SO ORDERED.
SIGNED this 14th day of September, 2018

Suzanne H. Bauknight
UNITED STATES BANKRUPTCY JUDGE

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

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

In re

RICHARD PARKER WILKINSON

Debtor

Case No. 3:16-bk-31282-SHB
Chapter 7

MICHAEL H. FITZPATRICK, TRUSTEE

Plaintiff

v.

RICHARD PARKER WILKINSON

Defendant

Adv. No. 3:17-ap-03029-SHB

MEMORANDUM AND ORDER
DENYING MOTION FOR SUMMARY JUDGMENT

Plaintiff filed the Objection to Discharge ("Complaint") commencing this adversary proceeding on July 26, 2017, objecting to Defendant's discharge under 11 U.S.C. § 727(a)(2)(B), (4), (5), and (6). On July 31, 2018, Plaintiff filed a Motion for Summary Judgment ("Motion"), abandoning his claim under § 727(a)(2)(B) but asking the Court to grant summary judgment and

deny Defendant's discharge under § 727(a)(4), (5), and/or (6). [Doc. 23.] Plaintiff supported his Motion with a brief, a statement of undisputed facts as required by the local rules; the Affidavit of Michael H. Fitzpatrick, Trustee; a Quit Claim Deed dated August 12, 2016, between Richard (Rick) Wilkinson and W. David Wilkinson; excerpts from Defendant's deposition; and Defendant's Response to Request for Admissions. [Docs. 24, 25.] Defendant responded to the Motion and the statement of undisputed facts, asserting three additional undisputed facts, and filed the Affidavit of Richard Parker Wilkinson, with his amended Form 122A-1 and Schedules I and J attached. [Docs. 26, 27, 28.] Plaintiff responded to Defendant's additional undisputed material facts on September 4, 2018, making this matter ripe for determination. [Doc. 29.]

Rule 56, which is applicable to adversary proceedings by virtue of Rule 7056 of the Federal Rules of Bankruptcy Procedure, provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law[,]" utilizing the procedures defined in subparts (c)(1) through (c)(4). When deciding a summary judgment motion, the Court does not weigh the evidence to determine the truth of the matter asserted but simply determines whether a genuine issue for trial exists, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

As movant, Plaintiff bears the burden of proving that, based on the record presented to the Court, there is no genuine dispute concerning any material fact, such that any defenses raised are factually unsupported, and that he is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *Owens Corning v. Nat'l Union Fire Ins. Co.*, 257 F.3d 484, 491 (6th Cir. 2001). "Where, as here, the party moving for summary judgment is the plaintiff, or

the party who bears the burden of proof at trial, the standard is more stringent. Under the more stringent standard, the movant must . . . show that, on all the essential elements of its case on which it bears the burden of proof at trial, no reasonable jury could find for the non-moving party." *Corcoran v. McCabe (In re McCabe)*, 543 B.R. 182, 188 (Bankr. E.D. Pa. 2015) (citations, brackets, and internal quotation marks omitted).

If the initial burden of proof is met, the burden shifts to the nonmoving party to prove that there are genuine disputes of material fact for trial, although they may not rely solely upon allegations or denials contained in the pleadings because reliance upon a "mere scintilla of evidence in support of the nonmoving party will not be sufficient." *Nye v. CSX Transp., Inc.*, 437 F.3d 556, 563 (6th Cir. 2006); *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). While viewing the facts and all resulting inferences in a light most favorable to the non-moving party, the Court must decide whether "the evidence presents a sufficient disagreement to require submission to a [fact-finder] or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 243. If "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (citations omitted).

In his Motion, Plaintiff argues that Defendant should be denied his discharge pursuant to 11 U.S.C. §727(a)(4), (a)(5), and/or (a)(6), which provide:

> (4) the debtor knowingly and fraudulently, in or in connection with the case –
>
> (A) made a false oath or account;
>
> . . . .
>
> (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; [and]

> (6) the debtor has refused, in the case –
>
> > (A) to obey any lawful order of the court, other than an order to respond to a material question or to testify[.]

The Court finds that Plaintiff has failed to meet his burden of proof that he is entitled to judgment as a matter of law under any of the foregoing subsections of § 727(a) so that summary judgment is not appropriate.

Discharge – 11 U.S.C. § 727(a)

The discharge provided by 11 U.S.C. § 727(a) relieves "honest but unfortunate" Chapter 7 debtors of their debts, thus affording them a "fresh start" through the discharge. *Buckeye Ret., LLC v. Heil (In re Heil),* 289 B.R. 897, 901 (Bankr. E.D. Tenn. 2003). Nevertheless, because "[a] bankruptcy discharge is a privilege and not a right . . . '[the] bankruptcy court must balance the policy in favor of liberally applying the Bankruptcy Code to grant discharge to the honest debtor against the policy of denying relief to debtors who intentionally engage in dishonest practices and violate the Bankruptcy Code provision.'" *McDermott v. Spencer (In re Spencer),* 539 B.R. 777, 784 (Bankr. N.D. Ohio 2015) (citations omitted). The enumerated exceptions to discharge in § 727(a) furnish creditors with a process through which a denial of discharge is the consequence of abusive debtor conduct; however, § 727(a) "should be construed liberally in favor of the debtor and strictly against the creditor [because c]ompletely denying a debtor his discharge . . . is an extreme step and should not be taken lightly." *McDermott v. Recupero (In re Recupero),* No. 13-60322, 2014 WL 1884331, at *5 (Bankr. N.D. Ohio May 12, 2014) (citations omitted).

11 U.S.C. § 727(a)(4)(A)

Plaintiff first seeks summary judgment pursuant to § 727(a)(4)(A), which requires Plaintiff to prove that Defendant "(1) made a statement under oath; (2) the statement was false;

(3) Defendant knew that the statement was false when he made it; (4) Defendant fraudulently intended to make the statement; and (5) the statement materially related to the bankruptcy case." *Russell v. Heath (In re Heath)*, Adv. Proc. No. 3:16-ap-3018-SHB, 2018 WL 702825, at *3 (Bankr. E.D. Tenn. Feb. 2, 2018) (citing *Ayers v. Babb (In re Babb)*, 358 B.R. 343, 355 (Bankr. E.D. Tenn. 2006)). Although Plaintiff has offered facts sufficient to satisfy four of these elements – that the initial Statement of Financial Affairs and Schedule I signed under penalty of perjury and filed by Defendant on April 25, 2016, contained false information; that Defendant knew the information was incorrect at that time; and that the statements and schedules materially related to his bankruptcy case – Plaintiff has failed to offer proof concerning the final element: that Defendant fraudulently intended to make the statement.

Courts "must exercise caution in deciding issues of intent at the summary judgment stage, especially when the moving party bears the burden of proof as to the nonmoving party's state of mind." *ABCD Holdings, LLC v. Hannon (In re Hannon)*, 512 B.R. 1, 16-17 (Bankr. D. Mass. 2014); *see also Summerfield Developers, Inc. v. Mihalatos (In re Mihalatos)*, 527 B.R. 55, 65 (Bankr. E.D.N.Y. 2015) ("Due to the total bar on the Debtor's discharge that would occur under § 727, a court must be mindful of the impact of granting summary judgment against the Debtors." (citations omitted)). Plaintiff failed to address Defendant's intent in the Motion and supporting documents. Plaintiff's only reference concerning Defendant's intent is found in the response to paragraph 3 of Defendant's Additional Undisputed Material Facts:

> 3. The Defendant lacked fraudulent intent for false statements in his schedules and Statement of Financial Affairs (Wilkinson Affidavit ¶6).
>
> RESPONSE:
>
> The Plaintiff objects to this being a "fact" as it is actually a conclusion of law and does not require a response. To the extent that this paragraph contains any facts that require a response, the Plaintiff denies that the Defendant lacked

> fraudulent intent based upon the totality of circumstances presented by the Plaintiff in his Motion for Summary Judgment, Brief in Support, and Statement of undisputed facts. In support of this denial, the Plaintiff relies upon the previously submitted Affidavit of Michael H. Fitzpatrick, Partial Deposition Transcript of Richard Parker Wilkinson, and the Requests to Admit to Debtor. The Plaintiff also bases this denial on the fact that the Defendant has previously filed for Chapter 7 relief on three other occasions (March 20, 2003 [[t]his case ended with a successful discharge and bore docket number 3:03-bk-31489-rs], August 29, 20015 [*sic*] [[t]his case was dismissed by the court due to the Defendant's failure to obtain pre-petition credit counseling . . . [and] bears docket number 3:15-bk-32526-SHB], and Nov. 21, 2015 [[t]his case was dismissed by the court due to the Defendant's failure to pay the filing fee and file required schedules . . [and] bears docket number 3:15-bk-33517-SHB] establishing his familiarity with the bankruptcy system.

[Doc. 29 at pp. 1-2.] This response to Defendant's affirmative assertion of an undisputed fact, however, does not overcome the lack of actual proof in the record to reflect Defendant's intent as to the inaccurate statements and schedules. Additionally, the fact that Defendant has filed a total of four bankruptcy cases does not, in and of itself, "establish[] his familiarity with the bankruptcy system." The first case, filed more than fifteen years ago, was filed by Defendant with the assistance of an attorney. The following three cases, including his current one, were filed by Defendant acting *pro se*, although he subsequently obtained representation in the underlying case, and Defendant's prior cases filed in 2015 were dismissed for procedural reasons that potentially could have been avoided had he been represented by counsel.

Without evidence to satisfy the intent element, there is a genuine dispute of material fact, and Plaintiff is not entitled to judgment as a matter of law that Defendant's discharge should be denied pursuant to subsection (a)(4)(A).[1]

[1] Because Plaintiff did not meet his burden of proving that all of the § 727(a)(4)(A) elements have been met, the burden does not shift to Defendant. That said, Defendant's Affidavit, filed in support of his response to Plaintiff's Motion, states that he did not possess fraudulent intent and he amended his statements and schedules after he retained counsel. [Doc. 28 at ¶¶ 5-6, 10-12 (erroneously numbered as a second paragraph 10).]

11 U.S.C. § 727(a)(5)

Plaintiff also seeks summary judgment under 11 U.S.C. § 727(a)(5), which requires him to demonstrate that "(1) at a time not too remote from the bankruptcy, the Defendant owned identifiable assets; (2) on the day that he commenced his bankruptcy case, the Defendant 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) (citations omitted). Notwithstanding the foregoing requirements, the only reference to § 727(a)(5) in the Motion and its supporting documentation is an assertion that Plaintiff should prevail "due to the fact that the Defendant has acknowledged that his Statement of Financial Affairs and Schedule I was [*sic*] false." [Doc. 24 at p. 6.] This unsubstantiated declaration, however, is not proof that Defendant owned identifiable assets before filing his case, that he no longer owned such assets on the petition date, and that his statements and schedules failed to adequately explain disposition of the assets. Once again, the record does not support Plaintiff's assertion that he is entitled to judgment as a matter of law denying Defendant a discharge.[2]

11 U.S.C. § 727(a)(6)(A)

Finally, Plaintiff argues that summary judgment is appropriate under § 727(a)(6)(A) because Defendant does not dispute that he failed to comply with the Court's August 18, 2016 Order entered in the underlying bankruptcy case, directing Defendant to "file amended Schedules I and J, and an amended Official Form 122A-2 Chapter 7 Means Test Calculation no later than August 25, 2016" [Doc. 55, Case No. 3:16-bk-31282-SHB]. Courts are split concerning the requirements to satisfy the burden of proof under § 727(a)(6)(A); however, as

[2] Because Plaintiff did not meet his burden of proving that the requirements of § 727(a)(5) have been met, the burden does not shift to Defendant.

stated by the Honorable Richard Stair, Jr. in *Roberts v. Starnes (In re Starnes)*, Adv. No. 09-3171, 2010 WL 711804 (Bankr. E.D. Tenn. Feb. 23, 2010):

> A majority of courts has held that the statutory term 'refused' in § 727(a)(6)(A) requires an element of willfulness and intent, *McDow v. Gardner (In re Gardner)*, 2008 Bankr. LEXIS 4304, at *7-8, 2008 WL 2766079, at *3 (Bankr. D.D.C. July 14, 2008), while a minority of courts has held that a § 727(a)(6)(A) action should be treated as one for civil contempt, requiring merely proof that the debtor had knowledge of the order, the debtor violated the order, and the violated order was specific and definite. *Fidelity & Guaranty Life Ins. Co. v. Settembre (In re Settembre)*, 2010 Bankr. LEXIS 331, at *23, 2010 WL 420561, at *8 (Bankr. W.D. Ky. Feb. 1, 2010). In either event, however, because a debtor may present factual proof in defense of the objection to discharge, whether it is proof of the debtor's intent under the majority view, or the debtor's inability or impossibility to comply under the minority view, and when an individual's intent is at issue, it would be inappropriate to grant summary judgment. *See Ohio Carpenters' Pension Fund v. Aerni (In re Aerni)*, 402 B.R. 801, 807 (Bankr. N.D. Ohio 2009) (citing *Hoover v. Radabaugh*, 307 F.3d 460, 467 (6th Cir. 2002)); *Settembre*, 2010 Bankr. LEXIS 331, at *24, 2010 WL 420561, at *9 (citing *United States v. Bryan*, 70 S. Ct. 724, 730-32 (1950)).

2010 WL 211804, at *2. This Court agrees that it would be inappropriate to enter summary judgment without proof of Defendant's intent on this record.

Summary

In summary and for the foregoing reasons, the Court finds that there is a genuine dispute of material facts concerning whether Defendant possessed the requisite fraudulent intent to justify denying his discharge pursuant to 11 U.S.C. § 727(a)(4)(A) and/or (a)(6). The Court also finds that, upon consideration of the record provided through the Motion for Summary Judgment and its supporting documentation, taking the proof in a light more favorable to Defendant and construing the § 727 exceptions to discharge strictly against Plaintiff but liberally in Defendant's favor, Plaintiff has not met his burden of proof that he is entitled to judgment as a matter of law that Defendant's discharge should be denied under 11 U.S.C. § 727(a)(4)(A), (a)(5), and/or (a)(6). Accordingly, the Court directs that the Motion for Summary Judgment filed by Plaintiff

on July 31, 2018 [Doc. 23], is DENIED.

###