

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of	:	
	:	
KATHLEEN MARIE TILLEY,	:	Case No. 89-1534-W H
	:	
Debtor.	:	Chapter 7
-----	:	
KATHLEEN MARIE TILLEY,	:	
	:	Adv. No. 89-129
Plaintiff,	:	
	:	
v.	:	
	:	
HIGHER EDUCATION ASSISTANCE	:	
FOUNDATION,	:	
	:	
Defendant.	:	
	:	
	:	

ORDER--PLAINTIFF'S MOTION FOR
LEAVE OF COURT TO WITHDRAW DEEMED ADMISSIONS;
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

On February 1, 1990, Plaintiff's motion for leave of court to withdraw deemed admissions and Defendant's motion for summary judgment came on for hearing. The following appearances were entered: Timothy O'Grady for Plaintiff and Mark D. Walz for Defendant. At the conclusion of said hearing, the Court took the matters under advisement. The Court considers the matters fully submitted.

This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I). The Court, upon review of the pleadings and arguments of counsel, now enters its findings and conclusions pursuant to F. R. Bankr. P. 7052.

FINDINGS OF FACT

1. On July 12, 1989, Plaintiff filed a voluntary Chapter 7 petition.

2. On September 12, 1989, Plaintiff filed a complaint to determine dischargeability of Defendant's debt.

3. On October 27, 1989, Defendant filed an answer to the complaint and a counterclaim.

4. On November 20, 1989, Defendant served upon Plaintiff's counsel its first set of interrogatories and requests for admissions of fact and genuineness of documents. The first set of interrogatories and requests for admission were filed with the Court on November 21, 1989.

5. On December 29, 1989, Defendant filed a motion for summary judgment against Plaintiff, asserting that the facts stated in Defendant's counterclaim, in the admissions on file, (by virtue of the Plaintiff's failure to file an answer or objection pursuant to B.R. 7036), and in Defendant's statement of undisputed facts, established the basis for a claim and judgment against the Plaintiff.

In its motion for summary judgment, Defendant prayed that the Court enter judgment against the Plaintiff, as originally prayed for in the counterclaim; dismiss Plaintiff's complaint with prejudice; award Defendant judgment in the amount of \$2,009.00 plus interest from May 3, 1989, at 8 percent per annum, and reasonable attorney's fees and costs of collection; and declare the indebtedness not dischargeable

pursuant to §523(a)(8).

6. On January 3, 1990, Plaintiff served her response to Defendant's request for admissions.

7. On January 10, 1990, Plaintiff filed a resistance to Defendant's motion for summary judgment. She attached her response to Defendant's requests for admissions as Exhibit A.

8. On January 10, 1990, Plaintiff filed a motion for leave of Court to withdraw deemed admissions.

ANALYSIS

Federal Rule of Bankruptcy Procedure 7036, which incorporates F.R.Civ.P. 36, provides in pertinent part:

(a) Request for Admission. A party may serve upon any other party a written request for the admission ... of the truth of any matters within the scope of Rule 26(b) set forth in the requests that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the requests ...

Each matter of which an admission is requested shall be separately be set forth. The matter is admitted unless, within 30 days after service of the request, ... the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter ...

(b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pretrial order, the Court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment

will prejudice that party in maintaining the action or defense on the merits.

Federal Rule of Bankruptcy Procedure 7056, which incorporates F.R.Civ.P. 56, provides in pertinent part:

... the [summary] judgment sought shall be rendered forthwith 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 the case *sub judice*, Plaintiff failed to timely respond to Defendant's request for admissions of fact and genuineness of documents. Therefore, Plaintiff admitted those matters listed in Defendant's requests for admissions under Fed.R.Civ.P. 36(a). However, the Court will permit withdrawal of the deemed admissions under Fed.R.Civ.P. 36(b) because the presentation of the merits of the action will be subserved by the withdrawal of deemed admissions.

Further, Defendant has failed to satisfy the Court that withdrawal of the deemed admissions will prejudice the Defendant in maintaining the counterclaim and defense on the merits.

Concerning Defendant's motion for summary judgment, upon the withdrawal of the deemed admissions, Plaintiff's response to Defendant's request for admissions and the pleadings show that there is a genuine issue as to a material fact. Therefore, Defendant is not entitled to summary judgment.

IT IS ACCORDINGLY ORDERED that Plaintiff's motion for leave of

Court to withdraw deemed admissions is granted and Defendant's motion for summary judgment is denied.

Dated this 5th day of March, 1990.

Russell J. Hill
U.S. Bankruptcy Judge