

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

IN RE:	)	CHAPTER 7
	)	
<b>ARQUETTE MARVETTE OLIVER,</b>	)	CASE NO. <b>11-66197 – MHM</b>
	)	
Debtor.	)	
	)	
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<b>GUY G. GEBHARDT,</b>	)	
<b>ACTING UNITED STATES</b>	)	
<b>TRUSTEE,</b>	)	
	)	
Plaintiff,	)	<b>ADVERSARY PROCEEDING</b>
v.	)	<b>NO. 14-5486</b>
	)	
<b>ARQUETTE MARVETTE OLIVER,</b>	)	
	)	
Defendant.	)	

**ORDER GRANTING DEFAULT JUDGMENT**

This adversary proceeding is before the court on Plaintiff's *Motion for Default Judgment* filed March 10, 2015 (Doc. No. 5) (the "Motion"). Plaintiff filed a complaint initiating this adversary proceeding December 30, 2014, alleging Defendant failed to disclose approximately \$105,000.00 from the liquidation of her 401(k) retirement account and subsequently spent the retirement proceeds without authority from the Court. As a result, Plaintiff requested the Court deny Defendant a discharge pursuant to Bankruptcy Code sections 727(a)(2)(B), 727(a)(3), 727(a)(4)(A), 727(a)(4)(D), 727(a)(5), and 727(a)(6).

A Summons was issued December 30, 2014 and, through the Certificate of Service filed December 30, 2014, Plaintiff certifies that the summons was served upon Defendant by first class United States mail (Doc. No. 3). Plaintiff requested an Entry of Default February 10, 2015 (Doc. No. 10), and the Clerk's Entry of Default was filed February 11, 2015 (Doc. No. 11). Plaintiff now seeks default judgment. For the reasons stated below, Plaintiff's Motion is *granted*.

### **Undisputed Facts<sup>1</sup>**

Defendant filed Chapter 13 Case No. 11-66197 June 3, 2011 (Doc. No. 1)(the "Main Case"). Defendant signed and filed, under penalty of perjury, Schedules<sup>2</sup> A through J (each a "Schedule" or collectively "Schedules") and a statement of financial affairs (the "SoFA") (Doc. No. 1). In Schedules B and C, Debtor disclosed a 401(k) account valued at \$60,000.00, and claimed the account exempt pursuant to O.C.G.A. §44-13-100(a)(2.1). Defendant's Chapter 13 plan was confirmed January 12, 2012.

The Chapter 13 Trustee filed a motion to dismiss the Main Case March 31, 2014 due to Defendant's failure to maintain plan payments and failure to remit 2011, 2012, and 2013 income tax returns (Doc. No. 38). Defendant requested her case be converted to one under Chapter 7 May 19, 2014 (Doc. No. 40). Defendant appeared and testified June 12,

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<sup>1</sup> Because Defendant failed to file an answer or responsive pleading to the Complaint, the allegations therein are deemed admitted. Fed.R.Civ.P. 8(b)(6).

<sup>2</sup> Section 521(a) and Bankruptcy Rule 1007(b) require a debtor to file schedules of assets and liabilities, a schedule of current income and expenditures, a schedule of executory contracts and unexpired leases, and a statement of financial affairs (the "Schedules").

2014 at the § 341(a) meeting of creditors (the “341 Meeting”), 11 U.S.C. § 341, that she converted her case to a Chapter 7 because she had taken a leave of absence from her job to care for her daughter, which caused her to fall behind on her Chapter 13 plan payments. The Chapter 7 trustee continued the 341 Meeting for Defendant to provide her 2013 tax return and to file post-conversion amendments to Defendant’s Schedules.

Defendant signed and filed, under penalty of perjury, amended schedules B,C, F, I, and J (each an “Amended Schedule” or collectively “Amended Schedules”) and an amended SoFA June 23, 2014 (the “Amended SoFA”) (Doc. No. 47). Defendant’s Amended SoFA disclosed that she had income from employment, but made no payments to any creditors other than the Chapter 13 trustee, no gifts under item No. 7, no transfers under No. 10, and no closed financial accounts under No. 11 (Doc. No. 47). In addition, Defendant disclosed her 401(k) in Schedule B with a \$0.00 value and no exemptions claimed (Doc. No. 47). Defendant also provided her 2013 tax return to the Chapter 7 trustee prior to the continued 341 Meeting. Debtor’s 2013 tax return showed Defendant received \$105,790.00 from IRA distributions and \$776.00 from pensions and annuities as additional income in 2013, a total of \$106,566.00 (the “Retirement Proceeds”).

Defendant appeared and testified at the continued 341 Meeting July 16, 2014. When the Chapter 7 trustee questioned Defendant about the Retirement Proceeds, Defendant testified she spent the Retirement Proceeds to assist her mother, whose house was in foreclosure, to pay for her extremely ill daughter’s medical expenses, and spent

the remainder on some personal expenses. In response, the Chapter 7 trustee asked Defendant to provide an accounting of the Retirement Proceeds along with supporting documentation.

The United States Trustee (hereinafter "Plaintiff" or "UST") requested Defendant provide an explanation of why she converted her case to one under Chapter 7, copies of her 2013 federal and state income tax returns with all attachments, schedules, W-2s, 1099s, K-1s, and an accounting of all funds withdrawn from Defendant's retirement accounts from January 1, 2013 through June 30, 2014. Defendant provided the UST a statement August 6, 2014, indicating she spent the Retirement Proceeds as follows (the "Statement"):

Rent	\$8,460.00
Utility bills	\$2,760.00
Bedroom furniture	\$5,800.00
Dining room chairs	\$800.00
Daughter's medical bills	\$55,000.00
Mother's mortgage payments	\$36,000.00
Air conditioning unit for mother's house	\$2,600.00
Hot water heater for mother's house	\$1,300.00
Telephone bills	\$648.00

Car insurance	\$3,600.00
Chapter 13 plan payments	\$1,800.00
Taxes	\$20,000.00

UST requested supporting documentation for Defendant's Statement August 27, 2014 and filed a *Motion for Examination of Debtor* October 9, 2014 pursuant to Fed. R. Bankr. P. 2004 and for production of documents (a "2004 exam") (Doc. No. 61).

Defendant's counsel informed the Chapter 7 and UST December 5, 2014 that Defendant's August 6, 2014 statement was incorrect, but was unable to provide a complete accounting of the Retirement Proceeds. UST filed a complaint initiating this adversary proceeding December 30, 2014 seeking to deny Defendant a discharge pursuant to Bankruptcy Code sections 727(a)(2)(B), 727(a)(3), 727(a)(4)(A), 727(a)(4)(D), 727(a)(5), and 727(a)(6).

#### **Standard of Review**

Federal Rule of Civil Procedure 55, made applicable by Federal Rule of Bankruptcy Procedure 7055, provides that a plaintiff may obtain a default judgment against a defendant who "has failed to plead or otherwise defend[.]" FED. R. BANKR. P. 7055. Under Federal Rule of Civil Procedure 8, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7008, Defendant's failure to respond to the Complaint serves to admit Plaintiff's allegations. "The defendant, by his default, admits

the plaintiff's well-pleaded allegations of fact." *Nishimatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir.1975). "A default judgment is unassailable on the merits but only so far as it is supported by well-pleaded allegations, assumed to be true." *Id.* Nonetheless, a defendant's lack of response does not automatically entitle a plaintiff to default judgment. *Cf. In re Trevisan*, 300 B.R. 708, 713 (E.D. Wis. 2003); *Mercantile Bank v. Canovas*, 237 B.R. 423 (Bankr. N.D. Ill. 1998). The court must ensure that the well-plead allegations contained in the complaint actually "state a cause of action and there is a substantive, sufficient basis in the pleadings for the particular relief sought." *Tyco Fire & Security, LLC v. Alcocer*, 218 Fed. Appx. 860, 863 (11th Cir.2007).

### Count 1

Plaintiff contends Defendant should be denied a discharge under 11 U.S.C. § 727(a)(2)(b) because Defendant liquidated approximately \$105,000.00 from her 401(k) retirement account and subsequently spent and/or transferred the Retirement Proceeds without authority from the Court with the intent to hinder, delay, or defraud. Under 11 U.S.C. §727(a)(2)(b), the court shall grant Debtor a discharge unless

the debtor, with the intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed — . . .property of the estate, after the date of the filing of the petition.

Essentially, to sustain an objection under § 727(a)(2)(b), Plaintiff must prove by a preponderance of the evidence that (1) the act complained of occurred postpetition, (2) the act was performed with actual intent to hinder, delay or defraud a creditor or officer of the estate charged with custody of the property under the Bankruptcy Code, (3) that the act was that of the debtor, and (4) that the act consisted of transferring, removing, destroying or concealing any of the debtor's property. *Eastern Diversified Distribs., Inc. v. Matus (In re Matus)*, 303 B.R. 660, 672 (Bankr.N.D.Ga.2004). Furthermore, plaintiff must prove actual fraudulent intent; constructive fraud is insufficient. *Id.*; see also *Equitable Bank v. Miller (In re Miller)*, 39 F.3. 301, 306 (11<sup>th</sup> Cir. 1994). As it is unlikely that a debtor will admit fraudulent intent, "a finding of actual intent may be based on circumstantial evidence or inferred from the surrounding facts and circumstances." *In re Matus*, at 672. "Although a single wrongful act or omission may be sufficient to prove actual intent, evidence of a pattern of wrongful behavior presents a stronger case." *Id.* When considering whether fraudulent intent may be inferred from circumstantial evidence, courts look to the existence of certain indicia or "badges of fraud." *Dionne v. Keeting (In re XYZ Options, Inc.)* 154 F.3d 1262 (11<sup>th</sup> Cir. 1998). The badges of fraud include whether

- (1) The transfer or obligation was to an insider;
- (2) The debtor retained possession or control of the property transferred after the transfer;
- (3) The transfer or obligation was disclosed or concealed;

- (4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
- (5) The transfer was of substantially all the debtor's assets;
- (6) The debtor absconded;
- (7) The debtor removed or concealed assets;
- (8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
- (9) The Debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- (10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and
- (11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to the insider of the debtor.

GA.CODE ANN. § 18-2-74(b) (2002); *see e.g., Coady v. D.A.N. Joint Venture III, LP.*

*(In re Coady)*, 588 F.3d 1312, 1316 (11th Cir.2009). If Plaintiff can meet this initial burden of proof, then the burden shifts to Debtor to provide a satisfactory explanation.

*Chalik v. Moorefield (In re Chalik)*, 748 F.2d. 616, 619 (11<sup>th</sup> Cir. 1984).

In this case, three of the elements for denial of discharge under 11 U.S.C. §727(a)(2)(b) are irrefutable: (1) postpetition, (2) Defendant, (3) received approximately \$105,000.00 from the liquidation of her 401(k) retirement account, as evidenced by her 2013 tax return and subsequently spent and/or transferred a portion or all of the retirement proceeds without authority from the Court. Plaintiff has also alleged, and Defendant has failed to refute, that Defendant transferred or concealed the property with the actual intent to hinder, delay, or defraud creditors or officers of Debtor's bankruptcy estate. Plaintiff has also made allegations which indicate fraud under

O.C.G.A. § 18-2-74: (1) Defendant concealed or did not fully disclose the true value of her 401(k) at the time of filing the petition when she valued it at \$60,000.00 in 2011 and later liquidated the account for approximately \$105,000.00 in 2013; (2) Defendant did not disclose on her Amended Schedules or Amended SoFA that she liquidated her Retirement Proceeds and subsequently spent and/or transferred some of the funds to her mother or daughter; (3) Defendant testified that she transferred a portion of the Retirement Proceeds to her mother and daughter, who are considered insiders; (4) The liquidation and disbursement of Defendant's Retirement Proceeds were substantially all of Defendant's assets; and (5) Defendant transferred a portion of the Retirement Proceeds without adequate consideration.

Based on the foregoing, the well-plead allegations of the complaint establish that Defendant liquidated approximately \$105,000.00 from her 401(k) retirement account and subsequently spent or transferred the Retirement Proceeds without authority from the Court with the intent to hinder, delay, or defraud creditors or the officers of her bankruptcy estate; therefore, Defendant is not entitled to a discharge under 11 U.S.C. §727(a)(2)(b).

The Court will not address the other grounds for denial of discharge because "if discharge is unavailable under any one subsection of 11 U.S.C. §727(a), it is not necessary to address other bases." See *In re Protos*, 322 Fed. Appx. 930, 932 (11<sup>th</sup> Cir.

2009) (“a finding against the Appellant under any single subsection of 727 is sufficient to deny him a discharge”). Accordingly, it is hereby

ORDERED that the Motion is *granted*: Debtor’s discharge is *denied*.

IT IS SO ORDERED, this the 5<sup>th</sup> day of May, 2015.

  
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MARGARET H. MURPHY  
UNITED STATES BANKRUPTCY JUDGE