

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

IN RE:

**DAVIS DARRELL MCCULLOUGH AND
ALICE SUE MCCULLOUGH,**

CASE NO. 04-02006-EE

DEBTORS.

CHAPTER 11

**ALICE SUE MCCULLOUGH AND
DAVIS DARRELL MCCULLOUGH**

PLAINTIFFS

VS.

ADV. PROC. NO. 05-00051-NPO

**BRIAN WHITE d/b/a
TAYLORSVILLE POULTRY SUPPLY**

DEFENDANT

**MEMORANDUM OPINION AND ORDER
GRANTING MOTION FOR SUMMARY JUDGMENT**

There came on for consideration the Motion for Summary Judgment (the “Motion”) (Adv. Dk. No. 30) filed by Alice Sue McCullough and Davis Darrell McCullough (the “Debtors”), the Response to Motion for Summary Judgment (the “Response”) (Adv. Dk. No. 41) filed by Brian White d/b/a Taylorsville Poultry Supply (the “Defendant”), and the Debtors’ Rebuttal to Defendant’s Response to Motion for Summary Judgment (the “Rebuttal”) (Adv. Dk. No. 40) in the above-styled adversary proceeding (the “Adversary”).¹ Al Shiyou represented the Debtors, and Jolly W. Matthews represented the Defendant. The Motion, Response, and Rebuttal, together with the parties’ legal memoranda, were submitted to the Court. Having considered the pleadings and briefs, the Court finds that the Motion for Summary Judgment should be granted for the following reasons.

¹ The following constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052.

Jurisdiction

This Court has jurisdiction over the subject matter of and the parties to this proceeding pursuant to 28 U.S.C. § 1334. Notice of the Motion was proper under the circumstances.

Facts

There are no genuine issues with respect to the following material facts:

1. On April 16, 2004, the Debtors filed their joint voluntary petition for relief under chapter 13 of the Bankruptcy Code (Dk. No. 1).

2. On July 6, 2004, the chapter 13 case was converted to a chapter 11 case (Dk. No. 15). The chapter 11 plan was confirmed on October 4, 2005 (Dk. No. 95).

3. On March 23, 2005, this Adversary was initiated by the filing of a Complaint (the “Complaint”) (Adv. Dk. No. 1) wherein the Debtors, who are owners of a chicken farm, allege that the Defendant improperly installed cool cells in the Debtors’ chicken houses. The Complaint sets forth counts of negligence and breach of contract, and seeks a judgment for actual damages in the amount of \$10,736.00, plus interest and court costs.

4. On July 5, 2005, the Defendant filed his Answer (the “Answer”) (Adv. Dk. No. 8) wherein he denied the material allegations of the Complaint.

5. On July 15, 2005, the Debtors propounded their first set of discovery requests to the Defendant (Adv. Dk. No. 11).

6. On September 22, 2005, the Court entered a Scheduling Order (Adv. Dk. No. 16) which included a discovery completion deadline of November 28, 2005.

7. On September 27, 2005, the Debtors filed a Motion to Compel Discovery (Adv. Dk. No. 17), asserting that the Defendant had failed to reply sufficiently to the discovery requests.

8. The Motion to Compel Discovery was set for hearing on October 18, 2005 (Adv. Dk. No. 19). The parties advised the Court prior to the hearing that the Defendant had agreed to provide the requested discovery, the Motion to Compel Discovery had been resolved, and an agreed order reflecting the resolution would be submitted to the Court.

9. The Court did not receive an agreed order resolving the Motion to Compel Discovery. Therefore, the Court issued an Order to Show Cause and appear for failure to submit the order from the October 18, 2005 hearing (Adv. Dk. No. 23).

10. Al Shiyou, Counsel for the Debtors, appeared at the hearing on the Order to Show Cause (the "Show Cause Hearing") held on July 11, 2006. Jolly Matthews, Counsel for the Defendant, did not appear at the Show Cause Hearing. At the Show Cause Hearing, Mr. Shiyou advised the Court that he had twice faxed a proposed order regarding the Motion to Compel Discovery to Mr. Matthews, but had not been able to obtain Mr. Matthews' signature. Following the Show Cause Hearing, the Court entered an Order Compelling Discovery by August 8, 2006 (Adv. Dk. No. 25) and an Order sanctioning Mr. Matthews for his failure to appear (Adv. Dk. No. 28).

11. On August 23, 2006, the Debtors filed the Motion presently before the Court asserting that they are entitled to summary judgment pursuant to Federal Rules of Bankruptcy Procedure 7037(2)(c) and 7056² based on the Defendant's failure to comply with the Order Compelling Discovery.

12. On August 31, 2006, over thirteen (13) months after the discovery was served and twenty-three (23) days following the expiration of the extended discovery deadline contained in the

² Hereinafter, all rule references pertain to the Federal Rules of Bankruptcy Procedure unless otherwise noted.

Order Compelling Discovery, the Defendant served his responses to the discovery requests (Adv. Dk. No. 33).

13. On March 30, 2007, the Defendant filed his Response to the Motion, disputing that summary judgment should be entered.

14. On April 3, 2007, the Debtors filed the Rebuttal.

Discussion

Federal Rule of Civil Procedure 37, made applicable to bankruptcy proceedings pursuant to Federal Rule of Bankruptcy Procedure 7037, provides in pertinent part as follows:

(b) Failure to Comply With Order.

....

(2) Sanctions by Court in Which Action is Pending. If a party . . . fails to obey an order to provide or permit discovery, including an order [compelling discovery] made under subdivision (a) of this rule . . . , the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

....

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any party thereof, or rendering a judgment by default³ against the disobedient party; . . .

Fed. R. Bankr. P. 7037(b)(2)(C); *see also* United States v. \$49,000 Currency, 330 F.3d 371, 376 (5th Cir. 2003) (“Rule 37(b)(2)(c) authorizes the district court to strike pleadings or render a default judgment against a party as a sanction for failure to comply with a discovery order.”); Sciambra v.

³ While this Motion might more accurately have been styled as a motion for default judgment pursuant to Rule 7037, case law reflects that the terms are used interchangeably. *See, e.g., Sciambra v. Graham News Co.*, 841 F.2d 651 (5th Cir. 1988) (upholding grant of default judgment as Rule 37 sanction); Update Art, Inc. v. Modiin Publishing Ltd., 843 F.2d 67 (1988) (affirming summary judgment award as Rule 37 sanction).

Graham News Co., 841 F.2d 651, 655 (5th Cir. 1988)(entry of default judgment as sanction for discovery violations is contemplated by Federal Rule of Civil Procedure 37).

Additionally, the Fifth Circuit has stated:

[W]here a district court awards default judgment as a discovery sanction, two criteria must be met. First, the penalized party's discovery violation must be willful. Also, the drastic measure is only to be employed only where a lesser sanction would not substantially achieve the desired deterrent effect. The reviewing court may also consider whether the discovery violation prejudiced the opposing party's preparation for trial, and whether the client was blameless in the violation.

United States v. \$49,000 Currency, 330 F.3d at 376 (internal citations omitted).

In the case at bar, the Defendant maintains that the failure to answer discovery was not willful but rather “a failure of communication between the attorney and the client [where] the client did not seem to understand the urgency of answering the interrogatories.” (Def.'s Resp. ¶ 3). As reflected by the history of the case set forth above, the Debtors propounded discovery on July 15, 2005, but the Defendant did not file adequate responses. The Debtors subsequently filed a Motion to Compel Discovery, which was set for hearing. The Defendant then agreed to provide the requested discovery but in fact, did not. Consequently, the Court entered an Order to Show Cause, which was set for hearing. Neither the Defendant nor his Counsel attended the Show Cause Hearing, causing the Court to issue an Order Compelling Discovery and to sanction Defendant's Counsel. Yet, even then, the Defendant ignored the new discovery deadline, violating the Order Compelling Discovery. The Defendant has exhibited, for well over a year, a pattern of disregarding his responsibilities with regard to discovery. Thus, the Court finds that the Defendant's discovery violations were willful.

Furthermore, the Court already has attempted to use a lesser sanction by the issuance of the Order Compelling Discovery pursuant to Rule 7037(a), which the Defendant disregarded. The

Defendant's actions have prejudiced the Debtors by delaying the setting of a trial in the Adversary. The Defendant was not blameless in the discovery violations, but rather appears to be the reason behind them.

Based on the foregoing, the Court is persuaded that the Defendant should be sanctioned by the issuance of a default judgment in favor of the Debtors in accordance with Rule 7037(b)(2). *See United States v. \$49,000 Currency*, 330 F.3d at 377 ("It is the utter failure by the Claimants-Appellants to meet the deadline set by the *court* which rendered Claimant-Appellants subject to sanction.") (emphasis in original).

IT IS THEREFORE ORDERED that the Motion is hereby granted.

IT IS FURTHER ORDERED that judgment is entered against the Defendant in the amount of \$10,736.00, plus post-judgment interest calculated in accordance with 28 U.S.C. §1961 from the date of the entry of this judgment until paid, and all costs of court.

A separate final judgment will be entered in accordance with Rules 7054 and 9021.

DATED this the 4th day of May, 2007.

/s/ Neil P. Olack
NEIL P. OLACK
UNITED STATES BANKRUPTCY JUDGE