IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

K. JAMES CARPENTER	:	**CIVIL ACTION**
	:	
Plaintiff,	:	
vs.	:	**NO. 04-927**
	:	
RONALD DAVID ASHBY, WEICHERT CO. OF PENNSYLVANIA, and, KENNETH GOLDSTEIN	:	
Defendants.	:	

ORDER AND MEMORANDUM

O R D E R

AND NOW, this 4th day of December, 2006, upon consideration of Weichert Defendants' Motion for Summary Judgment (Document No. 98, filed August 11, 2006); Plaintiff K. James Carpenter's Response to Deny Weichert's Defendants/Goldstein Motion for Summary Judgment (Document No. 127, filed September 29, 2006); Weichert Defendant's Reply to Response to Motion for Summary Judgment (Document No. 129, filed October 10, 2006); Defendant Ashby's Motion for Summary Judgment (Document No. 87, filed June 27, 2006); and Plaintiff K. James Carpenter's Response to Deny Defendant Ronald David Ashby's Motion for Summary Judgment (Document No. 125, filed October 10, 2006), **IT IS ORDERED** as follows:

(1) The Motion of Defendants Weichert Company of Pennsylvania and Kenneth Goldstein for Summary Judgment (Document No. 98) is **GRANTED**;

(2) Defendant Ronald David Ashby's Motion for Summary Judgment (Document No. 87) is **GRANTED**;

(3) **JUDGMENT IS ENTERED** in **FAVOR** of defendants, Ronald David Ashby, Weichert Company of Pennsylvania, and Kenneth Goldstein, and **AGAINST** plaintiff, K. James Carpenter.

MEMORANDUM

Plaintiff, K. James Carpenter, originally filed this action against six defendants on March 2, 2004. Motions to Dismiss were granted as to three defendants by Orders dated August 3, 2004 and May 31, 2005. There are three remaining defendants: Weichert Co. of Pennsylvania, Kenneth Goldstein (collectively "the Weichert defendants"), and Ronald David Ashby. Plaintiff's sole remaining claim against defendant Ashby is that Ashby filed fraudulent documents in a bankruptcy action so as to deprive plaintiff of credit for mortgage payments in violation of 42 U.S.C. § 1981. Against the Weichert defendants, plaintiff's sole claim is that the Weichert defendants terminated his employment because he was involved in a bankruptcy proceeding and that termination for that reason violated 11 U.S.C. § 525.

After reviewing the parties' submissions and the record in this case, the Court grants defendants' motions for summary judgment and enters judgment in favor of defendants and against plaintiff.[1]

I. BACKGROUND[2]

This dispute stems from plaintiff's purchase of commercial real property in Media, Pennsylvania from Eva Winters Johnson in December 1994. Ms. Winters Johnson took back a note and mortgage in the amount of $150,000 to secure payment of the purchase price. The note and mortgage were to mature in January 2006 and the note was payable in monthly installments of $525.00, with a balloon payment due at maturity. The mortgage was reset by agreement following institution of a suit against plaintiff by Ms. Winters Johnson in 1997. Ms. Winters Johnson

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[1]In reaching its decision, the Court has construed *pro se* plaintiff's submissions liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972).

[2]The facts of the case were set forth in the Court's August 3, 2004 and May 31, 2005 opinions, and are repeated in this Memorandum as necessary to resolve the pending motions.

subsequently foreclosed on that mortgage in 2001 in the Court of Common Pleas of Delaware County.

On March 1, 2002, plaintiff first filed for Chapter 13 Bankruptcy in the Eastern District of Pennsylvania, Bankruptcy No. 02-13127. The bankruptcy action was voluntarily dismissed by plaintiff on January 23, 2003. Thereafter, on September 5, 2003, the Court of Common Pleas of Delaware County issued an order finding plaintiff delinquent in mortgage payments to Ms. Winters Johnson and directing plaintiff to execute a warranty deed transferring the disputed property to Ms. Winters Johnson. Five days later, plaintiff filed a second Chapter 13 bankruptcy case in the Eastern District of Virginia; that action was transferred to the Eastern District of Pennsylvania on December 18, 2003 upon the motion of Ms. Winters Johnson, Bankruptcy No. 03-38697F. This second bankruptcy action was dismissed by Bankruptcy Judge Bruce I. Fox on July 13, 2004 due to plaintiff's inability to propose a feasible Chapter 13 plan. In both bankruptcy actions, defendant Ashby represented Ms. Winters Johnson as a creditor of plaintiff.

Plaintiff began work as a real estate agent with Weichert Realty in December 1992. On or about October 22, 2002, defendant Goldstein terminated Weichert's relationship with plaintiff.

II. STANDARD OF REVIEW

A court should grant summary judgment 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." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). A "genuine" issue exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" when it "might affect the outcome of the suit under the governing law." Id.

"In determining the facts, the court should draw all reasonable inferences in favor of the nonmoving party." Id. at 255; Highlands Ins. Co. v. Hobbs Group, LLC, 373 F.3d 347, 351 (3d Cir. 2004). The nonmoving party, however, cannot rely merely upon bare assertions, conclusory allegations, or suspicions to support a claim. Fireman's Ins. Co. v. DuFresne, 676 F.2d 965, 969 (3d Cir. 1982); see also Anderson, 477 U.S. at 249-50 (stating that summary judgment must be granted if the evidence is "merely colorable" or "not significantly probative"). In a summary judgment motion, the moving party has the initial burden of identifying evidence which demonstrates the absence of a genuine issue of material fact. However, where the nonmoving party bears the burden of proof, it must "make a showing sufficient to establish the existence of [every] element essential to that party's case." Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp., 812 F.2d 141, 144 (3d Cir. 1987) (citing Celotex, 477 U.S. at 323-24).

III. WEICHERT DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff claims that the Weichert defendants terminated his employment because he was involved in a bankruptcy proceeding in violation of 11 U.S.C. § 525. As a result of this discriminatory action, plaintiff also argues that his homeowner's insurance coverage was terminated, and that he was not paid $4,000 in commissions.

As a threshold matter, the Court must determine whether the protections of 11 U.S.C. § 525 are available to plaintiff. Section 525(b) provides:

> (b) No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt, solely because such debtor or bankrupt
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> (1) is or has been a debtor under this title or a debtor or bankrupt under the Bankruptcy Act;
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> (2) has been insolvent before the commencement of a case under this title or during the case but before the grant or denial of a discharge; or
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> (3) has not paid a debt that is dischargeable in a case under this title or that was

discharged under the Bankruptcy Act.

The Supreme Court has ruled in United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241-42 (1989) that provisions of the Bankruptcy Code must be construed in accordance with the meaning of their plain language. See also, Laracuente v. Chase Manhattan Bank, 891 F.2d 17, 21 (1st Cir. 1989) ("In construing § 525(b), most courts have applied the plain meaning of the statute.").

The Weichert defendants argue that plaintiff was an independent contractor, and under the plain language of Section 525(b), independent contractors are not entitled to its protections. To support their argument that plaintiff was an independent contractor, the Weichert defendants point to, *inter alia*, the "Independent Contractor's Agreement," with plaintiff, which provides that "the Company [Weichert] retains Sales Associate [Carpenter] as an independent contractor," [3] Goldstein Aff., Ex. A, and the affidavit of defendant Kenneth Goldstein, in which he avers that "at all times plaintiff controlled his own work," explaining that "Weichert did not direct him what to do, when to do it, where to go, or which clients to see. Moreover, Weichert did not tell plaintiff when to begin work, when to stop work, when to take lunch, or when to take vacation." Goldstein Aff. ¶ 9. See Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (enumerating factors to consider in determining independent contractor status); Verdecchia v. Douglas A. Prozan, Inc., 274 F. Supp. 2d 712, 720 (W.D. Pa. 2003) (holding that, when determining whether someone is an independent

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[3]The Agreement further provides:

> The parties agree that the relationship between them is that of independent contractors, not that of employment, agency, Partnership, or otherwise whatsoever and, specifically, but without limitation, the Company shall not be liable for the acts of Sales Associate, except as specifically required by law. For federal tax purposes Sales Associate shall not be treated as an employee with respect to the services performed hereunder.

Goldstein Aff., Ex. A.

contractor, "the greatest emphasis is placed on the hiring party's right to control the manner and means by which the work is accomplished").

Although some courts have refused to apply 11 U.S.C. § 525 to independent contractors, see, e.g., In re Hardy, 209 B.R. 371 (Bankr. E.D. Va. 1997); Kepple v. Miller, 572 S.E. 2d 687 (Ct. App. Ga. 2002), there is contrary authority, see, e.g., In re McNeely, 82 B.R. 628 (Bankr. S.D. Ga. 1987); 2 Collier Bankruptcy Manual P 525.03 (3d. Ed. Rev. 1997). This Court need not decide that issue because assuming, *arguendo*, that 11 U.S.C. § 525 were to be deemed applicable to independent contractors, plaintiff's claim must fail because he has presented absolutely no evidence that the Weichert defendants terminated its relationship with him solely because he filed a petition in bankruptcy.

To prevail on a claim under 11 U.S.C. § 525, a plaintiff must prove that his bankruptcy filing provided the *sole* reason for his termination. White v. Kentuckiana Livestock Market, Inc., 397 F.3d 420, 426-27 (6th Cir. 2005) (rejecting a § 525 claim when another factor existed for the termination); Corneaux v. Brown & Williamson Tobacco Co., 915 F.2d 1264, 1268-69 (9th Cir. 1990) (holding that "in order to maintain a cause of action under section 525(b), a plaintiff must show that [his bankruptcy filing] provided the sole reason for termination"); Laracuente, 891 F.2d at 21-23 (holding that "a fundamental element of a § 525(b) claim is that . . . the filing of bankruptcy . . . is the sole reason for discriminatory treatment by an employer"); Cipolla v. HMS Host Corp., No. 04-2646, 2005 U.S. Dist LEXIS 24997, *11-12 (D.N.J. Oct. 20, 2005) ("Plaintiff must show that his bankruptcy filing provided the 'sole reason' for termination."). In Cipolla, the District of New Jersey granted an employer's motion for summary judgment when the plaintiff provided no direct evidence that plaintiff's bankruptcy was the sole reason for the termination decision. 2005 U.S. Dist LEXIS 24997, at *12-13 ("Plaintiff provides neither testimony nor

documentation that he was terminated for his bankruptcy and proffers no motive.").

As in Cipolla, plaintiff has presented no evidence that his bankruptcy was a motivating factor in his termination let alone the sole reason for the termination. Defendant Goldstein stated in an affidavit attached to the Weichert defendants' Motion that "[t]he fact that plaintiff had supposedly filed for bankruptcy played no role whatsoever in my decision to terminate his independent contractor relationship with Weichert. To the contrary, I was not even aware that plaintiff had filed for bankruptcy at the time I terminated the relationship." Goldstein Aff. ¶ 19; see also Letter from Kenneth Goldstein to Kenneth Carpenter, October 22, 2002, Goldstein Aff., Ex. C (stating that termination was related to plaintiff's "attitude more than any other factor."). Plaintiff's bare allegations that his termination was motivated by his bankruptcy filing are insufficient to withstand a motion for summary judgment. Fireman's Ins. Co., 676 F.2d at 969. Accordingly, as plaintiff has demonstrated no genuine issue of material fact as to whether his bankruptcy was the sole reason for his termination, the Court grants the Weichert defendants' Motion for Summary Judgment.

IV. DEFENDANT ASHBY'S MOTION FOR SUMMARY JUDGMENT

Plaintiff alleges that defendant Ashby discriminated against him by submitting fraudulent pleadings in the 2003 bankruptcy proceeding in violation of 42 U.S.C. § 1981. The Court grants defendant Ashby's Motion for Summary Judgment on the ground that plaintiff has failed to prove any intent to discriminate on the basis of race by defendant Ashby, an essential element of plaintiff's § 1981 claim.

The Court, in its Order and Memorandum on May 31, 2005, stated that "with respect to a § 1981 claim, a plaintiff must allege that (1) he is a member of a racial minority; (2) intent to discriminate on the basis of race by the defendant; and (3) discrimination concerning one or more of

the activities enumerated in the statute." Carpenter v. Ashby, No. 04-927, 2005 WL 1364787, *6 (E.D. Pa. May 31, 2005) (citing Brown v. Phillip Morris, Inc., 250 F.3d 789, 797 (3d Cir. 2001)). Reading plaintiff's Complaint liberally, the Court concluded that plaintiff's Complaint plead the necessary elements of this claim, but noted "serious doubts concerning plaintiff's ability to maintain this § 1981 claim at later stages of this case." Id. at *7.

In his response to the Motion for Summary Judgment, plaintiff states that "Its [sic] no secret if plaintiff were a white male defendant Ashby would never have attempted to defraud that person of his rightful ownership of properties." Pl.'s Resp. at 2. The Third Circuit has advised that:

> An issue of material fact is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Consequently, a plaintiff may not simply rest upon his bare allegations to require submitting the issue to a jury; rather he must present significant probative evidence tending to support the complaint.

In re Phillips Petroleum Sec. Litig., 881 F.2d 1236, 1243 (3d Cir. 1989) (citations omitted).

Plaintiff has presented no "significant probative evidence" to demonstrate that any actions by defendant Ashby were motivated by racial animus. The bare allegation that plaintiff's race was a motivating factor is simply insufficient to defeat a motion for summary judgment. See id. (explaining that once the moving party demonstrates that "the non-movant has failed to introduce evidence supporting a necessary element of his case . . . the burden then shifts to the non-movant to identify which portions of the record support the allegedly unsupported element"). As such, the Court grants defendant Ashby's Motion for Summary Judgment on the ground that there is no genuine issue of material fact as to the claim that defendant Ashby's alleged filing of forged documents was motivated by racial animus. In view of this determination the Court does not reach the question whether defendant Ashby filed any fraudulent documents.

V. DISCOVERY ABUSES

Defendants raise serious allegations of discovery abuses by plaintiff in their summary judgment motions. The primary abuses detailed by both defendants are: plaintiff's repeated failure to appear at noticed depositions, plaintiff's failure to respond to defendants' requests for production of documents, and plaintiff's failure to provide fully responsive answers to defendants' interrogatories. As a consequence, defendants ask the Court to dismiss the case on that ground.

The Court is troubled by the allegations of discovery abuse. Nevertheless, it need not address the issue in view of its decision to grant the two motions for summary judgment on the ground that plaintiff has failed to demonstrate a genuine issue of material fact.

VI. CONCLUSION

For the foregoing reasons the Court grants the Weichert Defendants' Motion for Summary Judgment and Defendant Ashby's Motion for Summary Judgment and enters judgment in favor of those defendants and against plaintiff, K. James Carpenter.

BY THE COURT:

/s/ Honorable Jan E. DuBois

JAN E. DUBOIS, J.