

THIS OPINION IS NOT INTENDED FOR PUBLICATION.

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:)	CASE NO. 01-52465
)	
KELLIE KING,)	CHAPTER 7
)	
DEBTOR(S))	
)	
COUNTY OF SUMMIT BOARD OF)	ADVERSARY NO. 01-5361
MENTAL RETARDATION AND)	
DEVELOPMENTAL DIFFICULTIES,)	JUDGE MARILYN SHEA-STONUM
)	
PLAINTIFF(S),)	
)	
vs.)	
)	
KELLIE KING)	ORDER DENYING DEFENDANT-
)	DEBTOR'S MOTION FOR
DEFENDANT(S).)	SUMMARY JUDGMENT

This matter comes before the Court on a motion for summary judgment filed by defendant-debtor on June 20, 2002 [**docket #13**] and an objection to that motion filed by plaintiff on July 19, 2002 [**docket #14**]. This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is determined to be a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I) over which this Court has jurisdiction pursuant to 28 U.S.C. §§1334(b), 157(a) and 157(b). Based upon the defendant-debtor's motion for summary judgment and plaintiff's objection thereto and the stipulated facts, the Court makes the following conclusions of law.

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UNDISPUTED FACTS

Pursuant to the parties' stipulations, the following facts are not in dispute in this matter:

1. From April 6, 1998 to the present defendant-debtor has been employed by plaintiff as a billing specialist.
2. Defendant-debtor is a union member and her salary is determined under a collective bargaining agreement.
3. From January 2000 to February 2001 defendant-debtor was overpaid by plaintiff due to a clerical error.
4. Beginning in January 2000, defendant-debtor was to receive a raise of \$894.00 per annum but instead received a raise of \$5,927.00 per annum.
5. The total amount that plaintiff overpaid defendant-debtor was \$5,652.27.
6. Throughout the period in question, defendant-debtor was paid by check.
7. In February 2001, plaintiff corrected the clerical error and a repayment plan was instituted through payroll deductions. Of the amount overpaid to defendant-debtor by plaintiff, \$770.90 was recouped through payroll deductions.
8. Plaintiff stopped payroll deductions in June 2001 pursuant to the filing of defendant-debtor's chapter 7 case.

DISCUSSION

Through its complaint, plaintiff contends that the balance of salary overpayments still due to it are non-dischargeable in defendant-debtor's chapter 7 case pursuant to 11 U.S.C. §523(a)(2). Despite that provision having two distinct subsections under which an action to challenge dischargeability of a debt can be brought, plaintiff has never articulated

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which subsection it is relying upon. However, because subsection (B) of §523(a)(2) deals with a written statement regarding a debtor's financial condition it has no application to this case. Accordingly, plaintiff can only be relying upon subsection (A) for its requested relief.

Section 523(a)(2)(A) of the Bankruptcy Code provides that a debt for money is nondischargeable to the extent that it was obtained by "false pretenses, a false representation, or actual fraud" In order for a debt to be deemed nondischargeable pursuant to §523(a)(2)(A), plaintiff must demonstrate by a preponderance of the evidence: (1) that debtor made a false representation as to a material fact; (2) that when the false representation was made, debtor had an intent to deceive; (3) that plaintiff relied upon the debtor's false representation and that the reliance was justifiable under all the circumstances; and (4) that plaintiff sustained a loss as a result of the debtor's false representation. *Field v. Mans*, 516 U.S. 59, 73 (1995); *Rembert v. AT&T Universal Card Svcs., Inc. (In re Rembert)*, 141 F.3d 277, 281 (6th Cir. 1998); *Longo v. McLaren (In re McLaren)*, 3 F.3d 958, 961 (6th Cir. 1993).

Through her motion for summary judgment defendant-debtor acknowledges that what she "knew of should have known" regarding her overpayment is a determinative fact in this case. *See* Motion for Summary Judgment [docket #13] at pg. 2. Defendant-debtor also acknowledges that the parties' stipulations do not address this fact. *Id.* Notwithstanding such acknowledgments, defendant-debtor contends that she is entitled to summary judgment "as the facts of the case as stipulated do not support the allegations of the Complaint in this matter (i.e., that there was any intent or knowledge on the part of the Debtor)" *Id.*

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A court shall grant a party's motion for summary judgment "if...there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); FED. R. BANKR. P. 7056. The party moving for summary judgment bears the initial burden of showing the court that there is an absence of a genuine dispute over any material fact, *Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th Cir. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)), and, upon review, all facts and inferences must be viewed in the light most favorable to the nonmoving party. *Searcy v. City of Dayton*, 38 F.3d 282, 285 (6th Cir. 1994); *Boyd v. Ford Motor Co.*, 948 F.2d 283, 285 (6th Cir. 1991). A material fact is one that must be decided before there can be a resolution of the substantive issue that is the subject of the motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

What exactly defendant-debtor "knew or should have known" regarding her overpayment is a material fact because it must be determined before there can be a decision as to whether the overpayments should be excepted from discharge pursuant to §523(a)(2)(A) of the Bankruptcy Code. Because that material fact is in dispute in this case, defendant-debtor's motion for summary judgment cannot be granted and is hereby denied.

IT IS SO ORDERED.

MARILYN SHEA-STONUM
U.S. Bankruptcy Judge

DATED: 8/23/02