IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

IN RE:	§	
	§	
THUNDER REED, LLC	§	Case No. 09-40114
	§	(Chapter 7)
Debtor.	§	
_____	§	
	§	
STEVEN W. VIKEN,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Adv. No. 09-04028
	§	
CORI LYNN BAILEY,	§	
	§	
Defendant,	§	
	§	
v.	§	
	§	
THUNDER REED, LLC and THUNDER FOOTBALL, LP,	§	
	§	
Third-Party Defendants.	§	

MEMORANDUM OPINION GRANTING
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The plaintiff brought this action against the defendant seeking to recover $3,500 from the defendant for allegedly taking his mascot suit. The defendant now moves for summary judgment. In support of the motion, the defendant relies primarily on the "deemed admissions" arising from the plaintiff's failure to respond to her request for admissions under Federal Rule of Bankruptcy Procedure 7036 and Federal Rule of Civil Procedure 36. However, independent of the deemed admissions, there is substantial evidence in support of the motion.

I. JURISDICTION

The Court previously addressed its jurisdiction over this proceeding at a hearing on January 25, 2010, in response to an objection by the plaintiff. The Court entered an order on March 2, 2010, denying the plaintiff's motion to dismiss. This Court has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334(b) because it is related to the bankruptcy petition filed by Thunder Reed, LLC. The Court exercises its jurisdiction over the matter pursuant to 28 U.S.C. § 157(b).

II. BACKGROUND

Oon August 8, 2008, Mr. Steven W. Viken ("Viken" or "Plaintiff") filed suit in small claims court in Denton County, Texas, against Ms. Cori Lynn Bailey ("Bailey") for "non-payment of mascot suit."[1] Bailey responded that she was acting as an agent of Thunder Reed, LLC ("Thunder Reed" or "Debtor"), and she proceeded to implead Thunder Reed. Thunder Reed removed the small claims suit to this Court after filing for bankruptcy on January 13, 2009.

In essence, the underlying action between Viken and Bailey concerns an agreement that Bailey made with Viken to purchase what she believed to be Viken's mascot suit for $3,500. Bailey was an agent or employee of Thunder Reed at the time of the purchase. Viken complains that Bailey stopped payment on the check made out for the mascot suit, and that he was not paid for the transaction.

Viken originally possessed the mascot suit because he owned the "Frisco Thunder," an indoor football team. Viken later defaulted on the loans that he had used to purchase the "Frisco Thunder." Thus, ownership of the team – and all its assets, including the mascot suit – reverted from Viken back to the governing league, the Intense

[1] Viken also filed suit against Thunder Reed, but that case is not at issue in this proceeding.

Football League, Inc. Thunder Reed, the Debtor, subsequently purchased the Frisco Thunder and all its assets.

Bailey admits stopping payment on the check to Viken. She claims, however, that she did so only when Thunder Reed informed her that Viken had stolen the mascot suit and that it properly belonged to Thunder Reed. Thunder Reed retained possession of the mascot suit and continued to use it until it filed for bankruptcy protection.

The legal basis for Viken's claim against Bailey is unclear from his petition. Viken's petition merely states that Bailey "is justly indebted to the Plaintiff in the sum of $3,500."[2] Nevertheless, in her answer, Bailey asserts a general denial[3] to Viken's allegations. In addition to this general denial, Bailey makes several specific, verified denials. These include denial of: 1) "each and every item in Plaintiff's sworn account"; 2) ever having an "open account with the Plaintiff, or a written or oral contract . . . or any business dealings with Plaintiff on which an account could be founded"; and 3) the entire sworn account of charges made by Plaintiff. Additionally, Bailey responds that any "contract or agreement referred to in Plaintiff's Original Petition is without consideration." Finally, Bailey asserts that the statute of frauds, an affirmative defense, bars Viken's claim.

On January 26, 2010, Bailey served Viken with multiple discovery requests, including a set of interrogatories, a request for production of documents and electronically stored information, and a request for admissions. She sent these discovery requests to Viken via certified mail to his last known address of 6552 Marblewing, Corpus Christi, Texas 78414. *See* FED. R. CIV. P. 5(b)(2)(B) (providing that service of

[2] Viken's petition is a fill-in-the-blank form routinely filed in small claims courts. In the blank after "Plaintiff's claim is based upon the following," the Plaintiff stated "non-payment of mascot suit."

[3] TEX. R. CIV. P. 92.

pleadings and orders is effected by "[m]ailing a copy to the last known address of the person served. Service by mail is complete on mailing."); FED. R. BANKR. P. 7005 (providing that Federal Rule 5 applies in adversary proceedings). Viken used this address on his original petition to the small claims court. However, on March 1, 2010, Bailey's letter enclosing these discovery requests was returned to her attorney stamped as "UNCLAIMED."

II. SUMMARY JUDGMENT STANDARDS

Motions for summary judgment are authorized by Rule 56 of the Federal Rules of Civil Procedure, as adopted and applied to this proceeding by Rule 7056 of the Federal Rules of Bankruptcy Procedure. The entry of a summary judgment is appropriate "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 judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting FED. R. CIV. P. 56(c)). The party seeking summary judgment always bears the initial responsibility of informing the Court of the basis for the motion and identifying those portions of the "pleadings, depositions, answers to interrogatories, and affidavits, if any," which it believes demonstrates the absence of a genuine issue of material fact. *Id.* at 323. "If a moving party fails to carry its initial burden of production, the non-moving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion." *Hunter v. Caliber System, Inc*., 220 F.3d 702, 726 (6th Cir. 2000) (citing *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102-03 (9th Cir. 2000)).

If a summary judgment motion is properly supported, a party opposing the motion

may not merely rest upon the contents of its pleadings, but must demonstrate the existence of specific facts constituting a genuine issue of material fact for which a trial is necessary. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248-49 (1986) (citing FED. R. CIV. P. 56(e)); *Eber v. Harris County Hosp. Dist.*, 130 F. Supp. 2d 847, 852 (S.D. Tex. 2001) ("A genuine issue of material fact exists 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'") (quoting *Anderson*, 477 U.S. at 248). "All the evidence must be construed 'in the light most favorable to the non-moving party without weighing the evidence, assessing its probative value, or resolving any factual disputes.'" *Eber v. Harris County Hosp. Dist*, 130 F. Supp.2d at 852. If the burden of persuasion at trial must be borne by the non-moving party, the party moving for summary judgment may satisfy the burden of production under Rule 56 by either (1) submitting affirmative evidence that negates an essential element of the non-moving party's claim, or (2) demonstrating that the non-moving party's evidence is insufficient to establish an essential element of the non-moving party's claim. *Celotex*, 477 U.S. at 331; *Lavespere v. Niagra Machine & Tool Works, Inc*., 910 F.2d 167, 178 (5th Cir. 1990).

Here, Viken has not responded to Bailey's request for summary judgment. By failing to respond in any manner to Bailey's motion, Viken has wholly failed to provide any summary judgment proof to create a fact issue on the elements of his cause of action. The Fifth Circuit has repeatedly recognized that summary judgment is proper "where a party fails to establish the existence of an element essential to his case and on which he bears the burden of proof. A complete failure of proof on an essential element renders all other facts immaterial because there is no longer a genuine issue of material fact." *Washington v. Armstrong World Indus.*, 839 F.2d 1121, 1122 (5th Cir. 1988) (citing

Celotex, 477 U.S. at 323). "If the party with the burden of proof cannot produce any summary judgment evidence on an essential element of his claim, summary judgment is required." *Geiserman v. MacDonald*, 893 F.2d 787, 793 (5th Cir. 1990).

III. DISCUSSION

Bailey's motion for summary judgment rests primarily on Viken's admissions. "Under the Federal Rules of Civil Procedure, if a request for admission remains unanswered, with no objection lodged, for more than thirty days after service of the request, it is deemed admitted." *Eber*, 130 F. Supp. 2d at 853; *see* FED. R. CIV. P. 36(a)(3).[4] Any matter admitted under Rule 36(a) is conclusively established. FED. R. CIV. P. 36(b). Accordingly, deemed admissions may serve as the basis for summary judgment. *Eber*, 130 F. Supp. 2d at 853 (citing cases).

In this case, more than thirty-three days have passed since Bailey served Viken with her requests for admissions. Viken has not responded. The Court finds that, by not responding to Bailey's requests for admissions in a timely manner, Viken has admitted each request. Thus, the following material, undisputed facts are before the Court:

1. Viken entered into a contract to purchase the Frisco Thunder from the Intense Football League in November 2006.
2. Viken defaulted on his contract to purchase the Frisco Thunder from the Intense Football League in April 2007 and as a result, all of the assets of the Frisco Thunder, including the mascot suit, became the property of the Intense Football League

[4] FED. R. CIV. P. 6(c) provides that if the original request for admissions is delivered by mail, the thirty day deadline is extended by three days. *Eber*, 130 F. Supp. 2d at 854.

3. Thunder Reed purchased the Frisco Thunder, and all of its assets, including the mascot suit, from the Intense Football League in April or May 2007.
4. The mascot suit was originally purchased from ProMascot by the Frisco Thunder.
5. Viken did not own the mascot suit on or about May 31, 2007 or June 1, 2007.
6. Viken stole the mascot suit from Thunder Reed prior to May 31, 2007.
7. Viken had no right to sell the mascot suit to any person on June 1, 2007.
8. Bailey does not owe Viken any debt.
9. Viken only dealt with Bailey in her capacity as an agent of Thunder Reed.
10. Bailey never entered into any contract with Viken in her individual capacity.

IV. CONCLUSION

Based on the facts deemed admitted, Bailey has established that no genuine issues of material fact exist regarding the circumstances of the claim set forth by Viken. Additionally, the undisputed facts eliminate the elements of any possible legal basis for Viken's claim of "nonpayment." The evidence submitted with Bailey's motion and contained in the deemed admissions mandates dismissal all of Viken's claims against Bailey as a matter of law. The Court will enter a separate judgment consistent with this Memorandum Opinion.

Signed on 9/10/2010

Brenda T. Rhoades SR

HONORABLE BRENDA T. RHOADES,
CHIEF UNITED STATES BANKRUPTCY JUDGE