UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re: BKY 3-92-6396

Charles Anthony Smith f/d/b/a Minuteman Press - Maplewood and Power Marketing, Inc.,

Debtor.

Anchor Paper Company, ADV. 3-93-52

Plaintiff,

vs. ORDER

Charles Anthony Smith,

Defendant.

This matter came before the Court on Plaintiff Anchor Paper Company's motion for summary judgment. Mark Gleeman appears on behalf of Plaintiff. Donald Fett appears on behalf of Defendant. Based upon the files, records, and arguments of counsel, the Court makes this Order pursuant to the Federal Rules of Bankruptcy Procedure.

I.

Charles Anthony Smith filed a Chapter 7 petition on December 4, 1992. Plaintiff timely filed its complaint objecting to discharge pursuant under 11 U.S.C. Sections 727(a)(2), 727(a)(4)(A) and 727(a)(5).(FN1) Plaintiff has moved for summary judgment based, in large part, on Defendant's failure to timely respond to discovery, in particular, Requests for Admission.(FN2) The Plaintiff asserts that as a consequence, the Requests are deemed admitted and accordingly, there are no facts in dispute.(FN3)

The crux of Plaintiff's position is that Debtor owned and sold a business named Minuteman Press to R. L. Printing approximately one-month prior to filing his petition, without disclosing the transfer and receipt of approximately $43,000 from the sale on his bankruptcy schedules. The Plaintiff argues that Debtor's intent is most telling in that he did not even amend his schedules to disclose the transaction once it became known to the Chapter 7 Trustee. Plaintiff asserts that Defendant has intentionally and fraudulently given a material false oath and has committed a concealment of the sale transaction to the detriment of creditors.

Lastly, Plaintiff contends that Debtor did not satisfactorily explain the loss of assets, causing the creditors as well as the of funds and payments made by the Debtor.(FN4) Alternatively, Plaintiff requests that if summary judgment is not granted, sanctions be imposed for failure to timely comply with its discovery requests. Plaintiff asserts prejudice by the untimely discovery responses because the Court's scheduling order as to

business after that date.(FN5) He contends that when the business was

sold the funds simply passed through his hands and were immediately applied to satisfy federal and tax liens owing on the business. In essence, he asserts that he was merely a conduit to the transaction. Defendant asserts that any interest he had in the business was lost to his spouse in connection with the dissolution proceeding and that his wife's interest in the business was sold a few months prior to his bankruptcy. Defendant contends that he did indicate, on his Statement of Financial Affairs, all of those creditors who had received payments within 90 days prior to bankruptcy.

II.

Initially, the Court must determine whether the Requests are determined admitted(FN6); and, if so, whether the Plaintiff would be unduly prejudiced were the Court to allow withdrawal of the admissions and substitution of the responses. Fed. R. Civ. Pro. 36(b) provides:

> Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission...when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that the withdrawal or amendment will prejudice the party in maintaining the action or defense on the merits.

Essentially, Rule 36(b) gives the Court discretion to relieve the nonresponding party of the severity of having all matters automatically deemed admitted. The party obtaining the admission must show the withdrawal will cause prejudice. This prejudice may relate to the difficulty a party may face in proving its case because of the sudden need to obtain evidence required through further discovery to prove the matter admitted. Gutting v. Falstaff Brewing Corp., 710 F.2d 1309 (8th Cir. 1983).

Here, the Defendant did respond to the discovery requests submitted by Plaintiff. He responded the day before the summary judgment motion was to be heard. Because of the tardily filed responses, the Plaintiff asserts that it will be prejudiced due to the fact that the discovery period in the Court's scheduling order on July 16, 1993, has lapsed; therefore, it is precluded from further discovery, which the responses have now necessitated.

Plaintiff has not argued that the claimed prejudice cannot be remedied by reopening of the discovery period. The Court will allow withdrawal of the admissions and accept Defendant's tardily filed discovery responses. The discovery period will be reopened by separate scheduling order to address any prejudice to the Plaintiff. The price for this relief to the Defendant must be an

appropriate sanction.

The penalty for discovery violations are specifically and clearly articulated in the Court's scheduling order in capitalized and emboldened letters.(FN7) Furthermore, Paragraph 7 of that order provides:

> 7. The dates fixed in this order are mandatory. Deadlines shall not be extended except on motion and for good cause.

Plaintiff was prejudiced in bringing the summary judgment motion by Defendant's failure to timely respond to discovery requests. Adding to the egregiousness of the situation, was Defendant's continued inaction. After being served with the motion for summary judgment on July 30, 1993, Defendant still did not serve responses to the discovery requests until the day before the motion was to be heard. Sanctions are appropriate to compensate Plaintiff, in the amount of $500.00.

In light of the fact that the Court is allowing the tardily filed responses to discovery by Defendant, summary judgment is inappropriate. Rule 56(c) of the Federal Rule of Civil Procedure, provides that summary judgment may be rendered only if: the pleadings, depositions, answers to interrogatories, admission 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. The party opposing the motion must set forth specific facts showing that there is a genuine issue of material fact for trial. Anderson v. Liberty Lobby, 477 U.S. 242 (1986). Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574 (1986).

Here, there exist material factual issues that bear on the Defendant's obligation, and the reasonable consequences of his failure, to disclose the sale transaction in his schedules. For instance, the Defendant claims he had no interest in the transferred business by virtue of the dissolution decree, and that he did not profit from the transaction. The Plaintiff claims otherwise, and asserts that the Defendant maintained control over the business up to, and including the sale, evidenced by his ex-spouse's affidavit. The Debtor alleges that the affidavit is false.

Resolution of these matters is necessary to determine the nature of the Defendant's obligation to disclose the transaction in his schedules; and, if obligated, whether failure to disclose was inadvertent and negligent, rather than intentional for purposes of defrauding, concealing, or obstructing creditors. Accordingly, the Court finds that Plaintiff's motion for summary judgment must be denied.

## III.

NOW, THEREFORE, IT IS ORDERED:

1. Defendant is allowed to withdraw his admissions to

Plaintiff's Requests For Admissions, and the Court accepts the untimely responses to Plaintiff's discovery requests.

2. Plaintiff is awarded $500.00 as and for attorney's fees and costs from Defendant for failure to comply with the Court's scheduling order.

3. Plaintiff's motion for summary judgment is denied.

4. The discovery period is reopened and discovery will expire on October 30, 1993.

Dated: September 21, 1993.

Dennis D. O'Brien
United States BankruptJudgecy

(FN1)These sections provide in pertinent part:
11 U.S.C. 727. Discharge
(a) The Court shall grant the debtor a discharge, unless--
(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed--
(A) property of the debtor, within one year before the date of filing of the petition; or....
(4) the debtor knowingly and fraudulently, in or in connection with the case--
(A) made a false oath or account;...
(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities; ...
(c) The trustee, [or] a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section.
END FN

(FN2)A scheduling order was entered by this Court requiring all discovery to be completed by July 16, 1993. Plaintiff served Interrogatories and Requests for Admission on Plaintiff. Plaintiff did not respond to discovery until August 17, 1993, the day before the summary judgment motion filed by Plaintiff was to be heard. The scheduling order specifically states in bold, capital letters: DISCOVERY REQUESTS ARE TO BE LIBERALLY CONSTRUED. COUNSEL SHALL NOT MANIPULATE THE DISCOVERY RULES SO AS TO HINDER, IMPEDE OR OBSTRUCT LEGITIMATE, REASONABLE DISCOVERY REQUESTS. ... SANCTIONS WILL BE IMPOSED UPON A PARTY AND COUNSEL WHO ARE FOUND TO HAVE ABUSED OR MISUSED DISCOVERY. SANCTIONS WILL BE IMPOSED IN THE

MINIMUM AMOUNT OF $500.00, AND MAY BE IMPOSED IN AMOUNTS OF $1,000.00 OR MORE. ALL DISCOVERY DISPUTES WHICH REQUIRE JUDICIAL RESOLUTION WILL RESULT IN THE IMPOSITION OF SANCTIONS.
END FN

(FN3)The Defendant untimely responded to the Requests for Admission as follows:
1. That checks attached as Exhibit A to the Complaint in this matter made payable to you.
RESPONSE: Admit, but deny that I had the right to receive payment on the checks, deny that I owned any of the checks and deny that I had the right to discretionary use of any of the checks.
2. That you did not disclose the receipt of those checks in your bankruptcy schedules filed in this matter.
RESPONSE: Admit, but deny that I had any obligation to do so.
3. That the checks attached to the Complaint in this matter as Exhibit A were received by you within ninety (90) days before the filing of your bankruptcy petition in this matter.
RESPONSE: Admit to the extent that they were "received", it was within 90 days of filing of the Bankruptcy Petition.
4. That you knew the checks attached to the Complaint in this matter as Exhibit A were not disclosed in your bankruptcy schedules filed in this matter.
RESPONSE: Admit, but deny that I had an obligation to do so.
5. You failed to disclose the alleged transfer of your interest in Minuteman Press in the bankruptcy schedules that you filed in connection with this matter.
RESPONSE: Admit that the referenced sale of Minuteman Press by my ex-spouse is not disclosed in the bankruptcy schedules. My ex-spouse was awarded Minuteman Press in the decree which dissolved our marriage.
6. That you have no legal authority to support your defense in this matter.
RESPONSE: Deny.
END FN

(FN4)The Plaintiff asserts that while the Debtor wrote a letter to the Chapter 7 Trustee explaining the transaction, together with checking account information, the letter did not sufficiently disclose the transaction to the Court as well as other creditors as it was written to the Trustee and not disclosed directly to the creditors.
END FN

(FN5)The Plaintiff submitted an Affidavit of Defendant's ex-spouse stating that she did not run the business, rather that the Defendant did.
END FN

(FN6)Fed. R. Civil P. 36(a) provides that each matter requested is deemed admitted unless the responding party serves a written answer or objection within 30 days.
END FN

(FN7)See ftn 2, supra.