



IT IS ORDERED as set forth below:

Date: April 18, 2008

**Paul W. Bonapfel
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN THE MATTER OF:	:	CASE NUMBER: A07-72309-PWB
	:	
CECELIA LOU DORSEY,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Debtor.	:	BANKRUPTCY CODE
_____	:	
	:	
NATIONAL INCOME TAX SERVICE,	:	
INC.,	:	
	:	
Plaintiff	:	ADVERSARY PROCEEDING
	:	NO. 07-6666
v.	:	
	:	
CECELIA LOU DORSEY,	:	
	:	
Defendant.	:	

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

National Income Tax Service (the “Plaintiff”) seeks denial of the Debtor’s discharge pursuant to 11 U.S.C. §§ 727(a)(2) and (a)(4) and, based upon the Debtor’s failure to file an answer, requests that the Court enter judgment against the Debtor. The Plaintiff’s motion [Doc.

No. 4] is titled "Motion for Summary Judgment," and the body of the motion requests entry of both summary judgment and default judgment against the Debtor on the objection to discharge. For the reasons set forth herein, the Plaintiff's motion is denied.

A review of the complaint, the Plaintiff's motion, and the record in this case reveals certain procedural problems. First, the Plaintiff has failed to set forth whether this proceeding is core or non-core. *See* FED. R. BANKR. P. 7008(a). Second, the complaint and summons have not been properly served. The certificate of service attached to the complaint states that the Plaintiff's counsel served a copy of the summons and complaint upon the Debtor by U.S. Mail on November 19, 2007, which is an impossibility since the complaint was not filed and *the summons was not issued until November 20, 2007*. Moreover, this certificate of service reflects no service upon the Debtor's attorney as required by FED. R. BANKR. P. 7004(g). The Plaintiff's motion for summary judgment further complicates matters by stating that the Debtor and the Debtor's attorney were served with a copy of the summons and the complaint on November 13, 2007. This apparently makes reference to the date on which the Plaintiff wrongly filed an objection to discharge in the Debtor's main case (apparently unaware that an adversary proceeding was required). Regardless, it is patently incorrect since no summons was issued by the Clerk's office on November 13, 2007.¹

¹In addition, there are other procedural problems. In seeking summary judgment, BLR 7056-1(a)(1), NDGa, requires the movant to attach to the motion a separate and concise statement of the material facts, numbered separately, as to which the movant contends no genuine issue exists to be tried. Further, BLR 7007-1 requires the filing of a memorandum of law in support of the motion, as well as affidavits, to the extent allegations of fact not otherwise in the record are relied upon. The Plaintiff has failed to satisfy these requirements. With respect to entry of default judgment, Rule 55(b)(2) of the Federal Rules of Civil Procedure (applicable under FED. R. BANKR. P. 7055) states "a default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared." In addition, the Servicemember's Civil Relief Act, 50 App. U.S.C. § 501 *et seq*, requires a plaintiff seeking default judgment to file an affidavit indicating whether the defendant is or is not in the military service or that the plaintiff is unable to determine the defendant's military status. The

The more fundamental problem of the Plaintiff's complaint is whether its two counts state claims for relief under 11 U.S.C. §§ 727(a)(2) and (a)(4). The Plaintiff alleges that the Debtor was unable to make her \$1,600 per month mortgage payments on property located at 1121 Third Street, Stone Mountain, Georgia (the "Property"). The parties entered an agreement whereby the Debtor executed a warranty deed conveying the Property to Plaintiff on April 17, 2007, and Plaintiff agreed to pay the past due mortgage balance, with the Debtor leasing the Property back from the Plaintiff for \$1,300 per month for twelve months. The Plaintiff alleges that, after the Debtor failed to make payments for June, July and August 2007, the Debtor filed this bankruptcy case on the eve of eviction proceedings commenced by the Plaintiff.

The Plaintiff seeks denial of the Debtor's discharge pursuant to § 727(a)(2) on the theory that the Debtor engaged in an intentional scheme to "hinder, delay or defraud" the Plaintiff by inducing the Plaintiff to enter into a transaction in which the Debtor transferred the Property with the intent to retain possession of the Property and live there rent free. While the Plaintiff contends that the Debtor's retention of possession of the Property and subsequent default on a rental agreement is an indicia of fraud, the Court cannot conclude that this is sufficient to warrant denial of a discharge.

A debtor's retention of possession of transferred property may be a badge of fraud. *E.g.*, *Salomon v. Kaiser (In re Kaiser)*, 722 F.2d 1574 (2d Cir. 1983) (insolvent debtor's transfer of property to his wife while retaining the use of the property was a badge of fraud). This is because the transfer of the asset (presumably of value) to someone for no consideration while the debtor retains the ability to fully use the asset suggests that the debtor is attempting to prevent collection

Plaintiff has failed to file an affidavit setting forth that the Debtor does not fall within any of these delineated groups.

efforts by creditors. Here, however, the Plaintiff contends that the Debtor's transfer of the Property to the Plaintiff was an act to hinder, delay, or defraud the Plaintiff. This badge of fraud does not apply in this circumstance and provides no basis for inferring or even suspecting fraudulent intent. Even assuming that the Debtor failed to make the rental payments as agreed, the Plaintiff received consideration by receiving a warranty deed to the Property.

The complaint also alleges that the Debtor transferred the property to the Plaintiff with actual fraudulent intent and that she "devised a scheme to defraud [the Plaintiff] into believing it would receive monthly rental income of \$1,300.00 until February 28, 2008 if it accepted the Warranty Deed." (Complaint, ¶ 10). Arguably, these allegations, if supported by proper proof, could form the basis for a conclusion that the debt for rent is excepted from discharge under 11 U.S.C. § 523(a)(2). But the objection here is to discharge, not dischargeability of the debt, so the Court need not address this tenuous position. The focus of the discharge objection is transfer of an asset with an intent to defraud creditors generally, not an individual creditor, and there are no allegations that such a generalized intent existed. Thus, the Court concludes that the facts set forth in the complaint, with respect to the transfer of the Property, do not establish an entitlement to relief under § 727(a)(2).

In addition, the Plaintiff seeks denial of the discharge under § 727(a)(4)(A) because she "knowingly and fraudulently, in or in connection with the case made a false oath or account." Because a debtor signs her petition and schedules under penalty of perjury, a false statement or omission of information from the debtor's petition is a false oath within the meaning of 11 U.S.C. § 727(a)(4)(A). *Chalik v. Moorefield (In re Chalik)*, 748 F.2d 616 (11th Cir. 1984). The Eleventh Circuit has found that in order to "justify denial of discharge under § 727(a)(4)(A), the false oath must be fraudulent and material." *Swicegood v. Ginn*, 924 F.2d 230, 232 (11th Cir. 1991). The

Plaintiff contends that the Debtor's bankruptcy schedules contain two false oaths: (1) a false social security number; and (2) false statements regarding her interest in the Property. The Court concludes that the complaint does not allege a sufficient factual basis to support either claim.

A debtor's use of a false social security number in a bankruptcy petition could indeed constitute a false oath warranting discharge if such use was knowing and intentional. However, a false oath or statement resulting from mistake or inadvertence is not knowing and intentional for purposes of § 727(a)(4). *Parnes v. Parnes (In re Parnes)*, 200 B.R. 710, 714 (Bankr. N.D. Ga. 1996). The Plaintiff's complaint fails to disclose the critical fact that the Debtor amended her petition to correct her social security number (by one digit) six weeks prior to the Plaintiff's commencement of this proceeding. *See Gullickson v. Brown (In re Brown)*, 108 F.3d 1290, 1294 (10th Cir. 1997) (in context of § 727(a)(2)(A), "no inference of fraudulent intent can be drawn from an omission when the debtor promptly brought it to the court's or trustee's attention absent other evidence of fraud"). The Plaintiff has offered no evidence that the Debtor intentionally chose to use a false social security number at the time she filed bankruptcy, and there is no evidence in the record of the main case that would otherwise suggest or support such a finding at this time.

The Plaintiff also contends that the Debtor has made a false oath in her schedules by stating "multiple and contradictory" interests in the Property. With respect to the Property and the debt owed to the Plaintiff, the Debtor's schedules disclose the following: (1) the assignment of the Property to the Plaintiff on April 17, 2007 (Statement of Financial Affairs, Question 6); (2) the transfer of the Property to the Plaintiff on April 17, 2007 (Statement of Financial Affairs, Question 10); a fee simple interest in the Property (Schedule A); a first mortgage on the Property held by Washington Mutual (Schedule D); unsecured debts to the Plaintiff and the Plaintiff's attorney (Schedule F); and a real estate sales and lease contract with the Plaintiff whereby the Debtor would

“sell house to [Plaintiff] and lease back” (Schedule G).

The Court cannot conclude that these disclosures constitute false oaths. While the disclosures, viewed very narrowly, may appear contradictory, they may be considered, alternatively, a form of cautious overdisclosure. In other words, it is better for a debtor to disclose everything, than to omit anything. Moreover, even if contradictory, it is unclear whether the statements are even material. A false oath is material if it “bears a relationship to the bankrupt’s business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property.” *Chalik v. Moorefield (In re Chalik)*, 748 F.2d 616, 618 (11th Cir. 1984) (citations omitted). Here, the Debtor appears to have attempted to disclose, not hide, any possible interest that she, and thus the Chapter 7 trustee, might have in the Property. The Plaintiff has not offered any facts to support a theory that contradictory disclosures regarding the Property were made with an eye to obfuscation or evasion on the part of the Debtor.

Based on the foregoing, the Court concludes that the complaint fails to set forth a factual basis for the denial of the Debtor’s discharge and that, in any event, the Plaintiff has failed to properly serve the summons and complaint in this case. The Court concludes that it is appropriate to require the Plaintiff to determine whether it desires to proceed with prosecution of this complaint. If the Plaintiff intends to proceed, it must file an amended complaint and serve the complaint and a newly issued summons in accordance with Bankruptcy Rule 7004 within 15 days of the entry date of this Order. If the Plaintiff takes no action within 15 days of this Order, the Court shall dismiss the complaint without further notice or hearing.

If the Plaintiff has no more evidence than it has produced in support of its motion for summary judgment, it is not going to prevail in this proceeding. Its conclusory allegations of fraudulent intent are insufficient to support a finding to that effect, and the circumstances

themselves clearly do not suggest any fraudulent conduct on the part of the Debtor. And the Court would not enter a default judgment based on this record even in the absence of the procedural defects. If the Plaintiff proceeds and if the Debtor fails to answer, the Court will require the Plaintiff to produce evidence to prove its allegations.

Given that no answer has been filed in the case (apparently since the Debtor's attorney has not been properly served with the complaint and summons notwithstanding the Plaintiff's attorney's false certification to the contrary), the Debtor has incurred no attorney's fees for the defense of this action. In view of the problems with the Plaintiff's claims pointed out above, the Court finds it appropriate to remind the Plaintiff and its counsel of the requirement of FED. R. BANKR. P. 9011(b) that its claims be warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law and that its allegations have evidentiary support or are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

Based on the foregoing, it is ORDERED:

1. That the Plaintiff's motion for summary judgment is denied; and
2. That, within 15 days of the entry date of this Order, the Plaintiff shall file an amended complaint and serve the complaint and a newly issued summons in accordance with Bankruptcy Rule 7004. If the Plaintiff takes no action within 15 days of this Order, the Court shall dismiss the complaint without further notice or hearing.

End of Order

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