



ENTERED

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The following constitutes the order of the Court.

Signed May 4, 2004.

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
TIMOTHY SCHUTZE,	§	CASE NO. 02-80528-SAF-7
DEBTOR(S).	§	
_____	§	
PRESTON NATIONAL BANK,	§	
PLAINTIFF,	§	
	§	
VS.	§	ADVERSARY NO. 03-3140
	§	
TIMOTHY SCHUTZE,	§	
DEFENDANT.	§	

MEMORANDUM OPINION AND ORDER

The defendant, Tim Schutze, moves the court for partial summary judgment. The plaintiff, Preston National Bank, opposes the motion, in part. The court held a hearing on the motion on April 12, 2004.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and other matters presented to the court

show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Washington v. Armstrong World Indus., Inc., 839 F.2d 1121, 1122 (5th Cir.

1988). On a summary judgment motion, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Anderson, 477 U.S. at 255. A factual dispute bars summary judgment only when the disputed fact is determinative under governing law. Id. at 250.

The movant bears the initial burden of articulating the basis for its motion and identifying evidence which shows that there is no genuine issue of material fact. Celotex, 477 U.S. at 322. The respondent may not rest on the mere allegations or denials in its pleadings but must set forth specific facts showing that there is a genuine issue for trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986).

Schutze has moved for summary judgment on several counts to which the bank has not responded with summary judgment evidence. Schutze presented summary judgment in support of his motion on those counts. At the hearing on the motion, the bank did not suggest it had summary judgment evidence on those counts nor did the bank request a further opportunity to present summary

judgment evidence on those counts. Accordingly, the court grants partial summary judgment dismissing the counts alleged in ¶¶ 3.a.1, 3.a.2, 3.a.3, 3.b, 3.c, 6 and 8 of the fourth amended complaint objecting to Schutze's discharge and the dischargeability of his debt to the bank.

Schutze does not request summary judgment for the count alleged in ¶ 7, alleging a dischargeability claim under 11 U.S.C. § 523(a)(6). The court has set the trial for May 18, 2004.

That leaves for consideration the counts alleged in ¶¶ 3.a.4 and 5. Paragraph 3.a.4 alleges that Schutze should be denied his discharge because he falsely testified at the meeting of creditors concerning invoices sold by his corporation, Primavera Stone, Inc., to the bank. 11 U.S.C. § 727(a)(4). Paragraph 5 alleges that Schutze provided the bank with false information in written statements concerning invoices bought by the bank pursuant to an agreement of the parties. 11 U.S.C. § 523(a)(2)(B). That objection to the discharge of the debt is governed by § 523(a)(2)(B), not § 523(a)(2)(A), because it is premised on the use of written statements.

The bank alleges that Schutze faxed or otherwise transmitted false written information to the bank representing that Primavera had good, bona fide and collectible invoices to sell to the bank. According to the deposition of William Martin, a loan officer at the bank, Schutze sold the bank invoices for work not completed.

Martin stated that the bank considered those invoices "fictitious."

Schutze submitted a declaration stating that he believed Primavera could sell invoices to the bank based on contracts with a customer, even if the work covered by the contracts had not been performed. Schutze stated, "I have always believed (and still believe) that the Contract [between Primavera and the bank] permits accounts to be sold by Primavera Stone to Preston National at the time that Primavera Stone obtained a customer contract, not only upon completion of a job." Schutze concedes that he tendered invoices to the bank before completion of jobs. He tendered those invoices based on his understanding of the contract with the bank and testified to that effect at the meeting of creditors.

Primavera and the bank entered a Business Manager Agreement which was "intended to govern the sale of Receivables . . . by [Primavera] to the Bank." Primavera would sell and the bank would buy "Receivables arising from the sales or services to Customers by [Primavera]." The contract defines receivables to include contract rights "arising from [Primavera's] sale of goods or rendering of services." The contract defines invoice as evidence "of the terms of a non-cash sale of goods or provision of services previously made by [Primavera] to a Customer."

Primavera agreed to "submit to the Bank all Invoices

representing receivables arising from all sales of goods or rendering of services to Customers for the Bank's determination of acceptability as Receivables." Primavera agreed to provide the bank with "proof of delivery of goods or rendering of services as the Bank may reasonably require."

Primavera represented and warranted that tendered "[r]eceivables are currently and were at the time of their creation, bona fide and existing obligations of Customers of [Primavera] arising out of its sales or services, free and clear of all security interests, liens, and claims whatsoever of third parties."

As a covenant, Primavera agreed:

with respect to each Receivable as it arises; (a) [Primavera] will have made delivery of the goods and/or will have rendered the services represented by the Invoice, and the goods and/or services will have been accepted; . . . (f) [Primavera] will have the right to render the services and/or to sell the goods creating the Receivable, and will do so in compliance with all applicable laws.

This contract requires that goods had been delivered or services had been rendered. There is no summary judgment evidence that customers had an obligation to pay for goods or services until the goods had been delivered or the services provided. Indeed, Primavera agreed that with respect to each receivable, Primavera will have "made delivery" or "rendered the services." These are past tense contractual provisions. They do not mean that Primavera had entered a contract with a customer to

deliver goods or provide services on a job in the future.

Furthermore, the receivables must be "bona fide." "Bona fide" means "[m]ade in good faith; without fraud or deceit . . . Sincere; genuine." Black's Law Dictionary 168 (7th ed. 1999). The bank presented summary judgment evidence that for several of the invoices, the customer did not contract with Primavera, work had not been performed, or the invoice had been paid. The bank presented evidence reflecting the invoices it purchased and its investigation of them. The bank presented evidence from Primavera's customers confirming that in several instances the customer and Primavera did not enter contracts; rather, Primavera submitted bids for jobs that did not result in contracts. In other instances, the customers maintained that the invoice had been paid.

Schutze objects to the use of invoice 2511 as summary judgment evidence because the bank did not purchase that invoice. The court sustains that objection. As to the other invoices highlighted by the bank's summary exhibit, Schutze contends, for the most part, that he has no personal knowledge of the circumstances of those invoices. With respect to three invoices, he states that the contract with the customer had been cancelled. With regard to the remaining invoices on the bank's summary exhibit, Schutze maintains the stone was purchased, fabricated and installed or picked up by the customer. In his declaration,

Schutze states that he relied on his sales people for the written representations he made to the bank.

Based on this summary judgment evidence there are material issues of fact concerning the written representations Schutze made to the bank regarding the financial condition of the invoices purchased by the bank. There are also material issues of fact concerning Schutze's testimony at his meeting of creditors about the representations. Accordingly, the motion for partial summary judgment concerning ¶¶ 3.a.4 and 5 will be denied. Those claims will be tried on May 18, 2004.

In ¶ 9 of the fourth amended complaint and the prayer for relief, the bank asks the court to liquidate the bank's claim. Schutze questions whether a bankruptcy court can enter a money judgment on debts determined to be non-dischargeable. Schutze suggests that the court may only declare whether or not the debt is discharged. Apparently, if the bank prevails in this litigation, Schutze would prefer another lawsuit for the liquidation of the debt. The bank concedes a split of authority but contends that the liquidation of the debt in a dischargeability adversary proceeding has been approved by the Fifth Circuit, citing In re Jordan, 927 F.2d 221, 227 (5th Cir. 1991). As the matter must proceed to trial on several claims, the court defers consideration of this issue until the entry of its findings of fact and conclusions of law after trial.

Based on the foregoing,

IT IS ORDERED that the motion for partial summary judgment is **GRANTED IN PART** and **DENIED IN PART**.

IT IS FURTHER ORDERED that the claims alleged in the fourth amended complaint of Preston National Bank in ¶¶ 3.a.1, 3.a.2, 3.a.3, 3.b, 3.c, 6 and 8 are **DISMISSED**.

IT IS FURTHER ORDERED that the motion for partial summary judgment concerning the claims alleged in ¶¶ 3.a.4 and 5 is **DENIED**. The trial of those claims, along with the claim alleged in ¶ 7, is set for **May 18, 2004, at 9:30 a.m.**

####END OF ORDER####