

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO

In re: Rose M. Moya,  
aka Rose M. Gerdes,

No. 7-09-13488 JA

Debtor.

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Northern New Mexico School Employees  
Federal Credit Union,

Plaintiff,

v.

Adv. No. 09-1155 J

Rose M. Moya,

Defendant.

ORDER DENYING SUMMARY JUDGMENT

This matter is before the Court on Northern New Mexico School Employees Federal Credit Union's Motion for Summary Judgment ("Motion") (Docket No.7) filed on January 20, 2010. Debtor, Rose M. Moya, failed to file a response timely or otherwise.

Northern New Mexico School Employees Federal Credit Union (the "Credit Union") seeks a determination that a debt allegedly incurred by Ms. Moya for the payment of taxes is non-dischargeable pursuant to 11 U.S.C. §523(a)(14A). The Credit Union asserts that Ms. Moya obtained a loan for the purpose of paying her New Mexico income taxes and that the loan proceeds were used to pay those taxes, and therefore the obligation to repay the loan is nondischargeable. The Credit Union further seeks an award of its costs and attorney's fees incurred herein.

Ms. Moya, in her answer to the complaint, admitted that she received a loan and averred that because the loan in question was a signature loan it is dischargeable. She further averred

that the loan proceeds were used to pay the State of New Mexico but that she does not owe any taxes to the State of New Mexico or a student loan.

The Court having reviewed the Motion for Summary Judgment, and being sufficiently advised, finds that the evidence supporting the motion is insufficient to grant summary judgment in favor of the Credit Union. The Court therefore will deny the Motion for Summary Judgment without prejudice to the filing of another motion for summary judgment supported by additional evidence.

#### SUMMARY JUDGMENT STANDARD

It is appropriate for the Court to grant summary judgment if the pleadings, discovery materials, and any affidavits before the Court show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c) made applicable to the adversary proceeding by Fed. R. Bankr.P 7056. “[A] party seeking summary judgment always bears the initial responsibility of informing the . . . court of the basis for its motion, and . . . [must] demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Courts must review the evidentiary materials submitted in support of a motion for summary judgment to ensure that the motion is supported by evidence. If the evidence submitted in support of the summary judgment motion does not meet the movant’s burden, then summary judgment must be denied. Hearsay evidence cannot be considered on a motion for summary judgment. *Wiley v. United States*, 20 F.3d 222, 226 (6th Cir. 1994). Any documentary evidence submitted in support of summary judgment must either be properly authenticated or self authenticating under the Federal Rules of Evidence. *Goguen v. Textron, Inc.*, 234 F.R.D. 13, 16 (D. Mass. 2006). Furthermore, New Mexico Local Bankruptcy Rule 7056-1 provides that the movant’s statement

of material facts as to which the movant contends no genuine fact exists must “refer with particularity to those portions of the record upon which the movant relies.” NM LBR 7056-1.

FACTS AS TO WHICH NO GENUINE DISPUTE  
HAS BEEN RAISED IN THE RECORD<sup>1</sup>

On May 1, 2007 Ms. Moya obtained a loan from the Credit Union in the amount of \$3,251.18.<sup>2</sup> The Credit Union funded the loan by issuing a check dated May 1, 2007 in the amount of \$3,183.37 made payable to: STATE OF NM TAXATION & REV. FOR ROSE M. MOYA.<sup>3</sup> The check was negotiated. Ms. Moya filed her voluntary petition under Chapter 7 of the United States Bankruptcy Code, 11 U.S.C. § 101 *et. seq.*, on August 5, 2009 in the United States Bankruptcy Court for the District of New Mexico commencing a bankruptcy case assigned No. 09-13488 (sometimes, the “Chapter 7 Case”). (*See* Docket No. 1 in the Chapter 7 Case). On November 25, 2009, an order was entered in the Chapter 7 Case granting Ms. Ms. Moya a discharge, and the Chapter 7 Case was closed. (*See* Docket No. 15 and Docket Entry of 011/25/09 in the Chapter 7 Case).

DISCUSSION

The Credit Union argues that because Ms. Moya incurred a debt to the Credit Union to pay a tax to New Mexico Taxation and Revenue that would be nondischargeable under Section 523(a)(1), her debt to the Credit Union is nondischargeable under Section 523(a)(14A).

11 U.S.C. §523(a)(14A) provides:

(a) A discharge under section 727...of this title does not discharge an individual debtor from any debt -

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<sup>1</sup> The only evidence before the Court in support of the Motion for Summary Judgment consists of an Affidavit of Larry Lujan, copies of the Credit and Security Agreement, Check #104190 in the amount of \$3,183.37 made payable to State of NM Taxation & Rev. for Rose M. Moya, Open-End Disbursement Receipt Plus dated 5/1/2007, and the Docket and papers filed in Ms. Moya’s chapter 7 case of which the Court takes judicial notice. *See* Motion for Summary Judgment, Exhibits 1, 1-A, 1-B, and 1-C.

<sup>2</sup> *See* Motion for Summary Judgment, Exhibit 1-C (Docket No.7).

<sup>3</sup> *See* Motion for Summary Judgment, Exhibit 1-B.

(14A) incurred to pay a tax to a governmental unit, other than the United States, that would be nondischargeable under paragraph (1).

The 2005 amendments to the Bankruptcy Code added Section 523(a)(14A). That section is the same as Section 523(a)(14)<sup>4</sup> enacted in 1994, except Section 523(a)(14) applies to debts incurred to pay a tax to the United States that are nondishargeable under Section 523(a)(1), whereas Section 523(a)(14A) applies to debts incurred to pay a tax to a governmental unit other than the United States that are nondishargeable under Section 523(a)(1).<sup>5</sup> The purpose of Section 523(a)(14) is to prevent a debtor from substituting an otherwise nondishargeable tax debt of a type described in Section 523(a)(1) owing to the United States for a dischargeable debt incurred to pay the nondishargeable tax debt.<sup>6</sup> Section 523(a)(14A) extends this purpose to debts incurred to pay a nondishargeable tax debt of a type described in Section 523(a)(1) to governmental units other than the United States.<sup>7</sup>

To prevail on a nondishargeability claim under section 523(a)(14A), the creditor must prove two elements: (1) the debt was incurred to pay a tax owed to a governmental unit other than the United States; and (2) the tax owed to a governmental unit other than the United States would have been nondishargeable under § 523(a)(1) if it had not been paid prepetition.<sup>8</sup>

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<sup>4</sup> 11 U.S.C. §523(a)(14) provides

(a) A discharge under section 727...of this title does not discharge an individual debtor from any debt (14) incurred to pay a tax to the United States that would be nondishargeable pursuant to paragraph (1).

<sup>5</sup> The only difference between the language of Sections 523(a)(14) and 523(a)(14A), other than the different referenced governmental units, is that Section 523(a)(14) refers to a tax “that would be nondishargeable *pursuant to* paragraph (1)” whereas Section 523(a)(14A) refers to a tax “that would be nondishargeable *under* paragraph (1).” (emphasis added). Although the Court is mindful of the canon of statutory construction that different terms used in the same statute presumptively have the same meaning, *see, e.g., Corus Stall BV v U.S.*, 502 F.3d 1370,1376 (C.A Fed. 2007) and *Soliman v. Gonzales*, 419 F.3d 276, 283 (4<sup>th</sup> Cir. 2005), is clear from the plain meaning of the two statutory provisions that Congress used “pursuant to” in Section 523(a)(14) and “under” in Section 523(a)(14A) to mean the same thing. Use of the different terms is attributable to in artful drafting, and does not signify different meanings.

<sup>6</sup> *In re Barton*, 321 BR 877, 878 (Bankr.N.D.Ohio 2005).

<sup>7</sup> *In re Stephenson*, 2007 WL 4268904, \*2 (Bankr. E.D. 2007).

<sup>8</sup> *See Barton*, 321 B.R. at 878 (applying this two prong requirement to Section 523(a)(14) in the case of taxes paid to the United States).

The evidence before the Court establishes that Ms. Moya incurred the loan made to her by the Credit Union to pay a tax liability to the State of New Mexico, which is a governmental unit other than the United States.<sup>9</sup> The Credit Union thus has satisfied the first element to prevail on a nondischargeability claim under Section 523(a)(14A).

However, the Credit Union has provided no evidence in support of its Motion for Summary Judgment to show that the tax if not paid prepetition would have been nondischargeable under 11 U.S.C. §523(a)(1). By the express terms of Section 523(a)(1), tax debts that are nondischargeable under that section include: (a) tax claims having a priority under Section 507(a)(3) or (8); (b) taxes for which a return was required and was not filed; (c) certain taxes where there is a late filed return, and (d) taxes for which there is a fraudulent return or willful tax evasion.<sup>10</sup> There is no evidence before the Court, for example, identifying the tax year for which the tax was paid, whether or when the tax return was due or filed, or whether the taxes were assessed. Without evidence to establish that the tax paid with the loan proceeds is of a type that would have been nondischargeable under 11 U.S.C. §523(a)(1), the Court is unable to determine whether the second element to prevail on a nondischargeability claim under Section 523(a)(14A) is satisfied.

Although Ms. Moya failed to file a timely response or objection to the Motion, the mere failure to respond to a motion for summary judgment does not result in a court granting the motion by default. Because Fed.R.Civ.P. 56(c) and 56(e) require, before summary judgment may issue, a determination that the movant is entitled to judgment as a matter of law on a motion properly made and supported, the court must still consider the motion on the merits. *See United States v. One Piece of Real Property Located At 5800 SW 74th Avenue, Miami, Florida,*

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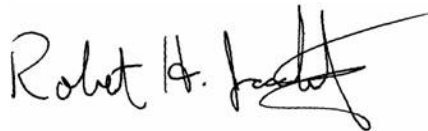
<sup>9</sup> The New Mexico Department of Taxation & Revenue is an agency of the State of New Mexico charged with collecting taxes owed to the State.

<sup>10</sup> *In re Carlin*, 318 B.R. 556, 561-562 (Bankr.D.Kan. 2004).

363 F.3d 1099, 1101 (11th Cir. 2004) (finding that the district court could not grant summary judgment based merely on the fact that no objection to the motion was made). Further, failure to respond to a motion for summary judgment does not result in the admission of any facts not controverted by a response if the movant submitted no evidence to support those facts. Courts must review the evidentiary materials submitted in support of a motion for summary judgment to ensure that the motion is supported by evidence. Thus only when a motion for summary judgment is properly supported by evidence will the complete failure of the non-moving party to respond result in an admission of all material facts for purposes of granting summary judgment.

The Credit Union has failed to meet its burden to support its Motion for Summary Judgment with admissible evidence that establishes that Moya's debt was incurred to pay a nondischargeable tax liability to New Mexico Taxation and Revenue of a type described in Section 523(a)(1). Summary judgment must, therefore, be denied.

WHEREFORE, IT IS HEREBY ORDERED that the Motion for Summary Judgment is DENIED, without prejudice to the Plaintiff filing another motion for summary judgment supported by additional evidence.



ROBERT H. JACOBVITZ  
United States Bankruptcy Judge

Entered on Docket Date: April 2, 2010

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