



Dated: July 06, 2018
The following is SO ORDERED:


David S. Kennedy
UNITED STATES CHIEF BANKRUPTCY JUDGE

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

In re

Derek Evins Denman and

Marnie Danell Denman,

Debtors.

S.S.N: xxx – xx – 5954

S.S.N.: xxx – xx – 7540

Case No. 17-24122-K

Joint Chapter 7

Samuel K Crocker, United States

Trustee for Region 8,

Plaintiff,

vs.

Derek Evins Denman,

Defendant.

Adv. Proc. No. 17-00171

**MEMORANDUM AND ORDER ON DEFENDANT'S F.R.B.P. 7012(c) MOTION FOR
JUDGMENT ON THE PLEADINGS AND PLAINTIFF'S F.R.B.P. 7056 MOTION FOR
SUMMARY JUDGMENT**

INTRODUCTION

On May 8, 2017, the above-named Debtors, Derek Evins Denman and Marnie Danell Denman, filed a joint case under Chapter 7 of the Bankruptcy Code. On August 10, 2017, Plaintiff, the United States Trustee for Region 8 ("U.S. Trustee") filed this timely complaint under 11 U.S.C. § 727(c)(1) and Federal Rule of Bankruptcy Procedure 7001(4) seeking to deny debtor/defendant, Derek Denman ("Mr. Denman"), a Chapter 7 discharge. On September 15, 2017, Mr. Denman filed a motion for judgment on the pleadings pursuant to Fed. R. Bankr. P. 7012(c) alleging that the U.S. Trustee had failed to allege a vital piece of his claim. The U.S. Trustee objected to Mr. Denman's motion on September 25, 2017, and after several continuances on that matter, filed his own motion for partial summary judgment on April 17, 2018.

For the reasons mentioned below, the Court will deny Mr. Denman's motion for judgment on the pleadings and grant the U.S. Trustee's motion for summary judgment.

JURISDICTION

The U.S. Trustee filed this complaint under 11 U.S.C. § 727(c)(1) and Federal Rule of Bankruptcy Procedure 7001(4) seeking to deny Mr. Denman a Chapter 7 general discharge. This is a core proceeding which the Court may hear and determine under 28 U.S.C. § 157(b)(2)(A) and (J), and 11 U.S.C. § 105. The Court has subject matter jurisdiction under 28 U.S.C. § 1334 and § 157(a).

FACTS

Except where specifically noted, the following facts are undisputed.

Mr. Denman founded Opus Medical Management, LLC ("Opus") in 2006. [*United States Trustee's Statement of Undisputed Facts* 1, Doc. No. 19.] Mr. Denman was the CEO, president,

and manager of Opus from 2006 until 2014. [*Id.* at 2.] Opus had gross receipts or sales of approximately \$8 million in 2011 and over \$14 million in 2012. [*Id.*]

On March 20, 2014 Opus filed for protection under Chapter 11. [*Id.* at 3; Case No. 14-22960 (Bankr. W.D. Tenn.)] Mr. Denman signed the Opus Chapter 11 petition. [*Id.*] Opus had several affiliates which also filed Chapter 11 cases: Reggie White Cardiopulmonary Rehabilitation Center, LLC (Case No. 14-22961 (Bankr. W.D. Tenn.)), O2 Medical, LLC (Case No. 14-22962 (Bankr. W.D. Tenn.)), and Sleep Diagnostics, LLC (Case No. 14-23000 (Bankr. W.D. Tenn.)). [*Id.* at 3.]

Opus did not file a Form 1065 U.S. Return of Partnership Income for the tax year 2013 ("2013 Tax Return"). [*Id.* at 4.] Opus also did not file the Form 941 Employer's Quarterly Federal Tax Returns for the first quarter of 2014 ("2014 Quarterly Return"). [*Id.*]

The Amended and Restated Operating Agreement of Opus Medical Management, LLC dated July 1, 2010 was in effect when both the 2013 Tax Return and the 2014 Quarterly Return came due. [*Id.*] Article III, Section 4.4 of the Opus Operating Agreement designates Mr. Denman to be Opus's Tax Matters Member. [*Id.* at 9.] Mr. Denman was responsible for filing Opus's tax returns and ensuring that all tax liabilities were paid. [*Id.*]

On February 26, 2014, just 23 days before Opus filed for bankruptcy, Mr. Denman hired Randall Songstad, Esquire to act as Opus's COO. [*Id.* at 24.] In October 2014, Mr. Denman was removed from his positions with Opus. [*Defendant's Response to Motion for Partial Summary Judgment Filed by the United States Trustee* ("Response") 3, Doc. No. 23.] On February 25, 2015, Opus's Chapter 11 was converted to a Chapter 7. Case No. 14-22960 (Bankr. W.D. Tenn.), Doc. No. 140. Neither the Opus 2013 Tax Return nor the 2014 Quarterly Return has ever been filed by Mr. Denman, Mr. Songstead, or the Chapter 7 Trustee. [*Response* 3.]

DISCUSSION

The Court has before it two matters for judicial determination. On September 15, 2017, Mr. Denman filed a motion for judgment on the pleadings (Doc. No. 6), and on April 17, 2018, the U.S. Trustee filed a motion for partial summary judgment (Doc. No. 17). The Court will consider each in turn.

A. Mr. Denman's Motion for Judgment on the Pleadings.

Mr. Denman seeks judgment as a matter of law pursuant to Federal Rule of Civil Procedure 12(c) made applicable here by Fed. R. Bankr. P. 7012(c). Pursuant to Fed. R. Civ. P. 12(c), the moving party is entitled to a judgment only if after accepting all well-pled allegations as true, the party is nonetheless entitled to judgment. Mr. Denman contends that the U.S. Trustee has failed to allege that a former CEO of a business has a legal right or duty to personally possess financial records belonging to the business. He believes that because there is no such duty, the U.S. Trustee cannot satisfy any of the requirements of 11 U.S.C. § 727(a) and therefore cannot successfully object to Mr. Denman's general discharge.

The U.S. Trustee seeks denial of Mr. Denman's general discharge based upon 11 U.S.C. § 727(a)(7), which provides, in relevant part, as follows:

The court shall grant the debtor a discharge unless –
the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6)
. . . within one year . . . of the filing of the petition . . . in connection with another
case . . . concerning an insider.

The U.S. Trustee alleges that Mr. Denman has violated § 727(a)(3) which denies a discharge to a "debtor [who] has . . . failed to keep . . . any recorded information . . . from which the debtor's financial condition or business transactions might be ascertained, unless . . . justified under all of the circumstances."

Mr. Denman is correct in his assertion that the U.S. Trustee has failed to allege that he had a duty to possess the 2013 Tax Return or the 2014 Quarterly Return. However, the U.S. Trustee does allege that Mr. Denman had a duty to prepare and file those tax returns but failed to do so. The U.S. Trustee further alleges that by failing to prepare those returns, Mr. Denman has violated 11 U.S.C. § 727(a)(3) in a prior case. Lastly, the U.S. Trustee alleges that Mr. Denman was an "insider" as defined in 11 U.S.C. § 101(31) with Opus when the violation occurred.

Accepting all of the allegations in the complaint as true, the U.S. Trustee has alleged facts sufficient to survive Mr. Denman's motion for judgment on the pleadings. Therefore, the Mr. Denman's motion for judgment on the pleadings is hereby denied.

B. The U.S. Trustee's Motion for Partial Summary Judgment

The U.S. Trustee filed a motion for partial summary judgment on April 17, 2018. [Doc. No. 17.] This motion seeks summary judgment as to Count 1 of the U.S. Trustee's complaint; however, the complaint only seeks relief based off of one count. Therefore, the Court will consider the U.S. Trustee's motion as seeking summary judgment in full.

I. Standard for Summary Judgment

Fed. R. Bankr. P 7056, which incorporates Fed. R. Civ. P. 56, provides that summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." To meet this burden, the moving party may rely on any of the evidentiary sources listed in Rule 56(c) or on the failure of the nonmoving party to produce more than a mere scintilla of evidence that would create a genuine dispute for the jury. *Leary v. Daeschner*, 349 F.3d 888, 896-97 (6th Cir. 2003). There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party; if the evidence is merely colorable or is not significantly

probative, summary judgment may be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). The central issue is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Anderson*, 477 U.S. at 251-52.

It is not sufficient simply to show that there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The facts must provide more than a scintilla of evidence and must meet the standard of whether a reasonable juror could find by a preponderance of the evidence that the nonmoving party is entitled to a verdict. *Anderson*, 477 U.S. at 252. Summary judgment must be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

II. Denial of Discharge Under 11 U.S.C. § 727(a)(7)

As noted earlier, the U.S. Trustee objects to Mr. Denman's general discharge under 11 U.S.C. § 727(a)(7). He is entitled to make such an objection by virtue of 11 U.S.C. § 727(c).

In order for the Court to sustain his objection, the U.S. Trustee must establish three essential elements: a) that Mr. Denman has committed an act specified in subsections (2)-(6) of 11 U.S.C. § 727(a) in connection with another case; b) such act occurred within one year of the bankruptcy petition being filed or during the case itself; and c) that Mr. Denman was an insider with the debtor of the other case.

a. 11 U.S.C. § 727(a)(3)

In the motion for summary judgment, the U.S. Trustee alleges two violations that he believes are sufficient to deny a general discharge to Mr. Denman. First, he alleges that Mr.

Denman has failed to provide personal bank statements for the period January 2012 through October 2014. Second, he alleges that Mr. Denman also failed to file the 2013 Tax Return and the 2014 Quarterly Return for Opus.

The failure to provide personal bank statements in his personal bankruptcy case is by definition not an act "in connection with another case" as required by 11 U.S.C. § 727(a)(7). Those documents were requested in this case, and no evidence has been entered to establish that Mr. Denman was required to and failed to provide those documents in Opus's case. Therefore, because the U.S. Trustee's objection is based solely on 11 U.S.C. § 727(a)(7), he cannot prevail based on Mr. Denman's failure to provide personal bank statements alone.

The crux of the U.S. Trustee's objection is, in essence, that Mr. Denman failed to ensure that Opus filed its 2013 Tax Return and 2014 Quarterly Return. Under 11 U.S.C. § 727(a)(3), failure to keep or preserve books from which the debtor's financial condition or business transactions might be ascertained is grounds for denying a discharge, unless the debtor can provide a reasonable justification. The U.S. Trustee has the burden of establishing the failure to keep or preserve records; however, once he does so, the burden shifts to Mr. Denman to provide a reasonable justification. *Turoczy Bonding Co. v. Strbac (In re Strbac)*, 235 B.R. 880, 882-83 (6th Cir. BAP 1999); *In re Martin*, 554 F.2d 55 (2nd Cir. 1977); *Berks v. Calisoff (In re Callisoff)*, 92 B.R. 346 (Bankr. N.D. Ill. 1998).

In this case, there is no dispute that Opus was required to file the 2013 Tax Return or the 2014 Quarterly Return and failed to do so. It is universally accepted that tax returns provide material information about a debtor's financial condition. *See, for example, Robertson v. Dennis (In re Dennis)*, 330 F.3d 696, 703 (5th Cir. 2003); *In re Gartner*, 326 B.R. 357, 377 (Bankr. S.D.

Tex. 2006). Accordingly, the Court holds that failing to file tax returns is an act within the meaning of § 727(a)(3).

The U.S. Trustee must establish that Mr. Denman bore the responsibility for filing the missing tax returns. It is undisputed that Article III, Section 4.4 of the Opus Operating Agreement designates Mr. Denman to be Opus's Tax Matters Member. As such, Mr. Denman was contractually responsible for filing Opus's tax returns.

But the analysis does not end here. A general discharge can only be denied under 11 U.S.C. § 727(a)(3) if the debtor fails to provide a reasonable justification. In this case, Mr. Denman states that he hired Randy Songstead, Esquire in March 2014 as the operating officer for Opus and that it was his responsibility to file the tax returns. The Court is unpersuaded by this argument. First, Mr. Songstead was Mr. Denman's employee, meaning that Mr. Denman is still ultimately responsible for all of the tasks assigned to Mr. Songstead. Second, under common law contract principles, Mr. Denman voluntarily accepted the responsibility of filing the tax returns when he entered into the Opus Operating Agreement. Mr. Songstead was not a party to this agreement. Even if Mr. Denman sub-contracted the responsibility of filing the tax returns to Mr. Songstead, Mr. Denman would still be contractually obligated to ensure that Mr. Songstead actually filed them. There is no evidence in the record that the Opus Operating Agreement was modified to make Mr. Songstead the party responsible for filing Opus's tax returns. Therefore, the Court finds that Mr. Denman's failure to file the tax returns was not justified under a totality of the facts and circumstances.

The U.S. Trustee has shown that Mr. Denman indeed violated the provisions of 11 U.S.C. § 727(a)(3) in connection with another case, and Mr. Denman has failed to offer a reasonable

explanation for doing so. Therefore, the U.S. Trustee has satisfied the first prong of the 11 U.S.C. § 727(a)(7) analysis.

b. The Act Occurred Within One Year

Section 727(a)(7) of the Bankruptcy Code is clear that the violation of § 727(a)(3) must have occurred within one year of the filing of the bankruptcy petition or during the case itself. While there does appear to be some debate amongst courts as to which bankruptcy petition the statute is referring, there is no need for this Court to address that issue as the results are the same either way in this instance.

First, if the time limit is based on the filing of the bankruptcy petition of Opus Medical, then Mr. Denman's failure to file the tax returns occurred after the filing of the Opus bankruptcy petition and while the case was still pending.

Alternatively, if the time limit is based on the filing of Mr. Denman's personal bankruptcy petition, then the act was still within the time limit, although the analysis is more complex. Mr. Denman maintains that the failure to file the tax returns occurred in 2014, three years before the bankruptcy petition in this case was filed. However, he has provided no legal basis to support his position. The Court is not convinced that the obligation to file a tax return ever ends. In fact, while 26 U.S.C. § 6501 sets a three year statute of limitations for the IRS to collect tax liabilities, there is an exception in 26 U.S.C. § 6501(c)(3) which states that "in the case of failure to file a return [collection may be made] at any time." It does not take a large leap in logic to determine that if the IRS's ability to collect is unending then the obligation to file tax returns must necessarily be unending. If such obligation still exists to this day, then every passing day in which the tax returns are not filed is another day that the responsible party is committing the act of not filing them.

Here, Mr. Denman presents a wrinkle in the analysis. He argues that since he was ousted from the company that it is impossible for him to fulfill his obligation and file the tax returns. Since he was ousted more than a year before the filing of the bankruptcy petition in the instant case, he argues, the impossibility places his act outside of the time limit. The Court disagrees for the simple reason that his ouster did not make it impossible for him to file the tax returns. Mr. Denman is responsible for ensuring that the tax returns are filed properly. This responsibility arises out of contract law and from the fact that he was listed with the State of Tennessee and the IRS as the party responsible. After his ouster, when he was denied access to the records necessary to fulfill his obligation, Mr. Denman was not left with no recourse as he has continually maintained. He still, however, had full access to courts (both this Court and the State courts) with the authority to force the turnover of those records. Additionally, 11 U.S.C. § 704(a)(7) specifically provides that a bankruptcy case trustee must furnish information concerning the estate if requested by a party in interest. There is no evidence in the record that Mr. Denman has ever taken any action to recover, either from Opus or the former Chapter 7 Trustee, the information necessary to file the tax returns. The Court does not mean to imply that litigation would have been a simple solution for Mr. Denman; however, it was a possible solution that he failed to avail himself of. When a possible solution exists, a party cannot argue impossibility.

Because Mr. Denman cannot establish the impossibility defense and he remains responsible for the filing of the missing tax returns, his failure to file such tax returns is an ongoing violation of 11 U.S.C. § 727(a)(3) and therefore within the time limit of 11 U.S.C. § 727(a)(7).

c. Mr. Denman Was An Insider With Opus Medical

Section 727(a)(7) of the Bankruptcy Code requires that the debtor in the instant case was an insider with the debtor in the other case. "Insider" is a defined term within the Bankruptcy Code. 11 U.S.C. § 101(31). There is no dispute that Mr. Denman was an "insider" with Opus. He was a 70% equity holder and its CEO, president, and manager of Opus from 2006 until 2014.

C. Failure to Provide Personal Bank Statements

The parties have spent a great deal of time and effort discussing Mr. Denman's failure to produce personal banking records. The U.S. Trustee's complaint alleges only a violation of 11 U.S.C. § 727(a)(7). As noted above, failure to provide personal banking records in the current case cannot satisfy the requirements of 11 U.S.C. § 727(a)(7). While the failure to provide the personal banking records may be a violation of another subsection of 11 U.S.C. § 727(a), the Court will render no opinion on that matter as it has not been properly brought before it, nor is it necessary as Mr. Denman's failure to file the 2013 Tax Return and the 2014 Quarterly Return is sufficient for denying Mr. Denman a general discharge.

CONCLUSION

Because the U.S. Trustee has adequately alleged facts sufficient to satisfy 11 U.S.C. § 727(a)(7), Mr. Denman's motion for judgment on the pleadings is hereby denied.

After considering all of the undisputed facts and considering all disputed facts in Mr. Denman's favor, the Court holds that the U.S. Trustee is entitled to summary judgment. Mr. Denman's general discharge is hereby denied. This ruling has no bearing on the discharge of Mrs. Denman, and the Court Clerk shall forthwith issue Mrs. Denman a general discharge.

Accordingly, IT IS ORDERED AND NOTICE IS HEREBY GIVEN that:

1. Mr. Denman's motion for judgment on the pleadings is **DENIED**.
2. The U.S. Trustee's motion for summary judgment is **GRANTED**.

3. Mr. Denman shall not be eligible for a discharge in this case.
4. Debtor Marnie Danell Denman shall receive a general discharge.
5. The Bankruptcy Court Clerk shall cause a copy of this Memorandum, Order, and

Notice of the entry thereof to be sent to the following:

Christian Johnson, Esq.
Attorney for the Defendant
44 N. 2nd Street, Suite 1103
Memphis, TN 38103

Derek Evins Denman
Defendant
585 S. Greet Street, #1100
Memphis, TN 38111

Sean M. Haynes, Esq.
Office of the United States Trustee
200 Jefferson Ave., Suite 400
Memphis, TN 38103