

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI**

IN RE:)	
SCOTT M. FAVRE AND)	CASE NO. 00-55067
VANESSA W. FAVRE)	
Debtors)	CHAPTER 7
)	

LYNDON PROPERTY INSURANCE)	
COMPANY)	
Plaintiff)	
V.)	ADVERSARY NO. 01-05138
)	
SCOTT M. FAVRE)	
Defendant)	

OPINION

The matter before the court is the Motion for Partial Summary Judgment filed by the plaintiff, Lyndon Property Insurance Company, requesting the court to sustain its objection to discharge pursuant to 11 U.S.C. § 523(a)(4). Having considered the matter, the court concludes that the Motion for Partial Summary Judgment should be granted.

I. FACTUAL BACKGROUND

Lyndon Property Insurance Company (“Lyndon”) filed an objection to discharge and complaint to determine dischargeability of debt against the debtor, Scott M. Favre (“Favre”), on August 16, 2001. Lyndon posted payment and performance bonds on two construction projects naming Panther Utilities of Mississippi, Inc. as principal on the bond. The complaint alleged that Favre, as president, sole director and stock of Panther Utilities of Mississippi, Inc., breached his obligations under an express trust by disbursing trust funds to parties who were not parties to

whom the surety would be liable under the bonds. The plaintiff alleged under Count I that the obligations to Lyndon were nondischargeable under 11 U.S.C. § 523(a)(4) and § 523(a)(6). Count II of the complaint alleged that discharge should be denied under 11 U.S.C. § 727(a)(4)(A) for failure to accurately list value of stock and erroneously claiming an exemption.

Lyndon filed its motion for partial summary judgment on June 1, 2005, claiming there are no genuine issues of material fact and that Lyndon is entitled to judgment as a matter of law pursuant to 11 U.S.C. § 523(a)(4).

II. CONCLUSIONS OF LAW

The matter before the court is a core proceeding pursuant to 28 U.S.C. § 157. The court has jurisdiction over the parties and the subject matter pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157.

The movant requests summary judgment pursuant to Federal Rule of Bankruptcy Procedure 7056, which makes applicable Rule 56 of the Federal Rules of Civil Procedure.

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The Court views the evidence in a light most favorable to the non-movant. *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 533 (5th Cir.1997). The non-movant must go beyond the pleadings and come forward with specific facts indicating a genuine issue for trial to avoid summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Summary judgment is appropriate, however, if the non-movant “fails to make a showing sufficient to establish the existence of an element essential to that party's case.” *Celotex*, 477 U.S. at 322-23, 106 S.Ct. 2548.

Templet v. HydroChem Inc. 367 F.3d 473, 477 (5th Cir. 2004)

Lyndon requests that the court enter summary judgment based on the supporting

affidavits, deposition and supporting documentation provided. The documentation includes authenticated copies of the bonds and the indemnity agreement that was entered into with Favre, and documentation regarding payments made from the funds.

Favre's response to Lyndon's motion claims there are disputed factual issues, and disputes any breach of fiduciary duties. Favre claims that the plaintiff was aware of and approved repayment of debts on loans made for expenses related to the bonds.

Lyndon's reply indicates that the materials provided by Favre contain evidentiary deficiencies and do not meet the standards required by Rule 56. Lyndon points out affidavits not sworn and certain documentation not authenticated. *See, Nissho-Iwai American Corp. V. Kline*, 845 F. 2d 1300, 1306 (5th Cir. 1988)(an unsworn affidavit is incompetent to raise a fact issue precluding summary judgment); *Douglass v. United Services Automobile Association*, 79 F. 3d 1415,1429 (5th Cir. 1996)(conclusory allegations, speculation and unsubstantiated assertions are inadequate to satisfy the nonmovant's burden); *Duplantis v. Shell Offshore Company, Inc.*, 948 F. 2d 187, 192 (5th Cir. 1991)(material that is inadmissible will not be considered on a motion for summary judgment). The court agrees with the arguments and authorities cited by Lyndon and concludes that the supporting documentation provided by Favre is insufficient to prove a genuine issue of material fact.

Lyndon has requested the court enter judgment in its favor excepting the debt from discharge pursuant to 11 U.S.C. § 523(a)(4). That section provides that a debtor is not discharged from any debt "for fraud, or defalcation while acting in a fiduciary capacity, embezzlement, or larceny". 11 U.S.C. § 523(a)(4). The court concludes that the indemnity agreement created an express trust and that funds were disbursed in breach of Favre's fiduciary

obligations under that trust. *See, In re Herndon*, 277 B.R. 765 (Bankr. E.D. Ark. 2002); *In re McCormick*, 283 B.R. 680 (Bankr. W.D. Pa. 2002). The court further concludes that Lyndon's motion for partial summary judgment should be granted and that Lyndon is entitled to judgment on the law excepting its debt from discharge pursuant to 11 U.S.C. § 523(a)(4).

An order will be entered consistent with these findings and conclusions pursuant to Federal Rule of Bankruptcy Procedure 9021 and Federal Rule of Civil Procedure 58. This opinion shall constitute findings and conclusions pursuant to Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52.

DATED this the 31st day of January, 2006.

/s/ Edward R. Gaines
EDWARD R. GAINES
UNITED STATES BANKRUPTCY JUDGE

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