

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re:

MICHAEL ALLEN HOLLEY,
Debtor.

Case No. 7-12-12608 TA

MIDAS AUTO SALES, INC.,
Plaintiff,

v.

Adversary No. 12-1301 T

MICHAEL ALLEN HOLLEY,
Defendant.

**ORDER DENYING DEFENDANT'S AMENDED MOTION FOR SUMMARY
JUDGMENT**

Before the Court is Defendant's Amended Motion for Summary Judgment ("Motion") filed July 18, 2013, doc. 38, and Plaintiff's response thereto, filed August 1, 2013, doc. 41.

Upon reviewing of the Motion and supporting affidavit, the Court finds that Defendant failed to comply with the Federal, Bankruptcy, and Local rules governing summary judgment, and therefore that the Motion should be denied without prejudice.¹

DISCUSSION

Fed.R.Civ.P. 56 provides in part:

¹ Despite labeling the Motion one for summary judgment, Defendant cites to Rule 12(b)(6). Motion, p. 1. The Court has briefly reviewed Plaintiff's amended complaint to determine if there is any failure to state a cause of action with respect to any of the asserted nondischargeability counts. Although the Court has questions about the strength of some of the claims, the amended complaint does not suffer from any pleading deficiencies sufficient to warrant dismissal. Thus, to the extent Defendant intended to file a motion to dismiss for failure to state a claim upon which relief can be granted, denial of the motion is appropriate.

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense--or the part of each claim or defense--on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) Objection That a Fact Is Not Supported by Admissible Evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.

(4) Affidavits or Declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

....

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address

another party's assertion of fact as required by Rule 56(c), the court may:

- (1) give an opportunity to properly support or address the fact;*
- (2) consider the fact undisputed for purposes of the motion;*
- (3) grant summary judgment if the motion and supporting materials-- including the facts considered undisputed--show that the movant is entitled to it; or*
- (4) issue any other appropriate order.*

The Court's Local Rule provides:

7056-1 Summary Judgment

(a) Memoranda. The movant shall file with the motion a memorandum containing a concise statement in support of the motion with a list of authorities. A motion for summary judgment filed without a memorandum may be summarily denied. A party opposing the motion shall, within 21 days after service of the motion, file a memorandum containing a concise statement in opposition to the motion with a list of authorities. If no response is filed, the court may grant the motion. The movant may, within 14 days after the service of a response, file a reply memorandum.

(b) Undisputed Facts. The memorandum in support of the motion shall set out as its opening a concise statement of all of the material facts as to which movant contends no genuine issue exists. The facts shall be numbered and shall refer with particularity to those portions of the record upon which movant relies.

(c) Disputed Facts. 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 movant's statement that are properly supported shall be deemed admitted unless specifically controverted.

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 Bankruptcy Rule 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, (1986).

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. *See United States v. One Piece of Real Property Located At 5800 SW 74th Avenue, Miami, Florida*, 363 F.3d 1099, 1101 (11th Cir. 2004).

Here, Defendant’s Motion does not comply with Fed.R.Civ.P. 56 and Local Rule 7056-1 in the following key respects:

- The Motion does not identify each claim or defense--or the part of each claim or defense--on which summary judgment is sought;
- The Motion does not set out a concise statement of all of the material facts as to which movant contends no genuine issue exists; and
- The Motion does not refer with particularity to those portions of the record upon which movant relies.

The deficiencies in the Motion make it impossible for the Court to determine (i) whether there are any undisputed facts; (ii) if so, whether they are material; and/or (iii) if Defendant is entitled to judgment in his favor as a matter of law on all or any portion of one or more of the six counts in Plaintiff’s amended complaint. Similarly, the deficiencies prevent Plaintiff from filing a proper response.

Rather than attempt to fix or overlook all of the problems in the Motion, the Court concludes that the only proper course is to deny the Motion.

WHEREFORE, IT IS HEREBY ORDERED that Plaintiff's Motion is DENIED without prejudice.



Hon. David T. Thuma
United States Bankruptcy Judge

Entered on docket: September 11, 2013.

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