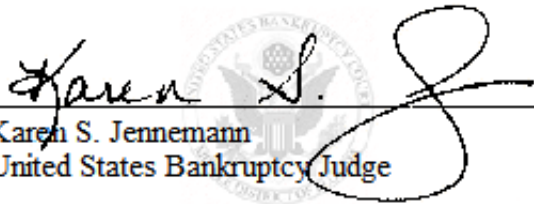


ORDERED.

Dated: February 10, 2020



 Karen S. Jennemann
 United States Bankruptcy Judge

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

In re)	
)	
Jeffrey James Cotter,)	Case No. 6:17-bk-04372-KJ
)	Chapter 7
Debtor(s).)	
_____)	
)	
Cadles of West Virginia, LLC)	
)	
Plaintiff(s),)	
)	
vs.)	Adversary No. 6:18-ap-00006-KJ
)	
Jeffrey James Cotter,)	
)	
Defendant(s).)	
_____)	

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

Debtor, Jeffrey James Cotter, is a defendant in this proceeding brought by creditor, Cadles of West Virginia, LLC under Bankruptcy Code §§ 727(a)(3) and (a)(5).¹ Debtor/Defendant requests judgment on the pleadings,² arguing the facts alleged in the amended complaint describe

¹ Doc. No. 23. All references to the Bankruptcy Code refer to 11 U.S.C. §§ 101 et seq.

² Doc. No. 41.

a discovery dispute between the parties and do not support denial of the Debtor's discharge under §§ 727(a)(3) and (a)(5).³ Plaintiff opposes the motion,⁴ arguing the amended complaint states a claim and that any asserted deficiency is directly due to Debtor/Defendant's active concealment of information and documents requested by Plaintiff.⁵ The Court agrees.

Rule 12(c) of the Federal Rules of Civil Procedure provides that, "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings."⁶ Bankruptcy Rule 7012 incorporates Rule 12(c) of the Federal Rules of Civil Procedure into adversary proceedings.⁷

Judgment on the pleadings is appropriate when "there are no material facts in dispute, and judgment may be rendered by considering the substance of the pleadings and any judicially noticed facts."⁸ Federal courts apply a "fairly restrictive standard in ruling on motions for judgment on the pleadings."⁹ Similar to the standard used for motions to dismiss under Rule 12(b)(6), the court must accept all allegations in the complaint as true and construe them in the light most favorable to the plaintiff.¹⁰ "A Rule 12(b)(6) motion should be granted only if it appears beyond doubt that the plaintiffs can prove no set of facts in support of their allegations which would entitle them to relief."¹¹

Plaintiff alleges prior to the bankruptcy filing Debtor/Defendant "conducted an entire series of complicated estate planning" which created Debtor/Defendant's beneficial interest in

³ Doc. No. 41, p. 8.

⁴ Doc. No. 45.

⁵ Doc. No. 45, p. 12.

⁶ Fed. R. Civ. P. 12(c).

⁷ Fed. R. Bankr. P. 7012.

⁸ *Horsley v. Rivera*, 292 F.3d 695, 700 (11th Cir. 2002) (citing *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1370 (11th Cir. 1998)).

⁹ *U.S. v. Halifax Hosp. Medical Center*, 997 F.Supp.2d 1272, 1274 (M.D. Fla. 2014)(Presnell, J.).

¹⁰ *Id.*

¹¹ *White v. Lemacks*, 183 F.3d 1253, 1255 (11th Cir. 1999); *See also Horsley*, 292 F.3d at 700.

multiple trusts and sub-trusts (collectively the “Trusts”).¹² Debtor/Defendant acted as sole trustee or co-trustee for the Trusts.¹³ Within three years prior to bankruptcy, the Trusts transferred real property to a limited liability company, which Debtor/Defendant and his wife manage,¹⁴ and sold another property, depositing the sale proceeds into an account maintained by Debtor/Defendant’s wife.¹⁵

During the bankruptcy case, Plaintiff examined the Debtor/Defendant and his wife pursuant to Rule 2004 and requested additional information or documents regarding the Trusts, Debtor’s interest in limited liability companies which received property from the Trusts, and the source of funding for the property owned by the Trusts.¹⁶ Debtor/Defendant refused to provide this additional information after the examination.¹⁷ Before the discovery dispute could be resolved and with the deadline to object to Debtor/Defendant’s discharge imminent, Plaintiff filed this proceeding.¹⁸

Plaintiff contends Debtor/Defendant’s discharge should be denied under § 727(a)(3) since Debtor/Defendant failed and is unable to produce to Plaintiff any recorded information regarding his finances and interests relating to the Trusts and limited liability companies,¹⁹ from which Debtor/Defendant’s financial condition and business transactions can be ascertained.²⁰ In addition, Plaintiff asserts Debtor/Defendant’s discharge should be denied under § 727(a)(5) as Debtor/Defendant has failed to explain satisfactorily a deficiency of assets to meet his liabilities

¹² Doc. No. 23, ¶ 26.

¹³ Doc. No. 23, ¶¶ 27, 31.

¹⁴ Doc. No. 23, ¶ 29.

¹⁵ Doc. No. 23, ¶¶ 31, 32.

¹⁶ Doc. No. 23, ¶ 33.

¹⁷ Doc. No. 23, ¶ 35.

¹⁸ Doc. No. 23, Ex. C.

¹⁹ Doc. No. 23, ¶ 39.

²⁰ Doc. No. 23, ¶ 43.

which includes the source of funds used to purchase the Trusts' property and the sale and transfer of the Trusts' property.²¹

A plaintiff must prove under Section 727(a)(3) “(1) either that the debtor failed to keep or preserve any recorded information, or that he destroyed, mutilated, falsified, or concealed recorded information, and (2) that it is impossible to ascertain the financial condition of the debtor as a result of the debtor’s conduct.”²² The purpose of § 727(a)(3) is to give creditors, the trustee, and the bankruptcy court, “complete and accurate information regarding the status of a debtor’s affairs and to test the completeness of the [debtor’s] disclosure.”²³ Courts have wide discretion in determining whether a debtor has maintained sufficient records.²⁴

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 assets that are now unavailable to distribute to creditors.”²⁷ Upon such a showing, debtors then must supply a satisfactory reason why they no longer have the asset.²⁸ “A [debtor’s] general oral explanation for the disappearance of substantial assets without

²¹ Doc. No. 23, ¶¶ 46, 47, 48.

²² *In re Fasolak*, 381 B.R. 781, 790 (Bankr. M.D. Fla. 2007) (quoting *In re Floyd*, 322 B.R. 205, 213 (Bankr. M.D. Fla. 2003)). Section 727(a)(3) of the Bankruptcy Code provides:

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

(3) 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 of the circumstances of the case.

²³ *Sackett v. Shahid (In re Shahid)*, 334 B.R. 698, 706 (Bankr. N.D. Fla. 2005) (citing *Grant v. Sadler (In re Sadler)*, 282 B.R. 254, 263 (Bankr. M.D. Fla. 2002)).

²⁴ *In re Shahid*, 334 B.R. at 706 (internal citations omitted).

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).

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.*

documentary corroboration” is not enough.²⁹ Vague and indefinite explanations of losses are not sufficient.³⁰

Having reviewed the pleadings and considered the record in the bankruptcy case and this proceeding, the Court denies judgment on the pleadings on Plaintiff’s § 727 claims. It is not beyond doubt that Plaintiff can prove no set of facts in support of its claims.

Accordingly, it is

ORDERED:

1. Debtor/Defendant’s Motion for Judgment on the Pleadings (Doc. No. 41) is

DENIED.

2. A further pretrial conference is scheduled for **11:00 a.m. on February 26, 2020**, in Courtroom A, Sixth Floor, 400 West Washington Street, Orlando, Florida. **No further continuances will be granted.**

3. Parties are directed to file a proposed Case Management Order by **February 24, 2020.**

###

Attorney, Daniel A. Velasquez, 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.

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 616, 619 (11th Cir. 1984).