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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
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CLEVELAND

In re:) Case No. 99-11244
)
LYNN DIAMOND,) Chapter 7
)
Debtor.) Judge Pat E. Morgenstern-Clarren
_____)
)
JAMES WIDRICH, et al.,) Adversary Proceeding No. 99-1231
)
Plaintiffs,)
)
v.) **MEMORANDUM OF OPINION AND**
) **ORDER REGARDING CROSS**
) **MOTIONS FOR SUMMARY**
LYNN DIAMOND,) **JUDGMENT**
)
Defendant.)

Plaintiffs James and Jerilyn Widrich filed this Adversary Proceeding alleging that Defendant-Debtor, Lynn Diamond, owes them a debt in the amount of \$30,000 plus interest based on her failure to pay their probate claim in her position as executrix of the estate of her late husband, Herbert Diamond. They seek a determination that her liability to them is nondischargeable under 11 U.S.C. § 523(a)(4). The Widrichs request summary judgment on the issues of Ms. Diamond's liability and dischargeability. (Docket 12, 17, 18). Ms. Diamond both opposes that request and moves for summary judgment in her favor. (Docket 11, 13, 19). Her motion is based on the argument that the Widrichs failed to present a claim against Mr. Diamond's estate, and that absent such a claim she did not have a duty to pay them. The Widrichs oppose this request. (Docket 14).

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JURISDICTION

The Court has jurisdiction to determine this matter under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

FACTS

These are the undisputed material facts:

Herbert Diamond borrowed a total of \$30,000 from the Widrichs. The terms of repayment, as stated in a letter dated January 11, 1996, required: (1) payment of monthly interest until the loan was paid; and (2) 90 days notice for payment of the principal loan amount. Mr. Diamond died on July 14, 1996 and at the time of his death the loan was outstanding.

The Cuyahoga County Probate Court appointed Lynn Diamond executrix of her husband's estate: *Estate of Herbert Diamond*, Case No. 1133037. The appointment date is not in the record. Ms. Diamond was the sole heir of the estate. The Widrichs did not present a written claim in the probate case. However, Ms. Diamond sent the Widrichs a letter dated December 15, 1996 (the "Letter") in which she stated:

THIS LETTER IS TO CONFIRM THE LOAN AGREEMENT MADE BY HERBERT DIAMOND AND THE WIDRICHS HAS BEEN ASSUMED BY HIS ESTATE AND THAT LYNN DIAMOND, EXECUTRIX OF HER HUSBAND'S ESTATE WILL CONTINUE TO PAY INTEREST ON THE LOAN AS AGREEDED [sic]

NINETY DAYS NOTICE OF PAY BACK WAS ALSO AGREEDED [sic] UPON, WITH INTEREST TO LOWER ACCORDINGLY . . .

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Ms. Diamond, as executrix, made interest payments to the Widrichs until July of 1998. When she distributed the probate estate assets, she did not pay the Widrich loan as part of that distribution.

The Widrichs filed a lawsuit against Ms. Diamond in Cuyahoga County Common Pleas Court in which the parties dispute the meaning and the effect of the Letter and whether Ms. Diamond properly distributed the probate estate funds. *Jerilyn Widrich, et al. v. Lynn Diamond, et al.*, Case No. 369093. The Widrichs requested judgment in the amount of \$30,000 against Ms. Diamond and the estate of Herbert Diamond based on the loan. The lawsuit was stayed by Ms. Diamond's Chapter 7 filing on May 20, 1999.

DISCUSSION

I.

Summary Judgment Standard

Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Federal Rule of Civil Procedure 56(c), made applicable to these proceedings by Federal Rule of Bankruptcy Procedure 7056; *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The movant must initially demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. at 323. The burden is then on the non-moving party to show the existence of a material fact which must be tried. *Id.* The non-moving party must oppose a proper summary judgment motion "by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves" *See Celotex Corp. v. Catrett*, 477 U.S. at 324. All reasonable

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inferences drawn from the evidence must be viewed in the light most favorable to the party opposing the motion. *Hanover Ins. Co. v. American Eng'g Co.*, 33 F.3d 727, 730 (6th Cir. 1994). However, “[n]ot every factual dispute between the parties will prevent summary judgment. The disputed facts must be material. They must be facts which, under the substantive law governing the issue, might affect the outcome of the suit.” *60 Ivy St. Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987). Summary judgment may be granted when “the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.” *Northland Ins. Co. v. Guardsman Prod., Inc.*, 141 F.3d 612, 616 (6th Cir. 1998), quoting *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992).

II.

The Motions

The Widrichs’ Motion

The Widrichs move for summary judgment on their complaint. They argue: (1) they were not required to present a written claim in the probate case because Ms. Diamond accepted their claim in the Letter; (2) Ms. Diamond failed to meet her fiduciary obligation as executrix to pay that claim; (3) Ms. Diamond is liable on their loan claim; and (4) the liability is not dischargeable under § 523(a)(4).

Ms. Diamond’s Motion

Ms. Diamond moves for summary judgment and opposes the Widrichs’ request for summary judgment by arguing that the Widrichs did not present a claim in the probate case and, therefore, that she had no obligation to pay the loan as executrix of her husband’s estate. She

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argues further that her failure to pay the loan did not constitute a fraud or defalcation by her as a fiduciary.

III.

Ohio Revised Code § 2117.06

Ohio Revised Code § 2117.06(A) establishes the procedure for presenting a claim against a probate estate. Additionally, any such claim must be presented within one year after the decedent's death. Ohio Rev. Code Ann. §§ 2117.06(A) and (B) (Banks-Baldwin 1999). These presentment requirements are mandatory. *Fortelka v. Meifert*, 176 Ohio St. 476, 200 N.E.2d 318 (1964). Section 2117.06 "[o]perates to relieve absolutely an executor or administrator and the estate he represents from responding to a belated claim (*Beach v. Mizner*, 131 Ohio St. 481, 3 N.E.2d 417) and is so conclusive as to preclude an executor or administrator from waiving its requirements (*Prudential Ins. Co. of America v. Joyce Building Realty Co.*, 143 Ohio St. 564, 56 N.E.2d 168)." *In re Estate of Wyckoff*, 166 Ohio St. 354, 358, 142 N.E.2d 660, 664 (1957). However, it has also been noted in this context that "[s]ince the law does not require a claimant or litigant to do a vain thing, the mandatory provisions of the state requiring presentation in writing to the personal representative of claims against the estate he represents, are said to be quite uniformly softened and not enjoined when the application of such provisions would run contrary to reason and common sense'." *Fortelka*, 176 Ohio St. 476, 480, 200 N.E.2d 318, 321-22 (quoting 22 O. Jur. 2d. 653 § 293).

Ms. Diamond argues that the Widrichs failed to present a timely, written claim as required by § 2117.06. Absent such a claim, she argues that she had no obligation to pay the loan as a claim against her husband's probate estate. The Widrichs, however, argue that they

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were not required to present a written claim based on the Letter. They rely on Ohio case law which has allowed various forms of presentment. See, for example, *Gerhold v. Papathanasion*, 130 Ohio St. 342, 199 N.E. 353 (1936).

The parties have raised material issues of fact about the meaning and significance of the Letter and its intended effect with regard to the Ohio probate claim presentment requirements. There are no Ohio decisions with facts identical to those raised in this matter and the Sixth Circuit has held that summary judgment is not appropriate under very similar circumstances. *Hart v. Johnston*, 389 F.2d 239 (6th Cir. 1968). As the issue of whether the Widrichs had a valid claim in the probate case must be determined at trial before other issues in this case can be addressed, the Motions for Summary Judgment must be denied.

CONCLUSION

For the reasons stated, both Motions for Summary Judgment are denied. All dates set forth in the Adversary Case Management Scheduling Order will remain in effect.

IT IS SO ORDERED.

Date: 18 July 2000



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Susan Gray, Esq.
Jeffrey Slavin, Esq.
Mary Ann Rabin, Trustee

By: James L. Gordon, Secretary

Date: 6/18/2000