

FILED

at ___ O'clock & ___ min. ___ M

JUN 16 2004

BRENDA K. ARGOE, CLERK
United States Bankruptcy Court
Columbia, South Carolina 29201

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

In re:

Gregory Ignacio Piceno, Jr.,
Debtor.

Beverly Reinhardt f/k/a Beverly Piceno,

Plaintiff,

v.

Gregory Ignacio Piceno, Jr.,

Defendant.

Case No. 03-10248-jw

Adv. Pro. No. 03-80546-jw

ENTERED

JUN 16 2004

JUDGMENT

D.G.

Chapter 7

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, Piceno's Motion for Summary Judgment as to Reinhardt's first, second, and third causes of action is hereby granted; Piceno's request for fees and costs pursuant to Rule 11 of the Federal Rules of Civil Procedure is hereby denied; and the adversary proceeding is hereby dismissed.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,

June 16, 2004.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

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D.G.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER COMES BEFORE THE COURT upon the Motion for Summary Judgment ("Motion") filed by Gregory Ignacio Piceno, Jr. ("Piceno"), seeking summary judgment on Plaintiff Beverly Reinhardt f/k/a Beverly Piceno's ("Reinhardt") first, second, and third causes of action pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure and Rule 56(c) of the Federal Rules of Civil Procedure. As set forth below, the Court hereby grants the Motion.

FACTS

The following facts are admitted in the pleadings filed by the parties, or are matters of record in this case.

1. Reinhardt and Piceno were married on October 7, 1961. In or around August 1998, Reinhardt and Piceno separated.

2. On or about June 23, 2000, Piceno and Reinhardt entered into a Stipulated Judgment in which they agreed to divide certain property. Included in the property to be divided was an individual retirement account (“IRA”), which is the subject of this adversary proceeding.

3. The Stipulated Judgment provided that the IRA was community property and was to be divided as such according to a Qualified Domestic Relations Order (“QDRO”), which was to be prepared at a later date.

4. On or about June 23, 2000, the Superior Court of California, County of Kern entered a Judgment of Dissolution granting the divorce and incorporating the Stipulated Judgment.

5. The IRA was comprised of stock, which included certain biotech stocks. Subsequent to the acquisition of the stocks through the date of the Stipulated Judgment, the value of the stocks increased significantly.

6. Thereafter, the value of the IRA significantly decreased. Piceno asserts that the decrease in value is attributable to biotech stocks in the IRA, which suffered a substantial loss of value.

7. Subsequent to the divorce, Piceno moved to South Carolina.

8. On August 19, 2003, Piceno filed a Petition for Relief under Chapter 7 of the Bankruptcy Code (11 U.S.C. § 101, et seq.).

9. On November 18, 2003, Reinhardt filed a Complaint commencing this adversary proceeding seeking exception to Piceno’s discharge.

10. On December 17, 2003, Piceno filed an Answer to the Complaint.

11. Piceno served Reinhardt with his First Set of Interrogatories to Plaintiff, First Set of Request for Production of Documents to Plaintiff and First Request to Admit to Plaintiff (the “Discovery Requests”) on February 18, 2004.

12. On March 31, 2004, Reinhardt served Piceno with Plaintiff’s Answers to Defendant’s First Set of Interrogatories to Plaintiff and Plaintiff’s Answers to Defendant’s First Request for Production (the “Discovery Responses”).

13. On April 22, 2004, counsel for Piceno deposed Reinhardt.

14. Thereafter, Piceno filed the Motion. In support of the Motion, Piceno filed the Discovery Responses of Reinhardt and attached excerpts of the transcript of Reinhardt’s deposition to the Motion.

15. At the hearing on the Motion, Reinhardt filed an Objection to Motion for Summary Judgment (“Objection”). Reinhardt did not file or submit any affidavits in support of her Objection, but attempted to submit an unauthenticated letter in support of her argument at the hearing. Piceno objected to the timeliness of the Objection and submission of the letter. Reinhardt also submitted portions of the transcript of her deposition to support her Objection. Piceno did not object to the submission of the deposition excerpts.

CONCLUSIONS OF LAW

Piceno maintains that the admitted facts in this case establish that Reinhardt cannot prove the required elements of her alleged causes of action against him. Reinhardt failed to present any evidence to counter this argument. The admitted facts in this matter show that there is no genuine issue of material fact with regard to certain of the required elements of Reinhardt’s causes of action, and that Piceno is entitled to judgment as a matter of law. Accordingly, the Motion should be granted.

A. Reinhardt's Allegations

Reinhardt's Complaint alleges three causes of actions, seeking an exception to discharge based on fraud and defalcation, a breach of fiduciary duty and conversion of the funds in the IRA. All of Reinhardt's causes of action are premised on Piceno's alleged misuse of the funds in the IRA. Thus, if Reinhardt fails to prove that Piceno misused the funds in the IRA, all three causes of action must fail.

In her first cause of action, Reinhardt seeks an exception to discharge asserting that Piceno improperly misused funds in the IRA. Reinhardt alleges that Piceno is liable to her for fraud and defalcation in the handling of the funds in the IRA, and that such liability is a debt which should be excepted from discharge under 11 U.S.C. § 523(a)(4). Pursuant to 11 U.S.C. § 523(a)(4),

A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt... (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

Therefore, to succeed in excepting a debt from discharge due to fraud or defalcation under 11 U.S.C. § 523(a)(4), the creditor must show that a debt arose from fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.¹

In her second cause of action, she alleges a breach of fiduciary duty. To prevail on a claim for breach of fiduciary duty, the plaintiff must prove (a) a fiduciary duty existed and (b) a

¹ Reinhardt also generally alleges in the last paragraph of her first cause of action that the "debt" should be excepted from discharge under § 523(a)(5), which pertains to a debt to a spouse, former spouse, or child of the debtor, for alimony, maintenance or support of that person. However, the only debt alleged is the debt arising by the alleged malfeasance or misconduct of Piceno. As such, if Reinhardt fails to prove the alleged malfeasance or misconduct (*i.e.*, the alleged fraud and defalcation), there is no debt to be considered for possible exception to discharge under § 523(a)(5). In order for Reinhardt to prevail on excepting "the debt" from discharge under § 523(a)(5), she must prove that the alleged debt exists, *i.e.*, she must first prove that Piceno misused the funds. The Court notes that in the Joint Pre-Trial Order submitted by the parties, Reinhardt did not identify 11 U.S.C. § 523(a)(5) as being an issue to be litigated.

breach occurred. Restatement (2d) of Torts § 874 (1979). Reinhardt's claim for breach of fiduciary duty relies on the alleged misuse of the funds in the IRA to be the breach. Thus, if Reinhardt fails to submit evidence proving that Piceno misused the funds in the IRA, she cannot prove that a breach occurred and her claim for breach of fiduciary duty fails.

Finally, to sustain a cause of action for conversion, the plaintiff must prove (a) an interest by the plaintiff in the thing converted; (b) the defendant converted the property to his or her own use; and (c) the use was without the plaintiff's permission. See Crane v. Citicorp Nat'l Services, Inc., 313 S.C. 70, 437 S.E.2d 50 (1993) (superceded by statute on other grounds); Owens v. Andrews Bank & Trust Co., 265 S.C. 490, 220 S.E.2d 116 (1975); and Ralph King Anderson, Jr., *South Carolina Request to Charges - Civil* § 3-2 (2002). Accordingly, Reinhardt's claim for conversion is also premised on Piceno's alleged misuse of the funds in the IRA, which is necessary to show that Piceno converted the property for his own use without Reinhardt's permission. If Reinhardt fails to prove that Piceno misused the funds in the IRA, her cause of action for conversion fails.

B. Summary Judgment

Piceno is entitled to judgment as a matter of law because Reinhardt failed to produce any evidence - either in her Discovery Responses, her deposition testimony or in a timely filed objection to the Motion - to prove the required elements for the three causes of actions in her Amended Complaint. Based on the uncontroverted facts in this case, no genuine issue of material fact exists and, therefore, summary judgment is appropriate.

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. When a motion for summary judgment is filed, the Court does not

weigh the evidence, but determines if there is a genuine issue for trial. Listak v. Centennial Life Insurance Company, 977 F.Supp. 739, 743 (D.S.C. 1997), citing Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 249, 106 S. Ct. 2505, 2510, 91 L.Ed. 2d 202 (1986). The Fourth Circuit has summarized Rule 56 procedure as follows:

Fed.R.Civ.P. 56 prescribes specific procedures to be followed in submitting evidence for or against a summary judgment motion. These procedures help assure the fair and prompt disposition of cases. They ensure further that neither side in a dispute can unfairly surprise the other with evidence that the other has not had time to consider. They also allow a district court to ascertain, through criteria designed to insure reliability and veracity, that a party has real proof of a claim before proceeding to trial.

Orsi v. Kirkwood, 999 F.2d 86, 91 (4th Cir. 1993).

Once a moving party has made an initial showing that there is no general issue of material fact, the burden then shifts to the non-moving party to go beyond the pleadings and set forth affidavits, depositions, answers to interrogatories or admissions to show specific facts indicating a genuine issue for trial. Campbell v. Capital One Bank (In re Broughton), C/A No. 99-06953-W, Adv. Pro. No. 00-80143, slip op. (Bankr. D.S.C. Mar. 20, 2001).

In Orsi, the Fourth Circuit affirmed the district court's grant of summary judgment based on the failure of the non-moving party to submit sworn, authenticated evidence in accordance with Fed. R. Civ. P. 56. The Fourth Circuit held that the district court correctly refused to consider letters offered by the non-moving party in response to the summary judgment motion, because the letters were untimely, unauthenticated and not submitted in a form which met the requirements of Fed. R. Civ. P. 56. Orsi, 999 F.2d at 91. The Fourth Circuit stated that "[i]t is well established that unsworn, unauthenticated documents cannot be considered on a motion for summary judgment." Id. at 92 (citations omitted). To be admissible at the summary judgment stage, a document must be attached to an affidavit and authenticated by its author in the affidavit

or deposition. Id. at 92. Furthermore, the submission of the letters in opposition to the summary judgment motion the day of the hearing was untimely pursuant to Fed. R. Civ. P. 56(c). Id. at 92; See also Foy v. Norfolk & Western Ry. Co., 377 F.2d 243, 246 (4th Cir. 1967) (holding that an untimely offer of proof is the same as no offer of proof).

Similarly, in Rohrbough v. Wyeth Lab., the Fourth Circuit held that certain evidence was inadmissible because it was not properly submitted to the district court prior to the hearing on a motion for summary judgment. 916 F.2d 970, 973 (4th Cir. 1990). The Fourth Circuit also noted that most of the inadmissible evidence (including a letter from a physician) was unsworn hearsay because it was not properly authenticated and, therefore, could not be considered on a summary judgment motion. Id. at 974.

In the case at bar, Reinhardt failed to submit any admissible evidence supporting her assertion that Piceno misused or improperly defalcated funds from the IRA. At the hearing, Reinhardt submitted a letter written by Mark E. Albert, CPA (the “Letter”) to support her position that a genuine dispute exists. Submission of the Letter the day of the hearing in response to the Motion is untimely and not submitted in a form that meets the requirements of Fed. R. Civ. P. 56. Orsi, 999 F.2d at 91.² Further, Reinhardt failed to authenticate the Letter and, therefore, the Court will not consider the Letter as evidence that there is a genuine dispute. See Orsi, 999 F.2d at 92. However, even if the Court were to consider the Letter, the Court notes that the Letter fails to raise a general issue of material fact.³ The Letter merely indicates that certain stock was sold and that certain withdrawals were made from the IRA. The Letter does

² Although the Letter was appended to Reinhardt’s deposition, it was not presented in opposition to the Motion until the day of the hearing.

³ The Court in Orsi further noted that a court can consider a late affidavit if it chooses to do so. Orsi, 999 F.2d at 91; Fed. R. Civ. P. 6(d). Generally such an exception is not considered unless cause or some other excusable neglect is shown. Id. Counsel for Plaintiff’s allegation that the Clerk’s Office told him, without substantiation, that he could file his documents the day of the hearing is insufficient. Further, even if the timeliness of the Letter is not considered, the Letter was not submitted in proper, authenticated form. Id.

not raise a genuine issue of material fact regarding any misuse of the funds in the IRA.

At the hearing, Reinhardt also submitted portions of the transcript of her deposition to support her Objection. Piceno did not object to the submission of such portions of the deposition transcript. Although Reinhardt submitted the portions of the deposition transcript, the deposition transcript excerpts support Piceno's position that there is no genuine issue of material fact. Reinhardt failed to identify any portion of her deposition transcript which supported her Objection.

Thus, due to Reinhardt's failure to submit any evidence indicating a genuine issue of material fact for trial, Piceno is entitled to judgment as a matter of law.

CONCLUSION

Accordingly, based on the Motion, the supporting Memorandum filed with the Motion, Reinhardt's Discovery Responses, Reinhardt's deposition testimony, the pleadings filed with the Court, and the arguments made by counsel at the hearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

(1) Piceno's Motion for Summary Judgment as to Reinhardt's first, second, and third causes of action is hereby **GRANTED**; and

(2) Piceno's request for fees and costs pursuant to Rule 11 of the Federal Rules of Civil Procedure is hereby **DENIED**;⁴ and

(3) The adversary proceeding is hereby dismissed.

IT IS SO ORDERED.



The Honorable John E. Waites
United States Bankruptcy Judge

Columbia, South Carolina,
June 16, 2004.

⁴ In his Motion, Piceno sought sanctions against Reinhardt pursuant to Fed. R. Civ. P. 11. This Court has previously found that it is procedurally improper to include a request for such sanctions without serving the request separately from the underlying motion and that the motion requesting sanctions be served upon the opposing party twenty-one days prior to it being filed with the Court. See In re Sammon, 253 B.R. 672, 678-79 (Bankr. D.S.C. 2000); Fed. R. Bankr. P. 9011(c)(1)(A). It appears from the pleadings presented that neither of these procedural requirements was met in this case, therefore, the Court will not consider sanctions.