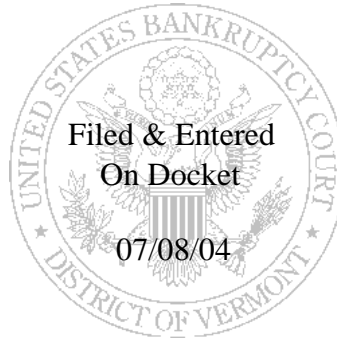


UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

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 Canney, Esq.*
 Rutland, VT
 Attorney for Plaintiff

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

ORDER

**DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND
DENYING DEFENDANT-DEBTOR'S CROSS-MOTION FOR SUMMARY JUDGMENT**

The Plaintiff moves for summary judgment on its complaint for revocation of the confirmation of the Debtor's chapter 13 plan and either dismissal of the chapter 13 case or a reconversion of the case to chapter 7. See Pl.'s Mot. Summ. J. at 4 (doc. #31). In support of its Motion for Summary Judgment, the Plaintiff has filed the transcript of a deposition of the Debtor, with numerous deposition exhibits, and an affidavit. However, the Plaintiff has not filed a Statement of Undisputed Facts. See Vt. LBR 7056-1(a)(1). The Debtor opposes Plaintiff's Motion for Summary Judgment and cross-moves for summary judgment. See Def.'s Opp'n & Cross-Mot. Summ. J. (doc. #35). The Debtor attaches a letter to his Opposition and Cross-Motion, but he too fails to file a separate, short and concise statement of disputed facts as required by Vt. LBR 7056-1(a)(2). The Court finds that there are material facts in dispute, and also finds both motions to be procedurally deficient. Therefore, both the Plaintiff's Motion for Summary Judgment and the Debtor's Cross-Motion for Summary Judgment are denied.

This Court previously issued an Order Denying Motion for Judgment on the Pleadings (doc. #24) in which it found most of the material facts in this proceeding to be undisputed. Specifically, it found:

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. In his schedules the Debtor listed total unsecured indebtedness of \$258,928.18,1 including this debt 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 monthly 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 (doc. #s 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 discharge, which was dismissed on February 14, 2003. On February 10, 2003, the Plaintiff filed the present complaint to revoke confirmation order. On March 6th, the Debtor accepted service and on March 12th the Debtor 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. The Debtor filed the Motion seeking judgment on the pleadings, on October 13, 2003.

See Oder Denying Motion for Judgment on the Pleadings at 2.

Yet, the Court also found some facts to be in dispute.

[B]y virtue of supplemental allegations set forth in the papers relating to the Debtor's request for judgment on the pleadings, there are now some facts which appear to be in dispute. The new facts presented include the following: in its Motion, the Debtor asserts that the Debtor was judgment proof at the time the case was converted to chapter 13 and could not have paid the judgment even if directed to in an order declaring Plaintiff's debt to be non-dischargeable, see Motion at par. 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 the 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.

See id. Treating the Debtor's Motion for Judgment on the Pleadings as a motion for summary judgment because both the Plaintiff and Debtor had presented matters outside the pleadings, see FED. R. BANKR. P. 7012(b) (citing FED. R. CIV. P. 12(c)), the Court found that the Motion and Opposition both disclosed material factual issues. The material factual issues found included, but were not limited to: (1) if and when the New Jersey 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 the adversary proceeding was filed. Moreover, the Court found there were 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. These issues needed to be briefed before the Court would make a determination as to whether the Debtor was entitled to judgment as a matter of law. Since the Court concluded that there were material facts in dispute which prohibited the granting of summary judgment, it was compelled to deny the Debtor's Motion for Judgment on the Pleadings.

The Court currently has the Plaintiff's Motion for Summary Judgment and the Debtor's Cross-Motion for Summary Judgment before it. This Court's Local Rules direct: "A separate, short, and concise statement of undisputed material facts *must* accompany every motion for summary judgment. *Failure to submit this statement constitutes grounds for denial of the motion.*" Vt. LBR 7056-1(a)(1) (emphasis added). Since both parties have failed to submit a statement of undisputed facts, denial of both motions is warranted on procedural grounds. Additionally, in the absence of any statements of undisputed facts, the Court must deny summary judgment due to the utter lack of evidentiary record upon which to grant judgment. Lastly, even assuming *arguendo* that the Court's findings of fact in its Order on the Debtor's Motion for Judgment on the Pleadings established a sufficient record, the Court would be obliged to deny both motions for summary judgment on the merits, since it finds that there are material facts in dispute that must be resolved before judgment can be entered.

Accordingly, IT IS HEREBY ORDERED that

- (1) the Plaintiff's Motion for Summary Judgment is DENIED;
 - (2) the Debtor's Cross-Motion for Summary Judgment is also DENIED;
 - (3) the parties are to **file the required pre-trial statement by noon on Friday, July 9, 2004** in connection with the trial set for July 13, 2004. See Standing Order #02-3 (Bankr. D. Vt. Dec. 2, 2002), available at <http://www.vtb.uscourts.gov>; and
 - (4) counsel for each party **appear by telephone at 9:30 a.m. on Friday, July 9, 2004** for a hearing to address the Plaintiff's Motion to Continue and the Plaintiff's Motion to Disqualify Attorney Glinka.
- SO ORDERED.**

July 7, 2004
Rutland, Vermont



Colleen A. Brown
United States Bankruptcy Judge