UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

---

In re:

AMY LYNN KIRCH, Chapter 7
Case No.: 03-16670

Debtor.

---

NORTHERN FEDERAL CREDIT UNION,

Plaintiff, Adv. Pro. No.: 04-90065

v.

AMY LYNN KIRCH,

Defendant.

---

APPEARANCES:

Anthony Inserra, Esq.
Attorney for the Debtor/Defendant
531 Washington Street
Suite 3401
Watertown, New York 13601

Antonucci Law Firm David P. Antonucci, Esq.
Attorney for the Plaintiff
12 Public Square
Watertown, NY 13601

Hon. Robert E. Littlefield, Jr., United States Bankruptcy Judge

**Memorandum-Decision and Order**

Northern Federal Credit Union (the "Credit Union") commenced the above-captioned adversary proceeding against Amy Lynn Kirch (the "Debtor") by filing an adversary complaint on March 15, 2004 (the "Complaint"). In this action, the Credit Union seeks an order (1) denying the Debtor's general discharge pursuant to 11 U.S.C. §§ 727(a)(3), (a)(4) and/or (a)(6),[1] (2) dismissing the case with prejudice pursuant to 11 U.S.C. § 109(g), and (3) awarding the Credit Union costs and disbursements, including reasonable

[1] The Credit Union proceeds under three separate causes of action, but not in this particular order. For purposes of clarity, the court will discuss each section in accordance with its statutory order.

attorney's fees. Presently before the court is the Debtor's motion to dismiss the adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7012(b), which incorporates Federal Rule of Civil Procedure 12(b)(6), and her related request for an award of costs and attorney's fees as sanctions for having to answer and defend an allegedly "frivolous" action.

**Jurisdiction**

The court has jurisdiction over the parties and subject matter of this core proceeding pursuant to 28 U.S.C. §§ 157(a), 157(b)(1), (b)(2)(J), and 1334(b).

**Facts**

The Debtor filed a voluntary petition under Chapter 7 of the United States Bankruptcy Code (11 U.S.C. §§ 101 - 1330) (the "Code") on October 6, 2003 (the "Petition"). The Petition lists personal property valued at $20,415.85, including an eleven year old horse valued at $500, secured debt totaling $50,007.89, unsecured debt totaling $14,450.48, monthly net income of $2,515.04, and monthly expenses of $2,478. The Credit Union is listed as a secured creditor of the Debtor by virtue of a mortgage on the Debtor's former residence that she quit claimed to her ex-spouse three to four years prior to filing bankruptcy, and as an unsecured creditor by virtue of a consumer credit account with an outstanding balance of $2,220.16 as of the filing date.

On November 12, 2003, the Trustee and counsel for the Credit Union, David P. Antonucci, examined the Debtor at the § 341 meeting of creditors, which was closed upon the Trustee's filing of a no asset report on November 14, 2003. The Credit Union, however, moved to further examine the Debtor pursuant to Federal Rule of Bankruptcy Procedure 2004 and to extend its time to object to discharge. By Order dated January 9, 2004, the court granted the Credit Union's motion. Pursuant to the terms of the Order, the 2004 examination occurred on March 2, 2004 ("2004 Examination"). Soon afterward, the Credit Union filed the Complaint based upon information obtained at the 2004 Examination. On March 29, 2004, the Debtor filed an answer denying all substantive allegations of the Complaint and asserting the affirmative defense that the

Complaint failed to state a cause of action upon which relief could be granted. The answer was followed by the Debtor's filing of the motion to dismiss on April 9, 2004 (the "Motion to Dismiss").

**Arguments**

The Credit Union makes the following allegations in support of its argument that the denial of the Debtor's discharge is warranted: (1) the Debtor has failed to retain any financial records concerning her income and expenses (Complaint ¶ 18); (2) the Debtor's Schedule "J" is false and, as such, is designed to hinder, defraud or delay creditors (*Id.* ¶ 23); and (3) the Debtor appeared at the 2004 Examination as required, but failed to provide the requested bank records, excluding tax returns, as ordered (*Id.* ¶ 12). With respect to the second allegation, the Credit Union specifically contends that the Debtor's monthly utilities and transportation costs are significantly inflated, that the Debtor lists business expenses that do not correlate to her tax returns, and that her maintenance of a horse is inconsistent with her declaration of insolvency. In addition, although not specifically pleaded in the Complaint, the Credit Union alleges that the Debtor's bank records reveal that she earns or receives approximately $600 - $800 of undisclosed monthly income.[2]

First and foremost, the Debtor maintains that her schedules and statements are accurate as filed.

[2] Notwithstanding the well-known requirement that allegations of fraud be pled with specificity, the Credit Union made this allegation for the first time at the May 6, 2004 hearing on the Motion to Dismiss. Following oral argument, the court adjourned the matter to June 2, 2004, over the opposition of Mr. Inserra, to allow the parties to resolve this issue on the merits. Despite notice of the deficiencies in its original pleading, the Credit Union did not move to amend the Complaint. On May 27th, the Debtor filed an affidavit clarifying her income and reaffirming the figures listed in the Petition (the "Kirch Affidavit"). The matter was heard on June 2nd, and the court ordered the Credit Union to make additional submissions, if any, on or before June 16th. The Debtor was ordered to submit her reply, if any, on or before June 30th. On June 21st, Mr. Inserra filed a personal affidavit stating, "The deadline has passed without any further submissions from the Plaintiff or any substantiation of the Plaintiff's various allegations of fraud by the Debtor." (Inserra Aff. ¶ 11.) On June 23rd, one week after submissions were due and without having sought an extension of time from the court, the Credit Union filed the affidavit of Joy Shaffer, Senior Credit Solutions Specialist for the Credit Union (the "Schaffer Affidavit") and its memorandum of law in opposition to the Motion to Dismiss. Pursuant to Federal Rule of Bankruptcy Procedure 7016, which incorporates Federal Rule of Civil Procedure 16, the court will disregard the late submissions by the Credit Union. Nonetheless, even if the court were to consider the same, they would not bolster the Credit Union's case, since the Shaffer Affidavit relies upon a spreadsheet that the affiant, who does not have personal knowledge of the Debtor's income or expenses, created by reviewing and analyzing the Debtor's Credit Union bank records. (Shaffer Aff., Ex. A.)

First, the Debtor argues that there is no evidence to support the Credit Union's claim of insufficient financial records, because the Debtor produced two years of Federal and State tax returns, six months of cellular telephone bills, and two months of Niagara Mohawk bills. In addition, she offered to sign any necessary authorization for the retrieval of records relating to her closed Credit Union accounts and to produce account statements for her current bank accounts. Second, the Debtor argues that her expenses are actual, not inflated. In addressing the Plaintiff's specific charges regarding expenses, the Debtor contends that the Credit Union's judgments regarding her horse maintenance charges and tax deductions are wholly irrelevant to the question of whether her Schedule "J" is accurate and complete. Contrary to the Credit Union's position, the Debtor suggests that some of the listed expense may in fact be underestimated. As an example, she notes the inclusion of only $150 for telephone expenses per month, which she uses mainly for work purposes but which are not reimbursed by her employer, although her telephone bills evidence a higher average monthly charge of $195.18. Third, the Debtor states that she has complied with all document requests and, at all times, acted in good faith to obtain the desired Chapter 7 discharge. As a show of good faith, the Debtor points to her inclusion of a $20 per month automatic pay deduction for contribution to the United Way, and to her payment of $340 per month to Consumer Credit Counseling for six months prior to filing the Petition.

According to the Debtor, the facts do not support any of the allegations made by the Credit Union. Moreover, the Debtor asserts that, under these circumstances, which were known to the Credit Union following the 2004 Examination, the Credit Union had no basis upon which to commence the adversary proceeding. As for the additional $600 - $800 per month, the Debtor explains that she (1) deposited and cashed $1,500 worth of checks for a prior boyfriend (Kirch Aff. ¶ 3), (2) received and deposited $1,500 from a single candle party that was immediately used to pay the candle manufacturer, resulting in a net profit of less than $100 (*Id.* ¶ 5), (3) received a loan of $1,000 from her father which she deposited into her Credit Union account, but immediately repaid (*Id.* ¶ 6), and (4) received an unexpected one-time, pre-tax bonus of

$3,600 (*Id.* ¶ 7). Based on these factors, she argues that any alleged discrepancy in her Petition is "superficial" at best.

**Discussion**

Procedurally, the Debtor has moved to dismiss the Complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Because the court will consider the timely submissions[3] of the parties in addition to the pleadings, the court *sua sponte* converts the Debtor's motion to dismiss to one for summary judgment under Fed. R. Civ. P. 56, made applicable to this proceeding by Fed. R. Bankr. P. 7056. *See* Fed. R. Civ. P. 12(b)(6) (if, on a Rule 12(b)(6) motion, matters outside the pleading are presented to and

not excluded by the court, the motion shall be treated as one for summary judgment); *Pani v. Empire Blue Cross Blue Shield*, 152 F.2d 67, 75 (2d Cir. 1998) (consideration of extrinsic material on a motion to dismiss requires that the court convert the motion to one for summary judgment); *Morelli v. Cedel*, 141 F.3d 39, 45 (2d Cir. 1998) (consideration of matters outside the pleadings converts a motion to dismiss into a summary judgment motion).[4] Under Fed. R. Civ. P. 56(c), summary judgment is proper "if the pleadings, depositions,

---

[3] *See supra* note 2.

[4] Since the court, on its own initiative, converts the Motion to Dismiss into one for summary judgment, it immediately dispenses with the Credit Union's argument that summary judgment cannot be granted in favor of the Debtor because she has not complied with Local Bankruptcy Rule 7056-1 (Pl.'s Answering Aff. ¶ 23). This Rule provides:

> *On a motion for summary judgment* pursuant to Fed.R.Civ.P. 56, there shall be annexed to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue, with specific citations to the record. The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue, with specific citations to the record where the factual issues arise. All material facts set forth in the statement served by the moving party shall be deemed admitted unless controverted by the statement served by the opposing party. The motion for summary judgment may be denied if the moving party fails to file and serve the statement required by this paragraph.

Local Bankruptcy Rule 7056-1 (emphasis supplied). The Debtor did not move for summary judgment, but instead moved to dismiss under Federal Rule of Civil Procedure 12(b)(6). Local Bankruptcy Rule

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." Entry of summary judgment is therefore appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Where, as here, the non-moving party would bear the burden of proof at trial, the moving party must first make a *prima facie* showing that there is no genuine issue of material fact or that there is no evidence to support the non-moving party's case. *Id.* at 324. If this is done, the non-moving party must respond with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Throughout this inquiry, all justifiable inferences are to be drawn in favor of the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

It follows then that the court must first look to the substantive law of the case to discern whether issues of material fact exist that would preclude the entry of summary judgment.

*I. Code § 727(a)(3)*

Code § 727(a)(3) provides that a discharge shall be granted unless:

> the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case.

11 U.S.C. § 727(a)(3). The purpose of this section is to provide creditors, the trustee, and the court with complete and accurate information concerning a debtor's financial affairs, and to ensure that all interested parties receive sufficient information to trace a debtor's financial history for a reasonable period of time prior to the bankruptcy filing. *In re Jacobowitz*, 309 B.R. 429, 436 (S.D.N.Y. 2004) (citations omitted); *see also Meridian Bank v. Alten*, 958 F.2d 1226, 1234 (3d Cir. 1992) ("The purpose of section 727(a)(3) is to make

---

7056-1, therefore, is inapplicable. As such, no procedural error has been committed by the Debtor.

full financial disclosure a condition precedent to the grant of discharge in bankruptcy.").

In order to satisfy its initial burden of proving that the case falls within Code § 727(a)(3), a creditor objecting to the discharge must show (1) that the debtor failed to maintain or preserve adequate records, and (2) that such failure makes it impossible to ascertain the debtor's financial condition and material business transactions." *Meridian Bank*, 958 F.2d at 1232. The Second Circuit in the case of *In re Underhill*, 82 F.2d 258 (2d Cir. 1936), has clarified that the requirement of "adequate" bookkeeping is a question in each instance of reasonableness in the particular circumstances. Thus, what will justify failure to keep records depends largely upon how sophisticated the debtor is, and on the level of complication associated with the debtor's pre-bankruptcy financial dealings.

Two questions arise in the context of this summary judgment inquiry: first, whether the Credit Union has made a satisfactory showing that the Debtor failed to maintain or preserve adequate records; second, whether such a showing, if reduced to evidence, would be sufficient to carry the Credit Union's burden of proof at trial. Based upon the parties' submissions, both questions must be answered negatively.

The Debtor has met her initial responsibility of demonstrating the absence of a genuine issue of material fact, thereby shifting the burden to the Credit Union to come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). In response to the Credit Union's discovery requests, the Debtor has produced several statements from Niagara Mohawk (Mot. to Dismiss, Ex. D), the Certificate of Title for her automobile (*Id.*, Ex. E), a statement from Verizon Wireless covering the period from January 2003 to June 2003 (*Id.*, Ex. F), and a check stub from her employer, Advanced Business Systems, dated July 3, 2003 (Kirch Aff., Ex. A). In addition, the Debtor has submitted an affidavit methodically explaining the miscellaneous deposits targeted by the Credit Union. Finally, the Debtor testified at the 2004 Examination that, as of that date, her employment, expenses, and income had not changed. (2004 Examination Transcript ("Tr.") at 7.) She further testified that she did not have health benefits at the time of filing (*Id.* at 9), that she receives a flat rate of $50 per week from her employer for

mileage, which is why she does not keep a mileage log (*Id.* at 10), that she is not reimbursed by her employer for her cellular telephone charges (*Id.* at 14), and that she supplied the figures in her Petition from memory and by reviewing her monthly bills and review of certain financial records (*Id.* at 17).

The Credit Union nonetheless contends that the Debtor has "kept hopelessly inadequate financial records" that make it "impossible to glean any additional information." (Shaffer Aff. ¶¶ 14, 15.) The court disagrees. This case mainly involves the personal finances of the Debtor; although the Debtor does incur some business-related expenses, she has testified that none of these expenses are reimbursed by her employer. The Debtor is not a business owner, officer, or director; thus, she can only be expected to maintain records in a manner consistent with her position as a salaried, non-commissioned, employee.

Review of the parties submissions leads the court to conclude that the Credit Union has only one plausible objection to the Debtor's records, or lack thereof: although the Debtor offered to produce bank account statements, she allegedly refused to produce copies of a check ledger or cancelled checks from the same bank account.[5] Not only would the Debtor incur an unnecessary cost in obtaining copies of cancelled

---

[5] Based upon the following colloquy between counsel at the 2004 Examination, even this conclusion is a stretch:

> Mr. Antonucci: Again, I'll visit the issue of banking records. Can we expect them to be produced?
> Debtor's Counsel: What banking records are you looking for, specifically?
> Mr. Antonucci: The Watertown Savings Bank records and the credit union accounts, unless we can take those directly.
> Debtor's Counsel: I can get them.
> . . . .
> Debtor's Counsel: I just spoke with my client about whether or not she has or keeps her records regarding Watertown savings account; she doesn't keep the records, but she can, if necessary, if you insist, she can get copies from the bank. Is this what you want?
> Mr. Antonucci: That's what I'd like. I'm more concerned with the canceled checks. Is there a check ledger as opposed to the actual checks and statements?
> . . . .
> Mr. Antonucci: I would like, quit frankly, to see the canceled checks.
> Debtor's Counsel: Canceled checks. All right. I'm going to object to that at this point; there's an expense associated with that that I think is completely unnecessary.
> Mr. Antonucci: All right. That's fine. And I have no further questions. I would like a copy of the return.
> Debtor's Counsel: That is your copy of the return, and that is your copy of the bill.

checks, but she would also be undertaking a futile exercise since the same information would appear on each set of documents. Moreover, it appears from the transcript cited herein that this objection was not vigorously pursued by the Credit Union.

Accordingly, even when viewed in a light most favorable to the Credit Union, the facts do not support the Credit Union's position that the Debtor has provided sub-par disclosure in this case. Turning to the second question, even if the Debtor failed to maintain or produce certain documents that the Credit Union deemed relevant, the Credit Union still could not show that it is impossible to trace the Debtor's financial history from the records provided. This is not a Debtor whose income to debt ratio is suspect; she is not involved in any complex business operations; and the Petition, on its face, fails to show either unusual charges for extraordinary items or the excessive accumulation of debt immediately prior to filing. Contrary to the Credit Union's assertions, her financial history is seemingly straightforward. In fact, this case amounts to no more than the "garden variety" filing.

Summary judgment is therefore appropriate in favor of the Debtor on the Credit Union's Code § 727(a)(3) cause of action.

*II. Code § 727(a)(4)*

Code § 727(a)(4)(A) preserves the sanctity of the "fresh start" by carving out an exception to discharge for those debtors who "knowingly and fraudulently, in or in connection with the case made a false oath or account." To sustain an objection to discharge under this section, an objecting creditor must establish five elements: (1) the debtor made a statement under oath; (2) such statement was false; (3) the debtor knew the statement was false; (4) the debtor made the statement with fraudulent intent; and (5) the statement related materially to the bankruptcy case. *In re Bodenstein,* 168 B.R. 23, 32 (Bankr. E.D.N.Y. 1994) (citing *In re Beaubouef,* 966 F.2d 174, 178 (5th Cir. 1992)).

---

(Tr. at 21 - 24.)

As discussed *supra*,[6] the court limits its discussion to those allegations contained within the four corners of the Complaint. The Complaint documents four instances of fraudulent conduct by the Debtor:

> a. The Defendant maintains a lower apartment in a small house and lives alone. However, her heating and electric bills are in amount equal, upon information and belief, [to those of] a family of four.
>
> b. The Defendant claims business expenses in Schedule J that are not contained in her tax returns.
>
> c. The Defendant maintains a horse but claims to be insolvent.
>
> d. The transportation expense of the debtor seems grossly inflated based on her testimony at the Bankruptcy Rule 2004 examination.

(Complaint ¶ 25.) In addition to these allegations, the Credit Union offers the sweeping statement that "it only follows that if the debtor cannot demonstrate her expenses, the oaths concerning the schedules may be false." (Pl.'s Answering Aff. to Mot. to Dismiss ¶ 21.)

Again, the court must begin by looking at the basis for the Debtor's Motion to Dismiss. The Debtor filed an answer to the adversary proceeding denying all allegations of fraud. In addition, once the Debtor learned of the Credit Union's belief that she earned a significant amount of undisclosed income, she promptly supplied an affidavit clarifying her income and explaining each and every statement or omission challenged by the Credit Union. In support of the Motion to Dismiss, the Debtor maintains that her statements and schedules were accurate as of the time of filing, and that any discrepancies were caused by irregularities that should not be included in her annual income. She has established a *prima facie* showing that she is entitled to judgment as a matter of law.

The burden of persuasion now shifts to the Credit Union. The Credit Union, after adequate time for discovery and questioning of the Debtor at the 2004 Examination, has failed to show that its fraud claim is factually supported. Each of the four allegations included in the Complaint is speculative, *i.e.*, the Debtor's heating costs *should* be less; the Debtor's tax deductions *should* correlate precisely with her business

[6] *See supra* note 1.

expenditures; a bankrupt individual *should not* be able to maintain a horse; and the Debtor's transportation costs, despite her frequent work-related travel, *should* be less. None of these allegations raise a genuine, triable issue of fact. Moreover, as the non-moving party, the Credit Union "may not rely on mere conclusory allegations nor speculation, but instead must offer some hard evidence showing that its version of the events is not wholly fanciful." *Golden Pac. Bancorp v. FDIC*, 2004 U.S. App. LEXIS 14394, *10 (2d Cir. 2004) (citing *D'Amico v. City of New York*, 132 F.3d 145, 149 (2d Cir. 1998). "In other words, when the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (internal quotation marks omitted).

Even if the above facts were material to a Code § 727(a)(4) determination, they would not, without more, prove that the Debtor had *fraudulently* made false statements or a false oath. In order to survive summary judgment, the Credit Union must make a sufficient showing to establish the inference of fraudulent intent on the part of the Debtor. *See Celotex Corp. v. Catrett*, 477 U.S. at 322-323 (where non-moving party fails to make a sufficient showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of that party's case necessarily renders all other facts immaterial). The Credit Union cannot overcome this hurdle.

Summary judgment is therefore appropriate in favor of the Debtor on the Credit Union's Code § 727(a)(4) cause of action.

*III. Code §§ 109(g)[7] and 727(a)(6)*

[7] The Credit Union references this section together with Code § 727(a)(6) as the basis for its first claim for relief, but neither party addresses the same in connection with the pending motion to dismiss or otherwise. Without further discussion, since the Plaintiff appears to have abandoned its claim that the Debtor is ineligible for Chapter 7 relief because of a bad faith dismissal of a prior filing within 180 days prior to the filing of this case, the court dismisses without prejudice any cause of action thereunder for failure to prosecute.

The Credit Union's final cause of action seeks to deny the Debtor's discharge on the ground of her refusal to obey a lawful order of this court. Code § 727(a)(6). The Credit Union's cause of action is supported by the single allegation that the Debtor refused to obey the court's February 10, 2004 Order requiring the Debtor to appear at the 2004 Examination and to provide Mr. Antonucci with "all documentation demanded by the debtor [sic] including all records of purchases, receipts and banking records relating to the debtor."

The Credit Union acknowledges that the Debtor provided counsel with tax returns and cellular telephone bills at the 2004 Examination, but takes issue with Mr. Shaffer's alleged "refusal to produce the [bank] records as some cost might exist." (Pl.'s Answering Aff. ¶ 15.) After reviewing the transcript of the 2004 Examination, the court finds the Credit Union's allegation to be wholly unsubstantiated. The Debtor's counsel did agree to provide Mr. Antonucci with statements for the Debtor's Watertown Savings Bank accounts (Tr. at 23), but objected to his request for cancelled checks on the basis that there would be a fee associated with retrieval of the cancelled checks from the bank. Following that objection, Mr. Antonucci replied, "All right. That's fine." No further discussions ensued over the production of documents.

In light of the Credit Union's failure to show any meritorious basis upon which it could prove that the Debtor violated an order of this court, the court concludes that summary judgment is also appropriate in favor of the Debtor on the Credit Union's Code § 727(a)(6) cause of action.

*IV. Attorney's Fees*

Both parties have requested attorney's fees in this matter, but neither party has done so by separate motion as required by Federal Rule of Bankruptcy Procedure 9011(c)(1)(A). This issue is identical to that raised in another adversary proceeding involving the same parties, *see Northern Federal Credit Union v. Eliopoulos, Case No.: 03-16950, Adv. Pro. No.: 04-90063,* wherein the court determined that the facts and circumstances justified its issuance of a show cause order against the Credit Union and its counsel pursuant to Federal Rule of Bankruptcy Procedure 9011(c)(1)(B). The parties are fully familiar with the court's July

27, 2004 Memorandum-Decision and Order in that matter. The facts and circumstances of this case are not so egregious as to necessitate the same course of action here.

Consequently, the "American Rule" governs and the parties are required to provide for their own counsel fees. *See Aleyska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240, 247 (attorneys' fees are not ordinarily recoverable by the prevailing litigant in federal litigation unless statutorily authorized).

**Conclusion**

Based on the foregoing, the court concludes that the Debtor has met the standard for summary judgment on all three causes of action asserted by the Credit Union against her. In accordance with the purpose of the summary judgment rule to isolate and dispose of factually unsupported claims, the Complaint is hereby dismissed.

Dated: July 27, 2004
Albany, New York

_____
Hon. Robert E. Littlefield, Jr.
United States Bankruptcy Court Judge