

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION**

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| In re: |) | |
| |) | |
| Brokers, Inc., |) | Case No. 04-53451 |
| |) | |
| Debtor. |) | |
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**ORDER GRANTING BROKERS' MOTION
FOR PARTIAL SUMMARY JUDGMENT**

This matter came before the Court upon Brokers' Motion for Partial Summary Judgment on the claim of Hossein Ahmadi d/b/a H.B. Auto Sales for negligent damage to business equipment. Upon consideration of the motion, response, and other matters of record, the court makes the following findings of fact and conclusions of law:

Procedural History

On November 22, 2004, the Debtor filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code. Prior to the death of its principal and sole shareholder, Dolen Bowers ("Bowers"), the Debtor operated as a real estate holding, management and development company, and its assets consisted primarily of real estate located in Davidson, Guilford, Montgomery and Randolph County. Bowers died testate on June 6, 2003. After significant litigation regarding the ownership of the Debtor, Bowers' heirs entered into a settlement agreement acknowledging that the estate of Bowers (the "Bowers Estate") is the sole shareholder of the Debtor. On January 27, 2006, the court confirmed a plan of liquidation pursuant to which all claims have been or will be paid in full.

On April 13, 2005, Hossein Ahmadi d/b/a H.B. Auto Sales ("Ahmadi") filed a proof of

claim (the “Claim”) for a debt incurred on or about May 2002 in an unliquidated amount with a copy of a complaint attached. On April 27, 2005, the court entered an agreed order modifying the automatic stay for the limited purpose of permitting Ahmadi to file the complaint in state court in order to prevent the running of the applicable statutes of limitations and permitting Ahmadi to serve the complaint on the Debtor. The parties agreed that the Debtor was not required to file an answer or any other responsive pleading in state court, and that the matter would be litigated as a claim in the bankruptcy proceeding.

Accordingly, Ahmadi filed the complaint on April 29, 2005 against the Debtor in the North Carolina Superior Court, High Point Division, asserting claims for negligent damage to automobiles, trespass to personalty, punitive damages, and negligent damage to business equipment. In response, Brokers filed an objection to the Claim and this court entered a scheduling order, which was amended numerous times, setting deadlines for various pleadings and discovery. The complaint was amended on July 17, 2007 (the “Amended Complaint”), and a second scheduling order was entered. On October 15, 2007, the Debtor filed the present motion for partial summary judgment on Ahmadi’s claim for negligent damage to business equipment.

Summary Judgment Standard

The standard for summary judgment is set forth in Fed. R. Civ. P. 56, which is made applicable to this proceeding by Bankruptcy Rule 7056, and provides that the movant will prevail on a motion for summary judgment if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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.” Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). The party seeking summary judgment bears the burden of initially coming forward and demonstrating the absence of a genuine issue of material fact. *Id.* at 323. Once the moving party has met its burden, the non-moving party must then affirmatively demonstrate that there is a genuine issue of material fact which requires a trial. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Nevertheless, a mere scintilla of evidence is insufficient to withstand a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). A dispute about a material fact is genuine only if the evidence is such that a reasonable fact-finder could return a verdict for that party. *Id.* at 250; *Sylvia Dev. Corp. v. Calvert County, Md.*, 48 F.3d 810, 817 (4th Cir.1995). When making a summary judgment determination, the court must view the evidence, and all justifiable inferences from the evidence, in the light most favorable to the non-moving party. *Zahodnick v International Bus. Machs. Corp.*, 135 F.3d 911, 913 (4th Cir. 1997).

Factual Allegations

From 1993 to the fall of 2004, Ahmadi leased property from the Debtor, consisting of real property and a building located in Thomasville in Davidson County, North Carolina, (the “Premises”), upon which he operated his business of purchasing, reconditioning, and selling vehicles. During the occupation of the Premises by Ahmadi, the roof on the leased building leaked on numerous occasions. Despite complaints by Ahmadi, the Debtor failed to permanently remedy the situation. Ahmadi contends that the Debtor was negligent in damaging Ahmadi’s personal business property by failing to make, or properly supervise and conduct, proper repairs to the building as necessary in order to resolve continued leaking of water into the building. As

a result, Ahmadi alleges that he suffered damage to his business equipment by an amount in excess of \$10,000.00.

In support of this motion for partial summary judgment seeking dismissal of this claim, the Debtor presented evidence including the deposition testimony of Ahmadi, Hassan Ahmadi, Harvey Dean Deweese, Branson Hunt, and Christopher R. Leonard. In deposition testimony, Ahmadi stated that the roof on the leased building began to leak a couple of years after he moved onto the Premises, but that he could not remember exactly what year. Ahmadi testified that he complained about the roof to Bowers, but the roof was not properly fixed. Consequently, the roof began to leak again a few months after the repairs were made. Specifically, Ahmadi testified that “[a] couple of months down the road it started to leak. And the water would fall from the building, from the ceiling, would come to the floor.” (Ahmadi Dep. p.36). This sequence of events was repeated on numerous occasions during Ahmadi’s occupation of the Premises. Ahmadi testified that Bowers, acting on behalf of the Debtor, never refused to fix the building. (Ahmadi Dep. p.37). Whenever he complained about the leak, Bowers would send someone to fix it, but “he didn’t fix it right.” (Ahmadi Dep. p.37). When asked about the damage to his business property, Ahmadi testified “I’ve got all my office – office equipment, like a computer, fax machine, everything else. Because that place started, the water came, and the water it make mold.” (Ahmadi Dep. p.91)

As a result of the leaks, the overall condition of the building gradually worsened. Hassan Ahmadi, Ahmadi’s brother, testified that “water would accumulate,” and there was “mold all around the inside.” (Hassan Ahmadi Dep. p.117). Ahmadi’s computer, desk, and other office equipment were damaged. Hassan Ahmadi further testified that mold would grow on the sofa

because “underneath it was water - - water was there for years and years.” (Hassan Ahmadi Dep. p. 172). When Hassan Ahmadi was asked when the damage took place, he replied “when we were over there.” (Hassan Ahmadi Dep. p.175). He indicated that the damage took place “over time” and was unable to identify a specific date or the year in which the damage to the building or his property occurred. (Hassan Ahmadi Dep. p. 175).

The Debtor also presented the depositions of several former employees of the Debtor who had been on the Premises and in the building during the relevant time period. They testified to essentially the same facts. Branson Hunt described that the floors on the building fell in and water poured in from the roof, so Ahmadi moved his property “into corners and stuff.” (Branson Hunt Dep. p. 64-65). Harvey Dean Deweese described that the roof was caving in on the building such that “when it rained, you might as well carry your umbrella with you.” (Harvey Dean Deweese Dep. p. 88).

In response to the present motion for partial summary judgment by the Debtor, Ahmadi submitted an affidavit stating that he purchased his own building for his business in October 2002, and none of his business equipment was damaged prior to that time. The affidavit indicates that Bowers was angry that Ahmadi had purchased a new building, and, as a result, the Debtor did not fix leaks in the leased building after that time.

Discussion

Ahmadi filed his complaint asserting his claim for negligent damage to business equipment on April 29, 2005. The Debtor contends that this claim for negligent damage to business equipment is barred by the three year statute of limitations because some of the physical damage to Ahmadi’s property became apparent prior to April 29, 2002. N.C. Gen. Stat. § 1-52

provides that within three years an action:

(16) Unless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action, except in causes of actions referred to in G.S. 1-15(c), shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action

N.C. Gen. Stat. § 1-52(16). In interpreting this statute, the North Carolina Supreme Court has stated that “as soon as the injury becomes apparent to the claimant or should reasonably become apparent, the cause of action is complete and the limitation period begins to run. It does not matter that further damage could occur; such further damage is only aggravation of the original injury.” *Pembee Mfg. Corp. v. Cape Fear Constr. Co., Inc.*, 329 S.E.2d 350, 354 (N.C. 1985) (citations omitted). Nevertheless, where an injury or damage is separate and distinct from previous injuries, the limitation period will not begin to run until the date of that separate and distinct injury. *Harrison v. City of Sanford*, 627 S.E.2d 672, 676 (N.C. App. 2006).

In response to the Debtor’s motion, Ahmadi concedes that damage to the building leased by Ahmadi occurred prior to April 29, 2002, but contends that Ahmadi’s business property, such as the computer, sofa, and desk, was not damaged until at least October 2002. Ahmadi argues that since he did not own the building, the statute of limitations did not begin to run when the building was damaged. Rather, Ahmadi contends that there is ample evidence that the damage to the property that he owned occurred only within the statute of limitations period.

In this case, despite Ahmadi’s well-taken distinction between property he leased and property he owned, the Debtor is entitled to summary judgment. The court agrees with Ahmadi’s assertion that the relevant date is not when damage to the leased building became

apparent, but when damage to his personal property should have become apparent.

Nevertheless, the overwhelming evidence supports a finding that the damage to Ahmadi's property ought to reasonably have become apparent well before April 29, 2002. The evidence shows that the leased building began to leak in the mid-1990's and leaked for years and years. The building leaked to such an extent that the floor decayed and water would "pour" in from the roof. In his deposition, Ahmadi could not pinpoint exactly when the damage to his own property took place, but he clearly asserts that any damage to his property was a direct result of the leaking. It is undisputed that the leaking began around the year 1995, seven years prior to the statute of limitations bar date. Hassan Ahmadi testified that it took place "when we were over there" and that, as a result of the leaking, there was water underneath the sofa for "years and years" such that mold would grow. Thus, as the leaking was an ongoing problem, so too was the damage to Ahmadi's business property.

While the overwhelming majority of the evidence shows that the leased building had leaked since the mid-1990's to such an extent that water poured onto the floor, the only evidence that supports Ahmadi's contention that his business property was not damaged until October 2002 is his own affidavit so stating. This affidavit is inconsistent with all of deposition testimony presented. Even taken in the light most favorable to Ahmadi, no reasonable fact-finder could find that the damage to Ahmadi's property ought not to have become reasonably apparent prior to April, 2002. *See Sylvia Dev. Corp. v. Calvert County, Md.*, 48 F.3d 810, 818 (4th Cir.1995) (explaining that "[w]hether an inference is reasonable cannot be decided in a vacuum; it must be considered in light of the competing inferences to the contrary" (internal quotation marks omitted)).

Furthermore, as a general rule, a party may not overcome a motion for summary judgment by submitting an affidavit that conflicts with earlier deposition testimony to create a material issue of fact. *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984). “If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.” *Id.* at 961 (citations omitted). “A genuine issue of material fact is not created where the only issue of fact is to determine which of the two conflicting versions of the plaintiff’s testimony is correct.” *Id.*

In this instance, the affidavit presented to the court in response to the Debtor’s motion for summary judgment is inconsistent with Ahmadi’s previous deposition testimony. In his deposition, Ahmadi did not limit when the damage to his business property took place to any particular time period during his occupancy of the Premises. Nevertheless, in the affidavit submitted in response to the Debtor’s motion for summary judgment, Ahmadi stated that none of his business equipment was damaged prior to October, 2002. In his deposition Ahmadi testified the Debtor never refused to fix the leak and would send a repair man out each time Ahmadi complained. Yet, in his affidavit, Ahmadi indicates that Bowers became angry with him in 2002, and as a result, Brokers no longer repaired the leaks. The court finds that the affidavit submitted by Ahmadi in response to the Debtor’s motion is insufficient to create a genuine issue of material fact.

Based upon the foregoing, the court finds that Ahmadi’s claim for negligent damage to business equipment is barred by the applicable statute of limitations. As a result, Brokers’ Motion for Partial Summary Judgment on Hossein Ahmadi’s claim for negligent damage to

business equipment must be granted, and Ahmadi's claim for negligent damage to business equipment must be dismissed.

IT IS SO ORDERED.

SERVICE LIST

Hossein Ahmadi
5098 Tower Road
Greensboro, NC 27410-5218

Andrew Brown
301 N. Greene Street
Greensboro, NC 27401

Benjamin Kahn
P. O. Box 3463
Greensboro, NC 27408

Brokers, Incorporated
c/o Mark T. Preston
Suite 201-K
3410 Healy Drive
Winston-Salem, NC 27103

Paul A. Daniels
P. O. Box 1898
Greensboro, NC 27402-1898

Michael D. West
P. O. Box 1828
Greensboro, NC 27402