

**NOT FOR
PUBLICATION**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

In re:)	
)	
CLINTON'S MUSIC, INC.,)	CASE NO. 03-31702 (ASD)
)	
Debtor.)	CHAPTER 7
RICHARD M. COAN, Trustee,)	
)	
Plaintiff,)	
vs.)	ADV. PRO. NO. 05-3025
)	
JEFFREY WASIKOWSKI,)	
)	
Defendant.)	Re: DOC. I.D. NO. 10

**MEMORANDUM OF DECISION ON TRUSTEE'S
MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

This adversary proceeding was initiated by Richard M. Coan, the duly appointed Chapter 7 Trustee (hereafter, the "Trustee"), through the filing of a Complaint seeking to avoid alleged preferential transfers to the Defendant, Jeffrey Wasikowski. On June 13, 2005, the Trustee filed a Motion for Summary Judgment, Doc. I.D. No. 10 (hereafter, the "Motion"), accompanied by a Memorandum in Support of Motion for Summary Judgment, Doc. I.D. No. 11 (hereafter, the "Memorandum in Support") and a Statement of Undisputed Facts, Doc. I.D. No. 12 (hereafter, the "Statement").¹ On July 7, 2005,

¹The Trustee filed virtually identical pleadings seeking disparate monetary judgments in (i) Bankruptcy Case No. 03-31055 (Clinton's Music), Adversary Proceeding No. 05-3046; (ii) Bankruptcy Case No. 03-31702 (Clinton's Music, Inc.), Adversary Proceeding No.05-3046; and (iii) Bankruptcy Case No. 03-31734 (Clinton's of Hartford, Inc.), Adversary Proceeding No.05-3047. All but the instant case and proceeding are assigned to United States Bankruptcy Judge Lorraine Murphy Weil.

the Trustee filed the Affidavit of Timothy D. Miltenberger in Support of Trustee's Motion for Summary Judgment, Doc. I.D. No. 13 (hereafter, the "Affidavit").² Then on July 15, 2005, the Trustee filed an additional Statement of Undisputed Facts, Doc. I.D. No. 14 (hereafter, the "Modified Statement"). Distilled to their essence, the Trustee's filings seek summary judgment in the amount of \$3,450.00, plus costs of \$150.00, on the basis of facts argued to be deemed admitted by virtue of the Defendant's failure to respond to a Request for Admissions, see Federal Rule of Civil Procedure 36, made applicable hereto by Federal Rule of Bankruptcy Procedure 7036. Notwithstanding that the Defendant has filed no papers responding to the Motion, and for the reasons which follow, the Motion shall be **DENIED** without prejudice.

II. JURISDICTION

The United States District Court for the District of Connecticut has jurisdiction over the instant proceeding by virtue of 28 U.S.C. § 1334(b); and this Court derives its authority to hear and determine this matter on reference from the District Court pursuant to 28 U.S.C. §§ 157(a), (b)(1). This is a "core proceeding" pursuant to 28 U.S.C. §§ 157(b)(2)(F).

III. DISCUSSION

A. Summary Judgment Standards

Federal Rule of Civil Procedure 56(c) (hereafter, "Rule 56"), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056, directs that summary judgment shall enter when "the pleadings, depositions, answers to interrogatories, and

²The following documents were attached to the Affidavit: *Richard M. Coan, Trustee's First Set of Interrogatories and Request for Production* (Exhibit A) and *Richard M. Coan, Trustee's First Set of Requests for Admission* (Exhibit B), both dated April 5, 2005.

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.” (Emphasis added).

When ruling on motions for summary judgment “the judge’s function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The moving party has the burden of showing that there are no material facts in dispute and all reasonable inferences are to be drawn, and all ambiguities resolved in favor of the non-moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

B. Application of Federal Rule of Civil Procedure 36

The “admissions” referenced in Rule 56 include, *inter alia*, admissions made during discovery pursuant to Federal Rule of Civil Procedure 36 (hereafter, “Rule 36”). See e.g., 11 Moore’s Federal Practice, ¶ 56.14[2][d][i] (3rd ed. 2003). Under Rule 36(a) each fact for which an admission is requested pursuant to that Rule “is admitted unless, within 30 days after service of the request, . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection”

The record in this proceeding reveals the Defendant’s failure to timely respond to the properly propounded . . . Trustee’s First Set of Requests for Admissions (hereafter, the “Request for Admissions”). See Affidavit ¶¶ 4 & 5, and Exhibit B annexed thereto. The Request for Admissions solicited the Defendant’s admission with respect to propounded facts embracing each and every element of an avoidable and recoverable preferential transfer, as alleged in the Trustee’s Complaint, pursuant to Bankruptcy Code Sections 547 and 550.

Since facts deemed admitted by operation of Rule 36(a) are “conclusively established” pursuant to Rule 36(b), such facts are not in “genuine issue” for purposes of summary judgment. See, e.g., In re Larson, 169 B.R. 945, 954 (Bankr. D.N.D. 1994); 7 Moore’s Federal Practice, ¶ 36.03[4] (3rd ed. 2003) (“The court may grant a motion for summary judgment . . . on the basis of an admission resulting from a party’s failure to respond timely to the request for admission”). Accordingly, in the present matter, upon a procedurally and otherwise substantively compliant motion for summary judgment, the Trustee would be entitled to judgment as a matter of law.³ Unfortunately for the Trustee, due to certain important technical deficiencies in the prosecution of the instant Motion, as detailed below, the Court will refrain from granting summary judgment at this time.

C. Application of Local Rule 56(a)

Rule 56(a) of the Local Civil Rules of the United States District Court for the District of Connecticut (hereafter, the “Local Rule(s)”), made applicable to this proceeding by D.Conn. LBR 1001-1(b), supplements Rule 56(c) by requiring statements of material fact from each party to a summary judgment motion.⁴ Specifically, the Local

³ The Motion also seeks a judgment for costs in the amount of \$150.00. The nature of these costs is not explained in the Motion, the Memorandum in Support, the Statement, the Modified Statement, or the Affidavit. Nor are claimed “costs” described or prayed for in the Trustee’s Complaint. Accordingly, summary judgment for “costs” is inappropriate given the Trustee’s failure to satisfy his burden of demonstrating an entitlement to such “costs” as a matter of law.

⁴ Local Rule 56(a), entitled “Motions for Summary Judgment”, applicable to this proceeding by D. Conn. LBR 1001-1(b), states in pertinent part as follows:

1. There shall be annexed to a motion for summary judgment a document entitled “Local Rule 56(a)1 Statement”, which sets forth in separately numbered paragraphs a concise statement of each material fact as to which the moving party contends there is no genuine issue to be tried. All material facts set forth in said statement will be deemed admitted unless controverted by the statement required to be filed and served by the opposing party in accordance with Local Rule 56(a)2.

Rule requires a party moving for summary judgment to annex to the motion a document entitled "Local Rule 56(a)1 Statement" asserting the allegedly undisputed facts on which that party relies, together with citation to the admissible evidence of record supporting each such fact. See Local Rule 56(a)1, 3.

The Second Circuit Court of Appeals has recently instructed that in adjudicating summary judgment motions, a court cannot grant such a motion merely for lack of response but must (i) assess "whether the moving party has fulfilled its burden of demonstrating that there is no genuine issue of material fact and its entitlement to judgment as a matter of law" and (ii) "be satisfied that the citation to evidence in the record supports the assertion." Vermont Teddy Bear Co. Inc. v. 1-800 Beargram Co., 373 F.3d 241, 244 (2d Cir. 2004); see also Giannullo v. City of New York, 322 F.3d 139 (2d Cir. 2003); Holtz v. Rockefeller & Co., Inc., 258 F.3d 62, 74 (2d Cir.2001).

Here, the Statement does not permit the Court to satisfy itself that "the citation to evidence in the record" supports the Trustee's assertions because the Statement does

2. The papers opposing a motion for summary judgment shall include a document entitled "Local Rule 56(a)2 Statement," which states in separately numbered paragraphs corresponding to the paragraphs contained in the moving party's Local Rule 56(a)1 Statement whether each of the facts asserted by the moving party is admitted or denied. The Local Rule 56(a)2 Statement must also include in a separate section entitled "Disputed Issues of Material Fact" a list of each issue of material fact as to which it is contended there is a genuine issue to be tried.

3. Each statement of a material fact by a movant in a Local Rule 56(a)1 Statement or by an opponent in a Local Rule 56(a)2 Statement, and each denial in an opponent's Local Rule 56(a)2 Statement, must be followed by a specific citation to (1) the affidavit of a witness competent to testify as to the facts at trial and/or (2) evidence that would be admissible at trial. The affidavits, deposition testimony, responses to discovery requests, or other documents containing such evidence shall be filed and served with the Local Rule 56(a)1 and 2 Statements in conformity with Fed. R. Civ. P. 56(e). Counsel and pro se parties are hereby notified that failure to provide specific citations to evidence in the record as required by this Local Rule may result in sanctions, including, when the movant fails to comply, an order denying the motion for summary judgment, and, when the opponent fails to comply, an order granting the motion.

* * * *

not provide “specific citation to (1) the affidavit of a witness competent to testify as to the facts at trial and/or (2) evidence that would be admissible at trial” as is required by Local Rule 56(a)3. The source of the Statement’s omission of citations is clear - it is obvious that the Statement was prepared in accordance with an early version of Local Rule 9(c),⁵ which was substantively amended in 2001, and then supplanted by Local Rule 56(a) in 2003.

Although the Trustee later filed the Modified Statement - which did provide requisite citations to the record - that document serves merely to confuse further an unnecessarily cluttered procedural path taken by the Trustee. First, the Modified Statement is filed “[p]ursuant to Local Rule 9(c)(1)” despite Local Rule 56(a)1’s directive that it be entitled “Local Rule 56(a)1 Statement”.⁶ The Modified Statement also violates that annexation requirement, *i.e.* that a statement of undisputed facts “be annexed to [the] motion” Compounding these technical deficiencies in the Modified Statement

⁵Former Local Rule 9(c) (1998), entitled “Motions for Summary Judgment,” stated:

1. There shall be annexed to a motion for summary judgment a document entitled “Local Rule 9(c)1 Statement”, which sets forth in separately numbered paragraphs a concise statement of each material fact as to which the moving party contends there is no genuine issue to be tried. All material facts set forth in said statement will be deemed admitted unless controverted by the statement required to be served by the opposing party in accordance with Rule 9(c)2.

2. The papers opposing a motion for summary judgment shall include a document entitled “Local Rule 9(c)2 Statement,” which states in separately numbered paragraphs corresponding to the paragraphs contained in the moving party’s Local Rule 9(c)1 Statement whether each of the facts asserted by the moving party is admitted or denied. The Local Rule 9(c)2 Statement must also include in a separate section a list of each issue of material fact as to which it is contended there is a genuine issue to be tried.

3. The statements referred to above shall be in addition to the material required by these Local Rules and the Federal Rules of Civil Procedure.

⁶It appears that the Trustee is oblivious to the January 1, 2003 abrogation of Local Rule 9(c) and its replacement by Local Rule 56(a). The Trustee may have filed the Modified Statement based upon the ultimate (*i.e.* post-November 1, 2001) version of Local Rule 9(c), which included the “citation” language now appearing at Local Rule 56(a)3.

are additional errors and omissions in the prosecution of the Motion, which, while individually minor, are collectively quite troubling.⁷

Faithful compliance with Local Rule 56(a) is an important aspect of the proper prosecution of a motion for summary judgment in this District as that Local Rule is intended, *inter alia*, to “streamline the consideration of summary judgment motions by freeing . . . courts from the need to hunt through voluminous records” Holtz, supra, 258 F.3d at 74. The serial filing of documents contrary to Local Rule 56 confuses the respondent, confounds the record, wastes valuable time and resources, and impedes the effective and efficient discharge of the Court’s independent role under applicable law.

Local Rule 56(a)3 provides for sanctions in the event of a party’s failure to comply with its terms and specifically identifies the sanction of denial of the motion as appropriate where the default is on the part of the moving party. Given the remedial nature of the Local Rule, this Court deems such a sanction appropriate in this case.

⁷*Inter alia*, the Memorandum in Support is improperly captioned, references an erroneous case number, and, in part, seeks relief unrelated and inappropriate to the instant case and proceeding. In addition, in the Motion and Memorandum in Support the Trustee seeks relief in his capacity as “Trustee of the *Bankruptcy Estate of Gantos, Inc.*” (emphasis added). And, even if the Court were to deem the Modified Statement as fully compliant, procedurally and substantively, with Federal Rule 56 and Local Rule 56(a), consideration of this matter would arguably be premature as the Defendant would have until August 5, 2005 to respond thereto. See Fed. R. Civ. P. 6, D. Conn. L. Civ. R. 6, D. Conn. LBR 1001-1(b).

IV. CONCLUSION

In view of the foregoing, the Motion shall be **DENIED** *without prejudice*.⁸

Dated: August 5, 2005

BY THE COURT


Albert S. Dabrowski
Chief United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

⁸The Defendant should not read this Memorandum with any degree of comfort as the order shall enter without prejudice to the Trustee's future prosecution of a procedurally and otherwise substantively compliant motion for summary judgment. In failing to respond to the Request for Admissions and the Motion the Defendant has chosen a very "risky and imprudent path". *Vermont Teddy Bear Co. Inc., supra*, 373 F.3d at 247.

DISTRICT OF CONNECTICUT

In re:)
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CLINTON'S MUSIC, INC.) CASE NO. 03-317023 (ASD)
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Debtor.) CHAPTER 7

RICHARD M. COAN, TRUSTEE)
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Plaintiff,)
vs.) ADV. PRO. NO. 05-3025
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JEFFREY WASIKOWSKI,)
)
Defendant.) Re: DOC. I.D. NO. 10

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

A Motion for Summary Judgment (hereafter the "Motion"), Doc. I.D. No. 10, having been filed by the Plaintiff-Trustee, and the Court having reviewed all material submitted in support of the Motion, and having issued a Memorandum of Decision on Trustee's Motion for Summary Judgment this same date, in accordance with which it is hereby

ORDERED that the Motion is **DENIED** without prejudice.

BY THE COURT

Dated: August 5, 2005


Albert S. Dabrowski
Chief United States Bankruptcy Judge