

IT IS ORDERED as set forth below:

Date: January 6, 2014



James R. Sacca
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	}	
	}	Case No.: 13-63865-JRS
ROBERT CLARK SCOTT,	}	
	}	Chapter 7
Debtor.	}	

J.R. CLARK,	}	
	}	ADVERSARY PROCEEDING
Plaintiff,	}	
	}	
v.	}	No. 13-5334-JRS
	}	
ROBERT CLARK SCOTT,	}	
	}	
Defendant.	}	

ORDER

This adversary proceeding involves allegations that the Debtor has transferred or hidden assets to improperly shield them from creditors and thus is not entitled to a discharge in his underlying Chapter 7 bankruptcy case pursuant to § 727(a) of the Bankruptcy Code. In his Complaint, the Plaintiff essentially contends that the Debtor contrived sham transactions to

shield his automobiles and home equity from creditors and/or has failed to produce records or satisfactorily explain what happened to the cash proceeds of these transactions. Accordingly, the Plaintiff seeks a determination from the Court that the Plaintiff's debts are nondischargeable pursuant to 11 U.S.C. §§ 727(a)(2)(A), (a)(2)(B), (a)(3), and (a)(5). The Debtor filed a Motion to Dismiss, contending that the Complaint fails to state a claim for which relief can be granted, which is now before the Court. [Doc. 5].

Motion to Dismiss Standard

Federal Rule of Civil Procedure 12(b)(6)—which applies in adversary proceedings pursuant to Bankruptcy Rule 7012(b)—provides that a defendant in an adversary proceeding may move for dismissal for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). To state a claim, a plaintiff's complaint must "contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 683 (11th Cir. 2001) (quoting *In re Plywood Antitrust Litigation*, 655 F.2d 627, 641 (5th Cir. Unit A Sept.8, 1981)). But simple "recitals of the elements of a cause of action, supported by mere conclusory statements," are not enough to survive a motion to dismiss; the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)). When determining whether a claim is plausible, "the complaint must be construed in a light most favorable to the plaintiff and the factual allegations taken as true." *Brooks v. Blue Cross & Blue Shield of Florida, Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997). In sum, the Court must look at the alleged facts—just the facts—and reach no conclusions regarding whether plaintiff's claims are valid—only whether the plaintiff's claims are plausible.

Factual Allegations

Keeping the above standard in mind, the Court makes no findings of fact but instead assumes the truth of the following well-pleaded allegations in the Complaint. According to the Complaint, the Debtor executed a promissory note in 2009 for \$150,000 plus interest payable to the Plaintiff. (Compl. ¶5). After Debtor failed to make payments on this note, the Plaintiff sued the Debtor in the Superior Court of Cobb County, Georgia (the “Superior Court”) in March 2011. (Compl. ¶6). The Superior Court granted the Plaintiff summary judgment in July 2012. (Compl. ¶7). The Debtor filed an appeal with the Georgia Court of Appeals, which was dismissed for procedural reasons. (Compl. ¶8). On May 6, 2013, the Plaintiff obtained and recorded a Writ of Fi. Fa.¹ for the judgment amount of \$160,204.00. (Compl. ¶9). The Plaintiff sought post-judgment discovery and set a hearing before the Superior Court to compel the Debtor to participate in a deposition. (Compl. ¶10). On June 25, 2013—the day before the Superior Court hearing—the Debtor filed for Chapter 7 bankruptcy protection, thus commencing the underlying bankruptcy case.

The Plaintiff’s attorney attended the Debtor’s 341 meeting of creditors and elicited the Debtor’s testimony regarding several transactions that the Plaintiff contends are suspicious. First, the Debtor testified that he consigned his 1933 Buick Series 90 vintage automobile (the “Buick”) with an auction company in May 2012 and received a check for more than \$50,000 upon its sale, which he cashed and never placed into any account. (Compl. ¶12–13). Second, the Debtor testified that in August 2012 he sold his 1937 Cadillac town car (the “Cadillac”), valued at \$3,500, to Jeffrey Dan Smith—his best friend whom he has known since elementary school—and in November 2012 he sold his 2008 Infiniti QX56 (the “Infiniti”) to Donna Smith—his best

¹ “Fi. Fa.” is an abbreviation of *feri facias* and refers to a “writ of execution that directs a marshal or sheriff to seize and sell a defendant’s property to satisfy a money judgment.” BLACK’S LAW DICTIONARY (9th ed. 2009) at 703.

friend's wife—for a price between \$20,000 and \$25,000, but he did not give her a title for the vehicle. (Compl. ¶14–15). The Debtor testified that he received cash for both of these transactions and never placed the cash into any account. (Compl. ¶16). Finally, in December 2012 the Debtor entered into a promissory note for \$120,000 with Mr. Smith and gave him a second-in-priority security deed on his home, effectively encumbering his home with a new lien (the “Lien”); the Debtor testified that this transaction was envisioned as a line of credit and that he never received any money from Mr. Smith related to it. (Compl. ¶18–19, 27). All of these alleged transactions took place after the Plaintiff sued the Debtor in the Superior Court, and the alleged transactions involving the Smiths occurred after the Plaintiff obtained a judgment against the Debtor and within a year of his bankruptcy filing. The Plaintiff alleges that the Debtor has not produced any documentation reflecting the transfer of title for the Cadillac or the Infiniti, nor any documentation to show what happened to the cash he received in any of these transactions. (Compl. ¶24).

Analysis

Section 727 of the Bankruptcy Code provides that the Court shall grant a debtor a discharge unless one of several enumerated conditions exists. 11 U.S.C. § 727(a). This discharge is one of the primary benefits of filing for bankruptcy, enabling the debtor to get a “fresh start.” But this fresh start is only available to the “honest but unfortunate debtor.” *Grogan v. Garner*, 498 U.S. 279, 287 (1991) (citation and quotations omitted). Among the situations listed in § 727(a) that may prevent a debtor from receiving a discharge are those where the debtor has not been completely honest in revealing and surrendering assets for distribution to creditors. Specifically, the debtor may not transfer, remove, destroy, mutilate, or conceal his property (or permit someone else to do so) within a year before filing his petition or do so with his estate's property after filing “with intent to hinder, delay, or defraud a creditor” or the trustee. 11 U.S.C.

§ 727(a)(2). Similarly, a debtor may not receive a discharge if he unjustifiably has “concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information . . . from which the debtor’s financial condition or business transactions might be ascertained.” 11 U.S.C. § 727(a)(3). Likewise, discharge may not be available if “the debtor has failed to explain satisfactorily . . . any loss of assets or deficiency of assets to meet the debtor’s liabilities.” 11 U.S.C. § 727(a)(5). Construing the Complaint in a light most favorable to the Plaintiff and taking the factual allegations as true, the Plaintiff has alleged sufficient facts to state a plausible claim under each of these Bankruptcy Code provisions.

In his Motion to Dismiss, the Debtor argues that the Plaintiff’s claims under § 727(a)(2) should be dismissed because he has not pled fraud with particularity. This argument fails for two reasons. First, a claim under § 727(a)(2) does not necessarily need to be predicated on fraud; the statute provides that it is improper to transfer or conceal assets “with intent to *hinder, delay, or* defraud a creditor.” 11 U.S.C. § 727(a)(2) (emphasis added). Furthermore, a claim under this provision is simply not the same as a claim for fraud—it is much broader. For this subsection to apply, Congress has not required that the debtor necessarily have *committed* fraud—only that he has shifted or veiled assets *with intent* to hinder, delay, or defraud. And of course intent can always be alleged generally and then proven with circumstantial evidence because it is literally impossible to peer inside a person’s mind and discover direct evidence of intent. Second, even if the Plaintiff were required to allege fraud with particularity, he has made sufficient allegations to pass that test. He has alleged that the Debtor transferred the Cadillac to his best friend and the Infinity to his best friend’s wife after the Plaintiff obtained a judgment against the Debtor, that both of these transactions were for cash, that no documents have been produced to support these transactions, and that the title to the Infinity was never actually transferred. Although the Court

makes no factual findings at this time, these allegations appear sufficient to support a contention that the Debtor constructed these transactions with intent to hinder, delay, or defraud creditors.

Further, the Debtor argues that he did not transfer, remove, destroy, or conceal any of his property within the meaning of § 727(a)(2) by executing the promissory note with Mr. Smith and granting him the Lien. This argument also has no merit. By creating the Lien, the Debtor effectively granted a security interest to Mr. Smith, which is a transfer of an interest in property. Once the Debtor filed for bankruptcy protection, any home equity that would have gone to the estate and then been distributed to unsecured creditors upon sale of the Debtor's home was instead encumbered by the Lien and would have gone to pay Mr. Smith's secured claim. In other words, the Debtor allegedly transferred the right to receive any residual home equity (after the home was sold and the first mortgage paid off) from himself (and his estate) to Mr. Smith—his best friend. The court finds that these allegations are sufficient to state a plausible claim that the Debtor transferred or concealed assets with intent to hinder, delay, or defraud a creditor within the meaning of § 727(a)(2).

Likewise, there is no merit to the Debtor's argument that the Plaintiff's claim under § 727(a)(3) should be dismissed. The Debtor argues that the Plaintiff's allegations—that the Debtor has failed to keep or preserve books or records from which his financial condition might be ascertained and that he has failed to provide supporting documentation regarding the transfers and the disposition of the proceeds—are insufficient as a matter of law. The Court disagrees and concludes that it is simply too early in the case to dismiss this claim. The Debtor asserts that the Plaintiff has not made any request for the Debtor to provide any additional documentation to substantiate his financial position. But the Court notes that before the Debtor filed the underlying bankruptcy case, the Plaintiff filed a motion to compel discovery and set a hearing on it in the Superior Court. That motion would not have been filed if the Plaintiff had not alleged

some type of failure to produce information. Moreover, the Plaintiff would presumably request this information if the Court denies the Debtor's Motion to Dismiss and permits discovery to go forward. The Court does not see how the Plaintiff could ever prove his claim under § 727(a)(3) without having an opportunity to engage in discovery. And if the Debtor does have records that will help substantiate his financial position, he should be given an opportunity to produce them.

Similarly, the Debtor's argument that the Plaintiff does not state a claim under § 727(a)(5) also fails. The Plaintiff has alleged that the Debtor received tens of thousands of dollars in cash in exchange for the Buick, the Cadillac, and the Infinity. Assuming that the Debtor did in fact receive this cash, the question of what happened to it remains. The Debtor should be afforded an opportunity to satisfactorily explain where the cash went, and the Plaintiff should have a chance to examine him and present a case for nondischargeability under § 727(a)(5). Similarly to § 727(a)(3)—§ 727(a)(5) requires the Plaintiff to prove a negative: that the Debtor has failed to explain what happened to the cash. Beyond alleging that the Debtor received a large amount of cash from specific transactions and has not adequately explained what happened to it, the Court cannot discern what more the Plaintiff would need to allege in order to state a plausible claim.

Conclusion

For the reasons stated above, it is hereby

ORDERED that the Debtor's Motion to Dismiss is DENIED in its entirety.

[END OF ORDER]