

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE: \*  
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M.D. CONSULTANTS, INC., \*  
\* CASE NUMBER 02-42805  
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Debtor. \*  
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M.D. CONSULTANTS, INC., \*  
\*  
Plaintiff, \*  
\*  
vs. \* ADVERSARY NUMBER 02-4150  
\*  
MIRACLE EAR, INC., *et al.*, \*  
\*  
Defendants. \*  
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M E M O R A N D U M O P I N I O N  
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The matter before the Court is the Motion of Defendants Miracle-Ear, Inc., *et al.* ("Miracle-Ear") for Partial Summary Judgment (the "Motion") and Brief in Support thereof, which was filed on May 13, 2004. Plaintiff M.D. Consultants, Inc. ("MDC") failed to file a response to the Motion. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b). This is a core proceeding pursuant to 28 U.S.C. § 157(b). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

F A C T S

On September 9, 2002, MDC filed an adversary complaint

against Miracle-Ear and other defendants, alleging, among other things, five counts, including breach of contract, fraudulent transfer under federal and state law, fraud and conversion/turnover. MDC filed an Amended Complaint on January 16, 2003. The Amended Complaint alleges that Miracle-Ear was the franchiser and MDC was the franchisee of a Miracle-Ear franchise, which business was located in certain stores operated by Sears Roebuck and Company. On or about May 2, 2002, Miracle-Ear sent MDC a notice of default under the franchise agreement. MDC alleges that, as of June 3, 2002, it had a pending offer from a third party for the purchase of MDC's franchised business in an amount not less than One Million One Hundred Thousand Dollars (\$1,100,000.00). (See Amended Complaint at ¶ 9.) MDC alleges damages in Counts I through III of the Amended Complaint stemming from Miracle-Ear's interference with such pending offer.

Miracle-Ear's Motion deals only with the issue of whether MDC can establish that a pending offer existed during the relevant time period. Miracle-Ear asserts that there is no genuine issue of fact regarding the absence of a pending offer to purchase the business of MDC and seeks partial summary judgment on that issue only.

#### **S T A N D A R D   O F   R E V I E W**

The procedure for granting summary judgment is found in FED. R. CIV. P. 56(c), made applicable to this proceeding through FED. R. BANKR. P. 7056, which provides in part that,

[t]he judgment sought shall be rendered forth-with 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. BANKR. P. 7056(c). Summary judgment is proper if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it could affect the determination of the underlying action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Tenn. Dep't of Mental Health & Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996). An issue of material fact is genuine if a rational fact-finder could find in favor of either party on the issue. *Anderson*, 477 U.S. at 248-49; *SPC Plastics Corp. v. Griffith (In re Structurlite Plastics Corp.)*, 224 B.R. 27 (B.A.P. 6th Cir. 1998). Thus, summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

In a motion for summary judgment, the movant bears the initial burden to establish an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 322; *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195, 198 (B.A.P. 6th Cir. 1998). The burden then shifts to the nonmoving party to demonstrate the existence of a genuine dispute. *Lujan v. Defenders of Wildlife*,

504 U.S. 555, 590 (1992). 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). However, 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 v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 257). 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. *Street*, 886 F.2d at 1479.

This standard applies whether summary judgment is sought with respect to all or only part of the issues in question.

#### D I S C U S S I O N

Miracle-Ear moves the Court to find that MDC has not and cannot establish that there was a pending offer to purchase MDC's business as of June 3, 2002 when Michael A. Caparso, MDC vice president, went to Miracle-Ear's corporate headquarters and met with various representatives of Miracle-Ear in an attempt to resolve issues concerning the alleged default.

As set forth in the Motion, Mr. Caparso was deposed and affirmatively stated in that deposition that there was no

firm offer to purchase the business as of June 3, 2002. Furthermore, Miracle-Ear attached to its Motion an affidavit of Michael J. Papsidero, M.D., president of Cleveland Ear, Nose & Throat Center, Inc. Dr. Papsidero represents the party that purportedly had made the pending offer referenced by MDC in the Amended Complaint. The Papsidero affidavit states, at paragraph 4, that "no offer was ever made, either by myself or on behalf of Cleveland Ear, Nose & Throat Center, Inc. to acquire all or any portion of the business of M.D. Consultants, Inc."

MDC has failed to respond to the Motion, despite its pendency for more than one year. Although MDC alleges in the Amended Complaint that it had a pending offer for the purchase of its business, it has not produced an agreement for the purchase and sale of the business. Moreover, the deposition testimony of MDC's own vice president, Mr. Caparso, expressly acknowledges that there was no pending offer to purchase as of June 2002.

Thus, viewing the evidence most favorably to MDC, there is no genuine issue of fact with respect to whether or not there was a pending offer to purchase MDC's business in June 2002. The facts establish that no such offer was in existence.

Accordingly, this Court finds that Miracle-Ear's Motion is well taken and hereby grants summary judgment in favor of Miracle-Ear on the sole issue that there was no pending offer to purchase MDC's business in June 2002 and, thus, that no damages can flow from, be the result of, or be related to such alleged

offer.

An appropriate order shall enter.

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**HONORABLE KAY WOODS  
UNITED STATES BANKRUPTCY JUDGE**

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

M.D. CONSULTANTS, INC.,

Debtor.

CASE NUMBER 02-42805

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M.D. CONSULTANTS, INC.,

Plaintiff,

vs.

ADVERSARY NUMBER 02-4150

MIRACLE EAR, INC., et al.,

Defendants.

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O R D E R

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For the reasons set forth in this Court's Memorandum Opinion entered this date, the Motion of Defendants Miracle-Ear, Inc., et al. for Partial Summary Judgment is granted.

IT IS SO ORDERED.

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HONORABLE KAY WOODS  
UNITED STATES BANKRUPTCY JUDGE

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum Opinion and Order were placed in the United States

Mail this \_\_\_\_ day of May, 2005, addressed to:

ANDREW W. SUHAR, ESQ., 1101 Metropolitan Tower, P. O. Box 1497, Youngstown, OH 44501.

FREDERIC P. SCHWIEG, ESQ., 50 Public Square, Suite 1414, Cleveland, OH 44113.

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SAUL EISEN, United States Trustee, BP America Building, 200 Public Square, 20th Floor, Suite 3300, Cleveland, OH 44114.

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JOANNA M. ARMSTRONG