UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In Re:	)	
	)	
KEITH N. GRIFFIN, SR.,	)	Case No. 05-47745-293
	)	Chapter 7
	)	
Debtor.	)	
	)	
KIMBERLY E. BANKS,	)	**Adversary No. 05-4224-659**
	)	
Plaintiff,	)	
	)	
and	)	
	)	
DAVID A. SOSNE, CHAPTER 7 TRUSTEE	)	
	)	
Intervenor-Plaintiff,	)	
-v-	)	
	)	
KEITH N. GRIFFIN, SR.,	)	
	)	
Defendant.	)	
	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The matter before the Court is Trustee's Motion for Summary Judgment and Memorandum in Support Thereof and Debtor's Answer to Trustee's Motion for Summary Judgment. A hearing on this matter was held on December 19, 2005, whereby both Debtor and Trustee appeared by counsel. Upon consideration of the record as a whole, the Court makes the following FINDINGS OF FACT:

Keith N. Griffin, Sr., ("Debtor") filed his voluntary petition for relief under Chapter 7 of the Bankruptcy Code on June 4, 2005. David A. Sosne ("Trustee") is the duly appointed and acting Chapter 7 Trustee. Debtor, along with his then spouse, Virdomae Dominica Freeman Griffin, ("Debtors") filed a joint petition for relief under Chapter 13 of the Bankruptcy Code on July 8, 1999. Debtors obtained confirmation of a Plan and an amended Plan. Debtors made all payments under the confirmed Plans and subsequently received a discharge in the Chapter 13 proceeding.

According to the Chapter 13 Trustee's Final Report issued in that case, Debtors paid unsecured creditors $5,608.08 out of the total $29,531.83 claimed.

Trustee argues that Debtor's present case under Chapter 7 should be denied a discharge under 11 U.S.C. § 727(a)(9)(B) since Debtor received a discharge within six (6) years and failed to pay unsecured creditors at least 70% of allowed claims. Debtor argues that his case was not commenced within six (6) years, since the language of Section 727(a)(9) is unclear and subject to more than one interpretation. Debtor also argues that Debtor paid 100% of unsecured claims since Debtor paid a total of approximately $28,000.00 in total payments in the prior case. The Court weighs the merits of each argument and reaches a decision below.

JURISDICTION

This Court has jurisdiction over the parties and subject matter of this proceeding under 28 U.S.C. §§ 151, 157, and 1334 (2005) and Local Rule 81-9.01 (B) of the United States District Court for the Eastern District of Missouri. This is a core proceeding under 28 U.S.C. § 157(b)(2)(J), which the Court may hear and determine. Venue is proper in this District under 28 U.S.C. § 1409(a) (2005).

CONCLUSIONS OF LAW

The main issue before the Court is whether summary judgment is appropriate under the facts of this case. "Summary judgment is 'proper if the evidence, viewed in the light most favorable to the nonmoving party, demonstrates that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.'" *Stuart v. General Motor Corp.*, 217 F.3d 621, 630 (8th Cir. 2000) (citing *Floyd v. Missouri Dep't of Soc. Serv.,* 188 F.3d 932, 936 (8th Cir. 1999)).

However, "[s]ummary judgment shall not be granted unless the Court determines that there is no genuine issue of a material fact to be tried and therefore the moving party is entitled to judgment as a matter of law." "The burden is upon the moving party to clearly establish the absence of a genuine issue as to any material fact." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.

Ct. 1598, 1608, 26 L. Ed. 2d 142, 154 (1970). "[A] material fact is [genuine] … if the 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, *106 S.* Ct. 2505, 2510, 91 L. Ed. 2d 202, 211-212 (1986).

"The movant can meet its burden for summary judgment by showing that little or no evidence may be found to support the non-movant's case." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265, 275 (1986). "Once a movant has determined that no material facts are in dispute, the non-movant must set forth facts indicating a genuine issue for trial exists in order to avoid granting of summary judgment." *See Cifarelli v. Village of Babylon*, 93 F.3d 47, 51 (2d Cir. 1996) (citing *Western World Ins. Co. v. Stack Oil Co.*, 922 F.2d 118, 121 (2nd Cir. 1990)).

Here, an issue of material fact exists regarding whether Debtors received a discharge within six (6) years of Debtor's present bankruptcy filing and whether Debtors paid their unsecured creditors 70% of allowed claims in Debtor's first case. Debtors filed a Chapter 13 petition on July 8, 1999, and received a discharge of their debts. Debtor also filed an individual Chapter 7 petition on June 4, 2005. Debtor's previous discharge was granted less than six (6) years prior to his present Chapter 7 petition.

On the issue of whether Debtors paid their unsecured creditors 70% of their allowed claims, Debtor and his former spouse paid their unsecured creditors $5,608.08 out of the total $29,531.83 claimed. This figure is less than 70% of the unsecured claims in Debtor's Chapter 13 case. Furthermore, Trustee's arguments are based upon sufficient evidence within the Court's records. Debtor also failed to provide any evidence to contradict these findings. Therefore, the Court finds that there is no genuine issue of fact that Debtor received a discharge within six (6) years and paid less than 70% of allowed unsecured claims.

The remaining issue is whether Trustee is entitled to judgment as a matter of law. Debtor argues that his case was not commenced within six (6) years, since the language of Section

727(a)(9) is unclear and subject to more than one interpretation. Debtor also argues that Debtor paid 100% of unsecured claims in total plan payments.

Section 727(a)(9) provides, "[t]he court shall grant the debtor a discharge, unless – the debtor has been granted a discharge under section 1228 or 1328 of this title…in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least – (A) 100 percent of the allowed unsecured claims in such case; or (B)(i) 70 percent of such claims; and (ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort." 11 U.S.C. § 727(a)(9) (2005). The Supreme Court has made it clear that "when the statue's language is plain, the sole function of the courts--at least where the disposition required by the text is not absurd--is to enforce it according to its terms." *Lamie v. United States Tr.*, 540 U.S. 526, 534, 124 S. Ct. 1023, 1030, 157 L. Ed. 2d 1024, 1033 (2004).

Here, Debtor received a discharge under Section 1328 within six (6) years prior to Debtor's present Chapter 7 case. Debtor's interpretation of Section 727(a)(9) is unpersuasive since it clearly contradicts the plain meaning of the statute, which states that "debtor is not entitled to a discharge in a case commenced within six (6) years before the date of filing the petition." 11 U.S.C. § 727(a)(9) (2005). Furthermore, the conditions that led Debtor to file a new petition within six years are irrelevant to the issue at bar. If Congress wanted to include such an exception, it would have done so.

With regard to Debtor's second argument, Debtor failed to pay 100% of the allowed unsecured claims under the plain meaning of Section 727(a)(9)(A), since Debtor paid approximately 18.9% of allowed unsecured claims. Furthermore, Debtor paid less than 70% of allowed unsecured claims as required by Section 727(a)(9)(B). Debtor therefore fails to satisfy the requirements for a discharge of his debts under Chapter 7. Consequently, Section 727(a)(9) applies and the Court

will deny Debtor's discharge in this case. Therefore, Trustee's Motion for Summary Judgment will be granted by separate Order.

Kathy A. Surratt-States

KATHY A. SURRATT-STATES
United States Bankruptcy Judge

DATED: January 13, 2006
St. Louis, Missouri

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