U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
LINDA FAY JENKINS,	§	CASE NO. 02-38913-BJH-7
	§	
Debtor.	§	(Chapter 7)
	§	
	§	
DONALD ARMSTRONG,	§	
	§	
Plaintiff,	§	
	§	
- against -	§	ADV. PRO. NO. 03-03138-BJH
	§	
LINDA FAY JENKINS,	§	
	§	
Defendant.	§	

Memorandum Decision and Order Denying Motion to File Supplemental Brief and Evidence In Opposition to Defendant's Motion to Dismiss Amended Complaint

On June 16, 2003, the Court held a hearing on the motion to dismiss amended complaint filed by Linda Fay Jenkins ("Jenkins") in the above adversary proceeding and a motion for partial summary judgment filed by Donald Armstrong ("Armstrong").[1] After the hearing, Armstrong filed a motion to file supplemental brief and evidence in opposition to Defendant's motion to dismiss amended complaint and motion to appear by telephone (the "Motion to Supplement"). The Court held a hearing on the Motion to Supplement on August 7, 2003 at which time it took that motion under advisement.

The Court must decide if Armstrong, a pro-se, non-lawyer, should be permitted to

[1] Following the June 16 hearing, the Court entered an Order on June 26, 2003 directing Armstrong to supplement the record and directing Jenkins to advise the Court whether she continues to dispute the existence of an attorney-client relationship between she and Armstrong (the "Attorney-Client Relationship Issue"). The Order further directed the parties to advise the Court if they consented to a bench trial of the Attorney-Client Relationship Issue, following which the Court would advise the parties if a ruling on Jenkins' motion to dismiss and Armstrong's motion for summary judgment would await a separate trial of the Attorney-Client Relationship Issue. The parties complied with the first two directives, but Armstrong requested clarification of the Court's Order with respect to the separate trial. Accordingly, the Court held a further hearing, following which the Court entered an Order on September 4, 2003 which, among other things, denied Armstrong's summary judgment motion without prejudice to renew after separate trial of the Attorney-Client Relationship Issue and announced that Jenkins' motion to dismiss was under advisement.

supplement the record after he realized he had likely failed to carry his burden of proof during the hearing on Jenkins' motion to dismiss, which he had previously suggested be treated as a motion for summary judgement since both parties had submitted voluminous materials outside of the pleadings. The Court concludes that Armstrong should not be permitted to supplement the summary judgment record and its analysis is set forth below.

Procedural History

Armstrong filed his original complaint against Jenkins in United States District Court for the Northern District of Texas, Case No.3:01CV2611-N (the "District Court Action") on December 10, 2001. As originally filed, the complaint in the District Court Action alleged claims for legal malpractice, negligent misrepresentation, breach of fiduciary duty, negligence, gross negligence, violation of the Texas Deceptive Trade Practices Act and Consumer Protection Act, and fraud. Thereafter, Jenkins filed a voluntary petition for relief under Chapter 7 in this Court on October 7, 2002. On January 13, 2003, Armstrong filed this non-dischargeability action (the "Adversary Proceeding") against Jenkins in which he incorporated the allegations contained in the District Court Action and asserted that the damages judgment he would obtain in the District Court Action was non-dischargeable in Jenkins' bankruptcy case under 11 U.S.C. § 523(a)(2), (4) and/or (6). Between the District Court Action and the Adversary Proceeding, Armstrong's complaints have been amended several times, and Jenkins has filed several motions to dismiss those complaints.[2]

The first of Jenkins' motions to dismiss was filed in the Adversary Proceeding on February 14, 2003 (the "First Motion to Dismiss"). Jenkins also filed an affidavit in support of her motion to which were annexed several documentary exhibits. Thereafter, Armstrong responded and opposed a dismissal of the complaint (the "First Response"). The First Response contained, among other things, thirty numbered paragraphs of factual allegations under the headings of "Relevant Facts" and

[2]Armstrong first filed his summary judgment motion in the District Court Action on July 24, 2002. At the time of Jenkins' bankruptcy filing, the District Court had not ruled on Armstrong's motion for summary judgment. As a result of an agreement between the parties following a motion by Armstrong to withdraw the reference, this Court entered a Report and Recommendation to the District Court recommending that the District Court Action be referred to this Court for jury trial by consent. On June 5, 2003, United States District Judge David Godbey entered an order referring the District Court Action to this Court. This Court has entered an Order consolidating the District Court Action with the Adversary Proceeding. Thus, Armstrong's previously filed summary judgment motion was before this Court and ripe for decision. On September 4, 2003, the Court entered an Order denying that motion without prejudice.

"Controverting Facts to the Defendant's Factual Allegations." The First Response also incorporated an Affidavit of Donald E. Armstrong in Support of the Plaintiff's Motion for Partial Summary Judgment then pending in the District Court Action ("Armstrong's Summary Judgment Affidavit") and all of the exhibits to that affidavit. Armstrong's Summary Judgment Affidavit contained seventy eight numbered paragraphs of factual allegations and referred to sixteen documentary exhibits, which were included in two volumes, each over an inch thick. Armstrong's Summary Judgment Affidavit also incorporated all of the exhibits attached to the original complaint in the District Court Action. Armstrong argued in the First Response that

> the Defendant presented evidence beyond the four corners of the complaint by providing the Defendant's Affidavit. This Court can either ignore the Defendant's Affidavit or treat the Defendant's Motion to Dismiss as a Motion for Summary Judgment. *Meister v. Texas Adjutant General's Dept. 233 F.3d 332, 335 (C.A.5 Tex., 2000).* It is appropriate to evaluate the Defendant's Motion to Dismiss as a motion for summary judgment. With a motion for summary judgment, the Defendant must prove there are no undisputed facts and that the Defendant is entitled to a judgment as a matter of law.

Jenkins also filed a motion to dismiss Armstrong's complaint in the District Court Action.[3] Once again, she attached an affidavit and documentary exhibits. Once again, Armstrong responded with papers which incorporated numerous factual allegations and exhibits and, once again, Armstrong argued that "the Defendant's Motion to Dismiss should be treated as a motion for summary judgment since the Defendant has presented evidence from outside the pleadings." Response in Opp. to Mot. to Def.'s Mot. to Dismiss Compl., p. 15.

Jenkins then filed an amended motion to dismiss the Adversary Proceeding on March 6, 2003. Armstrong opposed with a lengthy response and an affidavit dated March 27, 2003 which contained sixty seven numbered paragraphs of facts and which attached twenty six exhibits. In her reply filed on April 10, 2003, Jenkins included a "Second Amendment to Defendant's Motion to Dismiss Complaint" in which she argued for the first time that the claims asserted by Armstrong, even if proven, are dischargeable under 11 U.S.C. § 523(a)(2), (4), and (6).

Armstrong then filed an Amended Complaint in the Adversary Proceeding on April 14, 2003

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[3] Jenkins noted that she had filed the same motion in the bankruptcy court, but "in an abundance of caution, because of Plaintiff's motion for this Court to withdraw the reference of this action, Defendant also is filing this motion in the District Court." Defendant's Motion to Dismiss Complaint, p. 1 n.1.

and on May 2, 2003, he filed an Amended Complaint in the District Court Action. On April 22, 2003, Jenkins filed the present motion to dismiss, again relying upon Fed. R. Bankr. P. 7012, which incorporates Fed. R. Civ. P. 12(b)(6), and again relying upon evidence outside the pleadings. This most recent motion to dismiss is upon the grounds that Armstrong's claims, even if proven, are dischargeable in her Chapter 7 bankruptcy case because Armstrong has failed to plead (or raise a genuine issue of material fact regarding each of the required elements of) a proper claim under 11 U.S.C. § 523(a)(2), (4), and/or (6).

Once again, Armstrong opposed the motion to dismiss and incorporated Armstrong's Summary Judgment Affidavit and all exhibits thereto into his response in opposition. As relevant here, the response again requested that the Court convert the motion to dismiss to a motion for summary judgment because "[t]here are already substantial pleadings in this case. This case . . . is far past a normal motion to dismiss." Resp. in Opp. to Def.'s Mot. to Dismiss Amended Compl. Mot. to Strike and Mot. to File Amended Compl., p. 16.

At the outset of the June 16, 2003 hearing, the Court concluded that it was appropriate to treat the motion to dismiss as a motion for summary judgment because both parties requested that the Court do so. As the hearing progressed and the shortcomings of Armstrong's pleadings and evidence began to be discussed in detail, Armstrong changed his mind and "objected" to the Court treating the motion to dismiss as a motion for summary judgment, notwithstanding his prior, clearly articulated consent in both writing (in the various pleadings noted above) and orally (at the outset of the hearing). He asserted that had he realized he would have the burden to come forward with evidence, he would have either objected to the conversion to summary judgment or requested additional discovery. The Court carried Armstrong's objection through the conclusion of the hearing.

As noted previously, Armstrong filed the Motion to Supplement after the conclusion of the June 16, 2003 hearing.

<u>The Motion to Supplement</u>

In his Motion to Supplement, Armstrong asks the Court to permit him to file an additional brief and "additional affidavits and evidence in opposition to Defendant's Motion to Dismiss

Amended Complaint." He does not identify what legal issues he wishes to brief, or what additional affidavits and evidence he wishes to file. In his Memorandum in Support of Motion to File Supplemental Brief and Evidence in Opposition to Defendant's Motion to Dismiss Amended Complaint, Armstrong essentially argues that he "had no opportunity or obligation to assert facts since the Defendant provided no facts. There were no "facts" for the Plaintiff to overcome." *Id.* at p. 3. He also asserts that Jenkins never met her burden "to establish that there are no facts in the record supporting the Plaintiff's allegations in the Amended Complaint. In fact, the Defendant presented no evidence relating to facts at all. Until the Defendant met the Defendant's burden, the Plaintiff had no burden." *Id.* at p. 4.

Once again, Armstrong does not identify which legal issues he wishes to brief and what additional evidence he wishes to submit. He asserts that Jenkins has refused to comply with discovery and that "the Motion to Dismiss did not allege that the Plaintiff had not provided any facts proving the Plaintiff's allegations in the Plaintiff's Amended Complaint." He essentially argues that additional discovery is required before the motion to dismiss can be heard, that Jenkins did not meet her burden to establish the lack of facts, and that

> [i]n a motion to dismiss it is the Defendant's burden to prove the Plaintiff has not alleged sufficient facts. The Plaintiff responded. Through this procedure, the burden of proof was shifted from the Defendant's difficult burden of proof with a motion to dismiss to the Plaintiff's difficult burden of proof to disprove a motion for summary judgment without discovery and without appropriate pleading.

Legal Analysis

A decision to allow a party to supplement the record is within the court's discretion. *National Gypsum Co. v. Prostok*, No. Civ. A. 3:98CV0869P, 2000 WL 1499345 (N.D.Tx. Oct. 5, 2000) (unreported decision). In *Performance Autoplex II Ltd. v. Mid-Continent Cas. Co.*, 322 F.3d 847, 862 (5th Cir. 2003) (reviewing for abuse of discretion a district court's decision not to accept additional evidence after a magistrate judge's recommendation on summary judgment had been issued), the Fifth Circuit identified several factors that a court should consider in deciding whether to accept additional evidence in connection with a pending summary judgment motion including: (1) the moving party's reasons for not originally submitting the evidence; (2) the importance of the omitted evidence to the moving party's case; (3) whether the evidence was previously available to

the non-moving party when it responded to the summary judgment motion; and (4) the likelihood of unfair prejudice to the non-moving party if the evidence is accepted. *See also Fields v. Pool Offshore, Inc.,* 182 F.3d 353 (5th Cir. 1999) (finding no abuse of discretion in denial of motion to supplement record where evidence was publicly available and could have been proffered either on original motion or in reply to opposition to original motion). In addition, the Court can consider whether the evidence to be added would be cumulative. *Sanders v. Casa View Baptist Church,* 134 F.3d 331 (5th Cir.1998) (finding no abuse of discretion in denial of a motion to supplement the summary judgment record where evidence sought to be submitted was cumulative).

Applying these factors here, the Court concludes that Armstrong has failed to state a compelling reason why leave to supplement should be granted. First, and of significance, Armstrong has failed to identify what evidence he wishes to add to the summary judgment record. Consequently, he has failed to show that the potential evidence has any significance to his non-dischargeability case. Because the Court has not been advised of the specific additional evidence that Armstrong wishes to supplement the summary judgment record with, it cannot assess whether the evidence was previously available. Moreover, Armstrong has failed to offer a legally sufficient explanation for his failure to submit the "missing" evidence in any of the numerous pleadings he filed prior to the June 16 hearing. The only reason stated for failing to submit the "missing" evidence is that he did not respond to the motion to dismiss with facts because Jenkins did not provide any facts for him to respond to. However, as noted above, Armstrong has responded to each of the various motions to dismiss with *numerous* facts and voluminous exhibits. He has had ample opportunity to submit, and in fact has submitted, a great deal of evidence in response to the motion to dismiss. The Court believes, in light of the many repetitive submissions of affidavits which incorporate identical exhibits, that the evidence Armstrong would submit is most likely cumulative of that already before the Court.

Implicit in Armstrong's response is a potential second explanation for his failure to submit the "missing" evidence prior to the hearing – *i.e.*, he needs to take more discovery before he can submit that evidence. Armstrong concedes that he has not filed a formal rule 56(f) motion. Nonetheless, the Court will treat his affidavits and responses to the motion to dismiss as a motion

for a rule 56(f) continuance. *See Hinds v. Dallas Indep. School Dist.*, 188 F.Supp. 2d 664 (N.D. Tx. 2002); *Union City Barge Line, Inc. v. Union Carbide Corp.*, 823 F.2d 129, 137 (5th Cir. 1987) ("Although we have no duty to be indulgent with motions that do not exist, we can treat [the plaintiff's] responses to summary judgment as an attempt to comply with Rule 56(f) . . .").

However, once again, he fails to identify with any specificity what additional discovery is required in order to defend against the motion. Based upon analogous Fifth Circuit case law, this implicit explanation is legally insufficient as well. The standard for resisting a summary judgment motion on the ground that more discovery is required is set forth as follows:

> Because the burden on a party resisting summary judgment is not a heavy one, one must conclusively justify his entitlement to the shelter of rule 56(f) by presenting specific facts explaining the inability to make a substantive response as required by rule 56(e) and by specifically demonstrating 'how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact.' The nonmovant may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts, particularly where, as here, ample time and opportunities for discovery have already lapsed. The determination of the adequacy of a nonmovant's rule 56(f) affidavits and the decision whether the grant a continuance thereon rests in the sound discretion of the trial court.

SEC v. Spence & Green Chem. Co., 612 F.2d 896, 901 (5th Cir. 1980) (citations omitted). To satisfy the standard for a rule 56(f) continuance, a claim that further discovery or a trial might reveal facts of which the nonmovant is unaware is insufficient; the nonmovant must show why the discovery is needed and how it will allow him to demonstrate a genuine issue of material fact. *Hinds v. Dallas Indep. School Dist.*, 188 F. Supp.2d 664 (N.D. Tx. 2002). Armstrong has failed to make the required showing here.

The Court has considered several other factors before coming to its conclusion that the Motion to Supplement will be denied. First, while this Court has always upheld Armstrong's right to represent himself in this non-dischargeability action, it has repeatedly suggested that non-dischargeability actions can be complex and that Armstrong should carefully consider his decision to represent himself in both this action and the related legal malpractice action. Notwithstanding the Court's numerous inquiries, Armstrong chose to continue to represent himself.

Second, as noted previously, it was Armstrong who urged the Court to treat the motion to dismiss as one for summary judgment. Armstrong has repeatedly argued that each of the motions

to dismiss should be treated as motions for summary judgment since they presented matters outside the pleadings. Armstrong himself responded to each of the motions with voluminous materials outside the pleadings. He filed his own summary judgment motion in which he also presented a great deal of evidence.

Third, although the Court recognizes that pro se litigants are held to a more relaxed pleading standard and are entitled to have their pleadings liberally construed, *see Taylor v. Books a Million, Inc.*, 296 F.3d 376 (5th Cir. 2002) (pro se complaints are held to less stringent standards than formal pleadings drafted by lawyers) and *Hepperle v. Johnston*, 544 F.2d 201, 202 (5th Cir. 1976) (reversing dismissal of pro se complaint for failure to state a claim and stating that a judge "is to employ less stringent standards in assessing pro se pleadings . . . than would be used to judge the final product of lawyers"), this relaxed standard has limits, *see Taylor v. Books a Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002) ("regardless of whether the plaintiff is proceeding pro se . . . conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss"), and does not relieve even a pro se litigant from the usual requirements of summary judgment. *Verone v. Catskill Regional Off-Track Betting Corp.*, 10 F.Supp.2d 372 (S.D.N.Y. 1998) (granting summary judgment against pro se plaintiff who had failed to produce sufficient evidence in an age discrimination case despite liberal reading of responsive papers).

Moreover, Armstrong is not the usual pro se plaintiff. While he has no formal legal training, he is an experienced litigator. Annexed to Armstrong's March 27, 2003 Affidavit in Opposition to Defendant's Amended Motion to Dismiss ("March 27 Affidavit") as Exhibits 21 and 22 are nondischargeability complaints which Armstrong filed pro se against Paula Ziegler and Mark Ladeda in the bankruptcy court for the Central District of California along with copies of default judgments he successfully obtained. Armstrong has represented himself in extensive litigation in his own (and affiliated) bankruptcy cases pending in Utah. He is intelligent, articulate, thorough and well-prepared and clearly has access to and uses a law library. He has frequently correctly stated the legal standards applicable to the various motions which have been heard before this Court. In short, while Armstrong is pro se, the Court does not find credible his assertion that he did not understand the ramifications of his forceful arguments that the motion to dismiss should be treated as one for

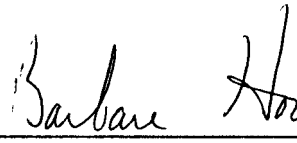
summary judgment.

Finally, the Court does not believe that further briefing is required. Armstrong has filed extensive briefing already, on all of the myriad issues involved in this case. The present motion does not identify what further issues he wishes to brief. He has already had the opportunity to respond to each of the motions to dismiss and has filed lengthy and detailed legal argument.

For all of these reasons, the Motion to Supplement is denied. It is therefore

ORDERED that the Motion to Supplement is denied.

Signed: October 7, 2003.



Barbara J. Houser
United States Bankruptcy Judge