

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

IN RE:)	CHAPTER 7
)	CASE NO. 05-11683-JDW
BRINSON D. CLEGG and)	
SANDRA K. CLEGG,)	
)	
DEBTORS.)	
)	
FRANKIE LUKE, f/k/a FRANKIE J.)	ADVERSARY PROCEEDING
RUFFIN,)	NO. 05-1045
)	
PLAINTIFF,)	
)	
VS.)	
)	
BRINSON D. CLEGG and)	
SANDRA K. CLEGG,)	
)	
DEFENDANTS.)	

BEFORE

JAMES D. WALKER, JR.

UNITED STATES BANKRUPTCY JUDGE

COUNSEL

For Plaintiff: T. Lee Bishop, Jr.
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For Defendants: Greg A. Clark
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MEMORANDUM OPINION

This matter comes before the Court on Plaintiff's motion for partial summary judgment. This is a core matter within the meaning of 28 U.S.C. § 157(b)(2)(J). After considering the pleadings, the evidence, and the applicable authorities, the Court enters the following findings of fact and conclusions of law in conformance with Federal Rule of Bankruptcy Procedure 7052.

Background

Plaintiff, Frankie Luke, filed a complaint against Debtor-Defendants Brinson and Sandra Clegg on November 14, 2005, objecting to discharge. Plaintiff has filed a motion for summary judgment with respect to count 2, an objection to discharge pursuant to § 727(a)(3). Along with the motion, Plaintiff filed a statement of undisputed facts. Defendants have filed no opposition to the motion and have not contested the statement of undisputed facts.

Material Facts Not in Dispute

Plaintiff has asserted that the following material facts, based on the pre-trial

stipulation and the affidavit of Plaintiff, are undisputed. On September 26, 2003, Debtors executed a promissory note in favor of Security Bank and Trust Company in the principal amount of \$59,844.82. Plaintiff, who is Debtor Sandra Clegg's mother, gave the bank a mortgage on her house as security for the note. Debtors used \$40,000 of the loan proceeds to purchase a hair salon, which they operated as The Hair Force from September 11, 2003, until September or October of 2004. An additional \$10,000 of the loan proceeds was used as startup money for the business, including the purchase of equipment and supplies. After the purchase of The Hair Force, a section of the salon was set aside as a children's salon known as Cowlicks and Pigtails. Debtors made substantial purchases of equipment, supplies, and product for the children's salon.

For a few months, Plaintiff worked as the primary bookkeeper for The Hair Force. During that time, various business records were produced and maintained by the salon. For example, checkbook stubs and a check ledger register containing information relating to the purpose for each check were maintained. In addition, records were maintained in a three-ring binder, including the cash register tapes and documents listing the daily sales and payments due to the stylists. The salon kept invoices for purchases of supplies, product, and equipment in file folders labeled with the name of the vendor. The appointment book included information relating to services performed, product sold, and amounts collected from customers. The salon also retained copies of deposit slips, and it kept some records on graph paper.

Debtors resided in a mobile home. Some of the business records for The Hair Force, including the appointment book, were stored in the mobile home. No later than June 20,

2005, Debtor Sandra Clegg was aware that Vanderbilt Mortgage had filed an action to repossess the mobile home. According to the statement of financial affairs, as amended on May 11, 2006, Debtors' mobile home was repossessed some time in 2005.¹

During discovery, Debtors failed to produce any invoices for the Cowlicks and Pigtails equipment, the appointment book, the checkbook stubs, the check register, the check register ledger, records kept in the three-ring binder, cash register tapes, documents stored on computer, records kept on graph paper, bank statements for the business account for June and July 2004, bank statements for the time period after August 2004, bank statements for Debtors' personal bank account, or invoices for equipment purchased. Debtors also failed to produce all of the deposit slips. Item 19(c) of the amended statement of financial affairs states that some records were stored in the mobile home at the time it was repossessed and others were kept by a friend who cannot be located.²

After considering the evidence put forth by Plaintiffs and the applicable law, the Court will deny the motion for summary judgment.

Conclusions of Law

Summary Judgment Standard

Summary judgment is governed by Federal Rule of Civil Procedure 56, made applicable to adversary proceedings through Federal Rule of Bankruptcy Procedure 7056.

¹ Prior to the amendment, the statement of financial affairs indicated that Debtors had moved out of the mobile home and voluntarily surrendered it.

² The original statement of financial affairs did not indicate that any records were missing or otherwise unavailable.

Under Rule 56, a party is entitled to summary judgment when 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(c); McCaleb v. A.O. Smith Corp., 200 F.3d 747, 750 (11th Cir. 2000). The Court views all evidence and reasonable factual inferences in the light most favorable to the nonmoving party. Burton v. Tampa Housing Auth., 271 F.3d 1274, 1277 (11th Cir. 2001). However, pursuant to Local Rule 7056-1(c), the facts alleged in the movant’s statement of undisputed facts may be deemed admitted unless controverted by a statement of facts from the respondent. Debtors, the respondents in this case, have not contested the motion for summary judgment and have not filed a statement controverting the facts alleged by Plaintiff. For that reason, the Court will accept the facts asserted by Plaintiff as true.

Objection to Discharge

At issue in this case is whether Debtors should be denied a discharge for failure to maintain business records. Section 727(a)(3) provides as follows:

- (a) The court shall grant the debtor a discharge, unless—
 - ...
 - (3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor’s financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all circumstances of the case[.]

11 U.S.C. § 727(a)(3).

“The purpose of section 727(a)(3) is to give creditors and the bankruptcy court

complete and accurate information concerning the status of the debtor's affairs and to test the completeness of the disclosure requisite to a discharge." Meridian Bank v. Alten, 958 F.2d 1226, 1230 (3d Cir. 1992) (citations omitted). "The statute also ensures that the trustee and creditors are supplied with dependable information on which they can rely in tracing a debtor's financial history." Id. However, the Court also should be mindful of the broader bankruptcy policy to provide the debtor with a fresh start, and thus should construe § 727(a) liberally in favor of the debtor. Everspring Enter., Inc. v. Wang (In re Wang), 247 B.R. 211, 214 (Bankr. E.D. Tex. 2000).

To prevail on a § 727(a)(3) claim, Plaintiff must prove: "(1) that the debtor failed to maintain and preserve adequate records, and (2) that such failure makes it impossible to ascertain the debtor's financial condition and material business transactions." Alten, 958 F.2d at 1232.

In this case, Plaintiff has cited numerous records that, according to her personal knowledge, were kept by Debtors but were not produced by them. But, the fact that some records are missing or otherwise unavailable does not end the inquiry. Plaintiff must also show that the failure to produce the records makes it impossible to ascertain Debtors' financial condition. Based on the evidence proffered in this case, it is impossible for the Court to evaluate the second prong of the § 727(a)(3) test. Plaintiff has argued that the missing records are necessary to determine Debtors' financial status. However, she has made no showing that records already produced are insufficient to ascertain Debtor's financial condition. The motion presumes that proof of missing records is proof of insufficiency. Such an assumption cannot serve as the basis for a grant of summary

judgment.

Because the Court does not have the necessary facts to determine whether Plaintiff is entitled to a judgment as a matter of law, the Court will deny her motion for partial summary judgment.

An Order in accordance with this Opinion will be entered on this date.

Dated this 6th day of June, 2006.

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