ORDERED.

Dated: August 07, 2019

Karen S. Jennemann
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re	)	
	)	
HASMUKH PATEL and	)	Case No. 6:18-bk-00036-KSJ
NIRUBEN PATEL,	)	Chapter 7
	)	
Debtors.	)	
	)	
SYNOVUS BANK,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Adversary No. 6:18-ap-00029-KSJ
	)	
HASMUKH PATEL,	)	
	)	
Defendant.	)	
	)	

ORDER GRANTING DEBTOR'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Synovus Bank, seeks to deny the Debtor/ Defendant, Hasmukh Patel, a discharge under §§ 727(a)(4) and (5) of the Bankruptcy Code.[1] Debtor moves for summary judgment[2]

[1] All references to the Bankruptcy Code refer to 11 U.S.C. §§ 101 *et seq*.
[2] Doc. No. 65. Related pleadings include: Deposition Transcripts (Doc. Nos. 74, 75, 76, 77, 78, 79, 80, and 81); the Bank's Response to the Debtor's Motion for Summary Judgment (Doc. No. 82); and Debtor's Reply (Doc. No. 92).

asserting the Bank's[3] claims fail as a matter of law because it has identified no false oath or lost asset he failed to explain. Debtor's Motion for Summary Final Judgment is granted.

Undisputed Facts

For many years, the Debtor was a businessman in Jacksonville, who, with his extended family, owned and operated hotels. When he and his wife filed this Chapter 7 bankruptcy case on January 4, 2018,[4] the Debtor listed four lawsuits on his schedules.[5] Three lawsuits relate to his failed hotel ventures.[6] Synovus holds a substantial deficiency judgment against the Debtor arising from one of these lawsuits.[7]

While the Debtor was immersed in litigation over his failed hotel projects, his daughter, Lisa Patel, purchased a hotel using a newly formed corporate entity—Florida Family Hospitality, LLC ("FFH").[8] Lisa undisputedly was always the sole owner of FFH.[9] She bought the hotel, now operating as an Econo Lodge,[10] from her uncle in 2014.[11] Debtor helped his daughter open and run this Hotel since its inception. Lisa got the money to buy the Hotel with gifts (perhaps loans) from her family members to fund a down payment of $70,000, but NOA Bank (not the Plaintiff) funded most of the purchase with a loan.[12] Debtor guaranteed that loan and offered his home as

[3] Plaintiff's name is Synovus Bank. The Court will refer to the Plaintiff as the Bank or Synovus. Other banks preceded Synovus, specifically Florida Community Bank, N.A., f/k/a Premier American Bank, N.A., in this dispute but the roles were identical to Synovus. (Doc. Nos. 84 and 98).
[4] Doc. No. 1 in Main Case: 6:18-bk-00036-KSJ.
[5] Doc. No. 1 in Main Case, p. 36.
[6] Doc. No. 1 in Main Case, p. 36.
[7] Doc. No. 1 in Main Case, p. 23. Doc. No. 1, ¶ 10.
[8] Doc. No. 65, Exh. C, 10:1-20; Doc. No. 65, Exh. B, 19:11-25, 20:1, 26:11-15.
[9] Doc. No. 65, Exh. A, 21:1-10; Doc. No. 65, Exh. B, 9:20-25, 10:1-2; Doc. No. 65, Exh. D, 18:24-25, 19:1-5; Doc. No. 65, Exh E, ¶ 2.
[10] Doc. No. 65, Exh. B, 19:5-10; Doc. No. 65, Exh. C, 8:7-15, 9:15-22; Doc. No. 65, Exh. E, ¶ 2. The hotel is located at 1181 Airport Road, Jacksonville, Florida (the "Hotel").
[11] Doc. No. 65, Exh. G; Doc. No. 65, Exh. C, 32:5-7, 98:16-23. Specifically, FFH (owned by Lisa) bought the hotel from JaxFlorida Group, LLC (owned by Lisa's uncle).
[12] Doc. No. 65, Exh. D, 5:5-12; Doc. No. 65, Exh. B 39:32-25, 40:1-10.

additional collateral for the loan.[13] Debtor continues to work at the Hotel as a general manager receiving a modest salary.[14] Lisa also provides other financial support to her parents.[15]

Debtor and his wife filed extensive bankruptcy schedules. Debtor listed ownership interests in three corporate entities—ISHA Hospitality, LLLP; R & H Hospitality, LLLP; and HDTV, LLC. But he listed no interest in his daughter's company FFH.

Bank's Allegations

The Bank's primary argument is that FFH actually is owned by the Debtor, not his daughter Lisa Patel. If true, FFH is the Debtor's "alter ego" and, the Bank argues, he should have listed his *potential* interest on his petition as an asset of the bankruptcy estate.[16] After the parties completed substantial discovery over several months, Synovus could locate no other asset the Debtor failed to list in his schedules or to explain its loss.

At the hearing on the Debtor's Motion for Summary Judgment, however, Synovus "identified" other possible undisclosed and unexplained assets discussed in underwriting materials connected with NOA's loan to FFH. During Lisa Patel's deposition,[17] Lisa was asked about an *alleged* personal financial statement, dated August 6, 2014, *perhaps* signed by the Debtor.[18] She did not recognize the document. Synovus argues this financial statement, *maybe* given to the US Small Business Administration in connection with the Debtor's guarantee of his daughter's FFH loan, and the related credit memorandum and underwriting analysis, dated October 29, 2014, that references various personal property and income *maybe* owned by the Debtor in 2014, *possibly*

[13] Debtor's home is at 2800 Fellwood Lane, Melbourne, Florida, 32904 (the "Home"). Doc. No. 65, Exh. B, 37:9-25, 38:1-13; *See also* Doc. No. 1 in Main Case, p. 10. Doc. No. 1, ¶ 18.
[14] Doc. No. 65, Exh. B, 47:5-24; Doc. No. 82, ¶ 31.
[15] Doc. No. 65, Exh. A, 21:11-15; Doc. No. 65, Exh. B, 48:21-15, 49:1-12. Debtor received an annual salary of $30,000, but Lisa also paid for vacations and other expenses for her parents.
[16] Doc. No. 82, pp. 12-16.
[17] Doc. No. 75. The deposition was taken on December 6, 2018.
[18] Doc. No. 75, p. 115.

could constitute an undisclosed and unexplained assets. The Bank hangs their legal hat on these tangential loan documents to demonstrate the Debtor had identifiable, now-lost assets he has not satisfactorily explained.[19]

The Complaint[20] cites two statutory bases to deny the Debtor's discharge. In Count 1, under § 727(a)(4) of the Bankruptcy Code, Synovus argues the Debtor knowingly or fraudulently made a false oath in his bankruptcy schedules by not listing his potential interest in FFH or other unidentified assets. Section 727(a)(4)(A) provides that a debtor shall not receive a discharge where he "knowingly and fraudulently, in or in connection with the case, makes a false oath."[21] The false oath must be both fraudulent and material.[22] A false oath is material if it "bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence or disposition of his property."[23] An omission from a debtor's schedules or statement of financial affairs, for example, can constitute a false oath under § 727(a)(4).[24]

In Count 2, under § 727(a)(5) of the Bankruptcy Code, Synovus argues the Debtor has failed to satisfactorily explain the loss of assets, including FFH and the assets listed in the financial statement/ credit memorandum connected to the NOA loan. Section 727(a)(5)[25] precludes a debtor's discharge where the debtor fails to explain a loss of assets.[26] A plaintiff has the preliminary burden of demonstrating that the debtor "formerly owned substantial, identifiable

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[19] Doc. No. 82, p. 16.
[20] Doc. No. 1.
[21] 11 U.S.C. § 727(a)(4)(A).
[22] *Swicegood v. Ginn,* 924 F.2d 230, 232 (11th Cir. 1991).
[23] *Chalik v. Moorefield (In re Chalik),* 748 F.2d 616, 618 (11th Cir. 1984).
[24] *In re Whitehill*, 514 B.R. 687, 692 (Bankr. M.D. Fla. 2014).
[25] Section 727(a)(5) provides:

> (a) The court shall grant the debtor a discharge, unless-- . . .
> (5) 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.

[26] *Hawley v. Cement Indus. (In re Hawley)*, 51 F.3d 246, 248 (11th Cir. 1995).

assets that are now unavailable to distribute to creditors."[27] Upon such a showing, debtors then must supply a satisfactory reason they no longer have the asset.[28] "A [debtor's] general oral explanation for the disappearance of substantial assets without documentary corroboration" is not enough.[29] Vague and indefinite explanations of losses are not sufficient.[30] Under § 727(a)(5), courts generally look back for the two-year period preceding the bankruptcy filing, unless a longer look-back period is appropriate.[31]

Summary Judgment Standard

Debtor contends this issue is ripe for resolution by summary judgment. Rule 56(a) provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[32] The moving party must establish the right to summary judgment.[33] A "material" fact is one that "might affect the outcome of the suit under the governing law."[34] A "genuine" dispute means that "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[35] Once the moving party has met its burden, the nonmovant must set forth specific facts showing there is a genuine issue for trial.[36] In determining entitlement to summary judgment, "facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts."[37]

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[27] *Turner v. Tran (In re Tran)*, 297 B.R. 817, 836 (Bankr. N.D. Fla. 2003) (citing *First Commercial Fin. Group v. Hermanson (In re Hermanson)*, 273 B.R. 538, 545 (Bankr. N.D. Ill. 2002) (citing *Banner Oil Co. v. Bryson (In re Bryson*), 187 B.R. 939, 955 (Bankr. N.D. Ill. 1995))).
[28] *Id.*
[29] *In re Tran*, 297 B.R. at 836 (citing *In re Hermanson*, 273 B.R. at 549).
[30] *In re Chalik*, 748 F.2d at 619.
[31] *See White v. White* (*In re White)*, 568 B.R. 894, 913 (Bankr. N.D. Ga. 2017); *Fiala v. Lindemann (In re Lindemann)*, 375 B.R. 450, 472 (Bankr. N.D. Ill. 2007).
[32] Fed. R. Civ. P. 56(a).
[33] *Fitzpatrick v. Schlitz (In re Schlitz)*, 97 B.R. 671, 672 (Bankr. N.D. Ga. 1986).
[34] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986); *Find What Investor Grp. v. FindWhat.com*, 658 F.3d 1282, 1307 (11th Cir. 2011).
[35] *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510.
[36] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 10 S. Ct. 1348 (1986).
[37] *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007).

The primary purpose of a Chapter 7 consumer bankruptcy case is to reward an honest debtor with a fresh start from all debts—a discharge.[38] Courts construe objections to discharge liberally for the debtor and strictly against the objecting party.[39] However, only those debtors who fully disclose their assets may receive a discharge.[40] Early and complete disclosure by the honest debtor avoids extraordinary and unjustified work by Chapter 7 Trustees and creditors, who should not spend time recreating what "may" have happened to a debtor's assets.[41]

Hypothetical Assets Require No Disclosure or Explanation

Debtor, however, rightfully argues he did not have to list any *potential* interest in FFH because it is based on a legal theory not proven or adjudicated. This Court agrees. Other courts do, too.

In a § 727(a)(2)(A) analysis, Bankruptcy Judge Doyle dismissed a creditor's alter ego claim because §727 only gives creditors the ability to challenge discharges if a debtor hides, conceals, or lies about assets *already* included as property of the estate.[42] Section 727 does not give creditors leeway to challenge discharges for *hypothetical* assets creditors later may bring into the estate under fraudulent transfer or alter ego theories. No statutory support exists for applying § 727 to assets that are *not* property of the bankruptcy estate, such as a Chapter 7 Trustee's claim under an alter ego legal theory.[43]

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[38] *Perez v. Campbell*, 402 U.S. 637, 660, 91 S. Ct. 1704, 1716, 29 L. Ed. 2d 233 (1971).
[39] *Coady v. D.A.N. Joint Venture III, L.P. (In re Coady)*, 588 F.3d 1312, 1315 (11th Cir. 2009); *Reynolds v. Trafford* (*In re Trafford)*, 377 B.R. 387, 392 (Bankr. M.D. Fla. 2007).
[40] *In re Coady*, 588 F.3d at 1315 (citing *Jennings v. Maxfield (In re Jennings)*, 533 F.3d 1333, 1338-39 (11th Cir. 2008)).
[41] *See Waldron v. Brown (In re Waldron)*, 536 F.3d 1239, 1244 (11th Cir. 2008).
[42] *Trivedi v. Levine*, No. 14 B 10740, 2014 WL 7187007, at *3 (Bankr. N.D. Ill. Dec. 16, 2014).
[43] *Id.* at *5. The Court further rejects the analysis in *Dublina of America, Ltd. V. Sklarin (In re Skarlin*), 69 B.R. 949, (Bankr. S.D. Fl. 1987), as inconsistent with the Bankruptcy Code. Debtors only need to list assets included in their own "property of the estate." They are not required to list assets held by corporations in which they hold equity interests, or, by extension, hypothetical assets that may become property of the estate if a creditor succeeds in an alter ego claim.

Bankruptcy Judge Feeney, in a factually different case, also analyzed how difficult it would be for a debtor to extrapolate all potential alter ego claims and then to hold the debtor responsible for listing every asset he (or his bankruptcy trustee) potentially could acquire through future legal challenges.[44] Courts would be forced to make several tenuous assumptions—that the debtor transferred or titled an asset to a third party but retained actual ownership, that the scheme was fraudulent, and that a later fiduciary, perhaps a bankruptcy trustee, would seek to avoid the transfer under an alter ego legal theory. Such a clairvoyant disclosure standard, guessing what creditors or the bankruptcy trustee may claim as property of the estate in the future, is impossible to apply to debtors, particularly when no legal challenge exists on the bankruptcy petition date. (Obviously, if litigation were pending, debtors necessarily must disclose the lawsuit.)

Here, Synovus claims Lisa Patel's ownership is suspicious because of the Debtor's role in helping her acquire and manage the Hotel. They argue the Court should assume the Debtor is the true owner of FFH, he fraudulently titled ownership of FFH in his daughter's name four years ago, and that the bankruptcy trustee someday may seek to avoid the transfer. This is entirely conjecture. And, to date, the Chapter 7 trustee, who is the only person with standing to raise these alter ego claims, has filed no litigation.[45] The Court is not willing to make these inferences and will not deny the Debtor a discharge for failing to disclose these purely hypothetical assets on his schedules. In connection with the Bank's arguments relating to FFH, the Debtor has made no false oath or failed to explain any asset. Summary judgment is granted for the Debtor.

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[44] *In re Cusson*, 557 B.R. 15, 36 (Bankr. D. Mass. 2016).

[45] *In re Packer*, 520 B.R. 520, 527 (Bankr. E.D. Tex. 2014), subsequently aff'd, 816 F.3d 87 (5th Cir. 2016) ("Even the Plaintiff concedes that its contentions under § 727(a) are essentially based upon the validity of its alter ego/veil-piercing claims, and particularly upon one uncontested fact: the Debtor–Defendant's continued use of the bank account of his single-member LLC, P Custom Homes, LLC ("PCH"), from which he has admittedly paid for personal expenses.")

Synovus Fails to Prove Any Other Basis to Deny the Debtor's Discharge

Other than Synovus' alter ego arguments relating to FFH, which the Court rejects, Synovus relies solely on inadmissible statements and a credit memorandum *perhaps* connected to NOA's loan to FFH.[46] Synovus has identified no other false oaths or unexplained assets of the Debtor that would justify denying the Debtor's discharge.

First, these documents are not admissible and cannot rebut the Debtor's request for summary judgment. When deciding a motion for summary judgment, courts only consider evidence that can be reduced to an admissible form.[47] Hearsay, an out-of-court statement offered to prove the truth of the matter asserted,[48] is not admissible except as provided in Fed. R. Evid. 802.[49] "The general rule is that inadmissible hearsay cannot be considered on a motion for summary judgment."[50] Courts, however, may "consider a hearsay statement in passing on a motion for summary judgment if the statement could be reduced to admissible evidence at trial or reduced to admissible form."[51] The party offering evidence on a motion for summary judgment has the burden to "show that the material is admissible as presented or to explain the admissible form that is anticipated."[52]

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[46] Doc. No. 75, Exh. 16.
[47] *Rowell v. BellSouth Corp*., 433 F.3d 794, 800 (11th Cir. 2005).
[48] Fed. R. Evid. 801.
[49] Fed. R. Evid. 802. Hearsay is not admissible unless a federal statute, rules of evidence or other rules prescribed by the Supreme Court provide otherwise.
[50] *Macuba v. Deboer*, 193 F.3d 1316, 1322 (11th Cir. 1999).
[51] *Macuba*, 193 F.3d at 1323-24.
[52] *Kornacki v. Southern Farm Bureau Life Ins. Co*., Case No. 3:14-cv-784-J-34 MCR, 2015 WL 6445504, *8 (M.D. Fla. Oct. 23, 2015) (citing Rule 56, Advisory Committee Notes to 2010 Amendments, Subdivision (c)(2)).

Synovus argues that the Court must consider the statements and credit memorandum because the documents are admissible under the business records exception to hearsay.[53] Here, the Court does not have to decide if the business record exception applies. The documents reflect that the assets listed within derive from third-party statements, and not NOA.[54] "Hearsay within hearsay subject to an exception is not admissible."[55] The business record exception alone cannot render the hearsay statements within the documents admissible.[56] Even if the business record exception applies to the documents, Synovus failed to demonstrate how the hearsay statements within the documents are admissible or explain how they would be reduced to an admissible form at trial. Synovus did not meet its burden, and as a result, the documents are not admissible.

Second, even if considered, the statements and credit memorandum are dated four years before this bankruptcy case was filed. This credit memorandum references assets the Debtor *may have* owned in 2014, and includes a financial assessment performed by a third-party bank. Plaintiff has failed to identify a single specific lost asset that the Debtor failed to satisfactorily explain.

Accordingly, it is

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[53] Fed. R. Evid. 803(6) provides:

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(6) *Records of a Regularly Conducted Activity*. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

[54] Doc. No. 75, Exh. 16, 17. The documents cite to a residential appraisal report, tax returns, a financial statement dated October 1, 2014, a life insurance policy and a credit report, all provided by third-parties, when referring to the assets.

[55] *United Technologies Corp. v. Mazer*, 556 F.3d 1260, 1278 (11th Cir. 2009)(quoting *Joseph v. Kimple*, 343 F.Supp.2d 1196,1204 (S.D. Ga. 2004)

[56] *United Technologies Corp*, 556 F.3d at 1278 (Fed. R. Evid. 803(6) cannot render hearsay statements contained within the report admissible).

ORDERED:

1. The Motion for Summary Judgment (Doc. No. 65) is **GRANTED.**

2. A separate Final Judgment for the Debtor and against the Plaintiff, Synovus Bank, shall enter. Debtors may receive discharges.

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Attorney, Justin Luna, is directed to serve a copy of this order on all interested parties who are non-CM/ECF users and file a proof of service within three days of entry of the order.