UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 7
	)	
JOSEPH H. HARMAN,	)	CASE NO. **11-67522** – MHM
	)	
Debtor.	)	
	)	
	)	
Carolyn T. McAfee,	)	
Executor of the Estate of	)	
James T. McAfee,	)	
	)	
Plaintiff,	)	**ADVERSARY PROCEEDING**
v.	)	**NO. 11-5534**
	)	
JOSEPH H. HARMAN,	)	
	)	
Defendant.	)	

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION TO DISMISS

This adversary proceeding is before the court on Plaintiff's *Motion for Partial Summary Judgment* filed December 31, 2013 (Doc. No. 107) ("Plaintiff's Motion") and Defendant's *Partial Motion to Dismiss* filed April 4, 2014 (Doc. No. 133) ("Defendant's Motion"). On September 9, 2011, Plaintiff filed a complaint initiating this adversary proceeding to object to Defendant's discharge under 11 U.S.C. § 727(a) and seek a determination of nondischargeability under 11 U.S.C. § 523(a)(2), (a)(4), and (a)(6) (the "Complaint"). On December 31, 2013, Plaintiff filed a *Motion for Partial Summary*

Judgment to request that Defendant be denied discharge under § 727(a)(2) and (a)(4). That same day, Plaintiff also filed a *Motion to Amend Complaint*, which was granted February 6, 2014. Plaintiff filed the amended complaint February 19, 2014, providing additional allegations of Defendant's fraudulent conduct to support its objection to Defendant's discharge (Doc. No. 113) (the "Amended Complaint"). In Plaintiff's Motion, Plaintiff argues that no issue of material fact exists with respect to Plaintiff's objection to discharge under § 727(a), and that Plaintiff is entitled to judgment as a matter of law. Defendant asserts that material issues of fact do exist and, in any event, the new allegations related to Plaintiff's § 727(a) objection to discharge should be dismissed as a matter of law, because the new grounds were raised after deadline to object to discharge under § 727(a).

ALLEGATIONS OF FACTS

Plaintiff and Defendant were parties to a lawsuit in a Fulton County state court that resulted in a judgment February 4, 2011, against Defendant for $5,400,300.34, plus post-judgment interest. Plaintiff filed an action to collect the judgment March 23, 2011 in Fulton County and April 18, 2011 in Carroll County, seeking to garnish Defendant's funds held by SunTrust Bank and Defendant's long-time counsel, Smith Conerly, respectively.

Plaintiff alleges that on at least three occasions within the year before Defendant filed for bankruptcy, Defendant transferred or concealed his property with an intent to hinder, delay, and defraud his creditors: 1) Defendant transferred $3,300 from a joint

bank account subject to Plaintiff's garnishment to an account held by J.H.H. Holdings, Corp. ("JHH"), an entity purportedly[1] owned by Defendant's wife (the "$3,300 Transfer"); 2) Defendant transferred $257,256 to the escrow account of Shadrix Lane, P.C. ("Shadrix Lane"), a law firm from which he had previously never sought services (the "Shadrix Transfer"); and 3) Defendant transferred $89,202.18 to his former bankruptcy counsel, Smith Conerly LLP ("Smith Conerly"), and failed to disclose the transfer on his Schedules (the "Smith Transfer").

The $3,300 Transfer

It is undisputed that in May 2011, Defendant transferred $3,300 from a joint bank account at SunTrust Bank to an account purportedly controlled by Defendant's wife. It is further undisputed that, at the § 341 Meeting of Creditors held July 19, 2011, Defendant testified about the transfer, "At the time, I was experiencing garnishment so here popped in $3,300 into an account that was still open and I transferred it to my wife so that it would not be garnished." Plaintiff asserts Defendant's testimony at the §341 meeting establishes that Defendant transferred funds with the intent to avoid Plaintiff's garnishment. Defendant asserts that the subject funds were Social Security funds exempt from garnishment; therefore, the transfer of those funds cannot evidence an intent to hinder, delay, or defraud Debtor's creditors. Defendant further argues that, because all

[1] In another adversary proceeding stemming from the case underlying the instant adversary proceeding, the Chapter 7 Trustee argues that accounts and businesses nominally controlled by Defendant's wife are, in fact, controlled by Defendant. Nothing in this order should be construed as a finding of fact with respect to control of any account or business. It suffices to say that the destination account was not subject to Plaintiff's garnishment.

garnishable funds in the SunTrust account had already been garnished, the account was no longer subject to garnishment at the time of the $3,300 Transfer, so the $3,300 Transfer did not hinder, delay, or defraud any creditor.

The Shadrix Transfer and the Smith Transfer

Defendant has neither admitted nor denied the allegations relating to the Shadrix Transfer and Smith Transfer, arguing that Defendant's Motion extends the time for answering those allegations until 14 days after a ruling is entered on Defendant's Motion.

Plaintiff's complaint alleges a scheme by which Defendant diverted the proceeds from the sale of an apartment complex in Blacksburg, Virginia to hinder Plaintiff's collection efforts. The complex, known as Terrace View, sold May 25, 2011, for approximately $53,300,000.00. Plaintiff asserts that, by virtue of his 3.56% ownership interest in an entity known as New River Valley Associates, LP, Defendant was entitled to $257,256 of the Terrace View proceeds[2], after applicable taxes (the "NRV Proceeds"), and was scheduled to receive those funds May 25, 2011. Plaintiff alleges that, because Defendant's and Smith Conerly's bank accounts were each subject to garnishment at the time, Defendant and J. Nevin Smith of Smith Conerly "devised a plan to hide [the NRV Proceeds] in the trust account of another attorney." According to Plaintiff, Defendant telephoned his accountant Michael Nelson at Jones & Kolb and directed that the NRV Proceeds not be delivered to Defendant due to the McAfee lawsuit. Plaintiff further

[2] The Complaint alleges Defendant was also entitled to other Terrace View proceeds by virtue of his interest in other companies; however, those proceeds are not the subject of Plaintiff's Motion.

asserts that J. Nevin Smith telephoned Gregory Shadrix of Shadrix Lane to engage Shadrix Lane to hold the NRV Proceeds in escrow. Thus, the NRV Proceeds were disbursed to Shadrix Lane. Plaintiff asserts that when Shadrix Lane requested information about the funds, they were provided Defendant's name and address, as well as the word, "McAfee."

In further support of Defendant's intent to hinder, delay, or defraud creditors, Plaintiff notes that Smith Conerly had been served with a garnishment, and Smith Conerly's answer to the garnishment – stating whether it was holding money or property of Debtor – was due May 25, 2011. Plaintiff alleges the NRV Proceeds were sent to Shadrix Lane May 25, 2011, and Smith Conerly responded negatively to the garnishment. The next day, May 26, 2011, the Smith Transfer occurred when Smith Conerly directed Shadrix Lane to transfer $89,202.18 of the NRV Proceeds to Smith Conerly.

Debtor filed the Chapter 7 petition initiating the main case underlying this proceeding (Case No. 11-67522) (the "Main Case") June 14, 2011. Debtor filed schedules, a Statement of Financial Affairs ("SoFA"), and other documents required in the Main Case June 28, 2011.[3] Debtor's Schedule B, a statement of Debtor's personal property assets, disclosed $168,053.87 held by Shadrix Lane; however, it did not disclose $89,202.18 held by Smith Conerly on Debtor's behalf, nor was a transfer of $89,202.18

[3] Section 521(a) and Bankruptcy Rule 1007(b) require a debtor to file the SoFA, schedules of assets and liabilities, schedules of current income and expenses, and a schedule of executory contracts and unexpired leases (collectively, the "Schedules"). Section 521(a) also requires an individual debtor to file pay advices.

to Smith Conerly disclosed anywhere in Debtor's initial documents, whether as a payment to a creditor (SoFA, Question 3), as payment for services related to bankruptcy (SoFA, Question 9; Disclosure of Compensation of Attorney, Question 1), or otherwise (SoFA, Questions 7 and 10).[4] The

§ 2016(b) Disclosure of Compensation of Attorney discloses $25,000 as having been received by Smith Conerly in connection with Defendant's bankruptcy case. Plaintiff asserts Defendant's transfer of $89,202.18 and failure to disclose that transfer in his bankruptcy case served to further hinder, delay, or defraud Defendant's creditors.

LEGAL STANDARD

Federal Rule of Civil Procedure 56(a), incorporated in Federal Rule of Bankruptcy Procedure 7056, provides that summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED. R. BANKR. P. 7056; *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). The moving party has the initial burden of showing that the record, viewed in the light most favorable to the nonmoving party, demonstrates that no genuine issue of material fact exists. *Id.*; *Rollins v. TechSouth, Inc.*, 833 F. 2d 1525, 1528 (11th Cir. 1987). If this burden is met, the burden of proof then shifts to the nonmoving party, who must go beyond the pleadings to establish issues of material fact. *Celotex*, 477 U.S. at 324. If the court determines that

[4] An amendment to Debtor's SoFA filed February 19, 2014 – 32 months after the petition was filed and the same day Plaintiff filed its Amended Complaint – discloses pre-petition transfers to Smith Conerly as a creditor: $10,421.82 April 28, 2011, $10,000.00 May 12, 2011, $39,202.18 May 26, 2011, and $25,000.00 May 26, 2011 – a total of $84,624.00.

the nonmoving party's evidence is not significantly probative, summary judgment should be granted to the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). However, the court should deny summary judgment if reasonable minds could differ on inferences arising from undisputed facts. *Id.* at 250; *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1534 (11th Cir. 1992).

11 U.S.C. § 727(a)(2) provides that the Court must grant a discharge to a debtor unless

> 2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate . . . 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

11 U.S.C. § 727(a)(2). This section is generally construed liberally in favor of the debtor and strictly against the creditor. *State Bank of India v. Chalasani (In re Chalasani)*, 92 F.3d 1300, 1310 (2d Cir. 1996).

To object to discharge under § 727(a)(2), a plaintiff must prove by a preponderance of the evidence "(i) that the act complained of was executed within one year before the date of the filing of the petition, (ii) that the act was executed with actual intent to hinder, delay or defraud a creditor or an officer of the estate charged with custody of property under the Bankruptcy Code, (iii) that the act was that of the debtor or a duly authorized agent of the debtor, and (iv) that the act consisted of transferring, removing, destroying or concealing any of the debtor's property, or permitting any of these acts to be executed." *Eastern Diversified Distribs., Inc. v. Matus (In re Matus)*, 303

B.R. 660, 673 (Bankr. N.D. Ga. 2004); *see also Minsky v. Silverstein (In re Silverstein)*, 151 B.R. 657, 660 (Bankr. E.D.N.Y. 1993). If the plaintiff meets this initial burden of proof, the burden then shifts to the defendant to provide a satisfactory explanation of the defendant's conduct that is convincing. *Chalik v. Moorefield (In re Chalik)*, 748 F.2d 616, 619 (11th Cir. 1984). Vague explanations without corroborating documents are unsatisfactory. *Id.*

Actual intent may be inferred from circumstantial evidence and course of conduct as well as "a pattern of errors or omissions . . . giving rise to an inference of an intent to deceive," *Parnes v. Parnes (In re Parnes)*, 200 B.R. 710, 714 (Bankr. N.D. Ga. 1996); *Devers v. Bank of Sheridan, Montana (In re Devers)*, 759 F.2d 751, 753-54 (9th Cir. 1985). To determine whether fraud may be inferred from circumstantial evidence, courts look to the existence of certain indicia or "badges of fraud." *Dionne v. Keating (In re XYZ Options, Inc.)*, 154 F.3d 1262, 1271 (11th Cir. 1998). These 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 an insider of the debtor.

GA. CODE ANN. § 18-2-74(b) (2002); *see e.g., Coady v. D.A.N. Joint Venture III, L.P. (In re Coady)*, 588 F.3d 1312, 1316 (11th Cir. 2009) (determining that a debtor who diverts all the fruits of his labor into business owned solely in wife's name has concealed property); *In re Matus*, at 672-73 (denying discharge based on transfer of property to debtor's wife three weeks prior to filing bankruptcy petition for no consideration and without relinquishing benefits of the property).

Under § 727(a)(4)(A), a defendant must have knowingly and fraudulently made a false oath or account in connection with defendant's bankruptcy case. 11 U.S.C. § 727(a)(4)(A). A false oath or account may consist of a false statement or omission about a material matter that "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." *See In re Chalik*, 748 F.2d at 618; *In re Matus*, 303 B.R.at 676-77.

DISCUSSION

Plaintiff argues that the $3,300 Transfer, the Shadrix Transfer, and the Smith Transfer display Defendant's efforts to hinder, delay, or defraud Defendant's creditors, and that Defendant should therefore be denied a discharge pursuant to § 727(a).

Defendant contends that Plaintiff's § 727 claim, as it relates to the $3,300 Transfer, fails as a matter of law because the transferred funds consisted of exempt Social Security payments. Defendant argues that, to the extent Plaintiff's § 727 claim is based on the Smith Transfer or the Shadrix Transfer, it must be denied as untimely. Alternatively, Defendant argues that issues of material fact remain as to intent, so the Motion must be denied.

With respect to the $3,300 Transfer, three elements required for denial of discharge under § 727(a)(2) are not in dispute. (i) Within one year prior to the petition date (iii) Debtor (iv) transferred Debtor's property from an account bearing Debtor's name to a different account. *Eastern Diversified Distribs., Inc.*, 303 B.R. at 673. Thus, of the four elements described in *Eastern Diversified Distribs.*, we are left with only element (ii): whether the transfer was executed with the actual intent to hinder, delay, or defraud a creditor of Debtor. *Id.*

Many of the indicia of fraud set forth in O.C.G.A. § 18-2-74 surround the $3,300 Transfer: (1) The transfer was made to an insider, as Debtor transferred the funds to his wife, or to an account owned by a company in turn controlled by either Debtor or his wife. (4) and (10): The transfer was made shortly after Debtor had been sued, and, consequently, incurred a substantial debt. (8) From the record, it appears Debtor did not receive *any* consideration for the transfer, much less consideration of reasonably equivalent value. (9) Debtor was insolvent or became insolvent shortly after the transfer, as evidenced by Debtor having filed bankruptcy a short time after the transfer occurred.

Plaintiff also points to testimony of Debtor and Debtor's wife to show Debtor's intent to hinder Plaintiff's garnishment. In the § 341 meeting of creditors held in the Main Case, Debtor testified about the $3,300 Transfer, "I was experiencing garnishment so here popped in $3,300 into an account that was still open and I transferred it to my wife so that it would not be garnished." Debtor further testified in a deposition held June 19, 2013, "There was more than that in that account to begin with before the garnishment." In that same deposition, Debtor stated, "I discovered within the month following or so there was about $3,300 left in the account. I'm not sure why it was not taken." When asked the reason he chose what account to transfer the funds to, Debtor testified, "Nothing. I just wanted it out of my name … I saw this amount left over after what I thought should take all the balance out of the SunTrust account … I said, well, gosh, this – I'll keep this from being garnished or taken."

Debtor's wife similarly testified that Debtor "was confused that a garnishment of his accounts would have left any money in it, because the assumption of a garnishment is everything is taken out… All of his balances went to zero except for this one … And nobody understood why…. We're assuming it was a mistake on the part of the bank."

In response to Plaintiff's Motion, Debtor filed an affidavit, stating that he made the $3,300.00 Transfer "because [he] believed that the social security (*sic*) funds were exempt from garnishment" (Doc. No. 129; ¶ 16). Debtor's affidavit directly contradicts his testimony at the § 341 meeting of creditors and at Debtor's deposition, but fails to explain the contradiction.

Viewed in the light most favorable to Debtor, the Court cannot read Debtor's testimony regarding the $3,300 Transfer as anything but an admission of Debtor's intent to hinder the efforts of his creditors. Debtor's declaration to the contrary, executed nearly three years after the transfer in question and in direct response to Plaintiff's Motion for Summary Judgment, provided no explanation for the conflicting testimony and, therefore, cannot serve to create an issue of fact where before none existed. *Tippens v. Celotex Corp.*, 805 F.2d 949, 954 (11th Cir. 1986) ("An affidavit may … be stricken as a sham when a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact … and that party attempts thereafter to create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.") (internal citations omitted); *Rodriguez v. Jones Boat Yard, Inc.*, 435 Fed.Appx. 885 (11th Cir. 2011) ("We will not allow a party to create an issue of material fact by providing supplemental testimony that contradicts prior answers to unambiguous questions."); *Bryant v. U.S. Steel Corp.*, 428 Fed. Appx. 895, 897 (11th Cir. 2011) (affirming striking of affidavit in which affiant recalled the exact date of receiving a letter but did not explain, in the affidavit, the new recollection, having previously testified that she did not know the exact date); *see, also, In re Marrama*, 445 F.3d 518 (1st Cir. 2006) (affirming summary judgment denying Debtor's discharge under § 727(a)(2), relying on debtor's admission that he transferred a vacation home "to protect it" and discrediting debtor's testimony explaining an innocent intent to transfer funds). Defendant's *Response to Plaintiff's Statement of Material Facts* attempts to explain the

contradiction by stating that he tried to protect the funds from garnishment *because* he thought they were exempt from garnishment (Doc. No. 130); however, this explanation must be rejected because it is not in evidence, *Bryant*, 428 Fed. Appx. At 897 ("the affidavit presented no valid reason for Bryant's subsequent recollection … counsel's argument is not evidence"), and because the explanation directly contradicts Defendant's testimony that he was "not sure why it was not taken" and he "thought [the garnishment] should take all the balance out of the SunTrust account."

Debtor also argues that, because the $3,300 Transfer funds were funds from Social Security payments, they are exempt from garnishment and from Bankruptcy, and therefore the $3,300 Transfer cannot have been a transfer with actual intent to hinder, delay, or defraud creditors. This argument conflates intent with result, and it must fail. Nothing in § 727(a)(2) requires that the property transferred be garnishable, or the transfer be successful in hindering creditors – the statute merely requires that Debtor *intended* that the transfer hinder creditors. Moreover, nothing in the statute requires that the funds be property of the bankruptcy estate; indeed, § 727(a)(2) explicitly applies where Debtor transferred property of *either* Debtor *or* the bankruptcy estate.

Because the record in this case shows no issues of material fact with respect to Defendant's intent to hinder and delay creditors by transferring $3,300 of Debtor's funds in May 2011, Defendant's discharge must be denied pursuant to § 727(a)(2). Because Defendant's discharge will be denied based on the $3,300 Transfer, Defendant's Motion,

seeking to strike Plaintiff's objection to discharge as it relates to the Shadrix Transfer and the Smith Transfer, is moot. Accordingly, it is hereby

ORDERED that Plaintiff's Motion is ***granted*** and Defendant's Motion is ***denied as moot.***

IT IS SO ORDERED, this the 10th day of September, 2014.

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE