UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	
	)	CHAPTER 7
JOHN WILLIAM CLAPPER and MONA KAY CLAPPER,	)	CASE NO. 01-64718
Debtors.	)	JUDGE RUSS KENDIG
JAMES R. KANDEL, TRUSTEE,	)	ADV. PRO. NO. 02-6061
Plaintiff,	)	
v.	)	
	)	**MEMORANDUM OF DECISION**
JOHN WILLIAM CLAPPER, et al.,	)	
Defendants.	)	

This matter is before the court upon the motion for summary judgment against J.P. Morgan Chase Bank filed by James R. Kandel (hereafter "Plaintiff") on July 18, 2002. J.P. Morgan Chase (hereafter "Defendant") filed a response and motion for leave to respond to request for admission on July 23, 2002. For the reasons that follow, Plaintiff's motion for summary judgment is **DENIED**, and Defendant's motion for leave to respond to request for admission is **GRANTED**.

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(a) and the general order of reference entered in this district on July 16, 1984. This is a core proceeding under 28 U.S.C. § 157(b)(2)(K). The following constitutes the court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

FACTS

On April 16, 2001, Plaintiff commenced this proceeding to avoid an allegedly defective mortgage. On May 23, 2002, Edward Bailey filed an answer on behalf of Defendant denying Plaintiff's allegations.[1] On June 6, 2002, Plaintiff served discovery requests on Defendant via counsel Edward Bailey. A pretrial conference was held on June 13, 2002. Participating were Plaintiff's counsel and Defendant's counsel Edward Bailey. Subsequently, David Freeburg,

[1]On May 31, 2002, Stephen Helfgott also filed an answer on behalf of Defendant. Defendant had erroneously retained two separate counsel in its defense. The docket has since been corrected.

Defendant's counsel in the defense of the motion for summary judgment, filed a notice of appearance on June 20, 2002.[2]

On June 18, 2002, Mr. Freeburg sent a letter to Plaintiff's counsel requesting a copy of the discovery that had been served upon Defendant. The next day, Plaintiff's counsel forwarded a copy of the discovery requests previously propounded on Defendant to Mr. Freeburg.

The discovery requests included a request for an admission, which is at the heart of this matter. In pertinent part, the request asks Defendant to "[a]dmit that only one person witnessed the Debtor sign the Mortgage." Defendant did not respond to the request for admission in the time period prescribed by the Federal Rules of Bankruptcy Procedure.

ARGUMENTS

Plaintiff moves for summary judgment on the basis Defendant's failure to respond to the request for admission deems the matter admitted, and there no longer being any material facts in dispute, Plaintiff is entitled to judgment as a mater of law.

In support of Defendant's failure to respond to the request for admission, Defendant proffers several arguments. First, Defendant argues it had no duty to respond to the admission request as discovery was not served within the timeframe allowed under the Federal Rules of Bankruptcy Procedure. Federal Rule of Civil Procedure 26 (d) and (f), applicable through Federal Rule of Bankruptcy Procedure 7026, limits the commencement of discovery until the parties have conferred, unless authorized by the rules, upon order of court, or agreement of parties. Defendant alleges his late entry into the case prevented him from participating in such a conference with Plaintiff, and thus, Plaintiff's discovery requests were served prematurely, negating Defendant's obligation to respond.

Second, Defendant argues the purpose of Federal Rule of Civil Procedure 36(a), made applicable through Federal Rule of Bankruptcy Procedure 7036, is to expedite trial proceedings by eliminating the necessity of proving undisputed and peripheral facts. Defendant argues Rule 36(a) is misapplied if applied to an admission of a fact that has consistently been denied. Moreover, Defendant argues the request for admission seeks not the admission of a question of fact but a conclusion of law.

Third, Defendant argues it should be allowed to amend the admission under Rule 36(b). The admission goes to a central issue in the case, and if not permitted to do so, the prejudice

[2]David Freeburg actually represents the title company that performed the closing on the allegedly defective mortgage at issue. As often happens in these cases, the title company is indemnifying the mortgage company in the defense of these proceedings. The court's standard scheduling and trial order instructs title counsel to enter an appearance as soon as possible and instruct the court on the scope of representation.

resulting to Defendant would outweigh the benefit to Plaintiff.

Finally, Defendant argues the responses to Plantiff's discovery requests were not due until July 19, 2002, as Plaintiff served Mr. Freeburg with a copy of those requests on June 19, 2002. Defendant states Plaintiff is attempting to take unfair advantage of Defendant's change in counsel. Even if the court finds the discovery requests were properly served on June 6, 2002, with three days allowed for mail service, Defendant had until July 9, 2002 to respond. Plaintiff's filing of a motion for summary judgment seven days later was done in bad faith.

ANALYSIS

I. Summary Judgment Standard

The procedure for granting summary judgment is found in Federal Rule of Civil Procedure 56(c), made applicable to this proceeding through Federal Rule of Bankruptcy Procedure 7056, which provides in part

> [t]he 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.

The evidence must be viewed in the light most favorable to the nonmoving party. Adickes v. S.H.Kress & Co., 398 U.S. 144, 158-59 (1970). Summary judgment is not appropriate if a material dispute exists over the facts, "that is, if evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Summary judgment is appropriate, however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). *See also* Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986).

The Sixth Circuit Court of Appeals has recognized that Liberty Lobby, Celotex, and Matsushita effected "a decided change in summary judgment practice," ushering in a "new era" in summary judgments. Street v. J.C. Bradford & Co., 886 F.2d 1472, 1476 (6th Cir. 1989). In responding to a proper motion for summary judgment, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" Street, 886 F.2d at 1479 (quoting Liberty Lobby, 477 U.S. at 257). The nonmoving party must introduce more than a scintilla of evidence to overcome the summary judgment motion. Street, 886 F.2d at 1479. It is also not sufficient for the nonmoving party merely to "show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. Moreover, "[t]he trial court no longer has the duty to search the entire record to establish that it is bereft of

a genuine issue of material fact." Street, 886 F.2d at 1479. That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact.

This line of cases emphasizes the point that when one party moves for summary judgment, the nonmoving party must take affirmative steps to rebut the application of summary judgment. Courts have stated that:

> Under *Liberty Lobby* and *Celotex*, a party may move for summary judgment asserting that the opposing party will not be able to produce sufficient evidence at trial to withstand a directed verdict, and if the opposing party is thereafter unable to demonstrate that he can do so, summary judgment is appropriate. "In other words, the movant could challenge the opposing party to 'put up or shut up' on a critical issue [and] . . . if the respondent did not 'put up,' summary judgment was proper."

Fulson v. City of Columbus, 801 F. Supp. 1, 4 (S.D. Ohio 1992) (quoting Street, 886 F.2d at 1478).

II. Admission

Plaintiff's motion for summary judgment alleges Defendant's failure to respond to the admission request of whether only one witness was present at the mortgage signing deems the matter admitted and makes summary judgment appropriate as no questions of material fact exist. Rule 36(a) of the Federal Rules of Civil Procedure, made applicable by Rule 7036 of the Federal Rules of Bankruptcy Procedure, provides in pertinent part:

> 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 . . . 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 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 . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney.

Generally, admission requests to which a party fails to respond are deemed admitted. Menchise v. Barber (In re Camero Enterprises, Inc.), 240 B.R. 446, 449 (Bankr. M.D. Fla. 1997);

In re Ladouceur, 1996 WL 596718, *3 (N.D.N.Y. 1996). Likewise, it is well settled law in this district that a failure to respond to an admissions request, where the facts deemed admitted are dispositive, paves the way for a decision on summary judgment. Lucas v. Higher Education Assistance Foundation, 124 B.R. 57, 58 (Bankr. N.D. Ohio 1991); McGraw v. Fox (In re Bell & Beckwith), 50 B.R. 419, 421 (Bankr. N.D. Ohio 1985); McGraw v. Jordan (In re Jordan), 47 B.R. 712, 714 (Bankr. N.D. Ohio 1985). Plaintiff's argument is well taken, however, the analysis does not end there.

Defendant proffers several arguments in its defense, the most persuasive of which is Defendant's third argument: it should be allowed to amend the deemed admission. Pursuant to Federal Rule of Civil Procedure 36(b), applicable through Federal Rule of Bankruptcy Procedure 7036, a court has discretion, upon motion, to allow untimely answers to requests for admissions where no prejudice results to the opposing party. Universal Bank v. Hoffman (In re Hoffman), 2000 WL 192986, *2 (Bankr. E.D. Pa. 2000); Lucas, 124 B.R. at 58. In pertinent part, the rule provides:

> Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission . . . .[T]he 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.

When faced with allowing a party to withdraw or amend deemed admissions, a court is to balance competing interests. On one hand, the court is to ensure the upholding of the integrity of the process by promoting a resolution of the action on its merits, and on the other hand, the court is to ensure the party who has obtained the admissions will not be prejudiced by their withdrawal or amendment.

In the case at hand, Defendant's current counsel entered midway through the pretrial stage. It is not unexpected that there would be delays in the discovery process. While the court does not condone what may have been the dilatory behavior of Defendant's previous counsel in forwarding a copy of the discovery requests to Defendant's new counsel, the court cannot sanction Defendant for this behavior and prevent a resolution of the case on its merits. The court is mindful of its responsibility to make sure the matter proceeds to its merits while also making sure Plaintiff is not prejudiced thereby. Defendant has consistently and continuously disputed Plaintiff's contention that one witness was present during the signing of the mortgage. Courts have found no prejudice results to a party to whom a belated response is applied "simply because his position is prejudiced by the true facts contained in the response." Beatty v. United States, 983 F.2d 908, 909 (8th Cir. 1993); *see also* Szatanek v. McDonnell Douglas Corp., 109 F.R.D. 37, 39-40 (W.D. N.Y. 1985) (allowed belated responses to request for admissions as such served to resolve action on merits and opposing party failed to demonstrate actual prejudice); NCR Corp. v. J-Cos Systems Corp., 1987 WL 13683, *1 (E.D. Pa. 1987) (party permitted to withdraw

deemed admissions as whenever possible "an action should be resolved on its merits."). *Accord* French v. United States, 416 F.2d 1149, 1152 (9th Cir. 1969).

Moreover, courts have been particularly responsive to requests to allow late answers to admissions where summary judgment is at issue. Lucas, 124 B.R. at 58 (citing, for example, St. Regis Paper Co. v. Upgrade Corp., 86 F.R.D. 355 (W.D. Mich. 1980)); Hadra v. Herman Blum Consulting Engineers, 74 F.R.D. 113, 114 (N.D. Tex. 1977) ("It does not further the interests of justice to automatically determine all the issues in a lawsuit and enter summary judgment against a party because a deadline is missed.").

For the foregoing reasons, Defendant's motion for leave to respond to request for admission must be granted.

III. Motion for summary judgment

As Plaintiff's request for admission of whether only one witness was present at the signing of the mortgage at issue has been denied by Defendant, through leave of the court, a material fact is now in dispute, and Plaintiff cannot meet its burden on its motion for summary judgment. Accordingly, Plaintiff's motion for summary judgment must be denied.

CONCLUSION

Admission requests which are not responded to timely are deemed admitted under Rule 36 of the Federal Rules of Civil Procedure, applicable through Federal Rule of Bankruptcy Procedure 7036. Defendant failed to respond timely to Plaintiff's request for admission, so the admission request as to whether one witness was present at the execution of the mortgage is deemed admitted.

Under Federal Rule of Civil Procedure 36(b), applicable through Federal Rule of Bankruptcy Procedure 7036, Defendant is permitted to withdraw its admission. The ends of justice served thereby outweigh the prejudice to Plaintiff. Defendant's motion for leave to amend is granted.

As Defendant's motion for leave to amend is granted, Plaintiff cannot meet its burden of prevailing on its motion for summary judgment as material facts are in dispute. Plaintiff's motion for summary judgment is denied.

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RUSS KENDIG
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	
JOHN WILLIAM CLAPPER and MONA KAY CLAPPER,	)	CHAPTER 7
Debtors.	)	CASE NO. 00-64101
JAMES R. KANDEL, TRUSTEE,	)	
Plaintiff	)	JUDGE RUSS KENDIG
v.	)	ADVERSARY PROCEEDING NO. 02-6061
JOHN WILLIAM CLAPPER, et al.,	)	
Defendants.	)	**ORDER**

For the reasons set forth in the accompanying Memorandum of Decision, the court finds Plaintiff's motion for summary judgment not well taken and Defendant's motion for leave to respond to request for admission well taken. Accordingly, Plaintiff's motion is **DENIED**, and Defendant's motion is **GRANTED**.

IT IS THEREFORE ORDERED that the parties continue in their pursuit of discovery. No extensions of the discovery deadline will be granted based upon this matter.

_____
RUSS KENDIG
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this _____ day of August 2002, the above Order was sent via regular U.S. Mail to:

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_____
Deputy Clerk