

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION**

In re:

Case No. 3:11-bk-9122-PMG

Thomas Matthew DiVenere,

\_\_\_\_\_  
Debtor.

Chapter 7

Guy G. Gebhardt,

\_\_\_\_\_  
Plaintiff,

vs.

Adv. No. 3:12-ap-630-PMG

Thomas Matthew DiVenere,

\_\_\_\_\_  
Defendant.

**ORDER ON DEFENDANT'S MOTION FOR  
JUDGMENT ON THE PLEADINGS**

**THIS CASE** came before the Court to consider the Motion of the Defendant/Debtor, Thomas Matthew DiVenere, for Judgment on the Pleadings.

The United States Trustee for Region 21 (UST) commenced this action by filing a Complaint Objecting to Entry of the Debtor's Discharge. The Debtor contends that he is entitled to a judgment in his favor on the Complaint, because the UST cannot state a claim for denial of his discharge under §727(a) of the Bankruptcy Code.

The Debtor's Motion should be denied. The standard for evaluating a Motion for Judgment on the Pleadings is virtually the same as the standard for evaluating a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Accordingly, the Court has considered the Complaint in the light most favorable to the UST, and finds that the Complaint alleges sufficient facts to state a claim for denial of the Debtor's discharge that is plausible on its face.

### **Background**

The Debtor is an attorney who is licensed to practice law in the state of Connecticut, and is also a businessman who has been involved in "many business ventures." (Complaint, ¶¶3, 4; Answer, ¶I.B.1).

On May 26, 2010, the Debtor filed a petition under Chapter 11 of the Bankruptcy Code (Case No. 10-4524). Case No. 10-4524 was dismissed on November 21, 2011, pursuant to a Motion to Dismiss filed by the UST.

On December 20, 2011, the Debtor filed the petition that commenced the current Chapter 11 case. On his Amended Schedule of assets filed in the current case, the Debtor listed an interest in five parcels of real property located in Florida, South Carolina, and Colorado with an aggregate value of \$2,659,000.00, and aggregate encumbrances of \$4,902,000.00. The Debtor also listed personal property with a total value of more than \$42,420.64, including household goods and furnishings with a value of \$17,340.00. The household goods were itemized on an exhibit filed with the Amended Schedules. (Main Case, Doc. 49).

On his Amended Schedule of liabilities, the Debtor listed creditors holding general unsecured claims in the amount of \$18,044,905.00.

On his Amended Statement of Financial Affairs, the Debtor listed a present interest in three businesses known as Dancing Bear Management, LLC, The DiVenere Group, LP, and Dancing Bear Development, LP.

On March 23, 2012, the UST filed an Objection to the Debtor's claim of exemptions. (Main Case, Doc. 70). The Objection relates primarily to the exemption claimed for certain real property located on Silkvine Lane in Jacksonville, Florida, and also to the exemption claimed for the Debtor's household goods and furnishings.

On May 29, 2012, the Court entered an Order sustaining the UST's objection to the Debtor's claim of exemptions. (Main Case, Doc. 122).

On May 31, 2012, the UST filed a Motion to Dismiss or Convert the Debtor's Case. (Main Case, Doc. 123). The Motion was scheduled for hearing on June 14, 2012, and the Debtor filed a Notice of Conversion of his case to a case under Chapter 7 on the day of the scheduled hearing. (Main Case, Doc. 141).

On July 25, 2012, the Trustee in the Chapter 7 case filed an Objection to the Debtor's Claim of Exemptions, together with a Motion for Turnover. (Main Case, Docs. 155, 156). The Chapter 7 Trustee's Objection related to the exemptions claimed for the Silkvine Lane property in Jacksonville and the Debtor's household goods.

On August 30, 2012, the Court entered an Order Sustaining the Trustee's Objections. (Main Case, Doc. 275).

On February 7, 2013, the Trustee filed a Notice of Intent to compromise his dispute with the Debtor regarding the Debtor's claimed exemptions. (Main Case, Doc. 214). According to the

compromise, the Debtor agreed to pay the Trustee the total sum of \$20,000.00, with monthly payments to commence on February 1, 2013, and a final lump sum payment on November 1, 2013.

On April 22, 2013, the Trustee filed an Affidavit of the Debtor's default under the compromise. (Main Case, Doc. 247).

### **Discussion**

The UST has filed a Complaint Objecting to Entry of the Debtor's Discharge in the Chapter 7 case. Generally, the UST asserts in the Complaint that the Debtor failed to fully disclose his assets and financial information in his bankruptcy cases, and also that he failed to comply with Court orders in the cases. The Complaint contains five Counts to deny the Debtor's discharge under §727(a) of the Bankruptcy Code.

#### **I. The UST's authority to bring the action**

The duties of the UST are set forth in 28 U.S.C. §586, and include taking such action as it deems appropriate to ensure that all required schedules and reports are properly filed, and performing the duties prescribed for the UST under the Bankruptcy Code. 28 U.S.C. §586(a)(3)(D), (a)(5). One of the duties contemplated for the UST by the Bankruptcy Code is objecting to a debtor's discharge. In re Levine, 287 B.R. 683, 695 n.12 (Bankr. E.D. Mich. 2002). Specifically, §727(c)(1) of the Bankruptcy Code provides:

#### **11 USC § 727. Discharge**

...

(c)(1) The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section.

11 U.S.C. §727(c)(1)(Emphasis supplied). “On its face, this section gives independent authority to a case trustee, a creditor, or the UST to file an objection to discharge.” In re Phouminh, 2004 WL 1637036, at 4 (Bankr. D. Colo.).

The UST is authorized to file the Complaint against the Debtor in this case.

## **II. The standard under Rule 12(c)**

The Debtor contends that he is entitled to a judgment in his favor on the Complaint. The Debtor filed a Motion for Judgment on the Pleadings under Rule 12(c) of the Federal Rules of Civil Procedure, as made applicable to this proceeding by Rule 7012(b) of the Federal Rules of Bankruptcy Procedure.

Rule 12(c) of the Federal Rules of Civil Procedure provides that a party may move for judgment on the pleadings “[a]fter the pleadings are closed—but early enough not to delay trial.” Fed.R.Civ.P. 12(c).

A motion under *Rule 12(c)* is evaluated by essentially the same standard as a motion to dismiss pursuant to *Rule 12(b)(6)*, the only notable difference being that in a motion for judgment on the pleadings the Court reviews not only the complaint, but the answer as well. *Phillips v. Transunion, L.L.C.*, 2012 WL 1439088 (E.D. Pa. April 25, 2012). Under this standard the Court must accept as true all allegations in the *Complaint* and all inferences that can be drawn therefrom, and view them in the light most favorable to the . . . non-moving party.

In re General Purpose Steel, Inc., 469 B.R. 602, 605 (Bankr. W.D. Pa. 2012)(Emphasis in original).

See also In re DBSI Inc., 2013 WL 1498365, at 2 (Bankr. D. Idaho)(For a Rule 12(c) motion, which is “functionally identical” to a Rule 12(b)(6) motion, the allegations of the complaint are accepted as true, and the court construes all factual allegations in the complaint in the light most favorable to the nonmoving plaintiff.).

In testing a complaint under Rule 12(c), the Court considers whether it contains sufficient factual allegations to state a facially plausible claim for relief. In re General Purpose Steel, Inc., 469 B.R. at 605.

A complaint is sufficient if it pleads “enough facts to state a claim for relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). In determining the Motion, the Court “must determine only whether ‘the claimant is entitled to offer evidence to support the claims,’ not whether the plaintiff can ultimately prove the facts alleged.” *Perdido Sun Condo. Ass’n, Inc. v. Nationwide Mut. Ins. Co.*, 2007 WL 2565990, at 3 (N.D. Fla. 2007)(citations omitted).

In re Champalanne, 425 B.R. 707, 711 (Bankr. S.D. Fla. 2010). To survive a motion for judgment on the pleadings, the complaint is only required to plead “sufficient facts to allow the Court to draw a reasonable inference of misconduct.” In re DBSI Inc., 2013 WL 1498365, at 2(citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)).

### **III. The UST’s Complaint**

In this case, the Court has considered the Complaint and Answer in the light most favorable to the UST, and finds that the Complaint alleges sufficient facts to state a claim for denial of the Debtor’s discharge that is plausible on its face.

#### **A. Count I**

Count I of the Complaint is based on §727(a)(2) of the Bankruptcy Code. Section 727(a)(2) provides that a debtor’s discharge may be denied if the debtor transferred or concealed property of the debtor or the estate with the intent to hinder, delay, or defraud a creditor or an officer of the estate. 11 U.S.C. §727(a)(2).

To establish a claim under §727(a)(2), a plaintiff must show (1) a transfer or concealment of property of the debtor or the estate, and (2) a subjective intent to hinder, delay, or defraud a creditor or

court officer. The fraudulent intent may generally be proven by circumstantial evidence surrounding the debtor's conduct. In re Seligman, 478 B.R. 497, 502 (Bankr. N.D. Ga. 2012)(Citations omitted).

In this case, the UST contends that the Debtor concealed property by “failing to list all of his assets in his Schedules and other Statements; and failing to file an inventory as ordered by the Court.” (Complaint, ¶81).

The claim relates to the Debtor's household goods and personal property. The UST asserts that the Debtor did not disclose a number of items of personal property on his schedules, and that the assets were later discovered by an appraiser employed by the Chapter 7 Trustee. Specifically, the UST alleges:

The Appraisal also affirmatively indicates certain of the property located at that residence but not included on the Defendant's schedules. (*Id.*). The Appraisal states that the Defendant failed to include approximately thirty items of personal property, including several pieces of artwork and many pieces of furniture, all with a total value of approximately \$3,590.00. (*Id.*, at 9-12).

(Complaint, ¶67). The appraiser's report is referred to in the UST's Complaint, and is found at docket number 177 in the Debtor's main case. (Complaint, ¶65).

In his Answer, the Debtor admitted the allegations contained in paragraph 67 of the Complaint, with the exception of the word “failed.” According to the Debtor, the appraisal states that the designated items of personal property were “not included” on his schedules. (Answer, ¶I.B.1).

The omission of assets from a debtor's schedules may constitute a concealment for purposes of §727(a)(2) of the Bankruptcy Code. In re Voccia, 477 B.R. 625, 633-35 (Bankr. E.D. Va. 2011). In this case, the Court can draw a reasonable inference from the Complaint and Answer that the Debtor omitted various items of personal property from his schedules.

Additionally, the Court can reasonably infer that the omission was material. The UST alleged, and the Debtor admitted, that the omitted property was valued at approximately \$3,590.00. Although the Debtor asserts that the value of the omitted property is small in relation to the amount of the debt that he seeks to discharge (Doc. 33, p. 30), such an assertion does not defeat a cause of action under §727. An omission is material if it bears a relationship to the debtor's business transactions, estate, or the discovery of assets. A debtor cannot escape the denial of his discharge under §727 by claiming that a disputed asset is of little value, since creditors are entitled to evaluate for themselves if the asset will benefit the estate. In re Chalik, 748 F.2d 616, 618 (11<sup>th</sup> Cir. 1984).

Based on the omission of material assets from the Debtor's schedules, the Court can reasonably infer from the Complaint and Answer that the Debtor concealed property of the estate with the intent to hinder, delay, or defraud creditors or a court officer.

## **B. Count II**

Count II of the Complaint is based on §727(a)(3) of the Bankruptcy Code. Section 727(a)(3) provides that a debtor's discharge may be denied if the debtor has concealed, falsified, or failed to keep or preserve any recorded information from which his financial condition might be ascertained, unless the failure was justified under all of the circumstances. 11 U.S.C. §727(a)(3).

To establish a claim under §727(a)(3), a plaintiff must initially show (1) the debtor's failure to keep or preserve recorded information, and (2) that the failure rendered it impossible to ascertain the debtor's financial condition. If the plaintiff shows the absence of the records, the burden shifts to the debtor to justify the absence. In re O'Hara, 2011 WL 1467927, at 7 (Bankr. N.D. N.Y. 2011).



In this case, the UST alleges that the monthly operating reports (MORs) filed by the Debtor in his Chapter 11 case did not include (1) documentation regarding his non-debtor wife's income and expenses, or (2) documentation regarding certain of the Debtor's expenses, "including payments to or on behalf of his children or other family members." (Complaint, ¶¶85, 86).

The Debtor asserts that the omission of his family's income and expenses is not grounds to deny his discharge, because his wife's income is not property of the estate and therefore not material to his bankruptcy case. Additionally, the Debtor apparently contends that the UST monitored his finances for two years, and was therefore aware of his transactions and expenditures. (Doc. 33, p. 25).

Documentation regarding the income and expenses of a non-filing spouse is information from which a debtor's financial condition might be ascertained. See In re Lorenz, 337 B.R. 423, 432 (1<sup>st</sup> Cir. BAP 2006)(Courts take into account a non-debtor spouse's income in a variety of contexts, because it is necessary to evaluate a debtor's ability to repay his financial obligations.), and In re Kuhns, 2011 WL 4713225, at 3 (Bankr. N.D. Ohio)(A non-debtor spouse's income is necessary to determine a debtor's financial situation under §707(b)(3).).

The MOR forms required the Debtor to provide information regarding the monthly cash receipts for his household, and the monthly disbursements for his household. (See, for example, Main Case, Doc. 120, Monthly Operating Report for the period from April 1, 2012, to April 30, 2012.). The instructions for preparing the MORs directed the Debtor to complete a Schedule of Household Cash Receipts and Cash Disbursements. (See [http://www.usdoj.gov/ust/r21/reg\\_info.htm](http://www.usdoj.gov/ust/r21/reg_info.htm)). A "household" may be recognized as all of the people with a financial connection who occupy a housing unit. In re Fraleigh, 474 B.R. 96 (Bankr. S.D. N.Y. 2012).

The UST alleges that the Debtor did not provide documentation on his MORs regarding his household income and expenses. The Complaint pleads sufficient facts to allow the Court to draw the reasonable inference that the Debtor failed to keep or preserve recorded information from which his financial condition might be ascertained.

### **C. Count III**

Count III of the Complaint is based on §727(a)(4)(A) of the Bankruptcy Code. Section 727(a)(4)(A) provides that a debtor's discharge may be denied if the debtor knowingly and fraudulently made a false oath in connection with the case. 11 U.S.C. §727(a)(4)(A).

To establish a claim under §727(a)(4)(A), a plaintiff must show that a debtor's oath was knowingly and fraudulently made, and related to a material fact. In re Quiepo, 2007 WL 917248, at 4 (Bankr. S.D. Fla.)(citing In re Ingersoll, 124 B.R. 116, 122 (M.D. Fla. 1991)). "A false statement or omission in the debtor's petition, schedules, or statements, satisfies the requirements of a false oath." In re Pongvitayapanu, 487 B.R. 130, 140 (Bankr. E.D. N.Y. 2013).

In this case, the UST alleges that the Debtor's false oaths include his failure to (1) list all of his assets in his schedules, (2) accurately value his assets, (3) accurately list his liabilities, (4) accurately identify co-debtors and joint obligations, (5) accurately reflect his income and expenses in his schedules and Form 22B, (6) answer all questions on his Statement of Financial Affairs, and (7) include all information regarding his finances and basic expenses, and the income of his non-debtor spouse, on his MORs. (Complaint, ¶¶68-78, 91-101).

In his Motion for Judgment on the Pleadings, the Debtor asserts that the Complaint does not state a claim under §727(a)(4)(A), because the allegations that he "failed to accurately" reflect his financial

information do not sufficiently allege a false oath. The Debtor alternatively asserts that, even if information was omitted from his schedules and statements, the information was not material and cannot establish fraudulent intent. (Doc. 33, pp. 21-22).

“The exceptions to discharge for concealment of assets under §727(a)(2) and false oath under §727(a)(4) usually go hand in hand because a debtor who fraudulently conceals assets in the petition has also necessarily made a false oath by signing the petition.” In re Voccia, 477 B.R. at 633. See also In re Dailey, 405 B.R. at 393 (By “intentionally failing to accurately list his tax refund” on his schedules, a debtor made a false oath in connection with his case.).

As shown above, the UST’s Complaint sufficiently alleges that the Debtor omitted certain personal property from his schedules, and that the omission was material. The allegedly omitted items were described generally in the appraisal prepared for the Chapter 7 Trustee as “approximately thirty items of personal property, including several pieces of artwork and many pieces of furniture,” and were specifically designated in the appraiser’s report. (Complaint, ¶67). The UST’s Complaint also sufficiently alleges that the Debtor did not accurately state his household income and expenses on his MORs and other forms that were filed under oath in the case. (Complaint, ¶¶75-78).

Based on the Complaint and Answer, the Court can draw a reasonable inference that the Debtor knowingly and fraudulently made a false oath in his case, and that the false oath related to a material fact. The Complaint pleads sufficient facts for a cause of action to deny the Debtor’s discharge under §727(a)(4)(A) of the Bankruptcy Code.

#### **D. Count IV**

Count IV of the Complaint is based on §727(a)(6)(A) of the Bankruptcy Code. Section 727(a)(6)(A) provides that a debtor's discharge may be denied if the debtor has refused in the case to obey any lawful order of the Court, other than an order to respond to a material question or to testify. 11 U.S.C. §727(a)(6)(A).

To establish a claim under §727(a)(6)(A), a plaintiff must show that the debtor was aware of the Court order, and failed to comply. The refusal must be the result of willful or intentional disobedience, and not inadvertence or mistake. In re Mullin, 455 B.R. 256, 263 (Bankr. M.D. Fla. 2011).

In this case, the UST contends that the Debtor "refused to obey at least seven different Orders of this Court" that were entered in the main bankruptcy case, including (1) the Administrative Order Establishing Initial Procedures in Chapter 11 Cases, (2) the Order Authorizing Individual to Manage Financial Affairs, (3) the Order Granting Motion to Extend Time to File Lists, Schedules and Statements, (4) the Order Sustaining Objection to Debtor's Claim of Exemptions, (5) the Order on Objections to Disclosure Statement, (6) the Order Granting Motion to Extend Time to File Amended Schedules, and (7) the Order Sustaining Objection to Debtor's Claim of Exemptions and Amended Exemptions. (Complaint, ¶104).

As an example, the Administrative Order Establishing Initial Procedures in Chapter 11 Cases directs Chapter 11 debtors to file a Case Management Summary "within the earlier of three business days following the petition date or the date of the first scheduled hearing." The Administrative Order was served on the Debtor by mail on December 25, 2011. (Main Case, Doc. 16). The Order Granting Debtor's Motion for Enlargement of Time to File Lists, Schedules, and Statements provided that the Debtor "shall have up to and including January 19, 2011" to file certain documents, including the Case

Management Summary. (Main Case, Doc. 22). The Order was served on the Debtor by mail on January 7, 2012. (Main Case, Doc. 24).

The UST alleges in the Complaint that the “Debtor never filed a Case Management Summary while the case was pending in chapter 11.” (Complaint, ¶35). The Debtor admitted the allegation in his Answer. (Answer, ¶I.B.1).

Under these circumstances, the Court can reasonably infer that the Debtor was aware of the Court Orders, and failed to comply with their terms. The Complaint alleges sufficient facts to state a cause of action to deny the Debtor’s discharge under §727(a)(6)(A) of the Bankruptcy Code for refusal to obey a lawful Court order.

#### **E. Count V**

Count V of the Complaint is based on §727(a)(7) of the Bankruptcy Code. Section 727(a)(7) provides that a debtor’s discharge may be denied if the debtor has committed an act specified in §727(a)(2), §727(a)(3), §727(a)(4), §727(a)(5), or §727(a)(6) within one year before the petition date in connection with another case concerning an insider. 11 U.S.C. §727(a)(7).

To establish a claim under §727(a)(7), a plaintiff must show that the elements of the cited subsections are satisfied, that the actions occurred during the current case or within one year before the current case was filed, and that the actions are in connection with the bankruptcy case of an insider. In re Kosth, 2012 WL 863634, at 7 (Bankr. C.D. Ill).

In this case, the UST alleges that the Debtor committed acts specified in §727(a)(3), §727(a)(4)(A), and §727(a)(6)(A) in his prior Chapter 11 case (Case No. 10-4524). The UST contends, for example,

that the Debtor failed to file all required financial information with his MORS in the prior case, including information regarding his expenses and his wife's income. (Complaint, ¶¶109-115).

In response, the Debtor asserts that the Complaint does not state a claim under §727(a)(7), because the prior case was not filed by an insider of the Debtor within the meaning of §101(31) of the Bankruptcy Code, but was instead his own Chapter 11 case. (Doc. 33, pp. 12-14).

The Complaint states a claim for relief under §727(a)(7) that is plausible on its face. The Court cannot determine at this stage of the proceeding that the Debtor did not commit a specified act "in connection with another case . . . concerning an insider." 11 U.S.C. §727(a)(7). The Debtor admitted that he filed Case Number 10-4524 on May 26, 2010, and that the case was dismissed on November 21, 2011, pursuant to the UST's Motion. (Complaint, ¶¶14, 21; Answer, ¶I.B.1).

To fall within §727(a)(7), the UST asserts that the prior case is only required to "concern" an insider of the debtor, even though it may be "commenced" by the debtor in the current case. (Doc. 46, p. 17). The term "insider" is defined in §101(31) to "include" the individuals and entities described in the section, but the section does not constitute an exhaustive list of parties who may be insiders. In re Barman, 237 B.R. 342, 348 (Bankr. E.D. Mich. 1999). Section 727(a)(7) is intended to extend the basis for denial of a discharge to a debtor's misconduct in a related case that is not remote in time. In re Kosth, 2012 WL 863634, at 7; In re Brown, 2007 WL 1470142, at 6 (Bankr. D.N.H.).

For these reasons, the Court finds that the Complaint alleges sufficient facts to state a claim for denial of the Debtor's discharge under §727(a)(7) of the Bankruptcy Code.

### **Conclusion**

The UST commenced this action by filing a Complaint Objecting to Entry of the Debtor's Discharge. The Debtor has filed a Motion for Judgment on the Pleadings in the action, and contends that he is entitled to a judgment in his favor because the UST cannot state a claim for denial of his discharge under §727(a) of the Bankruptcy Code.

The Debtor's Motion should be denied. The standard for evaluating a Motion for Judgment on the Pleadings is virtually the same as the standard for evaluating a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Accordingly, the Court has considered the Complaint in the light most favorable to the UST, and finds that the Complaint alleges sufficient facts to state a claim for denial of the Debtor's discharge that is plausible on its face.

Accordingly:

**IT IS ORDERED** that the Motion of the Debtor, Thomas Matthew DiVenere, for Judgment on the Pleadings is denied.

**DATED** this 14 day of May, 2013.

**BY THE COURT**

Paul M. Glenn

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PAUL M. GLENN  
United States Bankruptcy Judge