

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

In re)	
)	
Dana Marion Micallef,)	Case No. 6:18-bk-06259-KSJ
)	Chapter 7
Debtor.)	
_____)	
)	
Gene T. Chambers, Chapter 7 Trustee,)	
)	
Plaintiff,)	
)	
vs.)	Adversary No. 6:19-ap-00268-KSJ
)	
)	
Dana Marion Micallef,)	
)	
Defendant.)	
_____)	

**ORDER GRANTING
TRUSTEE’S MOTION FOR SUMMARY JUDGMENT**

This adversary proceeding came before the Court on the Trustee’s Motion for Summary Judgment (the “Motion”).¹ Dana Micallef (“Debtor” or “Defendant”) initially sought bankruptcy

¹ Doc. No. 8. The Motion for Summary Judgment was filed on January 17, 2020, giving the Defendant 21 days to file a response. No response was filed.

relief² under Chapter 11 of the Bankruptcy Code.³ The case later was converted to a Chapter 7 liquidating case.⁴ Gene Chambers (“Trustee” or “Plaintiff”) was appointed as the Chapter 7 Trustee and filed this adversary proceeding⁵ objecting to Debtor’s Discharge in six counts under §727 of the Bankruptcy Code.⁶ She now seeks summary judgment.⁷ Although the Debtor/Defendant filed a very brief Answer⁸ to Plaintiff’s Complaint, he filed no response to the Motion and, apparently, does not oppose summary judgment.

Federal Rule 56(a), made applicable by Federal Rule of Bankruptcy Procedure 7056, 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.”⁹ The moving party must establish the right to summary judgment.¹⁰ A “material” fact is one that “might affect the outcome of the suit under the governing law.”¹¹ A “genuine” dispute means that “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.”¹²

Once the moving party has met its burden, the nonmovant must set forth specific facts showing there is a genuine issue for trial.¹³ The non-moving party “must do more than simply show that there is some metaphysical doubt as to the material facts.”¹⁴ The non-moving party must go beyond the pleadings, and by its own affidavits, depositions, or admissions on file, designate

² Doc. No. 1, Case No. 6:18-bk-06259-KSJ. The case was filed on October 10, 2018.

³ All references to the Bankruptcy Code refer to 11 U.S.C. § 101, *et seq.*

⁴ Doc. No. 46, Case No. 6:18-bk-06259-KSJ. The conversion to Chapter 7 occurred on January 23, 2019.

⁵ Doc. No. 1.

⁶ Trustee opposes the Debtor receiving a Discharge under §§ 727(a)(2)(A), (a)(2)(B), (a)(3), (a)(4)(A), (a)(5), and (a)(6)(A).

⁷ Doc. No. 8.

⁸ Doc. No. 6. Defendant handwrote short responses in the margins of a copy of the Plaintiff’s Complaint.

⁹ Fed. R. Civ. P. 56(a).

¹⁰ *Fitzpatrick v. Schlitz (In re Schlitz)*, 97 B.R. 671, 672 (Bankr. N.D. Ga. 1986).

¹¹ *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).

¹² *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510.

¹³ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 10 S. Ct. 1348 (1986).

¹⁴ *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

specific facts to back up conclusory allegations.¹⁵ Defendant has filed no paper that would establish any genuine actual issue that would preclude summary judgment as a matter of law.

Plaintiff contends the Court should deny Debtor's discharge because of numerous material omissions on the Debtor's Schedules and Statement of Financial Affairs ("SOFA")¹⁶ including: three Space Coast Credit Union bank accounts, a cyber currency account, ownership interest in an Andy Warhol painting purportedly worth \$43,000,000, an ownership interest in Danaland Development, LLC, homestead property acquired within 1,215 days of filing for bankruptcy, \$234,913.86 payment to Waterside Title Company, \$80,000 worth of payments to Debtor's father, a \$39,000 payment to Omnipresent Web Solutions, a \$5,567.06 payment to Anderson Family Land Holdings, transferring an approximately 70% ownership interest in Daytona Beach Yacht Charters, LLC, and a \$12,458 credit card payment with an account number ending in 2169.¹⁷ Plaintiff further alleges Debtor failed to provide adequate documentation regarding numerous, significant transfers exceeding \$450,000 from his personal bank accounts.¹⁸

Plaintiff met her initial burden and demonstrated Defendant omitted substantial assets in his Schedules or failed to adequately explain where his assets went. Debtor filed no response to the Motion and does not challenge the accuracy of the Plaintiff's allegations. The only paper filed by the Defendant was a crude answer that interlineated handwritten comments on a copy of the Complaint.¹⁹ Defendant sets forth no competent evidence to contest the Plaintiff's allegations.

¹⁵ *Jeffrey v. Sarasota White Sox, Inc.*, 64 F.3d 590, 593-94 (11th Cir. 1995).

¹⁶ Doc. No. 56 in the Main Case No. 6:18-bk-06259-KSJ.

¹⁷ Doc. No. 8. In support of her Motion for Summary Judgment, Plaintiff attached substantial credible evidence demonstrating the Debtor's failure to include material information about his assets. Specifically, Plaintiff attached to its Motion the Debtor's Space Coast Credit Union account history for accounts ending in 4100, 4130, and 8241 (Exh. A), Coinbase account history (Exh. B), Seacoast National Bank Account history for an account ending in 4796 (Exh. D), Warranty Deeds for Debtor's homestead property (Exhs. C and E), and copies of four checks made out to Debtor's father, Anderson Family Land Holdings, and Omnipresent Web Solutions (Exh. F).

¹⁸ *Id.*

¹⁹ *See* Doc. No. 6.

So, the only issue is whether the Plaintiff's unchallenged allegations are sufficient to grant summary judgment as a matter of law. The Court concludes Plaintiff meets this standard and will deny the Debtor a discharge under §§ 727(a)(3) and (a)(5) of the Bankruptcy Code for failing to preserve financial records and explain his substantial loss of assets.

§ 727(a)(3) – Count 3
Failure to preserve records

Plaintiff's third count is based on § 727(a)(3) of the Bankruptcy Code provides:

The court shall grant the debtor a discharge, unless . . . 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.²⁰

To make a *prima facie* case under § 727(a)(3), a creditor must prove “(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.”²¹ If moving under the “failed to keep or preserve any recorded information” prong, the creditor first must make a showing of inadequate or nonexistent records; then, “the burden of proof shifts to the debtors to justify the inadequacy or nonexistence of the records.”²² Courts have wide discretion to determine whether a debtor has maintained sufficient records.²³ The focus of § 727(a)(3) is “on the debtor's presentation of an accurate and complete account of his financial affairs.”²⁴

²⁰ 11 U.S.C. § 727(a)(3).

²¹ *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)).

²² *In re Canava*, 550 F.3d 755, 761 (7th Cir. 2008).

²³ *In re Shahid*, 334 B.R. 698, 706 (Bankr. N.D. Fla. 2005) (citing *In re Leffingwell*, 279 B.R. 328, 355 (Bankr. M.D. Fla. 2002)).

²⁴ *Fasolak*, 381 B.R. at 790 (citing *In re Herbert*, 304 B.R. 67, 75 (Bankr. E.D.N.Y. 2004)).

Plaintiff sustained her initial burden by demonstrating Debtor failed to keep or preserve records detailing the substantial withdrawals and transfers from his Space Coast and Seacoast bank accounts. After the Plaintiff's initial burden was met, the burden shifts to the Debtor to satisfactorily explain the inadequacy of records. Debtor does not explain his lack of financial books and records other than a summary note in his Answer that says a creditor obtained his financial records in a separate lawsuit, and it was too costly to reproduce the requested documents.²⁵ This is not enough.

Debtor has not sufficiently explained the inadequacy of his financial records. He filed bankruptcy knowing his finances would be under strict scrutiny and should have preserved or obtained financial records that would explain the large pre-petition transfers from his personal bank accounts. Trustee requires this financial information to evaluate the Debtor's estate. Debtor's discharge is denied under § 727(a)(3) of the Bankruptcy Code.

§ 727(a)(5) – Count 5
Failure to explain loss or deficiency of assets

Plaintiff's fifth count is based on §727(a)(5) of the Bankruptcy Code requiring a plaintiff to prove: (1) at a time not too remote from the commencement of the case, the debtor owned a substantial, identifiable asset; (2) the debtor no longer owned the particular asset on the date of filing the voluntary petition; and (3) that the debtor could not satisfactorily explain the non-existence of the asset when called upon to do so.²⁶ "If the party objecting to the discharge establishes the basis for its objection, then the burden shifts to the debtor to 'explain satisfactorily the loss.'"²⁷

²⁵ Doc. No. 6. Plaintiff requested documents pertaining to Debtor's bank accounts, Danaland, Omnipresent, Daytona Beach Yacht Charters, and the Andy Warhol painting.

²⁶ *In re Walden*, 380 B.R. 883, 894 (Bankr. M.D. Fla. 2008).

²⁷ *In re Fasolak*, 381 B.R. 781, 792 (Bankr. M.D. Fla. 2007) (citing *In re Hawley*, 51 F.3d 246, 249 (11th Cir. 1995)).

Plaintiff easily sustained her initial burden by demonstrating the Debtor withdrew or transferred \$100,316.09 from his Space Coast Credit Union accounts,²⁸ and \$359,480.92 from his Seacoast bank account,²⁹ in the months preceding the bankruptcy. The burden then shifts to the Debtor to satisfactorily explain the transfers. Debtor offers no explanations other than scribbles in his “Answer,” which the Court rejects as a valid response to the Plaintiff’s Motion for Summary Judgment.³⁰ Debtor provided no supporting documentation or additional details regarding the omitted and challenged transfers.

Debtor did not satisfactorily explain the loss of substantial and identifiable assets. Where did monies totaling about \$450,000 go? Debtor’s vague and indefinite explanations in his Answer uncorroborated by any documentation are unsatisfactory.³¹ The Court finds that Plaintiff proved the elements of §727(a)(5) and also denies the Debtor a Discharge under Count 5.

Plaintiff’s Motion for Summary Judgment is granted as a matter of law under §§ 727(a)(3) and (a)(5) of the Bankruptcy Code for Debtor’s failure to preserve financial records and satisfactorily explain the substantial loss of assets. Because the Debtor is denied a Discharge under these two counts, the Court need not address the other pending counts. Accordingly, it is

ORDERED:

1. Debtor’s discharge is denied under §§ 727(a)(3) and (a)(5) of the Bankruptcy Code.
2. A separate and final judgment for the Plaintiff and against the Debtor/Defendant consistent with this Order shall be entered.

²⁸ Doc. No. 8, Exh. A.

²⁹ Doc. No. 8, Exhs. D and F.

³⁰ Doc. No. 6.

³¹ See *Chalik*, 748 B.R. at 619.

###

Trustee Gene T. Chambers is directed to serve a copy of this order on interested parties who are non-CM/ECF users and file a proof of service within 3 days of entry of the order.