

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re

SHERRY DENISE GRAHAM,

Debtor.

No. 95-21639
Chapter 7

MUNICIPAL EMPLOYEES
CREDIT UNION,

Plaintiff,

vs.

Adv. Pro. No. 96-2014

SHERRY DENISE GRAHAM,

Defendant.

M E M O R A N D U M

APPEARANCES :

WILLIAM K. ROGERS, ESQ.
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*Attorney for Municipal Employees
Credit Union*

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding involves a request for a denial of the debtor's discharge under 11 U.S.C. §§ 727(a)(2)(A) and (a)(4)(A) by Plaintiff, Municipal Employees Credit Union ("Municipal"), and the debtor's counterclaim against Municipal for sanctions under Fed. R. Bankr. P. 9011(a). Presently pending before the court is a motion for summary judgment on the counterclaim filed by Municipal on August 5, 1996, asserting that there is no genuine issue as to any material fact in controversy and that Municipal is entitled to a judgment as a matter of law, and the debtor's response thereto filed on August 26, 1996. For the following reasons, the motion for summary judgment will be denied. This is a core proceeding. 28 U.S.C. § 157(b)(2)(J).

I.

This adversary proceeding was commenced upon Municipal's filing of a "COMPLAINT OBJECTING TO DISCHARGE" on January 16, 1996. In the complaint, Municipal alleges that the discharge of the debtor should be denied pursuant to § 727(a)(4)(A) because (1) the debtor made statements which were false while under oath during her 11 U.S.C. § 341(a) meeting of creditors; (2) statements made under oath by debtor in her bankruptcy petition, upon information, were false; (3) the debtor made false oaths

concerning personal properties she owns; and (4) the debtor made false representations as to the value of a personal injury claim which is pending on her behalf in Arizona.

Municipal also alleges in its complaint of January 16 that the debtor during her 11 U.S.C. § 341(a) meeting of creditors "testified she signed a house valued at approximately \$125,000.00 with \$90,000.00 in equity over to her husband, Thomas Graham within one year of the date of filing her bankruptcy" in violation of 11 U.S.C. § 727(a)(2)(A). Finally, Municipal alleges, upon information, that the debtor's income is greater than that listed in her schedules and requests that the court "either hold that a Chapter 7 discharge is not appropriate or require that [debtor] proceed under Chapter 13 of the Bankruptcy Code."

The complaint filed on January 16 was filed in the debtor's underlying bankruptcy case, did not set forth the caption required by Official Bankruptcy Form No. 16(b) pursuant to Fed. R. Bankr. P. 7010, and was not accompanied by the requisite summons and necessary filing fee. Because Municipal alternatively requested in the complaint an extension of the deadline for filing objections to discharge (notwithstanding the fact that the complaint in and of itself was an objection to discharge), the court scheduled a hearing on that request and,

thereupon, determined that an extension of the discharge deadline was appropriate in order to provide Municipal time to conduct a Fed. R. Bankr. P. 2004 examination of the debtor, which relief it had requested by separate motion in the debtor's bankruptcy case. It was agreed at that time by the parties that the January 16, 1996 "Complaint Objecting to Discharge" would be deemed a motion for extension of the discharge deadline, rather than a complaint objecting to discharge, and that presumably Municipal would decide whether to object to discharge after the Rule 2004 examination. Accordingly, Municipal's counsel thereafter tendered an agreed order which was entered by the court on February 29, 1996, providing Municipal an extension of the time for filing complaints objecting to discharge through February 28, 1996. No reference was made in the agreed order regarding the parties' agreement to treat the January 16, 1996 complaint as a motion, nor did the order make any other disposition of the complaint except to the extent the complaint requested an extension of the discharge deadline.

On February 29, 1996, Municipal filed a second complaint entitled "COMPLAINT FOR DETERMINATION THAT DEBT IS NONDISCHARGEABLE AND FOR DISMISSAL" which pleading set forth substantially the same averments as were contained in the January 16 complaint, although the allegation as to amount of

equity in the house transferred by the debtor to Thomas Graham was reduced from the January 16 complaint figure of \$90,000.00 to \$50,000.00. In addition, the February 29 complaint averred that venue of the debtor's chapter 7 case was improper because debtor had resided in Tennessee less than 90 days prior to filing her petition and, therefore, the petition should be dismissed; that debtor's statement in her petition that she had been a resident of the state of Tennessee for the requisite time was a false oath and a basis for a denial of discharge under 11 U.S.C. 727(a)(4); that debtor's petition failed to list several of her debts and assets and, therefore, was a false oath under 727(a)(4); and that generally the debts owed to Municipal by the debtor were nondischargeable under 11 U.S.C. § 523. Although the February 29 complaint, like the earlier complaint, was deficient in that it did not contain the appropriate caption, it was accompanied by the requisite filing fee and issuance of a summons was requested.

In response to the filing of the February 29 complaint, the debtor filed a motion to dismiss asserting that the second complaint was not timely filed prior to the expiration of the February 28, 1996 deadline for objecting to discharge, and that the allegation in the second complaint regarding dischargeability pursuant to 11 U.S.C. § 523 was untimely

because the deadline for objecting to dischargeability of debts had expired on January 16, 1996, and had not been extended by the court's order of February 29, 1996.

At the hearing on the motion to dismiss, the court concluded that the second complaint had not been timely filed since it was filed after the February 28, 1996 deadline, but did not grant the motion to dismiss due to the debtor's concession that the January 16, 1996 complaint requesting a denial of discharge was properly before the court despite its deficiencies. The January 16 complaint had been timely filed, it had not been stricken or dismissed, and its procedural deficiencies were not fatal. The court treated the February 29, 1996 complaint as an amendment to the earlier complaint and held that Municipal could raise in the amended complaint the issue of nondischargeability under § 523 to the extent the factual allegations in the original complaint pertaining to denial of discharge also set forth a basis for an exception to dischargeability and, therefore, related back pursuant to Fed. R. Civ. P. 15, as incorporated by Fed. R. Bankr. P. 7015. See order entered May 9, 1996. Municipal, however, chose not to pursue a cause of action under 11 U.S.C. § 523 and, accordingly, all allegations in the February 29, 1996 complaint regarding dischargeability of debts were denied. See order entered May 23, 1996.

In answering the January 16 complaint, the debtor generally denied making any intentionally false statements and averred that she was unaware of making any unintentional false statements. Specifically, the debtor denied that (1) she had made any intentional false statements concerning properties which she owns or the personal injury claim; (2) her income was greater than what was listed on the schedules at the time they were signed; and (3) she signed over a house with \$90,000.00 in equity to her ex-husband. The debtor asserted that she did, as a part of a marital dissolution agreement, "sign over to her ex-husband, Thomas Graham, her interest in marital property worth possibly \$125,000.00 which was encumbered with a lien of at least \$90,000.00 at the time of the transaction." However, she denied that this was in violation of 11 U.S.C. § 727(a)(2)(A).

In her counterclaim against Municipal, the debtor seeks costs and sanctions for an alleged violation of Fed. R. Bankr. P. 9011 asserting that Municipal undertook no investigation of the facts as alleged in the complaint prior to its filing on January 16, 1996. The debtor maintains that the allegations in the complaint were not made upon the basis of a reasonable inquiry and that the complaint is not well grounded in fact and has been interposed for an improper purpose, namely to harass and cause unnecessary increase in the cost of the debtor's

bankruptcy. In its answer to the counterclaim, Municipal denies any violation of Fed. R. Bankr. P. 9011.

II.

Fed. R. Civ. P. 56, as incorporated by Fed. R. Bankr. P. 7056, mandates the entry of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. See also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548 (1986). In ruling on a motion for summary judgment, any inferences to be drawn from the underlying facts contained in the record must be viewed in the light most favorable to the party opposing the motion. See *McCafferty v. McCafferty (In re McCafferty)*, ___ F.3d ___, 1996 WL 525866 (6th. Cir. 1996), citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348 (1986). The court has before it the pleadings of the parties, the transcript from the discovery deposition of the debtor, and the affidavits of debtor, debtor's counsel, and Thomas Dires Graham, the debtor's ex-husband.

Municipal's motion for summary judgment is based upon the debtor's admission that she had not resided in this district for

a period of 180 days prior to her bankruptcy filing and the sworn affidavit from Thomas Graham dated January 24, 1996, "that outlines as many as fourteen (14) false oaths or accounts which Defendant has made in violation of 11 U.S.C. § 727 in this case." Municipal argues that each of the facts standing alone provides a sufficient basis for a complaint objecting to discharge and that Thomas Graham's affidavit "indicates and proves that Plaintiff and its Counsel has a reasonable basis to file its claim and investigated prior to filing the claim." Municipal accordingly contends that the debtor's counterclaim should be dismissed as a matter of law.

The debtor contends that there are material facts in dispute and that, therefore, summary judgment is not appropriate. She notes that her affidavit directly controverts several of the statements contained in Mr. Graham's affidavit and that other statements therein are simply statements of opinion as to value upon which individuals may reasonably differ. She asserts that if Municipal had conducted an adequate investigation prior to the filing of the complaint, it would have learned that its allegations were false and had no basis in fact. Specifically with respect to the averment in its complaint that the debtor made an intentionally false oath concerning the value of a personal injury claim pending on her behalf in Arizona which the

debtor had listed in her schedules at \$10,000, the affidavit of Thomas Graham states that the insurance agent had demanded \$35,000.00 for the claim and expected to clear \$15,000.00 to \$20,000.00. The debtor notes that she explained at the 341 meeting of creditors that estimation of value for this type of lawsuit was difficult and that the \$10,000.00 amount had been arrived at after discussion with her bankruptcy attorney. Furthermore, the debtor observes that Municipal made no effort to ascertain the true value of the lawsuit by discussing it with her Arizona personal injury attorney and that she subsequently received a net amount of \$9,659.00 from a settlement of the claim, proving that her valuation of \$10,000.00 was correct.

With respect to the allegations regarding the transfer of her house, the debtor again states that a reasonable investigation prior to the filing of the complaint would have disclosed the falsity of Municipal's averments. She notes that this transfer, which was made in connection with her divorce, was set forth in her statement of financial affairs, that all of the documentation regarding the divorce and transfer was easily ascertainable and had been provided to the chapter 7 trustee, and that the house had been purchased for \$105,000.00 on November 2, 1994, with an original mortgage of \$98,536.44.

The debtor maintains that Municipal had no basis in fact to

support its assertion in the complaint that the debtor's income was greater than that listed in her bankruptcy petition. The only reference in Thomas Graham's affidavit to the debtor's income was the statement that "[the debtor] told me that she has a job as a secretary now and besides that income she has her child support and \$431.00 a month of social security." The affidavit does not indicate when this statement was allegedly made by the debtor or that it is a statement as to the debtor's income at the time of her bankruptcy filing. The debtor states in her memorandum that she had income only from Social Security Supplemental Benefits for her child and child support from her ex-husband at the time of the filing of her bankruptcy.

Finally, regarding the fact that the debtor had not resided in this district for 180 days preceding her bankruptcy filing, the debtor denies any intentional misrepresentation. Her counsel's affidavit states that the debtor was unaware of the residency requirement for proper venue and that he "personally completed the petition and schedules during an extended conference" with the debtor, but neglected to ascertain the exact amount of time the debtor had resided in Tennessee.

III.

Rule 9011 of the Federal Rules of Bankruptcy Procedure

requires that "[e]very petition, pleading, motion and other paper served or filed in a case under the Code on behalf of a party represented by an attorney . . . be signed by at least one attorney of record," and further provides in pertinent part as follows:

The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.

Fed. R. Bankr. P. 9011.

Rule 9011 tracks the language of Fed. R. Civ. P. 11 as it existed prior to its amendment effective December 31, 1993, and, correspondingly, the case law developed under former Rule 11 is instructive in its application. See, e.g., *In re 72nd Street Realty Associates*, 185 B.R. 460, 470 (Bankr. S.D.N.Y. 1995). In the Sixth Circuit, the test for the imposition of sanctions under this rule is whether the individual's conduct was

reasonable under the circumstances that existed "at the time the pleading, motion, or other paper was submitted." See *Mihalik v. Pro Arts, Inc.*, 851 F.2d 790, 792 (6th Cir. 1988), citing *INVST Financial Group v. Chem-Nuclear Systems*, 815 F.2d 391, 401 (6th Cir. 1987), cert. denied, *Garratt v. INVST Financial Group, Inc.*, 484 U.S. 927, 108 S. Ct. 291 (1987); and *Davis v. Crush*, 862 F.2d 84, 88 (6th Cir. 1988). The standard is an objective one, presenting a mixed question of law and fact. See *Mihalik*, 851 F.2d at 792. If the court finds that the alleged misconduct was not reasonable, sanctions must be imposed. *Id.* See also *INVST*, 815 F.2d at 401.

To support its motion for summary judgment and apparently to demonstrate a sound legal basis for filing its complaint, Municipal argues that the debtor's admission during her discovery deposition that she did not reside in this district for at least 180 days prior to filing her bankruptcy petition "alone should provide a basis for a Complaint" objecting to debtor's discharge. However, no case law establishing this legal proposition has been offered.* The making of a false oath or account in or in connection with a bankruptcy case is grounds

*The court observes that Municipal did not file a motion in the underlying bankruptcy case under Fed. R. Bankr. P. 1014(a) seeking dismissal or transfer of venue of the case.

for denial of discharge under 11 U.S.C. § 727(a)(4) **if** the statement was made "knowingly and fraudulently." Debtor's admission that her statement of residency in the petition was false does not establish the "knowingly and fraudulently" elements of § 727(a)(4). In the absence of proof supplying these elements, the court is unable to conclude as a matter of law based solely on the debtor's admission of improper venue that Municipal's complaint on the whole was filed after a reasonable inquiry, is well grounded in fact, warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and is not imposed for a improper purpose.

The other basis for Municipal's motion for summary judgment concerns the affidavit from Thomas Graham dated January 24, 1996, which Municipal contends proves it had a reasonable basis to file its complaint and that it investigated the allegations therein prior to its filing. No evidence, however, is before the court that Municipal investigated the allegations of its complaint filed on January 16, 1996, prior to obtaining that affidavit which is dated eight days thereafter. Moreover, in light of the debtor's affidavit which controverts some of the matters contained in Mr. Graham's affidavit and the debtor's assertion supported by her affidavit that a reasonable inquiry

into the facts and the law prior to the filing of the complaint would have revealed the absence of any basis for a denial of discharge, the court cannot conclude as a matter of law that Municipal conducted a reasonable investigation into these allegations prior to the filing of its complaint.

In summary, the court holds that a genuine issue of material fact exists as to the reasonableness of Municipal' conduct, precluding summary judgment. The debtor's counterclaim should proceed on its merits. Although a failure of proof at trial on Municipal's complaint is not necessarily sufficient to support the imposition of sanctions under Rule 9011, the lack of evidence to support Municipal's factual assertions or legal theories is an important element in the sanction analysis. See *In re Morz*, 65 F.3d 1567, 1573 (11th Cir. 1995). An order denying Municipal's motion for summary judgment will be entered contemporaneously with the filing of this memorandum opinion.

FILED: September 27, 1996

BY THE COURT

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE