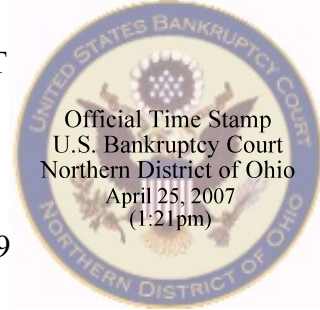


UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:)	Case No. 06-13899
)	
MICHAEL F. ZIOL and)	Chapter 7
LYNETTE S. ZIOL,)	
)	
Debtors.)	Judge Pat E. Morgenstern-Clarren
_____)	
)	
BOARD OF TRUSTEES OF OHIO)	Adversary Proceeding No. 06-1859
CARPENTERS' PENSION FUND, et al.,)	
)	
Plaintiffs,)	
)	
v.)	
)	
MICHAEL F. ZIOL,)	<u>MEMORANDUM OF OPINION</u>
)	(NOT FOR COMMERCIAL PUBLICATION)
Defendant.)	

The plaintiffs¹ move for summary judgment on their complaint which requests a determination of non-dischargeability under bankruptcy code § 523(a)(4) for debt related to unpaid employer pension contributions and employee withholdings. (Docket 18). Defendant

¹ The plaintiffs are the Board of Trustees of the Ohio Carpenters' Pension Fund on behalf of the Ohio Carpenters' Pension Fund, the Board of Trustees of the Cleveland and Vicinity Carpenters' Hospitalization Fund on behalf of the Cleveland and Vicinity Carpenters' Hospitalization Fund (including the Carpenters' Vacation Savings Plan), the Board of Trustee of the Carpenters' Joint Apprenticeship Training Program on behalf of the Carpenters' Joint Apprenticeship and Training program, the Board of Trustees of the Ohio Carpenters' Annuity Fund on behalf of the Ohio Carpenters' Annuity Fund, and the Ohio and Vicinity Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, (as successor to the Northeast Ohio District Council, United Brotherhood of Carpenters and Joiners of America).

debtor Michael Ziol opposes this request. (Docket 21). For the reasons stated below, the motion for summary judgment is denied.²

I. JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered in this district 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).

II. SUMMARY JUDGMENT

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. *See* FED. R. CIV. P. 56(c) (made applicable by FED. R. BANKR. P. 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.*, 477 U.S. at 323. The burden is then on the nonmoving party to show the existence of a material fact which must be tried. *Id.* at 324. The nonmoving party “may not rest upon the mere allegations or denials of the [nonmoving] party’s pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.” FED. R. CIV. P. 56(e). All reasonable inferences drawn from the evidence must be viewed in the light most favorable to the party opposing the motion. *Hanover Ins. Co. v. Am. Eng’g Co.*, 33 F.3d 727, 730 (6th Cir. 1994). The issue at this stage is whether there is evidence on which a trier of fact could reasonably find for the nonmoving party. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989).

² This written opinion is entered only to decide the issues presented in this case and is not intended for commercial publication in an official reporter, whether print or electronic.

III. DISCUSSION

A. The Complaint

Michael Ziol filed a joint chapter 7 petition with his wife Lynette on August 30, 2006. Prior to the filing, Michael Ziol owned and operated Mavin Construction, Inc. which was a signatory to a collective bargaining agreement under which the plaintiffs are bound. Under the collective bargaining agreement, Mavin Construction was required to make certain monthly employer contributions and was also required to deduct certain amounts from employees' pay to fund vacation and holiday benefits and to pay certain employee assessments. Michael Ziol signed an unconditional guarantee for the payment of these amounts. The plaintiffs allege that there are outstanding unpaid employer contributions, employee withholdings and delinquency assessments in the total amount of \$84,161.54, that Michael Ziol is liable for them, and that the debt is not dischargeable. They now move for summary judgment on their complaint.

B. 11 U.S.C. § 523(a)(4)

An individual chapter 7 debtor is entitled to a discharge of all prepetition debts except for the type of debts identified in bankruptcy code § 523. The plaintiffs rely on the exception provided in § 523(a)(4), which states that: “[a] discharge under § 727. . . of this title does not discharge an individual from any debt . . . for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny[.]” 11 U.S.C. § 523(a)(4).

The plaintiffs submitted the declaration of Roger Newman and various exhibits in support of their summary judgment motion. Michael Ziol filed a tardy brief in opposition which denies that the plaintiffs are owed the amount they claim and disputes the non-dischargeability

of at least part of any debt owed.³ Mr. Ziol submitted a payroll item detail with his opposition, but did not submit an affidavit or other permitted evidence to support his opposition. *See* FED. R. CIV. P. 56(e).

Despite the lack of a timely and appropriate defense to the motion, the plaintiffs have failed to establish that they are entitled to summary judgment under § 523(a)(4) because the motion contains an inconsistency as to the amount of the debt. The plaintiffs allege that the debtor is liable for a total amount of \$84,161.54 and they submitted Mr. Newman's declaration as evidence of the debt. *See* motion exh. B. Mr. Newman's declaration does state that the debtor owes employer contributions and employee withholdings in the total amount of \$70,134.62 and additional delinquency assessments in the amount of \$14,026.92, for a total debt of \$84,161.54. However, both the motion and Mr. Newman's declaration also refer to judgments which the plaintiffs obtained against the debtor and Mavin Construction for different amounts and the motion fails to address the reason for the discrepancy. Moreover, the judgment entered against the debtor personally on January 25, 2006 is in the amount of \$64,319.94, which is not the amount alleged to be owed by him in this proceeding.

Additionally, the plaintiffs' case involves the debtor's failure to comply with his agreement to guarantee the debt at issue. Although the debtor does not dispute that he signed the agreement, the terms of the agreement are not in evidence, because the plaintiffs did not attach it to their complaint as stated and did not provide it as an exhibit to their motion.

³ The debtor's response in opposition to the motion was filed on March 23, 2007 and was untimely pursuant to this court's order which set March 16, 2007 as the last date to oppose the motion. *See* docket 19, 21.

As a result of these problems, the plaintiffs' evidence does not support the summary judgment they request.

CONCLUSION

A separate order will be entered denying the plaintiffs' motion for summary judgment.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

NOT FOR COMMERCIAL PUBLICATION

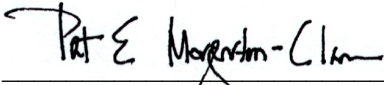
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Plaintiffs,)	
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v.)	
)	
MICHAEL F. ZIOL,)	ORDER
)	(NOT FOR COMMERCIAL PUBLICATION)
Defendant.)	

For the reasons stated in the memorandum of opinion filed this same date, the plaintiffs' motion for summary judgment on their complaint is denied. (Docket 18).

IT IS SO ORDERED.



 Pat E. Morgenstern-Clarren
 United States Bankruptcy Judge