

2-3-06

UNITED STATES BANKRUPTCY COURT
 NORTHERN DISTRICT OF GEORGIA
 NEWNAN DIVISION

IN THE MATTER OF:	:	CASE NUMBERS
	:	
TERRANCE OWENS,	:	BANKRUPTCY CASE
	:	NO. 04-17420-WHD
Debtor.	:	
_____	:	
	:	
ORLANDERS LOONEY	:	
	:	
Plaintiff,	:	ADVERSARY PROCEEDING
	:	NO. 05-1706
v.	:	
	:	
TERRANCE OWENS,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Defendant.	:	BANKRUPTCY CODE

ORDER

Before the Court is the Motion for Summary Judgment filed by Terrance Owens (hereinafter the "Debtor") in the above-captioned adversary proceeding. Also before the Court is the Cross-Motion for Partial Summary Judgment and the Motion for Contempt of Court and Discovery Sanctions, filed by Orlanders Looney (hereinafter the "Plaintiff"). These motions arise in connection with an objection to the Debtor's discharge and a complaint to determine the dischargeability of a debt filed by the Plaintiff, both of which constitute core proceedings over which this Court has subject matter jurisdiction. *See* 28 U.S.C. §§ 157(b)(2)(I)-(J); § 1334.

BACKGROUND

The Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code on August 31, 2004. On November 3, 2004, the matter of confirmation of the Debtor's Chapter 13 plan came before the Court. At that time, the Chapter 13 Trustee objected to confirmation and requested dismissal pursuant to section 109(g). An order dismissing the Debtor's case was entered on November 5, 2004. On November 8, 2004, the Debtor filed a motion for reconsideration of the dismissal order, stating that he had not realized at the time of the confirmation hearing that he could have sought conversion of his case to Chapter 7. Because the Court would most likely have granted such a request had the Debtor made it at the call of the confirmation hearing, the Court granted the Debtor's motion, vacated the dismissal order, and converted the Debtor's case to Chapter 7. *See* Docket Number 16, Order Granting Motion for Reconsideration, November 9, 2004.

The Plaintiff owns real property located at 110 Monmouth Drive, Fayetteville, Georgia (hereinafter the "Property"). The Plaintiff alleges that the Debtor and the Plaintiff executed a lease agreement on February 1, 2001 (hereinafter the "Lease"), under which the Debtor was to occupy the Property as a tenant for a term of one year in exchange for monthly rent of \$865. The Plaintiff further asserts that the Debtor executed the lease agreement without any intent to pay rent and, in fact, paid rent for only three months before ceasing to pay any further rent payments. According to the complaint, the Plaintiff began three separate dispossessory proceedings in Fayette County Magistrate

Court, received a writ of possession at the conclusion of each of the proceedings, and received judgments against the Debtor for unpaid rent and attorney's fees. The Debtor filed a previous voluntary petition under Chapter 13 on July 23, 2004 (case number 04-17372). The Debtor voluntarily dismissed that case on August 16, 2004, prior to confirmation. According to the complaint, after the dismissal of the Debtor's first bankruptcy case, the Debtor appealed the magistrate court's entry of the writ of possession, and, on the day that the writ of possession would have become enforceable, the Debtor filed his second Chapter 13 petition, which he later converted to Chapter 7.

The Plaintiff also asserts that, although the Debtor testified at the first meeting of creditors that he operated a business at the Property, the Debtor failed to disclose any interest in a business or any income received from a business in his Schedules and Statement of Financial Affairs. The complaint alleges that the Debtor also made false statements to the Court about the Chapter 13 Trustee in his motion for reconsideration regarding the circumstances of the dismissal of his case in order to persuade the Court to vacate the dismissal and allow the Debtor to convert to Chapter 7. Specifically, Plaintiff asserts that the Debtor falsely stated that the Chapter 13 Trustee's representative informed him that the Court would not allow the Debtor to convert his case to Chapter 7 and that she advised him to leave the confirmation hearing prior to the Court's taking the bench. Finally, the Plaintiff alleges that the Debtor made false statements in his Schedules and Statement of Financial Affairs, which were filed following the conversion

of his case to Chapter 7.

The Plaintiff seeks a denial of the Debtor's discharge pursuant to section 727(a)(4)(A) and (B) on the basis that the Debtor knowingly and fraudulently made a false oath and presented a false claim in connection with his bankruptcy case and failed to disclose all of his assets and financial information on his Schedules and Statement of Financial Affairs. The Plaintiff also objects to the Debtor's discharge pursuant to section 727(a)(5) on the basis that the Debtor has failed to satisfactorily explain the fact that he has no assets, despite the fact that he has occupied the Property for three years without paying any rent. Alternatively, the Plaintiff seeks denial of the Debtor's discharge on the general basis that the Debtor filed his second bankruptcy case in bad faith. Finally, the Plaintiff seeks a determination that the unpaid rent owed by the Debtor is nondischargeable under section 523(a)(2)(A) because the Debtor made false statements to the Plaintiff to induce him to lease the Property to the Debtor.

The Debtor filed what he has captioned a motion for summary judgment. It appears that the motion seeks judgment only as to the section 523(a)(2)(A) count of the complaint, as the motion does not appear to address the objection to his discharge. In response, the Plaintiff opposes the Debtor's motion for summary judgment and seeks partial summary judgment in his own favor. Further, the Plaintiff has filed a motion for a finding that the Debtor is in contempt of this Court's previous order compelling the Debtor to respond to the Plaintiff's discovery requests.

CONCLUSIONS OF LAW

A. *Debtor's Motion for Summary Judgment*

In accordance with Federal Rule of Civil Procedure 56 (applicable to bankruptcy under FED. R. BANKR. P. 7056), this Court will grant summary judgment only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if it might affect the outcome of a proceeding under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The moving party has the burden of establishing the right of summary judgment, *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991); *Clark v. Union Mut. Life Ins. Co.*, 692 F.2d 1370, 1372 (11th Cir. 1982), and the Court will read the opposing party's pleadings liberally. *Anderson*, 477 U.S. at 249.

In determining whether a genuine issue of material fact exists, the Court must view the evidence in the light most favorable to the party opposing the motion. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Rosen v. Biscayne Yacht & Country Club, Inc.*, 766 F.2d 482, 484 (11th Cir. 1985). The moving party must identify those evidentiary materials listed in Rule 56(c) that establish the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *see also* FED. R. CIV. P. 56(e). Once the motion is supported by a *prima facie* showing that the moving

party is entitled to judgment as a matter of law, the party opposing the motion must go beyond the pleadings and demonstrate the existence of a material issue of fact that precludes summary judgment. *Celotex*, 477 U.S. at 324.

In this case, the Debtor has identified no admissible evidence to establish the absence of a genuine issue of material fact. As the Court stated in its order denying the Debtor's previous motion to dismiss, the Plaintiff's complaint makes allegations that, if proven, would result in a finding that the debt owed is nondischargeable. Specifically, the Plaintiff has alleged that the Debtor entered the Lease without the subjective intent to pay rent and with the intent to defraud the Plaintiff. The issues of whether the Debtor actually entered the Lease, whether he intended to pay rent at that time, and whether he actually paid rent are all factual issues that require the Court to consider evidence.

The Debtor has not presented any admissible evidence to refute the Plaintiff's factual allegations. The Debtor has attached several documents to his motion as exhibits. However, simply attaching documents to a motion for summary judgment is not a proper method of submitting evidence for the Court's consideration for this purpose. *See* FED. R. CIV. P. 56(e); *see also In re Harris*, 209 B.R. 990 (Bankr. 10th Cir. 1997) (although Rule 903 of the Federal Rules of Evidence obviates the need for the testimony of a subscribing witness to authenticate a writing, Rule 903 does not completely obviate the need for the authentication of the document); *In re Walton*, 158 B.R. 948, 951 (Bankr. N.D. Ohio 1993) ("[D]ocuments ... [that] are not part of the pleadings, depositions,

answers to interrogatories, and admissions on file, can only enter the record as attachments to an appropriate affidavit to constitute a basis for summary judgment'''); *In re Oody*, 249 B.R. 482, 488 n.7 (Bankr. E.D. Tenn. 2000).

As the movant, the Debtor has the burden of showing that, under the undisputed facts of the case, the Debtor is entitled to judgment as a matter of law. The Debtor has not done so. For this reason, summary judgment would be inappropriate at this time and the Debtor's motion must be denied.

B. Plaintiff's Cross-Motion for Partial Summary Judgment

In his response to the Debtor's motion for summary judgment, the Plaintiff seeks summary judgment as to the section 727(a)(4) and (a)(5) claims (objection to discharge) and the section 523(a)(2)(A) claim (non-dischargeability due to fraud). In support of this motion, the Plaintiff asserts that the necessary facts to support these claims have been admitted by the Debtor as a consequence of his failure to respond to the Plaintiff's request for admissions.

1. *Section 523(a)(2)(A)*

The Court has considered the admissions that the Plaintiff contends have been admitted. Even considering the facts to have been established, the Plaintiff has failed to establish that the Debtor's promise to pay rent was fraudulent at the time it was made. It

is well established that the failure to perform a promise is not a sufficient basis for determining that a resulting debt is nondischargeable due to fraud. *See In re Lane*, 50 F.3d 1 (1st Cir. 1995). Accordingly, summary judgment as to the section 523(a)(2)(A) would be inappropriate at this time.

2. Section 727(a)

As to the section 727 claims, when proceeding under section 727, the plaintiff bears the burden of demonstrating that a denial of discharge is warranted. *See* FED. R. BANKR. P. 4005; *see also In re Wines*, 997 F.2d 852, 856 (11th Cir. 1993). The plaintiff must satisfy this burden by a preponderance of the evidence. *Peterson v. Scott (In re Scott)*, 172 F.3d 959, 966-67 (7th Cir. 1999); *United States v. Hindenlang (In re Hindenlang)*, 164 F.3d 1029, 1034 (6th Cir. 1999); *Farouki v. Emirates Bank Int'l Ltd.*, 14 F.3d 244, 249 (4th Cir. 1994). Furthermore, the Court must interpret the applicable provisions of section 727 narrowly, so as to favor a presumption of the debtor's eligibility for a discharge. *Rosen v. Bezner*, 996 F.2d 1527, 1531 (3d Cir. 1993); *In re Burgess*, 955 F.2d 134, 136 (1st Cir. 1992); *Boroff v. Tully (In re Tully)*, 818 F.2d 106, 110 (1st Cir. 1987). "Completely denying a debtor his discharge, as opposed to avoiding a transfer or declining to discharge an individual debt . . . is an extreme step and should not be taken lightly." *Rosen*, 996 F.2d at 1530; *cf. Dilworth*, 69 F.2d at 624 ("[t]he reasons for denying a discharge to a bankrupt must be real and substantial, not merely

technical and conjectural”). Additionally, litigation seeking the denial of the debtor’s discharge under section 727 is rarely amenable to resolution at the summary judgment stage. *See United States v. Lenard (In re Lenard)*, 140 B.R. 550, 555 (D. Colo. 1992) (summary judgment is “particularly problematic” under section 727 since the issues “often require inquiry into the debtor’s state of mind or justification for his actions, necessitating explanatory testimony by the debtor and an assessment of his demeanor and credibility”).

With respect to section 727(a)(4), the plaintiff has the burden of proving that (1) the debtor knowingly made a false statement under oath or "presented or used a false claim"; (2) the statement is material to the bankruptcy proceeding; and (3) the debtor made the statement with a fraudulent intent. *Beaubouef v. Beaubouef (In re Beaubouef)*, 966 F.2d 174, 177-78 (5th Cir. 1992). For this purpose, a statement made in the debtor's bankruptcy schedules is considered an oath. *See id.*

In this case, the Plaintiff contends that the Debtor made a false statement in his bankruptcy schedules by failing to disclose the operation of a business or any business income. However, the Court has no evidence before it that the Debtor operated a business or earned any income that he would have been required to disclose. For this reason, the Court cannot find that the Plaintiff has established by a preponderance of the evidence that the Debtor made a false oath in his schedules and summary judgment is inappropriate as to this claim.

The Plaintiff also alleges that the Debtor presented a false claim within the meaning of section 727(a)(4)(B). "To deny a debtor's discharge under Section 727(a)(4)(B), the debtor must have presented or used an inflated or fictitious claim in a bankruptcy case, with intent to defraud." *In re Gollomp*, 198 B.R. 433, 439 (S.D.N.Y. 1996) (citing *In re Natale*, 136 B.R. 344, 349 (Bankr.E.D.N.Y.1992); *In re Overmyer*, 121 B.R. 272, 282 (Bankr.S.D.N.Y.1990)). A "false claim" is not the equivalent of an assertion, representation, or statement. *See In re Gorchev*, 275 B.R. 154, 164 (Bankr. D. Mass. 2002); *In re Garcia*, 168 B.R. 403, 407 (D. Ariz. 1992); *In re Parnes*, 200 B.R. 710 (Bankr. N.D. Ga. 1996) (Bihary, J.). For purposes of section 727(a)(4)(B), a "claim" is a "right to payment" or a "right to an equitable remedy for breach of performance if such breach gives rise to payment." *Id.* (citing 11 U.S.C. § 101(5)); *see also In re Kline*, 48 B.R. 581 (Bankr. E.D. Tenn. 1985) (debtor accused of filing a false proof of claim on behalf of a creditor); *In re Pope*, 18 B.R. 125 (Bankr. S.D. Fla. 1982) (debtor accused of scheduling a debt that did not exist); *In re Woerner*, 66 B.R. 964 (Bankr. E.D. Pa. 1986) (same).

In this case, the Plaintiff relies on the Debtor's statement to the Court regarding his conversation with the Chapter 13 Trustee's attorney and the Clerk's office as a basis for finding that the Debtor presented a false claim. The Debtor's statement is not a "claim" within the meaning of section 727(a)(4)(B) and therefore cannot support a cause

of action under that statutory provision.¹

Finally, the Plaintiff alleges that the Debtor has failed to satisfactorily explain the loss or deficiency of his assets and should therefore be denied a discharge under section 727(a)(5). The Plaintiff points to the fact that the Debtor listed no assets in his bankruptcy schedules, despite the fact that he has, according to the Plaintiff, lived rent free for several years.

Section 727(a)(5) provides that the court shall grant the debtor a discharge unless "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." 11 U.S.C. § 727(a)(5). "Under § 727(a)(5), the plaintiff has the initial burden of identifying the assets in question by appropriate allegations in the complaint and showing that the debtor at one time had the assets but they are no longer available for the debtor's creditors Once the creditor has introduced some evidence

¹ This statement is not a "false oath or account" within the meaning of section 727(a)(4)(A). "Statements which are not under oath or formally verified" do not constitute a false oath or account for purposes of section 727(a)(4)(A). *See In re Kunec*, 27 B.R. 650, 652 (Bankr. D. Pa. 1982). The Debtor made this statement in a motion to reconsider, which the Debtor signed and filed with this Court. However, the Debtor did not sign the motion under penalty of perjury or otherwise verify the pleading. The Debtor was not required to do so, as only petitions, lists, schedules, statements and amendments thereto" must be signed under penalty of perjury or verified. FED. R. BANKR. P. 1008; *see also* FED. R. BANKR. P. 9011. Assuming that the Debtor did in fact lie to the Court in his motion, the Debtor may be subject to sanctions for violating Rule 9011, but his discharge is not subject to denial under section 727(a)(4)(A).

of the disappearance of substantial assets, the burden shifts to the Debtor to explain satisfactorily the losses or deficiencies.” *In re Brien*, 208 B.R. 255 (Bankr. 1st Cir. 1997); *see also In re Silverstein*, 151 B.R. 657 (Bankr. E.D.N.Y. 1993). The debtor is merely required to provide a satisfactory explanation of what happened, and is not required to put forth a satisfactory explanation as to why it happened. *Id.* at 663.

The Plaintiff has not satisfactorily shown that the Debtor had assets, let alone substantial assets, that have disappeared.² Accordingly, the burden has not shifted to the Debtor to explain the loss of those assets, and the Plaintiff must await trial to establish his right to a judgment on this claim.

3. *General Allegations of Bad Faith*

The Plaintiff also seeks summary judgment on his claim that the Court should deny the Debtor's discharge as a sanction for the Debtor's general bad faith in filing and prosecuting his bankruptcy case. The Plaintiff asserts that the Court has the power to dismiss the Debtor's case for bad faith and, accordingly, the Court can deny the Debtor's discharge on this basis.

The Plaintiff is correct in his assertion that the Court can dismiss a debtor's

² The only evidence of income or assets submitted to the Court is the Debtor's tax returns. The tax returns are not accompanied by an affidavit and therefore cannot be considered by the Court on a motion for summary judgment. Even if the Court could consider the tax returns, the returns, which show very modest income earned by two individuals with two dependents, without more, is insufficient to meet the Plaintiff's evidentiary burden.

Chapter 7 case for "cause." 11 U.S.C. § 707(a). Such cause can include, but is not limited to, "unreasonable delay by the debtor that is prejudicial to creditors." *Id.* Courts do not agree on the question of whether the debtor's bad faith in filing a bankruptcy case is sufficient grounds for dismissal under section 707(a). *Compare In re Padilla*, 222 F.3d 1184, 1191 (9th Cir. 2000) (bad faith is not a ground for dismissal under section 707(a)), with *In re Zick*, 931 F.2d 1124, 1126 (6th Cir. 1991) (bad faith is a basis for dismissal under section 707(a)). While the allegation that the Debtor relied on false statements of fact in his motion for reconsideration in order to persuade the Court to vacate the dismissal of his Chapter 13 case and permit his conversion to Chapter 7 may be a proper basis for dismissal of his Chapter 7 case, this adversary proceeding is not the appropriate procedural vehicle in which to seek such a dismissal.

In accordance with Rule 1017(a), a Chapter 7 "case shall not be dismissed . . . for . . . other cause . . . before a hearing on notice as provided in Rule 2002." FED. R. BANKR. P. 1017(a). Rule 2002(a)(4) provides that the Court may not hear a motion to dismiss a Chapter 7 case without providing 20 days' notice of the hearing to "the debtor, the trustee, all creditors and indenture trustees." FED. R. BANKR. P. 2002(a)(4). Should the Plaintiff file a motion to dismiss the Debtor's bankruptcy case in the main bankruptcy case, the Court would set the matter for a hearing and consider the evidence presented at that time.

C. Plaintiff's Motion for Contempt and For Discovery Sanctions

On October 21, 2005, the Court entered an order granting in part the Plaintiff's Motion to Compel Discovery. In that Order, the Court directed the Debtor to be more specific in answering interrogatory number 19 regarding a bartering arrangement in which his employer provided him with lodging and, additionally, directed the Debtor to disclose the approximate value of the goods received in exchange for his services. The Court also directed the Debtor to produce tax returns to the extent he has the legal or practical ability to obtain copies of the tax returns or transcripts from the Internal Revenue Service. The Court warned the Debtor that the Court expected the Debtor's cooperation with discovery matters and that more drastic sanctions would be employed if he failed to comply with the Court's Order. On November 29, 2005, the Plaintiff filed the instant motion for contempt, in which he seeks the imposition of discovery sanctions.

The Plaintiff argues that the Debtor's production of his tax returns does not comply with the Court's October 21st Order because the tax returns are not complete. Apparently, the Plaintiff's main complaint is that the Debtor did not provide copies of his W-2s or 1099s. The Court can understand that the Debtor may not have interpreted the Court's Order to require the production of these documents. For that reason, the Court will not sanction the Debtor. However, the Court sees the need for the Plaintiff to have access to these documents and **hereby orders the Debtor to produce the full copies of the tax returns, including schedules and W-2s or 1099s, as filed with the Internal**

Revenue Service. If these documents are not in the Debtor's possession, the Debtor can obtain copies of these documents from the Internal Revenue Service.³

Additionally, the Plaintiff argues that the Debtor's amended response to Plaintiff's interrogatory number 19 is insufficient. It appears to the Court that the Debtor has made an attempt to comply with the Court's direction in being more specific about the nature of his income. However, the Court agrees that the amended response still does not provide enough detail regarding his non-cash income. **The Debtor shall provide the Plaintiff with a break down of exactly what items or services are provided to the Debtor each month in exchange for his services and the value of these items or services. If the Plaintiff does not already know this information, the Debtor shall also provide the name and address of any entity providing such items or services.**

CONCLUSION

For the reasons stated above:

The Debtor's Motion for Summary Judgment is **DENIED**.

The Plaintiff's Cross-Motion for Partial Summary Judgment is **DENIED**.

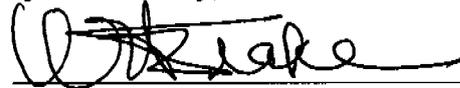
The Plaintiff's Motion for Contempt and For Discovery Sanctions is **DENIED**.

³ See IRS Official Form 4506. Note that the instructions to the form indicate that only the signature of one spouse is required to receive a copy of joint returns.

IT IS FURTHER ORDERED that the Debtor shall comply with the Court's additional orders with regard to discovery on or before March 10, 2006.

IT IS ORDERED.

At Newnan, Georgia, this 3 day of February, 2006.



W. HOMER DRAKE, JR.

UNITED STATES BANKRUPTCY JUDGE