

UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT



In re:

**Daniel J. O'Hara, Jr.,
Debtor.**

**Chapter 13 Case
02-10325**

**The Estate of John F. Dolan,
Plaintiff,**

v.

**Daniel J. O'Hara, Jr.,
Defendant.**

**Adversary Proceeding
03-1008**

Appearances: *John R. Canney, III, Esq.*
 Rutland, VT
 Attorney for Plaintiff

Gleb Glinka, Esq.
Cabot, VT
Attorney for Debtor-Defendant

ORDER
DENYING DEBTOR'S MOTION FOR JUDGMENT ON THE PLEADINGS

On October 14, 2003, the Debtor filed a Motion for Judgment on the Pleadings pursuant to FED. R. BANKR. P. 7012(b) (doc. #14) ("the Motion"), to which the Plaintiff interposed a memorandum in opposition, on November 13, 2003 (doc. #17) ("the Opposition"). On November 20, 2003, the Motion was set for oral argument on December 18, 2003. Oral argument was then postponed until today's date, February 17, 2004, for the same date and time as the pre-trial conference in this adversary proceeding, as the parties asserted that it would be more convenient to have the oral argument on the Motion held at the same time as the pre-trial conference. On February 13, 2003, however, the Debtor's counsel requested the Court decide his Motion on the papers filed in this matter. The Court has reviewed the Complaint, Answer, Motion, Opposition, and all exhibits filed with these documents, and has determined that no hearing is necessary to rule on this Motion. Thus, based on the papers filed and for the reasons set forth below, the Court finds that the Debtor has not sustained his burden for the relief sought in his Motion.

This Court has jurisdiction over this adversary proceeding and the Motion for Judgment on the Pleadings pursuant to 28 U.S.C. §§ 157(b)(2)(B), (J), (L) and 1334.

THE UNDISPUTED FACTS

Most of the material facts are not disputed. The Debtor has set forth the material facts as follows in his Motion, and the Plaintiff has not disputed them in its Opposition; thus, they are deemed undisputed. See Vt. LBR 7056(2)(a). On October 24, 2001, the Plaintiff obtained a judgment against the Defendant in the amount of \$144,026.85. On March 11, 2002, the Debtor filed for protection from his creditors under Chapter 7 of the Bankruptcy Code. In his schedules, the Debtor listed total unsecured indebtedness of \$258,928.18, including the judgment to the Plaintiff in the amount of \$144,026.85. On May 23, 2002, the Plaintiff filed a proof of claim for \$144,026.85. On August 1, 2002, this Court entered an Order granting the Debtor's Motion to Convert this case to one under Chapter 13. On August 5, 2002, the Debtor filed a proposed Chapter 13 Plan, funding payments of \$330.50 per month for 42 months through the contribution of his non-filing spouse, who was not liable for any of his debts. The Plaintiff, both directly and by its attorney, John R. Canney, III, was served with this proposed Chapter 13 Plan and with the Notice of Confirmation Hearing on August 8, 2002, as confirmed by the Bankruptcy Noticing Center (docs. #13 and #14). On September 24, 2002, this Court confirmed the Debtor's proposed Chapter 13 Plan. On October 11, 2002, the Plaintiff amended its claim to increase the amount to \$496,075.00. On December 12, 2002, the Plaintiff filed a complaint to revoke the confirmation order, which was dismissed on February 14, 2003. On February 10, 2003, the Plaintiff filed the present Complaint to revoke the confirmation order. On March 6, 2003, the Debtor accepted service and on March 12th answered the Complaint. On May 28, 2003, the Court entered a Scheduling Order allowing the parties until October 15, 2003 to file any dispositive motions in this proceeding. The Debtor filed the instant Motion seeking judgment on the pleadings, on October 13, 2003.

By virtue of supplemental allegations set forth in the papers relating to the Debtor's request for judgment on the pleadings, however, the Court finds there are now some facts which appear to be in dispute. The new facts presented include the following: in his Motion, the Debtor asserts that he was judgment proof at the time the case was converted to chapter 13, and that he could not have paid the judgment even if directed to in an order declaring Plaintiff's debt to be non-dischargeable, see Motion at ¶10; and in its Opposition, the Plaintiff alleges that the Debtor was the only one who knew the actual amount of the sum he embezzled from the Plaintiff, and his failure to disclose this amount in his schedules and plan is the fraud which entitles the Plaintiff to a judgment revoking the confirmation order in the Debtor's case, see Opposition at pp.1, 2 and 3.

DISCUSSION

(1) Judgment on the Pleadings

In order to obtain judgment on the pleadings, the Debtor must meet the standard set forth in FED. R. BANKR. P. 7012(b), which applies FED. R. CIV. P. RULE 12(c) in adversary proceedings, namely:

(c) Motion for Judgment on the Pleadings.

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

FED. R. BANKR. P. 7012(b) (citing FED. R. CIV. P. RULE 12(c)).

As noted above, the Plaintiff and Debtor have both presented matters outside the pleadings in connection with the Motion. Therefore, the Court will treat this Motion as a motion for summary judgment, under Rule 12(c). Thus, each party is entitled to an opportunity to respond to the new allegations. These issues may be addressed at the trial on the Plaintiff's Complaint.

(2) Summary Judgment Standard

Summary judgment is proper only if the record 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. See 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 (1986); see also Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. See Anderson, 477 U.S. at 247. Factual disputes that are irrelevant or unnecessary are not material. See id. Furthermore, materiality is determined by assessing whether the fact in dispute, if proven, would satisfy a legal element under the theory alleged or otherwise affect the outcome of the case. See id. The court must view all the evidence in the light most favorable to the nonmoving party and draw all inferences in the nonmovant's favor. See Cruden v. Bank of New York, 957 F.2d 961, 975 (2d Cir. 1992). 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 Anderson, 477 U.S. at 249; see also Delaware & Hudson Ry. Co. v. Conrail, 902 F.2d 174, 178 (2d Cir. 1990).


(3) The Instant Case

In order to prevail on a motion for summary judgment the moving party must demonstrate both that there are no material facts in dispute and that it is entitled to summary judgment as a matter of law. In this case, the Court finds that there are material facts in dispute and insufficient proof that the Debtor is entitled to judgment as a matter of law. In particular, the new factual issues raised in the Motion and Opposition, including but not limited to: (1) if and when the state court amended the judgment amount; (2) whether the Debtor knew and was required to disclose the full amount embezzled, rather than the amount of the judgment, at the time he filed his schedules and plan; and (3) whether the Debtor was judgment proof at the time either of the two adversary proceedings was filed, are all factual allegations which are material and in dispute. Moreover, there are legal issues, such as whether the Debtor was obligated to disclose in his plan the full amount embezzled, rather than the amount of the judgment as of the date of the conversion to chapter 13, and the *res judicata* impact of the confirmation order, which would need to be briefed before the Court would make a determination as to whether the Debtor is entitled to judgment as a matter of law. Thus, the Court finds there are not grounds for granting summary judgment at this time.

CONCLUSION

Accordingly, the Debtor's motion for judgment on the pleadings under FED. R. BANKR. P. 7012(b) is DENIED and the pre-trial conference set for today shall proceed, to set a date for the trial.

February 17, 2004
Rutland, Vermont



Colleen A. Brown
United States Bankruptcy Judge