

IT IS SO ORDERED.

Dated: December 10, 2015  
04:10:23 PM

  
*Kay Woods*  
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Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

JEREMIAH K. GOMOLL,

Debtor.

\* \* \* \* \*

COPPER ZONE TANNING, INC.,

Plaintiff,

v.

JEREMIAH K. GOMOLL,

Defendant.

CASE NUMBER 14-41607

ADVERSARY NUMBER 15-4003

HONORABLE KAY WOODS

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MEMORANDUM OPINION REGARDING

COPPER ZONE'S MOTION FOR JUDGMENT ON THE PLEADINGS

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Plaintiff Copper Zone Tanning, Inc. ("Copper Zone") filed Amended Complaint to Deny Discharge Under 11 U.S.C. §§ 727(a)(2) and 727(a)(4) ("Amended Complaint") (Doc. 21) on June 25, 2015, in

which Copper Zone requests that the Court deny Debtor/Defendant Jeremiah K. Gomoll a discharge pursuant to § 727(a)(2) and (a)(4).<sup>1</sup> On September 30, 2015, Copper Zone filed Motion for Judgment on the Pleadings with Memorandum of Points and Authority ("Motion") (Doc. 29), which is presently before the Court. Copper Zone asserts that the Debtor has admitted sufficient facts to grant Copper Zone judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). The Debtor filed Response to Motion for Judgment on the Pleadings and Brief in Support ("Response") (Doc. 30) on October 14, 2015, and Copper Zone filed Reply to Response to Motion for Judgment on the Pleadings with Memorandum in Support ("Reply") (Doc. 31) on October 21, 2015.

For the reasons set forth herein, the Court (i) finds that issues of material fact exist; and (ii) will deny the Motion.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and General Order No. 2012-7 entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(J). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

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<sup>1</sup>Unless otherwise indicated, all statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, *et seq.*

## I. BACKGROUND

On March 19, 2013, the Debtor filed a voluntary petition pursuant to chapter 13 of the Bankruptcy Code, which was denominated Case No. 13-40543 ("Prior Bankruptcy Case"). After the chapter 13 trustee moved to dismiss the Prior Bankruptcy Case based on the Debtor's failure to make proposed chapter 13 plan payments, the Debtor voluntarily dismissed the Prior Bankruptcy Case on November 6, 2013. A chapter 13 plan was never confirmed in the Prior Bankruptcy Case.

Less than one year later, on July 31, 2014 ("Petition Date"), the Debtor filed his present voluntary petition pursuant to chapter 7 of the Bankruptcy Code, which is denominated Case No. 14-41607 ("Main Case"). On January 15, 2015, Copper Zone commenced this adversary proceeding by filing Complaint to Deny Discharge Under 11 U.S.C. §§ 727(a)(2), 727(a)(4)(A) and 727(a)(7) (Doc. 1). Copper Zone filed the Amended Complaint on June 25, 2015, and the Debtor filed Answer to the Amended Complaint ("Answer") (Doc. 23) on July 2, 2015.

In the Amended Complaint, Copper Zone requests that the Court deny the Debtor a discharge pursuant to § 727(a)(2) and (a)(4) because the Debtor (i) transferred and concealed real property within one year before the Petition Date with the intent to defraud his creditors; and (ii) knowingly and fraudulently made false statements in his bankruptcy petition and schedules.

The following facts are specifically admitted in the Debtor's Answer and, thus, not in dispute:

1. "[The Debtor] acquired sole ownership of certain real property located at 131 Apache Lane, Columbiana, Ohio (the 'Real Estate') on September 16, 2009 through a warranty deed . . . ." (Am. Compl. ¶ 12; Ans. ¶ 4.) "[The Debtor] uses [the Real Estate] as a residence, although not necessarily his primary residence." (Ans. ¶ 4.)
2. "On or about September 16, 2009, a . . . mortgage deed was recorded which . . . secures a promissory note from [the Debtor] to his mother, Terrie L. Gomoll, for the sum of \$160,000.00 plus interest at the rate of 3% per annum[.]" (Am. Compl. ¶ 13; Ans. ¶ 5.)
3. "The . . . promissory note required payments of \$672.88 per month, with payments to begin on October 1, 2009. [The Debtor] and his mother testified that [the Debtor] never made a payment towards the mortgage. For over five (5) years, not a single payment was ever made on the . . . loan." (Am. Compl. ¶ 14; Ans. ¶ 6.)
4. "On or about December 29, 2009, [Copper Zone] sold and delivered all of its tangible business assets to Bella Sun Tanning, Inc., an entity which was owned and controlled by [the Debtor] . . . . In consideration for the sale and transfer of the business assets, [Copper Zone] received from [the Debtor] and his company, Bella Sun Tanning, Inc., as co-makers, a promissory note for \$60,000.00 plus interest (the 'Note'). [The Debtor] and his business defaulted in making the payments to [Copper Zone] as required under the Note." (Am. Compl. ¶ 7; Ans. ¶ 1.)
5. "On January 14, 2013, the Court of Common Pleas of Allegheny County, Pennsylvania entered judgment against [the Debtor] and Bella Sun Tanning, Inc., jointly and severally, in the amount of \$66,950.67 plus interest (the 'Judgment')." (Am. Compl. ¶ 8; Ans. ¶ 1.)
6. "On or about February 8, 2013 (a month after the Judgment was entered against [the Debtor] and approximately 40 days before commencing the Prior Bankruptcy Case), [the Debtor] . . . recorded the Real Estate in the name of Melissa Wellington, his domestic partner and mother of his children, through a quitclaim deed . . . ." (Am. Compl. ¶ 15; Ans. ¶ 7.)

7. "[Copper Zone] filed to domesticate the Judgment in Mahoning County, Ohio. [The Debtor] was ordered to appear for a debtor's examination and, on March 18, 2013, the Mahoning County Court of Common Pleas entered a Judgment Entry ordering the Sheriff to seize the assets of [the Debtor] in execution on the Judgment." (Am. Compl. ¶ 9; Ans. ¶ 1.)
8. "The following day (March 19, 2013), the [Debtor] filed the Prior Bankruptcy Case, thereby staying the debtor's examination and Judgment execution proceedings." (Am. Compl. ¶ 10; Ans. ¶ 1.)
9. "[The Debtor] did not list the alleged loan from his mother, nor did he list the alleged mortgage in his Prior Bankruptcy Case schedules. Further, [the Debtor] did not list a home mortgage payment in Schedule 'J' or include the claim in his Chapter 13 Plan filed in the Prior Bankruptcy Case." (Am. Compl. ¶ 17; Ans. ¶ 1.)
10. "[The Debtor] filed a notice of voluntary dismissal of the Prior Bankruptcy Case and an Order Dismissing Chapter 13 Case was entered on November 6, 2013." (Am. Compl. ¶ 20; Ans. ¶ 1.)
11. "[A] quitclaim deed . . . transferred [the Real Estate] from Melissa Wellington to [the Debtor]'s mother. Said deed was recorded on November 13, 2013 – exactly 7 days after [the Debtor] dismissed his Prior Bankruptcy Case, as a deed in lieu of foreclosure . . . ." (Am. Compl. ¶ 21; Ans. ¶ 8.)
12. "[The Debtor] was insolvent at the time of [the] transfers, with debts that far exceeded his assets according to the schedules filed in the Bankruptcy Cases."<sup>2</sup> (Am. Compl. ¶ 26; Ans. ¶ 1.)
13. "[The Debtor] . . . filed the [Main Case] on July 31, 2014." (Am. Compl. ¶ 3; Ans. ¶ 3.) "[The Debtor] signed his petition, schedules and statements filed in the [Main Case] under penalty of perjury." (Am. Compl. ¶ 25; Ans. ¶ 1.)
14. "[The Debtor] listed his address in the petition as 1220 Main Blvd., East Liverpool, OH 43920 – a property which is owned by his mother and believed to be her residence. At his 2004 examination, [the Debtor] testified that he actually resides

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<sup>2</sup>The Amended Complaint defines "Bankruptcy Cases" as the Prior Bankruptcy Case and the Main Case.

with Melissa Wellington and his children at the Real Estate.”  
(Am. Compl. ¶ 27; Ans. ¶ 1.)

15. “In Schedule ‘A’, in which [the Debtor] is required to disclose all legal, equitable, or future interest [in real property], including all property as a cotenant, community property, or in which the debtor has a life estate include[ing] any property in which the debtor holds rights and powers exercisable for the Debtor’s own benefit, the [Debtor] listed ‘None’.” (Am. Compl. ¶ 30; Ans. ¶ 1.)
16. “In Schedule ‘J’, [the Debtor] lists the payment of \$400.00 per month for rent/home ownership expense. [The Debtor] and his mother both testified that [the Debtor] has never paid a rent/home ownership expense to her.” (Am. Compl. ¶ 28; Ans. ¶ 1.)
17. “[The Debtor] did not list his mother as a secured creditor in Schedule ‘D’. She was listed on Schedule ‘F’ as ‘mortgage on real estate’ with a claim of \$160,000.00.” (Am. Compl. ¶ 29; Ans. ¶ 1.)
18. The Debtor “has paid some real estate taxes on the Real Estate, performed some repairs and maintenance, and from time-to-time has occupied the real estate with others.” (Ans. ¶ 9.)

**A. Count One: § 727(a)(4)(A)**

Count One of the Amended Complaint – False Oath – asserts that the Debtor should be denied a discharge pursuant to § 727(a)(4)(A) because the Debtor “knowingly and fraudulently made a false oath” regarding the following information in his bankruptcy petition and schedules: (i) he listed a false address for his residence in the petition; (ii) he failed to disclose his interest in the Real Estate<sup>3</sup> on Schedule A – Real Property; and (iii) he

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<sup>3</sup>This Memorandum Opinion and accompanying Order will utilize the defined terms in the Amended Complaint.

listed a false monthly rental expense of \$400.00 in Schedule J – Your Expenses. (Am. Compl. ¶ 34.) Copper Zone further states that the Debtor “has not, as of the date of this filing, amended his bankruptcy schedules other than to list additional liabilities.” (*Id.* ¶ 35.)

In the Motion, Copper Zone states that the Debtor has admitted “that his petitions were signed under oath and subject to perjury; that he did not reside at the address set forth on his petition; that he did not pay rent; and, [sic] that he did not disclose a mortgage upon or equitable interest in the Real Estate.” (Mot. at 13.) Copper Zone further alleges that the Debtor made such misrepresentations with fraudulent intent and that the misrepresentations are material to the Debtor’s bankruptcy case:

[Copper Zone] has satisfied the element of Fraudulent Intent. The [Debtor], through his admissions about the existence and timing of the transfers, has basically stated that he has not provided this Court with a complete financial disclosure. The transfer of the Real Estate to [Ms. Wellington] occurred after Judgment was taken against him. [Ms. Wellington]’s transfer to the [Debtor]’s mother occurred after the dismissal of the first bankruptcy and prior to the filing of the current bankruptcy. Purportedly, it was given in lieu of foreclosure. But, the [Debtor] admitted that he had not made payments for five years. Although denied, there was no threatened foreclosure and the [Debtor] continued to live at the Real Estate with his family burden free while enjoying equitable ownership and all the benefits of true ownership. These transfers occurred after the Judgment was obtained and nothing else legitimately or genuinely explains the transfers and their timing other than the risk of losing the home to a creditor.

[Copper Zone] has satisfied the element of Materiality to Bankruptcy. . . . Each and every representation made or omission by the [Debtor] is material as it directly bears upon the discovery of assets, business dealings or the existence and disposition of his property. He has attempted to shield from [Copper Zone] a valuable asset that would permit complete recovery on [Copper Zone]'s valid Judgment.

(*Id.* at 13-14.)

**B. Count Two: § 727(a)(2)(A)**

Count Two of the Amended Complaint – Intent to Hinder, Delay or Defraud – asserts that the Debtor should be denied a discharge pursuant to § 727(a)(2)(A) because the Debtor “committed fraudulent acts and concealed his property, with intent to hinder, delay or defraud a creditor, transferred, removed and/or concealed or permitted to be transferred, removed and/or concealed, property of the Defendant within one year before the filing date of the [Main Case].” (Am. Compl. ¶ 40.) Copper Zone alleges that the Debtor deeded the Real Estate to Ms. Wellington on February 8, 2013 “to assist [the Debtor] in evading payment of his creditors and to keep the Real Estate out of his Bankruptcy Cases – the first of which was filed just 40 days later.” (*Id.* ¶ 39.) Copper Zone further alleges that the Debtor “had the Real Estate appear to be encumbered by a mortgage to his mother and then attempted to have the Real Estate transferred to his mother . . . without her knowledge, to conceal [the Debtor]'s true ownership of, or

beneficial interest in, the Real Estate with the intent to defraud his creditors." (*Id.*)

In the Motion, Copper Zone states that the Debtor has admitted "ownership of the Real Estate . . . , the existence and timing of [Copper Zone]'s Judgment . . . [and] that he was insolvent at the time that he transferred the Real Estate to . . . Melissa Wellington." (Mot. at 10.) Regarding fraudulent intent, Copper Zone states,

These admissions coupled with the efforts of [Copper Zone] to enforce its Judgment, the timing of the bankruptcy filings, and transfers of the Real Estate to insiders that permitted [the Debtor] to enjoy the beneficial interest of the Real Estate at the expense of creditors compel a finding by this Court that the [Debtor], with intent to defraud [Copper Zone] as a creditor, transferred and/or concealed an asset from his bankruptcy estate.

(*Id.*) Copper Zone further states that, in the Answer, the Debtor "has failed to deny the material allegations that he concealed property with the intent to hinder, delay or defraud his creditors, within one year before the [Petition Date]." (*Id.* at 11.)

### **C. The Debtor's Response**

In his Response, the Debtor notes that he has specifically denied the following:

1. "[The] note and mortgage are a fiction, legal nullity, invalid and/or unenforceable." (Am. Compl. ¶ 13; Ans. ¶ 5.)
2. The Debtor transferred the Real Estate to Ms. Wellington "with intent to hinder, delay or defraud his creditors, and for no consideration . . . ." (Am. Compl. ¶ 15; Ans. ¶ 7.)

3. "[The Debtor] has retained a beneficial interest in the Real Estate." (Am. Compl. ¶ 31; Ans. ¶ 9.)
4. The Real Estate was transferred to Melissa Wellington "to assist [the Debtor] in evading payment of his creditors and to keep the Real Estate out of his Bankruptcy Cases . . . . [The Debtor] had the Real Estate appear to be encumbered by a mortgage to his mother and then attempted to have the Real Estate transferred to his mother . . . without her knowledge, to conceal [the Debtor]'s true ownership of, or beneficial interest in, the Real Estate with the intent to defraud his creditors." (Am. Compl. ¶ 39; Ans. ¶ 13.)
5. The Debtor "knowingly and fraudulently made a false oath" in his bankruptcy petition and schedules. (Am. Compl. ¶ 34; Ans. ¶ 12.)

The Debtor also notes that the Answer contains the following qualified general denial, "[The Debtor] denies each and every remaining allegation of the Amended Complaint not expressly admitted herein to be true." (Resp. at 3 (quoting Ans. ¶ 14).)

The Debtor contends that, as a result of his specific denials and qualified general denial, he "has controverted every allegation made in the Amended Complaint relating to whether acts of his were fraudulent, wrongful, made to evade creditors or in any way prejudicial to the estate." (*Id.* at 5.) Furthermore, the Debtor argues that "[f]raudulent and improper intent to conceal assets to evade creditors are questions of fact" and "[Copper Zone]'s allegation of fraudulent intent or improper purpose, having been controverted by [the Debtor], must be taken to be false for purposes of the Motion for Judgment on the Pleadings." (*Id.* at 5-6 (citations omitted).) The Debtor concludes that, because

issues of material fact exist concerning his alleged fraudulent intent, the Motion must be denied.

#### **D. Copper Zone's Reply**

In the Reply, Copper Zone disputes the Debtor's contention that the qualified general denial was properly pled, but also argues that no issues of material fact exist based on the Debtor's specific admissions irrespective of the qualified general denial. Copper Zone states that the Debtor's "pattern of admitted omissions and inaccuracies indicates an intent to defraud or, at the very least, a reckless disregard for the truth." (Reply at 7 (citation omitted).) Copper Zone further states that the Debtor's admitted actions "bear the badges of fraud and with the [Debtor]'s pattern of omissions and inaccuracies, sworn under the penalty of perjury, to this Court, in regards to the Real Estate there is ample evidence to infer fraudulent intent." (*Id.* at 9 (citation omitted).)

#### **II. STANDARD OF REVIEW**

Federal Rule of Civil Procedure 12(c), which applies to this adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7012(b), states, "After the pleadings are closed – but early enough not to delay trial – a party may move for judgment on the pleadings." FED. R. CIV. P. 12(c) (2015). A court should grant judgment on the pleadings "when no material issue of fact exists and the party making the motion is entitled to judgment as a matter

of law.” *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 582 (6th Cir. 2007) (quoting *Paskvan v. Cleveland Civil Serv. Comm’n*, 946 F.2d 1233, 1235 (6th Cir. 1991)). “For purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of the pleadings of the opposing party must be taken as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment.” *Johnson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010) (quoting *Tucker v. Middleburg-Legacy Place, LLC*, 539 F.3d 545, 549 (6th Cir. 2008)).

### **III. ANALYSIS**

#### **A. Federal Rule of Civil Procedure 8(b)**

The Court will first address Copper Zone’s argument that the Debtor failed to deny certain allegations in the Amended Complaint. Federal Rule of Civil Procedure 8(b), which applies to this adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7008(a), states, in pertinent part,

(b) Defenses; Admissions and Denials.

(1) In General. In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

\* \* \*

(3) General and Specific Denials. A party that intends in good faith to deny all the allegations of a pleading – including the jurisdictional grounds – may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.

(4) Denying Part of an Allegation. A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

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(6) Effect of Failing to Deny. An allegation – other than one relating to the amount of damages – is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

FED. R. CIV. P. 8(b) (2015) (emphasis added).

In the Motion, Copper Zone contends that the Debtor has failed to deny the allegations in paragraphs 35 and 36 of Count One and paragraphs 40 and 41 of Count Two, which, if those allegations are deemed admitted, “is tantamount and practically decisive to this Motion.” (Mot. at 8.) Those paragraphs state,

35. In spite of these admissions, [the Debtor] has not, as of the date of this filing, amended his bankruptcy schedules other than to list additional liabilities.

36. Based upon the foregoing, the Court should deny the [Debtor]’s discharge pursuant to 11 U.S.C. § 727(a) (4) (A).

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40. [The Debtor] has committed fraudulent acts and concealed his property, with intent to hinder, delay or defraud a creditor, transferred, removed and/or concealed or permitted to be transferred, removed and/or concealed, property of the [Debtor] within one year before the [Petition Date].

41. Based upon the foregoing, the Court should deny [the Debtor]'s discharge pursuant to 11 U.S.C. § 727(a)(2).

(Am. Compl. ¶¶ 35-36, 40-41.)

However, in the Motion, Copper Zone fails to address paragraph 14 of the Answer, which states, “[The Debtor] denies each and every remaining allegation of the Amended Complaint not expressly admitted herein to be true.” (Ans. ¶ 14.) In the Reply, Copper Zone addresses the Debtor’s qualified general denial by arguing, “[A] ‘catch-all’ denial such as that evinced by Paragraph 14 of the Answer does not comport with Fed.R.Civ.P. 8, absent a good faith intent to deny each and every allegation, including jurisdiction and identity.” (Reply at 11.)

Copper Zone’s position regarding the Debtor’s qualified general denial is contrary to the plain language of Federal Rule of Civil Procedure 8(b)(3). Copper Zone is correct that, pursuant to the first sentence in Rule 8(b)(3), a “catch-all” or general denial requires a good faith intent to deny every allegation in a pleading. FED. R. CIV. P. 8(b)(3) (“A party that intends in good faith to deny all the allegations of a pleading – including the jurisdictional grounds – may do so by a general denial.”).

However, the second sentence in Rule 8(b)(3) permits “[a] party that does not intend to deny all the allegations [to] either specifically deny designated allegations or generally deny all except those specifically admitted.” *Id.* The District Court for the Eastern District of Virginia discussed the permissibility of general denials, together with specific admissions, in *Bradford v. HSBC Mortg. Corp.*, No. 1:09cv1226, 2011 WL 9933767 (E.D. Va. Jan. 21, 2011):

As these provisions make clear, all of defendants’ responses are within the contemplation of Rule 8, Fed.R.Civ.P. Indeed, not only do defendants respond to each allegation – specifically admitting, denying, or stating a basis for failing to admit or to deny each allegation – but each defendant’s answer also includes a general denial stating that, to the extent that any allegations are not specifically admitted, they are denied. Nothing in the form of these responses violates the Federal Rules of Civil Procedure.

*Id.* at \*1.

Because the Debtor specifically admitted certain allegations, he was within his rights to generally deny the remainder of Copper Zone’s allegations. Accordingly, the Court finds that the Debtor has properly pled a qualified general denial of the allegations in paragraphs 36, 40 and 41 of the Amended Complaint.

Although the Debtor generally denied the allegations in paragraph 35 of the Amended Complaint – *i.e.*, that the Debtor has not amended his bankruptcy schedules other than to list additional liabilities – those allegations are a matter of public record

subject to judicial notice.<sup>4</sup> The Debtor filed his bankruptcy schedules on September 8, 2014 (Main Case, Docs. 17-20). On September 15, 2014, the Debtor amended (i) Summary of Schedules; (ii) Statistical Summary of Certain Liabilities and Related Data; and (iii) Schedule F (Main Case, Doc. 21). The Debtor has not otherwise amended his bankruptcy petition or schedules. Rule 8(b)(4) states, "A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest." FED. R. CIV. P. 8(b)(4). While the Debtor was permitted to generally deny Copper Zone's allegations pursuant to Rule 8(b)(3), he was required to admit true portions of allegations pursuant to Rule 8(b)(4). Accordingly, the Court finds that the Debtor's qualified general denial was not properly pled with respect to paragraph 35 of the Amended Complaint. The Court takes judicial notice of the fact that the Debtor has not amended his bankruptcy petition or schedules after September 15, 2014.

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<sup>4</sup>Matters of public record subject to judicial notice are appropriate for the Court to consider in evaluating Copper Zone's Motion.

When deciding a motion for judgment on the pleadings, a court should consider the allegations in the complaint, as well as "documents that are attached to or submitted with the complaint . . . and any 'matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, [and] items appearing in the record of the case.'"

*CPC Props., Inc. v. Dominic, Inc.*, No. 12-4405, 2013 U.S. Dist. LEXIS 118482, \*4-5 (E.D. Pa. Aug. 21, 2013) (quoting *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006)).

The Court will next address Copper Zone's argument that, even if the Court were to accept the Debtor's qualified general denial, the Debtor has specifically admitted sufficient facts to grant the Motion.

**B. Section 727(a)**

Pursuant to § 727(a), an individual debtor is entitled to a discharge unless one of the enumerated exceptions apply. "At the trial on a complaint objecting to a discharge, the plaintiff has the burden of proving the objection." FED. R. BANKR. P. 4005 (2015). "The elements of a violation of 11 U.S.C. § 727 must be proven by a preponderance of the evidence to merit denial of a discharge. The Bankruptcy Code should be construed liberally in favor of the debtor." *Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 683 (6th Cir. 2000) (citations omitted).

Because the Court's ruling on Count Two will be dispositive of a portion of Count One, the Court will first address Count Two.

**1. Count Two: § 727(a)(2)(A)**

Section 727(a)(2)(A) states,

(a) The court shall grant the debtor a discharge, unless—

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(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(A) property of the debtor, within one year before the date of the filing of the petition[.]

11 U.S.C. § 727(a)(2)(A) (2015). Section 727(a)(2)(A) requires that "(1) the Debtor conceal assets within one year of the petition date; (2) the act of concealment be performed by the Debtor; (3) the act consist of a transfer, removal, destruction or concealment of the Debtor's property; and (4) the act be done with the intent to hinder, delay and/or defraud either a creditor or officer of the Debtor's estate." *Buckeye Retirement Co. v. Swegan (In re Swegan)*, 383 B.R. 646, 653 (B.A.P. 6th Cir. 2008) (citation omitted).

Copper Zone alleges that the Debtor transferred or concealed his interest in the Real Estate by (i) recording a fictitious mortgage in favor of his mother; (ii) transferring the Real Estate to Ms. Wellington for no consideration; and (iii) causing Ms. Wellington to transfer the Real Estate to his mother. While the Debtor admits that each of these transactions occurred, he denies that he transferred the Real Estate to Ms. Wellington for no consideration or that he caused Ms. Wellington to transfer the Real Estate to his mother. The Debtor further denies that the mortgage was fictitious or that he retained any interest in the Real Estate. In the Reply, Copper Zone argues that the timeline of events surrounding the Real Estate "bear[s] the badges of fraud" and that "[the Debtor]'s motive is clear – to mislead creditors in

an attempt to conceal property and to prevent the discovery of his interest in the Real Estate.” (Reply at 9.)

Accepting the Debtor’s denials as true for purposes of judgment on the pleadings, the Court cannot find by a preponderance of the evidence that the Debtor retained an interest in the Real Estate in the year before the Petition Date, which the Debtor could in turn transfer or conceal. Copper Zone cites *Keeney v. Smith (In re Keeney)*, 227 F.3d 679 (6th Cir. 2000), to support its argument that the Debtor retained a beneficial interest in the Real Estate pursuant to the continuing concealment doctrine, which provides that “a transfer made and recorded more than one year prior to filing may serve as evidence of the requisite act of concealment where the debtor retains a secret benefit of ownership in the transferred property within the year prior to filing.” *Id.* at 684 (quoting *Hughes v. Lawson (In re Lawson)*, 122 F.3d 1237, 1240 (9th Cir. 1997)). In *Keeney*, the Sixth Circuit adopted the continuing concealment doctrine and concluded that the debtor retained a beneficial interest in two properties, which could be “inferred . . . from [the debtor]’s payment for and use of the properties, including his rent-free residence on each and payment of all mortgage obligations . . . [together with] no explanation . . . as to why the properties were titled in [his] parents’ names.” *Id.* at 683-84.

However, the court in *Keeney* differentiated *Rosen v. Bezner*, 996 F.2d 1527 (3d Cir. 1993), in which the Third Circuit found that there was "a material issue of fact on the intent element of [§ 727(a)(2)(A)], so that case was not proper for summary judgment disposition."<sup>5</sup> *Keeney*, 227 F.3d at 685 (citing *Rosen*, 996 F.2d at 1532). Similar to the allegations in this proceeding, in *Rosen*, the debtor transferred his interest in real property to his wife, but continued to live at the real property, continued to make mortgage payments and remained obligated on the mortgage. The debtor filed a chapter 7 petition approximately twenty months later, and the bankruptcy court relied on the continuing concealment doctrine to deny the debtor's discharge pursuant to § 727(a)(2)(A). Specifically, the bankruptcy court, and later the district court, found that the debtor retained and concealed a beneficial interest in the real property during the year before the petition date. The Third Circuit reversed and remanded:

Here, it is undisputed that [the debtor] continued to live in the property after the transfer to his wife. This retention of the benefits of ownership is evidence tending to show that [the debtor] did retain a secret interest pursuant to an express or tacit agreement with his wife, such as a right to reconveyance on demand or a right to live in the house rent-free. However, from the record, we cannot conclude as a matter of law that [the debtor] retained a secret interest. [The debtor], as he claims, may have transferred all of his interest in the property to his wife; he might be living there at

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<sup>5</sup>Summary judgment is governed by the same standard as judgment on the pleadings. See FED. R. CIV. P. 56(a)(2015) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

his wife's sufferance and be subject to eviction at will. We will thus remand for a factual determination as to whether [the debtor] retained a secret interest in the property which was concealed from his creditors during the year preceding his bankruptcy filing.

*Rosen*, 996 F.2d at 1532 (internal citation and parenthetical omitted). In a footnote, the court further explained,

While "retention of the benefits of ownership" on the part of the debtor may support an inference and a factual finding that the debtor retained a secret interest in the property, such an inference is inappropriate on a motion for summary judgment. Evidence of a complete transfer of legal title, even if accompanied by evidence that the debtor continues to use the property, may, in some circumstances, support a contrary inference that the debtor has no remaining interest and only uses the property at the sufferance of the new owner.

*Id.* at 1532 n.5.

This Court previously addressed the allegation that a debtor failed to disclose an equitable interest in real property in *Buckeye Retirement Co. v. Hake (In re Hake)*, 387 B.R. 490 (Bankr. N.D. Ohio 2008). In *Hake*, the debtor transferred real property to a trust in exchange for satisfaction of a judgment lien. The parties stipulated that the debtor had no ownership interest in the trust, and testimony established that there was an oral agreement between the trust and the debtor for the debtor to continue to occupy the real property in exchange for performing maintenance and paying the mortgage and taxes on the real property. Following trial, this Court found that the debtor did not retain an interest in the real property:

Plaintiffs allege that Debtor failed to disclose the equitable interest he has in the residence, but they fail to describe what that equitable interest is. Debtor cannot pledge the residence as security. He cannot take out a further mortgage on the property. Any equity created by payment of the mortgage is for the benefit of the Hake Trust, not Debtor. The Hake Trust could terminate Debtor's right to occupy the residence; Debtor would have no recourse in that event. It is not clear to the Court what Plaintiffs would have had Debtor disclose and where disclosure of the alleged equitable interest would have been required.

\* \* \*

. . . Trustee cannot avoid the transfer of the residence to the Trust because the Trust gave adequate and equivalent value in exchange for legal title. This Court finds that Debtor's continued occupancy of the residence, coupled with payment of the mortgage, taxes, insurance, and maintenance, is not sufficient to establish that Debtor has a beneficial and/or equitable interest in the house when such house is owned by an irrevocable trust that paid adequate consideration for the house at the time of transfer. Accordingly, this Court finds that there is no equitable interest in the residence that Debtor could have or should have disclosed.

*Id.* at 505.

In this proceeding, while the Debtor's admissions may support the inference that the Debtor retained an equitable interest in the Real Estate during the year before the Petition Date, such inference is insufficient to grant judgment on the pleadings. For purposes of judgment on the pleadings, the Court must accept the Debtor's denials as true. Specifically, the Debtor denies that (i) the Mortgage was a fiction; (ii) the Real Estate was transferred to Ms. Wellington for no consideration; and (iii) the

Debtor orchestrated Ms. Wellington's transfer of the Real Estate to his mother. As explained in *Rosen* and *Hake*, the Debtor could be residing at the Real Estate in exchange for paying taxes and performing maintenance, but be subject to eviction. However, unlike in *Keeney*, this proceeding has not proceeded to trial to allow the Debtor to present such a defense. Accordingly, whether the Debtor transferred or concealed an interest in the Real Estate during the year before the Petition Date is a disputed material fact that precludes judgment on the pleadings with respect to Count Two.

Second, even if the Debtor had an interest in the Real Estate during the year before the Petition Date, the record does not establish by a preponderance of the evidence that the Debtor fraudulently transferred or concealed such interest. The following statement by the Bankruptcy Appellate Panel for the Sixth Circuit expresses the caution that courts must exercise in determining a party's intent absent presentation of evidence:

Courts must be cautious in determining issues that involve a person's state of mind when deciding a case at the summary judgment stage. *Wilson v. Seiter*, 893 F.2d 861, 866 (6th Cir. 1990), *vacated on other grounds*, 501 U.S. 294, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (U.S. 1991). Cases involving state of mind issues are not always inappropriate for summary judgment. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989). However, "summary judgment is particularly inappropriate" when an individual's intent is at issue. *Hoover v. Radabaugh*, 307 F.3d 460, 467 (6th Cir. 2002) (quoting *Marohnic v. Walker*, 800 F.2d 613, 617 (6th Cir. 1986)). Even where intent is at issue, "summary judgment

is appropriate if all reasonable inferences defeat the claims of one side . . . ." *Gertsch v. Johnson & Johnson, Fin. Corp. (In re Gertsch)*, 237 B.R. 160, 165 (B.A.P. 9th Cir. 1999) (quoting *Newman v. Checkrite Cal. Inc.*, 912 F. Supp. 1354, 1380 (E.D. Cal. 1995)).

*Buckeye Retirement Co. v. Swegan (In re Swegan)*, 383 B.R. 646, 655-56 (B.A.P. 6th Cir. 2008); see also *Snyder v. Manis (In re Manis)*, Case No. 05-13502, Adv. No. 05-1173, 2007 Bankr. LEXIS 1502, \*8 (Bankr. E.D. Tenn. Apr. 27, 2007) ("A decision on the debtor's intent usually requires a trial because the [debtor]'s intent cannot be determined without hearing the debtor's testimony.").

Copper Zone relies nearly exclusively on the timeframe in which the mortgage was recorded and the Real Estate was transferred to demonstrate fraudulent intent. Although these transactions, together with the Debtor's failure to make mortgage payments and continued use of the Real Estate, may be evidence of fraudulent intent, they are insufficient to defeat all reasonable inferences in favor of the Debtor at the pleadings phase of this proceeding. See *Buckeye Retirement Co. v. Swegan (In re Swegan)*, Case No. 03-45698, Adv. No. 04-2526, \*17 (Bankr. N.D. Ohio Sept. 23, 2009) (Woods, J.) (unpublished) (quoting *Fokkena v. Chapman (In re Chapman)*, Case No. 07-1485, Adv. No. 07-9193, 2009 Bankr. LEXIS 1945, \*12 (Bankr. N.D. Iowa July 9, 2009)) ("Denial of discharge . . . must be based on more than mere suspicion. The evidence must convince the Court [of the debtor's] intent to hinder or

defraud creditors." ). Because the Debtor's admissions do not establish by a preponderance of the evidence that the Debtor acted with fraudulent intent when he executed the note and mortgage in favor of his mother or transferred the Real Estate to Ms. Wellington, the Debtor must be permitted to present evidence of his intent concerning these transactions. Accordingly, the Court will deny the Motion for Judgment on the Pleadings with respect to Count Two.

**2. Count One: § 727(a) (4) (A)**

Section 727(a) (4) (A) states,

(a) The court shall grant the debtor a discharge, unless—

\* \* \*

(4) the debtor knowingly and fraudulently, in or in connection with the case—

(A) made a false oath or account[.]

11 U.S.C. § 727(a) (4) (A) (2015). Section 727(a) (4) contains five elements: "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." *Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 685 (6th Cir. 2000) (citing *Beaubouef v. Beaubouef (In re Beaubouef)*, 966 F.2d 174, 178 (5th Cir. 1992)). As explained by the Sixth Circuit,

[I]ntent to defraud "involves a material representation that you know to be false, or, what amounts to the same thing, an omission that you know will create an erroneous impression." *In re Chavin*, 150 F.3d 726, 728 (7th Cir. 1998). A reckless disregard as to whether a representation is true will also satisfy the intent requirement. See *id.* "'Courts may deduce fraudulent intent from all the facts and circumstances of a case.'" *Williamson [v. Fireman's Fund Ins. Co.]*, 828 F.2d [249,] 252 [(4th Cir. 1987)] (citation omitted). However, a debtor is entitled to discharge if false information is the result of mistake or inadvertence. See *Gullickson [v. Brown (In re Brown)]*, 108 F.3d [1290,] 1294 [(10th Cir. 1997)]. The subject of a false oath is material if it "bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property.'" *Beaubouef*, 966 F.2d at 178 (citation omitted).

*Id.* at 685-86.

Copper Zone alleges that the Debtor has knowingly and fraudulently made the following misrepresentations in his bankruptcy petition and schedules: (i) he listed a false address in the petition; (ii) he failed to disclose his interest in the Real Estate in Schedule A – Real Property; (iii) he listed a false rental expense of \$400.00 in Schedule J – Your Expenses. Copper Zone argues that each of these misrepresentations is material because it relates to the discovery of assets and, particularly, the Debtor's alleged interest in the Real Estate. Copper Zone further argues that the Debtor's "pattern of admitted omissions and inaccuracies indicates an intent to defraud or, at the very least, a reckless disregard for the truth" and that the Debtor "exacerbated his misstatements by making no effort to correct them

by amending his schedules.” (Reply at 7 (citations and parentheticals omitted).)

As discussed at length in Part III(B)(1), above, whether the Debtor has an interest in the Real Estate is a disputed material fact and, thus, whether the Debtor failed to disclose such interest is also a disputed material fact. Therefore, Copper Zone is not entitled to judgment on the pleadings on the basis that the Debtor failed to disclose an interest in the Real Estate.

However, it is not disputed that the Debtor made a false oath concerning his address and rental expense. First, the Debtor admits that he filed his bankruptcy petition and schedules under penalty of perjury. Second, the Debtor admits that he does not reside with his mother at 1220 Main Boulevard, East Liverpool, Ohio, as listed in his bankruptcy petition. Instead, the Debtor resides with Ms. Wellington and their children at the Real Estate. Third, the Debtor admits that he does not pay a monthly rental expense of \$400.00, as stated in Schedule J. Finally, the Court has taken judicial notice of the fact that the Debtor has not amended his bankruptcy petition or Schedule J. Thus, the only remaining issues with respect to Count One are whether the Debtor's misrepresentations: (i) were made knowingly; (ii) materially relate to the Debtor's bankruptcy case; and (iii) were made with fraudulent intent.

"The debtor ha[s] knowledge of the statement if 'the debtor knew the truth, but nonetheless failed to give the information or gave contradictory information.'" *Montedonico v. Beckham (In re Beckham)*, No. 08-8054, 2009 Bankr. LEXIS 1345, \*23-24 (B.A.P. 6th Cir. June 19, 2009) (quoting *Hamo v. Wilson (In re Hamo)*, 233 B.R. 718, 725 (B.A.P. 6th Cir. 1999)). In this proceeding, there is no plausible explanation as to how the Debtor could not have known that he misrepresented his address and rental expense. Copper Zone conducted its Rule 2004 examination of the Debtor on December 8, 2014,<sup>6</sup> which was less than five months after the Petition Date and only three months after Schedule F was filed. At that Rule 2004 examination, the Debtor admitted that he listed a false address and rental expense in his bankruptcy petition and Schedule F. As a consequence, the Court finds that the record establishes beyond a reasonable doubt that the Debtor knowingly misrepresented his address and rental expense.

"Materiality is normally an easily satisfied standard, only requiring that the false statement 'bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings or the existence and disposition of property.'" *U.S. Trustee v. Varner (In re Varner)*, Case No. 14-61103, Adv. No. 14-6021, 2015 Bankr. LEXIS 2144, \*25

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<sup>6</sup>Upon the motion of Copper Zone (Main Case, Doc. 40), the Court ordered the Debtor to appear on December 8, 2014 for an examination pursuant to Federal Rule of Bankruptcy Procedure 2004 (Main Case, Doc. 41).

(Bankr. N.D. Ohio June 30, 2015) (quoting *U.S. Trustee v. Zhang (In re Zhang)*, 463 B.R. 66, 86 (Bankr. S.D. Ohio 2012)). “In other words, ‘[a] claim is material if it hinders the administration of the [bankruptcy] estate.’” *Buckeye Retirement Co. v. Heil (In re Heil)*, 289 B.R. 897, 908 (Bankr. E.D. Tenn. 2003) (quoting *Calisoff v. Calisoff (In re Calisoff)*, 92 B.R. 346, 355 (Bankr. N.D. Ill. 1988)).

The address listed in the Debtor’s bankruptcy petition is critical to the administration of his bankruptcy case because it is (i) necessary to establish proper venue in this Court; and (ii) the address to which notices are sent. The importance of a debtor’s address is exhibited by Federal Rule of Bankruptcy Procedure 4002 – entitled “Duties of Debtor” – which mandates that “the debtor shall . . . file a statement of any change of the debtor’s address.” FED. R. BANKR. P. 4002(a)(5) (2015). In fact, because the Debtor has never amended his bankruptcy petition, notices continue to be sent to an address where the Debtor admittedly does not reside. Thus, the Debtor’s misrepresentation of his address is material to his bankruptcy case.

The false rental expense is also a material misrepresentation. By falsifying a rental expense, the Debtor has misled his creditors and the trustee. There would be no reason for the Debtor to inflate or create a rental expense in a chapter 7 case unless the Debtor intended such false expense to give support

to the false address. Accordingly, the Court finds that such misrepresentation is material to the Debtor's bankruptcy case.

The final element of Count One is whether the Debtor misrepresented his address and rental expense with fraudulent intent. The Bankruptcy Court for the Eastern District of Tennessee discussed fraudulent intent concerning the debtors' alleged omission of assets from their schedules in *Snyder v. Manis (In re Manis)*, Case No. 05-13502, Adv. No. 05-1173, 2007 Bankr. LEXIS 1502 (Bankr. E.D. Tenn. Apr. 27, 2007). In *Manis*, the creditor alleged that the debtors failed to schedule several items of personal property. In their answer, the debtors asserted that they had no interest in the personal property because it had been rented or borrowed. Furthermore, the debtors argued that any omissions were not the product of fraudulent intent. The bankruptcy court concluded that summary judgment was inappropriate because the debtors' intent was an unresolved issue of material fact. The court stated,

The complaint follows the usual pattern of alleging circumstantial evidence of wrongful intent – facts that imply wrongful intent – since the defendants have not admitted and will not admit wrongful intent. Thus, the motion for summary judgment relies on the complaint's allegations that only imply wrongful intent, and the defendants' answer contradicts the implication of wrongful intent. The motion for summary judgment does nothing more than the complaint to establish the defendant's wrongful intent. The court has the allegations of the complaint and the contradictions in the answer, and taken together, they do not allow the court to conclude that the defendants had the wrongful

intent required by § 727(a)(2) or (a)(4). The motion for summary judgment does not resolve the genuine issue of material fact with regard to the defendants' intent.

The result would probably be the same even if the defendants admitted or did not dispute the alleged omissions from the schedules and the statement of financial affairs. The court would be faced with the question of whether the omissions required the court to infer wrongful intent. The court thinks not. Inaccurate schedules and statements do not necessarily require the court to infer wrongful intent.

*Id.* at \*11-12.

As in *Manis*, the posture of this proceeding follows the typical pattern in which the Amended Complaint alleges circumstantial evidence of fraudulent intent, but the Debtor denies all fraudulent intent. Copper Zone even acknowledges that the evidence in this proceeding only "indicates an intent to defraud." (Reply at 7.) The Court must accept the Debtor's denials as true for purposes of judgment on the pleadings and, thus, cannot conclude by a preponderance of the evidence that the Debtor fraudulently misrepresented his address and rental expense. While Copper Zone is correct that the Debtor's failure to amend his schedules may be indicative of fraudulent intent, under these circumstances, the Debtor's intent can only be determined after presentation of evidence. Because the Debtor's intent in misrepresenting his address and rental expense is an issue of material fact, the Court will deny the Motion with respect to Count One.

#### IV. CONCLUSION

For purposes of judgment on the pleadings, the Court must accept the Debtor's properly pled denials as true. Pursuant to Federal Rule of Civil Procedure 8(b)(3), the Debtor was permitted to specifically deny certain allegations in the Amended Complaint and generally deny the remaining allegations, as the Debtor did in paragraph 14 of the Answer.

The Debtor denies that he retained any interest in the Real Estate after transferring it to Ms. Wellington or that he transferred the Real Estate for no consideration. Moreover, the Debtor's admissions do not necessarily lead to the inference that the Debtor retained an interest in the Real Estate. Thus, whether the Debtor possessed an interest in the Real Estate in the year before the Petition Date, which the Debtor transferred or concealed, is an issue of material fact that precludes judgment on the pleadings with respect to Count Two.

The Debtor admits that he misrepresented his address and rental expense, but denies that he did so with fraudulent intent. Without evidence as to why such misrepresentations were made, the Court is unable to conclude by a preponderance of the evidence that the misrepresentations were made with fraudulent intent. Accordingly, judgment on the pleadings cannot be granted with respect to Count One.

As a result, the Court will deny the Motion for Judgment on the Pleadings. An appropriate order will follow.

# # #

IT IS SO ORDERED.

Dated: December 10, 2015  
04:10:24 PM

  
*Kay Woods*  
\_\_\_\_\_  
Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

JEREMIAH K. GOMOLL,

Debtor.

\* \* \* \* \*

COPPER ZONE TANNING, INC.,

Plaintiff,

v.

JEREMIAH K. GOMOLL,

Defendant.

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CASE NUMBER 14-41607

ADVERSARY NUMBER 15-4003

HONORABLE KAY WOODS

\*\*\*\*\*

ORDER DENYING

COPPER ZONE'S MOTION FOR JUDGMENT ON THE PLEADINGS

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Plaintiff Copper Zone Tanning, Inc. ("Copper Zone") filed Amended Complaint to Deny Discharge Under 11 U.S.C. §§ 727(a)(2) and 727(a)(4) ("Amended Complaint") (Doc. 21) on June 25, 2015, in

which Copper Zone requests that the Court deny Debtor/Defendant Jeremiah K. Gomoll a discharge pursuant to § 727(a)(2) and (a)(4). On September 30, 2015, Copper Zone filed Motion for Judgment on the Pleadings with Memorandum of Points and Authority (Doc. 29), which is presently before the Court. The Debtor filed Response to Motion for Judgment on the Pleadings and Brief in Support (Doc. 30) on October 14, 2015, and Copper Zone filed Reply to Response to Motion for Judgment on the Pleadings with Memorandum in Support (Doc. 31) on October 21, 2015.

For the reasons set forth in the Court's Memorandum Opinion Regarding Copper Zone's Motion for Judgment on the Pleadings entered on this date, the Court hereby finds:

1. Pursuant to Federal Rule of Civil Procedure 8(b)(3), the Debtor was permitted to specifically deny certain allegations in the Amended Complaint and generally deny the remaining allegations;
2. Whether the Debtor possessed an interest in the Real Estate in the year before the Petition Date, which the Debtor transferred or concealed, is an issue of material fact; and
3. Whether the Debtor misrepresented his address and rental expense with fraudulent intent is an issue of material fact.

Because issues of material fact exist, the Court cannot grant judgment on the pleadings with respect to Counts One or Two of the

Amended Complaint. As a consequence, the Court hereby denies the Motion for Judgment on the Pleadings.

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