

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF IOWA**

In the Matter of:

Phillip L. Vlieger,
fdba Byblos Coporation,
dba PineApple Homes,

Case No. 09-03290-1mj7

Debtor

Chapter 7

Louis and Peggy Mayfield,

Adv. Pro. 09-30111-als

Plaintiffs

v.

Phillip L. Vlieger,

Defendant

**MEMORANDUM OF DECISION
(date entered on docket: February 11, 2011)**

At the conclusion of hearing on the Plaintiff's Motion for Summary Judgment the matter was taken under advisement. For the reasons set forth below the Motion is granted as to the claims asserted under 11 U.S.C. sections 523(a)(2)(A), 523(a)(4) and 523(a)(6). The requests for punitive damages and attorney fees are denied.

BACKGROUND OF PROCEEDING

An adversary proceeding objecting to the dischargeability of debt pursuant to 11 U.S.C. sections 523(a)(2)(A), 523(a)(4) and 523(a)(6) was filed on behalf of Louis and Peggy Mayfield (hereinafter "Plaintiffs" or "Mayfields") on August 25, 2009. The facts involve the construction of a home for the Mayfields by the Defendant-Debtor, Phillip L. Vlieger ("Defendant" or "Vlieger"). The Defendant, acting pro se, filed his answer

denying the allegations on October 1, 2009. A stipulation related to scheduling was submitted by the parties and approved by the court on November 13, 2009. No filings were made in the proceeding until January 27, 2010 when five Motions to Quash were filed by Vlieger related to discovery requested by the Plaintiffs. On January 29, 2010 the Plaintiff submitted a Motion to extend the time periods set forth in the stipulated scheduling order, which was granted. The Motions to Quash and Plaintiff's objection thereto were denied at a hearing conducted on March 2, 2010. A second Motion to extend time for the scheduling deadlines was requested by the Plaintiffs, and granted on May 4, 2010. On May 21, 2010 a Motion to Compel Discovery was filed by counsel for the Mayfields. A timely Motion for Summary Judgment was filed on behalf of the Plaintiffs on June 22, 2010. Prior to the July 7, 2010 hearing on the Motion to Compel, the parties submitted a consent order disposing of the matter. The Order provided that three depositions would be taken on September 9, 2010. In order to accommodate the agreed discovery schedule, a proceeding memo was entered which permitted until September 30, 2010 for the Plaintiff to supplement its Motion for Summary Judgment, allowed the Defendant until October 14, 2010 to resist the Motion and scheduled hearing on Plaintiffs' Motion for Summary Judgment for October 22, 2010.

No resistance to the Motion to Summary Judgment was filed by the Defendant by October 14, 2010. Further, he did not appear at the scheduled hearing. The record was closed and the matter was taken under advisement at the conclusion of the hearing.

DISCUSSION

Federal Rule of Civil Procedure 56 is applicable in bankruptcy proceedings pursuant to Bankruptcy Rule 7056(a). "Summary judgment is appropriate if, viewing the

evidence favorably to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” HealthEast Bethesda Hospital v. United Commercial Travelers of Am., 596 F.3d 986, 987 (8th Cir. 2010); see also Fed. R. Bankr. P. 7056(c)(2). “Summary judgment is not appropriate if the non-moving party can set forth specific facts, by affidavit, deposition, or other evidence, showing a genuine issue for trial.” Buam v. Helget Gas Prods., Inc., 440 F.3d 1019, 1022 (8th Cir. 2006) citing Grey v. City of Oak Grove, 396 F.3d 1031, 1034 (8th Cir. 2004).

Pursuant to the Plaintiffs’ Motion for Summary Judgment the following facts are undisputed:

1. The business entities Byblos Corporation and PineApple Homes, Inc. were not incorporated under Iowa law at the time the construction contract was entered into between the parties.
2. A personal note was executed by Vlieger in the amount of \$46,945 to finance construction of the Mayfield project.
3. Funds received from the Mayfields for construction costs were utilized by the Defendant for other purposes.
4. Construction of the home was not completed by the Defendant.
5. Vlieger transferred properties to third parties during the time period he owed performance and money to the Plaintiffs.
6. Mayfields incurred costs to third parties to complete construction of the home.
7. The Defendant failed to respond to Admissions served upon him by the Plaintiffs.

The Mayfields have supported their request for entry of judgment as a matter of law, and the burden shifts to the Defendant to identify one or more genuine issues of material fact for trial. To be successful in this showing, the non-moving party must offer something more than doubt regarding a material fact. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Summary judgment is appropriate if the resistance raises claims that are “merely colorable or [are] not significantly probative.” See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

Post hearing, on October 29, 2010, the Defendant filed a response to the Motion for Summary Judgment. This document generated a response by the Plaintiffs and further objection by the Defendant. Although not timely filed, the Court considered these documents to determine whether it would be appropriate to re-open the record and conduct an additional hearing. It is clear from a review of the documents filed by the Defendant that he understood the prior deadlines established by the Court; that the reason for non-appearance at the October 22, 2010 hearing was inconsistent with counsel’s representation on the record¹; that he believed his continued conversations somehow extended the pending Court deadlines and excused his appearance. Finally, in spite of Vlieger’s representation that a “large, forthcoming Affidavit, under preparation, will provide many more undisputable facts”, no such document has been filed. As a result of these facts, the Court is not persuaded that an additional hearing is required, or that at this juncture it would change the outcome of the pending Motion for Summary Judgment.

The Defendant has failed to comply with Federal Rule of Civil Procedure 56(e), made applicable by Federal Rule of Bankruptcy Procedure 7056 which provides that a

¹ Plaintiffs’ counsel reported that the Defendant was traveling and did not intend to appear. Defendant states in subsequent filings that he “missed the court date due to the fact that the Defendant thought he was working in good faith with Plaintiffs’ counsel toward discovering important facts”.

resistance to a pending motion for summary judgment “may not rely merely on allegations or denials in its own pleading; rather, its response must – by affidavits or as otherwise provided in this rule – set out specific facts showing a genuine issue for trial.” The facts included in the Request for Admissions are deemed admitted for failure of the Defendant to respond within 30 days of service and establish the Plaintiffs’ claims alleged under 11 U.S.C. section 523. See Fed. R. Civ. P. 36; Fed. R. Bankr. P. 7036. Further, the Court disagrees with the Defendant’s statement that he has “not had the opportunity to present any facts, documents, or statements which support his position.” There has been adequate opportunity for Vlieger to file appropriate pleadings, appear at hearings and present his case. The fact that he has elected to proceed pro se does not eliminate, nor excuse, the Defendant’s compliance with the Code, Rules and court orders. See Schooley v. Kennedy, 712 F.2d 372, 373 (8th Cir. 1983).

The information before the Court does not support entry of judgment for punitive damages. Attorney fees, although contained in the contract², are not provided for under the specific statutes alleged by the Plaintiffs and are therefore not appropriately awarded.

IT IS THEREFORE ORDERED THAT:

1. The Motion for Summary Judgment is granted for the claims asserted pursuant to 11 U.S.C. sections 523(a)(2)(A), 523(a)(4) and 523(a)(6);
2. Judgment shall enter in the amount of \$107,703.60 with interest at the legal rate from and after August 25, 2009.

² At hearing Plaintiffs’ counsel stated that the attorney fee request was based solely on the contract and the failure of Defendant to respond to the Request for Admissions.

3. The requests for punitive damages and attorney fees are denied.

/s/ Anita L. Shodeen
Anita L. Shodeen
U.S. Bankruptcy Judge

Parties receiving this Memorandum of Decision from the Clerk of Court:
Electronic Filers in this Adversary Proceeding
Others: Phillip L. Vlieger, Defendant