

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:) Case No. 11-13982
)
ERIC TODD WILSON,) Chapter 7
)
Debtor.) Judge Pat E. Morgenstern-Clarren
_____)
)
PAUL SHAIA,) Adversary Proceeding No. 11-1257
)
Plaintiff,)
)
v.)
)
ERIC TODD WILSON,) **MEMORANDUM OF OPINION AND**
) **ORDER**¹
Defendant.)



Defendant-debtor Eric Wilson has moved to dismiss the complaint and plaintiff Paul Shaia opposes the request.² For the reasons stated below, the motion to dismiss is granted in part and the plaintiff is given leave to file an amended complaint.³

I. JURISDICTION

The court has jurisdiction under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. §157(b)(2)(J) and (O). This decision is within the court’s constitutional authority as analyzed by the Supreme Court in *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

¹ This opinion is not intended for publication, either electronic or in print.

² The court granted the plaintiff’s unopposed motion for leave to respond to the motion. (Docket 22).

³ Docket 10, 17.

II. DISCUSSION

A. The Complaint

The five count complaint requests that the debtor's case be dismissed under Bankruptcy Code §707(b) and that the debtor be denied a discharge under various subsections of §727.⁴ The complaint alleges generally that: the debtor's petition states that his debts are primarily business debts; the debtor's bankruptcy filing lists debts to various entities and family members for purchases on behalf of various businesses; and that the listed debts or portions of them were for personal or non-business purposes. In addition, the complaint alleges that "Debtor has an asset through Pep Systems, Inc. that he does not identify in his bankruptcy petition" and that "the Debtor has other assets that he does not identify in his bankruptcy petition."

Count I incorporates the general allegations and asserts that because the debts which the debtor identifies in his petition are not primarily business debts, the debtor does not qualify for chapter 7 relief, and that the case should be dismissed, or converted, under §707(b). Counts II, III, IV, and V each incorporate the general allegations and assert that the debtor should be denied a discharge under §727(a)(2)(A), (a)(3), (a)(4), and (a)(5) respectively.

B. Rule 12(b)(6)

Civil Rule 12(b)(6) provides that a complaint may be dismissed for "failure to state a claim upon which relief may be granted[.]" FED. R. CIV. P. 12(b)(6) (made applicable by FED. R. BANKR. P. 7012(b)). The purpose of this rule is to test the sufficiency of the complaint. In ruling on a 12(b)(6) motion, the court accepts the factual allegations as true and construes the complaint

⁴ Although the caption and first sentence state that the plaintiff also requests a determination that the debt owed to him be found nondischargeable, the complaint does not refer to 11 U.S.C. §523.

in the light most favorable to the plaintiff. *In re Travel Agent Comm'n Anti-Trust Litig.*, 583 F.3d 896, 903 (6th Cir. 2009), *cert. denied*, 131 S. Ct. 896 (2011). The factual allegations must, however, be sufficient to show that the plaintiff is entitled to relief.

The analysis begins by “taking note of the elements a plaintiff must plead to state a claim[.]” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1947 (2009). The Sixth Circuit has stated that:

Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Although this standard does not require “detailed factual allegations,” it does require more than “labels and conclusions” or “a formulaic recitation of the elements of a cause of action.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007). Rather, to survive a motion to dismiss, the plaintiff must allege facts that, if accepted as true, are sufficient “to raise a right to relief above the speculative level,” *id.*, and to “state a claim to relief that is plausible on its face,” *id.* at 570, 127 S. Ct. 1955; *see also Ashcroft v. Iqbal*, – U.S. –, – – –, 129 S. Ct. 1937, 1949-50, 173 L. Ed.2d 868 (2009). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 129 S. Ct. at 1949. And although we must accept all well-pleaded factual allegations in the complaint as true, we need not “accept as true a legal conclusion couched as a factual allegation.” *Twombly*, 550 U.S. at 555, 127 S. Ct. 1955 (quoting *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed.2d 209 (1986)); *see also Iqbal*, 129 S. Ct. at 1949.

Hensley Mfg. v. Propride Inc., 579 F.3d 603, 609 (6th Cir. 2009) (footnote omitted).

Additionally, Civil Rule 9(b) requires a party alleging fraud to “state with particularity the circumstances constituting fraud[.]” FED. R. CIV. P. 9(b) (made applicable by FED. R. BANKR. P. 7009).

C. The Motion

The debtor argues that Count I fails to state a claim for relief under §707(b). That section

states that a chapter 7 case filed by a debtor whose debts are primarily consumer debts may be dismissed if granting relief would be an abuse, or alternatively, may be converted to chapter 13 or 11 with the debtor's consent. 11 U.S.C. § 707(b)(1). If certain facts are present, §707(b) creates a presumption that a case is an abuse. *See* 11 U.S.C. § 707(b)(2)(A)(i). Absent the presumption, a plaintiff seeking dismissal must prove that (a) the debtor filed in bad faith, or (b) the totality of the circumstances demonstrate abuse. 11 U.S.C. § 707(b)(3).

The motion to dismiss Count I states good cause. The allegations as to this count focus solely on whether the debtor's debts are primarily consumer debts, but do not provide any factual content regarding the debtor's circumstances that would allow the court to draw a reasonable inference that dismissal for abuse is appropriate. Rather, the complaint seems to allege that dismissal is required merely because this is a consumer case, a position which is legally incorrect. While the plaintiff's brief in opposition to the motion alleges some additional facts regarding the debtor's income, those allegations are not part of the complaint. Consequently, despite the plaintiff's contention that the debtor "knows exactly what is being alleged here[]," he did not allege sufficient facts to state a claim under §707(b).

The debtor also argues that Counts II, III, IV, and V fail to state claims for relief under §727(a). The request to dismiss Counts II, II, and IV states good cause. Count II requests relief under §727(a)(2)(A), which requires a plaintiff to show that: the debtor disposed of property within one year before the filing date (whether by transfer, concealment, or other disposition) that would have become estate property; and did so with a subjective intent to hinder, delay or defraud a creditor or an officer of the estate. *See Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 683 (6th Cir. 2000). The complaint alleges only that the debtor has assets related to an entity

known as Pep Systems, Inc. and other assets which he failed to identify in his bankruptcy petition. However, there are no factual allegations that describe the assets or the circumstances surrounding their disposition. Absent those additional factual allegations, this claim does not state a plausible claim for relief under §727(a)(2)(A). Similarly, Count V just refers to “an asset obtained while employed at Pep Systems, Inc. and an asset associated with The Shoreby Club,” but lacks sufficient detail regarding those assets to state a plausible claim that the debtor failed to satisfactorily explain a loss of assets under §727(a)(5). Finally, Count III, which seeks denial of discharge under §727(a)(3), fails to state a claim from relief under that provision. The count recites the Bankruptcy Code provision without providing facts to support a claim that the debtor failed to keep or preserve information regarding his financial condition or business transactions.

Count IV, which requests relief under §727(a)(4), is a different story. Section §727(a)(4) provides that a debtor’s discharge will be denied where the debtor has knowingly and fraudulently made a false oath or account in connection with the case. 11 U.S.C. §727(a)(4)(A). Here, the plaintiff must prove that “1) the debtor made a statement under oath; 2) the statement was false; 3) the debtor knew the statement was false; 4) the debtor made the statement with fraudulent intent; and 5) the statement related materially to the bankruptcy case.” *In re Keeney*, 227 F.3d at 685. Statements made by the debtor in the petition, schedules, and statement of financial affairs are made under oath. *Hamo v. Wilson (In re Hamo)*, 233 B.R. 718, 725 (B.A.P. 6th Cir. 1999). The plaintiff alleges that the debtor made a false oath when he failed to identify his debts as being primarily business debts on his petition. That claim is supported by factual allegations regarding the debtor’s debts and bankruptcy filing which, accepted as true for these purposes, set forth a facially plausible claim under §727(a)(4). Consequently, this count will not

be dismissed.

III. CONCLUSION

For the reasons state, the defendant's motion to dismiss is granted as to Counts I, II, III, V and is denied as to Count IV. Because the plaintiff, in the alternative, requested leave to amend and leave is to be freely given when justice requires, the plaintiff is granted leave to file an amended complaint on or before **December 19, 2011**.

IT IS SO ORDERED.


Pat E. Morgenstern-Clarren
United States Bankruptcy Judge