

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 10-11965
)
VIVEK R. GUPTA,)
) Chapter 7
)
Debtor.) Judge Pat E. Morgenstern-Clarren
_____)
)
NIYATI GUPTA,) Adversary Proceeding No. 10-1261
)
Plaintiff,)
)
v.)
)
VIVEK R. GUPTA,) **MEMORANDUM OF OPINION**
) **AND ORDER**¹
Defendant.)

In this adversary proceeding, the plaintiff Niyati Gupta asks the court to deny a discharge to the debtor—her estranged husband—or, alternatively, to determine that any debt which he owes to her is not discharged in this bankruptcy. The plaintiff moves for summary judgment on the denial of discharge issue, and the debtor opposes the motion.² For the reasons stated below, the plaintiff’s motion is denied.

I. 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)(I) and (J).

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.

² Docket 13, 14, 15.

II. DISCUSSION

A. Procedural History

The plaintiff Niyati Gupta and her estranged spouse, the debtor Vivek Gupta, have a divorce proceeding pending in state court. This court granted relief from stay to permit the state court action to proceed.³

B. Summary Judgment

Summary judgment should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show “that there is no genuine dispute as to any material fact and [that] the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a) (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. Zenith Radio Corp.*, 475 U.S. 574 (1986). The moving party generally bears the initial burden of showing that no genuine issue of material fact exists. *Gen. Motors Corp. v. Lanard Toys, Inc.* 468 F.3d 405, 412 (6th Cir. 2006). “Once the moving party has satisfied its burden, the nonmoving party may not rest upon its mere allegations or denials of the opposing party’s pleadings, but rather it must set forth specific facts showing that there is a genuine issue for trial.” *Havensure, L.L.C. v. Prudential Ins. Co. of Am.*, 595 F.3d 312, 315 (6th Cir. 2010). “In determining whether a genuine issue of material fact exists, [the] court draws all inferences in the light most favorable to the nonmoving party.” *Id.* 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).

³ See case no. 10-11965, docket 50.

C. 11 U.S.C. § 727

A chapter 7 debtor is entitled to a discharge of his debts, subject to certain exceptions.

The plaintiff's motion for summary judgment relies on the exceptions stated in Bankruptcy Code sections 727(a)(3), (a)(4)(A), and (a)(5). Under those sections, a debtor is denied a discharge if:

- (a)(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;
- (4) The debtor knowingly and fraudulently, in or in connection with the case—
 - (A) made a false oath or account . . . [or]
- (5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities[.]

11 U.S.C. §§ 727(a)(3), (a)(4)(A), (a)(5).

The plaintiff must prove her case by a preponderance of the evidence. FED. R. BANKR. P. 4005; *Barclays/American Business Credit, Inc. v. Adams (In re Adams)*, 31 F.3d 389, 393-94 (6th Cir. 1994). However, the burden of production is a shifting one. See *CM Temp. Servs., Inc. v. Bailey (In re Bailey)*, 375 B.R. 410, 415-16 (Bankr. S.D. Ohio 2007) (stating that the plaintiff must make a prima facie showing that the debtor failed to keep adequate records under § 727(a)(3), at which point the burden shifts to the debtor to explain why such failure is justified); *United States Trustee v. Halishak (In re Halishak)*, 337 B.R. 620, 626 (Bankr. N.D. Ohio 2005) (stating that once an objecting party meets the initial burden of introducing evidence of all of the elements of § 727(a)(4)(A), the burden of production shifts to the debtor to provide a credible explanation for

his actions); *Skyles v. Stinson (In re Stinson)*, 364 B.R. 269, 278 (Bankr. W.D. Ky. 2007) (noting that once the party objecting to discharge under § 727(a)(5) meets the initial burden of showing the disappearance of assets, the burden shifts to the debtor to provide a satisfactory explanation).

D. The Plaintiff's Motion

The plaintiff's motion focuses on the debtor's interest in an apartment located in Mumbai, India and the information he has provided with respect to it.

1. Count II (11 U.S.C. § 727(a)(3))

Count II alleges that the debtor's discharge should be denied under Bankruptcy Code § 727(a)(3). That section "requires the debtor to provide creditors 'with enough information to ascertain the debtor's financial condition and track his financial dealings with substantial completeness and accuracy for a reasonable period past to present.'" *Turoczy Bonding Co. v. Strbac (In re Strbac)*, 235 B.R. 880, 82 (B.A.P. 6th Cir. 1999) (quoting *In re Martin*, 141 B.R. 986, 995 (Bankr. N.D. Ill. 1992)). "The adequacy of [a] debtor's records must be determined on a case by case basis. Considerations to make this determination include debtor's occupation, financial structure, education, experience, sophistication and any other circumstance that should be considered in the interest of justice." *Id.* (quoting *United States v. Trogdon (In re Trogdon)*, 111 B.R. 655, 658 (Bankr. N.D. Ohio 1990)). This court exercises broad discretion in making its determination. *Dolin v. N. Petrochemical Co. (In re Dolin)*, 799 F.2d 251, 253 (6th Cir. 1986).

The plaintiff argues that the debtor concealed information from which his financial condition and business transactions might be ascertained. She argues that the debtor *must* have maintained such information related to the Mumbai property, which he has failed to turn over. She does not, however, tie this argument to any supporting evidence. Moreover, it appears that the plaintiff has obtained substantial information regarding the debtor's finances and financial

transactions, including the Mumbai property. Consequently, the plaintiff has not presented sufficient facts to meet her initial burden of showing that there is no genuine issue of material fact as to her right to relief under § 727(a)(3).

2. Count III (11 U.S.C. § 727(a)(4)(A))

In count III, the plaintiff alleges that the debtor failed to include certain information in his bankruptcy filing and asks that he be denied a discharge under § 727(a)(4). To deny the debtor his discharge under that provision, 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.” *Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 685 (6th Cir. 2000). The debtor’s statements in his petition, schedules, and statement of affairs are all made under oath. *See* FED. R. BANKR. P. 1008; *Hamo v. Wilson (In re Hamo)*, 233 B.R. 718, 725 (B.A.P. 6th Cir. 1999). 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.

Id. (internal quotation marks and citations omitted). 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.*

The plaintiff relies here on the debtor's failure to list his ownership interest in the Mumbai property in his bankruptcy filing. The uncontested evidence shows that the debtor entered into an agreement to purchase the Mumbai property before filing his chapter 7; that he did not list the property on schedule A; and that he did not list the property as having been transferred within the two years before the filing in response to question 10 on his statement of financial affairs. The dispute is over the nature of his interest in the property at the time he filed his bankruptcy case and whether he omitted that interest with fraudulent intent. The plaintiff introduced evidence which showed that the debtor agreed to purchase the property (to be constructed) in 2008 for approximately \$2,600,000.00 and paid \$1,790,000.00 of the purchase price with a \$100,000.00 cash down payment and the proceeds of a loan from HDFC, a bank located in India. The plaintiff also introduced evidence which showed that the debtor testified at his meeting of creditors⁴ that the property was still titled in his name post-filing, but that he had given notice to cancel the agreement six or seven months before.⁵ The parties dispute the current value of the property.

In opposition to the motion, the debtor provided an affidavit in which he states that: (1) he submitted a cancellation notice to the builder before he filed his bankruptcy; (2) he did not believe that he had an interest in the property at the time he filed bankruptcy; (3) at most, he was entitled to recover a portion of his deposit from the builder; and (4) he has amended his bankruptcy filing to reflect that potential asset.

Ordinarily, the question of whether an individual acted with fraudulent intent is not appropriate for summary judgment because it is fact-based, and this case falls within that general

⁴ See 11 U.S.C. § 341.

⁵ Transcript at 109, exh. 2, docket 13.

principle. See *Warren v. Rowland (In re Rowland)*, 441 B.R. 281, 286 (Bankr. S.D. 2010) (“Generally, such objections to discharge involving a fact-intensive analysis related to fraudulent intent are not amenable to disposition by summary judgment.”). Based on the evidence presented, there is a genuine issue of material fact as to whether the debtor acted with fraudulent intent, and that issue precludes summary judgment on count III.

3. Count IV (11 U.S.C. § 727(a)(5))

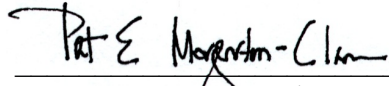
Count IV, brought under Bankruptcy Code § 727(a)(5), asks that the debtor be denied a discharge because he failed to satisfactorily explain any loss or deficiency of assets to meet his liabilities. The plaintiff argues that the debtor has not adequately explained his attempt to transfer the Mumbai property. Under § 727(a)(5), the “initial burden is on the Plaintiff to establish the loss or deficiency of assets by demonstrating that (1) at a time not too remote from the bankruptcy, the [debtor] owned identifiable assets; (2) on the day that he commenced his bankruptcy case, the [debtor] no longer owned the particular assets in question; and (3) his schedules and/or the pleadings in the bankruptcy case do not offer an adequate explanation for the disposition of the assets in question.” *Hendon v. Lufkin (In re Lufkin)*, 393 B.R. 585, 595 (Bankr. E.D. Tenn. 2008), *aff’d* 2010 WL 1332114 (E.D. Tenn. 2010). “The burden then shifts to the [Debtor] to provide a satisfactory explanation of the whereabouts of the assets.” *Id.* In this context, “[t]he word satisfactory ‘may mean reasonable, or it may mean that the Court, after having heard the excuse, the explanation, has that mental attitude which finds contentment in saying that he believes the explanation—he believes what the bankrupts say with reference to the disappearance or shortage. He is satisfied. He no longer wonders. He is contented.’” *United States v. Trogdon (In re Trogdon)*, 111 B.R. 655, 659 (Bankr. N.D. Ohio 1990) (quoting *First Tex. Sav. Ass’n, Inc. v. Reed*, 700 F.2d 986, 993 (5th Cir. 1983)).

The plaintiff's argument focuses on the difficulties which she encountered in obtaining recorded information regarding the Mumbai property. Even assuming that to be the case, that is not evidence that the debtor owned and disposed of the property at issue without providing an adequate explanation for the transactions.⁶ The plaintiff is not entitled to summary judgment on this count.

III. CONCLUSION

For the reasons stated, the plaintiff's motion for summary judgment is denied.

IT IS SO ORDERED.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

⁶ See Memorandum at 10 stating that "Upon information and belief, the Property is still owned by the Debtor." Docket 13.