT STANDARD

It is axiomatic that summary judgment is proper only if the record shows 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. Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056. A genuine issue exists only when “the evidence is such that a reasonable [trier of fact] could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *see also* Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)(movant need only illustrate by reference to record plaintiff’s failure to introduce evidence in support of essential element of claim). The court must view all the evidence in the light most favorable to the nonmoving party, Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 659 (7th Cir.), *cert. den.*, 484 U.S. 977 (1987), and draw all inferences in the nonmovant’s favor. Santiago v. Lane, 894 F.2d 218, 221 (7th Cir. 1990).

In making its determination, the court’s sole function is to determine whether there is any material dispute of fact that requires a trial. *See* Waldridge v. American Hoechst Corp., 24 F.3d 918 (7th Cir. 1994). Credibility determinations, weighing evidence, and drawing reasonable inferences are jury functions, not those of a judge deciding a summary judgment motion. Liberty Lobby, 477 U.S. at 255, 106 S.Ct. 2513-14. However, if the evidence is merely colorable, or is not significantly probative or merely raises “some metaphysical doubt as to the material facts,” summary judgment may be granted. Liberty Lobby, 477 U.S. at 249-50, 106 S.Ct. at 2510-11; Matsushita Electric Industries Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538 (1986). Lastly, the court is not obligated in our adversary system to “scour the record” in search of a factual dispute on behalf of a nonmoving party. *See* Waldridge v. American Hoechst Corp., 24 F.3d at 922; *see also* Monahan v. New York City Department of Corrections, 214 F.3d 275, 292 (2d Cir.

2000)(while trial court has discretion to conduct an assiduous review of the record in determining if summary judgment warranted, “it is not required to consider what the parties fail to point out”).

DISCUSSION

Plaintiffs Scott Huminski, Dana Huminski and Eastern Equipment & Services Corp. filed this adversary proceeding *pro se* seeking declaratory relief and alleging that certain obligations of the defendant arising from two pending state court proceedings, Scott Huminski and Dana Huminski v. Northrup (sic), et al., case no. 115-4-98 (Complaint, Exh. A), and Huminski v. Northrup (sic), et al., case no. 219-7-97 (Debtor’s Motion for Summary Judgment, Exh. D) should be deemed non-dischargeable pursuant to 11 U.S.C. §523(a)(6) and objecting to the debtor’s discharge pursuant to 11 U.S.C. §727. The status or outcome, if any, of these state court lawsuits are not part of the record in the instant proceeding and are accordingly deemed inconclusive.

First Cause of Action [Section 523(a)(6)]

Section 523(a)(6) renders non-dischargeable any debt “for willful and malicious injury by the debtor to another entity or to the property of another entity.” Aside from the conclusory allegations set forth in the Huminski Affidavit, there has been no admissible evidence filed of record to substantiate the allegations set forth in either of the unverified subject state court complaints (i.e., slander, tortious or “tortuous” interference, extortion, intentional/negligent infliction of emotional distress, conspiracy, unfair competition, breach of contract, negligence in training and supervision, negligence in hiring and retiring, negligence in performance of duties). Moreover, considering the evidence of record in light most favorable to the nonmovant, the plaintiff has failed to meet the standard for demonstrating grounds for either denial of discharge [§727(a)] or an exception to discharge [§523(a)(6)] under the Bankruptcy Code.

It is well recognized in this District and elsewhere that exceptions to discharge pursuant to 11 U.S.C. §523 must be strictly construed against an objecting creditor and liberally in favor of the debtor in order to be consistent with the liberal spirit that has always pervaded the entire bankruptcy system to allow a debtor a fresh start. In re Gallaudet, 46 B.R. 918 (Bankr.D.Vt. 1985); *see also In re Bonnanzio*, 91 F.3d 296 (2nd Cir. 1996); In re Miller, 39 F.3d 301 (11th Cir. 1994); In re Menna, 16 F.3d 7 (1st Cir. 1994). Therefore, bankruptcy courts narrowly construe exceptions to discharge and a creditor bears the burden of showing that a debt falls within a statutory exception to discharge. *See In re Barrup*, 37 B.R. 697 (Bankr.D.Vt. 1983); *see also* Fed. R. Bankr. P. 4005; In re Kelly, 135 B.R. 459, 461 (Bankr.S.D.N.Y. 1992)(plaintiff bears burden of proving grounds for objection to discharge).

In order to show a “willful and malicious injury” pursuant to §523(a)(6), most courts require a showing of an injury inflicted intentionally and deliberately, and either with the intent to cause the harm complained of or under circumstances in which the harm was certain or almost certain to result from the debtor’s act. *See In re Miller*, 156 F.3d 598 (5th Cir. 1998) *cert. den.* 526 U.S. 1016 (1999); In re Scarlata, 979 F.2d 521 (7th Cir. 1992); In re Kidd, 219 B.R. 278 (Bankr.D.Mont. 1998); In re Zentz, 157 B.R. 145 (Bankr.W.D.Mo. 1993); In re Cheripka, 122 B.R. 33 (Bankr.W.D.Pa. 1990); In re Dvorak, 118 B.R. 619 (Bankr.N.D.Ill. 1990). As noted by the United States Supreme Court in Kawaauhau v. Geiger, 523 U.S. 57, 118 S.Ct. 974 (1998):

The word “willful” in [§523](a)(6) modifies the word “injury,” indicating that non-dischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury. Had Congress meant to exempt debts resulting from unintentionally inflicted injuries, it might have described instead “willful acts that cause injury.” Or, Congress might have selected an additional word or words, i.e., “reckless” or “negligent,” to modify “injury.” Moreover ... the [§523] (a)(6) formulation triggers in the lawyer’s mind the category “intentional torts,” as distinguished from negligent or reckless torts. Intentional torts generally require that the actor intend “the *consequences* of an act,” not simply “the act itself.”

Kawaaauhau v. Geiger, 118 S.Ct. at 977 (emphasis original).

In this instance, the record is simply devoid of any evidence that the defendant caused a “deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury.” While the Huminski Affidavit asserts summarily that the defendant “engaged in a willful and malicious campaign to injure and damage” the plaintiffs, none of the acts otherwise described demonstrate the requisite misconduct necessary to support non-dischargeability pursuant to §523(a)(6). It is noteworthy that in paragraph 177 of the state court Complaint filed by the plaintiffs herein, the plaintiffs sum up their allegations as follows:

That the aforesaid occurrence [sic], to wit: the tortious interference, the defamation, the extortion and unfair competition, the intentional infliction of emotional distress, the unfair competition, the defamation, the conspiracy, the breach of contract, the resulting loss of income, the financial damages and injury, the resulting injuries to mind and body therefrom, were caused wholly and solely by reason of the negligence of the defendants, its [sic] agents, servants and employees without any negligence on the part of the plaintiffs.

Complaint, Exh. “A”, at p. 20 (emphasis added). As stated above, neither negligent, reckless, deliberate nor intentional *acts* suffice to warrant non-dischargeability under §523(a)(6). Non-dischargeability requires a showing of deliberate or intentional *injury*, which is not evident from the record.

Moreover, the factual matters set forth in the Defendant’s Statement of Undisputed Facts accompanying the summary judgment motion and the Northup Affidavit demonstrate the absence of a genuine issue of material fact regarding the elements necessary to warrant non-dischargeability. Specifically, the following facts asserted by the defendant in his Statement of Undisputed Facts are undisputed in the record:

1. Debtor Robert C. Northup was a package deliverer for UPS.

2. Scott Huminski filed bankruptcy in 1996, Chapter 7 Case 96-10391. Dana Huminski filed bankruptcy in 1999, Chapter 7 Case 99-11697. Eastern Equipment & Services Corp. filed Chapter 11 in 1996, Case 96-10773, which was terminated at some point thereafter. All of the foregoing bankruptcies were filed in this Court and have been concluded.
3. Eastern Equipment and Services Corp. did business as "the Mail Shoppe" in Bennington, Vermont. The stock of the corporation was owned by Dana Huminski.
4. While Eastern Equipment was still in Chapter 11, Margaret Harris contemplated buying it.
5. Margaret Harris' son worked for Scott Huminski prior to the contemplated sale.
6. Margaret Harris actually did purchase the Mail Shoppe. The sale was a arm's length transaction. Margaret Harris was fully informed of the financial risks involved. She did not seek or rely upon the statements by Robert Northup, who was only a package deliverer and not a financial advisor.
7. Although it is alleged that Robert Northup tried to lure John Green away from the employ of the Mail Shoppe, in fact John Green did not leave the employ of the Mail Shoppe. Moreover, John Green cooperated with Plaintiffs in tape recording a telephone conversation and in making a complaint to Robert Northup's supervisor.
8. Robert Northup requested that plaintiffs withdraw the complaint they made to his supervisor, but they refused to do so. Instead, they sued him and his employer.

These undisputed facts are buttressed by the Northup Affidavit. Even after a careful consideration of the unverified "facts" alleged in the state court Complaints, this Court finds no dispute as to the material facts set forth above, and no material facts other than these.

In addition to the foregoing, summary judgment is warranted by the plaintiffs' failure to submit a separate, short and concise statement of disputed material facts sufficient to demonstrate a genuine issue of material facts as required by the local rules. *See Hoffman v. Adinolfi, O'Brien & Hayes, P.C.*, 185 B.R. 674 (Bankr. D.Conn. 1995); *see also* Chambers Rule No. 1, September 30, 1999, U.S. Bankruptcy Court, District of Vermont (all material facts set forth in movant's statement

of undisputed facts shall be deemed admitted unless controverted by statement required to be served by opposing party). Since the plaintiffs are proceeding *pro se*, the Court granted the plaintiffs' request for additional time [see doc #31-1] and thereafter entered the Order to Show Cause reiterating the need for movant to file a further response and extending the time for a timely response to be filed [see doc #36-1]. Despite being provided several opportunities to submit opposing papers sufficient to demonstrate a genuine issue of material fact, the plaintiffs failed or refused to do so.

Lastly, the claim being asserted in these proceedings by or on behalf of Eastern Equipment and Services Corporation shall be dismissed based upon the corporation's lack of representation by counsel. *See Rowland v. California Men's Colony*, 506 U.S. 194, 113 S.Ct. 716 (1993); *In re Bijan-Sara Corporation*, 203 B.R. 358, 359 (2nd Cir. BAP 1996).

Second Cause of Action [Section 727(a)]

The plaintiffs have also failed to allege or demonstrate facts sufficient to support a cause of action under §727(a) for denial of the debtor's discharge. In addition to the lack of disputed facts and the rationale set forth above, it must be noted that the Complaint and Adversary Proceeding Cover Sheet fail to set forth any specific acts which constitute the grounds for relief under §727(a). As indicated above, a nonmovant may not rest merely on averments in its pleadings to avoid summary judgment under Bankruptcy Rule 7056, but must set forth specific facts under oath demonstrating a genuine issue of material fact for trial. *See In re Ralar Distributors, Inc.*, 4 F.3d 62 (1st Cir. 1993); *In re Burns*, 196 B.R. 11 (Bankr. W.D.N.Y. 1996). Moreover, if evidence opposing summary judgment is merely colorable or is not significantly probative, summary judgment may be granted when the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party. *See Liberty Lobby*, 477 U.S. at 249-50, 106 S.Ct. at 2510-11; *Lane Capital*

Management, Inc. v. Lane Capital Management, Inc., 192 F.3d 337, 346 (2nd Cir. 1999). In this instance, the plaintiffs have failed to demonstrate a genuine issue of material fact in response to the matters filed of record by the movant, thereby failing to defeat summary judgment on the merits.

Accordingly, the cause of action sounding in denial of discharge under §727(a) cannot survive the motion for summary judgment either. See In re Rindlisbacher, 225 B.R. 180 (9th Cir. BAP 1998); In re Meinen, 228 B.R. 368 (Bankr. W.D.Penn. 1998); In re Carletta, 189 B.R. 258 (Bankr. N.D.N.Y. 1995).

Third Cause of Action [Declaratory Judgment]

The Complaint seeks a declaratory judgment presumably declaring the debt to be non-dischargeable and the discharge to be denied, thereby effectively implementing the relief sought through the preceding causes of action. However, since the first and second causes of actions are being dismissed by summary judgment, the request for relief which constitutes this third cause of action is *de jure*, empty and must be dismissed for all of the same reasons articulated above.

Issue of Pro Se Representation

Since the plaintiffs are proceeding *pro se*, this Court has taken extra care to construe any ambiguity and resolve any doubt in favor of the plaintiffs in addressing this motion, in recognition of the fact that the party who drafted the pleadings has no formal legal training. Thus, this Court remains mindful of its obligation to make reasonable allowances to prevent *pro se* litigants from inadvertent forfeiture of important rights. See In re Krautheimer, 210 B.R. 37, 41- 42 (Bankr. S.D.N.Y. 1997)(and cases cited therein). This Court has also twice extended the time for the plaintiffs to submit any additional available materials in opposition to the pending summary

judgment motion, but to no avail.

Conclusion

In summary, the Motion for Summary Judgment filed by the defendant against Scott Huminski, Dana Huminski and Scott Huminski as owner of litigious rights of Eastern Equipment and Services is granted because the plaintiffs have failed to demonstrate any issue of material fact and have likewise failed to demonstrate on the merits any basis why the complaint should not be dismissed.

The defendant's motion as against Eastern Equipment and Services Corp. is granted for the same reasons and also because that plaintiff has failed to appear by counsel upon notice and thus the complaint must be dismissed as to that plaintiff in any event.

Therefore, the defendant's Motion for Summary Judgment is granted and the complaint filed in this adversary proceeding is dismissed.

April 3, 2001
Rutland, Vermont

/s/ Colleen A. Brown
Colleen A. Brown
United States Bankruptcy Judge