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

IN RE: **CHAPTER 7**
RITA DIANNE WINDHAM **CASE NO. 0401425JEE**

MID SOUTH LOAN, INC.

VS. **ADVERSARY NO. 040144**

RITA DIANNE WINDHAM

Michael M. Louvier
Post Office Box 1375
Brandon, MS 39043-1375
Attorney for Debtor

Julie P. Ratliff
Post Office Box 2488
Ridgeland, MS 39158-2488
Attorney for Mid South Loan, Inc.

Edward Ellington, Judge

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

This matter came before the Court on the *Plaintiff's Motion for Summary Judgment* filed by Mid South Loan, Inc. After considering the motion and the brief filed by Mid South Loan, Inc., the Court finds for the following reasons that the motion is well taken and should be granted.

FINDINGS OF FACT

On August 15, 2003, Rita Diane Windham[1] (Debtor) executed a *Promissory Note and Security Agreement* in the amount of $8785 for the benefit of Mid South Loan, Inc. (Mid South).

[1]More specifically, the Debtor cosigned the note with another party, a Ms. Faye Smith.

In the *Promissory Note and Security Agreement* (promissory note), the Debtor pledged as collateral for the loan a 1994 Ford Aerostar van (van).

On March 15, 2004, the Debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code. On August 12, 2004, Mid South filed its *Complaint to Determine the Dischargeability of a Debt Pursuant to 11 U. S. C. § 523.* In its complaint, Mid South alleges that the Debtor neglected to maintain and/or protect the van. Mid South alleges that the van was abandoned in a pasture and that the van rusted-out and/or was vandalized. Mid South then alleges that the van was moved from the pasture into "the yard" and tied to a tree. Finally, Mid South alleges that the motor was removed, that the fenders were removed and that the interior cavity and floorboard of the van were covered with trash. Mid South requests that the Court enter a judgment declaring the debt to be nondischargeable because the Debtor's actions toward the van constituted a willful and malicious injury as defined in 11 U. S. C. § 523(a)(6).[2] On September 7, 2004, the Debtor filed her *Response to Complaint to Dischargeability of Indebtedness.* On September 7, 2004, the Court entered a *Scheduling Order* which gave the parties sixty (60) days, until December 29, 2004, to complete discovery.

On or about October 29, 2004, Mid South propounded to the Debtor its *First Set of Requests for Admissions Propounded to Defendant* (Admissions). The thirty (30) day deadline for the Debtor to respond to the Admissions was November 30, 2004. The Debtor failed to respond to the Admissions by the November 30, 2004, deadline.

On May 4, 2004, Mid South filed its *Plaintiff's Motion for Summary Judgment* and its

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

Memorandum Brief in Support of Motion for Summary Judgment. In its motion and brief, Mid South argues that because the Debtor failed to respond to the Admissions within the thirty (30) day deadline, the Admissions are deemed admitted, and therefore, summary judgment should be granted in favor of Mid South 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 May 4, 2004, to file a response to the motion for summary judgment and a brief. The Debtor has failed to file a responsive pleading to the motion for summary judgment.

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[3] 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

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

and evidentiary material, and the reasonable inferences to be drawn therefrom, in the light most 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. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Bankr. P. 7056(e).

III.

A.

In its motion for summary judgment, Mid South argues that because the Debtor failed to timely respond to Mid South's request for admissions, there is no genuine issue as to any material fact and Mid South is thereby entitled to judgment as a matter of law that the debt owed to it 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.[4]

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:

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[4]On October 21, 2005, this Court entered its opinion in *Alfa Ins. Corp. v. Bumgarner (In re Bumgarner)*, Case Number 0400079EE, Adversary Number 040091 (October 21, 2005). The *Bumgarner* opinion addressed the same issue of the failure of a party to respond to request for admissions. The following part of subsection III (A) of this opinion is taken from pages 6 through 10 of the *Bumgarner* opinion.

> 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." *In re 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).

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

In the case at bar, Mid South propounded its Admissions on or about October 29, 2004. As in *Carney*, the Debtor failed to respond to Mid South's Admissions by the November 30, 2004, deadline. Therefore, Mid South'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); *In re 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 her responses late. "This Circuit has stressed that a deemed admission can only be withdrawn or amended by motion in accordance with Rule 36(b)." *In re Carney*, 258 F.3d at 419. Rule 36(b) states that "(a)ny matter admitted under this rule is conclusively established unless the court <u>on motion</u> 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)." *In re Carney*, 258 F.3d at 420. In the case at bar, the Debtor has never filed a motion with the Court seeking to have the deemed admissions withdrawn, amended or received permission from the Court to file her responses late.

Consequently, the Court finds that the Debtor 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." *In re 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 Mid South's request for admissions are deemed admitted, the Court must determine if summary judgment should be granted in favor of Mid South. 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.

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

As stated previously, Mid South asserts that its claim against the Debtor is nondischargeable because the Debtor committed a willful and malicious injury to Mid South's property within the meaning of § 523(a)(6). Section 523(a)(6) 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–
>
> . . . .
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity. . . .

Based upon the Court's ruling above, the following *Requests for Admissions* propounded to the Debtor on October 29, 2004, are deemed admitted:

REQUEST NO. 1 Please admit that you obtained a loan or other credit from Mid South Loan, Inc. on or about August 15, 2003, in the total amount of $8,785.10, excluding interest.

REQUEST NO. 2 Please admit that you filed this bankruptcy petition on March 15, 2004.

REQUEST NO. 3 Please admit that on or about August 15, 2003, you granted the Plaintiff a security interest in personal property more particularly described as follows: 1994 Ford Aerostar van, (hereinafter "the Property").

REQUEST NO. 4 Please admit that on August 15, 2003, you executed a Disclosure Statement, Promissory Note and Security Agreement in favor of Mid South and that a copy of the Disclosure Statement, Promissary Note and Security Agreement is attached hereto as Exhibit "A."

REQUEST NO. 5 Please admit that, as of March 15, 2004, the payoff balance pursuant to the Loan Agreement was $12,588.43.

REQUEST NO. 6 Please admit that Mid South holds a perfected lien on the Property in accordance with the laws of the State of Mississippi.

REQUEST NO. 7 Please admit that you neglected to maintain and/or protect the 1994 Ford Aerostar van which served as collateral for the loan.

REQUEST NO. 8 Please admit that the neglect of the Property was a willful and malicious injury by you to property in which Mid South had an interest.

REQUEST NO. 9 Please admit that, at the time of the making of the loan, the Property had a fair market value equal to the amount of the original loan.

REQUEST NO. 10 Please admit that you left the collateral outside to rust and/or be vandalized in a pasture.

REQUEST NO. 11 Please admit that you tied the collateral to a tree.

REQUEST NO. 12 Please admit that you removed the motor from the van and sold it.

REQUEST NO. 13 Please admit that you removed the fenders and did not replace them.

REQUEST NO. 14 Please admit that litter was strewn in the cavity and floorboard of the van.

REQUEST NO. 15 Please admit that the interior of the van was demolished.

REQUEST NO. 16 Please admit that because of your financial situation, you should have known you could not repay the August 15, 2003 debt.

REQUEST NO. 17 Please admit you did not have a good faith intention to repay the August 15, 2003 debt.

REQUEST NO. 18 Please admit that you should have known you would be filing bankruptcy at the time the August 15, 2003 debt was incurred.

REQUEST NO. 19 Please admit that your financial condition did not change dramatically from August 15, 2003 to March 15, 2004.

REQUEST NO. 20 Please admit that your income did not change dramatically from August 15, 2003 to March 15, 2004.

REQUEST NO. 21 Please admit that you were not in possession of the collateral which is the subject of Mid South's security interest at the time the debt was incurred.

REQUEST NO. 22 Please admit that your conduct was intended to hinder, delay and defraud Plaintiff.

REQUEST NO. 23 Please admit that the indebtedness to the Plaintiff described herein is excepted from discharge pursuant to 11 U.S.C. § 523.

REQUEST NO. 24 Please admit that you knew you would be filing bankruptcy at the time this loan was made.

REQUEST NO. 25 Please admit that on August 15, 2003 you did not own some or all of the collateral which is the subject of Mid South's security interest.

REQUEST NO. 26 Please admit that at the time you obtained the loan from Mid South you were delinquent in the repayment of other debts owed by you.

REQUEST NO. 27 Please admit that you fraudulently signed documents when the loan was made stating the condition of the collateral for the indebtedness.

REQUEST NO. 28 Please admit that you have not provided Plaintiff with any credible evidence explaining the disposition and/or condition of the property that is the subject of Mid South's security interest.

REQUEST NO. 29 Please admit that you are in possession of the collateral which is the subject of Mid South's security interest.

REQUEST NO. 30 Please admit that the property that is the subject of Mid South's security interest was not stolen.

First Set of Requests for Admissions Propounded to Defendant, pp. 1-4 (October 29, 2004). "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 exception to discharge provision set forth in § 523(a)(6), the Court finds that no genuine issue of material fact exists and that Mid South is entitled to a judgment of nondischargeability pursuant to § 523(a)(6) as a matter of law.

CONCLUSION

Based on the foregoing, the Court finds that the Debtor did not file responses to the Admissions and that the Debtor has not requested that the default admissions be withdrawn or amended, nor has the Debtor received permission to file responses late, therefore, the Admissions are deemed admitted. Therefore, no genuine issue of material fact exists and Mid South is entitled to a nondischargeable judgment pursuant to § 523(a)(6) 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 1st day of November, 2005.

/S/ EDWARD ELLINGTON
EDWARD ELLINGTON
UNITED STATES BANKRUPTCY JUDGE