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signed 2-11-03
**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In Re:

**MICHAEL W. UTTERBACK,

DEBTOR.**

**CASE NO. 01-42251-7
CHAPTER 7**

**COLUMBIAN NATIONAL TITLE
INSURANCE COMPANY,

PLAINTIFF,**

ADV. NO. 01-7130

v.

**MICHAEL W. UTTERBACK,

DEFENDANT.**

ORDER STRIKING LATE RESPONSE BUT DENYING SUMMARY JUDGMENT

This proceeding is before the Court on the plaintiff's motion for summary judgment. Plaintiff Columbian National Title Insurance Company ("Columbian") appears by counsel Charles R. Hay and Carol R. Bonebrake. The defendant-debtor ("Debtor"), acting *pro se*, filed a late response to the motion, which Columbian has moved to strike. The Court has reviewed the relevant pleadings and is now ready to rule.

FACTS

To support its motion, Columbian has submitted various documents, excerpts from the Debtor's testimony in a deposition, and an affidavit signed by one of its officers. The Court has drawn the following facts from these materials.

In 1997, the Debtor created a corporation through which he engaged in the construction business. He was the sole shareholder, the only officer or director, and the only employee. So far as he can remember, he supplied \$1,000 in initial capital to the corporation, and never paid in any more. The corporation owned a saw or two and a generator, but no other equipment. Although Columbian asserts that the corporation never owned any other assets, in the cited supporting testimony, the Debtor was asked only if the assets had grown by the end of 1998 and responded that they periodically grew and declined, and grew and declined. In addition, as discussed in more detail below, the corporation also for a time owned a piece of land on which it built a house. The corporation had one bank account, and the Debtor took draws from it when he needed money. The Debtor filed annual reports for the corporation until 2001, and hired an accountant to prepare the corporation's tax returns. His testimony was unclear about whether any minutes of corporate board meetings exist. Because the corporation did not file an annual report that was due in April 2001, its corporate status was forfeited in the following July.

In October 1999, the corporation submitted a proposal that was accepted to build a home for a couple named Williams. Late in December, the Williamses transferred a lot in a development in Sedgwick County to the corporation, and the corporation mortgaged the lot to Prairie State Bank ("Prairie State") to secure a construction loan or line of credit. The mortgage was recorded with the Sedgwick County Register of Deeds. As the home was built on the lot, the corporation drew on that loan or line of credit to pay the costs of construction. The Williamses planned to obtain a bank loan to pay for the house, and in March 2000, Columbian issued a commitment for title insurance to protect them and the proposed lender. The insurance commitment contained requirements to be complied with

and exceptions to the coverage. Among the requirements was one for “Lien Affidavit and Statement executed by sellers and contractors, if any, stating that all bills are paid for labor and/or material which might form the basis for a mechanic’s lien.” The exceptions included one for “Any lien, or right to a lien for services, labor or material heretofore or hereafter furnished, imposed by law and not shown by the public records.”

The home was completed to the Williamses’ satisfaction, and the conclusion of the parties’ transaction came on September 1, 2000. The corporation deeded the property back to the Williamses. In addition, as the corporation’s president, the Debtor signed an “affidavit and agreement” that contained the following provisions about the house and property that Columbian asserts are pertinent in this proceeding:

3. There are no outstanding unpaid bills for services, labor or materials used in the construction or repair of buildings and improvements on said real estate. Affiants further state all construction and/or repair of buildings and improvements on said real estate has been fully completed and accepted by owners.
4. There are no outstanding unpaid and /or unreleased Title I or Title II house or improvement loans, chattel mortgages, conditional sales contracts, security agreements, financing statements, continuation statements or other documents or instruments evidencing a secured interest in any chattel or fixture located in or upon said premises described above.
5. This affidavit is made and delivered in connection with the sale and /or mortgage of said real estate and is expressly for the benefit of any and all person or persons relying hereon, including but not limited to principals and their agents who are parties to this transaction.

NOTE: Paragraphs No. 6 and 7 apply in addition to the above only if mortgagee title insurance is issued.

6. The affiants, parties hereto, hereby request the issuance of mortgagee title insurance upon said real estate without exception therein as to any possible unfiled mechanic’s or

materialman's liens and any unreleased improvement loans, security agreements, financing statements, continuation statements or other instruments or documents evidencing a secured interest in said real estate, and in consideration thereof and as an inducement therefor, said affiant [sic] does hereby, jointly and severally, agree to indemnify and hold such title insurance underwriter harmless of and from any and all loss, cost, damage and expense of every kind, including attorney's fees, which such title insurance underwriter may suffer or incur or become liable for under its said policy or policies now to be issued, or any re-issue, renewal or extension thereof, or new policy at any time issued upon said real estate, part thereof or interest therein, arising, directly or indirectly, out of or on account of any such mechanic's or material man's liens or lien or claim or claims and/or such filings under the Uniform Commercial Code, in connection with its enforcement of its rights under this agreement.

Columbian issued the title insurance without an exception for the Prairie State mortgage. According to Columbian's executive vice president, Columbian and other title insurance companies routinely rely on such affidavits to issue title insurance that does not contain an exception "for one or more of the matters referenced in the affidavit." He further asserts that industry custom is that money required to pay "any liens, mortgages, or other such obligations as referenced in the affidavit" will be segregated and immediately paid to the appropriate party.

As a result of the completion of the transaction, the Debtor's corporation received a check for the full amount of its contract with the Williamses ("Sale Proceeds"). The check was made out to the corporation alone, not jointly with or solely to Prairie State, and the Debtor deposited it in the corporation's account. Nothing in the documents submitted in support of Columbian's motion mentions Prairie State or its mortgage, or expressly obligates the Debtor or his corporation to pay the Sale Proceeds to anyone in particular. Rather than using the Sale Proceeds to pay Prairie State, the Debtor used them to pay other corporate obligations. The Debtor explained that some modular home dealers had gone out of business owing him large amounts of money, and that those losses had driven him out

of business.

Although Columbian asserts that the Debtor has admitted the Sale Proceeds did not belong to his corporation, it supports this assertion with a reference only to the Debtor's answer filed in this proceeding. A careful review of the answer reveals no such admission. The Court can find only two statements in the answer that might conceivably be construed to support Columbian's assertion, but both can be read just as easily (if not more so) to mean something else. Referring to a paragraph in the complaint that alleged the Debtor's corporation had transferred the real property to the Williamses, the Debtor stated that he did not think that the corporation ever owned the property. The Court believes that the Debtor meant he did not remember that the lot the house was built on had been transferred to the corporation, not that the corporation was not the owner of the Sale Proceeds paid for the construction of the house. Responding to the complaint in general, rather than to any specific paragraph, the Debtor said, "Obviously, the check for \$71,200.00 should have been made payable to Prairie State Bank." The Court believes that the Debtor probably meant that the check should have been made payable to Prairie State because that would have ensured Prairie State got paid, thus avoiding his problems with Columbian, and did not mean that he thought or admitted that Prairie State owned the Sale Proceeds.

Because Columbian issued the title insurance policy for the Williamses and their lender without an exception for Prairie State's recorded mortgage, and neither the Debtor nor his corporation paid Prairie State, Columbian wound up paying off Prairie State's mortgage on August 13, 2001. The Debtor filed a chapter 7 bankruptcy petition a week later. Although the Debtor is defending this proceeding *pro se*, an attorney represented him in filing for bankruptcy. While this was his personal

bankruptcy case, he included Columbian and other creditors of his corporation as creditors in his schedules. Columbian appears to be asking the Court to interpret the Debtor's inclusion of the corporation's debts in his schedules as evidence that his corporation was a sham that should be ignored.

DISCUSSION AND CONCLUSIONS

As indicated, the Court drew its statement of the facts involved in this case from Columbian's motion and supporting materials, ignoring the Debtor's late response to the motion. Based on those facts, as will be discussed below, the Court concludes that the motion must be denied. Although the Debtor's late response has had no impact on that conclusion, the Court will grant Columbian's motion to strike the response.

The Court will now address the merits of Columbian's motion for summary judgment. Columbian first asserts that the Debtor's corporation is liable to reimburse Columbian for paying off Prairie State's mortgage, and that the Debtor should be liable for his corporation's debt to Columbian. Then it asserts that this personal obligation is nondischargeable under three provisions of 11 U.S.C.A. §523(a). It alleges that: (1) the Debtor caused a "willful and malicious" injury that is covered by §523(a)(6); (2) the Debtor breached a fiduciary duty and embezzled money so his obligation is covered by §523(a)(4); and (3) the Debtor's conduct constituted false pretenses, a false representation, and actual fraud covered by §523(a)(2)(A).

Federal Rule of Civil Procedure 56, governing summary judgment motions, is made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7056. Rule 56(c) provides that the Court must grant 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.” In considering a motion for summary judgment, the Court must examine all the evidence in the light most favorable to the party against whom summary judgment is sought.¹ Summary judgment is inappropriate if an inference can be drawn from the facts which would allow the nonmovant to prevail at trial.² Where different ultimate inferences may properly be drawn, summary judgment should be denied.³

A. Piercing the Corporate Veil

Columbian offers two theories for holding the Debtor liable for his corporation’s debt to Columbian, either by piercing the corporate veil under Kansas law or by holding him directly liable personally for allegedly improper actions he took on behalf of the corporation. To support the first theory, Columbian cites one Kansas bankruptcy court decision, *Helena Chemical Co. v. Circle Land and Cattle Corp. (In re Circle Land and Cattle Corp.)*,⁴ and a federal district court decision from New York, *United Orient Bank v. Green*.⁵ In the *Circle Land* decision, in the course of determining whether a complaint stated a cause of action for substantive consolidation, Judge Flannagan set out eight factors that Kansas courts have considered in deciding whether to pierce the veil of a closely held

¹*White v. General Motors Corp.*, 908 F.2d 669, 670 (10th Cir. 1990), *cert. denied* 498 U.S. 1069 (1991).

²*See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

³*United States v. O’Block*, 788 F.2d 1433, 1435 (10th Cir. 1986).

⁴213 B.R. 870, 874 (Bankr. K. Kan. 1997).

⁵215 B.R. 916 (S.D.N.Y. 1997).

corporation:

(1) undercapitalization of a one-man corporation, (2) failure to observe corporate formalities, (3) non-payment of dividends, (4) siphoning of corporate funds by the dominant stockholder, (5) non-functioning of other officers or directors, (6) absence of corporate records, (7) the use of the corporation as a facade for operation of the dominant stockholder or stockholders, and (8) the use of the corporate entity in promoting injustice or fraud.⁶

Applying these factors to the facts the Court has drawn from Columbian's motion, the Court is not convinced that Columbian has established that the Debtor's corporation was undercapitalized, that it failed to observe corporate formalities, that the Debtor siphoned corporate funds, or that no corporate records ever existed. While the Debtor's testimony indicated that he never paid more than \$1,000 into the corporation, nothing shows that this was insufficient capital for its business. The documents used in the transaction show that the Debtor always signed them as the president of his corporation. Until the April 2001 annual report came due, the corporation's annual reports were apparently filed with the state as required. The Debtor testified that an accountant prepared the corporation's tax returns. Although the Debtor said he took draws from the corporation when he needed money personally, nothing presented hints that he ever took unreasonable or excessive amounts, or that he used any of the Sale Proceeds for his personal benefit. He did not say that no corporate minutes or other records ever existed, merely that he did not have them with him at the deposition. These matters all preclude resolving Columbian's effort to disregard the existence of the Debtor's corporation by summary judgment. The Court would also point out that it does not perceive the Debtor's listing of the corporation's debts in his bankruptcy schedules to be an admission that the

⁶213 B.R. at 874 (citing *Amoco Chemicals Corp. v. Bach*, 222 Kan. 589, 594 (1977); *Kvassay v. Murray*, 15 Kan.App.2d 426, 437 (1991)).

corporation should be disregarded, but merely a recognition (likely by the Debtor’s lawyer rather than the Debtor himself) that those creditors could seek (as Columbian is now doing) to hold the Debtor liable for those debts by piercing the corporate veil.

The Court has also read the *United Orient Bank* decision, which applied New York law, and concludes that it does not suggest a different resolution of Columbian’s motion. Apparently under New York law, essentially only the last factor considered under Kansas law—use of the corporate form to commit fraud or other wrong—is necessary to justify piercing the corporate veil.⁷ The Court believes that factor is probably the most important one under Kansas law as well. Discussing the Debtor’s alleged wrongdoing, though, requires discussing the substance of Columbian’s arguments under §523(a)(6), (a)(4), and (a)(2)(A), and the Court will address Columbian’s allegations of wrongdoing along with those arguments.

B. Willful and Malicious Injury

Section 523(a)(6) of the Bankruptcy Code excepts from discharge any debt “for willful and malicious injury by the debtor to another entity or to the property of another entity.” In 1998, the Supreme Court ruled in *Kawaauhau v. Geiger* that this provision applies only to a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury.⁸ The Court explained that this meant the debtor must have intended the consequences of the act he or she performed, not simply the act itself.⁹ While the materials presented might support an inference that the Debtor intended

⁷See 215 B.R. at 925.

⁸523 U.S. 57, 60-64 (1998).

⁹523 U.S. at 61-62.

to injure Columbian, in order to grant summary judgment on this point, the Court would have to be convinced that no reasonable fact finder could conclude that he had acted with no such intent. Questions of a person's intent or other state of mind require consideration of intangible factors such as witness credibility and can rarely be resolved on a summary judgment motion.¹⁰ The fact the Debtor used the Sale Proceeds to pay corporate debts other than the Prairie State mortgage could support a finding that he intended to injure Columbian, but it does not *require* such a finding to be made.¹¹

Columbian cites several cases, all decided before *Geiger*, in support of its argument that the Debtor intended to injure it. In one of the cases, it was established that money the debtor had allegedly converted belonged to the complaining creditor.¹² In another, the debtor had unquestionably agreed to forward the money in question to the creditor when he received it.¹³ In the last case, the debtor had conceded that he used the proceeds of accounts receivable in ways that violated the creditor's security agreement.¹⁴ The Debtor's situation is distinguishable from these cases because the summary judgment materials do not establish that the Sale Proceeds belonged to anyone other than the Debtor's corporation, that the Debtor agreed to forward any of the Sale Proceeds to any particular creditor, or

¹⁰*Prochaska v. Marcoux*, 632 F.2d 848, 851 (10th Cir. 1980), *cert. denied* 451 U.S. 984 (1981); *see also* 10B Wright, Miller & Kane, *Fed. Prac. & Pro. Civil 3d*, §2730 (1998) (indicating actions involving state of mind can rarely be determined by summary judgment).

¹¹*See Mitsubishi Motors Credit of America, Inc., v. Longley (In re Longley)*, 235 B.R. 651, 656-57 (10th Cir. BAP 1999) (discussing evidence that can show intent to injure after *Geiger*).

¹²*See First National Bank v. Stanley (In re Stanley)*, 66 F.3d 664, 667-68 (4th Cir. 1995).

¹³*St. Paul Fire & Marine Insurance Co. v. Vaughn*, 779 F.2d 1003, 1006 (4th Cir. 1985).

¹⁴*Barclays Am./Bus. Credit, Inc., v. Long (In re Long)*, 774 F.2d 875, 881-82 (8th Cir. 1985).

that the Debtor has conceded that he or his corporation used the Sale Proceeds in a way that violated any agreement. So, even assuming the legal reasoning of each of these cases survived *Geiger*, they do not convince the Court that Columbian has established the Debtor's intent for summary judgment purposes.

Columbian also suggests that it may be viewed as being subrogated to the Williamses' rights against the Debtor, and that the Williamses would have a claim against him for conversion. According to a leading legal dictionary, in tort and criminal law, "conversion" means: "The wrongful possession or disposition of another's property as if it were one's own; an act or series of acts of willful interference, without lawful justification, with any chattel in a manner inconsistent with another's right, whereby that other person is deprived of the use and possession of the chattel."¹⁵ In support of this conversion argument, Columbian relies on the Supreme Court's decision in *McIntyre v. Kavanaugh*.¹⁶ In that case, a person had pledged stock to a partnership to secure a debt that was only a small fraction of the stock's value, and some members of the partnership immediately sold the stock and used the proceeds for their own benefit.¹⁷ After the partnership and its members were adjudged bankrupts, the person sued one of the partners, who defended on the ground of his bankruptcy discharge, among other things.¹⁸ The Supreme Court ruled the partner was liable for the conversion of the stock, a willful and

¹⁵"Conversion," Black's Law Dictionary (7th ed. 1999) (Bryan A. Garner, Editor in Chief) (obtained from Westlaw Feb. 4, 2003).

¹⁶242 U.S. 138 (1916).

¹⁷242 U.S. at 138-39.

¹⁸242 U.S. at 139.

malicious injury to the property of another that was excepted from the bankruptcy discharge.¹⁹

The reason *McIntyre* does not support Columbian's conversion claim is that nothing in the materials Columbian has presented establishes that the parties involved in the transaction ever agreed that the Sale Proceeds actually belonged to anyone other than the Debtor's corporation, or that the Debtor or his corporation promised to apply them to pay Prairie State's mortgage. This fact must be proven before the Court can find that the Debtor or his corporation converted the money. While the Debtor's statement that the check should have been made out to Prairie State can be interpreted as an admission that the Sale Proceeds belonged to Prairie State, it can also be interpreted to express only the Debtor's recognition that his present dispute with Columbian could have been avoided if the check had been prepared that way. In ruling on summary judgment, the Court must read the statement in the light most favorable to the Debtor.

C. Breach of Fiduciary Duty or Embezzlement

Next, Columbian contends that the Debtor breached a fiduciary duty or embezzled the money by not paying it to Prairie State, so his debt to Columbian is covered by §523(a)(4). That provision excepts from discharge any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." Columbian argues that the Debtor's fiduciary duty arose from his status as an officer and director of the corporation, and that he breached that duty by using the Sale Proceeds to pay other corporate bills instead of the one owed to Prairie State. It also contends that because the circumstances indicate that the Debtor's corporation was not to be the owner of the Sale Proceeds, he

¹⁹242 U.S. at 141-42.

embezzled them by using them to pay other corporate debts.

The Tenth Circuit has construed §523(a)(4) more narrowly than Columbian would like the Court to do here. In *Fowler Brothers v. Young (In re Young)*,²⁰ the Circuit said:

The existence of a fiduciary relationship under § 523(a)(4) is determined under federal law. However, state law is relevant to this inquiry. Under this circuit's federal bankruptcy case law, to find that a fiduciary relationship existed under § 523(a)(4), the court must find that the money or property on which the debt at issue was based was entrusted to the debtor. Thus, an express or technical trust must be present for a fiduciary relationship to exist under § 523(a)(4). Neither a general fiduciary duty of confidence, trust, loyalty, and good faith, nor an inequality between the parties' knowledge or bargaining power, is sufficient to establish a fiduciary relationship for purposes of dischargeability. Further, the fiduciary relationship must be shown to exist prior to the creation of the debt in controversy.²¹

The Court believes that the ordinary “fiduciary duties” that a corporate officer of a Kansas corporation may owe to the corporation or its creditors are the kind of “general fiduciary duty of confidence, trust, loyalty, and good faith” that the Tenth Circuit meant was not sufficient to constitute a fiduciary relationship covered by §523(a)(4).²² Columbian has presented no document or other evidence purporting to require the Debtor or his corporation to hold in trust any of the proceeds of the sale to the Williamses, and his status as an officer and director of the corporation, by itself, is insufficient to establish a fiduciary duty covered by §523(a)(4).

Embezzlement does not require a fiduciary relationship. The Tenth Circuit has said for purposes of §523(a)(4), “[E]mbezzlement is defined under federal common law as ‘the fraudulent

²⁰91 F.3d 1367, 1371-72 (10th Cir. 1996).

²¹91 F.3d at 1371-1372 (citations and internal quotation marks omitted).

²²*Cf. Holaday v. Seay (In re Seay)*, 215 B.R. 780, 785-87 (10th Cir. BAP 1997) (fiduciary duty Oklahoma law imposed on members of partnership or joint venture did not constitute fiduciary relationship covered by §523(a)(4)).

appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come.”²³ Columbian’s summary judgment motion fails to establish that the Debtor embezzled any money. Its evidence indicates only that the Debtor deposited the Sale Proceeds into his corporation’s bank account and paid corporate debts with them. Nothing before the Court indicates that the corporation had any obligation to apply the proceeds to its debt to Prairie State (or to any other debt). Without such an obligation, the Debtor could not fraudulently appropriate the Sale Proceeds by causing the corporation to use them to pay other corporate debts.

D. False Pretenses, False Representation, or Actual Fraud

Finally, Columbian contends the Debtor’s obligation to it is nondischargeable under §523(a)(2)(A). That provision excepts from discharge any debt “for money, [or] property, . . . to the extent obtained by—(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition.” “The terms ‘false pretenses,’ ‘false representation,’ and ‘actual fraud’ in § 523(a)(2)(A) are interpreted according to their definitions developed under common law.”²⁴ In order to succeed under this provision, Columbian

must prove the following elements by a preponderance of the evidence: 1) the debtor knowingly committed actual fraud or false pretenses, or made a false representation or willful misrepresentation; 2) the debtor had the intent to deceive the creditor; and 3) the creditor relied on the debtor's representation. *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1373 (10th Cir.1996). The creditor's reliance must have been justifiable, *Field v. Mans*, 516 U.S. 59, 74-75 (1995), and the creditor must have been damaged as a result, *Young*, 91 F.3d at

²³*Klemens v. Wallace (In re Wallace)*, 840 F.2d 762, 765 (10th Cir. 1988) (quoting *Great American Ins. Co. v. Graziano (In re Graziano)*, 35 B.R. 589, 594 (Bankr.E.D.N.Y. 1983), which was quoting *Gribble v. Carlton (In re Carlton)*, 26 B.R. 202, 205 (Bankr.M.D.Tenn. 1982)).

²⁴*Chevy Chase Bank v. Kukuk (In re Kukuk)*, 225 B.R. 778, 782 (10th Cir. BAP 1998) (citing *Field v. Mans*, 516 U.S. 59, 69 & n. 9 (1995)).

1373.²⁵

The Court is uncertain just what Columbian claims the Debtor did that is covered by this exception to discharge. It may be saying that the affidavit the Debtor signed at the sale closing includes a false representation that Prairie State's mortgage did not exist, or that the Debtor and Columbian had an understanding, apparently based on custom in the title insurance industry, that the Debtor and his corporation would use the Sale Proceeds to pay off Prairie State's mortgage.

To support its claim, Columbian cites a case where application of §523(a)(2)(A) was straightforward, *Lawyers Title Insurance Corp. v. Dallam (In re Dallam)*.²⁶ There, the debtor had signed an affidavit stating that everyone who had supplied services, labor, or materials in the construction of a home had been paid in full when, as she knew, many such creditors had not been paid, and the title insurance company issued a policy with no exception for such claims.²⁷ At the close of the insurance company's evidence, the bankruptcy court ruled that the company's claim against the debtor was dischargeable because the company had failed to prove that the unpaid creditors had enforceable liens, the only contingency the court felt the company had relied on the debtor's affidavit to resolve; the district court affirmed the ruling.²⁸ The Eighth Circuit reversed and remanded for a new trial, declaring that the insurance company had "produced evidence establishing fraud and a

²⁵*State of Missouri ex rel. Nixon v. Audley (In re Audley)*, 275 B.R. 383, 388 (10th Cir. BAP 2002).

²⁶850 F.2d 446 (8th Cir. 1988).

²⁷850 F.2d at 447.

²⁸850 F.2d at 448.

nondischargeable debt under [§523(a)(2)].”²⁹ The Court cannot tell whether the opinion means that the insurance company had produced sufficient evidence to support a finding in its favor (as the remand for new trial seems to suggest), or instead, sufficient evidence that the trial court *must* find in the company’s favor (as the quoted language seems to suggest).

In any event, this case is different from *Dallam*. First, it is not clear that the affidavit the Debtor signed includes any representation that there were no recorded mortgages on the property. Columbian quoted four paragraphs from the affidavit in its motion, indicating that those were the ones it believed to be relevant here. The first of them, labeled as number 3 in the affidavit, states that there are no outstanding bills for services, labor, or materials used in the construction, and that the owners (the Williamses) had accepted the construction. The paragraph labeled number 5 states that the affidavit is made for the benefit of everyone relying on it. Paragraph number 6 asks Columbian to issue title insurance for the Williamses’ mortgagee without exception for possible unfiled mechanic’s or materialman’s liens or unreleased secured interests in the real estate, and promises to indemnify Columbian for any loss it might suffer as a result of such claims. None of these paragraphs even arguably includes a representation that there is no outstanding mortgage like the one held by Prairie State.

The last paragraph that Columbian quoted, number 4 in the affidavit, is the only one that might contain such a representation, so it requires a closer examination. It reads:

There are no outstanding unpaid and /or unreleased Title I or Title II house or improvement loans, chattel mortgages, conditional sales contracts, security agreements, financing statements,

²⁹850 F.2d at 449.

continuation statements or other documents or instruments evidencing a secured interest in any chattel or fixture located in or upon said premises described above.

The first type of interest listed in the provision could possibly cover Prairie State's recorded mortgage since Prairie State's loan to the Debtor's corporation might be referred to as a "house or improvement loan," although the Court does not know what the words "Title I or Title II" mean here. A "conditional sales contract" could also conceivably be used to refer to a transaction in real property. The other four specific types of interest listed, however, refer not to direct interests in real property, but only to interests in personal property, although given the context, the personal property would in some way be related to real property. Furthermore, the catch-all phrase at the end of the list refers to interests that at most cover personal property that has been sufficiently attached to real property to be considered to have become a part of it as a fixture; again, the interests are not interests directly in real property. Especially because the affidavit is Columbian's form so ambiguities should be construed against Columbian, the Court would be inclined to read the entire provision to be referring only to interests in personal property that have somehow become related to the real property, and not to a direct interest in the real property like Prairie State's mortgage. In short, the Court is not convinced that the materials submitted demonstrate that no reasonable fact finder could conclude that the Debtor did not misrepresent anything by signing this affidavit despite the existence of the Prairie State mortgage.

The affidavit of Columbian's officer that was submitted to support its motion does not carry Columbian over this hurdle, either. While the officer states that in issuing title insurance policies for newly-built homes, Columbian and other title insurance companies routinely rely on affidavits like the one the Debtor signed, he indicates they rely on the affidavits and issue policies without exceptions only

for “the matters referenced in the affidavit.” If the affidavit the Debtor signed does not refer to a recorded mortgage like Prairie State’s, as the Court has concluded above is at least possible, then the statement about Columbian’s reliance on the affidavit is irrelevant to this proceeding.

Columbian’s other possible theory would seem to be based on its officer’s assertions about industry custom, and not on any express representation in the Debtor’s affidavit. Columbian’s officer makes the following statement in his affidavit:

In addition, the understanding and custom in the industry is that funds required to pay any liens, mortgages, or other such obligations as referenced in the affidavit will be immediately segregated by the recipient such as [the Debtor] or an individual or entity in an equivalent position as [the Debtor] and paid over immediately to the appropriate obligee or claimant.

With mechanic’s and materialmen’s liens, the Court understands that a title insurance company might have little ability to learn of such claims except to the extent the general contractor discloses them, or the potential lienholder files a claim of record. But Prairie State’s mortgage was recorded and Columbian could have discovered it by investigating the record title to the real property. In effect, the officer is saying that the custom in the title insurance industry is to expect a contractor to lie on the affidavit by swearing that no claims against the property are outstanding and then to rely on the contractor to use the sale proceeds to pay off claims that he has sworn do not exist. The Court finds this assertion particularly astonishing as applied to a recorded mortgage. Title insurance companies are in the business of insuring the quality of title to real property and, at least as the Court understands it, they investigate the record title to the real property before they insure it, and rely on their findings to determine what exceptions to include in their policies. It appears that Columbian simply overlooked Prairie State’s mortgage when it made its title search. If it had found the mortgage, the Court expects

that it would either have excepted the mortgage from the title policy or have required that the Sale Proceeds be used first to pay off the mortgage before any excess was paid to the Debtor's corporation.

Conclusion

Columbian's motion to strike the Debtor's late response to its motion for summary judgment is granted. However, Columbian's motion for summary judgment must be, and it is hereby, denied.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this _____ day of February, 2003.

JAMES A. PUSATERI
BANKRUPTCY JUDGE