UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF IOWA

In the Matter of	:	**Case No. 89-1866-C**
	:	**Chapter 7**
KHADIJA M. IBRAHIM n/k/a	:	
MICHELLE M. CARTER,	:	
	:	
Debtors.	:	
- -	:	
KHADIJA M. IBRAHIM, n/k/a	:	
MICHELLE M. CARTER,	:	
	:	**Adv. No. 93-93168**
v.	:	
	:	
IOWA COLLEGE STUDENT AID	:	
COMMISSION and	:	
COMMONWEALTH OF VIRGINIA,	:	
ex rel., STATE EDUCATION	:	
ASSISTANCE AUTHORITY,	:	
	:	
Defendants.	:	

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ORDER---MOTION FOR SUMMARY JUDGMENT

On May 19, 1994, a hearing was held on the Motion for Summary Judgment. Plaintiff/Debtor, Khadija M. Ibrahim n/k/a Michelle M. Carter, was represented by her attorney, Robert A. Wright, Sr. The Defendant, Iowa College Student Aid Commission ("ICSAC"), was represented by its attorney, James S. Wisby. At the conclusion of the hearing, the Court ordered the Plaintiff to respond to subject Motion for Summary Judgment on or before May 26, 1994. The Motion for Summary Judgment was ordered deemed submitted for ruling on said date. The Court then took the matter under advisement. Subsequently, the

Plaintiff filed an affidavit on June 29, 1994. The Court now considers this matter fully submitted.

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

FINDINGS OF FACT

1. On or about March 29, 1982, Plaintiff executed a promissory note payable to the order of the First Federal State Bank in the principle amount of $2,500. The note provided for interest at nine percent per annum.

2. The note evidences a student loan made to the Plaintiff under one or more programs funded by a governmental unit. The Defendant, ICSAC, is an agency of government of the State of Iowa and serves as a guarantee agency under the federal family education loan program. The loan was reinsured by the Department of Education of the United States.

3. The Plaintiff defaulted on her obligations to repay the note and the ICSAC paid under the terms of its guarantee and the note was endorsed and assigned to the ICSAC.

4. The Plaintiff filed a petition under Chapter 7 of the Bankruptcy Code on August 24, 1989. The Plaintiff's Petition in Bankruptcy was filed within seven years of the beginning of the repayment period of the educational loan.

5. The Plaintiff filed a Complaint to Determine Dischargeability of Education Loans on December 1, 1993 on the grounds that the debt should be discharged as it is an undue hardship upon her and her dependent children. In its answer, the Defendant filed a counterclaim

against the Plaintiff praying for judgment on the note in the amount of $2,589.26 plus interest thereon from December 17, 1993, at a rate of nine percent per annum. The Defendant also requests costs of collection in the amount of $609.03.

6. On December 21, 1993, Defendant served a Request for Admission on the Plaintiff through her attorney. The Request for Admission contained seven statements which are as follows:

> Statement No. 1: On or about March 29, 1982, plaintiff Khadija M. Ibrahim n/k/a Michelle M. Carter executed promissory note payable to First Federal State Bank in the principal amount of $2,500.00 (note #1), which bears interest at the rate of 9 percent per annum. A true and correct copy of note #1 is attached as Exhibit A.
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> Statement No. 2: The note evidences an educational loan made to plaintiff under a program funded by a governmental unit and was guaranteed by the ICSAC.
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> Statement No. 3: The note has been endorsed and assigned to the ICSAC.
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> Statement No. 4: The aggregate unpaid principal and interest due under the note is $2,589.26 plus interest thereon at 9% per annum simple interest from December 17, 1993.
>
> Statement No. 5: The amount due in federally mandated collection costs is $609.03. A copy of 34 CFR 682.410(b)(2) requiring payment of collection costs is attached as Exhibit B.
>
> Statement No. 6: The note did not first become due more than seven years (exclusive of any applicable suspension of repayment) prior to the date of the filing of the petition commencing the plaintiff's bankruptcy case.
>
> Statement No. 7: Excepting the note from discharge under 11 U.S.C. Section 523(a)(8) will not impose an undue hardship on the plaintiff and the plaintiff's dependents.

7. The Plaintiff failed to timely respond to the Request for Admission with written answer or objection.

8. On April 7, 1994, the Defendant, ICSAC, moved for summary judgment on its counterclaim on the grounds that there is no genuine issue of material fact. The Plaintiff filed an affidavit on June 29, 1994, contending that she did not have the ability to meet the loan obligation without creating extreme economic hardship on her children and herself. The affidavit states that the Plaintiff is a single mother of three children, ages 9 months, three years, and six years, respectively. The Plaintiff also attests that she will be fully unemployed after May 23, 1994.

DISCUSSION

A motion for summary judgment is governed by Fed.R.Civ.P. 56, made applicable to bankruptcy proceedings pursuant to Fed.R.Bankr.P. 7056, which provides in pertinent part:

> The judgment sought shall be rendered 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.

Fed.R.Civ.P. 56.

In ruling on a motion for summary judgment, the court's function is to determine whether a genuine issue as to any material fact exists, not to resolve any factual issues. Celotex Corp. v. Catrett,106 S.Ct. 2548, 2556 (1986); Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2509-11 (1986). The court must deny summary judgment where there is a genuine issue as to any material facts and grant summary judgment where there is no such issue and the movant is entitled to judgment as a matter of substantive law. Anderson, 106 S.Ct. at 2506-11.

The party seeking summary judgment bears the initial burden of asserting that the pleadings, depositions, answers to interrogatories, admissions, and affidavits established the absence of a genuine issue of material fact. Celotex Corp., 106 S.Ct. at 2552. The ultimate burden of demonstrating the existence of a genuine issue of material fact, however, lies with the nonmoving party. Id. at 2553. Any inferences to be drawn from the underlying facts contained in these materials must be considered in the light most favorable to the debtor. United States v. Diebold, Inc., 82 S.Ct. 993, 994 (1962). However, a court cannot grant a judgment in favor of a movant simply because the adverse party has not responded. The court is required at a minimum, to examine the movant's motion for summary judgment to ensure that he has discharged that burden. Carver v. Bunch, 946 F.2d 451 (6th Cir. 1991). If the moving party fails to make the necessary showing under Rule 56, summary judgment is inappropriate even though no opposing material is presented.

Defendant contends that this matter is appropriate for summary judgment because the Plaintiff has failed to answer the First Set of Interrogatories and Request for Admission of Facts and the Genuineness of Documents served on her attorney on December 21, 1993. The Defendant argues that the seven statements in the request for admissions should be deemed admitted and, therefore, all material facts are established in favor of the Defendant on its counterclaim.

Rule 36 of the Federal Rules of Civil Procedure governs request for admissions and is made applicable to bankruptcy proceedings by Bankruptcy Rule of Federal Procedure 7036. Rule 36 provides as follows:

> (a) **Requests for Admission**. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b)(1) set forth in requests that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of the documents described in the request. . . .
>
> Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, . . . 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 . . . .

Fed.R.Civ.P. 56(c) specifies that "admissions on file" can be an appropriate basis for the entry of summary judgment. It is also settled that "[a]dmissions made under rule 36, even default admissions can serve as a factual predicate for summary judgment. Rule 36(b) provides that a matter admitted is conclusively established." In re Niswonger, 116 B.R. 562, 565 (Bankr. S.D. Ohio 1990) (citations ommitted).

The Plaintiff was served with a Request For Admissions. The Plaintiff did not respond with written answer or objection within the thirty day time period provided by Fed.R.Civ.P. 36. The first six statements in the Request for Admission are relevant to the Defendant's counterclaim. The Plaintiff has not moved for amendment or withdrawal of the admissions. Accordingly, the Court finds that the first six statements are deemed admitted. The Court declines to decide the admittance of the seventh statement at this time as it is irrelevant to Defendant's counterclaim, the subject of the summary judgment before the Court.

The first six statements admit the amount due on the note for an educational loan, the interest rate, the parties to the transaction, the assignation to ICSAC, and the amount due for

collection costs. Therefore, taking into account the admissions on file, the Court finds that the Defendant has made the necessary showing of an absence of genuine fact on its counterclaim for judgment on the note. The burden then shifts to the Plaintiff to demonstrate the existence of a material fact. Even if the Court were to consider the untimely and procedurally deficient affidavit filed by the Plaintiff, the statement does not attempt to controvert the counterclaim, but only addresses the Plaintiff's complaint which is not the subject of the summary judgment before the Court. Therefore, the Plaintiff has failed to meet her burden of proof and summary judgment is hereby granted on the Defendant's counterclaim. The Plaintiff's Complaint to Determine Dischargeability of Education Loans shall proceed to trial.

ORDER

IT IS THEREFORE ORDERED that summary judgment is granted on the Defendant's counterclaim and the Defendant shall have judgment in the amount of $2,589.26 plus interest thereon from December 17, 1993 and costs of collection in the amount of $609.03.

Dated this ___30th_____ day of September, 1994.

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RUSSELL J. HILL, JUDGE
UNITED STATES BANKRUPTCY COURT