

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

IN RE:

MARY ALICE HUFFMAN,

CASE NO. 12-00177-NPO

DEBTOR.

CHAPTER 7

**DEREK A. HENDERSON, AS CHAPTER 7
TRUSTEE FOR THE BANKRUPTCY
ESTATE OF MARY ALICE HUFFMAN**

PLAINTIFF

VS.

ADV. PROC. NO. 12-00099-NPO

**LEGAL HELPERS DEBT RESOLUTION,
L.L.C., MACEY, ALEMAN, HYSLIP &
SEARNS, THOMAS G. MACEY,
JEFFREY J. ALEMAN, JEFFREY
HYSLIP, AND JASON SEARNS**

DEFENDANTS

**MEMORANDUM OPINION AND ORDER DENYING LEGAL HELPERS
DEBT RESOLUTION, LLC'S MOTION FOR SUMMARY JUDGMENT
AND THE PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Before the Court are cross-motions for summary judgment filed by the parties in the above-referenced adversary proceeding (the "Adversary"). The relevant pleadings related to the relief requested by Legal Helpers Debt Resolution, LLC ("Legal Helpers") are the Legal Helpers Debt Resolution, LLC's Motion for Summary Judgment (the "LHDR Summary Judgment Motion") (Adv. Dkt. 98)¹ filed by Legal Helpers; the Legal Helpers Debt Resolution, LLC's Memorandum in Support of Motion for Summary Judgment (the "LHDR Brief") (Adv. Dkt. 99) filed by Legal Helpers; the Plaintiff's Response to Defendants' Motion for Summary Judgment (Adv. Dkt. 102) filed by Derek A. Henderson, the duly-appointed chapter 7 trustee (the "Trustee"); the Plaintiff's Memorandum in Support of her Response to Defendants' Motion for

¹ Citations to the record are as follows: (1) citations to docket entries in the Adversary are cited as "(Adv. Dkt. ____)" ; and (2) citations to docket entries in the main bankruptcy case, Case No. 12-00177-NPO, are cited as "(Bankr. Dkt. ____)".

Summary Judgment (Adv. Dkt. 103) filed by the Trustee; and the Legal Helpers Debt Resolution, LLC's Reply Brief in Support of its Motion for Summary Judgment (the "LHDR Reply Brief") (Adv. Dkt. 112) filed by Legal Helpers. The relevant pleadings as to the relief sought by the Trustee are the Plaintiff's Motion for Partial Summary Judgment (the "Trustee Summary Judgment Motion") (Adv. Dkt. 104) filed by the Trustee; the Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment (Adv. Dkt. 105) filed by the Trustee; Legal Helpers Debt Resolution, LLC's Response to the Trustee's Motion for Partial Summary Judgment (the "LHDR Response Brief") (Adv. Dkt. 116) filed by Legal Helpers; and the Rebuttal Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment (Adv. Dkt. 117) filed by the Trustee. The Trustee is represented by Jason Graeber and Matthew S. Lott; Legal Helpers is represented by Derek M. Johnson and Stephanie Beaver. After considering the pleadings and the voluminous exhibits, the Court finds that the LHDR Summary Judgment Motion and the Trustee Summary Judgment Motion should be denied.

Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of this case pursuant to 28 U.S.C. § 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (E), (H) & (O).² Notice of the LHDR Summary Judgment Motion and the Trustee Summary Judgment Motion was proper under the circumstances.

² This finding of core jurisdiction is undisputed. The United States Supreme Court in *Stern v. Marshall*, 131 S. Ct. 2594 (2011), held that bankruptcy courts lack constitutional authority to enter a final judgment on a debtor's state-law, compulsory counterclaim that did not stem from the bankruptcy itself or that would not necessarily be resolved by the claims allowance process. Recently, the Supreme Court granted a petition for writ of certiorari in *Executive Benefits Insurance Agency, Inc. v. Arkison (In re Bellingham Insurance Agency, Inc.)*, 702 F.3d 553 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 2880 (2013), to consider whether bankruptcy courts lack constitutional authority under *Stern* to enter summary judgments in fraudulent conveyance claims against noncreditors. In the event that a higher court disagrees that

Facts

In making its determination of the facts, the Court must consider the LHDR Summary Judgment Motion and the Trustee Summary Judgment Motion independently and view the evidence and inferences in the light most favorable to the non-moving party. *Amerisure Ins. Co. v. Navigators Ins. Co.*, 611 F.3d 299, 304 (5th Cir. 2010). With that standard in mind, the Court finds that there are no genuine issues with respect to the following facts set forth in the LHDR Summary Judgment Motion and the Trustee Summary Judgment Motion unless otherwise noted.

After incurring credit card debt in the amount of \$39,265.00, the Debtor, Mary Alice Huffman (“Huffman”), who is now 84-years old, began experiencing serious financial problems. (Dep. of Huffman at 49, LHDR Ex. A, Adv. Dkt. 99-1; Dep. of Huffman at 118, Trustee Ex. E, Adv. Dkt. 104-5).³ On the brink of bankruptcy, she turned to Legal Helpers to review her finances and negotiate out-of-court settlements of her debts. Legal Helpers is the trade name of the law firm of Macey, Aleman, Hyslip & Searns (Trustee Ex. B, Adv. Dkt. 104-2).

On March 30, 2010, Huffman entered into a Retainer Agreement (the “Retainer Agreement”) with Legal Helpers. (Dep. of Huffman at 52-53, LHDR Ex. A, Adv. Dkt. 99-1; LHDR Ex. B, Adv. Dkt. 99-2). Jeffrey Hyslip, a lawyer and managing member of Legal Helpers, signed the Retainer Agreement on behalf of Legal Helpers. (Dep. of Aleman at 19, Trustee Ex. B, Adv. Dkt. 103-1). In the Retainer Agreement, which appears to be a form

this Adversary involves “core” matters and/or otherwise determines that the Court lacks constitutional authority to enter a final judgment, the Court recommends that this Opinion be regarded as its proposed findings of fact and conclusions of law and further recommends that the District Court enter this Opinion as its own after due consideration, in accordance with 28 U.S.C. § 157(c)(1).

³ The exhibits presented by Legal Helpers are cited as “(LHDR Ex. ____)”;

the exhibits presented by the Trustee are cited as “(Trustee Ex. ____). Because the exhibits are non-sequential, the citations also refer to docket entries to avoid confusion.

contract, Legal Helpers agreed to “negotiate and attempt to enter into settlements with creditors of [Huffman] in an effort to modify and/or restructure [Huffman’s] current unsecured debt.” (LHDR Ex. B ¶ III, Adv. Dkt. 99-2).

Attached to the Retainer Agreement is “Schedule B Payment Schedule & Fee Table” (the “Payment Schedule”) (LHDR Ex. B at Sched. B, Adv. Dkt. 99-2) prepared by Legal Helpers. According to the Payment Schedule, Legal Helpers proposed that Huffman contribute \$24,495.75 over a period of 48 months from April 5, 2010, until March 5, 2014, to settle all of her credit card debt and pay Legal Helpers’ fees for its services. (*Id.*). The portion of the payment allocated for the benefit of Huffman’s creditors in settlement of her debts would be deposited into a separate savings account (the “Savings Account”). From the total contribution of \$24,495.75, the Payment Schedule shows that \$15,706.00 would be deposited into the Savings Account, an amount based on the estimated cost to settle Huffman’s debts or 40% of the amount owed ($\$15,706.00 = 40\% \times \$39,265.00$).

Also from the total contribution of \$24,495.75, the Payment Schedule shows that \$8,789.75 would be paid to Legal Helpers as the cost for its debt settlement services. These costs consist of: (1) an initial flat retainer fee of \$500.00, (2) a monthly maintenance fee of \$50.00, and (3) a service fee of \$5,889.75, representing 15 percent of her total enrolled debt ($\$5,889.75 = \$39,265.00 \times 15\%$) (Dep. of Huffman at 83-84, LHDR Ex. A, Adv. Dkt. 99-1; LHDR Ex. B ¶ VIII & Scheds. A & B, Adv. Dkt. 99-2). In sum, the Payment Schedule provides for Huffman to pay her creditors \$15,706.00 on debts totaling \$39,265.00 and to pay Legal Helpers \$8,789.75 for the cost of its debt settlement services.

The amount of Huffman’s monthly contribution into the debt settlement program, according to the Payment Schedule, was \$497.19 except for the first three months and the last

month. The Payment Schedule shows that for the first three (3) months, from April 5, 2010 through June 5, 2010, Huffman would pay \$707.48, and on March 5, 2014, she would make a final payment of \$496.95. (LHDR Ex. B at 7, Adv. Dkt. 99-2). Huffman signed an authorization for Legal Helpers to withdraw these funds automatically from her checking account each month.

Pursuant to the Payment Schedule, Legal Helpers' fees are paid before any debts are settled. For that reason, the Payment Schedule divides the deductions from Huffman's monthly contributions into three (3) time periods. The retainer fee of \$500.00 is paid during the first fee period lasting three (3) months from April 5, 2010 through June 5, 2010. The service fee of \$5,889.75 is paid during the first and second fee periods lasting fifteen (15) months from April 5, 2010 through June 5, 2011. (*Id.*). No amount is scheduled to fund the Savings Account until July 5, 2010. Then, from July 5, 2010, until June 5, 2011, \$79.08 of the total monthly contribution of \$497.19 is scheduled to fund the Savings Account. The allocation to the Savings Account on June 5, 2011, is in the slightly different amount of \$79.09. By July 5, 2011, all initial fees due Legal Helpers are paid and only the \$50.00 monthly maintenance fee remains. Accordingly, from July 5, 2011, until February 5, 2014, the allocation to the Savings Account increases to \$447.19 (which is \$50.00 less than the amount of her full contribution), according to the Payment Schedule. From the final payment of \$496.95 on March 5, 2014, \$446.95 is allocated to the Savings Account.

Huffman participated in the debt settlement program from March 30, 2010, until June 2011. During these fifteen (15) months, funds were withdrawn automatically from her checking

account each month.⁴ At the start of the debt settlement program, Huffman stopped paying her creditors (Dep. of Huffman at 109, Trustee Ex. F, Adv. Dkt. 103-2), and Legal Helpers wrote letters informing each of them that “[o]ur law firm represents the above client(s)” and “[w]e are reviewing our client’s financial circumstance in order to determine all feasible legal remedies.” (Trustee Ex. J, Adv. Dkt. 104-10). Huffman began receiving dunning letters and telephone calls from creditors, and was sued for nonpayment. (Trustee Ex. K, Adv. Dkt. 104-11). Her financial situation deteriorated. In June 2011, Huffman called Legal Helpers, canceled the debt settlement program, and stopped the automatic withdrawal of funds from her bank account. The cancellation occurred fifteen (15) months into the 48-month debt settlement program.

Based solely upon the Payment Schedule, the Savings Account had accumulated \$948.97 for payment toward creditors from April 2010 to June 2011. During that same time period, Huffman had paid at least \$8,088.72 into the debt settlement program (Dep. of Huffman at 93-94, Adv. Dkt. 99-1; LHDR Ex. B, Sched. B, Adv. Dkt. 99-2). Legal Helpers did not settle any of the debts that were enrolled in the program. According to Legal Helpers, no settlements occurred because Huffman did not participate in the program long enough for it to do so.

Procedural History

A. Bankruptcy Case

Huffman retained the services of a local bankruptcy attorney, Michael G. Pond, and on January 19, 2012, filed a voluntary petition for relief (the “Petition”) (Bankr. Dkt. 1) under chapter 7 of the Bankruptcy Code (the “Bankruptcy Case”). Legal Helpers did not prepare Huffman’s Petition that commenced her Bankruptcy Case.

⁴ The parties dispute whether funds were withdrawn from Huffman’s checking account in the amounts set forth in the Payment Schedule. For example, the Trustee asserts that Huffman’s bank statements show that her first two payments were \$732.48, rather than \$707.48. (Trustee Ex. F, Adv. Dkt. 104-6).

B. Adversary Proceeding

1. Complaint

On September 28, 2012, the Trustee filed the Complaint (the “Complaint”) (Adv. Dkt. 1) asserting five (5) causes of action on Huffman’s behalf against Legal Helpers and Thomas G. Macey, Jeffrey J. Aleman, Jeffrey Hyslip, and Jason Searns (collectively, the “Members”): Count I: Turnover of Estate Property (Compl. ¶¶ 66-71), Count II: Fraudulent Transfers (Compl. ¶¶ 72-76), Count III: Accounting (Compl. ¶¶ 77-78), Count IV: 11 U.S.C. § 526⁵ (Compl. ¶¶ 79-87), and Count V: Fraud (Compl. ¶¶ 88-109). The gist of the Trustee’s allegations in the Complaint is that the debt settlement program did not actually help Huffman’s precarious financial situation, but in fact made it much worse by siphoning off monies that could have been paid to her creditors into Legal Helpers’ own pockets. The Trustee alleges numerous deceptive and abusive practices by Legal Helpers and the Members in the Complaint and seeks to recover all assets taken by Legal Helpers from the bankruptcy estate. (Trustee Resp. Brief at 2).

2. Prior Motions Filed by Legal Helpers

a. Legal Helpers’ Motion to Compel Arbitration

On November 14, 2012, Legal Helpers filed the Defendants [sic] Motion for [sic] to Compel Barry’s [sic] Claims to Arbitration Pursuant to the Federal Arbitration Act and to Stay Pending Arbitration (Adv. Dkt. 15). The Court denied their request to compel arbitration on February 6, 2013, in the Memorandum Opinion and Order Denying Motion to Compel Arbitration and to Stay Adversary Proceeding Pending Arbitration (Adv. Dkt. 37).

On February 20, 2013, Legal Helpers and the Members filed a Notice of Appeal of the denial of their request for arbitration (Adv. Dkt. 44) and contemporaneously filed separate

⁵ All code sections refer to the U.S. Bankruptcy Code found at title 11 of the U.S. Code unless otherwise noted.

answers to the Complaint (Adv. Dkts. 39-43). Thereafter, Legal Helpers and the Members filed a stipulation of dismissal of the appeal, and the Court entered an order dismissing the appeal pursuant to Rule 8001(c) of the Federal Rules of Bankruptcy Procedure on March 18, 2013. (Adv. Dkt. 60).

b. Legal Helpers' Motion for Judgment on the Pleadings

On April 10, 2013, Legal Helpers filed the Motion for Judgment on the Pleadings (Adv. Dkt. 64) in which Legal Helpers and the Members asked the Court to dismiss all of the Trustee's alter ego claims against the Members and most of his claims against Legal Helpers. As to the claims against Legal Helpers, they sought dismissal of the turnover claim, the accounting claim, and the fraud claim. They did not seek dismissal of the Trustee's claims against Legal Helpers for fraudulent transfer or for relief under § 526. On June 10, 2013, the Court entered the Memorandum Opinion and Order on Motion for Judgment on the Pleadings (the "Rule 12(c) Opinion") (Adv. Dkt. 75) in which it granted the Motion for Judgment on the Pleadings in part on the ground that the Trustee had failed to allege sufficient facts in the Complaint supporting an alter ego claim against the Members or a turnover claim with respect to the fees and expenses paid by Huffman. (Adv. Dkt. 75). The claims that remained after entry of the Rule 12(c) Opinion against Legal Helpers are the Trustee's claims for turnover, accounting, fraud, fraudulent transfer, and § 526.

3. Pending Motions

a. LHDR Summary Judgment Motion

Undaunted by the Court's denial of the Motion for Judgment on the Pleadings, Legal Helpers filed the LHDR Summary Judgment Motion on September 4, 2013. Legal Helpers submitted 297 pages of exhibits in support of the LHDR Summary Judgment Motion. (LHDR

Exs. A-C, Adv. Dkt. 98-1 to 98-3; LHDR Exs. A-F, Adv. Dkt. 99-1 to 99-11; LHDR Ex. A, Adv. Dkt. 112-1). The Trustee submitted 300 pages of exhibits in opposition to the LHDR Summary Judgment Motion. (Trustee Exs. A-H, Adv. Dkt. 103-1 to 103-8).

Legal Helpers requests summary judgment on the following claims for the reasons indicated: (1) the Trustee's turnover claim (Count I) because the Order (the "Discovery Order") (Adv. Dkt. 97) entered by the Court requiring Legal Helpers to produce a list of its Mississippi clients has rendered the claim moot; (2) the Trustee's fraudulent transfer claim (Count II) because Legal Helpers provided a "reasonably equivalent value" in the services it provided Huffman; (3) the Trustee's accounting claim (Count III) because the bank statements in the Trustee's possession provide all the information necessary to determine the total amount of money Huffman paid Legal Helpers; (4) the Trustee's claim under § 526 (Count IV) because Legal Helpers did not provide any "bankruptcy assistance" to Huffman; and (5) the Trustee's fraud claim (Count V) because (a) it consists of alleged misrepresentations that Huffman could not have reasonably relied upon, (b) it consists of alleged misrepresentations to act in the future, and (c) there is no evidence that the remaining misrepresentations were actually made. (LHDR S.J. Mot. ¶ 7). A summary judgment rendered in favor of Legal Helpers would dispose of all of the Trustee's claims in the Adversary.

b. Trustee Summary Judgment Motion

Also presently before the Court is the Trustee's request for summary judgment on his claims under § 526 (Count IV). The Trustee submitted 265 pages of exhibits in support of the Trustee Summary Judgment Motion. (Trustee Exs. A-AA, Adv. Dkts. 104-1 to 104-23, 117-1 to 117-4). Legal Helpers submitted 31 pages of exhibits in opposition to the Trustee Summary Judgment Motion (LHDR Exs. A-B, Adv. Dkt. 116-1 & 116-2). The Trustee asserts that the

undisputed facts establish as a matter of law that Legal Helpers violated § 526(a)(1) by failing to perform promised services and § 526(a)(3) by misrepresenting the services it would provide (Adv. Dkt. 105 at 3).

4. Adversary Trial

The last brief in this matter was filed on October 9, 2013. (Adv. Dkt. 117). The pre-trial order is due by November 6, 2013. (Adv. Dkt. 80). The trial of the Adversary is set to begin on November 20, 2013. (*Id.*).

Discussion

A. Summary Judgment Standard

Under Rule 56 of the Federal Rules of Civil Procedure (“Rule 56”), made applicable to adversary proceedings by Rule 7056 of the Federal Rule of Bankruptcy Procedure, summary judgment is appropriate when viewing the evidence in the light most favorable to the nonmoving party, the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, show that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Once the moving party has made its required showing, Rule 56(c)(1) provides, in relevant part:

A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record . . . ; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

FED. R. CIV. P. 56(c)(1). “Summary judgment . . . serves, among other ways, to root out, narrow, and focus the issues, if not resolve them completely.” *Calpetco 1981 v. Marshall Exploration, Inc.*, 989 F.2d 1408, 1415 (5th Cir. 1993).

By its express terms, Rule 56(a) provides for partial summary judgment. FED. R. CIV. P. 56(a). The effect of a partial summary judgment, if granted, is to lessen the length and complexity of trial on the remaining issues, “all to the advantage of the litigants, the courts, those waiting in line for trial, and the American public in general.” *Calpetco 1981*, 989 F.2d at 1415. When, as here, both parties have filed motions for summary judgment, the Court must rule on each motion on an individual and separate basis. *Shaw Constructors v. ICF Kaiser Engineers, Inc.*, 395 F.3d 533, 538-39 n.8 (5th Cir. 2004). Ultimately, the role of this Court is “not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Anderson*, 477 U.S. at 249; *see Hamilton v. Segue Software Inc.*, 232 F.3d 473, 477 (5th Cir. 2000).

B. Application of Summary Judgment Standard

This is the third time that dispositive motions have been before the Court in the Adversary. Based upon the Court’s prior decisions in the Adversary from which it has become familiar with the issues raised by the parties, and also based upon the sheer volume of exhibits submitted in this matter, the Court exercises its discretion to deny summary judgment so that the claims asserted by the Trustee may proceed to trial and the Court may benefit from a fuller presentation of the relevant evidence. Under Rule 56(a),⁶ the Court has the authority to deny summary judgment even if the moving party has shown that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See Kunin v. Feofanov*, 69 F.3d 59, 62 (5th Cir. 1995); *Black v. J.I. Case Co.*, 22 F.3d 568, 572 (5th Cir. 1994); *Veillon v. Exploration Servs., Inc.*, 876 F.2d 1197, 1200 (5th Cir. 1989).

⁶ Rule 56 was amended in 2010, but the revisions were stylistic only and did not change the standard for granting summary judgment. FED. R. CIV. P. 56 advisory committee notes; *see also Good Hope Constr., Inc. v. RJB Fin., LLC (In re Grand Soleil-Natchez, LLC)*, No. 12-00013-NPO (Bankr. S.D. Miss. Aug., 13, 2013).

In the alternative, the Court finds that genuine issues of material fact exist and that neither Legal Helpers nor the Trustee is entitled to summary judgment as a matter of law. Before explaining how the Court reached this finding, however, the Court must first address an evidentiary matter raised by Legal Helpers.

As previously mentioned, the Trustee submitted 565 pages of exhibits as evidence in opposition to the LHDR Summary Judgment Motion and in support of the Trustee Summary Judgment Motion. Legal Helpers contends that the Court may not consider some of these exhibits because the Trustee failed to properly authenticate them. (LHDR Reply Brief at 3-5; LHDR Response Brief at 3-5). Legal Helpers cites *Bellard v. Gautreaux*, 675 F.3d 454 (5th Cir. 2012), for the well-settled proposition that “[o]n a motion for summary judgment, the evidence proffered by the plaintiff to satisfy his burden of proof must be competent and admissible at trial.” *Id.* at 460 (citation omitted). It is not entirely clear which exhibits Legal Helpers challenges as inadmissible as opposed to those that it considers irrelevant or speculative but it appears that the exhibits in question consist of the pleadings filed in the collection suit brought against Huffman in state court and those filed in attorney-disciplinary proceedings brought against Aleman and another member of Legal Helpers in the state of Illinois (Trustee Exs. K, T, U & W, Adv. Dkt. 104-11, 104-20, 104-21 & 104-23).

Under Rule 56(c)(2), a party “may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.” FED. R. CIV. P. 56(c)(2). Rule 901(a) of the Federal Rules of Evidence provides that “the requirement of authenticating or identifying an item of evidence” is satisfied when “the proponent . . . produce[s] evidence sufficient to support a finding that the item is what the proponent claims it is.” FED. R. EVID. 901(a). The 901(a) requirement for authentication is met when “a document

was recorded or filed in a public office as authorized by law.” FED. R. EVID. 901(b)(7)(A). Here, all of the exhibits in question show “filed” stamps indicating that they have been filed as official public records. Accordingly, the Court finds that these exhibits are competent summary judgment evidence and may properly be considered. The Court notes that Legal Helpers does not suggest that these exhibits are not what the Trustee claims they are. Having disposed of this issue, the Court now addresses the arguments of the parties as to each count in the Complaint separately.

1. Count I

Legal Helpers contends that the Trustee’s turnover claim under § 542 in Count I has been rendered moot by the entry of the Discovery Order requiring Legal Helpers to produce a list of its Mississippi clients. Legal Helpers admits, however, that as of September 4, 2013, it had not yet complied with the Discovery Order. (LHDR Brief at 8). For that reason, the Court agrees with the Trustee that Legal Helpers is not entitled to summary judgment on the Trustee’s turnover claim at this time. If at some point prior to trial the documents are produced, the Court may revisit the mootness issue.

2. Count II

In Count II, the Trustee seeks to recover fees Huffman paid Legal Helpers for its services between April 2010 and June 2011 as fraudulent transfers under § 548 on the ground that Huffman received virtually nothing of value in return for her payments and became insolvent as a result of these payments. Legal Helpers contends that it is entitled to summary judgment because the \$8,789.75 in fees paid by Huffman was of “reasonably equivalent value” for the debt settlement services performed by Legal Helpers. Legal Helpers’ summary judgment evidence consists primarily of the Retainer Agreement itself which, according to Legal Helpers, expressly

warns that there is no guarantee that any out-of-court settlements would be reached. (LHDR Ex. B ¶¶ X(a), VII, VIII & Sched. B; Adv. Dkt. 99-2). It is this no-guarantee language that, according to Legal Helpers, prevents the debt settlement program from being viewed with the benefit of hindsight in determining the value of the services rendered Huffman.

The Bankruptcy Code does not define “reasonably equivalent value” but courts usually base the determination on factual findings “regarding the value of the property transferred and the ‘value’ received in exchange.” *Besing v. Hawthorne (In re Besing)*, 981 F.2d 1488, 1495 (5th Cir. 1993) (footnote omitted) (citation omitted). The Fifth Circuit Court of Appeals has noted with limited exceptions (mostly related to the doctrines of *res judicata* and/or *Rooker-Feldman*) that the issue of “reasonably equivalent value” is a question of fact. *Tex. Truck Ins. Agency, Inc. v. Cure (In re Dunham)*, 110 F.3d 286, 289 (5th Cir. 1997). Consistent with that view, the Court finds here that the Trustee has demonstrated the presence of numerous disputed facts regarding the value of the services provided by Legal Helpers. For example, it is undisputed that during the fifteen (15) months Huffman participated in the program, Legal Helpers did not negotiate the settlement of a single debt enrolled in the program. (LHDR Call Log, Trustee Ex. I, Adv. Dkt. 104-9). Also, Huffman’s deposition testimony suggests that Legal Helpers made no effort to do so. (*See, e.g.*, Dep. of Huffman at 34, Ex. F, Adv. Dkt. 103-2 (“[T]hey never did do anything.”)). These factual disputes regarding the nature and extent of the services provided Huffman are not amenable to determination on summary judgment.

The Court is not persuaded differently by *Kaler v. Able Debt Settlement, Inc. (In re Kendall)*, 440 B.R. 526 (B.A.P. 8th Cir. 2010), the case cited by Legal Helpers in support of its summary judgment argument. There, the Bankruptcy Appellate Panel affirmed the bankruptcy court’s judgment (reached after trial) that the value of debt settlement services was reasonably

equivalent to the \$1,708.37 paid by the debtors. *Id.* at 533-34. The nature and extent of the services provided to the debtors in *Kaler*, however, differed significantly from those allegedly provided by Legal Helpers to Huffman. Unlike the allegations here, the debt settlement company in *Kaler* was actively negotiating with many of the debtors' creditors when the debtors withdrew from the program. *Id.* at 533. Moreover, the appeal in *Kaler* was from a judgment rendered after trial. *Kaler* thus supports the view that these issues are more appropriately determined after trial.

3. Count III

As to the Trustee's accounting claim in Count III, Legal Helpers contends that the Trustee has in his possession all of the information necessary to determine the total amount of money paid by Huffman into her debt settlement program. According to Legal Helpers, Huffman's bank statements from April 2010 through June 2011 show the amounts paid, and the Payment Schedule shows the allocation of those payments. (LHDR Ex. D, Adv. Dkt. 99-4 to 99-6; LHDR Ex. E ¶¶ 7-8 & Exs. A-B, Adv. Dkt. 99-7 to 99-10).

The Trustee, in contrast, asserts that an accounting of Huffman's payments is complicated by the role of subcontractors in the provision of Legal Helpers' debt settlement services, as suggested by the deposition testimony of Jeffrey J. Aleman ("Aleman"), a bankruptcy attorney and member of Legal Helpers. (Dep. of Aleman at 8-9, 40, Trustee Ex. B, Adv. Dkt. 103-1). According to the Trustee, Global Client Solutions, whose function was to process payments deposited into the Savings Account, withdrew funds from Huffman's account that were not disclosed in the Payment Schedule. Thus, the Trustee asserts that some of the figures in the Payment Schedule are unreliable. The Court finds that the Trustee has demonstrated the presence of disputed facts precluding summary judgment on Count III.

4. Count IV

Both Legal Helpers and the Trustee seek summary judgment on Count IV of the Trustee's § 526 claim. Section 526 imposes certain restrictions on the conduct of "debt relief agencies" and provides sanctions and remedies when a debt relief agency "intentionally or negligently" fails to comply with its requirements. The Code defines a debt relief agency as "any person who provides any *bankruptcy assistance* to an assisted person in return for the payment of money or other valuable consideration." 11 U.S.C. § 101(12A) (emphasis added). Bankruptcy assistance is defined as any goods or services "provided to an *assisted person* with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors' meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding" in bankruptcy. 11 U.S.C. § 101(4A) (emphasis added). An assisted person is defined as "any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than \$186,825." 11 U.S.C. § 101(3).

Legal Helpers contends that § 526 does not apply because it is not a "debt relief agency." The Trustee, on the other hand, asserts that Legal Helpers is a debt relief agency that failed to perform promised services in violation of § 526(a)(1), and misrepresented the services to be provided in violation of § 526(a)(3). Although there is considerable overlap, the Court addresses Legal Helpers' argument first. If Legal Helpers is entitled to summary judgment on this element of the Trustee's § 526 claim, then there will be no need to consider the Trustee Summary Judgment Motion.

a. LHDR

Legal Helpers contends that it is not a “debt relief agency” under § 526 because it never provided any “bankruptcy assistance” to Huffman. In support of its position, Legal Helpers relies upon the deposition testimony of Aleman:

Q. What sort of advice did [Huffman] get with regard to just filing for bankruptcy on the outset?

A. We didn’t provide her with any advice with regard to that.

(Dep. of Aleman, Trustee Ex. B at 58, Adv. Dkt. 103-1). Its failure to advise Huffman, says Legal Helpers, is consistent with the Retainer Agreement which states that Legal Helpers would provide bankruptcy advice to Huffman only if her “circumstances change or [Huffman] requests such consultation.” (LHDR Ex. B ¶¶ III(c), XVII, Adv. Dkt. 99-2). According to Legal Helpers, liability under § 526 is based upon the *actual* provision of bankruptcy services, as opposed to a promise to provide bankruptcy services at some future date. Finally, Legal Helpers explains that although Huffman suggested to Legal Helpers that she may seek bankruptcy relief, Legal Helpers did not advise her to do so and did not prepare the Petition that commenced her Bankruptcy Case. (Dep. of Huffman at 37, 70-71, LHDR Ex. A, Adv. Dkt. 99-1).

The Trustee, on the other hand, claims that Legal Helpers admitted that it is a debt relief agency in the Retainer Agreement and in certain promotional material. (Trustee Ex. E, Adv. Dkt. 103-6). Moreover, the Trustee maintains that the Retainer Agreement is replete with actual bankruptcy advice provided Huffman, as demonstrated in the following paragraph:

Disclosure and Election of Services

Bankruptcy will usually discharge your unsecured debt and your creditors are not permitted to contact you once you have filed with the court. There are two kinds of bankruptcy; Chapter 13 bankruptcy where you are generally able to keep property that is mortgaged such as your house or car and are expected to repay debts in three to five years and Chapter 7 bankruptcy where you must give up all

non-exempt property and assets that you own in exchange for a discharge of most debt. Bankruptcy may be appropriate if you have pending foreclosures, collection litigation or wage garnishment, however, you will generally be unable to establish credit for up to ten years. In 2005, the bankruptcy law was changed to make it more difficult for some consumers to file Chapter 7 bankruptcy based on a financial means test and credit counseling requirements that may require a repayment of some of your debt.

(Trustee Ex. A at Ex. A, Adv. Dkt. 103-4).

The Trustee points to other provisions in the Retainer Agreement that show that Legal Helpers promised to provide Huffman “bankruptcy assistance,” such as: (1) “[Legal Helpers] will discuss specific debt related issues with Client and, if appropriate, offer additional legal services in regard to bankruptcy or other debt resolution services for Client’s consideration” (Trustee Ex. A ¶ III, Adv. Dkt. 103-4); (2) “[Legal Helpers] will discuss with the Client other legal remedies in the event of such circumstances including Chapter 7 or Chapter 13 bankruptcy” (*Id.* ¶ XII(e)); (3) “Client understands that there are other remedies available in regard to their goal of debt resolution including consumer credit counseling and bankruptcy” (*Id.* ¶ XVII); and (4) “Consumer Credit Counseling may impact less on the Client’s credit rating and reduce interest rates on current debt, but generally will require payment of the majority of the Client’s existing debt. Bankruptcy may discharge the majority of the client’s debts, however Client has requested [Legal Helpers] to pursue other alternatives at this time to avoid bankruptcy. [Legal Helpers] will discuss and advise Client as to the bankruptcy option, including fees and costs, at any time that Client’s circumstances change or Client requests such consultation. There are no additional fees or costs required from Client for such consultation and advice regarding bankruptcy” (*Id.* ¶ XVII). The Trustee summarizes the bankruptcy advice provided Huffman *via* the Retainer Agreement into three categories: (1) the dischargeability of debts in bankruptcy, (2) the retention of secured real and personal property, and (3) general bankruptcy procedures. *See*

11 U.S.C. § 110(e)(2)(B) (defining “legal advice” that only attorneys may provide). Aside from the Retainer Agreement, the Trustee relies upon Aleman’s deposition testimony, as follows:

Q. I know you said Ms. Huffman wasn’t advised of her right to file bankruptcy. What is the typical mode of conduct with regard to a client? Are they advised that that’s an option?

A. It’s communicated to them that bankruptcy is an option for debt resolution.

Q. You don’t advise them or no lawyer advises them of that; correct?

A. Typically, you know, -- well, our attorneys drafted the, you know, communications that Eclipse uses in this case.

Q. All communication?

A. I guess specifically to what I’m referring to is one of the documents that had, you know, debt negotiation, bankruptcy, and credit counseling has options where Ms. Huffman signed it. That document in particular was reviewed and approved by, I believe, Jason Searns with my law firm.

(Dep. of Aleman at 79-80, Trustee Ex. B, Adv. Dkt. 103-1).

Viewing the evidence in the light most favorable to the Trustee, the Court finds that genuine issues of material fact exist that preclude summary judgment on the issue of whether Legal Helpers is a debt relief agency within the meaning of § 526. The Court reaches this finding even though it rejects the Trustee’s argument that Legal Helper’s description of itself in the Retainer Agreement and in certain promotional material as a “debt relief agency” requires the Court to find that it is so for purposes of § 526. Those self-descriptions do not refer to § 526. A finding of a “debt relief agency” for purposes of § 526 focuses upon whether the entity provided bankruptcy assistance to an assisted person or a prospective assisted person, and not simply upon what name an entity chooses to call itself.

The definition of a debt relief agency was addressed recently by the United States Supreme Court in *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229 (2010).

There, the Supreme Court resolved a split of authority as to whether § 526 reached the conduct of attorneys by holding that “attorneys who provide bankruptcy assistance to assisted persons are debt relief agencies.” *Id.* at 239. Thus, the issue here, as framed by Legal Helpers, is whether Legal Helpers provided “bankruptcy assistance” to Huffman. The Court finds that Huffman’s deposition testimony creates a factual dispute that renders summary judgment inappropriate on that issue.

Q. Okay. Did you ever solicit any bankruptcy advice from anyone at [Legal Helpers]?

A. No, I did not. Yes, I did. That girl. And she – and she said, well, just give them a few more months. But I couldn’t afford them a few more months without them paying anything.

(Dep. of Huffman at 69, Trustee Ex. F, Adv. Dkt. 103-2).

Huffman’s deposition testimony and other evidence presented by the Trustee distinguishes this matter from *French v. Johnson Law Group (In re Kohlenberg)*, No. 10-3390, 2012 WL 3292854 (Bankr. N.D. Ohio Aug. 10, 2012), which Legal Helpers cites as being instructive. There, the bankruptcy court denied the trustee’s motion for default judgment after concluding that the trustee was not entitled to any relief under § 526(a)(3). The bankruptcy court in *Kohlenberg*, however, reached this conclusion based on the failure of the complaint to allege that the defendant, the Johnson Law Group, was a “debt relief agency” or to allege that the Johnson Law Group prepared any document for filing or provided any bankruptcy assistance to the debtors. In this matter, those allegations have been made aptly and repeatedly by the Trustee.

b. Trustee

The Court now turns briefly to the Trustee Summary Judgment Motion. For the same reason the Court denies the LHDR Summary Judgment Motion on the § 526 claims, the Court denies the Trustee Summary Judgment Motion. Section 526 applies to Legal Helpers only if it is

a debt relief agency, and Legal Helpers has demonstrated the presence of a factual dispute that prevents that determination from being made at the summary judgment stage. Until that issue is resolved, it is premature for the Court to consider whether the undisputed evidence supports the merits of the Trustee's § 526 claims.

5. Count V

Legal Helpers contends that the Trustee cannot prove its fraudulent misrepresentation claim in Count V because Huffman had no right to rely on any alleged misrepresentations that contradicted the plain language of the Retainer Agreement or that were promises to act in the future. *See Ballard v. Commercial Bank of DeKalb*, 991 So. 2d 1201, 1207 (Miss. 2008) (holding that as a matter of law, one may not reasonably rely on oral representations that contradict loan documents); *S. Mortg. Co. v. O'Dom*, 699 F. Supp. 1223, 1226 (S.D. Miss. 1987) (recognizing that under Mississippi law, a fraud claim cannot be predicated upon future promises). Legal Helpers points to two specific provisions in the Retainer Agreement that it contends render Huffman's reliance unreasonable: (1) that there is no guarantee that any debts will be reduced (LHDR Ex. B ¶¶ VII, X(a), XVII, Adv. Dkt. 99-2) and (2) that Huffman could be sued by her creditors for nonpayment despite her participation in the program. (*Id.* ¶ X(d)).

The Court finds that there are disputed facts that preclude summary judgment on the Trustee's fraud claim. At the outset, the Court notes that not all of the alleged misrepresentations involve oral statements, but some arise from the Retainer Agreement itself. (Trustee Ex. A at 1, 3 & 5, Adv. Dkt. 103-4). The Court also rejects Legal Helpers' argument that the oral statements necessarily contradict the no-guarantee and you-still-may-be-sued language in the Retainer Agreement. The alleged misrepresentations are not solely result-oriented but concern the efforts made by Legal Helpers to negotiate reductions in Huffman's debts. Finally, Legal Helpers'

characterization of the alleged misrepresentation as promises of future conduct is disputed by the Trustee. *See Redecop v. Gerber*, 265 F. App'x 321, 323 (5th Cir. 2008) (unpublished). For example, there are numerous statements of existing fact in the Retainer Agreement regarding the debt settlement program. (Trustee Ex. A at 1, 3 & 5, Adv. Dkt. 103-4). Whether Legal Helpers intended to provide any of the services listed in the Retainer Agreement at its inception and whether Legal Helpers understood that there was little chance Huffman's program would succeed from the outset could be characterized as misrepresentations of existing fact.

Conclusion

It is worth noting that the parties filed their dispositive motions, with a combined total of 893 pages of exhibits, despite the approaching trial date on November 20, 2013. Given the large number of exhibits submitted by the parties and the credibility determinations that must be resolved, the Court exercises its discretion under Rule 56(a) and denies both the LHDR Summary Judgment Motion and the Trustee Summary Judgment Motion so that a fuller development of the record may be presented at trial. In the alternative, the Court concludes that there are genuine issues of disputed fact and the parties have failed to show that they are entitled to judgment as a matter of law.

IT IS, THEREFORE, ORDERED that the LHDR Summary Judgment Motion is hereby denied.

IT IS FURTHER ORDERED that the Trustee Summary Judgment Motion is hereby denied.

SO ORDERED.



Neil P. Olack
United States Bankruptcy Judge

Dated: October 22, 2013