UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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December 23, 1998

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Subject: *Automobile Club Insurance Co. v. Daniel F. Grygierczyk (In re Grygierczyk)*, Adversary No. 98-4028; Chapter 7; Bankr. No. 98-40412

Dear Counsel:

The matter before the Court is Plaintiffs' Motion for Summary Judgment. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and subsequent judgment shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that summary judgment must be entered for Plaintiff.

SUMMARY OF FACTS *(in a light most favorable to Defendant-Debtor)*. Daniel F. Grygierczyk and Layne Drenth were in an automobile accident in November 1995. Layne Drenth was injured. His wife, Lisa Drenth, had automobile insurance with Automobile Club Insurance Company (Auto Club) on the vehicle Layne was driving at the time of the accident. Under that policy, Layne Drenth recovered $18,505.35. In a related civil action, Lisa Drenth obtained a judgment against Grygierczyk for $20,198.25 ($18,505.35 judgment plus costs and interest), to which Auto Club is subrogated.

Grygierczyk pled guilty in state court to reckless driving charges related to the November 1995 accident. He was fined $500.00 plus costs. and was given 60 days in jail. The jail time was suspended on the condition that Grygierczyk pay court appointed attorneys' fees of $55.00, pay his fine and court costs, and that he have no alcohol related traffic offenses for three years.

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Grygierczyk (Debtor) filed a Chapter 7 petition on May 20, 1998. Auto Club and Layne and Lisa Drenth (Plaintiffs) commenced this adversary proceeding seeking a determination that Lisa Drenth's civil judgment is non dischargeable under 11 U.S.C. § 523(a)(9). After expiration of the extended discovery deadline, Plaintiffs filed a summary judgment motion. In their supporting brief, they set forth the various evidence they would produce regarding Defendant-Debtor's intoxication at the time of the accident, including:

> Debtor consumed five beers within one hour before the accident. Debtor consumed the last beer within five minutes of the accident.
>
> Debtor admitted fault to a law enforcement officer.
>
> The investigating officer gave Debtor a portable breath test one hour after the accident. The test indicated Debtor's blood alcohol content was .11% or more.
>
> A blood alcohol test one and one-half hours after the accident indicated Debtor then had a blood alcohol content of .8%.
>
> The investigating officer gave Debtor four field sobriety tests. Debtor failed two.
>
> The investigating officer observed at the scene that Debtor had a strong odor of fresh beer and that his eyes were blood-shot and watery.
>
> A passing motorist who arrived at the scene about five minutes after the accident observed that Debtor had: slurred speech; a strong odor of alcohol; blood-shot, watery eyes; and difficulty standing and walking.

Plaintiffs cited to the state court documents, the accident report, Defendant-Debtor's answers to interrogatories, the deposition of the investigating officer, and the affidavit of the passing motorist. Plaintiffs reviewed applicable case law under § 523(a)(9) and set forth the state's standards for a conviction for driving while under the influence. Plaintiffs argued the insignificance of the lack of a state conviction for driving while under the influence.

Debtor filed a brief in response to the motion for summary judgment. He stated the result of a portable breath test is not admissible evidence to establish intoxication. He highlighted that he passed two of the four field sobriety tests and he argued that he achieved only an 80% result on the one-legged stand test due to injuries he received in the accident. No evidence of the nature or extent of Debtor's injuries was provided in the record other than

the accident report.

Debtor argued that summary judgment is not appropriate because expert testimony is needed regarding the absorption and distillation of alcohol in Debtor, a 190 pound male. Debtor did not set forth what admissible evidence he could offer on the absorption and distillation of alcohol. Debtor also argued summary judgment is not appropriate because the investigating officer did not observe Debtor while Debtor was driving. Debtor relied on the investigating officer's depositions to support his contentions. He did not contest Plaintiffs' assertion, based on case law, that a conviction for driving while under the influence is not required to establish non dischargeability under § 523(a)(9).

SUMMARY JUDGMENT. Summary judgment is appropriate when "there is no genuine issue [of] material fact and . . . the moving party is entitled to a judgment as a matter of law." F.R.Bankr.P. 7056 and F.R.Civ.P. 56(c). An issue of material fact is *genuine* if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992)(quotes therein). A genuine issue of fact is *material* if it might affect the outcome of the case. *Id.* (quotes therein). The matter must be viewed in the light most favorable to the party opposing the motion. *F.D.I.C. v. Bell*, 106 F.3d 258, 263 (8th Cir. 1997); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1490 (8th Cir. 1992)(quoting therein *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587-88 (1986), and cites therein). Further,

> the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial.

Amerinet, 972 F.2d at 1490 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)). The movant meets this burden if he shows that the record does not contain a genuine issue of material fact and he points out that part of the record that bears out his assertion. *Handeen v. LeMaire*, 112 F.3d 1339, 1346 (8th Cir. 1997)(quoting therein *City of Mt. Pleasant v. Associated Electric Coop*, 838 F.2d 268, 273 (8th Cir. 1988)). No defense to an insufficient showing is required. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 156 (1970) (cite therein); *Handeen*, 112 F.3d at 1346. If the movant meets his burden, the non movant, to defeat the motion, "must advance specific facts to create a genuine issue of material fact for trial." *Bell*, 106 F.3d at 263 (quoting *Rolscreen Co. v. Pella Products of St. Louis, Inc.*, 64 F.3d 1202, 1211 (8th Cir. 1995)). The non movant must do more than show there is some

metaphysical doubt; he must show he will be able to put on admissible evidence at trial proving his allegations. *Bell*, 106 F.3d 263 (citing *Kiemele v. Soo Line R.R. Co.*, 93 F.3d 472, 474 (8th Cir. 1996), and *JRT, Inc. v. TCBY System, Inc.*, 52 F.3d 734, 737 (8th Cir. 1995)).

DISCUSSION. Plaintiffs have meet their burden of showing that the record does not contain a genuine issue of material fact and that they are entitled to judgment as a matter of law. Plaintiffs have identified the parts of the record that support their assertions, as required by *Handeen*, 112 F.3d at 1346. It thus fell upon Defendant-Debtor to "advance specific facts to create a genuine issue of material fact for trial[,]" as discussed in *Bell*, 106 F.3d at 263. Defendant-Debtor has failed to do that. Even assuming the portable breath test result is not admissible, Defendant-Debtor has not shown that he will be able offer *admissible evidence at trial to overcome the evidence of* intoxication while driving to be offered by Plaintiff.

In particular, Defendant-Debtor argues that the investigating officer did not observe him while he (Debtor) was driving. That is an uncontested fact. Defendant-Debtor has not gone forward, however, and shown how that observation would have changed the investigating officer's opinion. Also, Defendant-Debtor argues summary judgment is inappropriate because expert testimony is needed on the rate the alcohol consumed by Debtor would have been absorbed and distilled before the accident. Debtor, however, has not identified in the record what that specific evidence would be and how it would conflict with Plaintiffs' other evidence of intoxication. Accordingly, the Court is left with no evidence on alcohol absorption and distillation, not conflicting admissible evidence that creates a genuine issue of material fact to be tried. *See Bell*, 106 F.3d 263.

Counsel for Plaintiffs shall prepare an appropriate judgment.

Sincerely,

Irvin N. Hoyt
Chief Bankruptcy Judge

INH:sh

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered
DEC 28 1998
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

CC: adversary file (docket original; copies to parties in interest)

Case: 98-04028 Form id: 122 Ntc Date: 12/28/1998 Off: 4 Page : 1
Total notices mailed: 4

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