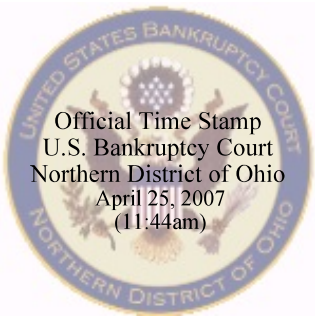
NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:	)	Case No. 06-10959
	)	
BEVERLEY A. SCHILERO,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
_____	)	
	)	
THEATRICAL GRILL, INC.,	)	Adversary Proceeding No. 06-1813
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
BEVERLEY A. SCHILERO,	)	**MEMORANDUM OF OPINION**
	)	**ON SUMMARY JUDGMENT MOTION**
Defendant.	)	(NOT FOR COMMERCIAL PUBLICATION)

Creditor Theatrical Grill, Inc. filed this complaint seeking to deny a discharge to the debtor Beverly Schilero under 11 U.S.C. § 727. The debtor now moves for summary judgment on the complaint, which the creditor opposes. For the reasons stated below, the motion is granted.

JURISDICTION

Jurisdiction exists 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).[1]

THE SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c) (made applicable by FED. R. BANKR. P. 7056); *see also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v.*

[1] This written opinion is entered only to decide the issues presented in this case and is not intended for commercial publication in an official reporter, whether print or electronic.

Zenith Radio Corp., 475 U.S. 574 (1986). The movant must initially demonstrate the absence of a genuine issue of material fact. *Celotex Corp.*, 477 U.S. at 323. A material fact is one whose resolution will affect the determination of the underlying action. *Tenn. Dep't of Mental Health & Mental Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996). "The substantive law determines which facts are 'material' for summary judgment purposes." *Hanover Ins. Co. v. Am. Eng'g Co.*, 33 F.3d 727, 730 (6th Cir. 1994) (citations omitted). An issue is genuine if a rational trier of fact could find in favor of either party on the issue. *Schaffer v. A.O. Smith Harvestore Prods., Inc.*, 74 F.3d 722, 727 (6th Cir. 1996) (citation omitted).

If the moving party meets this burden, the burden shifts to the non-moving party to show the existence of a material fact which must be tried. *Id.* The non-moving party "may not rest upon the mere allegations . . . of [its] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e) (made applicable by FED. R. BANKR. P. 7056). Those facts may be shown "by any of the kinds of evidentiary materials listed in Rule 56(c) . . . ." *Celotex Corp.*, 477 U.S. at 324.

All reasonable inferences drawn from the evidence must be viewed in the light most favorable to the party opposing the motion. *Hanover Ins. Co.*, 33 F.3d at 730. The issue at this stage is whether there is evidence on which a trier of fact could reasonably find for the nonmoving party. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989).

DISCUSSION

The bankruptcy code provides that an individual chapter 7 debtor is entitled to a discharge of all debts, with certain exceptions. Plaintiff Theatrical Grill, Inc. relies on two exceptions found in § 727(a)(2)(A) and (a)(4)(A):[2]

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

[2] The complaint only cites to § 727, rather than a particular subsection. Similarly, the plaintiff's opposition to the summary judgment motion only cites § 727. In the joint pretrial statement, however, the plaintiff stated that it is proceeding under § 727(a)(2)(A) and (a)(4)(A). (Docket 12). The court will, therefore, analyze the motion under those sections.

(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 . . . —

(A) property of the debtor, within one year before the date of the filing of the petition;

* * *

(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)(2)(A), (a)(4)(A).

The creditor must prove its case by a preponderance of the evidence. FED. R. BANKR. P. 4005; *see Barclays/Am. Bus. Credit, Inc. v. Adams (In re Adams)*, 31 F.3d 389, 393–94 (6th Cir. 1994). The burden of production, however, is a shifting one. "[T]he moving party is charged with the initial burden of putting forth evidence that all of the elements . . . have been met; but once shown, the burden of production will shift to the debtor to provide a credible explanation for their actions." *United States Trustee v. Halishak (In re Halishak)*, 337 B.R. 620, 626 (Bankr. N.D. Ohio 2005); *see also First Federated Life Ins. Co. v. Martin (In re Martin)*, 698 F.2d 883, 887 (7th Cir. 1983). Summary judgment regarding a debtor's discharge may be granted in appropriate cases. *See, e.g.*, *Hunter v. Sowers (In re Sowers)*, 229 B.R. 151 (Bankr. N.D. Ohio 1998).

11 U.S.C. § 727(a)(2)(A)

To prove a case under § 727(a)(2)(A), a plaintiff must prove that the debtor (1) disposed of property (whether by transfer, concealment or other disposition) that would have become estate property, (2) within one year before the filing date, (3) with a subjective intent to hinder, delay or defraud the creditor through that act. *See Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 683 (6th Cir. 2000). The term "transfer" includes "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with— (I) property; or (ii) an interest in property." 11 U.S.C. § 101(54)(D). Concealment can include omitting information from bankruptcy schedules. *See In re Sowers*, 229 B.R. at 156–57. The party challenging the

discharge must prove that the debtor subjectively intended to defraud creditors; constructive fraud is not enough. "[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 Keeney*, 227 F.3d at 686 (quoting *In re Chavin*, 150 F.3d 726, 728 (7th Cir. 1998)). Actual intent may be inferred from the circumstances of the case. *In re Krehl*, 86 F.3d 737, 743 (7th Cir. 1996); *see also Keeney*, 227 F.3d at 684.

11 U.S.C. § 727(a)(4)(A)

To deny a debtor a discharge under § 727(a)(4)(A), 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. The debtor's statements in the petition, schedules, and statement of affairs are all made under oath. *See* FED. R. BANKR. P. 1008, 9009; Official Forms B1, B6, and B7. A debtor's knowledge that a statement or omission is false:

> may be shown by demonstrating that the debtor knew the truth, but nonetheless failed to give the information or gave contradictory information. A false statement or omission that is made by mistake or inadvertence is not sufficient grounds upon which to base the denial of a discharge, but a knowingly false statement or omission made by the Debtor with reckless indifference to the truth will suffice as grounds for the denial of a Chapter 7 general discharge.

Hamo v. Wilson (In re Hamo), 233 B.R. 718, 725 (B.A.P. 6th Cir. 1999) (internal quotations and citations omitted). Again, fraud may be inferred from the totality of the circumstances. *In re Keeney*, 227 F.3d at 686. A statement is material to the case if it relates to the debtor's business transactions, discovery of assets, or the existence or disposition of property. *Id.*

Overview of the Complaint and Answer

The debtor filed her bankruptcy case on March 29, 2006. In the complaint, the plaintiff alleges that the debtor has financial connections to various companies that were not disclosed in her bankruptcy filing and that the omissions warrant denying her a discharge. The companies are: BAS Management & Consulting Services, Inc., FDB Inc., Magoo's Inc., AJ&N Inc., Hard

Rock Trucking & Leasing, Inc., Sun Baby, Inc., and Shot'z Bar & Grill, Inc. The debtor denies the allegations. The plaintiff's suspicions are heightened by the fact that in December 2000, the debtor pleaded guilty to one count of conspiracy to defraud the United States under 18 U.S.C. § 371. There is no apparent connection between the criminal plea and the civil debt owed to the plaintiff.

Count 1 of the Complaint[3]

The plaintiff here incorporates its factual background allegations, which are that:

(1) On December 21, 1999, the debtor was indicted on these counts: conspiracy to defraud, filing false tax returns and structuring transactions to evade reporting requirements.

(2) On December 15, 2000, the debtor pleaded guilty to one count of conspiracy to defraud the United States under 18 U.S.C. § 371.

(3) Before her indictment, she operated or managed several [unspecified] establishments in Cleveland.

(4) On about October 23, 2001, the debtor formed and became the 100% shareholder of BAS Management & Consulting Services, Inc., an Ohio corporation.

(5) BAS's sole business function is to consult with the same establishments the debtor once operated and/or managed. BAS is the alter ego of the debtor and a conduit for the debtor to operate the establishments.[4]

Count 1 alleges that "[w]ith respect to these Establishments, [the debtor] Schilero, with intent to hinder, delay, or defraud, transferred, removed and concealed property of the estate," and that she "knowingly and fraudulently, in or in connection with this case, has made a false oath."[5] The debtor answered and admitted that in 2001 she formed and became the sole shareholder of BAS.[6]

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[3] As noted above, a non-moving party may not rely just on the complaint's allegations in opposing a motion for summary judgment. The court quotes from the complaint not as support for the opposition, but to put the motion in context.

[4] Complaint ¶¶ 6–10. (Docket 1).

[5] Complaint ¶¶ 11–14.

[6] Answer ¶ 9. (Docket 9).

In her summary judgment motion, the debtor argues that there is no genuine issue of material fact and that she is entitled to judgment as a matter of law. In support, the debtor shows that she served discovery requests on the plaintiff asking the plaintiff to produce all documents showing that the debtor is the alter ego of BAS, serving as a mere conduit for the debtor to operate various establishments; that the debtor transferred, removed, or concealed property of the estate with the intent to hinder, delay, or defraud with respect to the establishments; and that the debtor knowingly and fraudulently in connection with the bankruptcy case made a false oath in regards to the establishments.[7]

The plaintiff responded to the request for alter ego documents by producing these documents: (1) a document from the Ohio Secretary of State stating that he has custody of the business records of BAS Management & Consulting Services, Inc., an Ohio for profit corporation; (2) BAS's articles of incorporation dated October 17, 2001; and (3) BAS's appointment of statutory agent. The debtor's name is written on the latter two documents.[8]

The plaintiff responded to the remaining requests by stating:

> The Plaintiff objects to this Request on the basis that the Defendant, not the Plaintiff, is in possession of documents responsive to this request. In the event that the Defendant does transmit documentation responsive to this request, said request remains objectionable on the basis of being duplicative and overly burdensome.[9]

From this response and production, the debtor argues that the plaintiff does not have any documents to support the allegations in count 1. The debtor then points to her affidavit stating that she does not have any such documents either and that she did not transfer, remove or conceal property of the estate with the intention to hinder, delay or defraud with respect to any of

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[7] Debtor's motion, exh. 1, ¶¶ 3–5. (Docket 17).

[8] Debtor's motion, exh. 2, ¶ 3.

[9] Debtor's motion, exh. 2, ¶¶ 4–5. The plaintiff's statement here is puzzling. The plaintiff was asked to produce documents in its custody or control that supported its claim; the plaintiff objected on the ground that the debtor had not yet given the documents to the plaintiff. This misunderstands the nature of the request: the plaintiff presumably had a good faith basis in law and fact for filing the complaint. The debtor was asking for the documents in the *plaintiff's* possession that support the complaint. The debtor's act of production or non-production is, therefore, irrelevant on this issue.

the establishments named in paragraph 12 of the complaint.[10] The evidence that the party with the ultimate burden of proof does not have documents to support its case, coupled with the debtor's affirmative affidavit, meets the debtor's initial burden of going forward to show that there is no genuine issue of material fact as to whether she improperly disposed of property of the estate within the requisite time frame. The burden then shifts to the non-moving party to produce any of the kinds of evidentiary materials listed in rule 56(e). That list includes pleadings, depositions, answers to interrogatories, and admissions, together with any affidavits the party may choose to offer. FED. R. CIV. P. 56(e).

In opposition, the plaintiff filed a brief that has several documents attached. The debtor argues that those documents may not be considered because they are not certified or otherwise authenticated as required by the bankruptcy rules. *See* FED. R. CIV. P. 56(e). The Sixth Circuit has held that when a party timely objects to documents offered in connection with a summary judgment motion on the ground that they do not meet the dictates of rule 56(e), those documents "must be disregarded." *Moore v. Holbrook*, 2 F.3d 697, 699 (6th Cir. 1993). The documents attached to the plaintiff's brief cannot, therefore, be considered. The plaintiff has not met its burden of production to show that there is a genuine issue of material fact.

The question then is whether the debtor is entitled to judgment as a matter of law. There is no evidence that the debtor disposed of property within the one-year limit with the requisite intent. Where there is a "complete failure of proof concerning an essential element of the nonmoving party's case . . . [t]he moving party is entitled to a judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof." *Celotex Corp.*, 477 U.S. at 323 (internal quotation marks omitted). The debtor is, therefore, entitled to judgment as a matter of law on the § 727(a)(2)(A) claim in count 1.

Additionally and alternatively, considering the documents provided by the plaintiff does not change the result. At a minimum, the plaintiff must start by identifying a genuine issue of

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[10] Debtor's motion, exh. 3, ¶ 2.

material fact that warrants sending the matter to trial. This can be accomplished in a straightforward fashion by words to the effect that: "There is a genuine issue of material fact as to whether the debtor transferred X property to Y on or about Z date with the actual intent to defraud." There is no such statement in the plaintiff's brief. A careful review of the brief shows that the plaintiff has not identified any alleged transfer from the debtor to BAS, much less one that comes within the other elements of § 727(a)(2)(A). The documents attached show, at the most, that the debtor served as the statutory agent for BAS. The role of a statutory agent is to accept service on behalf of a corporation. Ohio Rev. Code § 1701.07. Service in that capacity does not, in and of itself, show any questionable transfer. The plaintiff has not shown that there is a genuine issue of material fact as to whether such a transfer took place and the debtor is entitled to judgment as a matter of law on the § 727(a)(2)(A) claim.

Count 1 includes a false oath claim under § 727(a)(4)(A). The plaintiff does not specify what the alleged false oath is and the brief does not address this. The court thinks that this may be a claim that the debtor made a false oath in her filing by failing to disclose that BAS is the alter ego of the debtor and a conduit for operating other businesses. The bankruptcy laws require a debtor to list all businesses in which she currently owns an interest, as well as any business in which she owned a 5% or greater interest in the six years before the filing date.[11] The debtor did disclose her interest in BAS in her filing. As the plaintiff does not identify in this count any specific false oath that the debtor allegedly made and as the plaintiff did not respond to the summary judgment motion on that issue with relevant, admissible evidence, the debtor is entitled to judgment as a matter of law on the § 727(a)(4)(A) claim under the *Celotex* analysis discussed above.

Count 2 of the Complaint

The plaintiff again incorporates the background allegations set out above. It then adds that:

(1) On about April 9, 1986, the debtor formed and became the 100% shareholder of FDB, Inc., an Ohio corporation.

[11] Schedule B; Statement of Financial Affairs.

(2) FDB filed its certificate of dissolution on March 8, 2006 and prior to the debtor filing her petition.

(3) The debtor omitted her interest in FDB from her petition.

Count 2 continues that with respect to FDB, the debtor "with intent to hinder, delay, or defraud, transferred, removed and concealed property of the estate," and also "knowingly and fraudulently, in or in connection with this case, has made a false oath."[12] In her answer, the debtor admits that FDB filed its certificate of dissolution on March 8, 2006.[13]

The debtor argues in her summary judgment motion that there is no genuine issue of material fact and that she is entitled to judgment as a matter of law. In support, she shows that she served a discovery request asking the plaintiff to produce all documents showing that the debtor formed and owned 100% of FDB; the debtor transferred, removed, and concealed property of the estate with the intent to hinder, delay, or defraud with respect to FDB; and the debtor knowingly and fraudulently in connection with the bankruptcy case made a false oath in regards to FDB.[14] With respect to the request for documents relating to the formation and shareholder issues, the plaintiff responded by producing these documents: a document from the Ohio Secretary of State stating that he has custody of the business records of FDB, an Ohio for profit corporation; FDB's articles of incorporation approved April 9, 1986; an appointment of statutory agent; and the certificate of dissolution signed March 8, 2006. The latter three are signed by the debtor.[15] The plaintiff responded to the remaining requests:

> The Plaintiff objects to this Request on the basis that the Defendant, not the Plaintiff, is in possession of documents responsive to this request. In the event that the Defendant does transmit documentation responsive to this request, said request remains objectionable on the basis of being duplicative and overly burdensome.[16]

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[12] Complaint ¶¶ 15–22.

[13] Answer ¶ 19.

[14] Debtor's motion, exh. 1, ¶¶ 6–8.

[15] Debtor's motion, exh. 2, ¶ 6.

[16] Debtor's motion, exh. 2, ¶¶ 7–8.

From this response and production, the debtor argues that the plaintiff does not have any documents to support the allegations in count 2. The debtor adds her affidavit stating that she does not have any such documents either; that she was never the sole shareholder of FDB Inc; and that FDB Inc. has not conducted any business since before the debtor was indicted on December 21, 1999. She further states in her affidavit that she did not dispose of any property of FDB with the requisite intent and did not make any false oaths.[17] The showing that the party with the ultimate burden of proof does not have documents to support its case, coupled with the debtor's affirmative affidavit, meets the debtor's initial burden of going forward by showing that there is no genuine issue of material fact as to whether she improperly disposed of property of the estate to FDB within the requisite time frame and within the requisite intent. The burden then shifts to the non-moving party to produce evidence in support of its claim.

The plaintiff responds that FDB was incorporated in 1986 and that FDB did not file a certificate of dissolution until shortly before the debtor filed her bankruptcy petition. (The debtor does not dispute these statements.) The plaintiff goes on to state that the defendant was the president of FDB. The question becomes: Does the plaintiff's evidence that the debtor was the president of FDB, a third-party corporation that was dissolved before the bankruptcy was filed, raise a genuine issue of material fact that the debtor transferred, removed or concealed property through FDB that would otherwise have gone into her bankruptcy estate? The court must conclude that it does not. There is no evidence that the debtor owned an interest in FDB at the time of the filing and there is no evidence of any particular transfer from FDB, much less within the one-year statutory time frame, nor is there evidence of intent. There is no genuine issue of material fact and on the evidence presented the debtor is entitled to judgment as a matter of law on the § 727(a)(2)(A) claim under the *Celotex* analysis discussed above.

The plaintiff also made a § 727(a)(4)(A) false oath claim in count 2. In the brief, the plaintiff alleges that the debtor failed to disclose her business interest and income from FDB. The plaintiff has not, however, provided any admissible evidence to show that the debtor had

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[17] Debtor's motion, exh. 3, ¶¶ 4–7.

such a business interest or income that should have been, but was not, disclosed and that the debtor had the specific intent required by the statute. As the plaintiff does not identify or come forward with evidence of any specific false oath that the debtor allegedly made, the debtor is entitled to judgment as a matter of law on the § 727(a)(4)(A) claim in count 2.

Count 3 of the Complaint

The plaintiff incorporates the background facts and adds:

(1) In January 1995, the debtor formed and became the 100% shareholder of Magoo's.

(2) On March 8, 2006, Magoo's filed a certificate of dissolution.

(3) The debtor did not disclose her interest in Magoo's in her March 30, 2006 bankruptcy filing.

Count 3 continues that with respect to Magoo's, the debtor "with intent to hinder, delay, or defraud, transferred, removed and concealed property of the estate," and also "knowingly and fraudulently, in or in connection with this case, has made a false oath."[18] The debtor admits in her answer that Magoo's filed its certificate of dissolution in March 2006 before the bankruptcy filing.[19]

In her summary judgment motion, the debtor argues that there is no genuine issue of material fact on this count and she is entitled to judgment as a matter of law. She shows that she served discovery requests asking the plaintiff to produce all documents showing that the debtor formed and was the sole shareholder of Magoo's, Inc. She also asked that the plaintiff produce any documents showing that she transferred, removed, and concealed property of the estate with the intent to hinder, delay, or defraud with respect Magoo's and that the debtor knowingly and fraudulently in connection with the bankruptcy case made a false oath in regards to Magoo's.[20]

The plaintiff responded to the shareholder issue by producing these documents: a document from the Ohio Secretary of State stating that he has custody of the business records of

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[18] Complaint ¶¶ 23–30.

[19] Answer ¶ 27.

[20] Debtor's motion, exh. 1, ¶¶ 9–11.

Magoo's; the Magoo articles of incorporation dated January 23, 1995; the appointment of the debtor as statutory agent; and the certificate of dissolution signed March 8, 2006 (identifying the debtor as the president and director).[21] None of these documents shows that the debtor was the sole shareholder of Magoo's. The plaintiff responded to the remaining requests:

> The Plaintiff objects to this Request on the basis that the Defendant, not the Plaintiff, is in possession of documents responsive to this request. In the event that the Defendant does transmit documentation responsive to this request, said request remains objectionable on the basis of being duplicative and overly burdensome.[22]

From this, the debtor concludes that the plaintiff does not have any documents to support the allegations in count 3. She adds her affidavit stating that she does not have any such documents either, and that she did not transfer, conceal or remove any property with the necessary fraudulent intent and did not make a false oath. She affirms that Magoo's business consisted of operating a bar that was sold in 1995 or 1996, and that after the sale, Magoo's did not conduct any business.[23] The showing that the party with the ultimate burden of proof does not have documents to support its case, together with the debtor's affirmative affidavit, meets the debtor's initial burden of going forward by showing that there is no genuine issue of material fact as to whether the debtor improperly disposed of property that would have become property of the estate with the requisite intent within one year before the filing. The burden then shifts to the non-moving party to produce evidence to rebut this.

The plaintiff responds that:

> if in fact Magoo's was sold, it appears that it was "sold" to A.J.&N., Inc., a business in which the [debtor] owns approximately one-half of the company stock. See Voluntary Petition of Beverly Schilero, Statement of Financial Affairs; see also Exhibit 6. Magoo's is listed in the year-end general ledger of A.J.&N., Inc. as both an "Intercompany Payable" and

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[21] Debtor's motion, exh. 2, ¶ 9.

[22] Debtor's motion, exh. 2, ¶¶ 10–11.

[23] Debtor's motion, exh. 3, ¶¶ 9–11.

> "Intercompany Receivable" for all years through 2005. See Exhibit 6. Therefore, Schilero's statement that Magoo's was sold was obviously intended to deceive this Court as to the nature of the Defendant's interest in Magoo's.[24]

The court evaluates this argument in light of the legal standard for § 727(a)(2)(A): Is there a genuine issue of material fact over whether the debtor disposed of property (i.e., her interest in Magoo's) within one year before the bankruptcy filing with the requisite intent? The plaintiff's response does not identify or provide evidence of a transfer within one year of the filing and does not address the intent element. There is no genuine issue of material fact and the debtor is entitled to judgment as a matter of law on the § 727(a)(2)(A) claim in this count under the *Celotex* analysis discussed above.

The same is true of the § 727(a)(4)(A) claim. The debtor makes the same argument here as she did with respect to counts 1 and 2; i.e., that the plaintiff failed to produce any documents to support the claim and that she has provided an affidavit that she did not make a false oath with respect to Magoo's. This showing meets the debtor's initial burden going forward by showing that there is no genuine issue of material fact as to whether she made a false oath in her filing. The plaintiff responds with the argument quoted above, without differentiating between the two § 727 claims. The response refers to some alleged deception involving AJ&N, but the court notes that the debtor disclosed in schedule B and her statement of financial affairs (both as originally filed and as amended) that she is a 49% shareholder in AJ&N Inc.[25] The plaintiff has not identified or provided evidence of a false oath made by the debtor with the requisite intent. The debtor is, therefore, entitled to judgment as a matter of law on the § 727(a)(4)(A) claim under the *Celotex* analysis.

Count 4 of the Complaint

In count 4, the plaintiff incorporates the background allegations and adds:

1. On June 26, 1997, the debtor formed Hard Rock Trucking & Leasing, Inc. under Ohio law.

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[24] Plaintiff's reply at unnumbered pages 5–6. (Docket 26).

[25] Main case 06-10959, Docket 1, 10.

2. The debtor did not list an interest in Hard Rock in her petition.

3. Hard Rock filed a certificate of dissolution on July 1, 2005.[26]

Count 4 continues with the allegation that with respect to Hard Rock, the debtor "with intent to hinder, delay, or defraud, transferred, removed and concealed property of the estate," and that the debtor "knowingly and fraudulently, in or in connection with this case, has made a false oath."[27] The debtor admits in her answer that Hard Rock filed its corporate dissolution within one year before the bankruptcy filing.[28]

In her summary judgment motion, the debtor argues that there is no genuine issue of material fact and she is entitled to judgment as a matter of law. In support, the debtor shows that she served discovery requests on the plaintiff asking the plaintiff to produce all documents showing that the debtor formed Hard Rock; that, with respect to Hard Rock, the debtor transferred, removed, and concealed property of the estate with the intent to hinder, delay, or defraud; and that the debtor knowingly and fraudulently in connection with the bankruptcy case made a false oath in regard to Hard Rock.[29]

The plaintiff responded to the Hard Rock formation request by producing these documents: a cover letter to the Ohio Secretary of State dated June 25, 1997 from David Koerner (without attachments) and a certificate of dissolution for Hard Rock Trucking & Leasing dated July 20, 2005 signed by an unidentified person, which includes the statement that the debtor was the statutory agent.[30] None of these documents speaks to whether the plaintiff formed Hard Rock. The plaintiff responded to the remaining requests:

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[26] Complaint ¶¶ 31–35.

[27] Complaint ¶¶ 36–38.

[28] Answer ¶ 35.

[29] Debtor's motion, exh. 1, ¶¶ 12–14.

[30] Debtor's motion, exh. 2, ¶ 12. The documents referred to by the plaintiff in its response show why the rules require documents to be authenticated: there are several documents attached that seem to be out of order and relate to Magoo's rather than Hard Rock. The court cannot tell from this whether there are any other Hard Rock documents, but it does not appear that there are. In any event, it is up to the plaintiff to present its case at this point in the analysis.

> The Plaintiff objects to this Request on the basis that the Defendant, not the Plaintiff, is in possession of documents responsive to this request. In the event that the Defendant does transmit documentation responsive to this request, said request remains objectionable on the basis of being duplicative and overly burdensome.[31]

From this production and response, the debtor concludes that the plaintiff does not have any documents to support the allegations in count 4. The debtor then adds her affidavit stating that she does not have any such documents either, that she was the statutory agent and one of the owners of Hard Rock, that she sold her interest in Hard Rock in 1998 or 1999, and has not been an officer, director or shareholder since that time.[32] The showing that the party with the ultimate burden of proof does not have documents to support its case, coupled with the debtor's affirmative affidavit, meets the debtor's initial burden of going forward by showing that there is no genuine issue of material fact as to whether she improperly disposed of property of the estate within the requisite time frame and with the required intent. The burden then shifts to the non-moving party to produce evidence to rebut this.

The plaintiff did not respond at all in its brief to the count 4 issues and thus failed to meet its burden. The plaintiff did attach documents to its brief that seem to relate to Hard Rock, but they are not certified or authenticated and are not, therefore, properly presented as discussed above. Additionally and alternatively, even if the documents are considered, they do not provide evidence to meet the plaintiff's burden. The documents suggest that Hard Rock was incorporated in 1997 and dissolved in July 2005, at a time when the debtor was the statutory agent. The question again is: Has the plaintiff raised a genuine issue of material fact that the debtor transferred, removed or concealed property that would otherwise have gone into her bankruptcy estate by showing at best that the debtor was the statutory agent of Hard Rock, a corporation that was dissolved prepetition? The court must conclude that the plaintiff has not identified such a material fact. There is no evidence of any particular transfer, much less within the one-year statutory time frame, nor is there evidence of intent. The plaintiff has not shown

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[31] Debtor's motion, exh. 2, ¶¶ 13–14.

[32] Debtor's motion, exh. 3, ¶¶ 12–15.

that there is a genuine issue of material fact as to whether the debtor improperly disposed of property relating to Hard Rock and the debtor is entitled to judgment as a matter of law on the § 727(a)(2)(A) claim in this count.

The same is true of the § 727(a)(4)(A) false oath claim. The debtor again argues that the plaintiff failed to produce documents to support the claim and points to her affidavit stating that she did not own an interest in Hard Rock during the relevant time period. This meets the debtor's initial burden of going forward to show that there is no genuine issue of material fact with respect to this claim. The plaintiff did not respond with evidence that the debtor did own such an interest that should have been disclosed or any other alleged false oath with the requisite intent. The plaintiff has not identified a material fact that must be tried and the debtor is entitled to judgment as a matter of law on the § 727(a)(4)(A) claim under the *Celotex* analysis.

Count 5 of the Complaint

In count 5, the debtor incorporates the background allegations and adds:

1. In April 1997, Schilero formed Sun Baby, Inc., an Ohio corporation.

2. The debtor did not list an interest in Sun Baby in her March 30, 2006 filing.

3. Sun Baby is an active corporation.

Count 5 continues with the allegation that with respect to Sun Baby, the debtor "with intent to hinder, delay, or defraud, transferred, removed and concealed property of the estate;" that the debtor "knowingly and fraudulently, in or in connection with this case, has made a false oath;" and that "[t]he concealment of the business and [the debtor's] conduct and omissions as set forth above, are grounds for denial of the [d]ebtor's discharge pursuant to the provisions of § 727 of the Bankruptcy Code."[33] In her answer, the debtor admits that the Secretary of State's office listed Sun Baby's status as an "active" corporation.[34]

[33] Complaint ¶¶ 39–46.

[34] Answer ¶ 43.

In her summary judgment motion, the debtor argues that there is no genuine issue of material fact and she is entitled to judgment as a matter of law. In support, the debtor shows that she served discovery requests on the plaintiff asking the plaintiff to produce all documents showing that the debtor formed Sun Baby and that, with respect to Sun Baby, the debtor transferred, removed, and concealed property of the estate with the intent to hinder, delay, or defraud, and that the debtor knowingly and fraudulently in connection with the bankruptcy case made a false oath.[35]

The plaintiff responded to the Sun Baby formation request by producing these documents: articles of incorporation for Sun Baby dated April 24, 1997 signed by the debtor; a document appointing the debtor as the original statutory agent; a letter dated April 14, 1997 from the debtor to the Ohio Secretary of State referencing the first two documents; a computer printout dated August 31, 2006 stating that Sun Baby is active; and another document from 1997 that has a charter number.[36] The documents do show that the debtor "formed" Sun Baby in the sense that the debtor was one of the incorporators, but the position of an incorporator does not necessarily equate to ownership in a corporation. *See Beck v. Stimmel*, 177 N.E. 920, 922 (Ohio Ct. App. 1931) ("The incorporators have no interest in the corporate estate, nor have they any rights in it. Their sole function is to bring into existence the corporation . . . .").

The plaintiff responded to the remaining requests:

> The Plaintiff objects to this Request on the basis that the Defendant, not the Plaintiff, is in possession of documents responsive to this request. In the event that the Defendant does transmit documentation responsive to this request, said request remains objectionable on the basis of being duplicative and overly burdensome.[37]

From this, the debtor concludes that the plaintiff does not have any documents to support the allegations in count 5. The debtor then adds her affidavit stating that she does not have any such documents either; that she sold Sun Baby in 1998 or 1999; that she has not filed any tax

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[35] Debtor's motion, exh. 1, ¶¶ 15–17.

[36] Debtor's motion, exh. 2, ¶ 15.

[37] Debtor's motion, exh. 2, ¶¶ 16–17.

returns for Sun Baby since the sale; and that the current information from the Ohio Secretary of State's office shows that the Sun Baby corporate charter was cancelled in January 2007. She states further that she did not transfer, remove or conceal property of the estate with the intent to hinder, delay or defraud with respect to Sun Baby.[38] The showing that the party with the ultimate burden of proof does not have documents to support its case, coupled with the debtor's affirmative affidavit, meets the debtor's initial burden to go forward by showing that there is no genuine issue of material fact with respect to whether she improperly disposed of property within the time frame and with the requisite intent. The burden then shifts to the non-moving party to produce evidence to the contrary.

The plaintiff responds to the summary judgment motion by stating that the Sun Baby charter was cancelled for failure to file tax returns (a fact which the court notes is not in evidence), which "behavior mirrors [the debtor's behavior] of her 2001 federal indictment and guilty plea. [The debtor's] omission of her interest in Sun Baby places her within the auspices of Section 727."[39]

The plaintiff does not make any argument with respect to the § 727(a)(2)(a) claim and has not produced evidence to show that there is a genuine issue of material fact. The plaintiff has not identified any transfer made within one year with the requisite intent involving Sun Baby. The debtor is, therefore, entitled to summary judgment on the § 727(a)(2)(a) under the *Celotex* analysis discussed above.

The next issue is the § 727(a)(4)(A) false oath claim. The plaintiff argues that the debtor owned an interest in Sun Baby that should have been, but was not, listed in her filing. The only argument made is that Sun Baby did not file tax returns, which somehow shows that the debtor owned an interest in Sun Baby because it is the same or similar behavior as that reflected in the charge to which the debtor pled guilty. First, there is no evidence that Sun Baby did not file tax returns. Second, the guilty plea is not in evidence. And third, the notion that a third-party

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[38] Debtor's motion, exh. 3, ¶¶ 16–20.

[39] Plaintiff's response at unnumbered page 6.

corporation's failure to file tax returns tends to prove that the debtor made a false oath in her bankruptcy case is a nonsequitor. As the plaintiff has not identified a false oath that the debtor made in her filing with the requisite intent, the debtor is entitled to judgment as a matter of law on § 727(a)(4)(A) claim in this count under the *Celotex* analysis discussed above.

Count 6 of the Complaint

In count 6, the plaintiff incorporates the background allegations and adds:

1. In September 1998, the debtor formed Shot'z Bar & Grill, Inc., an Ohio corporation.

2. Shot'z is an active Ohio corporation.

3. The debtor did not disclose her interest in Shot'z in her filing.

Count 6 continues with the allegation that with respect to Shot'z, the debtor "with intent to hinder, delay, or defraud, transferred, removed and concealed property of the estate;" that the debtor "knowingly and fraudulently, in or in connection with this case, has made a false oath;" and that "[t]he concealment of the business and [the debtor's] conduct and omissions as set forth above, are grounds for denial of the [d]ebtor's discharge pursuant to the provisions of § 727 of the Bankruptcy Code."[40]

In her summary judgment motion, the debtor argues that there is no genuine issue of material fact and that the debtor is entitled to judgment as a matter of law. In support, the debtor shows that she served discovery requests on the plaintiff asking the plaintiff to produce all documents showing that the debtor formed Shot'z and that the debtor transferred, removed, and concealed property of the estate with the intent to hinder, delay, or defraud with respect to Shot'z, and that the debtor knowingly and fraudulently in connection with the bankruptcy case made a false oath in regard to Shot'z.[41]

The plaintiff produced these documents: a computer printout dated July 6, 2006 stating that the debtor is the statutory agent for an unidentified corporation; a document with a charter number for Shot'z stating "Return to: R.P. Gross & Associates Inc.;" a document from the Ohio

[40] Complaint ¶¶ 47–54.

[41] Debtor's motion, exh. 1, ¶¶ 18–20.

secretary of state dated October 21, 1992 stating that his records show the recording of "ARF MIS" of Shot'z; articles of incorporation stating that Michael Rebeta is the sole incorporator; appointment of someone other than the debtor as the statutory agent; and an unsigned consent for use of similar name.[42]

The plaintiff further responded:

> The Plaintiff objects to this Request on the basis that the Defendant, not the Plaintiff, is in possession of documents responsive to this request. In the event that the Defendant does transmit documentation responsive to this request, said request remains objectionable on the basis of being duplicative and overly burdensome.[43]

From this production and response, the debtor concludes that the plaintiff does not have any documents to support the allegations in count 6. The debtor then adds her affidavit stating that she has not operated Shot'z since 1994; that she became the statutory agent for Shot'z in 1998; has never been a shareholder or director of the corporation; and does not have any documents that support the plaintiff's allegations.[44] The showing that the party with the ultimate burden of proof does not have documents to support its case, coupled with the debtor's affidavit, meets the debtor's initial burden of going forward to show that there is no genuine issue of material fact as to whether she improperly disposed of property within the one-year time frame with actual intent to defraud. The burden then shifts to the plaintiff as the non-moving party to produce evidence showing that there is such a material fact.

The plaintiff responds that the debtor "formed" Shot'z in 1992. The documents cited do not show this; they are instead the documents described above. The plaintiff next argues that it has evidence that the debtor continued operating Shot'z until 2001, rather than the 1994 date claimed by plaintiff. In support, the plaintiff cites an unreported Ohio appellate court decision, *Shotz Bar and Grill, Inc. v. Ohio Liquor Control Commission*, No. 02AP-1141 (Ohio Ct. App. May 22, 2003), *available at* 2003 WL 21196842, addressing a ruling from the common pleas

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[42] Debtor's motion, exh. 2, ¶ 18.

[43] Debtor's motion, exh. 2, ¶¶ 19–20.

[44] Debtor's motion, exh. 3, ¶¶ 21–23.

court that affirmed an order revoking a liquor license. The debtor was not a party to the lawsuit and the plaintiff does not make any legal argument for why a factual finding in that decision would be preclusive or even relevant in this court on a discharge issue. The Ohio case does not, therefore, provide evidence that is helpful to the plaintiff. Finally, the plaintiff claims that bank statements for Shot'z have been sent to the debtor's home address for years. None of this, individually or collectively, tends to show that the debtor failed to disclose an interest in Shot'z in her bankruptcy filing. As the plaintiff has not shown that the debtor disposed of property within one year of the filing with the requisite intent, the debtor is entitled to judgment as a matter of law under the *Celotex* reasoning discussed above.

The second issue is the § 727(a)(4)(A) false oath claim. Again, it is not entirely clear what the plaintiff's argument is, but the court assumes it is that the debtor failed to disclose an interest in Shot'z. The argument made is the one discussed above. An argument is not evidence that the debtor owned, but failed to disclose, an interest in Shot'z. As the plaintiff has not identified, and supported with evidence, a false oath that the debtor made in her bankruptcy filing with requisite intent, the debtor is entitled to judgment as a matter of law on the § 727(a)(4)(A) claim in this count under the *Celotex* reasoning discussed above.

Count 7 of the Complaint

In count 7, the plaintiff incorporates all previous allegations and adds:

1. In schedule I, the debtor listed monthly gross wages of $8,450.00 and profit distributions from AJ&N of $682.00.

2. The debtor's pay stub advices and AJ&N's tax returns show substantially different amounts.

3. The debtor made a false oath about her income in connection with the case.

Count 7 continues with the allegation that with respect to AJ&N, the debtor "knowingly and fraudulently, in or in connection with this case has made a false oath," and that "[the debtor's] conduct and omissions as set forth above, are grounds for denial of the [d]ebtor's discharge pursuant to the provisions of § 727 of the Bankruptcy Code."[45]

[45] Complaint ¶¶ 55–59.

In her summary judgment motion, the debtor argues that there is no genuine issue of material fact and that the debtor is entitled to judgment as a matter of law. In support, the debtor shows that she served discovery requests on the plaintiff asking the plaintiff to produce all documents showing that the debtor knowingly and fraudulently in connection with the bankruptcy case made a false oath with respect to her income.[46] The plaintiff responded:

> The Plaintiff objects to this Request on the basis that the Defendant, not the Plaintiff, is in possession of documents responsive to this request. In the event that the Defendant does transmit documentation responsive to this request, said request remains objectionable on the basis of being duplicative and overly burdensome.[47]

From this, the debtor concludes that the plaintiff does not have any documents to support the allegations in count 7. The debtor then adds her affidavit stating that she does not have any such documents either,[48] and argues that she has shown that there is no genuine issue of material fact and that she is entitled to judgment as a matter of law. The showing that the party with the ultimate burden of proof does not have documents to support its case, coupled with the debtor's affirmative affidavit, meets the debtor's initial burden to go forward by showing that there is no genuine issue of material fact with respect to whether she improperly failed to disclose income. The burden then shifts to the non-moving party to produce evidence to the contrary. The debtor's schedule I discloses that she received $8,450.00 a month as president of BAS Management & Consulting Services Inc. together with $682.00 a month profit distribution from her disclosed interest in AJ&N Inc.[49] These statements are made under oath and presumably are the ones that the plaintiff is referring to in this count.

The plaintiff has not addressed this argument at all in its brief. The plaintiff has not, therefore, shown that there is a genuine issue of material fact as to whether the debtor received income from AJ&N, Inc. that she should have, but did not, disclose, resulting in a false oath.

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[46] Debtor's motion, exh. 1, ¶ 21.

[47] Debtor's motion, exh. 2, ¶ 21.

[48] Debtor's motion, exh. 3, ¶ 25.

[49] Main case 06-10959, Docket 1.

The debtor is entitled to judgment as a matter of law on the § 727(a)(2)(A) claim under the *Celotex* analysis discussed above.

Company Referred to in Brief but Not a Count of the Complaint

At the end of its brief, the plaintiff states that the debtor has an undetermined, undisclosed interest, in a company identified as "AJS Management and Consulting":

> Tax returns, bank statements and K-1's for AJS are all tied to the [debtor's] home address. See Exhibit 12. AJS'[s] general ledgers indicate that money is paid to the [debtor] and her business on a regular basis. Income from AJS was not reported on the [debtor's] bankruptcy petition in violation of the Bankruptcy Code.[50]

There are several reasons why this statement cannot be the basis for denying summary judgment. First, there is no count in the complaint relating to AJS and the plaintiff has not asked for, or received permission to, amend the complaint; a statement in a brief opposing summary judgment is not the equivalent of a well-pleaded cause of action. Second, the documents referred to as exhibit 12 are not authenticated and are not properly considered on summary judgment. And third, even if considered, they do not help the plaintiff's case. Exhibit 12 is a conglomeration of unauthenticated documents, including an unsigned 2005 U.S. Corporate tax return for AJS Management & Consulting, Inc.; a 2006 Ohio Corporate Franchise Tax Report for AJS; a document dated December 31, 2005 titled Trial Balance; a document that appears to be a Sky Bank statement for December 2005 with unidentified hand written notes; part of a 2005 schedule K-1 for Fifth Column, LLC; a 2005 W-3 for an unidentified person with handwritten notes; and a general ledger dated December 31, 2005 with handwritten notes. The plaintiff has not made any argument that ties these documents to an alleged failure to disclose income. To the extent that this can be construed as a claim against the debtor, the debtor is entitled to judgment as a matter of law under the *Celotex* analysis discussed above.

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One final argument needs to be addressed, and that is the plaintiff's contention that summary judgment should not be entered against it because the debtor "stonewalled" the

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[50] Plaintiff's response at unnumbered page 7.

plaintiff during discovery by failing to provide initial disclosures under rule 26 of the federal rules of civil procedure, made applicable by federal rule of bankruptcy procedure 7026.[51] The plaintiff states that this failure prevented it from serving discovery requests. This argument is totally without merit. As far as the court can tell, neither side provided the rule 26 disclosures despite the court order directing that this be done. And neither side brought the issue to the court in a timely fashion.[52] The debtor also obtained an extension of time to conduct a rule 2004 examination of the debtor before filing the adversary proceeding.[53] Without condoning the failure to follow the rules, the plaintiff has not offered any compelling reason why it then sat back during the agreed-upon discovery period and did nothing. The plaintiff knew that it could have served document requests on the debtor, noticed the debtor for deposition, and/or obtained documents or testimony from third-parties. The plaintiff elected not to do so.

Additionally, rule 56(f) provides a means for postponing a summary judgment decision where a party cannot present facts essential to justify a party's opposition. The party must file an affidavit stating the reasons why it cannot present the facts, at which time the court may make any order that is just. FED. R. CIV. P. 56(f). The plaintiff did not file such an affidavit, perhaps because the discovery period had expired without the plaintiff seeking formal discovery.[54] The debtor's failure to provide rule 26 disclosures is not a reason to change the result mandated by the evidence in this case.

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[51] Plaintiff's response at unnumbered page 2.

[52] *See* order entered on March 7, 2007. (Docket 21).

[53] Main case 06-10959, Docket 22. *See* FED. R. BANKR. P. 2004, which permits a creditor to depose a debtor even before filing an adversary proceeding complaint.

[54] The plaintiff may well have conducted informal discovery, as evidenced by the documents attached to the response. The court is not suggesting that the plaintiff did not act, just that there is nothing in the record to show any deposition notices or request for production of documents.

CONCLUSION

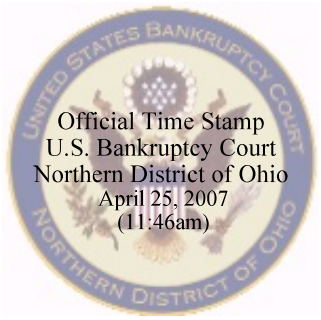
Throughout this analysis, the court has kept in mind that all admissible evidence must be construed in favor of the plaintiff, as the non-moving party. The court also notes that when presented with a large number of documents, such as the case here, one is tempted to conclude that there must be a genuine issue of material fact somewhere in the collection. Having carefully considered the admissibility of each document presented and then having viewed all admissible documents in the light most favorable to the plaintiff, however, the court can only conclude that there is no genuine issue of material fact and the debtor is entitled to judgment as a matter of law on all counts of the complaint.

A separate order will be entered reflecting this decision.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



Official Time Stamp
U.S. Bankruptcy Court
Northern District of Ohio
April 25, 2007
(11:46am)

In re:	)	Case No. 06-10959
	)	
BEVERLEY A. SCHILERO,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
_____	)	
	)	
THEATRICAL GRILL, INC.,	)	Adversary Proceeding No. 06-1813
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
BEVERLEY A. SCHILERO,	)	
	)	**JUDGMENT**
Defendant.	)	(NOT FOR COMMERCIAL PUBLICATION)

For the reasons stated in the memorandum of opinion filed this same date, the debtor defendant's motion for summary judgment is granted and judgment is entered in favor of the debtor on all counts of the complaint. (Docket 17).

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge