

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 00-32411

MARK ANTHONY HARNESS

Debtor

RITCHIE TRACTOR COMPANY,
RENTAL SERVICE CORPORATION and
BRADFORD JEWELERS

Plaintiffs

v.

Adv. Proc. No. 00-3102

MARK ANTHONY HARNESS

Defendant

**MEMORANDUM ON
DEFENDANT'S MOTION TO DISMISS**

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**RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE**

This adversary proceeding was commenced by the September 18, 2000, filing of the Plaintiffs' Complaint, which seeks denial of the Debtor's discharge pursuant to 11 U.S.C.A. § 727(a)(2)(A)¹ and (a)(3).² The Complaint avers that the Plaintiffs hold claims against the Debtor resulting from judgments awarded by the General Sessions Court of Knox County, Tennessee.

¹ Section 727(a) states in material part:

(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[.]

11 U.S.C.A. § 727(a)(2)(A) (West 1993).

² Section 727(a)(3) states in material part:

(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[.]

11 U.S.C.A. § 727(a)(3) (West 1993).

Presently before the court is the Defendant's Motion to Dismiss filed on October 23, 2000. The Defendant seeks dismissal pursuant to FED. R. CIV. P. 9(b)³ and 12(b)(6).⁴

The Plaintiffs filed a "Response to Motion to Dismiss and Motion to Amend Complaint" (Motion) on November 13, 2000, jointly opposing the Defendant's dismissal motion and requesting leave of court to amend their Complaint. Attached to this Motion as Exhibit A is an unsigned Proposed Amended Complaint. In the Proposed Amended Complaint, the Plaintiffs allege additional facts in support of their respective claims. Specifically, they contend that discharge should be denied under § 727(a)(3) due to the Debtor's failure to produce various financial records requested by the Plaintiff Rental Service Corporation during the Knox County General Sessions Court proceedings. The Plaintiffs further submit that discharge should be denied under § 727(a)(2)(A) due to the Debtor's failure to produce the above-mentioned records and due to the Debtor's non-disclosure of an account with First Tennessee Bank during the same General Sessions Court proceedings.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A), (J) (West 1993).

³ Rule 9(b), made applicable to this adversary proceeding by FED. R. BANKR. P. 7009, directs that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." FED. R. CIV. P. 9(b).

⁴ Rule 12(b)(6), made applicable to this adversary proceeding by FED. R. BANKR. P. 7012(b), provides that a defendant may move for dismissal based on the plaintiff's "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6).

I

Rule 15(a) of the Federal Rules of Civil Procedure, incorporated into this adversary proceeding by Rule 7015 of the Federal Rules of Bankruptcy Procedure, permits a party to amend its pleading one time as a matter of course before a responsive pleading is served. See FED. R. CIV. P. 15(a). A “pleading,” as defined by FED. R. CIV. P. 7(a) and FED. R. BANKR. P. 7007, can only be one of the following documents:

a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served.

FED. R. CIV. P. 7(a). Motions to dismiss are not within Rule 7(a)’s definition and therefore are not pleadings. See *id.*; see also *Rogers v. Girard Trust Co.*, 159 F.2d 239, 240 (6th Cir. 1947).

Because the Defendant has not yet submitted any of the “pleadings” set forth in Rule 7(a), the Plaintiffs are entitled to amend their Complaint one time as a matter of right. See FED. R. CIV. P. 15(a). Leave of court is not required and the Plaintiffs’ Motion is therefore unnecessary. The court will deny the Plaintiffs’ Motion and will review the Defendant’s Motion to Dismiss based on the contents of the Proposed Amended Complaint. The Plaintiffs will, however, be directed to file, within five days, their Amended Complaint in the identical format as the Proposed Amended Complaint.

II

The Defendant first seeks dismissal of both counts of the Complaint under FED. R. CIV. P. 9(b)⁵ for failure to plead fraud with particularity. The purposes of Rule 9(b) are “to provide a defendant with fair notice of a plaintiff’s claim, to safeguard a defendant’s reputation from improvident charges of wrongdoing, and to protect a defendant against the institution of a strike suit.” *Gupta v. Terra Nitrogen Corp.*, 10 F. Supp. 2d 879, 882 (N.D. Ohio 1998) (quoting *O’Brien v. National Property Analysts Partners*, 936 F.2d 674, 676 (2d Cir. 1991)). If Rule 9(b) governs a complaint, that pleading “must at minimum allege the time, place and contents of the misrepresentation(s) upon which [the Plaintiff] relied.” *Bender v. Southland Corp.*, 749 F.2d 1205, 1216 (6th Cir. 1984).

The Defendant cites *Olson v. Potter (In re Potter)*, 88 B.R. 843 (Bankr. N.D. Ill. 1988), for the proposition that § 727(a)(3) complaints are subject to the restrictions of Rule 9(b). *Potter*, however, stands for precisely the opposite point. *See Potter*, 88 B.R. at 848 (Section 727(a)(3) “is governed by the notice requirement of Federal Rule of Civil Procedure 8 and not the particularity requirement of Rule 9(b).”). Section 727(a)(3) addresses concealment, destruction, mutilation, falsification, and failure to keep or preserve recorded information. *See* 11 U.S.C.A. § 727(a)(3). It does not require an “averment of fraud” as contemplated by Rule 9(b). *See id.*; *see also Reiser v. Humphrey (In re Humphrey)*, 146 B.R. 202, 204-05 (Bankr. S.D. Ohio 1992). Rule 9(b) therefore does not govern the Plaintiffs’ § 727(a)(3) Complaint.

⁵ See footnote 3.

Next, § 727(a)(2)(A) pertains to actions taken “with intent to hinder, delay, or defraud.” This court, speaking through Judge Clive Bare, has previously stated that in § 727(a)(2)(A) complaints “it is not necessary to prove fraud; because the statutory language is disjunctive, an intent to hinder or delay suffices.” *Comprehensive Accounting Corp. v. Morgan (In re Cycle Accounting Servs.)*, 43 B.R. 264, 271 (Bankr. E.D. Tenn. 1984).

Nonetheless, there exists a split of authority as to whether Rule 9(b) applies to § 727(a)(2)(A) complaints, with the majority finding the Rule applicable. *Compare Govaert v. Primack (In re Primack)*, 89 B.R. 954, 956-57 (Bankr. S.D. Fla. 1988) (fraudulent intent must be plead with particularity), *and Potter*, 88 B.R. at 847 (same), *with Huntington Nat’l Bank v. Schwartzman (In re Schwartzman)*, 63 B.R. 348, 360 (Bankr. S.D. Ohio 1986) (fraudulent intent may be averred generally). The split exists even within a single district. *Compare Humphrey*, 146 B.R. at 205 (§ 727(a)(2) (complaints must be plead with particularity), *and Society Bank, N.A. v. Sinder (In re Sinder)*, 102 B.R. 978, 986 (Bankr. S.D. Ohio 1989) (§ 727(a)(2) “sounds in fraud”), *with Trel v. Dunleavy (In re Dunleavy)*, 75 B.R. 914, 918 (Bankr. S.D. Ohio 1987) (Rule 9(b) “does not require particularization of allegations of fraudulent *intent*.”) (citation omitted) (emphasis in original), *and Schwartzman*, 63 B.R. at 360.

Application of Rule 9(b) to the Plaintiffs’ § 727(a)(2)(A) Complaint is, at best, problematic. *See Bender*, 749 F.2d at 1216 (In context of RICO complaint, fraud must be plead with particularity, but fraudulent intent may be averred generally.); *see also* 10 KING, COLLIER ON BANKRUPTCY ¶ 7009.03, at 7009-5 (15th ed. rev. 2000) (“While fraud itself must be alleged with particularity, allegations of fraudulent intent can be alleged generally.”). Regardless, the court

finds each count of the Proposed Amended Complaint sufficiently detailed to satisfy Rule 9(b)'s particularity requirement. Each cites the time, place, and content of the complained-of conduct. Dismissal pursuant to Rule 9(b) is therefore unwarranted.

III

The Defendant next seeks dismissal pursuant to FED. R. CIV. P. 12(b)(6)⁶ on the ground that the Plaintiffs have failed to state a claim upon which relief can be granted. In considering a Rule 12(b)(6) motion, the court must interpret the complaint in the light most favorable to the plaintiff, accept as true all factual allegations, and determine whether the plaintiff could undoubtedly prove no set of supporting facts that would entitle him to relief. *See Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1240 (6th Cir. 1993); *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993). The complaint need only give fair notice of the plaintiff's claim and the grounds upon which it rests. *See DeLorean Motor Co.*, 991 F.2d at 1240. This standard is liberal but still "requires more than the bare assertion of legal conclusions." *Id.* The complaint must contain direct or inferential allegations of all material elements necessary to sustain recovery under some viable legal theory. *Id.*

The Proposed Amended Complaint satisfies Rule 12(b)(6) regarding the § 727(a)(3) claim. The Plaintiffs have set forth facts indicative of, at minimum, a concealment of recorded information from which the Debtor's financial condition might be ascertained. That is all that § 727(a)(3) requires.

⁶ See footnote 4.

As for their § 727(a)(2)(A) claim, the Plaintiffs successfully allege a concealment of property of the Debtor within one year prior to the bankruptcy filing. However, as previously noted, § 727(a)(2)(A) also requires “intent to hinder, delay, or defraud.” After construing the Proposed Amended Complaint in the light most favorable to the Plaintiffs, the court is unable to locate a direct or inferential allegation of intent. “Although intent is a state of mind that may be averred generally, FRCP 9(b), *it must [at least] be alleged.*” *Bender v. Southland Corp.*, 749 F.2d 1205, 1216 (6th Cir. 1984) (emphasis added). Count II fails to state a claim upon which relief can be granted and will accordingly be dismissed.

IV

A review of the Plaintiffs’ Complaint and Proposed Amended Complaint requires that the court, *sua sponte*, address one other issue. Rule 21 of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding by Rule 7021 of the Federal Rules of Bankruptcy Procedure, may require that the claims of the three Plaintiffs be severed.

The Plaintiffs’ Proposed Amended Complaint avers that “the Plaintiffs obtained judgments against the Defendant individually and his company, Harness Contracting, Inc., in the General Sessions Court for Knox County, Case Nos. 54473E, 50498E and 54125E.” The clear inference is that each Plaintiff holds a claim against the Debtor independent of the claims of the other Plaintiffs.

Plaintiffs may bring a single action against a defendant under FED. R. CIV. P. 20, which provides in material part:

(a) **Permissive Joinder.** All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.

FED. R. CIV. P. 20(a), made applicable to this adversary proceeding by FED. R. BANKR. P. 7020.

Rule 20 contains broad provisions and courts may use discretion in its application. See *Thompson v. Boggs*, 33 F.3d 847, 858 (7th Cir. 1994). Under Rule 20, there must be both an identity of the transaction or occurrence or a series of transactions or occurrences and a common question of law or fact. See *Hanley v. First Investors Corp.*, 151 F.R.D. 76, 78-9 (E.D. Tex. 1993). The presence of both requirements creates a logical relationship between the claims, which makes their joinder permissive. See *id.*

Misjoinder of parties is governed by FED. R. CIV. P. 21 which provides that “[p]arties may be dropped . . . by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.” FED. R. CIV. P. 21. Under Rule 21, “[a]ny claim against a party may be severed and proceeded with separately.” *Id.*

As previously noted, it appears from the court’s reading of the Proposed Amended Complaint that the Plaintiffs’ claims do not arise out of the same transaction, occurrence, or series of transactions or occurrences because the Plaintiffs allege that their claims arise out of three judgments obtained against the Debtor. The court presumes that each Plaintiff is the holder of one

of these judgments. If so, the claims of the Plaintiffs were improperly joined under Rule 20 and the claims of Rental Service Corporation and Bradford Jewelers should be severed according to Rule 21. The court will, however, provide the Plaintiffs an opportunity to establish that the court has wrongly concluded that there has been an improper joinder of parties to this action.

An order consistent with this Memorandum will be entered.

FILED: January 30, 2001

BY THE COURT

/s/

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

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Defendant

ORDER

For the reasons stated in the Memorandum on Defendant's Motion to Dismiss filed this date, the court directs the following:

1. To the extent the Plaintiffs, by their Response to Motion to Dismiss and Motion to Amend Complaint filed November 13, 2000, seek leave of court to file an Amended Complaint, their Motion is unnecessary and is accordingly DENIED.

2. The unsigned Proposed Amended Complaint appended as Exhibit A to the Plaintiffs' Response to Motion to Dismiss and Motion to Amend Complaint filed November 13, 2000, is deemed the Plaintiffs' Amended Complaint provided that the Plaintiffs shall, within five (5) days, file an original signed Amended Complaint containing identical provisions.

3. The Defendant's Motion to Dismiss filed October 23, 2000, is GRANTED with respect to Count II of the Plaintiffs' Proposed Amended Complaint and Count II is DISMISSED. The Motion to Dismiss is in all other respects DENIED.

4. The Plaintiffs shall appear before the court on February 15, 2001, at 1:30 p.m., in Bankruptcy Courtroom 1-C, First Floor, Howard H. Baker, Jr. United States Courthouse, Knoxville, Tennessee, to show cause why the claims of the Plaintiffs Rental Service Corporation and Bradford Jewelers should not be severed pursuant to Rule 21 of the Federal Rules of Civil Procedure.

SO ORDERED.

ENTER: January 30, 2001

BY THE COURT

/s/

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE