Dated: December 15, 2016
The following is SO ORDERED:

Paulette J. Delk
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

IN RE:

THOMAS W. HART, **Case No. 14-22272-PJD**

Debtor. **Chapter 7**

THOMAS W. HART,

Plaintiff/Counter-Defendant,

vs. **Adv. No. 15-00267**

THOMAS W. TAYLOR, LUCY TAYLOR YOUNG,
THOMAS W. TAYLOR REVOCABLE LIVING TRUST,
and LT, INC.,

Defendants/Counter-Plaintiffs.

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on the contested Motion of Thomas W. Hart ("Debtor") for summary judgment. A hearing was held on November 15, 2016, at which time the Court took this matter under advisement. Based on the testimony, arguments of counsel, and the entire record in this cause, the Court finds that the motion for summary judgment should be denied. The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

FACTUAL SUMMARY

The dispute between the parties began with a state court lawsuit in which Defendants/Counter-Plaintiffs Thomas W. Taylor, Lucy Taylor Young, Thomas W. Taylor Revocable Living Trust and LT, Inc. ("Creditors") sued the Debtor and others on a guaranty. Creditors were awarded a judgment in the amount of $518,724.82, which they duly recorded.

Creditors then petitioned in state court for a charging order or sale at public auction of the Debtor's partnership and membership interests in Debtor's business entities. Before the petition was heard, the Debtor filed for relief under Chapter 7 of the Bankruptcy Code, thereby staying the state court proceeding. On July 1, 2015, the bankruptcy court entered an order granting the Creditors' motion to abandon the Debtor's interests in the business entities and lifted the stay so that the state court action could proceed. *See* 11 U.S.C. §§ 554(b) and 362(d). Once abandoned, the bankruptcy estate's interests in the Debtor's business entities accordingly reverted back to the Debtor pursuant to Bankruptcy Code § 554(c). There was no request for the Court to order

otherwise. There was no objection to discharge.

On July 20, 2015, the Creditors filed an amended petition in state court, still seeking a charging order or sale of the Debtor's interests in the Debtor's business entities. However, on August 3, 2015, prior to any resolution of the state court proceeding, the Debtor received his Chapter 7 discharge in bankruptcy. Among the debts discharged was the Debtor's indebtedness to the creditors pursuant to the state court judgment. Prior to the Debtor's discharge, the Creditors filed no motion to stay the discharge, nor any other pleading that would delay discharge of the prepetition judgment debt.

The Debtor then filed this adversary proceeding on August 13, 2015 to determine the validity, priority and extent of the judgment lien, since the underlying debt was discharged. Essentially, the Debtor asserts that the judgment lien is now void, and any further effort to collect on the judgment is a violation of the discharge injunction under § 524(a)(2) of the Bankruptcy Code.[1]

Creditors contend that they may proceed with the state court lawsuit, acting in accordance with the order lifting the automatic stay, and that Debtor's discharge was obtained by fraudulent information regarding the value of the business interests abandoned by the Chapter 7 trustee. Creditors have accordingly filed a counter claim seeking revocation of the Debtor's discharge as obtained through fraud, pursuant to Bankruptcy Code § 727(d)(1).

The Debtor has now filed a motion for summary judgment, based on the premise that the

[1] The Court entered an Order in the bankruptcy case on September 28, 2015, granting in part and denying in part the Debtor's motion to enforce the discharge order, determining that the Taylor parties held a general unsecured claim that was discharged, and, nothwithstanding the Court's prior order lifting the automatic stay, the subsequent discharge injunction prevented the Creditors from pursuing the state court lawsuit. This Order was not appealed.

Debtor's statements regarding value of his business interests did not constitute "false oaths" as required for exception to discharge under § 727(a)(4)(A), and that the statements were immaterial to the trustee's decision to abandon the business interests.

Creditors contend that Debtor's sworn statements regarding the value of his business interests was a key factor in the trustee's decision whether to object to the motion to abandon the interests, and that the elements required for exception to discharge based on false oath under § 727(a)(4)(A) are met.

More specifically, Creditors point to Debtor's testimony at his first Rule 2004 examination on June 14, 2014, when, asked about the fair market value of the property at issue, Debtor gave his opinion that "the equity is not there." (Motion for Summary Judgment Exh. 4, Montedonico Deposition pp. 22-23). Thereafter, at the hearing on Creditors' motion to lift the automatic stay, Debtor testified as to value, "I think it is substantially lower than the debt due to occupancy rates in some of the properties. Because that's what drives the value in commercial real estate." (Motion for Summary Judgment Exh. 7, Transcript of May 5, 2015 hearing, pp. 19-20).

Creditors then go on to point out that Debtor subsequently expressed in a conversation with his brother, Mr. Paul Hart, and his brother's attorney, Mr. Terry Cox, his confidence that new appraised values of the properties would materially exceed the amount of refinanced debt, and that he anticipated a positive cash flow in the future. He also stated that he did not tell the bankruptcy court that the properties had no value, rather the bankruptcy trustee told the Court that the properties had no value. (Affidavit of Paul Hart filed in support of Creditors' Objection to Motion for Summary Judgment).

Creditors also contend that whether the Debtor testified falsely under oath creates a genuine

issue of material fact sufficient to defeat a motion for summary judgment.

DISCUSSION

Summary judgment motions in bankruptcy cases are governed by Bankruptcy Rule 7056, which incorporates Federal Rule of Civil Procedure 56. "Summary judgment is appropriate 'if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.'"*Medison Am., Inc. v. Preferred Med.Sys., LLC,* 357 Fed. Appx. 656, 661 (6th Cir. 2009)(quoting Fed. R. Civ. P. 56 (c)). Therefore, the entry of summary judgment is mandated "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,* 447 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). Further, "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id. at* 323.

When entertaining a motion for summary judgment, "all justifiable inferences are to be drawn in the non-moving party's favor." *Whiteway v. FedEx Kinko's Office & Print Servs.,* 319 Fed. Appx. 688 (9th Cir. 2009)(citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S. Ct. 2505 (1986)). The court must determine "'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.'" *S & M Homes, LLC v. Chicago Title Ins. Co.,* 623 Fed. Appx. 722, 724 (6th Cir. 2015), (quoting *Anderson* at 251-52).

Revocation of a Chapter 7 discharge is governed by Bankruptcy Code § 727(d)(1), which provides:

> (d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if –
>
> (1) such discharge was obtained through the fraud of the debtor; and the requesting party did not know of such fraud until after the granting of such discharge .

11 U.S.C. § 727(d)(1). The creditor has one year after the discharge is granted to request a revocation. 11 U.S.C. §727(e)(1). "Revocation of a debtor's discharge is an extraordinary remedy, so § 727(d) is liberally construed in favor of the debtor and strictly construed against the party seeking revocation." *Buckeye Retirement Co., LLC v. Heil (In re Heil),* 289 B.R. 897, 903 (Bankr. E.D. Tenn. 2003)(citations omitted). The debtor's fraud must be in obtaining the discharge, and not fraud viv-a-vis the complaining creditor. *Humphreys v. Stedham (In re Stedham),* 327 B.R. 889,897 (Bankr. W.D. Tenn. 2005)(string citations omitted). Further, as the statute indicates, a creditor made aware of the fraud prior to discharge may not seek revocation. *Id.* (string citations omitted). The burden of proof is on the creditor seeking revocation, by a preponderance of the evidence. *In re Heil* at 903.

Under § 727(d)(1), the fraud required to revoke the discharge is the same type as would prevent a debtor from receiving a discharge in the first instance. *Bowman v. Belt Valley Bank (In re Bowman),* 173 B.R. 922, 925 (B.A.P. 9th Cir. 1994). Here, Creditors argue that under § 727(a)(4)(A), Debtor would have been denied a discharge, because he made a false oath as to his actual opinion of the value of the property in question. "Under 727(a)(4)(A), '[t]he court shall grant a discharge unless the debtor knowingly and fraudulently, in or in connection with the case, made

a false oath or account.'" *McDermott v. Kerr (In re Kerr),* 556 B.R. 343, 349 (Bankr. N.D. Ohio 2016)(slip op.)(quoting *Beaubouef v. Beaubouef (In re Beaubouef),* 966 F.2d 174, 178 (5th Cir. 1992)). Further, a misrepresentation as to the debtor's true and honest opinion can constitute grounds for the denial of a debtor's discharge under § 727(a)(4)(A). *U.S. v. Sumpter (In re Sumpter),* 136 B.R. 690, 696 (Bankr. E.D. Mich. 1991), *aff'd in part, rev'd in part, U.S. v. Sumpter (In re Sumpter),* 64 F.3d 663 (6th Cir. 1995)(unpublished)("Since a critical issue in the context of a §727(a)(4)(A) action is the debtor's honesty, . . . such a misrepresentation could constitute grounds for denial of her discharge, even if the estimate of value which purports to be her opinion should prove to be accurate.")(citations omitted).

Creditors' pleadings and affidavit present evidence that demonstrates that Debtor may have misrepresented, at the 2004 examinations, his true and honest opinion as to the value of property of the estate. A false oath that relates to a debtor's business or to a decision regarding the disposition of property of the estate is material. *Chalik v. Moorefield (In re Chalik),* 748 F.2d 616 (11th Cir. 1984); *Weiner v. Perry, Settles & Lawson, Inc. (In re Weiner),* 208 B.R. 69 (B.A.P. 9th Cir. 1997), *rev'd on other grounds. Weiner v. Perry, Settles & Lawson, Inc. (In re Weiner),* 161 F.3d 1216 (9th Cir. 1998).

Debtor's statements made in the 2004 examinations regarding the value of the property at issue, and those made in a meeting with his brother and his brother's lawyer, provide very different values. In the hearing on the motion for summary judgment, Debtor attempted to reconcile the different statements, but there remains sufficient doubt as to present a genuine issue of fact as to whether the statements were made with fraudulent intent.

"Courts must be cautious in determining issues that involve a person's state of mind when

deciding a case at the summary judgment stage." *Buckeye Retirement Co., LLC, LTD v. Swegan (In re Swegan),* 383 B.R. 646, 655 (B.A.P. 6th Cir. 2008)(citation omitted). Since debtors rarely admit to a fraudulent intent, parties seeking denial of a debtor's discharge must establish such intent through circumstantial evidence that suggests that the debtor harbored the requisite ill will. *Id.* In many cases, state of mind determinations can only be made after a full evidentiary development, with an opportunity for examination and cross-examination. Therefore, summary judgment is often not appropriate where the debtor's subjective state of mind is at issue. *Marohnic v. Walker,* 800 F.2d 613, 617 (6th Cir. 1986)(when intent is at issue, summary judgment is particularly inappropriate)(citation omitted); *see also Montedonico v. Beckham (In re Beckham),* 421 B.R. 602 (B.A.P. 6th Cir. 2009)(unpublished).

In viewing all of the facts, evidence, and inferences that can be drawn from the facts in the light most favorable to the non-moving party, as it must, the Court finds that Creditors have met their burden in showing that there is a genuine issue as to a material fact, and the moving party is not entitled to judgment as a matter of law. *Fogerty v. MGM Group Holdings Corp., Inc.,* 379 F.3d 348, 352 (6th Cir. 2004); *Poss v. Morris (In re Morris),* 260 F.3d 654, 665 (6th Cir. 2001). The Court finds that the matter is not appropriate for summary judgment, and denies Debtor's motion.

It is SO ORDERED.

cc:

Plaintiff
Plaintiff's Attorney
Defendants
Defendants' Attorney
Chapter 7 trustee
Chapter 7 trustee's Attorney