

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW MEXICO

In re:

RAYMOND C. SLADE,

Debtor.

Case. No. 08-10927 JA

CAGO, INC.,

Plaintiff,

vs.

Adversary No. 08-1065 J

RAYMOND CURTIS SLADE,

Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Before the Court is Plaintiff's Motion for Summary Judgment ("Motion") filed January 30, 2009. *See* Docket No. 12. Cago, Inc. ("Cago") seeks to deny the dischargeability of its claim and Mr. Slade's discharge under various subsections of 11 U.S.C. §§ 523 and 727.

At a Status Conference held February 20, 2009, the Court extended the time for Defendant Raymond Curtis Slade to respond to the Motion until March 20, 2009. *See* Docket entry of February 27, 2009. Mr. Slade has not filed a response or objection to the Motion.

Upon review of the Motion and Cago's Memorandum in Support of Plaintiff's Motion for Summary Judgment filed January 30, 2009, the Court finds that Cago failed to properly support its Motion as required under Fed.R.Bankr.P. 7056, and, therefore, denies the Motion without prejudice to Cago filing another motion for summary judgment supported by evidence.

DISCUSSION

It is appropriate for the Court to grant summary judgment if the pleadings, discovery materials, and any affidavits before the Court show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c) made applicable to the adversary proceeding by Fed. R. Bankr.P 7056. “[A] party seeking summary judgment always bears the initial responsibility of informing the . . . court of the basis for its motion, and . . . [must] demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Here, Cago’s Statement of Material Facts set forth in its Memorandum contains no references to any pleadings, affidavits, depositions transcripts, or discovery responses, or any other evidence. Cago’s only reference to any evidence supporting its Statement of Material Facts is the assertion, in the conclusion of its Memorandum, that “Slade has admitted to all of the foregoing due to his neglect to properly file answers to Plaintiff’s First Request for Admissions.” However, no documents to support this contention were submitted in support of the Motion or filed in this adversary proceeding. There is no evidence before the Court showing that Cago served any requests for admissions on Mr. Slade or that Mr. Slade failed to respond to any such requests; nor is there anything before the Court showing the nature of any of requests for admissions served on Mr. Slade in this adversary proceeding.

Mr. Slade failed to file a timely response or objection to the Motion. However, the mere failure to respond to a motion for summary judgment does not result in a court granting the motion by default. Because Fed.R.Civ.P. 56(c) and 56(e) require, before summary judgment may issue, a determination that the movant is entitled to judgment as a matter of law on a motion properly made and supported, the court must still consider the motion on the merits. *See*

United States v. One Piece of Real Property Located At 5800 SW 74th Avenue, Miami, Florida, 363 F.3d 1099, 1101 (11th Cir. 2004) (finding that the district court could not grant summary judgment based merely on the fact that no objection to the motion was made). Further, failure to respond to a motion for summary judgment does not result in the admission of any facts not controverted by a response if the movant submitted no evidence to support those facts. Courts must review the evidentiary materials submitted in support of a motion for summary judgment to ensure that the motion is supported by evidence.¹ Thus only when a motion for summary judgment is properly supported by evidence will the complete failure of the non-moving party to respond result in an admission of all material facts for purposes of granting summary judgment. Cago failed to support its motion for summary judgment with any evidence, and therefore no facts were deemed admitted by Mr. Slade's failure to respond.

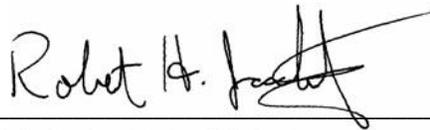
New Mexico Local Bankruptcy Rule 7056-1 does not dictate a different result. That Rule provides that the movant's statement of material facts as to which the movant contends no genuine fact exists must "refer with particularity to those portions of the record upon which the movant relies." It further provides: "All material facts set forth in the statement of the movant shall be deemed admitted unless specifically controverted." Local rules should be construed if possible to be consistent with the Federal Rules of Bankruptcy Procedure so the local rule is not rendered invalid. *See* Fed.R. Bankr.Proc. 9029 (local bankruptcy rules must be consistent with the Federal Rules of Bankruptcy Procedure); *State of Louisiana*, 757 F.2d at 707 (a local rule

¹*See, e.g. D.H. Blair & Co., Inc. v. Gottidiener*, 462 F.3d 95, 110 (2nd Cir. 2006) ("If the evidence submitted in support of the summary judgment motion does not meet the movant's burden of production, then summary judgment must be denied *even if no opposing evidentiary matter is presented.*")(quoting *Vermont Teddy Bear Co., Inc. v. 1-800 Beargram Co.*, 373 F.3d 241, 244 (2nd Cir. 2004)(emphasis in original)); *One Piece of Real Property*, 363 F.3d at 1101-1102 (to the same effect); *Jaroma v. Massey*, 873 F.2d 17, 20 (1st Cir. 1989)(per curiam) ("[T]he district court cannot grant a motion for summary judgment merely for lack of any response by the opposing party, since the district court must review the motion and the supporting papers to determine whether they establish the absence of a genuine issue of material fact."); *John v. State of Louisiana (Bd. of Trustees for State Colleges and Universities)*, 757 F.2d 698, 708 (5th Cir. 1985)(the movant has the burden of demonstrating the absence of a material fact even if no response to the summary judgment motion is made).

should be construed if possible as consistent with the Federal Rules of Civil Procedure since the local rule otherwise would be rendered invalid). Under NM-LBR 7056-1, failure to controvert a fact not supported by any evidence presented to the Court does not constitute an admission of the fact.

Cago as movant has failed to discharge its initial burden to support its statement of material facts with evidence. Summary judgment must, therefore, be denied even though Mr. Slade did not respond to the Motion.

WHEREFORE, IT IS HEREBY ORDERED that Plaintiff's Motion for Summary Judgment is DENIED, without prejudice.



ROBERT H. JACOBVITZ
United States Bankruptcy Judge

Entered on Docket Date: September 18, 2009

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