



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

**Date: October 13, 2011**

*Wendy L. Hagenau*

Wendy L. Hagenau  
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

IN RE:	)	CASE NO. 10-91876-WLH
	)	
CELIO O. BURROWES,	)	CHAPTER 7
	)	
Debtor.	)	JUDGE WENDY L. HAGENAU
_____	)	
	)	
ROBERT TRAUNER, as Chapter 7 Trustee,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ADV. PROC. NO. 11-5254-WLH
	)	
CELIO O. BURROWES,	)	
	)	
Defendant.	)	
_____	)	

**ORDER DENYING PLAINTIFF'S REQUEST  
FOR DEFAULT JUDGMENT AND SETTING TRIAL**

The Debtor filed his petition under Chapter 7 of the United States Bankruptcy Code on October 27, 2010, and Robert Trauner was appointed bankruptcy trustee. On May 12, 2011, the Trustee filed a complaint objecting to the Debtor's discharge pursuant to 11 U.S.C. §§ 727(a)(2),

(a)(3), (a)(4), (a)(5) and (a)(6). The summons and complaint were ultimately served on the Debtor and Debtor's counsel no later than June 28, 2011. After no answer was filed, the Trustee filed a Motion for Default Judgment on August 16, 2011. The Court entered a default against the Defendant on August 17, 2011. Now before the Court for consideration is the Plaintiff's request to enter default judgment denying the Debtor his discharge under Section 727.

Entry of default judgment is governed by Fed. R. Bankr. P. 7055. "[A] defendant's default does not in itself warrant the court in entering a default judgment. There must be a sufficient basis in the pleadings for the judgment entered." Nishimatsu Constr. Co., Ltd. v. Houston Nat'l Bank, 515 F.2d 1200, 1206 (5th Cir. 1975). A default only admits well-pled allegations of fact and does not admit conclusions of law. Id. "[F]acts which are not established by the pleadings ..., or claims which are not well-pleaded, are not binding and cannot support the [default] judgment." Alan Neuman Prods., Inc. v. Albright, 862 F.2d 1388, 1392 (9th Cir. 1988). In determining whether the allegations in a complaint are sufficient, the Supreme Court has recently provided guidance in both Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009). In these cases, the Supreme Court explained that, while "detailed factual allegations" are not required, the pleading must offer more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action ...". Twombly, 550 U.S. at 555. Instead, the complaint must contain "enough facts to state a claim to relief that is plausible on its face. ..." Twombly, 550 U.S. at 570. Lastly, the Court notes the denial of the Debtor's discharge is a severe remedy and not one to be granted lightly. With this background, the Court will now turn to the specific allegations in the Complaint.

The Plaintiff Trustee alleges this Court entered an Order for Examination under Rule 2004 ("Rule 2004 Order") on January 19, 2011, to which the Debtor has not responded. The

Trustee alleges he has made “numerous” requests to Debtor’s counsel after the date of entry of the Rule 2004 Order in an attempt to obtain the documents; however, the Debtor has failed to produce the documents. The Trustee attaches to the Complaint one letter of communication with Debtor’s counsel dated January 19, 2011. The Trustee alleges the documents requested are necessary in order to investigate the pre-petition conduct of the Debtor and otherwise to comply with the Trustee’s duties.

The Trustee alleges first that the Debtor’s actions in failing to produce documents in response to the Rule 2004 Order are a basis for denial of discharge under 11 U.S.C. § 727(a)(2). Under this Section, the court shall grant a discharge to the debtor unless,

the debtor, with intent to hinder, delay, or defraud a creditor or 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 –

- A. Property of the debtor within one year before the date of the filing of the petition; or
- B. Property of the estate after the date of the filing of the petition.

The Trustee alleges “on information and belief” the Debtor has violated Section 727(a)(2). The Trustee alleges no facts as to what property may have been transferred or concealed, the dates of any such transfer or concealment, and no basis for the “information and belief” that the Debtor had an intent to hinder, delay or defraud creditors. The Trustee’s allegations are conclusory in nature, so the Court cannot, on the mere basis of the Complaint, grant Plaintiff’s Request for Default Judgment under Section 727(a)(2).

Next, the Trustee alleges Debtor’s discharge should be denied under 11 U.S.C. § 727(a)(3), which provides as follows:

The debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and

papers from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all the circumstances of the case.

The Court notes that intent is not an element of a denial of discharge under Section 727(a)(3).

According to the Seventh Circuit Court of Appeals,

Section 727(a)(3) requires as a precondition to discharge that debtors produce records which provide creditors "with enough information to ascertain the debtor's financial condition and track his financial dealings with substantial completeness and accuracy for a reasonable period past to present." The provision insures that trustees and creditors will receive sufficient information to enable them to "trace the debtor's financial history; to ascertain the debtor's financial condition; and to reconstruct the debtor's financial transactions." Records need not be kept in any special manner, nor is there any rigid standard of perfection in recordkeeping mandated by section 727(a)(3). On the other hand, courts and creditors should not be required to speculate as to the financial history or condition of the debtor, nor should they be compelled to reconstruct the debtor's affairs.

In re Juzwiak, 89 F.3d 424, 427-28 (7th Cir. 1996) (citations omitted). However, whether a debtor has produced "adequate" records depends on the circumstances of the particular case. See In re Quay, No. 03-63644-WHD, 2005 WL 6488242, at \*10 (Bankr. N.D. Ga. March 29, 2005) (citing U.S. v. Trogdon, 111 B.R. 655, 658 (Bankr. N.D. Ohio 1990)).

In this instance, the Trustee's only allegation is that the Debtor has not responded to the Rule 2004 Order. From the allegations in the Complaint, however, the Court cannot conclude the Debtor has concealed the documents, destroyed or mutilated the documents, falsified documents, or failed to keep or preserve any documents. As the court noted in In re Quay, Section 727(a)(3) requires that the debtor preserve and produce "enough information" in order to determine the debtor's financial condition. In re Quay, 2005 WL 6488242, at \*10. Therefore, the Court must be able to find from the evidence the records requested were necessary for the Trustee and creditors to ascertain the Debtor's financial condition in the relevant time periods. There is no information in the Complaint from which the Court can conclude the documents

requested are in fact necessary to the Trustee. Thus, the Trustee's Request for Default Judgment under Section 727(a)(3) is denied.

The Trustee also alleges Debtor's discharge should be barred pursuant to 11 U.S.C. § 727(a)(4), which requires

the debtor knowingly and fraudulently, in or in connection with the case – (a) made a false oath or account; (b) presented or used a false claim; (c) gave, offered, received or attempted to obtain money, property, or advantage or a promise of money, property, or advantage, for acting or forbearing to act; or (d) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records and papers, relating to the debtor's property or financial affairs.

Plaintiff's Complaint, however, does not allege what oath or account or claim was false. The Complaint contains no factual allegations that the Debtor "gave, offered, received or attempted to obtain money, property, or advantage or a promise of money, property, or advantage, for acting or forbearing to act". Plaintiff's Complaint only alleges the Debtor has failed to respond to the Rule 2004 Order. While the Debtor's failure to produce documents may satisfy Section 727(a)(4)(D), the Plaintiff includes no factual allegations that any "withholding" of the books and records was knowing and fraudulent. A creditor arguing fraudulent intent under Section 727(a)(4) must establish actual, not constructive, fraud. Chambers v. Coon (In re Coon), 396 B.R. 772, 778 (Bankr. M.D. Fla. 2008). Therefore, the matters contained in the Complaint are not sufficient for the Court to grant Plaintiff a default judgment under Section 727(a)(4).

Plaintiff's Complaint further alleges the discharge should be barred under Section 727(a)(5) because, "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." Once again, however, the Plaintiff has not alleged any facts supporting a denial of discharge under this Section. The Complaint contains no information regarding the assets that

were purportedly lost. Moreover, the Complaint does not allege any facts supporting the allegation that the Debtor has failed to explain any deficiency of assets. Therefore, the Court denies the Request for Default Judgment under Section 727(a)(5).

Lastly, the Complaint seeks to bar the Debtor's discharge under Section 727(a)(6) because,

the Debtor has refused, in this case –

- A. To obey any lawful order of the Court, other than an order to respond to a material question or to testify.

Plaintiff's complaint certainly alleges the Debtor has failed to obey the Court's order for production of documents under Fed. R. Bankr. P. 2004. But a mere failure to produce documents is not equivalent to a refusal as required under Section 727(a)(6). Yappolo v. Walter (In re Walter), 265 B.R. 753, 759-60 (Bankr. N.D. Ohio 2001). The courts have recognized that "failure to timely produce discovery in an orderly, coherent fashion violates § 727(a)(6)(A) and may result in the denial of a debtor's discharge. ... To bar discharge, such failure to produce must be willful and not merely inadvertent. ... The documents must be necessary for the trustee and the creditors to understand the debtor's affairs." (Citation omitted). Salfi, P.A. v. Prevatt (In re Prevatt), 261 B.R. 54, 60-61 (Bankr. M.D. Fla. 2000); see also In re Mullin, No. 6:09-bk-17382-ABB, 2011 WL 135801 at \*5 (Bankr. M.D. Fla. 2011); In re Harmon, 379 B.R. 182, 188 (Bankr. M.D. Fla. 2007). Under the facts as alleged in the Complaint, the Court cannot conclude the Debtor's failure to produce documents is willful, or that the documents requested are necessary for the Trustee to understand the Debtor's affairs. The record reflects the Trustee never filed a motion to compel or for sanctions for failure to produce the requested documents. While not necessarily required, such steps would have buttressed the Trustee's claim that the Debtor has refused to obey an order of the Court. Further, given it is the Debtor who suffers

from a judgment denying a discharge, it is important to the Court to see evidence of the Debtor's refusal to produce, not just counsel's failure to respond. Consequently, the Court denies Plaintiff's request for the entry of a default judgment under Section 727(a)(6).

### **CONCLUSION**

Because the facts as alleged are not sufficient, without evidence, to enter a default judgment, Plaintiff's Motion for Entry of Default Judgment is DENIED. Rule 7055, however, permits the Court to conduct hearings when "to enter ... judgment, it needs to ... (c) establish the truth of any allegation by evidence; or (d) investigate any other matter." The parties are hereby given notice that the Court will conduct a trial in this matter on December 6, 2011, at 10:00 a.m., in Courtroom 1403, U.S. Courthouse, 75 Spring Street, SW, Atlanta, Georgia 30303.

**### END OF ORDER ###**

## **DISTRIBUTION LIST**

Robert Trauner, Esq.  
Chapter 7 Trustee  
Suite 700  
1 Glenlake Parkway, NE  
Atlanta, GA 30328-3496

William Russell Patterson, Esq.  
Ragsdale Beals Seigler Patterson & Gray  
Suite 2400  
229 Peachtree Street NE  
Atlanta, GA 30303-1629

Celio O. Burrowes  
Apt. 2402  
3481 Lakeside Drive NE  
Atlanta, GA 30326

Fannie H. Gilliam, Esq.  
The Gilliam Law Center  
Suite 303  
2001 Martin Luther King, Jr. Drive SW  
Atlanta, GA 30310