

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 was signed electronically on May 12, 2008, which may be different from its entry on the record.

IT IS SO ORDERED.

Dated: May 12, 2008



Arthur I. Harris  
United States Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

In re:	)	Chapter 7 Proceedings
	)	
MIKHAIL PERKIS,	)	Case No. 07-17689
Debtor.	)	
	)	Judge Arthur I. Harris
STEVEN S. DAVIS,	)	
Plaintiff,	)	Adversary Proceeding
	)	No. 07-1662
v.	)	
	)	
LUDMILA DOBRYAKOVA,	)	
Defendant.	)	

MEMORANDUM OF OPINION<sup>1</sup>

This matter is before the Court on the plaintiff-trustee’s motion for summary judgment, supported by “deemed admissions,” and the defendant’s response in opposition and motion for withdrawal or amendment of the admissions. For the reasons that follow, the Court grants the defendant’s motion for withdrawal of the

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<sup>1</sup>This memorandum of opinion is not intended for official publication.

admissions (Docket #16) and denies the plaintiff-trustee's motion for summary judgment (Docket #15). The defendant shall serve answers to the requests for admission on or before **May 21, 2008**. The parties shall continue to comply with all other dates in the February 12, 2008, amended scheduling order (Docket #12).

### JURISDICTION

In this adversary proceeding, the Chapter 7 trustee seeks to set aside the debtor's prepetition transfer of real property to the defendant as an allegedly fraudulent transfer. Proceedings to avoid a fraudulent conveyance are core under 28 U.S.C. § 157(b)(2)(H) and (N). The Court has jurisdiction over core proceedings under 28 U.S.C. §§ 1334 and 157(a) and Local General Order No. 84, entered on July 16, 1984, by the United States District Court for the Northern District of Ohio.

### FACTS AND PROCEDURAL BACKGROUND

On December 19, 2007, the plaintiff-trustee, Steven S. Davis, initiated the above-captioned adversary proceeding against defendant Ludmila Dobryakova seeking to set aside and to recover real property which the trustee alleges the debtor fraudulently transferred to the defendant. On January 18, 2008, the defendant filed an answer, and on February 13, 2008, the Court issued an amended trial scheduling order requiring all discovery to be completed on or before May 21,

2008.

On April 10, 2008, the defendant filed a certificate of service of discovery response, and on April 11, 2008, the trustee filed a motion for summary judgment. The trustee's motion is based solely upon matters deemed admitted by the defendant's failure to timely respond to requests for admission. On April 28, 2008, the defendant filed a motion to withdraw the admissions, and an objection to the motion for summary judgment.

### DISCUSSION

Pursuant to Rule 36(a) of the Federal Rules of Civil Procedure, made applicable to bankruptcy proceedings by Bankruptcy Rule 7036, a matter is deemed admitted unless a response or objection to a request for admission is served within thirty days after being served with the request. Rule 36(b) further provides that any matter admitted under Rule 36 is "conclusively established unless the court, on motion, permits the admission to be withdrawn or amended." Fed. R. Civ. P. 36(b). The rule provides that "the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits." Therefore, the Court may grant the defendant's motion to withdraw or amend the admissions: "(1) when the

presentation of the merits of the action will be subserved thereby; and (2) when 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.” *Kerry Steel, Inc. v. Paragon Indus., Inc.*, 106 F.3d 147, 154 (6th Cir. 1997). A court has “ ‘considerable discretion over whether to permit withdrawal or amendment of admissions.’ ” *Kerry Steel*, 106 F.3d at 154, *quoting American Auto. Ass’n v. AAA Legal Clinic of Jefferson Crooke, P.C.*, 930 F.2d 1117, 1119 (5th Cir. 1991).

The first half of Rule 36(b) is satisfied “ ‘when upholding the admissions would practically eliminate any presentation of the merits of the case.’ ” *Vaughan v. Meridian National Corp. (In re Ottawa River Steel)*, 324 B.R. 636, 639 (Bankr. N.D. Ohio 2005), *quoting Hadley v. United States*, 45 F.3d 1345, 1348 (9th Cir. 1995). Or, in other words, the first half of the test is satisfied when the admission involves “issues which are directly contested by the parties.” *Ottawa River Steel*, 324 B.R. at 639.

The second half of Rule 36(b) is satisfied unless the party who obtained the admission proves that allowing withdrawal of the admission would prejudice its case. *See Kerry Steel*, 106 F.3d at 154 (placing burden of proving prejudice on party who obtained omission); *Ottawa River Steel*, 324 B.R. at 640. “ ‘[T]he

prejudice contemplated by [Rule 36(b)] is not simply that the party who initially obtained the admission will now have to convince the fact finder of its truth,' ” *Kerry Steel*, 106 F.3d at 154, *quoting Brook Village North Assoc. v. General Elec. Co.*, 686 F.2d 66, 70 (1st Cir. 1982), rather it “ ‘relates to special difficulties a party may face caused by a sudden need to obtain evidence upon withdrawal or amendment of an admission.’ ” *Kerry Steel*, 106 F.3d at 154, *quoting American Auto.*, 930 F.2d at 1120.

In this case, every element to the trustee’s claim has been deemed admitted, and these admissions are the only basis upon which the trustee seeks summary judgment. *See* Docket #15. According to the defendant’s answer and her motion for withdrawal, the admissions relate to matters which are in dispute. Accordingly, the first half of Rule 36(b) has been met. Furthermore, the trustee has not filed any response to the defendant’s motion for withdrawal, nor has he provided any indication of how he would be prejudiced by withdrawal of the admissions. To the extend the trustee needs additional time for discovery based on the withdrawal of the admissions, the trustee remains free to move for an extension beyond the current deadline of May 21, 2008. Additionally, based upon the two certificates of service filed by the defendant, it appears the defendant has now, although belatedly, served responses to the discovery requests. Therefore, the second half of

36(b) has also been met. Accordingly, the defendant's motion for withdrawal of the admissions is granted.

With the withdrawal of the admissions, the trustee has provided no evidence which can be properly considered by the Court under Rule 56(c) – *i.e.*, pleadings, depositions, answers to interrogatories, admissions, or affidavits, including declarations under penalty of perjury. The only documents before the Court are the pleadings, which when viewed in a light most favorable to the defendant, fail to establish the absence of a genuine issue of material fact. *See* Fed. R. Civ. P. 56. Accordingly, the trustee's motion for summary judgment is denied without prejudice.

#### CONCLUSION

For the reasons stated above, the Court grants the defendant's motion for withdrawal of the admissions (Docket #16) and denies the plaintiff-trustee's motion for summary judgment (Docket #15). The defendant shall serve answers to the requests for admission on or before **May 21, 2008**. The parties shall continue to comply with all other dates in the February 12, 2008, amended scheduling order (Docket #12).

IT IS SO ORDERED.