

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

IN RE:

**DALE P. GRAHAM AND
CATHERINE R. GRAHAM
Debtor**

CASE NO. 03-51763 SEG

**SINGER ASSET FINANCE
COMPANY, L.L.C.
Plaintiff**

V.

ADV. NO. 03-05344 SEG

**DALE P. GRAHAM
Defendant**

OPINION

The matter before the court is the Motion for Summary Judgment (Dkt. # 43) filed by the Plaintiff, Singer Asset Finance Company, L.L.C. Having considered the motion, the memorandum filed by the Plaintiff (none was filed by the Defendant), and supporting documentation, the court concludes that the Motion for Summary Judgment should be granted.

I. FACTUAL BACKGROUND

Dale P. Graham and Catherine R. Graham filed a petition for relief under Chapter 7 of Title 11 on April 2, 2003 in the United States Bankruptcy Court for the Southern District of Mississippi.

Singer Asset Finance Company, L.L.C. (“Singer”) filed its Complaint Objecting to Dischargeability Pursuant to Bankruptcy Code Sections 523(a)(2) and 523(a)(6) against Dale P. Graham on July 11, 2003. The Plaintiff alleges in the Complaint that on July 7, 1997 the Debtor-Defendant, Dale P. Graham, entered into a Purchase Agreement with the Plaintiff in which the

Plaintiff purchased from the Debtor-Defendant an interest in an annuity and paid \$72,100.00.

An additional Purchase Agreement was entered March 19, 1999, whereby the Plaintiff purchased an interest in an annuity from the Debtor-Defendant and paid \$172,739.00. The Plaintiff alleges as the basis for the Complaint that the Debtor-Defendant attempted to revoke the authorization previously provided to the insurance company that is contractually obligated to make the annuity payments and to divert payments to himself.¹

In his Answer, the Debtor-Defendant asserts that he did not possess the right to sell any interest in his annuity by virtue of terms in the annuity, that the Plaintiff was unable to buy an interest in the annuity by its terms and conditions, that the Plaintiff induced him into a usurious contract of adhesion, and that the Plaintiff should have known he could not provide informed consent. The Debtor-Defendant filed a Counterclaim for Rescission asserting that interest rates in the purchase agreements are usurious and unenforceable, that payments received by Singer should be determined to be payment in full, and that Singer should have known that injuries sustained by Graham were sufficient to render him incapable of knowingly entering into a contractual arrangement with Singer, and that the terms of the purchase agreements are adhesive

¹ It was further explained in the Plaintiff's Memorandum and supporting documentation on the Motion for Summary Judgment that the Debtor-Defendant, Graham, sustained injuries in February of 1993, relating to allegedly negligent acts, omissions or lack of seaworthiness of certain vessels. He filed suit and settled with various defendants and was to receive periodic monthly payments of \$3,106.16 compounded at 3% annually, for life with a guarantee of 30 years. He consented to an assignment of liability to make payments to Prudential Property and Casualty Insurance Company. An annuity was purchased designating Prudential as owner and Graham as payee. Subsequent to this arrangement, Graham entered the Purchase Agreements with the Plaintiff herein, Singer, for immediate cash payments on portions of the structured settlement. Singer asserts that Graham breached the purchase agreements by seeking to divert to himself periodic payments that were sold and pledged to Singer, and then filing a petition for relief under Chapter 7, and listing Singer as an unsecured creditor holding a claim of \$376,207.00.

and coercive and should be declared null and void. Various defenses were set out by Singer in its Answer to the Counterclaim, including failure to state a claim upon which relief may be granted, waiver, estoppel, unjust enrichment, laches and unclean hands.

The parties agreed to several extensions of discovery. Subsequently, Singer filed its Motion for Summary Judgment, with a brief and supporting documentation, requesting judgment as a matter of law pursuant to Fed. R. Civ. P. 56 and Fed. R. Bankr. Pro. 7056, asserting that there is no genuine issue as to any material fact. No responsive pleading to the motion was filed by the Debtor-Defendant.

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 § 157.

The Plaintiff requests summary judgment determining that the obligations owed by Graham to Singer are nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) and § 523(a)(6).

The Code sections provide that:

11 USC 523. Exceptions to discharge.

(a) A discharge under 727 . . . does not discharge an individual debtor from any debt —

(2) for money, property, services, or an extension, renewal, or refinancing of creditor, to the extent obtained, by —

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

. . .

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity; . . .

11 U.S.C. §523(a)(2)(A), §523(a)(6). The standard of proof for exceptions to discharge under

11 U.S.C. § 523(a) is the ordinary preponderance of the evidence standard. *Grogan v. Garner*,

498 U.S. 279, 291, 111 S.Ct. 654, 661 (1991). In *General Electric Capital Corporation v. Acosta* (*In re Acosta*), 406 F.3d 367 (5th Cir. 2005), the court stated:

For a debt to be nondischargeable under section 523(a)(2)(A), the creditor must show (1) that the debtor made a representation; (2) that the debtor knew the representation was false; (3) that the representation was made with the intent to deceive the creditor; (4) that the creditor actually and justifiably relied on the representation; and (5) that the creditor sustained a loss as a proximate result of its reliance.

Id. at 372. Regarding § 523(a)(6), the Fifth Circuit has stated the following:

[W]e have restated the current test as follows: “The test for willful and malicious injury under § 523(a)(6), thus, is condensed into a single inquiry of whether there exists ‘either an objective substantial certainty of harm or a subjective motive to cause harm’ on the part of the debtor.” Because debtors generally deny that they had a subjective motive to cause harm, most cases that hold debts to be non-dischargeable do so by determining whether “[the debtor’s] actions were at least substantially certain to result in injury.”

Berry v. Vollbracht (*In re Vollbracht*), 2007 WL 3144848, 1 (5th Cir. 2007).

Summary judgment is appropriate under Fed. R. Civ. P. 56, made applicable by Fed. R. Bankr. P. 56, where there are no genuine issues as to any material fact:

Summary judgment is proper under Fed.R.Civ.P. 56 “if the pleadings, depositions, 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.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). We review a grant of summary judgment de novo. *Freeman v. Texas Dep’t of Crim. Justice*, 369 F.3d 854, 860 (5th Cir.2004).

Sossamon v. Williams 2008 WL 724656, 1 (5th Cir. 2008). *See also, Cooper Industries, LLC v.*

American International Specialty Lines Insurance Co., 2008 WL 900958, 2 (5th Cir. 2008).

Summary judgment may not be granted by default:

Under summary judgment standards, the Court may not grant summary judgment by default when the non-movant fails to file a response, *Eversley v. MBank Dallas*, 843 F.2d 172, 174 (5th Cir.1988); however, in such a situation, the Court

may accept the movant's evidence as undisputed, *Id.*, and grant summary judgment if that undisputed evidence establishes a *prima facie* showing of movant's entitlement to that relief. *C.F. Dahlberg & Co. v. Chevron USA, Inc.*, 836 F.2d 915, 919 (5th Cir.1988) (Where non-movant failed to submit affidavits, discovery items, or even pleadings on dispositive matters, no genuine issue of material fact existed.)

Chao v. M & D, Inc., 2007 WL 1168664, 1 (S.D.Tex. 2007); *See also, Gordon v. City of Galveston*, 2007 WL 294161, 1 (S.D.Tex. 2007); *Newby v. Enron Corp. (In re Enron Corp.)*, 2006 WL 1663383, 3-4 (S.D.Tex. 2006).

The Plaintiff, Singer, makes the following argument in its brief regarding satisfaction of requisites for establishing an exception from discharge on the obligations owed by the Debtor:

In entering into the Purchase Agreement with Singer whereby he allowed it to purchase and pledged his payment rights, David Graham impliedly represented and/or engaged in conduct by which he created the false impression that he was giving his structured settlement rights to Singer and would honor his assignment. By attempting to divert those payments from Singer, Mr. Graham, by his conduct, obviously deceived Singer into believing that it would receive its property and collateral payments and, in later trying to revoke the subject assignments, defrauded Singer. As a result, the debt owed for the remaining structured settlement payments rights which Singer purchased is nondischargeable under Section 523(a)(2)(A).

Section 523(a)(6) of the Bankruptcy Code prevents a debt “for willful and malicious injury by the debtor to another entity or to the property of another entity” from being discharged. Mr. Graham’s attempt to divert the remaining structured settlement payments referred to in the Purchase Agreements amounts to a willful and malicious injury to Singer. As a result, the Singer debt is nondischargeable under Section 523(a)(6).

Plaintiff’s Memorandum in Support of its Motion for Summary Judgment at 6.

As indicated above, the Debtor-Defendant asserted in his Answer and Counterclaim that under the terms of the annuity he did not have the right to sell any interest in it, that the Plaintiff was unable to buy an interest, that the Plaintiff induced him into a usurious contract of adhesion and the Plaintiff should have known he could not provide informed consent. The Debtor-

Defendant has not provided sufficient responses, documentation or evidence to establish the contention of a lack of mental capacity to execute the Purchase Agreements, or that he was induced to enter into them. Additionally, as argued by Singer, this was not a loan transaction under which rules regarding disclosure of interest rate may be applicable. Regarding Graham's argument that non-assignment language in the agreements voids the assignments, the court agrees with the legal arguments and citations provided by Singer that Graham has waived this defense, and that Article 9 of the Uniform Commercial Code voids the non-assignment language.

Based on the pleadings, memoranda, and supporting documentation of the Plaintiff, and upon the lack of documentation or evidence by the Debtor-Defendant, the court concludes that the Plaintiff's undisputed evidence sufficiently establishes a prima facie showing of entitlement to relief, and that the obligations should be excepted from discharge pursuant to 11 U.S.C, § 523(a)(2)(A) and (a)(6). The Plaintiff's Motion for Summary Judgment should be granted and judgment requested in the Complaint awarded, and the Counterclaim denied.

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.

This the 11th day of June, 2008.

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

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