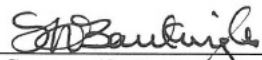




SO ORDERED.
SIGNED this 5th day of August, 2016

THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.


Suzanne H. Bauknicht
UNITED STATES BANKRUPTCY JUDGE

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

In re

Case No. 3:16-bk-30443-SHB

JOHN ROGER HEATH
fdba HEATH TRUCKING CO.

Debtor

LARRY DAVID RUSSELL

Plaintiff

v.

Adv. Proc. No. 3:16-ap-3018-SHB

JOHN ROGER HEATH

Defendant

**MEMORANDUM AND ORDER ON
MOTION TO DISMISS BY DEFENDANT**

Plaintiff filed the Complaint commencing this adversary proceeding on May 23, 2016, objecting to Defendant's discharge under 11 U.S.C. § 727(a)(4).¹ Defendant filed the Motion to Dismiss on June 21, 2016, arguing that the Complaint does not state a claim upon which relief

¹ The final sentence of the Complaint seeks, "in the alternative, that Mr. Russell's judgment against Mr. Heath be exempted from any discharge relief provided to Mr. Heath." [Doc. 1.] Although this appears to be a request for a determination of nondischargeability, the Complaint does not contain any statutory reference to 11 U.S.C. § 523.

may be granted and seeking dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, applicable in this adversary proceeding through Rule 7012 of the Federal Rules of Bankruptcy Procedure.

A defendant may move to dismiss a complaint for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6) (applicable to adversary proceedings through Fed. R. Bankr. P. 7012). When deciding a motion to dismiss under Rule 12(b)(6), the court is required to “construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff.” *Bassett v. Nat’l Collegiate Athletic Ass’n*, 528 F.3d 426, 430 (6th Cir. 2008) (quoting *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007)). Additionally, “[t]he court ‘consider[s] the complaint in its entirety, as well as . . . documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.’” *Solo v. United Parcel Serv. Co.*, 819 F.3d 788, 794 (6th Cir. 2016) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)).

“A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court’s jurisdiction . . . ; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.” Fed. R. Civ. P. 8(a) (applicable to adversary proceedings under Fed. R. Bankr. P. 7008). The complaint is not required to contain “detailed factual allegations[; however,] a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level[.]” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations and brackets omitted). In cases where fraud or mistake has been averred, Rule 9 of the Federal Rules

of Civil Procedure supplements Rule 8 by requiring that the party “state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b) (applicable in adversary proceedings through Fed. R. Bankr. P. 7009).

“While a complaint will survive a motion to dismiss if it contains ‘either direct or inferential allegations respecting all material elements’ necessary for recovery under a viable legal theory, this [C]ourt ‘need not accept as true legal conclusions or unwarranted factual inferences, and conclusory allegations or legal conclusions masquerading as factual allegations will not suffice.’” *Philadelphia Indem. Ins. Co. v. Youth Alive, Inc.*, 732 F.3d 645, 649 (6th Cir. 2013) (quoting *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 275-76 (6th Cir. 2010) (citation and quotation marks omitted)).

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. The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’”

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 556-57 (brackets omitted)); *see also Heinrich v. Waiting Angels Adoption Servs., Inc.*, 668 F.3d 393, 403 (6th Cir. 2012) (“Factual allegations must be enough to raise a right to relief above the speculative level.” (quoting *Twombly*, 550 U.S. at 555)); *Robinson v. BAC Home Loans Servicing, L.P.*, 2012 WL 1520125, at *2 (D. Ariz. May 1, 2012) (“A complaint that offers nothing more than naked assertions will not suffice.”).

Through his Motion to Dismiss, Defendant argues that Plaintiff has not pled sufficient factual allegations to support a denial of Defendant’s discharge under 11 U.S.C. § 727(a). In his brief in support of the Motion to Dismiss, Defendant argues that he amended Schedule A/B to

correct a few minor mistakes, but that he stands behind his statements and schedules as filed and amended. Notwithstanding Defendant's posture, the Court disagrees that Plaintiff has not alleged sufficient facts to state a claim under § 727(a).

A successful challenge to a debtor's discharge under § 727(a)(4) requires proof that the debtor (1) made a statement under oath; (2) the statement was false; (3) the debtor knew the statement was false when he made it; (4) the debtor fraudulently intended to make the statement; and (5) the statement materially related to the bankruptcy case. *Ayers v. Babb (In re Babb)*, 358 B.R. 343, 355 (Bankr. E.D. Tenn. 2006) (citing 11 U.S.C. § 727(a)(4)(A)). "Statements under oath" that fall within the scope of § 727(a)(4)(A) include affirmative false statements as well as omissions from a debtor's bankruptcy schedules, *In re Babb*, 358 B.R. at 355, and are material if they are related to a debtor's bankruptcy estate, the existence and disposition of property, business enterprises or transactions, and/or matters pertinent to the discovery of assets. *Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 686 (6th Cir. 2000); *Lim v. Storozhenko (In re Storozhenko)*, 487 B.R. 457, 466 (Bankr. E.D. Mich. 2012). A debtor's intent is inferred from circumstantial evidence and often turns on credibility and demeanor. *In re Babb*, 358 B.R. at 355 (citations omitted). "[W]hile mistakes do not warrant a denial of discharge, reckless indifference or disregard can provide the foundation for a finding of fraudulent intent." *Noland v. Johnson (In re Johnson)*, 387 B.R. 728, 743 (Bankr. S.D. Ohio 2008).

The Complaint alleges that Defendant made "demonstrably false" statements in his sworn Amended Statement of Financial Affairs and Amended Schedule A/B filed on April 1, 2016. Plaintiff cites specifically to five allegedly false assertions concerning (a) Defendant's ownership interests in business and other real and personal property and (b) Plaintiff's workers compensation judgment against Defendant. [Compl. (Doc. 1) ¶ 7.] The Complaint also contains

an allegation that three other answers in Defendant's Amended Schedule A/B are facially unbelievable. Such allegations satisfy the first two elements of a § 727(a)(4)(A) claim under *In re Babb*. Plaintiff's allegations that Defendant knowingly and fraudulently misstated his financial status and that such false statements made under oath "were calculated to mislead the court about [Defendant's] financial status" [Compl. (Doc. 1) ¶ 13] satisfy the third and fourth elements set out in *In re Babb*. Finally, Plaintiff also alleges facts that, if proven, could show that Defendant's allegedly undisclosed business ownership interests were material, thus satisfying the fifth *Babb* element. After reviewing the statements and schedules in question and considering the Complaint in a light most favorable to Plaintiff, taking the allegations as true as required by Rule 12(b)(6), the Court finds that Plaintiff has sufficiently pled facts that, if ultimately proved true, could support a denial of Defendant's discharge under 11 U.S.C. § 727(a)(4).

For this reason, Defendant's Motion to Dismiss is DENIED.

###