United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re: Ben Tesler

Bankruptcy Number: 21 B 00472

Adversary Caption: 4820 & 4901 Ltd vs. Ben Tesler

Adversary Number: 22 A 00102

Date of Issuance: January 18, 2023

Judge: David D. Cleary

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	
	)	Case No. 21 B 472
BEN TESLER,	)	
	)	
Debtor.	)	Chapter 7
_____	)	
	)	
4820 & 4901, LTD.,	)	
	)	Adv. No. 22 A 102
Plaintiff,	)	
	)	
v.	)	
	)	Judge David D. Cleary
BEN TESLER,	)	
	)	
Defendant.	)	

MEMORANDUM ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

Plaintiff 4820 & 4901, Ltd. ("Plaintiff") filed a five-count complaint ("Complaint") against Ben Tesler ("Defendant"), objecting to Defendant's discharge under 11 U.S.C. §§ 727(a)(2), (a)(3), (a)(4)(A), (a)(4)(D) and (a)(6). Defendant filed a motion to dismiss ("Motion") all five counts of the Complaint.

After Defendant filed the Motion, the court entered a briefing schedule prior to the initial hearing. Plaintiff timely filed a response ("Response") and Defendant filed his reply ("Reply"). Having reviewed the papers, the court will grant the Motion as to Counts IV and V. The court will deny the Motion as to Counts I, II and III. Plaintiff will be granted leave to amend the Complaint, if possible, to replead Count IV.

I. JURISDICTION

The court has subject matter jurisdiction under 28 U.S.C. § 1334(b) and the district court's Internal Operating Procedure 15(a). This is a core proceeding under 28 U.S.C. § 157(b)(2)(J). Venue is proper under 28 U.S.C. § 1409(a).

II. BACKGROUND

In resolving a motion to dismiss, the court considers well-pleaded facts and the reasonable inferences drawn from them in the light most favorable to the plaintiff. *See Reger Dev., LLC v. Nat'l City Bank*, 592 F.3d 759, 763 (7th Cir. 2010). Every allegation that is well-pleaded by a plaintiff is taken as true in ruling on the motion. *See Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 289-90 (7th Cir. 2016). For purposes of deciding this motion, the court accepts certain well-pleaded facts as true, as well as statements in Defendant's schedules and SOFA:

Plaintiff filed a complaint against Defendant in the Circuit Court of Cook County. That complaint commenced a case assigned number 19L003740 ("State Court Action"). In the State Court Action, Plaintiff sought to collect on a $100,000 promissory note ("Note"). Defendant had executed the Note in payment for past due rent owed by one of his moving and trucking companies, Olympic Moving & Storage, Inc. ("Olympic Moving").

On January 22, 2020, Plaintiff obtained a judgment against Defendant in the State Court Action and began supplementary proceedings.

Defendant filed for relief under chapter 7 of the Bankruptcy Code on January 14, 2021. With his petition, Defendant filed schedules and the Statement of Financial Affairs.

Defendant did not list the following assets on his schedules:

- 100% of the equity of Olympic Moving;[1]
- Membership interest in Unlimited Moving and Storage LLC ("Unlimited Moving"); and
- 100% of the equity of MV Moving.[2]

Defendant disclosed minimal personal property and valued it on Schedule B at amounts roughly equal to the statutory exemptions. Defendant did not explain the disposition of the undisclosed personal property located at his residence.

Defendant did not list any payments made by him during the 90-day period prior to the filing of this bankruptcy case to any creditor in the total amount of $6,825 or more, as required to respond to Question 6 on the Statement of Financial Affairs.

Defendant indicated on his petition that his debts are primarily business debts. Schedules D, E and F show that the only non-consumer debt is Plaintiff's judgment, scheduled in the amount of $117,000. Defendant listed no utilities as creditors on Schedule F. Debtor's nonpriority claims total $56,109.

Defendant listed only one payment on a debt owed to an insider during the year prior to the filing of this bankruptcy case as required to respond to Question 7 on the Statement of Financial Affairs.[3]

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[1] Defendant states in the Motion that Olympic Moving changed its name to Olympia Moving & Storage, Inc. ("Olympia Moving") in 2009. The court takes judicial notice of Defendant's answer to Question 19 on Schedule B, in which he listed a 50% interest in Olympia Moving, valued at $0. FRE 201. Since a contention in a motion to dismiss is not a well-pleaded allegation, however, the court will not assume that Olympic Moving is the same entity as Olympia Moving.

[2] Plaintiff states in paragraph 11(c) that Olympic Moving and MV Moving are also alter egos of Defendant. Therefore, Defendant has a direct interest in their assets. Whether or not those entities are Defendant's alter egos is a legal conclusion, and not a well-pleaded allegation. Therefore, the court will not accept this statement as true for purposes of resolving the Motion.

[3] Plaintiff alleges that since Defendant claims to have made $78,000 in wages and further operated various moving and trucking companies, it seems improbable that he failed to transfer funds to insiders such as his wife. This is a suggestion, not a well-pleaded allegation, and the court will not accept this statement as true for purposes of resolving the Motion.

Plaintiff has expended significant time and effort in obtaining discovery from Debtor and third parties through citations in the State Court Action and this case through Bankruptcy Rule 2004 discovery. Defendant did not produce essential documents including credit card statements, asset transfer records and business records.

III. LEGAL DISCUSSION

To defeat a motion to dismiss, a complaint must describe the claim in enough detail to give fair notice to the defendant. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In addition, it must be "plausible on its face." *Id.* at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

A complaint need only offer "a short and plain statement of the claim showing that the pleader is entitled to relief[,]" Fed. R. Civ. P. 8(a)(2) (made applicable to adversary proceedings by Fed. R. Bankr. P. 7008), unless the subject matter of that pleading implicates a heightened standard, *see* Fed. R. Civ. P. 9. The circumstances supporting an action sounding in fraud or mistake must be articulated with particularity under Rule 9. According to Rule 9 (made applicable to adversary proceedings by Fed. R. Bankr. P. 7009), "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."

Our Circuit has instructed its lower courts that when alleging fraud, a complaint must contain "the identity of the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff." *Rocha v. Rudd*, 826 F.3d 905, 911 (7th Cir. 2016) (quotation omitted). But Rule 9 is read in conjunction with Rule 8, which requires only a "short and plain statement of the claim[.]" Therefore, a complaint need not describe the details of the fraudulent conduct "as a journalist

would hope to relate them to [the] general public. It is only necessary to set forth a basic outline of fraud in order to alert the defendant of the purported fraud he is defending against." *Gasunas v. Yotis* (*In re Yotis*), 521 B.R. 625, 634 (Bankr. N.D. Ill. 2014) (quotation omitted). Allegations of intent, however, need only be set forth generally. *See* Fed. R. Civ. P. 9(b).

A. Count I: *11 U.S.C. § 727(a)(2) – Transferring, Removing or Concealing Assets*

The first count of the complaint is brought under 11 U.S.C. § 727(a)(2):

> (a) The court shall grant the debtor a discharge, unless-- …
>
> > (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; or
> > >
> > > (B) property of the estate, after the date of the filing of the petition[.]

For its claim for relief under § 727(a)(2) to survive a motion to dismiss, Plaintiff must plausibly allege that Defendant acted with actual intent to hinder, delay, or defraud it, and that his act consisted of transferring, removing, destroying or concealing any of his property. *See Village of San Jose v. McWilliams*, 284 F.3d 785, 791 (7th Cir. 2002). The timing of the Defendant's act determines whether § 727(a)(2)(A) or (B) applies.

1. The Complaint plausibly alleges an act of concealment

The court will begin its review of Count I with the second element, asking whether it contains an act that constitutes transfer, removal, destruction or concealment. In its Complaint, Plaintiff alleged that the act in question was Defendant's failure to list certain assets on his bankruptcy schedules. "The deliberate withholding of information about assets from a debtor's

schedules or testimony at a 341 meeting can constitute concealment of those assets." *PNC Bank, N.A. v. Leongas* (*In re Leongas*), 628 B.R. 71, 91 (Bankr. N.D. Ill. 2021).

Defendant argues in the Motion that in cases like *Leongas*, "the failure to schedule assets has only been peripheral to other conduct evidencing concealment." Motion, p. 5 (quotation omitted). *See Ruter v. Schryver (In re Schryver)*, 558 B.R. 856 (Bankr. N.D. Ill. 2016); *Layng v. Urbonas (In re Urbonas)*, 539 B.R. 533 (Bankr. N.D. Ill. 2015). Since the Complaint does not allege any concealment other than omissions in the schedules, Defendant asserts that these allegations are insufficient to state a claim under § 727(a)(2).

The Seventh Circuit has instructed its lower courts that "[c]oncealment ... includes preventing discovery, fraudulently transferring or *withholding knowledge or information required by law to be made known*." *In re Scott*, 172 F.3d 959, 967 (7th Cir. 1999) (quotation omitted) (emphasis added). Whether Defendant's omission of information from his schedules rises to the level of concealment that requires denial of his discharge will be an issue for trial. *Leongas*, *Schryver* and *Urbonas* were all written after a trial. For purposes of deciding a motion to dismiss, however, the Complaint sufficiently alleged that Defendant withheld information that the Bankruptcy Code required him to disclose. This is all that is required at this stage of the adversary proceeding.

Defendant also argues that the allegations in the Complaint that he improperly valued his household goods, clothing and electronics, or that he incorrectly checked the box that his debts are primarily non-consumer, cannot support a claim under § 727(a)(2).

Motions to dismiss cannot be used to excise redundant or superfluous allegations or to craft an ideal complaint. Perhaps they are additional allegations Plaintiff will submit as further support of its cause of action in the Complaint. If they are extraneous allegations, the court can

simply ignore them. The court has already found that the Complaint alleged an act of concealment.

2. The Complaint plausibly alleges an actual intent to hinder, delay or defraud

The only remaining question to decide in determining whether Count I survives, therefore, is whether Plaintiff plausibly alleged in the Complaint that Defendant acted with intent to hinder, delay, or defraud a creditor. Section 727(a)(2) is disjunctive. *See* § 727(a)(2) ("the debtor, with intent to hinder, delay, *or* defraud a creditor") (emphasis added); *In re Retz*, 606 F.3d 1189, 1200 (9th Cir. 2010) ("Because the language of the statute is in the disjunctive it is sufficient if the debtor's intent is to hinder or delay a creditor."); *Matter of Smiley*, 864 F.2d 562 (7th Cir. 1989). *See also Matter of Reed*, 700 F.2d 986 (5th Cir. 1983).

Intent to defraud "must be actual and cannot be constructive[.]" *Village of San Jose*, 284 F.3d at 790. It "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) (citations omitted). As the Seventh Circuit explained, because it is unlikely that the debtor will admit fraud:

> it may be shown through circumstantial evidence, and the Fifth Circuit adopted a series of factors which, if proven, indicate actual fraud:
>
> > (1) the lack or inadequacy of consideration; (2) the family, friendship or close associate relationship between the parties; (3) the retention of possession, benefit or use of the property in question; (4) the financial condition of the party sought to be charged both before and after the transaction in question; (5) the existence or cumulative effect of the pattern or series of transactions or course of conduct after the incurring of debt, onset of financial difficulties, or pendency or threat of suits by creditors; and (6) the general chronology of the events and transactions under inquiry.

Id. at 791. Even if the alleged course of conduct does not establish an intent to defraud creditors, the behavior can show intent "to hinder or delay" them. *Smiley*, 864 F.2d at 568 ("Mr. Smiley's

discharge must be denied pursuant to Section 727 because it is clear that he intended to hinder or delay his creditors, even if he had no intent to defraud them.")

Plaintiff alleges in the Complaint that "Debtor's intent in transferring such assets from his estate and concealing them from creditors is evidenced by (a) the intentional failure to list such assets on Debtor's Schedules; and (b) his failure to provide complete responses to discovery." Complaint, ¶ 22. It also alleges that Defendant retained possession, benefit or use of property until he transferred it "and after such assets were discovered by Plaintiff [he failed] to respond completely to inquiries regarding the assets and their current status." Complaint, ¶ 24.

Most crucially, the Complaint alleges that Defendant's "overall course of conduct" supports the reasonable inference that he acted with an actual intent to hinder, delay or defraud. In other words, taking all of Defendant's actions together, the court must conclude that as to the false statements Defendant made under oath – his failure to list certain assets on his bankruptcy schedules – his general course of conduct suggests he made those false statements with an intent to hinder, delay or defraud. The Defendant is experienced in litigation and has frustrated Plaintiff and the case trustee in their search for assets and explanation of liabilities. Complaint, ¶ 56. Since defendants rarely admit to it, "[i]ntent to conceal may be established through … inferences drawn from a general course of conduct." *Ruiz v. Kennedy* (*In re Kennedy*), 566 B.R. 690, 708 (Bankr. D.N.J. 2017).

That course of conduct, according to the Complaint, involved the $100,000 Note executed by Defendant in payment for past due rent owed by Olympic Moving, a 2019 lawsuit filed by Plaintiff in state court seeking to collect on the Note, a judgment obtained by Plaintiff in the State Court Action, and supplementary proceedings to collect on that judgment. During those supplementary proceedings, on which Plaintiff expended significant time and effort,

Defendant did not provide complete responses to discovery or respond completely to inquiries regarding the assets and their current status. Following all of this prepetition activity, Defendant filed for relief under chapter 7. He did not list on Schedule B his interest in the company that had owed rent to Plaintiff, the dispute that was the genesis of those proceedings.

Defendant argues in the Motion that no discovery has been issued in this proceeding and the state court made no finding that he has not complied with Plaintiff's requests. Therefore, Plaintiff has not alleged an intent to conceal. But, as suggested by *Village of San Jose*, the court is looking not just at whether Defendant responded fully to state court discovery. Instead, the court is considering whether Defendant's entire course of conduct involving this creditor – a creditor whose claim is more than double the amount of all other claims combined – suggests that Plaintiff plausibly alleged Defendant intended to hinder, delay or defraud it.

At this stage of the proceeding, Plaintiff need not describe Defendant's "course of conduct" with more specificity than what it alleged in the Complaint. While the first sentence of Rule 9(b) requires plaintiffs to "state with particularity the circumstances constituting fraud or mistake[,]" the question of Defendant's intent does not fall into this category. Intent is governed instead by the second sentence of Rule 9(b), which states that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally."

Therefore, Plaintiff's allegations in the Complaint are sufficient to put Defendant on notice of the claim against him. His general course of conduct, as alleged in the Complaint, supports the reasonable inference that he acted with intent to hinder, delay or defraud.

Having plausibly alleged that Defendant acted with intent to hinder, delay, or defraud, Plaintiff satisfied the final element and has stated a claim for relief under § 727(a)(2). For the reasons stated above, the court will deny the motion to dismiss Count I.

B. Count II: *11 U.S.C. § 727(a)(3) – Failure to Keep or Preserve Recorded Information*

The second count of the Complaint is brought under 11 U.S.C. § 727(a)(3):

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

> (3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case[.]

This section creates an affirmative duty on the debtor to keep and preserve records from which his bankruptcy can be administered. *See Matter of Juzwiak*, 89 F.3d 424, 427-28 (7th Cir. 1996). "The completeness and accuracy of a debtor's records are to be determined on a case-by-case basis, considering the size and complexity of the debtor's financial situation." *Baccala Realty, Inc. v. Fink (In re Fink)*, 351 B.R. 511, 522–23 (Bankr. N.D. Ill. 2006). A debtor must provide organized documentation of his assets, enough to "provide creditors and trustees with enough information to ascertain the debtor's financial condition with substantial completeness and accuracy without the need to resort to post hoc forensic investigation to assemble the debtor's financial transactions from chaos." *Schaumburg Bank & Trust Co., N.A. v. Hartford (In re Hartford)*, 525 B.R. 895, 909 (Bankr. N.D. Ill. 2015). However, "[o]bjections to discharge under § 727(a)(3) are not usually decided on summary judgment, as they normally require a fact intensive inquiry regarding the adequacy of the defendant's records." *Butler v. Liu (In re Liu)*, 288 B.R. 155, 161 (Bankr. N.D. Ga. 2002). This proceeding is not even at the summary judgment stage; on a motion to dismiss, the court need only determine whether the complaint plausibly alleges a cause of action.

Defendant argues that the Complaint does not meet even this low standard. "[T]he Complaint never alleges what was requested but not provided…. Plaintiff also never alleges what information is missing that could have enabled it to assess Debtor's financial condition….

Finally, Plaintiff never alleges that Debtor failed to preserve records which it should have or that such failure was not justified." Motion, p. 8.

In the Complaint, Plaintiff alleged that during state court and Fed. R. Bankr. P. 2004 discovery, "Debtor failed to produce essential documents including credit card statements, asset transfer records and business records." Complaint, ¶ 15. Plaintiff also alleged that "Debtor has provided little documentation regarding his personal assets and liabilities identified in paragraph [sic] or the liabilities identified in paragraph 13 above." Complaint, ¶ 31. Plaintiff further alleged that Defendant has a business background, should know how to keep financial records, and "had the requisite experience to compile the required business records and either has failed to do so or has refused to turn over such records." *Id.*

At this stage of the proceedings, Plaintiff need not provide evidence regarding what it requested but could not obtain. Neither is Plaintiff required to allege which records should have been kept but are missing. That standard of proof will come at trial. Instead, Plaintiff must make well-pleaded allegations, and the court will draw reasonable inferences from those allegations in the light most favorable to Plaintiff. In this case, Plaintiff plausibly alleged that Defendant provided less than adequate records and "failed to produce essential documents" regarding his assets and liabilities. These allegations provide a short and plain statement of the claim. From these allegations, the court may infer – in the light most favorable to the Plaintiff – that Defendant did not keep or preserve records from which a creditor could review his financial condition or business transactions.

The Complaint does not allege that any failure to keep or preserve records was not justified. However, that is not a flaw that requires dismissal. Plaintiff's initial burden is to plausibly allege that the Defendant did not keep or preserve adequate financial records. Only

after a plaintiff has demonstrated that a debtor's financial records are inadequate does the burden of production shift to the debtor to justify the lack of adequate records. *See Estate of Drabik v. Drabik (In re Drabik)*, 581 B.R. 554, 562 (Bankr. N.D. Ill. 2018). The question of whether any failure to keep or preserve records was justified will be decided at trial, if Plaintiff meets its burden. Therefore, the motion to dismiss will be denied as to Count II.

C. Count III: *11 U.S.C. § 727(a)(4)(A) – False Oath in Connection with the Case*

The third count of the Complaint is brought under 11 U.S.C. § 727(a)(4)(A):

> (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[.]

For its claim for relief under § 727(a)(4)(A) to survive a motion to dismiss, Plaintiff must plausibly allege: (1) Defendant made a statement under oath; (2) the statement was false; (3) the Defendant knew the statement was false; (4) the Defendant made the statement with fraudulent intent; and (5) the statement related materially to the bankruptcy case. *See Stamat v. Neary*, 635 F.3d 974, 978-79 (7th Cir. 2011).

1. The Complaint plausibly alleges that Defendant made two false statements under oath

a. False statements under oath

A debtor's petition, schedules and Statement of Financial Affairs are all statements under oath for purposes of §727(a)(4). *See Fiala v. Lindemann* (*In re Lindemann*), 375 B.R. 450, 469 (Bankr. N.D. Ill. 2007). If a plaintiff alleges that a debtor's schedules contain false statements, including omissions, then this element of § 727(a)(4)(A) is satisfied.

The Complaint alleges that Defendant owns equity in Olympic Moving and in Unlimited Moving. Question 19 on Schedule B requires debtors to list non-publicly traded stock and

interests in businesses. Olympic Moving and Unlimited Moving fall into that category. Therefore, Defendant was required to disclose his interests in Olympic Moving and Unlimited Moving on Schedule B.

In answer to Question 19, Defendant did *not* list an interest in either Olympic Moving or Unlimited Moving. Defendant's omissions of Olympic Moving and Unlimited Moving from Schedule B were made under oath.

Challenging the sufficiency of those allegations, Defendant asserts in the Motion that Olympic changed its name to Olympia, which he did list in answer to Question 19. We may learn later in this proceeding if it is true that Olympic and Olympia are the same entity. But as the court stated in footnote 1, a contention in a motion to dismiss is not a well-pleaded allegation. The court will not assume for purposes of deciding the Motion that Olympic Moving is the same entity as Olympia Moving. Defendant's omission of Olympic Moving from Schedule B remains a false statement under oath. Therefore, the Complaint has plausibly alleged that Defendant made two false statements under oath.

b. Facts that are not plausible allegations of a false oath

Plaintiff also alleged in the Complaint that Defendant omitted from Schedule B the assets owned by Olympic Moving and MV Moving. It argued that he should have listed those assets because Olympic Moving and MV Moving are Defendant's alter ego. As noted in footnote 2, whether or not those entities are Defendant's alter egos is a legal conclusion. For purposes of deciding the Motion, therefore, Defendant's failure to list the assets of Olympic Moving and MV Moving was not a false statement under oath.

Finally, Plaintiff asserts that Defendant omitted certain payments and transfers from his schedules and SOFA. The Complaint alleges that Defendant: (1) did not list any payments made

during the 90-day period prior to the petition date;[4] (2) claimed that his debts are primarily non-consumer; (3) did not list any utility companies on Schedule F; and (4) listed only one transfer made to an insider during the two years prior to the filing of this bankruptcy case.

None of these allegations support a claim that Defendant made a false statement under oath. While the allegations are accurate statements regarding Defendant's bankruptcy papers, there is no basis for the court to make a reasonable inference that any of those statements are false. In fact, Defendant's assertion that his debts are primarily non-consumer is supported by his schedules, in which the amount of Plaintiff's claim is approximately twice the amount of all other claims. Because Plaintiff alleged in the Complaint two false statements under oath, however, the second element is satisfied.

2. The Complaint plausibly alleges that Defendant knew he made two false statements under oath by omitting his interests in Olympic Moving and Unlimited Moving from Schedule B

As for the third element, the Complaint plausibly alleges that Defendant knew that omitting any interest in either Olympic Moving or Unlimited Moving from Schedule B was a false statement. Plaintiff alleged at paragraph 40 that "Debtor is a businessman with the education and experience to know that his statements in the Schedules were incomplete and inaccurate." It is a reasonable inference from this allegation to conclude that an educated and experienced businessperson, acting with the assistance of bankruptcy counsel, would know what a requirement to list non-publicly traded stock and interests in businesses means.

[4] While Defendant did not list any payments in answer to Question 6, the query is more specific than Plaintiff's characterization of it. Question 6 actually asks whether, during the 90 days before filing, a debtor paid "any creditor a total of $6,825 or more[.]"

3. The Complaint plausibly alleges fraudulent intent

The court then turns to what is often the most elusive element of a claim for relief under § 727(a)(4)(A) – the question of whether the complaint plausibly alleged that the defendant made the false statements with fraudulent intent. A reckless disregard for the truth is sufficient to support a claim for fraudulent intent. *See Stamat*, 635 F.3d at 982.

In paragraph 42 of the Complaint, Plaintiff alleges that Defendant acted with reckless disregard for the truth because he knew that disclosure of his assets was required by simply reading the instructions to the schedules, and because he had the assistance of bankruptcy counsel in preparing those schedules.

By itself, the court cannot infer a reckless disregard of the truth – and therefore an intent to defraud – from a failure to comply with the instructions for completing bankruptcy schedules. An allegation that a debtor did not follow instructions does not lead to the reasonable inference that the debtor "acted so recklessly in not reporting the asset that fraud is implied." *Matter of Yonikus*, 974 F.2d 901, 905 (7th Cir. 1992). If it did, then every debtor who omitted assets would have acted with an intent to deceive, because all debtors have the form instructions available to them. Neither does an allegation that Defendant acted with the assistance of counsel support an inference that he intended to defraud creditors; otherwise, Plaintiff is suggesting that merely being represented by counsel implies an intent to defraud.

However, Plaintiff incorporated paragraphs 5 to 15 of the Complaint into Count III. In those earlier paragraphs, Plaintiff made allegations regarding Defendant's course of conduct leading up to and through the time he omitted assets from his schedules.

A reckless disregard for the truth can be inferred from a pattern of misconduct. In this proceeding, Plaintiff plausibly alleged that Defendant executed a note in payment for past due

rent, unsuccessfully defended the state court action brought to collect on that note and, during supplementary proceedings, did not provide complete responses to discovery or respond completely to inquiries regarding his assets and their current status. Following all of this prepetition activity, Defendant filed for chapter 7, omitting from Schedule B his interest in the very company that had owed rent to Plaintiff. As the court found in Count I, these allegations regarding Defendant's general course of conduct support the reasonable inference – at least at this point in the proceeding – that he acted with a reckless disregard for the truth.

Having plausibly alleged that Defendant acted with fraudulent intent, Plaintiff satisfied the final element and has stated a claim for relief under § 727(a)(4)(A). For the reasons stated above, the court will deny the motion to dismiss Count III.

D. Count IV: *11 U.S.C. § 727(a)(4)(D) – Withholding Recorded Information from an Officer of the Estate in Connection with the Case*

The fourth count of the Complaint is brought under 11 U.S.C. § 727(a)(4)(D):

> (a) The court shall grant the debtor a discharge, unless-- …
>
> > (4) the debtor knowingly and fraudulently, in or in connection with the case-- …
> >
> > > (D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs[.]

One court explained the purpose of this section as follows:

> Trustees lack the time and resources to play detective and uncover all assets and transactions of their debtors. Debtors in bankruptcy have an affirmative duty to surrender to the Trustee all recorded information relating to property of estate, and are also obligated to cooperate by providing the Trustee with all relevant documents and papers and fully answering the questions in the petition for relief and attached schedules. Section 727(a)(4)(D) enforces this obligation by denying discharge to debtors who intentionally withhold records, books, documents, or other papers relating to their property or financial affairs. The requisite intent to act knowingly and fraudulently may be established by circumstantial evidence, or by inference drawn from a course of conduct.

Clark v. Tieszen (In re Tieszen), No. 98 B 27403, 1999 WL 669263, at *7 (Bankr. N.D. Ill. Aug. 24, 1999) (citations and quotations omitted).

Plaintiff contends that it plausibly alleged a claim for relief under this section because the "Complaint alleges that Debtor failed to explain the disposition of certain assets and failed and failed [sic] to produce documents in the state court collections case and in the bankruptcy case through Bankruptcy Rule 2004 discovery." Response, p. 7.

First, any allegations regarding a failure to produce documents in the state court case are not relevant to stating a claim under § 727(a)(4)(D), because this cause of action requires that the acts be done "in or in connection with the case."

More importantly, neither party focused on the requirement of § 727(a)(4)(D) that any withholding of information be done by the debtor to "an officer of the estate[.]" As *Tieszen* explains, § 727(a)(4)(D) enforces a debtor's statutory obligation to surrender information to the case trustee. Plaintiff is a creditor, not an officer of the estate. The only possibly relevant mention of the case trustee is found in paragraph 56 of the Complaint, which states that Defendant "has frustrated Plaintiff and Bankruptcy Trustee in their search for assets and explanation of his liabilities." A fleeting reference to the case trustee is not sufficient to support a claim for relief that Defendant knowingly and fraudulently withheld from an officer of the estate any recorded information relating to his property or financial affairs.[5]

[5] *See Blackwell Oil Co., Inc. v. Potts (In re Potts)*, 501 B.R. 711, 723 (Bankr. D. Colo. 2013) ("The only officer of the estate in this case was the Trustee, who did not file an action against Debtor or join in this claim filed by Blackwell. At trial, the Trustee testified that he was satisfied with the information received from Debtor in his schedules, at the meeting of creditors, and through the cooperation of Debtor's family. On cross examination the Trustee was specifically asked if he believed Debtor had withheld any recorded information relating to Debtor's property or financial affairs, and responded in the negative. This claim [under § 727(a)(4)(D)] therefore is not supported by the evidence.").

Plaintiff failed to plausibly allege a claim for relief under § 727(a)(4)(D). For the reasons stated above, the court will grant the Motion to dismiss Count IV. Plaintiff will be allowed time to amend the Complaint, if possible, to conform with the discussion above.

E. Count IV: *11 U.S.C. § 727(a)(6) – Refusal to Obey any Lawful Order of the Court*

Plaintiff stated in the Response that it "withdraws Count V." Therefore, the court will grant the motion to dismiss as to Count V.

CONCLUSION

For the reasons stated above, **IT IS ORDERED THAT**:

1. The Motion to Dismiss is **GRANTED** as to Counts IV and V;
2. Plaintiff is allowed leave to replead Count IV;
3. Any amended complaint must be filed on or before February 15, 2023; and
4. The Motion to Dismiss is **DENIED** as to Counts I, II and III.

ENTERED:

Date: January 18, 2023

DAVID D. CLEARY
United States Bankruptcy Judge