

The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.



Dated: September 23 2005

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:)	Case No.: 04-32242
)	
Angela L. Straight,)	Chapter 7
)	
Debtor.)	Adv. Pro. No. 04-3236
)	
Raymond W. Straight,)	Hon. Mary Ann Whipple
)	
Plaintiff,)	
v.)	
)	
Angela L. Straight,)	
)	
Defendant.)	

MEMORANDUM OF DECISION AND ORDER
DENYING MOTIONS FOR SUMMARY JUDGMENT

This adversary proceeding is before the court on Plaintiff’s Motion for Partial Judgment on the Pleadings and/or Summary Judgment [Doc. # 54], Defendant’s cross-motion for summary judgment [Doc. # 58] and Plaintiff’s reply [Doc. # 69]. Because Plaintiff relies on evidence outside the pleadings, the court construes his motion as one for partial summary judgment only. In his complaint, Plaintiff alleges four claims, three of which seek a determination that a debt allegedly owed to him from Defendant is

nondischargeable under 11 U.S.C. § 523(a)(2)(A), (a)(4), and (a)(6). Plaintiff's fourth claim alleges that he is entitled to "equitable relief" in the form of an order transferring all of Defendant's interest in certain real property to him. After reviewing the motions, as well as the briefs and the documents submitted by both parties in support thereof, the court will deny Plaintiff's motion and will grant partial summary judgment in favor of Defendant on Plaintiff's fourth claim for relief but will otherwise deny Defendant's motion for summary judgment.

FACTUAL BACKGROUND

I. Competency of the Evidence

Initially, the court notes that all documents submitted in connection with a motion for summary judgment must be properly authenticated. *E.g.*, *United States v. Billheimer*, 197 F. Supp. 2d 1051, 1058 n.7 (S.D. Ohio 2002); *see* Fed. R. Evid. 901-903. Documents may be authenticated through testimony of a witness with knowledge of its authenticity, which can be accomplished on summary judgment by affidavit. Fed. R. Evid. 901(b)(1); Fed. R. Civ. P. 56(e). Copies of public records, including court orders and court records, are self-authenticating, if certified as correct by an authorized person. Fed. R. Evid. 902(4).

Neither party has submitted an affidavit authenticating any of the documents attached to the parties' motions and none of those documents are otherwise properly authenticated or certified. Accordingly, the court will consider "undisputed" only those facts upon which the parties' memoranda agree, those admitted in Defendant's answer, and those admitted in Defendant's responses to Plaintiff's First Set of Requests for Admissions filed in this case by Defendant [Doc. # 43].

II. Undisputed Facts

On or about October 23, 2002, the Domestic Relations Court of Franklin County, Ohio, entered a Decree of Divorce, granting the parties a divorce. Prior to their divorce, the parties' marital residence was financed by a loan that was guaranteed by the United States Department of Veterans Affairs ("the VA"). Defendant never having served in the military, the loan guaranty was based on Plaintiff's status as a military veteran. The divorce decree awarded Defendant possession and ownership of the marital residence, located at 6612 Maple Parkway, Galloway, Ohio, and provided that she was to refinance the home within one year. The decree also required Plaintiff to execute a quit claim deed to Defendant and, if he failed to do so within fourteen days, ordered the County Recorder to remove Plaintiff's name from the deed upon Defendant's presentation of the divorce decree at the Recorder's office. On or about June 4, 2003, Defendant recorded the divorce decree in the Recorder's office and caused Plaintiff's name to be removed from the legal title

to the residence. Defendant moved out of the marital residence in December, 2003.

Plaintiff filed a Chapter 7 bankruptcy petition on October 13, 2003, in the United States Bankruptcy Court, Southern District of Ohio. Defendant filed her Chapter 7 petition in this court on March 26, 2004, and an order of discharge was entered on December 9, 2004.

LAW AND ANALYSIS

I. Summary Judgment Standard

This case is before the court upon the parties' cross-motions for summary judgment. Under Fed. R. Civ. P. 56, made applicable to this proceeding by Fed. R. Bankr. P. 7056, a party will prevail on a motion for summary judgment when "[t]he 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 judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed.R.Civ.P. 56(c). In order to prevail, movant must prove all elements of the cause of action or defense. *Taft Broadcasting Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991). Once that burden is met, however, the opposing party must set forth specific facts showing there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51 (1986); *60 Ivy St. Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987). Inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-88 (1986).

In cases such as this, where the parties have filed cross-motions for summary judgment, the court must consider each motion separately on its merits, since each party, as a movant for summary judgment, bears the burden to establish both the nonexistence of genuine issues of material fact and that party's entitlement to judgment as a matter of law. *Lansing Dairy v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994); *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 463 n.6 (6th Cir. 1999). The fact that both parties simultaneously argue that there are no genuine factual issues does not in itself establish that a trial is unnecessary, and the fact that one party has failed to sustain its burden under Fed.R.Civ.P. 56 does not automatically entitle the opposing party to summary judgment. See 10A Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice and Procedure: Civil 3d* § 2720 (1998).

II. Plaintiff's Motion for Partial Summary Judgment

Plaintiff moves for summary judgment only on his fourth claim for relief wherein he seeks "equitable

relief” in the form of an order transferring all of Defendant’s interest in the marital home to him. He argues that Defendant’s actions have jeopardized his eligibility for future VA home loan guaranty benefits. Plaintiff’s position is that if the VA must pay a claim to the lender, the used portion of the veteran’s eligibility may not be restored until the loss suffered by the government has been repaid. Thus, he argues that he is entitled to such equitable relief in order to protect his VA benefit. Plaintiff asserts that this court has the statutory authority to grant such relief under 11 U.S.C. § 105.

Section 105(a) empowers the court to issue such orders as are “necessary or appropriate” to carry out the provisions of the Bankruptcy Code. However, the statute "does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity." *United States v. Sutton*, 786 F.2d 1305, 1308 (5th Cir.1986); *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 423 (6th Cir. 2000). Equitable powers under § 105(a) may be exercised only in a manner consistent with the provisions of the Bankruptcy Code. *Sutton*, 786 F.2d at 1308; *Wasserman v. Immormino (In re Granger Garage, Inc.)*, 921 F.2d 74, 77 (6th Cir. 1990). Even assuming that transferring title to the marital home to Plaintiff would be equitable, which the court has no evidence that such is the case, doing so would not facilitate in any manner the carrying out of any identified provision of the Bankruptcy Code. As such, Plaintiff’s motion will be denied. There being no legal basis shown for ordering the transfer of title as requested by Plaintiff and in contravention of the division of property set forth in the divorce decree entered by the state court, Defendant will be granted summary judgment on this claim.

III. Defendant’s Motion for Summary Judgment

In his first, second, and third claims for relief, Plaintiff alleges that Defendant owes him a debt as a result of (1) fraudulent representations made by her to the state court for the purpose of depriving Plaintiff of his VA benefits, (2) a defalcation of Defendant’s fiduciary duty to act in a manner that would not jeopardize Plaintiff’s VA benefits by her moving out of the marital residence and leaving it in a state of disrepair , and (3) Defendant intentionally causing removal of Plaintiff’s name from the title to the marital home. Plaintiff alleges that Defendant’s conduct caused his eligibility for VA benefits to be “irrevocably damaged” in the amount of \$38,436, which he alleges is the amount of the “basic home loan guaranty benefit.” [Complaint, ¶¶ 12, 18, 24].

Defendant’s motion does not attack Plaintiff’s claims on their merits. Rather, she asserts the affirmative defenses of res judicata, collateral estoppel, and laches and argues that the case is moot.

However, each of Defendant's arguments and defenses are based upon evidence that, as discussed above, is not properly before the court. Thus, Defendant is not entitled to summary judgment on these grounds.

Defendant also argues that Plaintiff lacks standing to pursue his claims. Although Defendant did not raise standing in her answer to Plaintiff's amended complaint, neither constitutional nor prudential standing requirements can be waived as suggested by Plaintiff. See *Community First Bank v. Nation Credit Union Admin.*, 41 F.3d 1050, 1053 (6th Cir. 1994).

Defendant's standing argument is based on Plaintiff having filed his own Chapter 7 petition on October 13, 2003, a date after the alleged events occurred that form the basis of Plaintiff's claims. Defendant contends that Plaintiff failed to disclose these claims in his petition and that the claims are property of the bankruptcy estate. Thus, she contends that the Chapter 7 trustee in Plaintiff's bankruptcy case is the real party in interest.

Choses in action become property of the bankruptcy estate at the time a petition is filed. 11 U.S.C. § 541(a)(1); *Hendon v. Associates Commercial Corp. (In re Fastrans, Inc.)*, 142 B.R. 241, 245 (Bankr. E.D. Tenn. 1992). However, the trustee may abandon such property if, among other reasons, it is determined to be of inconsequential value and benefit to the estate. 11 U.S.C. § 554(a). In addition, any property listed in a debtor's bankruptcy schedules that is not administered at the time the case is closed is abandoned. 11 U.S.C. § 554(c). But any property that is not listed in the debtor's schedules remains property of the bankruptcy estate when the case is closed. *Cundiff v. Cundiff (In re Cundiff)*, 227 B.R. 476, 478-79 (B.A.P. 6th Cir. 1998). "Unless otherwise authorized, a cause of action which is property of the bankruptcy estate can only be prosecuted by the Trustee on behalf of the estate." *Id.* at 478.

The state of the record before the court does not permit the court to make a determination as to whether Plaintiff's claims continue to be property of his bankruptcy estate as Defendant contends. There is no evidence as to whether the claims were listed in Plaintiff's bankruptcy schedules as required under 11 U.S.C. § 521(1),¹ whether the trustee abandoned the claims or whether the case has even been closed. Nevertheless, standing is a "qualifying hurdle that plaintiffs must satisfy even if raised *sua sponte* by the court." *Community First Bank*, 41 F.3d at 1053. A plaintiff must satisfy both constitutional and prudential

¹ Plaintiff states in his reply that he "raised the issue of the [marital] residence" in his Chapter 7 case by indicating in his Statement of Intention his intent "to retain his ex-wife's real estate at 6612 Maplepark Way, Galloway, Ohio 43119 and his intent to reaffirm." [Doc. #69, Reply, p. 5]. However, this does not satisfy the requirement under § 554(c) that the property have been scheduled under § 521(1), which in turn requires that a debtor "file a list of creditors, . . . a *schedule of assets* and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs." (Emphasis added).

standing requirements. *See id.*

To satisfy Article III's standing requirement, a plaintiff must have suffered some actual or threatened injury due to the alleged illegal conduct of the defendant; the injury must be "fairly traceable" to the challenged action; and there must be a substantial likelihood that the relief requested will redress or prevent the plaintiff's injury. *See Valley Forge*, 454 U.S. at 472, 102 S.Ct. 752, 70 L.Ed.2d 700. Hence, the "irreducible minimum" constitutional requirements for standing are proof of injury in fact, causation, and redressability. *See id.* A plaintiff bears the burden of demonstrating standing and must plead its components with specificity. *See id.*

In addition to the constitutional requirements, a plaintiff must also satisfy three prudential standing restrictions. First, a plaintiff must "assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (citations omitted). Second, a plaintiff's claim must be more than a "generalized grievance" that is pervasively shared by a large class of citizens. *See Valley Forge*, 454 U.S. at 474-75, 102 S.Ct. 752, 70 L.Ed.2d 700. Third, in statutory cases, the plaintiff's claim must fall within the "zone of interests" regulated by the statute in question. *See id.* These additional restrictions enforce the principle that, "as a prudential matter, the plaintiff must be a proper proponent, and the action a proper vehicle, to vindicate the rights asserted."

Coal Operators and Associates, Inc. v. Babbitt, 291 F.3d 912, 916 (6th Cir. 2002).

Defendant's standing argument raises the prudential matter of whether plaintiff is the proper proponent of the claims in this case. Having reviewed the amended complaint, the court has additional concerns regarding constitutional standing requirements under Article III. Plaintiff must allege an injury in fact that may be redressed by the requested relief. The injury alleged by Plaintiff is the loss of his eligibility for the VA benefit of a home loan guaranty, and he requests relief in the monetary amount of \$38,436 to redress that injury. Plaintiff's ineligibility for the home loan guaranty benefit, without more, does not constitute an injury that may be redressed by order of this court. Plaintiff does not indicate how his ineligibility has caused him injury. "It is clearly established that '[a]llegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be certainly impending to constitute injury in fact.'" *Rosen v. Tennessee Comm'r of Finance and Admin.*, 288 F.3d 918, 929 (6th Cir. 2002) (citing *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). As indicated above, it is Plaintiff's burden to demonstrate standing and to "plead its components with specificity." *Babbitt*, 291 F.3d at 916. The court will grant Plaintiff leave to amend the complaint to plead, with specificity, facts demonstrating his standing in this case, specifically addressing both the prudential matters raised in Defendant's motion and the constitutional standing issues raised by the court.

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that Plaintiff's Motion for Partial Judgment on the Pleadings and/or Summary Judgment [Doc. # 54] be, and hereby is, **DENIED**; and

IT IS FURTHER ORDERED that Defendant be, and hereby is, **GRANTED** partial summary judgment on Plaintiff's fourth claim for relief and that Defendant's Motion for Summary Judgment be, and hereby is, otherwise **DENIED**; and

IT IS FURTHER ORDERED that Plaintiff is granted ten (10) days from the date of this order to file a second amended complaint alleging, with specificity, facts demonstrating his standing in this case, and Defendant shall file an Answer or otherwise respond within seven (7) days thereafter. Plaintiff's failure to file a second amended complaint will result in dismissal of the case for want of prosecution without further notice or opportunity for a hearing.