



SO ORDERED.

SIGNED this 11 day of August, 2009.

ROBERT E. NUGENT
UNITED STATES CHIEF BANKRUPTCY JUDGE

OPINION DESIGNATED FOR ON - LINE PUBLICATION
BUT NOT PRINT PUBLICATION

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

IN RE:

STEPHEN V. KOELZER,)	
)	Case No. 08-10557
Debtor)	Chapter 7
_____)	
)	
AGRICREDIT ACCEPTANCE LLC)	
)	
Plaintiff,)	
v.)	Adv. No. 08-5128
)	
STEPHEN V. KOELZER,)	
)	
Defendant.)	
_____)	

ORDER DENYING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT

Creditor Agricredit Acceptance LLC (Agricredit) moves for summary judgment on its complaint alleging that debtor’s debt to it should be excepted from his discharge pursuant to 11

U.S.C. §§ 523(a)(2) and (a)(6). Agricredit's complaint states that Koelzer cannot account for the whereabouts of two of the three balers he purchased on a Retail Installment Contract and Security Agreement (Contract). Agricredit has only been able to recover one of the balers and has a Washington state court judgment for the deficiency, approximately \$86,021. Agricredit appears by Eric D. Bruce of Bruce, Bruce & Lehman. Koelzer appears *pro se*.

Jurisdiction

This is a core proceeding under 28 U.S.C. § 157(b)(2)(I) over which this Court has subject matter jurisdiction, 28 U.S.C. § 157(b)(1) and § 1334(b).

Procedural Background

In the pretrial order entered in this case on March 5, 2009,¹ the parties stipulated to these facts: Koelzer signed the Contract on May 22, 2000 and purchased three Hesston balers for \$129,235. When Koelzer defaulted on the loan, Agricredit repossessed one of the balers, obtained a deficiency judgment against Koelzer and an order of replevin for the remaining two balers. Koelzer has no record of what happened to the balers and contends that another secured creditor, Baker Boyer National Bank, repossessed the balers, but has no records of his own to support that. He does stipulate that he is liable on the deficiency judgment mentioned above. Agricredit holds a claim in the amount of \$86,771.91.

Agricredit filed a statement of uncontroverted facts in support of its motion, but no memorandum of law. As support for the statement of uncontroverted facts, Agricredit attached a copy of the complete transcript of Koelzer's Fed. R. Bankr. P. 2004 examination, a copy of requests

¹ Adv. Dkt. 24. The pretrial order was submitted without Koelzer's contentions and signature pursuant to this Court's local rule, D. Kan. L.B.R. 9074.1(b). Koelzer did not object to the pretrial order.

for admission served upon him, several affidavits, and copies of the Contract documents. Agricredit relies principally on the admissions and affidavits, but in some instances does not “refer with particularity to the portions of the record on which the movant relies” as is required in D. Kan. L.B.R. 7056.1(a). Several of the proposed uncontroverted fact statements are actually legal conclusions. Koelzer, in turn, denies a number of the statements of fact by pleading lack of knowledge or stating the opposite of what is allegedly uncontroverted. He supplies no record support for any controversions he makes as he is obligated to do by D. Kan. L.B.R. 7056.1(b)(1) when opposing a motion for summary judgment.

Summary Judgment Standards

This Court’s function in reviewing Agricredit’s motion for summary judgment is to first determine whether genuine issues of fact exist for trial. In making this determination the Court may not weigh the evidence nor resolve fact issues.² On summary judgment, it is not the Court’s function to determine witness credibility, weigh evidence or decide competing inferences.³ Once the Court determines those facts to which there is no dispute, it must then determine whether those uncontroverted facts establish a sufficient legal basis which entitle the movant to judgment as a matter of law.⁴ If different ultimate inferences may properly be drawn from the facts, summary

² *First Sec. Bank of New Mexico, N.A. v. Pan American Bank*, 215 F.3d 1147, 1154 (10th Cir. 2000) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed. 2d 202 (1986); *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513, 1518 (10th Cir. 1994) (Court may not resolve disputed questions of fact at the summary judgment stage).

³ *Pan American Bank, supra*; *Masilionis v. Falley’s Inc.*, 904 F. Supp. 1224, 1226 (D. Kan. 1995); *Boyer v. Board of County Com’rs of Johnson County*, 922 F. Supp 476, 484 (D. Kan. 1996), *aff’d* 108 F.3d 1388 (10th Cir.1997).

⁴ *E.E.O.C. v. Lady Baltimore Foods, Inc.*, 643 F. Supp. 406, 407 (D. Kan. 1986) (Even if there are no genuine issue of material fact, the movant still has the burden to show it is entitled to

judgment is not appropriate.⁵

Here, both Agricredit's and Koelzer's compliance with summary judgment practice and D. Kan. L.B.R. 7056.1 is deficient. As noted above, neither party has properly cited to the record to support their version of the facts. The Court is not obliged to sift through the record to isolate and find the record support for the statement of uncontroverted fact or the controversion.⁶ Neither party has fully complied with Rule 7056.1(a) or (b). Where unsupported by citation to the record, the Court will disregard the movant's fact or the non-movant's response. The Court also disregards those factual disputes that are not material to the outcome⁷ and a party's characterization of the facts, whether made by the movant or the non-movant.⁸ To the extent either Agricredit's or Koelzer's

judgment as a matter of law.); *Reed v. Bennett*, 312 F.3d 1190, 1195 (10th Cir. 2002).

⁵ *Security Nat. Bank v. Belleville Livestock Commission Co.*, 619 F.2d 840, 847 (10th Cir. 1979).

⁶ *See Mitchell v. City of Moore, Oklahoma*, 218 F.3d 1190 (10th Cir. 2000); *Thomas v. Wichita Coca-Cola Bottling Co.*, 968 F.2d 1022, 1024-25 (10th Cir. 1992), *cert. denied*, 113 S.Ct. 635 (1992); *Thompson v. United Transp. Union*, 167 F. Supp. 2d 1254, 1266 (D. Kan. 2001); *Sprint Communications Co. L.P. v. Vonage Holdings Corp.*, 500 F. Supp. 2d 1290, 1304-05 (D. Kan. 2007)

⁷ *See Cease v. Safelite Glass Corp.*, 911 F. Supp. 477 (D. Kan. 1995) (Only disputes over facts that might affect the outcome under governing law will preclude summary judgment); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (Factual disputes that are irrelevant or unnecessary will not be considered); *Richards v. City of Topeka*, 934 F. Supp. 378 (D. Kan. 1996).

⁸ *See Patton v. AFG Industries, Inc.*, 92 F. Supp. 2d 1200, 1202 n. 3 (D. Kan. 2000) (Controversion only denied characterization of a fact [a conversation] and therefore the fact is deemed admitted); *Stephens v. City of Topeka, Kan.*, 33 F. Supp. 2d 947 (D. Kan. 1999) (Conclusory terms or characterizations without any concrete facts to support characterizations are afforded no weight by the court); *Rogers v. United States*, 58 F. Supp. 2d 1235 (D. Kan. 1999) (The general characterization of a transaction is a question of law).

submissions suffer from these defects, the proffered fact or response will be disregarded.⁹

In short, summary judgment is available only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Unsupported denials of movant's properly supported statements of fact will not suffice to create a genuine issue of fact for trial.¹⁰ Nor can the non-movant rest upon "lack of knowledge" to controvert a movant's statement of fact.¹¹ Here, Koelzer submitted no affidavit or other evidentiary support to oppose Agricredit's factual statements.¹² Thus, to the extent Agricredit's statements of *fact* are properly supported, they will be deemed admitted; conclusory statements without specific facts or reference to the supporting record will be disregarded.¹³ Between the stipulations in the pretrial order and the summary judgment papers, the Court finds that the following facts are uncontroverted.

Findings of Fact

Koelzer signed the Contract on May 22, 2000 and borrowed \$129,235 to purchase three

⁹ See Adv. Dkt. 26, Agricredit's Statement of Uncontroverted Facts, ¶¶ 9, 10, 11, 12, 13, 14.

¹⁰ *In re Grandote Country Club Company, Ltd.*, 252 F.3d 1146, 1149-50 (10th Cir. 2001); *In re Git-N-Go, Inc.*, 2007 WL 2816215, *4 (Bankr. N.D. Okla. 2007) (Trustee's statement of material facts would be deemed admitted if the nonmoving party asserted conclusory allegations and general denials without providing evidentiary support); Fed. R. Civ. P. 56(e)(2); D. Kan. L.B.R. 7056.1(a). See Dkt. 31, Koelzer's Response, ¶s 7, 9, 10, 11, 12, 13, 14.

¹¹ *In re Rafter Seven Ranches, LP*, 2008 WL 2783278, *4 n. 28 (Bankr. D. Kan. 2008); *In re Fries*, 378 B.R. 304, 308 (Bankr. D. Kan. 2007). See Dkt. 31, Koelzer's Response, ¶s 5-8.

¹² It was incumbent upon Koelzer to identify the movant's facts in dispute by reference to affidavits, deposition transcripts, or the other materials allowed by Rule 56. None of Koelzer's responses are supported by reference with particularity to the record. See *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998); Fed. R. Civ. P. 56(e)(2); D. Kan. L.B.R. 7056.1(d).

¹³ Dkt. 26, Agricredit's Statement of Uncontroverted Facts, ¶¶ 9-14.

balers. He granted a security interest in three Hesston balers to Agricoedit's predecessor ASNW, Inc. As stated in the affidavit of an officer of Agricoedit, ASNW assigned the Contract to Agricoedit on December 26, 2000. Koelzer defaulted on the Contract and Agricoedit repossessed one of the three balers. Agricoedit obtained a deficiency judgment against Koelzer in the amount of \$86,021.91 and the right to exercise replevin of the remaining two balers. Koelzer has no record of what happened to any of the balers. According to the supporting affidavit of its Vice President, Baker Boyer did not repossess any of the balers and has no knowledge of their whereabouts.¹⁴

Analysis

Agricoedit seeks to except this debt from discharge on two statutory grounds. It first alleges that Koelzer's debt to it was incurred by false statements or false pretenses within the meaning of § 523(a)(2)(A) or a false written statement respecting his financial condition within the meaning of § 523(a)(2)(B). It further alleges that Koelzer wilfully and maliciously damaged its property interests as set out in § 523(a)(6).

In the absence of a memorandum of law, the Court is hard pressed to see how being unable to account for missing collateral after a loan is made can be equated with making a false statement or acting with a false pretense in order to obtain the loan. Nor can the Court discern the existence of a statement in writing regarding Koelzer's financial condition that was materially false. In the absence of movant's identification of a false statement or some fraud, the Court concludes that there

¹⁴ The balance of Agricoedit's statements of uncontroverted fact are conclusory legal statements without reference to an evidentiary record (Statement ¶s 9-14) and the truth of which Koelzer has denied, also without reference to the supporting record. As discussed above, those statements will be disregarded for summary judgment purposes. *See supra*, pp. 3-5.

is no legal basis for summary judgment on the § 523(a)(2)(A) or (B) claim.¹⁵

Less simple, however, is the disposition of Agricredit's § 523(a)(6) claim. To prevail on summary judgment, movant must show that there is no genuine factual issue concerning either Koelzer's destruction or conversion of the balers or of his knowledge that doing so would damage Agricredit's economic interests. Some allegation concerning the element of scienter is necessary to support a § 523(a)(6) judgment, whether on summary judgment or at trial.¹⁶ Here, Koelzer claims not to know what happened to the balers. In his Rule 2004 examination, he stated that once his property began to be repossessed, he attempted to resist, but was jailed in the state of Washington for breach of the peace. Thereafter, he sat in his house and watched repossessions go forward without interfering. He professes to have no idea about the whereabouts of the two missing balers. Agricredit does not allege that Koelzer actively concealed or removed them, only that Koelzer can't or won't account for them. Nor does Agricredit cite to any portion of the record that would support a finding that Koelzer did in fact conceal or remove the balers with the knowledge that doing so would damage Agricredit. Indeed, Agricredit did not even seek such an admission.

There is simply no supported factual allegation that Koelzer intended to harm Agricredit. Koelzer's professed lack of knowledge may be less than credible, but this Court cannot assess

¹⁵ See *In re Kaspar*, 125 F.3d 1358 (10th Cir. 1997) (discussing elements of § 523(a)(2)(B)); *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367 (10th Cir. 1996) (discussing requisite proof for § 523(a)(2)(A)); *In re Joelson*, 307 B.R. 689 (10th Cir. BAP 2004) (distinguishing § 523(a)(2)(A) and (B)).

¹⁶ *Kawaauhau v. Geiger*, 523 U.S. 57, 61-62, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998) (Section 523(a)(6) encompasses acts done with the actual intent to cause injury; it requires a deliberate or intentional injury). See *In re Longley*, 235 B.R. 651 (10th Cir. BAP 1999) (Section 523(a)(6) claim discussed in context of conversion of secured property and applying *Geiger* standard).

credibility on summary judgment. As noted in Collier's treatise, "Courts must be careful not to equate a breach of a contract, which happens to be a security agreement, with conduct causing willful and malicious injury."¹⁷ All that is shown on this summary judgment record is that a contract has been breached. While a court who has observed the witnesses, assessed their credibility, weighed the evidence, and applied the requisite burden of proof at trial might reach a different conclusion on this record, there is insufficient record support for summary judgment at this stage.

Therefore, the Court DENIES Agricredit's motion for summary judgment. The facts as found herein shall be treated as established at the trial of this matter that will be scheduled in due course.¹⁸ The Clerk shall schedule this matter for a half-day trial at the Court's earliest available time.

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¹⁷ Lawrence P. King, editor-in-chief, 4 COLLIER ON BANKRUPTCY ¶ 523.12[3], p. 523-95 (15TH rev. ed).

¹⁸ See Fed. R. Civ. P. 56(d)(1).