



**IT IS ORDERED as set forth below:**

**Date: February 26, 2008**

*James E. Massey*

James E. Massey  
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

\_\_\_\_\_  
IN RE:

CASE NO. 07-75011

Michael Anthony Nelson,

CHAPTER 7

Debtor.

JUDGE MASSEY

\_\_\_\_\_  
Donald F. Walton, U.S. Trustee,

Plaintiff,

v.

ADVERSARY NO. 08-6025

Michael Anthony Nelson,

Defendant.

ORDER DENYING MOTION TO DISMISS

Defendant Michael Anthony Nelson, who is the Debtor in the above-referenced Chapter 7 case, moves to dismiss this adversary proceeding on the ground that it is “unfounded” and fails to

state a claim upon which relief can be granted. In a brief submitted with the motion, Defendant takes issue with the facts alleged by Plaintiff. Strangely, Plaintiff filed no response to the motion.

The complaint seeks a denial of Defendant's discharge pursuant to 11 U.S.C. § 727(a)(5), alleging that Defendant has failed to satisfactorily explain the loss or deficiency of his assets to meet his liabilities. In particular, Plaintiff alleges that within a year prior to filing the petition, Defendant "withdrew approximately \$546,934 in cash from his three checking accounts. Defendant maintains that because he has been a victim of theft and internet fraud, he no longer has this money." Complaint ¶ 7. Plaintiff further alleges facts concerning transactions involving the disposition of Defendant's assets that, if true, raise serious questions about whether those dispositions were legitimate. In addition, Plaintiff challenges Defendant's explanation concerning an alleged theft of \$215,000 in cash left unguarded in his car. These allegations raise the question of Defendant's credibility as to what happened. If Plaintiff is able to prove the facts alleged in the complaint, the burden of going forward would shift to Defendant to explain the legitimacy of each disposition of funds from his checking accounts.

"A complaint may not be dismissed under Fed.R.Civ.P. 12(b)(6) 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)."  
"*Magluta v. Samples*, 256 F.3d 1282, 1283 -1284 (11<sup>th</sup> Cir. 2001). Defendant's lengthy brief in support of his motion attempts to explain to some extent Defendant's position as to the disposition of his assets. But his unsworn statements of about what he did with his money do not establish his allegations as fact and do not even begin to show that Plaintiff will be unable to prove facts at trial showing that Defendant's explanations are unsatisfactory for purposes of

section 727(a)(5) of the Bankruptcy Code. (Although Defendant included with his brief a page labeled "Affidavit in Support of Defendant's Motion to Dismiss," the document is not sworn to under penalty of perjury and is therefore not an affidavit. A motion for summary judgment, disguised as a motion to dismiss, is not a proper response to a complaint. The Court has serious doubts that either side could show that there is no dispute of material fact. It is highly likely that this case must be tried.)

For these reasons, Defendant's motion to dismiss is DENIED.

PLEASE TAKE NOTICE that pursuant to Bankruptcy Rule 7012(a), Defendant must file and serve on Plaintiff an answer to the complaint on or before Friday, March 14, 2008. Failure to file an answer may result in entry of a judgment for the relief demanded in the complaint.

\*\*\*END OF ORDER\*\*\*