IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI JACKSON DIVISION

IN RE: **CHAPTER 7**

JAMES E. BUMGARNER **CASE NO. 0400079JEE**

ALFA INSURANCE CORPORATION

VS. **ADVERSARY NO. 040091**

JAMES E. BUMGARNER

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Edward Ellington, Judge

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE *MOTION FOR SUMMARY JUDGMENT*

This matter came before the Court on the *Motion for Summary Judgment* filed by Alfa Insurance Corporation and the *Response to Motion for Summary Judgment* filed by the Debtor, James E. Bumgarner. After considering the pleadings and the briefs filed by the parties, the Court finds for the following reasons that the motion is well taken and should be granted.

FINDINGS OF FACT

On September 6, 2001, James E. Bumgarner (Debtor) executed a *Promissory Note and Security Agreement* in the amount of $30,647.77 for the benefit of Alfa Insurance Corporation (Alfa). In the *Promissory Note and Security Agreement* (promissory note), the Debtor pledged as collateral for the loan a 2001 Chevrolet Suburban. The purpose of the loan from Alfa was to allow the Debtor to payoff an existing loan with AmSouth Bank (AmSouth) which was secured by the 2001 Chevrolet Suburban (the vehicle). At the time the Debtor executed the promissory note to Alfa, Alfa made a check payable to AmSouth in the amount of $30,647.77, which paid the Debtor's existing loan to AmSouth in full. Apparently upon receipt of the check from Alfa, AmSouth released the certificate of title on the vehicle and sent the certificate of title directly to the Debtor instead of sending it to Alfa.

Subsequently, in August of 2003, the Debtor sold the vehicle to a third party without notice to Alfa. The Debtor received the sale proceeds but never remitted any of the sale proceeds to Alfa.

On January 8, 2004, the Debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code. At the time the Debtor filed his petition, the Debtor owed Alfa $20,586.03, plus accrued interest, costs and fees pursuant to the terms and conditions of the note.

Since resolution of the motion for summary judgment is partially based upon what pleadings were filed in the adversary and when, the Court will set out a detailed time-line of the pleadings filed by the parties.

On May 10, 2004, Alfa filed the its *Complaint to Deny the Dischargeability of a Particular Debt Owed to Alfa Insurance Corporation.* In its complaint, Alfa requests that the Court enter a

judgment declaring the debt to be nondischargeable pursuant to 11 U. S. C. § 523(a)(2)(A)[1], (a)(4) and (a)(6). On July 6, 2004, the Debtor filed his *Response to Complaint to Deny the Dischargeability of a Particular Debt Owed to Alfa Insurance Company.* On July 22, 2004, the Court entered a *Scheduling Order* which gave the parties sixty (60) days, until September 27, 2004, to complete discovery.

On or about August 12, 2004, Alfa propounded to the Debtor *Plaintiff's First Consolidated Set of Interrogatories, Requests for Production of Documents* and *Requests for Admissions* (the Discovery). The thirty (30) day deadline for the Debtor to respond to the Discovery, including three (3) days for mailing time, was September 14, 2004. The Debtor failed to respond to the Discovery by the September 14, 2004, deadline.

On September 15, 2004, Alfa filed a *Motion to Extend All Scheduling Order Deadlines*. In its motion, Alfa requested that the Court extend the deadlines contained in the Court's *Scheduling Order* because Alfa had been trying to take the deposition of the Debtor and had been unable to get a deposition scheduled. After a hearing on the motion, the Court entered an *Order Extending All Scheduling Order Deadlines* in which the Court extended the period for discovery for ninety (90) days.

On October 27, 2004, Alfa filed its *Motion for Summary Judgment, Memorandum Brief in Support of Motion for Summary Judgment,* and *Statement of Undisputed Facts.* In its motion and brief, Alfa argues that because the Debtor failed to respond to the request for admissions within the thirty (30) day deadline, the admissions are deemed admitted, and therefore, summary judgment

[1]Hereinafter all code sections refer to the United States Bankruptcy Code found at Title 11 of the United States Code unless otherwise noted.

should be granted in favor of Alfa as there is no genuine issue of material fact.

Pursuant to Rule 18(III)(2) of the *Uniform Local Bankruptcy Rules for the United States Bankruptcy Courts in the Northern and Southern Districts of Mississippi* (Local Rules), the Debtor had twenty days from October 27, 2004, to file a response to the motion for summary judgment and a brief. As is the Court's custom when a motion for summary judgment has been filed and a response has not been received by the Court, a *Notice Regarding Motion for Summary Judgment* was sent to the attorney for the Debtor, C. Eiland Harris, on November 15, 2004, directing his attention to Local Rule 18.

On November 8, 2004, the Debtor filed with the Court *Defendant's Response to Discovery filed by the Plaintiff, Alfa Insurance Company*. This response included the Debtor's response to Alfa's request for admissions.

On December 9, 2004, the Debtor filed a *Motion for Extension of Time to File Memorandum Brief in Opposition of Motion for Summary Judgment.* Alfa filed *Plaintiff's Objection to Motion for Extension of Time to File Memorandum Brief in Opposition of Motion for Summary Judgment* on December 14, 2004. After a hearing on the motion and objection, the Court entered an order giving the Debtor until January 18, 2005, to comply with Local Rule 18.

The Debtor filed his *Response to Motion for Summary Judgment* and *Memorandum Brief in Opposition of Motion for Summary Judgment* on January 18, 2005. In his response, the Debtor argues that there were genuine issues of material facts because "the material deem *(sic)* as admitted by the plaintiff is not admitted by the defendant." *Response to Motion*, p. 1, ¶ 2. The Debtor alleges that he had an agreement with the attorney for Alfa that the extension of the scheduling order included an extension of time for him to respond to the Discovery propounded to him by Alfa.

Subsequently, on February 1, 2005, Alfa filed *Plaintiff's Answer and Response to Defendant's Response to Motion for Summary Judgment, Plaintiff's Request that Defendant's Response be Stricken and Motion for Sanctions*. In this response, the attorney for Alfa, Melanie Vardaman, denies that she had an agreement with Mr. Harris giving him an extension of time to answer the Discovery she had propounded. On February 7, 2005, the Debtor filed a rebuttal of Alfa's February 1, 2005, answer in his *Response to Plaintiff's Request that Defendant's Response be Stricken and Motion for Sanctions.*

CONCLUSIONS OF LAW

I.

This Court has jurisdiction of the subject matter and of the parties to this proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157. This is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(I).

II.

Rule 56 of the Federal Rules of Civil Procedure[2] provides that in order to grant a motion for summary judgment, the court must find that "[t]he 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 the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In addition, when considering a motion for summary judgment, the court must view the pleadings and evidentiary material, and the reasonable inferences to be drawn therefrom, in the light most

[2]Federal Rule of Civil Procedure 56 is made applicable to bankruptcy proceedings pursuant to Federal Rule of Bankruptcy Procedure 7056.

favorable to the non-moving party, and the motion should be granted only where there is no genuine issue of material fact. *Thatcher v. Brennan,* 657 F. Supp. 6, 7 (S.D. Miss. 1986), *aff'd*, 816 F.2d 675 (5th Cir. 1987)(citing *Walker v. U-Haul Co. of Miss.*, 734 F.2d 1068, 1070-71 (5th Cir. 1984)); *see also Matshushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356-57, 89 L.Ed.2d 538, 553 (1986). Moreover, "an adverse party may not rest upon the mere allegations of denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Bankr. P. 7056(e).

III.

A.

In its motion for summary judgment, Alfa argues that because the Debtor failed to timely respond to Alfa's request for admissions, there is no genuine issue as to any material fact and Alfa is thereby entitled to judgment as a matter of law that its debt is nondischargeable. Therefore, the Court must determine the binding effect, if any, of the Debtor's failure to timely respond to the request for admissions.

Federal Rule of Civil Procedure 36 (Rule 36), made applicable to bankruptcy proceedings pursuant to Federal Rule of Bankruptcy Procedure 7036, provides in pertinent part:

> Rule 36. Requests for Admission
>
> **(a) Request for Admission**. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any document described in the request. . . .
>
> Each matter of which an admission is requested shall be separately

> set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or the party's attorney. . . .

Fed. R. Civ. P. 36(a).

The United States Court of Appeals for the Fifth Circuit addressed the issue of a party's failure to respond to request for admissions in *Carney v. Internal Revenue Service (In re Carney)*, 258 F.3d 415 (5th Cir. 2001). In *Carney*, the debtor filed an adversary proceeding seeking to have his federal tax debts declared dischargeable. The bankruptcy court granted the Internal Revenue Service's (IRS) motion for summary judgment finding that the debtor's "failure to respond to the IRS's requests for admission created a deemed admission conclusively establishing the validity of the IRS's claims." *Carney*, 258 F.3d at 417. In affirming the bankruptcy court's grant of summary judgment, the Fifth Circuit held that

> Rule 36 allows litigants to request admissions as to a broad range of matters, including ultimate facts, as well as applications of law to fact. *See, e.g., Stubbs v. Comm'r Internal Rev.*, 797 F.2d 936, 938 (11th Cir. 1986); *Campbell v. Spectrum Automation Co.*, 601 F.2d 246, 253 (6th Cir. 1979). Such breadth allows litigants to winnow down issues prior to trial and thus focus their energy and resources on disputed matters. *Wright, Miller & Marcus, Federal Practice and Procedure:* Civil 2d § 2254 (1994). For Rule 36 to be effective in this regard, litigants must be able to rely on the fact that matters admitted will not later be subject to challenge. *American Auto. Ass'n v. AAA Legal Clinic*, 930 F.2d 1117, 1119 (5th Cir. 1991).

Carney, 258 F.3d at 419. (citations omitted).

In the case at bar, Alfa propounded its Discovery, which included request for admissions, on or about August 12, 2004. As in *Carney*, the Debtor failed to respond to Alfa's Discovery by the

September 14, 2004, deadline[3]. Therefore, Alfa's request for admissions are "conclusively established unless the court on motion permits withdrawal or amendment of the admission." *Fed. R. Civ. P.* 36(b); *Carney*, 258 F.3d at 419.

Having found that the request for admissions are deemed admitted, the Court must determine if the Debtor has properly withdrawn, amended or received permission from the Court to file his responses late. "This Circuit has stressed that a deemed admission can only be withdrawn or amended by motion in accordance with Rule 36(b)." *Carney*, 258 F.3d at 419. Rule 36(b) states that "(a)ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." *Fed. R. Civ. P.* 36(b) (emphasis added). "(T)he proper course for a litigant that wishes to avoid the consequences of failing to timely respond to Rule 36 request for admissions is to move the court to amend or withdraw the default admissions in accordance with the standards outlined in Rule 36(b)." *Carney*, 258 F.3d at 420. The Debtor has never filed a motion with the Court seeking to have the deemed admissions withdrawn. Therefore, the Court finds that the default admissions have not been amended or withdrawn.

Having found that the default admissions have not been amended or withdrawn, the Court must determine if the Debtor was granted additional time to file his responses to the Discovery. As noted previously, the Debtor did file with the Court *Defendant's Response to Discovery Filed by the Plaintiff, Alfa Insurance Company,* which included the Debtor's responses to the request for admissions, on November 8, 2004, which was after the September 14, 2004, deadline. Rule 36(a) provides that the responses to request for admissions are due within 30 days after service of the requests "or within such...longer time as the court may allow or as the parties may agree to in

[3]The Debtor did file with the Court *Defendant's Response to Discovery Filed by the Plaintiff, Alfa Insurance Company* on November 8, 2004.

writing, subject to Rule 29,...." *Fed. R. Civ. P.* 36(a). Federal Rule of Civil Procedure 29[4] states that a written stipulation is required for an extension of the response period under Rule 36. Therefore, in order for the Debtor to have been granted additional time to file his responses to Alfa's request for admissions, the Debtor must have made such a request in writing before the expiration of the thirty (30) day period.

The Debtor has not alleged that he filed a written request for an extension of time to respond to the Discovery. Rather in his *Response to the Motion for Summary Judgment*, the Debtor's attorney argues that he had an agreement with the attorney for Alfa that the "agreement by the parties as to the extending all discovery was to apply to the response to discovery by the Defendant." *Response*, p.1, ¶ 3 (January 18, 2005). As stated previously, Alfa filed a *Motion to Extend All Scheduling Order Deadlines* in which Alfa requested that the Court extend the deadlines contained in the Court's *Scheduling Order* because Alfa had been unable to get the deposition of the Debtor scheduled. The motion was set for hearing, however, the attorney for Alfa was the only party to appear at the hearing. Neither the Debtor nor the Debtor's attorney appeared at the hearing. The Court entered the *Order Extending All Scheduling Order Deadlines* submitted by Alfa's attorney. However, the order was not an agreed order nor does the order in any way state that the Debtor was given additional time to respond to the Discovery Alfa had propounded on the Debtor. The Court finds that the order simply extended the period for discovery for an additional ninety (90) days and extended all other deadlines in the scheduling order for an additional ninety (90) days. The Court finds that the order extending the scheduling order deadlines does not satisfy the requirement for a written stipulation for additional time to respond to the Discovery as required by Rules 36 and 29.

[4]Federal Rule of Civil Procedure 29 is made applicable to bankruptcy proceedings pursuant to Federal Rule of Bankruptcy Procedure 7029.

Assuming for the sake of argument that the Debtor's attorney had an oral agreement with the attorney for Alfa for additional time to respond to the Discovery, unless the agreement was in the form of a written agreement, there is no valid agreement for an extension of time to respond. The Fifth Circuit found the same argument by the debtor in *Carney* to be without merit. *Carney*, 258 F.3d at 219.

Consequently, the Court finds that the Debtor did not properly obtain additional time to file his responses to the Discovery and has not requested through a written motion that the default admissions be withdrawn or amended, and therefore, the request for admissions are deemed admitted. While the Court acknowledges that this may be a harsh result because the Debtor is denied the opportunity to contest the merits of the case "(t)his result, however, is necessary to insure the orderly disposition of cases; parties to a lawsuit must comply with the rules of procedure. In addition, the harshness is tempered by the availability of the motion to withdraw admissions, a procedure which [the Debtor] did not employ." *Carney*, 258 F.3d at 421. (citation omitted); *see also Henderson v. Pullman, et.al. (In re Management Dynamics, Ltd. Inc.*, Case No. 9900145JEE, Adversary No. 010008 (Bankr. S.D. Miss. July 24, 2002).

B.

Having found that Alfa's request for admissions are deemed admitted, the Court must determine if summary judgment should be granted in favor of Alfa. Rule 56(c)

> specifies that "admissions on file" can be an appropriate basis for granting summary judgment. Since Rule 36 admissions, whether express or by default, are conclusive as to the matters admitted, they cannot be overcome at the summary judgment stage by contradictory affidavit testimony or other evidence in the summary judgment record.

Carney, 258 F.3d at 420 (citations omitted).

As stated previously, Alfa asserts that its claim against the Debtor is nondischargeable

because the Debtor obtained money from Alfa under false pretenses, made false representations, or committed fraud within the meaning of 11 U.S.C. § 523(a)(2)(A). Section 523(a)(2)(A) provides in relevant part:

> **11 U. S. C. § 523. Exceptions to discharge**
>
> (a) A discharge under section 727, . . . of this title does not discharge an individual debtor from any debt–
>
> . . . .
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by–
>
> (A) false pretenses, a false representation, or actual fraud, ...

Based upon the Court's ruling above, the following *Requests for Admissions* propounded to the Debtor on August 12, 2004, are deemed admitted:

> **REQUEST NO. 1**: Please admit that the Defendant executed a promissory and security note (the "Note") in the amount of $30,647.77 on or about September 6, 2001, for the benefit of the Plaintiff.
>
> **REQUEST NO. 2**: Please admit that the Defendant executed the loan in order to payoff an existing loan with AmSouth Bank ("AmSouth") and refinance the Defendant's 2001 Chevrolet Suburban (the "vehicle").
>
> **REQUEST NO. 3**: Please admit that at the time the Note was executed, the Plaintiff made a check payable to AmSouth in the amount of $30,547.77, which paid the Defendant's existing loan in full.
>
> **REQUEST NO. 4**: Please admit that upon receipt of the funds from the Plaintiff, AmSouth released the certificate of title on the vehicle and sent it directly to the Defendant instead of the Plaintiff.
>
> **REQUEST NO. 5**: Please admit that in August of 2003, the Defendant sold the vehicle without any notice to the Plaintiff and received the sale proceeds.
>
> **REQUEST NO. 6**: Please admit that the Defendant never remitted any of the sale proceeds from the sale of the vehicle to the Plaintiff.
>
> **REQUEST NO. 7**: Please admit that the Defendant is indebted to the Plaintiff in the principal sum of $20,586.03 plus accrued interest, costs and fees pursuant to the

terms and conditions of the Note.

REQUEST NO. 8: Please admit that the Defendant obtained credit by false pretenses and/or actual fraud in refinancing the vehicle and then liquidating the same and failing to pay for the collateral in accordance with the terms and conditions of the Note.

REQUEST NO. 9: Please admit that the Defendant converted the vehicle refinanced by the Plaintiff in violation of 11 U.S.C. § 523(a)(2)(A), in that he obtained the property through false pretenses, a false representation, or actual fraud.

REQUEST NO. 10: Please admit that the actions of the Defendant fall within the scope of 11 U.S.C. § 523(a)(2)(A), and the debt owed to the Plaintiff should be excepted from discharge.

REQUEST NO. 11: Please admit that the Defendant converted certain personal property upon which the Plaintiff held a lien or security interest while acting in a fiduciary capacity and, as such, committed fraud against the Plaintiff and Defendant, while acting in a fiduciary capacity, embezzled property of the Plaintiff.

REQUEST NO. 12: Please admit that the actions of the Defendant fall within the scope of 11 U.S.C. § 523(a)(2)(4), and the debt owed to the Plaintiff should be excepted from discharge.

REQUEST NO. 13: Please admit that the Defendant willfully and maliciously converted the Plaintiff's secured property and, therefore, caused, willfully and maliciously, injury thereto so that the actions of the Defendant fall within the purview of 11 U.S.C. § 523(a)(2)(4), and the debt owed to the Plaintiff should be excepted from discharge.

Plaintiff's First Consolidated Set of Interrogatories, Requests for Production of Documents and Requests for Admissions Propounded to Defendant, pp. 7-8 (August 12, 2005). "Rule 36 allows litigants to request admissions as to a broad range of matters, including ultimate facts, as well as applications of law to fact." *In re Carney*, 258 F.3d at 419.

Therefore, applying the deemed admissions to the elements of § 523(a)(2)(A), the Court finds that no genuine issue of material fact exists and that Alfa is entitled to a judgment of nondischargeability pursuant to § 523(a)(2)(A) as a matter of law.

Having found that the debt to Alfa is nondischargeable pursuant to § 523(a)(2)(A), the Court

will not address the other code sections pled in the complaint, namely § 523(a)(4) or § 523(a)(6).

III.

In Alfa's *Plaintiff's Answer and Response to Defendant's Response to Motion for Summary Judgment, Plaintiff's Request that Defendant's Response be Stricken and Motion for Sanctions* and the Debtor's *Response to Plaintiff's Request that Defendant's Response be Stricken and Motion for Sanctions* both parties requested that the Court order sanctions against their opposing counsel. Having considered the motions, the Court finds that neither motion is well taken and that sanctions will not be granted.

CONCLUSION

Based on the foregoing, the Court finds that the Debtor did not properly obtain additional time to file his responses to the Discovery and has not requested that the default admissions be withdrawn or amended, therefore, the request for admissions are deemed admitted. Therefore, no genuine issue of material fact exists and Alfa is entitled to a nondischargeable judgment pursuant to § 523(a)(2)(A) as a matter of law.

A separate judgment will be entered in accordance with Federal Rules of Bankruptcy Procedure 7054 and 9021.

So ordered this the 21st day of September, 2005.

/S/ EDWARD ELLINGTON
EDWARD ELLINGTON
UNITED STATES BANKRUPTCY JUDGE