

**United States Bankruptcy Court
District of New Mexico**

Document Verification

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Case Number: 02-01239
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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re:
VDP, Inc.,
Debtor.

No. 11-01-17042 SL

VDP, Inc.,
Plaintiff,

vs.

Adv. No. 02-1239 S

Kendal M. Emery, et al.
Defendants.

**MEMORANDUM OPINION ON DEFENDANT
SHARON A. LALLA'S MOTION FOR
SUMMARY JUDGMENT and ORDER DENYING SAME**

This matter is before the Court on the Motion for Summary Judgment filed by Defendant Sharon A. Lalla (doc. 72)(with Memorandum attached), Plaintiff's Response (doc. 88) and Defendant Lalla's Reply (doc. 105). Defendant Lalla is represented by Martin, Lutz, Roggow, Hosford & Eubanks, P.C. (Bradford H. Eubanks). Plaintiff is represented by Steven E. Schmidt.

Federal Rule of Civil Procedure 56(c) provides, in part, "The judgment sought shall be rendered forthwith if the 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 a judgment as a matter of

law." Therefore, if the Court finds that a material fact is in dispute, summary judgment should be denied. The Court's task at summary judgment is not to assess the credibility of conflicting testimony. Starr v. Pearle Vision, Inc., 54 F.3d 1548, 1557 (10th Cir. 1995)(citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)("Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.")). Finally, the Court examines the factual record and reasonable inferences therefrom in the light of the nonmovant. Thomas v. International Business Machines, 48 F.3d 478, 484 (10th Cir. 1995); Cole v. Ruidoso Municipal Schools, 43 F.3d 1373, 1377 (10th Cir. 1994).

Whether a fact is material is determined by the substantive law governing the case. Anderson, 477 U.S. at 248. Therefore, the Court will briefly review Plaintiff's complaint. Count I is for turnover, and alleges that Defendants have computer hardware and software of some value that belongs to the estate, and seeks its return. Count II alleges that Defendants have tangible personal property, intellectual property, and copies of object and source code of software products used by Plaintiff to manufacture its

products, in addition to the actual products sold by Plaintiff; that Defendants took the property to improperly compete against the Plaintiff; and seeks to enjoin Defendants to account for and return the property and to enjoin them from using any property for any purpose. Therefore, the existence of any of Plaintiff's property in the hands of Defendants is a material fact on which both counts are based.

Defendant Richmond's Memorandum in Support of Motion for Summary Judgment, doc. 72, sets forth a Statement of Facts ("Facts"). Fact 2 states "It is uncontroverted that the only property for which the Plaintiff seeks turnover from the Defendant Lalla is a laptop computer and the software on that laptop computer." Fact 2 is evidenced by the Deposition of Walter P. Black, page 13, lines 4-22 (attached as an Exhibit to the Memo). Fact 3 states "It is uncontroverted that the above described property has been returned to Plaintiff by the Defendant Lalla." Fact 3 is also evidenced by the Deposition of Walter P. Black, page 13, lines 20-22. The Court does not read the deposition to say that. Rather, Mr. Black testified that the laptop was returned, not that the laptop and software were returned.

Plaintiff's Response (doc. 88) does not follow the procedure set up in NM LBR 7056-1. That Local Rule provides:

[a] memorandum in opposition to the motion shall contain a concise statement of the material facts as to which the party contends a genuine issue does exist. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies, and shall state the number of the movant's fact that is disputed. All material facts set forth in the statement of the movant shall be deemed admitted unless specifically controverted.

Rather, Plaintiff's response simply admits or denies Defendant's facts, comments whether the purported fact is "material", and fails to give any cite to the record where the conflicting evidence appears. Plaintiff does, however, then provide its own "Statement of Contested Material Facts" ("Contested Facts"). Because this Court prefers to decide matters on the merits, it has reviewed the Contested Facts to see whether they actually controvert Defendant's Facts. This involved unnecessary additional work for the Court, and Mr. Schmidt is advised that in the future he should follow the Local Rule when responding to motions for summary judgment, or risk sanctions. See, e.g., Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner, 101 F.3d 145, 151 (D.C. Cir. 1996)(Local rules regarding summary judgment practice should be strictly complied with in order to present a crystallized record for the reviewing court, which then need not sift through a voluminous record searching for fact issues.)

Plaintiff's Contested Fact 1 states "Defendant Lalla and the other defendants retained and have property of the Plaintiff." Contested Fact 1 refers to: the Black Affidavit (doc. 94); the Weadock affidavit (doc. 93); the Porter affidavit (doc. 96); and the Cogoli affidavit (doc. 92). Most of the cited paragraphs in these affidavits have nothing to do with Defendant Lalla. Having to review irrelevant affidavits is a waste of the Court's time¹. However, there are three affidavit citations that are relevant: 1) Black Affidavit ¶ 36 states "VDP, Inc. never received back the source code for its products from Messrs. Richmond, Wright, Emery or Ms. Lalla.;" 2) Black Affidavit ¶ 43 states:

Defendant Lalla withheld a laptop and two proprietary software programs, PS Update Creator and JaxMaker, and the software CD's for her productivity software (RoboHelp, Adobe Acrobat, Illustrator, PageMaker and Photoshop) so that it would all have to be replaced in order for VDP, Inc. to proceed.;

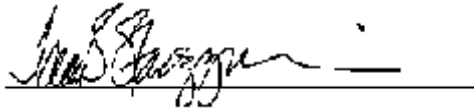
and 3) Weadock Affidavit ¶ 19 states:

I have been unable to create new Jack Panels or PS libraries for VidCAD customers because JaxMaker and PS Update Creator programs were not returned. There were 3 places this was stored, to my knowledge: Server Drive P: (which was reformatted and completely lost), on one of the computers that were reformatted and on Sharon Lalla's computer, which was not returned.

¹ Similarly, most of Plaintiff's Statement of Contested Material Facts are irrelevant to Defendant Lalla.

The Court finds that Facts 2 and 3 have been successfully put in doubt by Plaintiff's Response. The Court therefore finds that Defendant Lallt's Motion for Summary Judgment is not well taken.

IT IS ORDERED that Defendant Lalla's Motion for Summary Judgment (doc. 72) is denied.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on October 15, 2004, a true and correct copy of the foregoing was electronically transmitted, faxed, delivered, or mailed to the listed counsel and/or parties.

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