UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

William R. Hyneman
Debtor.

Case No. 11-23217 PJD
Chapter 7

Samuel K. Crocker,
United States Trustee, Region 8
Plaintiff.

vs.

Adv. Pro. No. 13-00180

William R. Hyneman,
Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Before the court is the Motion for Partial Summary Judgment ("Motion") filed by the United States Trustee for Region 8 ("UST") on December 11, 2013, averring that there are no genuine issues of material fact and that his Complaint filed on April 30, 2013, objecting to the discharge of

William R. Hyneman ("Defendant") under 11 U.S.C. §§ 727(a)(3), and (5), should be sustained and Defendant's discharge denied. Filed in support of the Motion are the Memorandum of Law, along with Exhibit 8, *In re Hazelrigg*, 2013 WL 6154102 (9th Cir. BAP 2013), and Statement of Material Undisputed Facts. Defendant filed Responses to the Motion and to the Statement of Material Undisputed Facts, along with the Affidavit of Defendant. The UST filed a Reply to Defendant's Responses, along with an Exhibit, the Transcript of Section 341 First Meeting of Creditors on May 6, 2011. Defendant filed a Sur-Reply, along with an Authenticating Affidavit with accompanying Indices and Documents. Upon the conclusion of a duly noticed summary judgment hearing, at which the court heard arguments of counsel, the court took the matter under advisement. While the matter was under advisement, Defendant filed an Emergency Motion to Supplement Summary Judgment Record with Newly Discovered Evidence. The UST filed an objection to that Emergency Motion. After a hearing, the court entered an order granting the Defendant's Emergency Motion to Supplement Summary Judgment Record, the contents of which were considered by this court.

For the reasons explained more fully below, the Motion is denied, because there exist genuine issues of material fact which preclude the entry of summary judgment. The court has jurisdiction over this core proceeding pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(J).

SUMMARY JUDGMENT

Summary judgment is appropriate if there are no genuine issues of material fact in dispute and the movant is entitled to judgment as a matter of law. Fed. R. Bankr. P. 7056 (making Fed. R. Civ. P. 56 applicable in adversary proceedings). Motions for summary judgment should be granted with great caution, because they truncate the adversarial process. But where the court finds that no reasonable grounds for dispute exist on any genuine issue, the court may grant a motion for

summary judgment. See generally *Nat'l Enters., Inc. v. Smith*, 114 F. 3d 561 (6th Cir. 1997); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

The initial "burden of proving that no genuine issue as to any material fact exists and that it is entitled to a judgment as a matter of law" is borne by the moving party. *R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427, 433 (6th Cir. 2005). The nonmoving party must then respond by setting forth "specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250 (1986). "A party opposing summary judgment cannot hold back his evidence until trial...." *In re Mezvinsky*, 265 B.R. 681, 688 (Bankr. E.D.Pa. 2001)(citing *McIntyre v. Delaware Division of Youth Rehabilitation Services*, 795 F.Supp. 668, 673 (D.Del. 1992)). The court, after construing the facts most strongly in favor of the nonmoving party, may grant the motion for summary judgment, where it finds that the proper resolution of the issues of law requires that judgment be entered for the moving party. *See Celotex*, 477 U.S. 317 (1986).

When an individual debtor files a Chapter 7 case, one of the primary expectations of that debtor is the discharge of outstanding debt, once the creditors' claims have been paid to the extent possible from available assets. The debtor is not entitled to the discharge as a matter of right, but the discharge will be granted unless the trustee or a creditor objects to the discharge. Indeed, Section 727(a) provides: "The court *shall* grant the debtor a discharge, unless---" certain exceptions apply. (emphasis added). 11 U.S.C. § 727(a). "Because the underlying purpose of the Bankruptcy Code is to grant the honest debtor a 'fresh start,' objections to discharge must be strictly construed against the objector and in favor of the debtor....When denial of discharge is sought on a motion for summary judgment, courts exercise even greater caution." *In re Sethi*, 250 B.R. 831, 839 (Bankr.

E.D.N.Y. 2000)(citing *In re Pimpinella*, 133 B.R. 694, 697 (Bankr. E.D.N.Y. 1991)); *See also In re Chachra*, 138 B.R. 397, 401 (Bankr. S.D.N.Y. 1992). If the nonmoving party has presented any evidence in the record to support a reasonable inference in its favor, then summary judgment is inappropriate. *In re Murphy*, 437 B.R. 74, 84 (Bankr. W.D.N.Y. 2010)(citations omitted). However, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts..." *Matsushita*, at 586-87. "A mere scintilla of evidence in support of the non-moving party is insufficient." *Nye v. CSX Trasportation*, 437 F.3d 556, 563 (6th Cir. 2006). "If, as to the issue on which summary judgment is sought, there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper." *Chambers v. TRM Copy Centers Corp*., 43 F.3d 29, 37 (2d Cir. 1994)(citing *Brady v. Town of Colchester*, 863 F.2d 205, 211(2d Cir. 1988).

The court will examine whether summary judgment may be granted concerning the denial of discharge under § 727(a)(3) and/or § 727 (a)(5).

Denial of Discharge under 11 U.S.C. § 727(a)(3)

Section 727(a)(3) provides:

> (a) The court shall grant the debtor a discharge unless–
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> (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;

11 U.S.C. § 727(a)(3).

The policy justifying the denial of discharge under § 727(a)(3), as well as § 727(a)(5), is based on the need of creditors and the trustee to draw a clear picture of the debtor's financial condition and business transactions enabling them to examine the debtor's transactions in the critical period surrounding the filing of the bankruptcy case. *In re Frommann*, 153 B.R.113, 116 (Bankr. E.D.N.Y. 1993). A debtor's intention to conceal is not a requirement of this provision, but there is a basic requirement that, upon filing the bankruptcy case, the debtor will set out a complete and total financial picture. *In re Erdheim*, 197 B.R. 23, 29 (Bankr. E.D.N.Y. 1996). Where the debtor has failed to maintain records in a form that allows the creditors and trustee to determine the debtor's financial condition and business transactions, then imposing the harsh penalty of discharge denial is appropriate, where debtor is unable to justify this failure to the satisfaction of the court. *Frommann*, 153 B.R. at 117. Underlying the purpose of both §§ 727(a)(3) and (5) is the deterrence of debtors who have availed themselves of the benefits of filing bankruptcy, but who have failed to account for their financial transactions in a full and transparent fashion that would allow creditors and the trustee to determine if the debtor is "honest, but unfortunate," and entitled to a "fresh start." "Sections 727(a)(3) and 727(a)(5) are designed to promote the integrity of the bankruptcy process by requiring a debtor to fully account for his past and present financial dealings and condition at the request of the trustee or creditors, as a prerequisite to grant of discharge." *In re Losinski*, 80 B.R. 464, 469 (Bankr. D. Minn. 1987)(citations omitted).

There is no required system in which the debtor has a duty to maintain records. But whatever system is used must be reasonable under this debtor's circumstances. *In re Underhill*, 82 F.2d 258, 259-60 (2d Cir. 1936). Rather, the test is whether there is available written evidence made

and preserved from which the debtor's present financial condition and his recent business transactions, for a reasonable period in the past, may be ascertained with substantial completeness and accuracy. *Id*. at 260. "Although the plaintiff has the burden of proving the inadequacy of the debtor's records, it is the debtor who has the obligation of producing financial records in the first place from which the debtor's financial condition may be ascertained." *In re Sethi*, 250 B.R. 831, 838 (Bankr. E.D.N.Y. 2000). Only after the movant proves that the debtor has failed to maintain records, does the burden of production shift to the debtor to explain the failure to maintain adequate records. In order to state a prima facia case under § 727(a)(3), the movant must show "(1) that the debtor failed to keep or preserve adequate records, and (2) that such failure makes it **impossible** to ascertain the debtor's financial condition and material business transactions." *Meridian Bank v. Alten*, 958 F.2d 1226, 1232 (3d Cir. 1992) (emphasis supplied).

The UST alleges that Defendant has failed to provide records that enable the trustee to determine the disposition of the proceeds from the sale of debtor's interests in Mo' Blues, LLC and Club 152, LLC ("Mo' Blues/Club 152 Proceeds") and the disposition of a 2006 Bentley GT, a 2004 Mercedes G-500, and a second 2006 Bentley (collectively "Luxury Vehicles"), and the failure to provide these records is evidence that Defendant failed to maintain adequate records as required under §727(a)(3). In response, Defendant argues that the UST has failed to produce any evidence that Defendant failed to produce any records or documents that were requested by the UST regarding Mo' Blues/Club 152 Proceeds and the Luxury Vehicles. Defendant further argues that he has produced financial records and documents to the Chapter 7 Trustee and to creditors to which the UST had full access.

What the court is called upon to determine is whether "there [is] available written evidence

made and preserved from which the present financial condition of the bankrupt, and his business transactions for a reasonable period in the past may be ascertained." *Id*. at 1230 (quoting *Cox v. Landsdowne* (In re Cox), 904 F.2d 1399, 1401 (9th Cir. 1990).

The schedules and statements filed by Defendant in his voluntary Chapter 7 case disclose debts of over $69 million, and were later amended to reveal debts over $73 million. Four years earlier, on February 8, 2007, Defendant entered into a Pre-Nuptial Agreement ("PNA") in which he incorporated his Financial Statement dated January 1, 2006. That Financial Statement showed assets of $18,311,748 and liabilities of $14,924,775.53, for a net worth of $3,386, 972.47. It also showed that Defendant owned Luxury Vehicles: a 2006 Bentley valued at $225,000, a 2004 Mercedes valued at $65,000 and a 2006 Bentley valued at $225,000. None of these three vehicles was listed on Schedule B of his bankruptcy petition. In addition, the Financial Statement listed Defendant's interests in Mo'Blues, LLC and Club 152, LLC. The UST learned from Defendant that his interest in those entities were sold in September, 2007, for a contract price of $500,000. From Defendant's federal income tax returns, the UST determined that Defendant received $400,000 in 2007, $40,000 in 2008 and $40,000 in 2009 from the sale of Defendant's interests in those businesses.

When the UST asked about the disposition of the Luxury Vehicles and the disposition of the proceeds of the sale of his interest in the businesses at the Rule 2004 examination, Defendant said that the Luxury Vehicles were sold prior to the filing of the bankruptcy petition, but that he did not know to whom or for how much, and that he deposited the proceeds of the sale of his interest in the businesses into his personal bank accounts to operate his companies and for personal expenses.

There is evidence that early in his Chapter 7 case, Defendant provided voluminous records and documents to the Chapter 7 Trustee and to creditors, along with an index on a compact disc to

guide a review of the documents. These documents were not presented as a hodge-podge of data, nor were they simply dumped on the Chapter 7 Trustee, the creditors, the UST, or the court. There is evidence to support a finding that the documents were presented in an organized fashion. After the Rule 2004 examination, along with his Authenticating Affidavit, Defendant provided specific documents related to the disposition of the Luxury Vehicles and the Mo'Blues/Club 152 Proceeds. The records that Defendant has produced throughout the pendency of this bankruptcy case are sufficient to create a genuine issue of material fact as to the adequacy of the records to enable the UST to ascertain the Defendant's financial condition and material business transactions. They are sufficient to create an issue for trial, because the Defendant provides a plausible explanation for the disposition of the proceeds, and because the records produced reveal inconsistencies that present questions of fact that can be answered only after a thorough review of the record and examination of evidence adduced at trial.

Defendant has produced at least some documentation for each of the transactions for which the UST alleges that sufficient records were not maintained or he has provided a plausible reason for the lack of available documents.[1] Defendant provided bank records and cancelled checks that reveal transactions that are plausibly related to the proceeds in question and the expenditures for which Defendant alleges the proceeds were used. Defendant also produced documents that provide explanations as well as reveal inconsistencies related to the Luxury Vehicles that are sufficient to create a genuine issue as to material facts. These issues must be addressed at a trial where a thorough examination of the evidence can be conducted. Therefore, the UST's motion for

[1] See below a more detailed discussion of the documents produced and explanations provided for the disposition of the business sale proceeds and Luxury Vehicles.

summary judgment is denied as it relates to 11 U.S.C. § 727(a)(3). The court will next examine whether summary judgment may be granted concerning the denial of discharge under 11 U.S.C. § 727(a)(5).

Denial of Discharge under 11 U.S.C. § 727(a)(5)

Section 727(a)(5) provides:

> (a) The court shall grant the debtor a discharge, unless—
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> (5) the debtor has failed to explain satisfactorily, before determination or denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities; ...

11 U.S.C. § 727(a)(5).

The movant bears the initial burden of showing that "(1) debtor at one time, not too remote from the bankruptcy, owned identifiable assets; (2) on the date debtor commenced his or her bankruptcy, debtor no longer owned the particular assets; and (3) the Bankruptcy pleadings do not reflect an adequate explanation for the disposition of the assets." *In re O'Brien*, 246 B.R. 271, 279 (Bankr. W.D. Ky. 1999)(citations omitted). After the movant has met its burden, then the burden of production shifts to the debtor to explain the loss or deficiency in a satisfactory manner. Whether or not the proffered explanation is sufficient is a question of fact at trial. See *In re Retz*, 606 F.3d 1189, 1205 (9th Cir. 2010); *In re Lufkin*, 393 B.R. 585, 595 (Bankr. E.D. Tenn. 2008); *In re Lazarevic*, 2012 WL 4483901 (Bankr. E.D. Tenn. 2012). What is required on a motion for summary judgment is that the nonmovant provide some explanation with some supporting documentation sufficient to create a genuine issue of fact for the disposition or dissipation of the assets identified by the movant. "Although the explanation need not be far-reaching and comprehensive, it must

consist of more than a vague, indefinite, and uncorroborated hodgepodge of financial transactions. A creditor is not required to rely on a debtor's mere statement that he no longer has certain assets. Importantly, a debtor is not permitted to defer an explanation until trial when the disposition of their assets has been placed in issue at summary judgment." *In re Adalian*, 500 B.R. 402, 412 (Bankr. M.D. Pa. 2013)(citations omitted); *In re Hermanson*, 273 B.R. 538, 549 (Bankr. N.D. Ill. 2002)("It is certainly not adequate in response to a motion for summary judgment to show only that such documents may yet be offered at trial.") . But at least one court has found that when the debtor provided inconsistent explanations of the disposition of the lost assets, that was sufficient to find that an issue of fact existed regarding the movant's § 727(a)(5) claim. *In re Lazarevic*, 2012 WL 4483901 at *15 (Bankr. E.D. Tenn. 2012).

What time period in the past is considered too remote for inquiry is determined on a case-by-case basis. In *In re Self*, 325 B.R. 224 (Bankr. N.D.Ill. 2005), the court held "that a debtor should be made to account for his business and personal transactions for a reasonable period prior to the commencement of the bankruptcy filing. The determination of what constitutes a reasonable period prior to the filing must be measured on a case-by-case basis, taking into account all of the circumstances of the case." *Id*. at 241-242. Relevant circumstances include the extent of the loss and whether other unexplained losses exist.

Through the 2007 PNA and the January 1, 2006 Financial Statement attached to the 2007 PNA, the UST has identified three Luxury Vehicles which the UST alleges have been lost without explanation. Defendant has responded that he has satisfactorily explained the disposition of each of these assets. For example, the UST complains that the Defendant owned a 2006 Bentley in 2007 for which Defendant has failed to account. Defendant alleges that this 2006 Bentley (VIN#38880)

was traded in for a 2007 Bentley (VIN#43110) which was traded in for another 2007 Bentley (VIN#50110) which was titled in the name of Rusco Company Partnership, and later was transferred to Defendant's wife, who borrowed funds to pay off the lien on the previous 2007 Bentley (VIN#43110).

At the hearing on UST's Motion for Summary Judgment, the UST asserted in oral argument that Defendant offered no explanation for the loss of the second Bentley listed on the Financial Statement, which the UST identified as a 2005 Bentley (VIN# 30260), although the Financial Statement identified two 2006 Bentleys, not a 2005 Bentley. It appears that the UST obtained this additional information from documents that Defendant had produced earlier to the Chapter 7 Trustee. From these records, it seems that Defendant only owned one 2006 Bentley (VIN# 38880), at the time that the January 1, 2006 Financial Statement was prepared. The Financial Statement lists only one vehicle as a 2006 Bentley with the designation "(H)" beside it, suggesting it is owned individually by the husband, the Defendant. There is the same "(H)" designation next to the Mercedes. In contrast, the 2005 Hummer H2 and the Prevost listed on the Financial Statement have the designation "Rusco" next to them, indicating that those are owned by Defendant's business, Rusco. There is no designation at all next to the second listed 2006 Bentley.

It is not at all clear in the record which Bentleys are on the Financial Statement or which Bentleys are referred to in Defendant's Rule 2004 examination. The Bentleys were not identified by make, color or VIN number. As it relates to assets on Defendant's Financial Statement, Defendant explained that his schedule of assets for his PNA was the same disclosure made for his 2005 divorce, and some of the assets listed on the Financial Statement were disposed of before the PNA was executed. He further explained that he was advised for purposes of the PNA that it was

better to err on the side of inclusion rather than exclusion of assets. [First Affidavit of WRH ¶ 4].

It is undisputed that Defendant purchased a 2003[2] Mercedes in 2005. Consistent with Defendant's affidavit that he purchased the Mercedes on or about April 4, 2005, the Carfax produced reflects that the vehicle was titled by a new owner, the Defendant, in Tennessee on April 6, 2005. [Docket 61-3, p. 22]. In his affidavit, Defendant also stated that sometime in October 2005, he "sold the car to a Tommy Silva by executing and delivering him the title." [First Affidavit of WRH ¶ 13]. Defendant also stated that he "did not keep a copy of the title or the check." [First Affidavit of WRH ¶ 8]. As support for this alleged sale in 2005, Defendant relies on the fact that documents produced do not show this Mercedes registered in Defendant's name after the original registration expired in April 2006. However, the Carfax record produced appears to conflict with Defendant's testimony that he sold the car in 2005. The Carfax does not report a "vehicle purchase" until April 2009, indicating that the Mercedes was owned by Defendant from its April 2005 purchase until it was sold four years later on April 15, 2009. The Carfax also reflects that this Mercedes was routinely serviced in Ft. Walton Beach, Florida in 2005, 2006, 2007, and 2008. The UST asserts that Defendant's wife owned real property near Ft. Walton Beach, Florida, which suggests that Defendant still owned the Mercedes during that time, and that he kept it for his or his family's personal use in Florida. [Docket 61-3, p. 20-34]. Defendant testified, however, that Tommy Silva lived in Florida. [First Affidavit WRH ¶ 8]. Defendant also produced documents suggesting that

[2] This Mercedes was identified as a 2004 model on Defendant's Financial Statement, and was referred to as such in Defendant's Rule 2004 examination and in pleadings filed by both parties. The parties now acknowledge that the Mercedes was a 2003 model, and documents produced support this.

Tommy Silva owned the vehicle during the time period from 2007 through 2008.[3] [Third Affidavit of WRH collective exhibits A, B and C]. Additionally, in his Third Affidavit, Defendant again avers that the Mercedes was sold in October 2005 and adds that the proceeds from the sale were used to make child support, alimony and attorney's fee payments in connection with his 2005 Marital Dissolution Agreement ("MDA"), which he entered into with his former wife. Defendant produced a copy of the 2005 MDA, the Final Decree of Divorce and a Receipt and Release for payments made by Defendant. [Third Affidavit of WRH ¶ 4].

The UST also contends that Defendant has not adequately documented the disposition of the proceeds from the sale of the Mo'Blues/Club 152 Proceeds. Defendant has explained that the 2007 installment of $400,000 was deposited into Union Planters Bank, account ending in 0484. Thereafter, $5,301 was used to cover a deficit balance with the bank, and $327,725 was transferred to Rusco Company [First Affidavit of WRH ¶ 15]. Defendant produced the relevant Union Planters Bank statement and cancelled checks. Similarly, Defendant explained that the 2008 installment of $40,000 was deposited into Community Bank, account ending in 6878, on October 16, 2008. Defendant itemized several expenses paid from this account between October 1 and December 31, 2008, and those expenses paid exceeded the $40,000 deposit. [First Affidavit of WRH ¶ 17]. As to the 2009 installment payment of $40,000, Defendant testified that he deposited those proceeds into Union Planters Bank, account ending in 0484, and used the funds to pay business and personal expenses well in excess of $40,000. [First Affidavit of WRH ¶ 19].

The UST has cited *Hazelrigg v. U.S. Trustee (In re Hazelrigg)*, 2013 WL 6154102 (9th Cir.

[3] In Defendant's Third Affidavit, Defendant said that he would file documents requested from the Florida Department of Motor Vehicles upon receipt of those documents. However, to date, no such documents have been filed with the Clerk's office.

BAP 2013) as a case that presents similar facts. In *Hazelrigg*, the bankruptcy court denied the discharge on summary judgment under § 727(a)(5), and on appeal the BAP affirmed the decision. The court held that the debtor failed to refute the evidence provided by the UST with any admissible evidence at all. *Id.* The debtor in *Hazelrigg* presented unsworn statements only and, as the court noted, such inadmissible evidence failed to demonstrate a genuine issue of material fact. In the case before this court, the Defendant has provided sworn statements with plausible explanations, along with some documentation of each of the allegedly missing assets. As a result, genuine issues are raised as to whether these explanations are satisfactory. Therefore, summary judgment must be denied as to § 727(a)(5).

CONCLUSION

Defendant's financial records and other documents produced by the Defendant raise the question of whether Defendant has adequately maintained records for purposes of § 727(a)(3), and if he has not, if this failure was justified. Defendant has provided plausible explanations with some documentation for each of the allegedly missing assets. As a result, Defendant has raised genuine issues as to whether those explanations are satisfactory. These questions of fact can be answered only after an examination of evidence adduced at trial. There are genuine issues of material fact with respect to all of the UST's allegations, and the UST is not entitled to judgment as a matter of law. Accordingly, the UST's Motion for Summary Judgment is hereby denied. The parties shall proceed to trial.

IT IS SO ORDERED.