THIS OPINION IS NOT INTENDED
FOR PUBLICATION

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
Eastern Division

IN RE:

SIMON V. HOFFMAN,

Debtor.

IN PROCEEDINGS IN CHAPTER 7

CASE NO.: 03-19250

ADVERSARY PROCEEDING NO.: 04-1055

JUDGE RANDOLPH BAXTER

OHIO CIVIL RIGHTS COMMISSION, ET. AL.,

Plaintiffs,

v.

SIMON V. HOFFMAN,

Defendant.

FILED
2004 JUN 16 AM 11:52
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

MEMORANDUM OF OPINION AND ORDER

The matter before the Court is the Motion for Summary Judgment ("Motion") filed by the Ohio Civil Rights Commission ("Plaintiff"). The Debtor-Defendant, Simon V. Hoffman ("Debtor") filed an objection to the Motion. In the complaint, filed by the Plaintiff along with Bennie Birks and Jessica Wigely ("Co-Plaintiffs"), denial of the Debtor's general discharge pursuant to 11 U.S.C. § 727(a)(3), (a)(4), and (a)(5) is sought. The Plaintiff brings the summary judgment motion based on § 727(a)(3) and (a)(5) only. Core jurisdiction of this matter is acquired under the provisions of 28 U.S.C. § 157(b)(2)(J), 28 U.S.C. § 1334, and General Order No. 84 of this District. Upon a duly noticed hearing and an examination of the parties' pleadings,

the following factual findings and conclusions of law are herein made.

*

On July 15, 2003, the Debtor filed a Chapter 7 petition. Prior to the Debtor's bankruptcy, the Plaintiff and Co-Plaintiffs filed a civil suit against the Debtor and two non-debtor co-defendants alleging fraud, unfair and deceptive practices, and discriminatory and predatory lending in violation of Ohio civil rights laws as set forth in Ohio Revised Code Chapter 4112. The parties resolved the suit in April 2003 by entering into a Conciliation Agreement and Consent Order ("Agreement"). The Debtor did not comply with the terms of the Agreement and subsequently filed for Chapter 7 relief. The Plaintiff's Proof of Claim in the Debtor's bankruptcy arises from the noncompliance with the Agreement. On February 2, 2004, the Plaintiff filed a complaint to deny the Debtor's general discharge pursuant to § 727(a)(3), (a)(4) and (a)(5). The present Motion is based solely upon § 727(a)(3) and (a)(5).

Section 727 provides, in pertinent part:

> (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;
> ***
> (5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency or assets to meet the debtor's liabilities....

11 U.S.C. § 727(a)(3) and (a)(5). The party seeking denial of a discharge under § 727 maintains

the burden of establishing a prima facie case by a preponderance of the evidence.[1] Grogan v. Garner, 498 U.S. 279, 286 (1991); In re Adams, 31 F.3d 389, 394 (6th Cir. 1994). Once the objecting party has established the prima facie case, the burden shifts to the debtor to explain why the discharge should be granted. See, e.g., In re Deskins, 171 B.R. 596 (Bankr. N.D. Ohio 1994).

In support of the Motion, the Plaintiff argues that because the Debtor has failed to produce business records with regard to his alter ego company, U.S.A. Builders, they should be awarded summary judgment pursuant to § 727(a)(3). Further, the Plaintiff asserts that the Debtor's partner, Jerry Ponsky, destroyed these records and because of the Debtor's inability to produce the business records his financial condition cannot be ascertained. As to § 727(a)(5), the Plaintiff contends that the Debtor has not satisfactorily explained the loss of certain assets, consisting of two homes.

The Debtor objects to the Motion, stating the he has explained the loss of the homes. The Debtor has included his interest in his amended schedules, but the amount of his interest and where to obtain any proceeds is unknown. The Debtor argues that whether this is a satisfactory explanation is an issue that should be determined at trial. Additionally, the Debtor argues that he has produced documentation for the Plaintiff from which his financial condition can be ascertained. The Debtor states that it is unnecessary for him to provide the business records of

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[1] It should be noted that there is a split of authority as to whether an objection to discharge pursuant to § 727 must be proven by clear and convincing evidence or whether the burden is satisfied by a preponderance of the evidence. See Barclays/American Business Credit, Inc. v. Adams, 171 B.R. 298 (Bankr. W.D. Tenn. 1992); In re Zell, 108 B.R. 615, 623 (Bankr. S.D. Ohio 1989). Although Grogan deals with § 523(a), this court finds that the Supreme Court's rationale applies with equal force to objections to discharge under § 727. Grogan v. Garner, 498 U.S. 279 (1991).

U.S.A. Builders because the company is now defunct and was never his alter ego.

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Summary judgment is proper "if...there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056. The party moving for summary judgment bears the initial burden of showing the court that there is an absence of genuine dispute over any material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986); Searcy v. City of Dayton, 38 F. 3d 282, 286 (6th Cir. 1994). This burden may be discharged by showing that there is an absence of evidence to support the non-moving parties case. Id. However, all facts and inferences must be viewed in the light most favorable to the nonmoving party. Searcy v. City of Dayton, 38 F.3d at 285; Boyd v. Ford Motor Co., 948 F.2d 283, 285 (6th Cir. 1991). A fact is material if it would affect the determination of the underlying action. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Tennessee Dep't of Mental Health & Retardation v. Paul B., 88 F.3d 1466, 1472 (6th Cir. 1996). An issue of material fact is genuine where a rational fact-finder could find in favor of either party on the issue. Anderson, 477 U.S. at 248-249; Structurlite Plastics Corp. v. Griffith (In re Griffith), 224 B.R. 27 (B.A.P. 6th Cir. 1998).

Whether the Debtor has satisfactorily explained the deficiency of certain assets and whether the Debtor's business are alter egos for which he would be required to produce business records are material facts because they must be determined before there can be a decision as to the denial of a general discharge pursuant to § 727(a)(3) or (a)(5). Not only are these matters material facts, they are genuinely in dispute between the parties herein. As such, the movant Plaintiff is not entitled to a judgment as a matter of law, pursuant to Bankruptcy Rule 7056, as it

has failed to show the absence of a genuine dispute over any material fact.

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Accordingly, the Motion is hereby denied. This matter will proceed as scheduled. Each party is to bear its respective costs.

IT IS SO ORDERED.

Dated, this 16th day of June, 2004

RANDOLPH BAXTER
UNITED STATES BANKRUPTCY JUDGE

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JUDGMENT

At Cleveland, in said District, on this 16th day of June, 2004.

A Memorandum Of Opinion And Order having been rendered by the Court in this matter,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff's Motion for Summary Judgment is hereby denied. Each party is to bear its respective costs.

IT IS SO ORDERED.

RANDOLPH BAXTER
UNITED STATES BANKRUPTCY JUDGE