UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MARK W. NICASTRO — CASE NO. 9l-0l280

Debtor — Chapter 12

EVANS EQUIPMENT CO., INC.,

Plaintiff

vs. — ADV. PRO. NO. 9l-60l9lA

MARK W. NICASTRO,

Defendant

APPEARANCES:

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Of Counsel

STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court considers the motion of Mark W. Nicastro ("Debtor") for an order dismissing the complaint filed herein by Evans Equipment Co., Inc. ("Evans") pursuant to Federal Rule of Bankruptcy Procedure ("Fed.R.Bankr.P.") 70l2(b) or in the alternative for summary judgment pursuant to Fed.R.Bankr.P. 7056.

The motion was argued at a term of this Court held in Utica, New York on October 8, l99l and the parties were given until November l, l99l to submit memoranda of law. Neither party submitted any memoranda.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over the parties and subject matter of this core proceeding pursuant to 28 U.S.C. §§1334(b) and l57(a), (b)(l) and

(b)(2)(I,K).

FACTS

On May 2, l99l, the Debtor filed a voluntary petition pursuant to Chapter 12 of the Bankruptcy Code (ll U.S.C. §§101-1330) ("Code"). Thereafter and on or about July 30, l99l, the Debtor filed a Chapter 12 Plan ("Plan"), which treated Evans' claim against the Debtor as unsecured, providing for a payment dividend of l0% of the claim.

On September 4, l99l, Evans instituted this adversary proceeding by filing a complaint seeking a declaration that its claim against the Debtor is secured by a lien on a Model 7700 Ford tractor ("tractor") and should be treated as such in Debtor's Plan or in the alternative, that the debt due Evans arising from repairs made to the tractor be declared nondischargeable.

Evans alleges that it was hired by Debtor to repair the tractor in October l990 and that it did in fact make such repairs, having a reasonable value of $3,497.99, which the Debtor failed to pay for.

Evans' complaint alleges further that by virtue of the repairs it acquired a lien pursuant to §184 of the New York Lien Law ("NYLL") and that said lien was perfected by Evans' continued retention of possession of the tractor until payment.

Between January ll, l99l and May 2, l99l, Evans alleges that Debtor entered upon its premises and removed the tractor without its consent and without payment, after being advised in writing that the tractor was subject to its lien.

ARGUMENTS

Evans contends that Debtor's actions in removing the tractor from its premises without its consent, not only did not destroy its lien under §184 of NYLL, but constituted fraud, conversion and grand larceny.

Debtor's motion, while not denying any of the factual allegations of the complaint, asserts that regardless of the existence of Evans' lien, that lien is subordinate to a blanket security interest of Norstar Bank ("Norstar"), which

fully encumbered the tractor before it came into Evans' possession.

Thus, contends the Debtor, Evans' claim, while technically a lien, is fully unsecured in accordance with Code §506(a) and need not be treated as a secured claim in Debtor's Plan.

In addition, Debtor asserts that, assuming arguendo the allegations of the complaint are true, the Debtor has not been damaged since even if the tractor had remained in its possession, it would have had nothing other than an unsecured claim for the cost of the repairs. Thus, argues the Debtor, Evans fails to state a cause of action based on Code §523(a).

DISCUSSION

The Court concludes that Debtor's motion must be denied in its entirety.

Initially, the motion seeks summary judgment pursuant to Fed.R.Bankr.P. 7056, which incorporates by reference Federal Rule of Civil Procedure ("Fed.R.Civ.P.") 56. Summary judgment is a procedural device which requires a showing by the moving party that there is no genuine issue of material fact and that judgment should be awarded to the moving party as a matter of law. The Court is required to determine the threshold issue as to whether any genuine issue of material facts exists. Hyman v. Commerce & Indus. Ins. Co., 524 F.2d l3l7, l3l9-20 (2d Cir. l975).

Uncertainty as to the true state of material facts defeats the motion. See Quinn v. Syracuse Model Neighborhood Corp., 6l3 F.2d 438, 445 (2d Cir. l980). If a material factual issue is found to exist, the motion must be denied and the case proceed to trial. See United States v. One Tintorento Painting Entitled "The Holy Family With Saint Catherine and Honored Donor," 69l F.2d 603, 606 (2d Cir. l982).

It is also noted that a motion for summary judgment is generally not viable procedurally until issue is joined and in any event, may not even be filed until more than twenty days has expired from the commencement of the action. See

Fed.R.Civ.P. 56(a).[1]

The Court must consider a motion for summary judgment in a light most favorable to the non-moving party. See Arnold Pontiac - GMC, Inc. vs. General Motors Corp., 700 F.Supp. 838, 840 (W.D.Pa. l988). In order to grant the relief sought pursuant to a summary judgment motion, the Court must find that the pleadings and admissions on file, together with the affidavits, show 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).

From a procedural standpoint, Debtor's motion for summary judgment is deficient on its face. The motion is not supported by any affidavits made by anyone with personal knowledge, but is based solely upon the affirmation of Debtor's counsel. While it is true that a supporting affidavit is not essential, clearly more weight will be given to a motion supported by affidavits based upon personal knowledge. See Sellers v. M.C. Floor Crafters, Inc., 842 F.2d 639, 643 (2d Cir. l988).

Here, the Debtor's counsel simply affirms that Norstar has a perfected security interest in numerous forms of collateral, including the tractor, which secures a claim of $62,099.37, and that Debtor has presumably valued that collateral at $60,000 because that is the amount, with interest, he purports to re-pay Norstar through the Plan. Attached to the motion are photocopies of a Note executed by the Debtor on October 2l, l983 and New York Uniform Commercial Code ("NYUCC") Financing Statements.

There is no support for Debtor's contention provided by Norstar, nor would Norstar be bound by such allegations regarding its secured status since it is not a party to this adversary proceeding.

The Plaintiff contends that its lien under §184 of NYLL primes any security interest of Norstar by virtue of §9-3l0 of NYUCC and, therefore, the amount of the Norstar debt versus the value of the collateral is irrelevant.

While such a legal argument may be correct, it is also without force and effect here in the absence of Norstar as a party to this adversary

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[1] Evans' complaint was filed on September 4, l99l and Debtor's Notice of Motion was initially stamped "Received" by the Clerk of this Court on September 23, l99l, and then stamped "Received and Filed" on October l, l99l.

proceeding. See Matter of Central States Press, 57 B.R. 4l8, 422 (Bankr. W.D.Mo. l985), Fed.R.Bankr.P. 70l9. Thus, until Norstar is joined as a party, summary judgment which will necessarily impact on Norstar's rights as a secured creditor cannot be considered and Debtor's motion must be denied.

Turning to Plaintiff's second cause of action, that predicated upon the nondischargeability of its claim for repairs under Code §523(a), the Debtor contends that it must be dismissed as matter of law because Plaintiff has suffered no damage.

Debtor again predicates his position on Plaintiff's lack of lienholder status, posturing that, assuming arguendo he in fact removed the tractor from Plaintiff's premises without its knowledge and/or consent, Plaintiff, without any secured lien position, has not been damaged.

The Court believes that Debtor's perception of a cause of action under Code §523(a) is erroneous. Code §523(a) requires only that the debt due and owing from a debtor to its creditors be incurred through actions of the debtor or be in the nature of a debt delineated in subsection (a)(l) through (l2).

Congress has granted to this Court the ability to deny a discharge as to the types of debts described in Code §523(a)(l)-(l2). See 28 U.S.C. §157(b)(l) and (2). The damage, if in fact there need be proof of damage, is the nature of the debt itself. Therefore, from the perspective of §523(a), it is not essential that the Plaintiff held a fully secured lien on Debtor's tractor if Plaintiff can establish that Debtor incurred its obligation to Plaintiff under any of the conditions set forth in Code §523(a)(2), (4) or (6).[2]

In considering a motion to dismiss under Fed.R.Bankr.P. 70l2 and Fed.R.Civ.P. l2(b)(6), the Court must accept the factual allegations of the complaint as true and in a light most favorable to the Plaintiff. Doubt as to a party's ability to prove his case, is no reason for dismissing the complaint. See Raine v. Lorimar Productions, Inc., 7l B.R. 450, 453 (S.D.N.Y. l987); In re

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[2] Debtor points out that nowhere in the complaint does Plaintiff make specific reference to Code §523(a) or its subsections,however, Debtor presumes, and is apparently correct, that Plaintiff is relying on Code §523(a)(2), (4) and (6).

O.P.M. Leasing Services, Inc., 2l B.R. 986, 99l (Bankr. S.D.N.Y. l98l); In re Silverman, l3 B.R. 70, 72 (Bankr. D.Mass. l98l).

Here, Debtor argues that even if Plaintiff had a lien on the tractor and the allegations that Debtor removed the tractor from Plaintiff's possession without its knowledge or consent were taken as being true, Plaintiff is without a cause of action under Code §523(a)(2), (4) or (6) because plaintiff's lien was wholly unsecured.

Clearly, if Plaintiff can show possessory rights in the tractor, it may well be able to meet the requirements of Code §523(a)(4) and/or (6). Conversely, if Plaintiff can show that Debtor procured its services with a fraudulent intent to avoid payment therefore, it may make out a cause of action under Code §523(a)(2)(A).

Thus, the Debtor's motion to dismiss the complaint at this juncture must be denied.

IT IS SO ORDERED.

Dated at Utica, New York
this day of February, l992

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STEPHEN D. GERLING
U.S. Bankruptcy Judge