Not for Publication

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

IN RE:	CASE NO.	11-30020 (LMW)
DEREK J. PORTALUPPI,	CHAPTER	7
DEBTOR.		
WILLIAM HOLMES,	ADV. PRO. NO.	11-3021
PLAINTIFF	ECF NO.	16, 66
vs.		
DEREK J. PORTALUPPI,		
DEFENDANT.		

William Holmes
239 Old Marlborough Turnpike
Portland, CT 06480

Pro Se Plaintiff

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Attorney for Debtor/Defendant

MEMORANDUM OF DECISION AND ORDER
RE: OBJECTION TO DISCHARGE AND ECF NO. 66[1]

Lorraine Murphy Weil, Chief United States Bankruptcy Judge

The matter before the court is the above-referenced *pro se* plaintiff's (the "Plaintiff") First Amended Complaint (ECF No. 16, the "Amended Complaint") objecting to entry of the above-

[1] References herein to the docket of this adversary proceeding appear in the following form: "ECF No. __." References herein to the docket of the above-referenced chapter 7 case appear in the following form: "Case ECF No. __."

referenced debtor's (the "Debtor") discharge pursuant to 11 U.S.C. §§ 727(a)(2)(A), (a)(3) and (a)(4)(A). This court has jurisdiction over this proceeding (and the authority to enter final orders and a final judgment therein) pursuant to 28 U.S.C. §§ 157(b) and 1334(b) and that certain Order dated September 21, 1984 of this District (Daly, C.J.).[2] This memorandum constitutes the findings of fact and conclusions of law mandated by Rule 52 of the Federal Rules of Civil Procedure (made applicable here by Rule 7052 of the Federal Rules of Bankruptcy Procedure).

I. BACKGROUND

A. The Case

The Debtor commenced this chapter 7 case by a petition filed on January 4, 2011. (*See* Case ECF No. 1.) Annexed to that petition were a set of schedules and a statement of affairs (collectively, the "Original Schedules"). The Original Schedules averred (among other things) that (a) the Debtor owned real property worth $222,380.00 (subject to a mortgage in the amount of $241,969.75); (b) the Debtor owned personal property with an aggregate value of $15,592.59 (including a 1990 Ford Thunderbird Super Coupe 2D worth $1,545.00, and a 1996 GMC Yukon Sport Utility 4D worth $2,485.00);[3] (c) there were no secured claims beyond the mortgage on the real property; (d) there were no unsecured priority claims; and (e) there were unsecured nonpriority claims against the Debtor's estate in the aggregate amount of $11,403.32. (*See* Case ECF No. 1.) Only one of those unsecured nonpriority claims was listed as either "contingent" or "disputed": a claim held by

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[2] That order referred to the "Bankruptcy Judges for this District" *inter alia* "all proceedings arising under Title 11, U.S.C. , or arising in . . . a case under Title 11, U.S.C. . . . ."

[3] Both motor vehicles were claimed as exempt by the Debtor. (*See* Case ECF No. 1 (Schedule C - Property Claimed as Exempt).)

the Plaintiff for "2005 Unpaid rent and taxes" in an "unknown" amount. (*Id.* (Schedule F - Creditors Holding Unsecured Nonpriority Claims).)

Schedule I (Current Income of Individual Debtor(s)) filed with the Original Schedules states that, as of the petition date, the Debtor had worked as a "[d]ispatcher" for Burris Logistics in Rocky Hill, Connecticut for about one year. Schedule I also states that, as of the petition date, the Debtor had monthly take home pay of $2,958.19. (*See* Case ECF No. 1 (Schedule I).) Schedule J (Current Expenditures of Individual Debtor(s)) filed with the Original Schedules states that, as of the petition date, the Debtor's monthly expenses were $3,503.36. (*See* Case ECF No. 1 (Schedule J).)

The Statement of Financial Affairs (the "SOFA") filed with the Original Schedules gives the following income history for the Debtor: $31,669.71 - "2010: Employment Income;" $30,015.00 - "2009: Employment Income;" and $106,551.00 - "2008: Employment Income." (*See* Case ECF No. 1 (Statement of Financial Affairs, item 1).) The SOFA also discloses the existence of a "[p]ending suit" in the "Hartford Housing Session" venue of the Connecticut Superior Court captioned *Holmes v. Portaluppi,* Docket #CVH-7387, "for unpaid rent and taxes" (the "State Court Action"). (*See id.*, item 4.) In response to the direction in the SOFA that the Debtor "[l]ist all . . . property, other than property transferred in the ordinary course of the business or financial affairs of the debtor, transferred either absolutely or as security within *two years* immediately preceding the commencement of this case" (Case ECF No. 1 (SOFA, item 10)), the Debtor answered "None." (*See id.*) The SOFA also discloses that the Debtor owned a "[b]ar" business in Rocky Hill for about 9 months in 2003. (*See id.,* item 18.) The Debtor's mailing matrix had two entries that are relevant for present purposes: "William Holmes, 2519 Main Street, Rocky Hill, CT 06067 [the "Plaintiff's

Matrix Address"];" and "Zuboff & Onore, LLP, Attn: Eric Onore, 344 Center Street, Manchester, CT 06040 ["Plaintiff's Counsel's Matrix Address"]." (*See* Case ECF No. 1 (Creditor Matrix).)[4]

The Debtor was examined under oath by the chapter 7 trustee (the "Trustee") pursuant to 11 U.S.C. § 341 (the "Section 341 Examination") on or about January 25, 2011. (*See* Case Docket Entry for January 26, 2011.)[5] Among other things, the Debtor testified about the Vehicle Transfers (as defined below). On January 26, 2011, the Trustee docketed her report that, based upon the Section 341 Examination (among other things), she had determined that no distributions would be made to creditors in this case. (*See id.* Docket Entry for January 26, 2011.) The last date for filing objections to discharge in this case was March 28, 2011. (*See* Case ECF No. 7.)

On August 16, 2011, the Debtor filed an amended Schedule F (Creditors Holding Unsecured Nonpriority Claims) (Case ECF No. 20, the "Amended Schedule F") and an amended SOFA (Case ECF No. 22, the "Amended SOFA"). The Amended Schedule F added a claim for a "2009-10 Personal Loan" held by "Ed and Tina Portaluppi" in the amount of $25,000.00. (*See* Case ECF No. 20.)[6] The Amended SOFA made two changes. First, it supplemented the Debtor's income information given in response to item 2 of the SOFA as follows: $2,720.00 - "2010 unemployment income;" $24,974.00 - "2009 unemployment income;" and $1,400.00 - "2010 rental income." (*See* Case ECF No. 22, item 2; *cf.* Debtor Exh. (as hereafter defined) D (2009 Federal Income Tax

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[4] The Plaintiff alleges in his March 5, 2012 post trial brief that he "parted ways" with his counsel in the State Court Action, Eric Onore, Esq., on or about January 5, 2011. (*See* ECF No. 52 at 1.) However, (even if such allegation is true) there is no evidence in the record that the Debtor knew about the foregoing.

[5] A transcript of that examination is not in evidence.

[6] That added claim was not listed as contingent, unliquidated or disputed. (*See id.*)

Return), Debtor Exh. F (2010 Federal Income Tax Return).) Second, the Debtor amended his response to item 10 of the SOFA from "None" to aver the following transfers:

NAME AND ADDRESS OF TRANSFEREE, RELATIONSHIP TO DEBTOR	DATE	DESCRIBE PROPERTY TRANSFERRED AND VALUE RECEIVED
Unknown Hamden, CT	6/2009	1994 Tahoe sold for $2,000
Unknown MA	4/2010	1993 Lincoln Mark VIII sold for $500
Unknown	10/2009	1971 El Camino sold for $6,000

(Case ECF No. 22, item 10 (collectively, the "Vehicle Transfers").) Amended Schedule F and the Amended SOFA conformed the Original Schedules to the Debtor's Section 341 Examination testimony.

B. Adversary Proceeding

The Plaintiff timely commenced this adversary proceeding by the filing of a complaint (ECF No. 1, the "Complaint") on March 25, 2011. The Complaint did not allude to 11 U.S.C. § 727 (although the Adversary Proceeding Cover Sheet did). (*See id.*) On April 14, 2011, the Plaintiff requested entry of a proposed pretrial order in this proceeding. (*See* ECF No. 6.) At that time, both parties were *pro se.* (*See* Adversary Proceeding Docket.) In light of the foregoing, on April 20, 2011 the court instead issued a scheduling order which required the appearance of both *pro se* parties at an on-the-record status conference scheduled for May 11, 2011. (*See* ECF No. 7.) On April 26, 2011, Scott M. Charmoy, Esq. filed an appearance in this adversary proceeding on behalf of the Debtor. (*See* ECF No. 9.)[7] On April 29, 2011, the now-represented Debtor filed an answer to the

[7] Nicole M. Boston, Esq. was the Debtor's original chapter 7 counsel and has not withdrawn her appearance to date. Attorney Charmoy is listed on the chapter 7 case docket as the

Complaint. (*See* ECF No. 10.) On May 5, 2011, the Plaintiff filed a "Reply to Defendant's Answer & Special Defenses" (ECF No. 12, the "Response"). The status conference was held as scheduled on May 11, 2011. (*See* Adversary Proceeding Docket Entry of even date.) (*See also* Oral Record of 5/11/2011 Status Conference at 11:42:41 *et seq.*) The initial pretrial order was signed that day. (*See* ECF No. 13.)

On May 20, 2011, the Plaintiff filed that certain Objection to Bankruptcy Petition. (*See* ECF No. 16.) By order dated May 20, 2011, the court deemed that Objection to be a motion to amend the Complaint and set that motion down for a hearing. (*See* ECF No. 15.) On the same day, the Debtor also filed a "Motion for Court Ordered Discovery." (*See* ECF No. 17, the "Discovery Motion.") The Discovery Motion also was set down for a hearing. On June 21, 2012, the court issued (without objection) that certain Order Granting Motion for Leave To Amend Complaint and Requiring Re-Docketing of ECF No. 16 as "First Amended Complaint" (*i.e.,* the Amended Complaint). (*See* ECF No. 23.) The Amended Complaint is discussed more fully below. On July 5, 2011, the Debtor filed an answer (ECF No. 25, the "Amended Answer") to the Amended Complaint. (*See* ECF No. 25.) The Court granted the Discovery Motion by order dated July 18, 2011. (*See* ECF No. 29, the "Discovery Order.") The Discovery Order speaks for itself.[8] An Amended Pretrial Order also issued

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Debtor's additional chapter 7 counsel (probably as the result of CM/ECF filings by Attorney Charmoy on August 16, 2011). (*See* Case ECF Nos. 20, 22.)

[8] On August 19, 2011, the Plaintiff filed a "Motion for Revocation of Discharge" (ECF No. 33.) After a hearing on December 15, 2011, it was determined that no action would be taken on that document. (*See* Adversary Proceeding Docket entry for December 15, 2011.)

Also on August 19, 2011, the Plaintiff filed a "Request" pursuant to 11 U.S.C. § 727(c)(2) for the court to order the Trustee to examine the acts and conduct of the Debtor with respect to entry of discharge. (*See* ECF No. 34.) After a hearing held on December 15, 2011, the court denied that "Request" to be untimely for the reasons stated on the Hearing record. (*See* Oral Record of 12/15/2011 Hearing at 10:15:48 *et seq.*; ECF No. 58.)

on July 18, 2011. (*See* ECF No. 28.) Pursuant to that order, counsel for the Debtor filed a Defendant's List of [Trial] Exhibits, Witnesses and Their Testimony. (*See* ECF No. 32.) On August 31, 2011, the Plaintiff filed an "Objection" to that list. (*See* ECF No. 37.) After a hearing on December 15, 2011, the court directed that no action be taken on the "Objection." (*See* Adversary Proceeding Docket Entry for 12/15/2011.)[9]

The trial on the Amended Complaint commenced on December 15, 2011 and was continued to January 26, 2012. Both the Plaintiff and the Debtor testified at the trial and both introduced documentary evidence into the record.[10] The trial was complicated by two events. First, during the trial, counsel for the Debtor discovered that he had inadvertently attached an email to his client to a document previously produced to the Plaintiff (the court had just admitted the document (with the attached email) as a full exhibit at the time of such discovery by counsel). (*See* Oral Record of 12/15/2011 Hearing at 12:32:23 *et seq.*) Counsel orally moved for a protective order with respect to the subject email. The court conducted an *in camera* review of the email and ordered a briefing schedule and a continued hearing with respect to the issue. (*See id.* at 2:33:43 *et seq.*) At the continued (*i.e.,* January 26, 2012) proceedings, the court granted a protective order pursuant to Rule 502(b) of the Federal Rules of Evidence and Rule 26(b)(5) of the Federal Rules of Civil Procedure for the reasons stated on the record. (*See* Oral Record of 1/26/2012 Hearing at 2:13:58 *et seq.*)

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[9] The court construed the "Objection" to be a motion in limine. As such, the court deemed the motion to be improper, but reserved the Plaintiff's right to object to the subject evidence as it was proffered by the Debtor at trial. (*See* Oral Record of 12/15/2011 at 10:21:11 *et seq.*) The court also deemed the "Objection" to be a pretrial brief in support of the Amended Complaint. (*See id.* at 10:32:19 *et seq.*)

[10] References herein to trial exhibits appear in the following form: "Plaintiff Exh. __" or "Debtor Exh. __," as the case may be.

The second complication indirectly arose from the first. The Plaintiff filed a "Brief" purportedly with respect to the "inadvertent disclosure" issue on January 12, 2012. Attached to that brief were twenty-two (22) pages of documents. (*See* ECF No. 50.) Of those documents, seventeen (17) pages related to purported interchanges between the Plaintiff and the Maine Bureau of Motor Vehicles (*see id.* at 6-22, the "Motor Vehicle Documents") and the remaining five (5) pages related to purported interchanges between the Plaintiff and a website named "AutoTrader.com" (*see id.* at 1-5, the "AutoTrader Documents").[11] At the continued trial, the court advised the Plaintiff that annexing the AutoTrader Documents and the Motor Vehicle Documents to his brief did not make those documents evidence. In response, the Plaintiff moved to have the subject documents admitted into evidence. Counsel for the Debtor objected on grounds including, but not limited to, hearsay. The court sustained the hearsay objection. The AutoTrader Documents plainly were inadmissible hearsay. (*See* Oral Record of 1/26/2012 Hearing at 3:03:48 *et seq*.) The Motor Vehicle Documents did not qualify for a hearsay exception under Rule 803(8) of the Federal Rules of Evidence ("Public records and reports") because they were not properly authenticated pursuant to Rule 902(1) or (2) of the Federal Rules of Evidence and were not otherwise authenticated. (*See id.* at 2:56:47 *et seq*.)[12]

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[11] The Debtor apparently used AutoTrader.com in connection with at least some of the Vehicle Transfers. (*See* Oral Record of 12/15/2011 Hearing at 3:49:06 *et seq*.)

[12] The court concluded that Rule 902(1) was not satisfied because the documents lacked an "attestation." (*See id.*) The court now believes that the better analysis is that neither Rule 902(1) nor (2) were satisfied because of the lack of "seal[s]." *Cf.* 31 C.A. Wright and V.J. Gold, *Federal Practice and Procedure: Evidence,* §§ 7135, 7136 (2000). With respect to the Motor Vehicle Documents in respect of the Ford F350 (as defined below), those documents were mooted by the Debtor's admission that his name had been on the title to that vehicle prior to the transfer discussed below. The court noted that the foregoing was not necessarily dispositive of actual ownership of that vehicle. (*See* Oral Record of 1/26/2012 Hearing at 3:05:37 *et seq*.)

After adjudication of the foregoing "complications," the trial record was closed and the matter was taken under advisement (subject to a briefing schedule). Briefing now is complete and the matter is ripe for decision. (*See* ECF Nos. 52 (Plaintiff brief), 53 (Plaintiff brief), 54 (Debtor brief), 55 (Debtor brief), 56 (Plaintiff brief), 57 (Plaintiff brief), 63 (Plaintiff brief).)[13]

II. THE AMENDED COMPLAINT AND THE AMENDED ANSWER

Because the Plaintiff is *pro se,* the Amended Complaint is somewhat inartful. Accordingly, the court deems it advisable to set forth the Amended Complaint in its entirety.

The debtor named above should not be granted any bankruptcy protection or discharge without submitting the following information listed below as a challenge to his list of assets.

> 1. Under the code section 727(a)(2)(3) [sic] & 727(a)(4)(a) [sic]. The debtor named above knowingly falsified information and made a false oath to the court. The Defendant knew the exact contact information of the Plaintiff. It has been available with his attorney Ryan McKeen. You will find this information under Hartford Housing Docket #CVH-7387. This was a malicious attempt by the Defendant to keep the Plaintiff from any proceedings of his bankruptcy case. You will find an example attached hereto.[14]
> 2. Under the code section 727(a)(2)(3) [sic] & 727(a)(4)(a) [sic]. The debtor named above failed to preserve any recorded information and made a false oath on his employment history. One of the reasons the debtor named above filed for bankruptcy protection is he lost his job and had to settle for employment at a reduced salary. In the past the debtor named above has been terminated for Embezzlement and Fraud and forced to settle with the employer or face charges.
> 3. Under the code section 727(a)(2)(3) [sic] & 727(a)(4)(a) [sic]. The debtor named above failed to preserve a complete documentation of all motor vehicles purchased, transfered [sic] or financed from person to person or financial institution

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[13] ECF No. 63 was stricken from the record for failure to serve the Debtor. (*See* ECF No. 66.) That order is hereby vacated and the court has taken the subject brief into consideration. Certain post-trial pleadings filed by the Plaintiff were denied or stricken as "unnecessary" or otherwise improper. (*See* ECF Nos. 65, 66, 67.)

[14] Annexed to the Amended Complaint are a copy of the docket of, and certain pleadings in, the State Court Action. Of particular interest is the "Request for Pre Trial" dated February 19, 2010 (the "State Court Pleading"). The State Court Pleading recites Plaintiff's address as 239 Old Marlborough Tpke, Portland, Conn. 06480" and further recites that such pleading was served on the Debtor's counsel as follows: "Leone, Throwe, Teller & Nagle, Ryan C. McKeen, His Attorney, 33 Connecticut Blvd., East Hartford, Ct. 06128."

with a legally written transfer or a bill of sale within the State of Connecticut and the State of Maine.

4. Under the code section 727(a)(2)(3) [sic] & 727(a)(4)(a) [sic]. The debtor named above failed to preserve a complete documentation of financial record of the past (10) ten years of any state and federal taxes/checking and savings accounts/retirement-401K/real estate transactions married or divorced/business transactions or cash transfers from person to person.

(ECF No. 16.)

Similar considerations also support the court's decision to set forth the Amended Answer in its entirety:

1. Defendant denies the allegations of paragraph 1.

2. As to the allegations contained in paragraph 2, Defendant admits that a salary decrease was a factor in his decision to file the instant bankruptcy case, and denies the remaining allegations.

3. Defendant denies the allegations of paragraph 3.

4. As to the allegations contained in paragraph 4, Defendant admits that he does not have a complete documentary record of the past ten years of his financial transactions, and denies the remaining allegations.

FIRST SPECIAL DEFENSE

1. As to all Counts, Plaintiff has failed to state claims upon which relief can be granted.

(ECF No. 25.)

At the December 15, 2011 hearing, the Plaintiff conceded that paragraphs 2 and 4 were each intended to be "more of a brief" and confirmed that he was proceeding only on paragraphs 1 and 3 of the Amended Complaint. (*See* Oral Record of 12/15/2011 Hearing at 10:43:51 *et seq.*)

III. FACTS

For some time prior to 2007, the Debtor and the Plaintiff were housemates at the Plaintiff's Matrix Address.[15] Title to the house was solely in the Plaintiff's name. The Debtor moved out in or about November of 2006. Some time after December 31, 2006 the Plaintiff lost title to the house through foreclosure and moved away from the Plaintiff's Matrix Address. (*See* Oral Record of 12/15/2011 Hearing at 10:46 *et seq.*; Debtor Exh. B.) As noted above, at least up to a point Eric Onore, Esq. represented the Plaintiff in the State Court Action. (*See* Debtor Exh. B.) The Summons - Civil dated December 31, 2006 for the State Court Action listed the Plaintiff's Matrix Address as his then-current mailing address. (*See* Debtor Exh. B.) On or around September 11, 2009, counsel for the Debtor (Ryan C. McKeen, Esq.) served a pleading entitled "Motion for Non-Suit for Failure to Plead" upon the Plaintiff at the Plaintiff's Matrix Address. (*See* ECF No. 16 (attachment).) On or about December 7, 2009, the Plaintiff served a pleading entitled "Objection To Motion for Default for Failure to Plead upon Attorney McKeen (the Debtor's counsel). (*See id.*) On that pleading, Plaintiff listed his own address as follows: "239 Old Marlborough Tpke, Portland, Conn. 06480 ["Plaintiff's Current Mailing Address"]." On or about January 5, 2011, Attorney McKeen verbally advised the Plaintiff that the Debtor was going to commence a bankruptcy case. (*See* Oral Record of 12/15/2011 Hearing, *supra.*) However, the Debtor retained Nicole M. Boston, Esq. (rather than Attorney McKeen) to file his bankruptcy petition. (*See* Case ECF No. 1.) The record does not disclose any communications between Attorney Boston and Attorney McKeen concerning the Plaintiff's Current Mailing Address. It is uncontested that the Plaintiff did not receive the notice of

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[15] Based upon the nature of the State Court Action, the court assumes that the Plaintiff claims that he was in the nature of the Debtor's landlord during that time. Details of that alleged arrangement are set forth in Debtor Exh. B.

this case sent to him at the Plaintiff's Matrix Address, did not learn of the pendency of this case otherwise until after the Section 341 Examination and did not appear at the Section 341 Examination. Prior to the Section 341 Examination, the Plaintiff did not have any communications with the Debtor directly about the Plaintiff's Current Mailing Address. (*See* Oral Record of 12/15/2011 Hearing at 12:18:23 *et seq.*)

The Debtor testified as to the Vehicle Transfers at the Section 341 Examination. (*See* Oral Record of 12/15/2011 Hearing at 12:39:36 *et seq.*) The Debtor testified at both the Section 341 Examination and at trial that the Vehicle Transfers were arm's-length transactions with third parties. (*See id.* at 12:39:38 *et seq.*) He further testified that he did not retain any documentation with respect to those transfers. (*See id.* at 2:55:48 *et seq.*) The Debtor testified at the trial that he failed to list the Vehicle Transfers on the SOFA because he "misunderst[ood]" the question (*i.e.,* item 10). (*See id.* at 12:39:28 *et seq.*)[16]

It is uncontested that the Debtor did not disclose matters related to a certain 2000 Ford F350 truck (the "Ford F350") at his Section 341 Examination, in the SOFA or in the Amended SOFA. At trial, the Debtor testified that the Ford F350 was owned by a friend undergoing financial (*i.e.,* tax) problems. (*See* Oral Record of 12/15/2011 at 3:22:01 *et seq.*, 3:55:11 *et seq.*) The Debtor further testified that, as an accommodation to that friend, the Debtor registered the Ford F350 in Maine in the Debtor's name and that subsequently (in July of 2010) he took his name off the title. (*See id.*)

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[16] Plaintiff Exh. 2 was not admitted into evidence for the reasons stated on the record. (*See* Oral Record of 12/15/2011 at 12:07:00 *et seq.*) In any event, the Plaintiff conceded that Plaintiff Exh. 2 was "focused" to prove transfers of the 1993 Lincoln and the 1991 El Camino. (*See id.* at 12:04:09 *et seq.*) However, the Debtor testified as to those transfers at the Section 341 Examination and the Amended SOFA admits those transfers. The Debtor also testified at trial that he had acquired two vehicles post-petition: a 2003 Chrysler PT Cruiser; and a 2003 Chevrolet S10 pickup truck. (*See id.* at 3:19:18 *et seq.*)

The Debtor further testified that he did not list that transaction among the Vehicle Transfers because he received nothing for such transaction and did not consider himself to be the owner of the F350. He further testified that he did not consider such transaction to be a "transfer." (*See id.* at 3:22:01 *et seq.,* 3:55:01 *et seq.*)

IV. APPLICABLE LAW

A. 11 U.S.C. § 727(a)(2)(A), (3), (4)(A) (In General)

Bankruptcy Code § 727(a) provides in relevant part as follows:

> (a) The court shall grant the debtor a discharge, unless –
>
> . . .
>
> (2) the debtor, with intent to hinder, delay, or defraud a creditor . . . 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;
>
> . . .
>
> (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 transaction might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case; [or]
>
> (4) the debtor knowingly and fraudulently, in or in connection with the case –
>
> (A) made a false oath or account . . . .

11 U.S.C.A. § 727(a) (West 2013). "[G]iven that the denial of a debtor's discharge 'imposes an extreme penalty for wrongdoing,' Section 727 'must be construed strictly against those who object to a debtor's discharge and liberally in favor of the . . . [debtor].'" *Cadle Co. v. Ogalin (In re Ogalin),* 303 B.R. 552, 557 (Bankr. D. Conn. 2004) (Dabrowski, J.) (quoting *In re Chalasani*, 92 F.3d 1300, 1310 (2d Cir. 1996)). The plaintiff in a proceeding under Section 727(a) must prove his

case by a preponderance of the evidence. *See Ogalin, supra* at 557; *see also* Fed. R. Bankr. P. 4005. When proof of the debtor's illicit intent is required as an element of the discharge objection, such proof may be made by circumstantial evidence. *See, e.g., Georgen-Running v. Grimlie (In re Grimlie),* 439 B.R. 710, 717 (BAP 8th Cir. 2010); *Buckeye Retirement Co., LLC v. Swegan (In re Swegan),* 383 B.R. 646, 655 (BAP 6th Cir. 2008), *appeal dismissed,* 555 F.3d 510 (6th Cir. 2009).

B. Bankruptcy Code § 727(a)(2)(A)

The Plaintiff seeks denial of the Debtor's discharge under Section 727(a)(2)(A). To prevail under Section 727(a)(2)(A), the plaintiff must prove by a preponderance of the evidence "the following four elements: (1) the debtor transferred, removed, concealed, destroyed, or mutilated, (2) his or her property, (3) within one year of the bankruptcy petition's filing, (4) with the intent to hinder, delay, or defraud a creditor." *Rowlands v. Fraser (In re Rowlands),* 346 B.R. 279, 282 (B.A.P. 1st Cir. 2006) (internal quotation marks omitted).

C. Bankruptcy Code § 727(a)(3)

The Plaintiff seeks denial of the Debtor's discharge under Section 727(a)(3) for an alleged failure to "keep or preserve any recorded information . . . from which the . . . [Debtor's] financial condition or business transactions might be ascertained . . . [with respect to the subject motor vehicle transfers]," 11 U.S.C.A. § 723(a)(3) (West 2013).

> The purpose of the Bankruptcy . . . [Code] provisions barring discharge for failure to keep adequate records is to insure that trustees and creditors have enough information on hand to effectively trace, evaluate, and reconstruct the financial history and present condition of the debtor's bankruptcy estate. *[See, e.]g.[,] In re Blonder*, 258 B.R. 534 (Bankr. D. Conn. 2001); *State Bank of India v. Sethi (In re Sethi)*, 250 B.R. 831, 837 (Bankr. E.D.N.Y. 2000); *In re Frommann*, 153 B.R. 113, 116 (Bankr. E.D.N.Y. 1993); *Aid Auto Stores, Inc. v. Anthony Pimpinella (In re Pimpinella)*, 133 B.R. 694, 697 (Bankr. E.D.N.Y. 1991); *See also In re Underhill*, 82 F.2d 258, 260 (2d Cir. 1936), *cert. denied,* 299 U.S. 546, 57 S.Ct. 9, 81 L.Ed. 402 (1936) (applying corresponding provision of the Bankruptcy Act); *In re Harron*, 31

> B.R. 466, 469 (Bankr. D. Conn. 1983). The Plaintiff must show that [(1)] "the debtor either failed to keep or preserve records . . . [and] [(2)] such failure . . . makes it unduly burdensome to determine the debtor's financial condition and material business transactions." *In re Wolfson*, 139 B.R. 279, 286 (Bankr. S.D.N.Y. 1992). The records need not be in any particular form; however they must be sufficient to "enable his creditors reasonably to ascertain his present financial condition and to follow his business transactions for a reasonable period in the past." *Office of the Comptroller General v. Tractman*, 107 B.R. 24, 26 (S.D.N.Y. 1989).

Casa Investments Co. v. Brenes (In re Brenes), 261 B.R. 322, 329-30 (Bankr. D. Conn. 2001) (Dabrowski, J.).[17] To prevail on a Section 723(a)(3) objection, it is not necessary for the plaintiff to demonstrate that there was an intent to conceal behind the debtor's failure to keep books/records. *Juzwiak,* 89 F.3d at 430. With respect to the first *Brenes* prong, the plaintiff must establish at trial that the debtor "failed to create, maintain and/or preserve the complement of business and personal records that would be expected of a reasonably prudent person in the [d]ebtor's position," *D.A.N. Joint Ventures v. Cacioli (In re Cacioli),* 285 B.R. 778, 782-83 (Bankr. D. Conn. 2002) (Dabrowski, J.), *aff'd*, 332 B.R. 514 (D. Conn. 2005), *aff'd*, 463 F.3d 229 (2d Cir. 2006). Further,

> [i]f the occupation or business is of a kind in which persons normally would not keep books or records, failure by the debtor so to do does not bar the discharge. It has even been said that a business may be so small that no books or records are required to be kept, although it would seem that not the size of the business but its complexity fixes the bounds of the duty . . . Few consumer debtors maintain anything more than, at most, a collection of bills, receipts and canceled checks, and, absent a sudden and large dissipation of assets, a discharge should not be denied in a typical consumer bankruptcy case due to a lack of books or records.

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[17] *Brenes* uses an "unduly burdensome" test. It is true that some courts state the test in terms of "impossibil[ity]." *See, e.g., Meridian Bank v. Alten*, 958 F.2d 1226, 1232 (3d Cir. 1992); *O'Connell v. DeMartino (In re DeMartino),* 448 B.R. 122, 130 (Bankr. E.D.N.Y. 2011). However, it appears that even those courts which use an "impossibil[ity]" test may not use literal "impossibil[ity]" as the test. *See, e.g., In re Juzwiak*, 89 F.3d 424 (7th Cir. 1996); *PNC Bank v. Buzzelli (In re Buzzelli)*, 246 B.R. 75 (Bankr. W.D. Pa. 2000). Because of the basis for the court's decision here, it is unnecessary to determine whether or not the *Brenes* "unduly burdensome" test differs materially from the "impossibil[ity]" test used by some other courts and, if so, which test is more appropriate.

6 Alan N. Resnick & Henry J. Sommer, *Collier on Bankruptcy* ¶ 727.03[3][g] (16th ed. 2010) (footnotes omitted).

"Once a plaintiff has established a prima facie case that the debtor concealed, destroyed, or failed to keep material records, the burden of proof shifts to the defendant to furnish credible, rebuttal evidence that such act or failure was justified." *In re Brenes*, 261 B.R. at 330. Accordingly, were the burden of production thus to be shifted to the Debtor, the court would be required to determine whether the Debtor was justified in his failure to keep or preserve necessary records. In assessing justification, the court may consider the following factors:

> (1) Whether the debtor is engaged in business, and if so, the complexity and volume of the business;
> (2) The amount of the debtor's obligations;
> (3) Whether the debtor's failure to keep or preserve records was due to the debtor's fault;
> (4) The debtor's education, business experience and sophistication;
> (5) The customary business practices for record keeping in the debtor's type of business;
> (6) The degree of accuracy disclosed by the debtor's existing books and records;
> (7) The extent of any egregious conduct on the debtor's part; . . .
> (8) The debtor's courtroom demeanor; [and]
> (9) [A]ny special circumstances that may exist.

Id. (citation and internal quotation marks omitted).

D. <u>Bankruptcy Code § 727(a)(4)(A)</u>

The Plaintiff seeks denial of the Debtor's discharge under Section 727(a)(4)(A). In order to deny discharge under Section 727(a)(4)(A), the Plaintiff must establish by a preponderance of the evidence that: (1) the Debtor made the statement under oath; (2) the statement was false; (3) the Debtor knew that the statement was false; (4) the statement was made with fraudulent intent; and

(5) the statement related materially to the bankruptcy case. *In re Brenes*, 261 B.R. at 334.[18] Omissions as well as affirmative misstatements qualify as false statements for Section 727(a)(4)(A) purposes. *Beaubouef v. Beaubouef* (*In re Beaubouef*), 966 F.2d 174, 178 (5th Cir. 1992). Misstatements and omissions in the debtor's sworn bankruptcy schedules and/or in the debtor's sworn testimony at the debtor's Section 341 examination both are within the purview of Section 727(a)(4)(A). *See, e.g., Moreo v. Rossi (In re Moreo),* 437 B.R. 40 (E.D.N.Y. 2010); *United States of America v. Argenti (In re Argenti),* 391 B.R. 671, 675 (Bankr. D. Conn. 2008) (Shiff, J.).

A statement is deemed to be made with knowledge of its falsity if it was known by the debtor to be false or if it was made with reckless disregard for the truth. *Cacioli*, 285 B.R. at 784. "[O]nce it reasonably appears that the oath is false, the burden falls upon the bankrupt to come forward with evidence that [s]he has not committed the offense charged." *Boroff v. Tully (In re Tully),* 818 F.2d 106, 110 (1st Cir. 1987) (internal quotation marks omitted). Fraudulent intent may be inferred if the false statement is not explained satisfactorily. *Montey Corp. v. Maletta (In re Maletta),* 159 B.R. 108, 112 (Bankr. D. Conn. 1993) (Shiff, J.). However, the risk of nonpersuasion on the issue of fraudulent intent at all times remains with the plaintiff. *See* Fed. R. Evid. 301. *Cf. BTE Concrete Formwork, LLC v. Arbaney (In re Arbaney),* 345 B.R. 293, 301 (Bankr. D. Colo. 2006). A false statement resulting from ignorance or non-reckless carelessness is not a statement that is knowing and fraudulent. *See Sanderson v. Ptasinski (In re Ptasinski),* 290 B.R. 16, 23 (Bankr. W.D.N.Y. 2003) (court may find intent to deceive in a "reckless disregard of both the serious nature of the

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[18] With respect to materiality to the bankruptcy case, this court accepts the following formulation: "The subject matter of a false oath is 'material,' and thus sufficient to bar discharge, if it bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property." *Chalik v. Moorefield* (*In re Chalik*), 748 F.2d 616, 618 (11th Cir. 1984).

information sought and the necessary attention to detail and accuracy in answering" but not in mere ignorance or carelessness); *see also Diorio v. Kreisler-Borg Constr. Co.,* 407 F.2d 1330 (2d Cir. 1969).

V. APPLICATION OF LAW TO FACT

A. Incorrect Plaintiff's Matrix Address for Plaintiff (11 U.S.C. § 727(a)(4)(A))[19]

The Plaintiff claims that the Debtor listed an incorrect address for the Plaintiff on the Debtor's mailing matrix in a "malicious" attempt to keep the Plaintiff from participating at the Section 341 Examination "because the Plaintiff knew too much of what the . . . [Debtor] does and does not have for assets," (ECF No. 52 at 2). The court construes the foregoing as an allegation that "the debtor knowingly and fraudulently, in or in connection with the case – (A) made a false oath or account . . . ," 11 U.S.C.A. § 727(a)(4)(A). As discussed above, Section 727(a)(4)(A) requires fraudulent intent on the Debtor's part. However, the court is not persuaded that the Debtor's use of the incorrect Plaintiff's Mailing Matrix Address was anything other than an honest mistake on the Debtor's part.[20] The court considers the fact that the Debtor listed the Plaintiff's Counsel's Matrix Address on the mailing matrix as an additional attempt by the Debtor to give the Plaintiff notice, which further belies any fraudulent intent on the Debtor's part. While the Debtor (or Attorney Boston) could have contacted Attorney McKeen as to the Plaintiff's Current Mailing Address (Attorney McKeen presumably had knowledge of the same), on this record the court is not persuaded that the Debtor (or Attorney Boston) had any reason to do so.

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[19] Other subsections of Section 727(a) are not apposite to the referenced issue.

[20] In some sense of the word, it was not even a mistake. That is because the Debtor was required to use the Plaintiff's last known address and the Debtor used the last address for the Plaintiff *known to the Debtor at that time*.

B. Ford F350 (11 U.S.C. §§ 727(a)(2)(A), 727(a)(4)(A))[21]

With respect to the Ford F350, the court construes the Plaintiff's allegations to be as follows: (a) the Debtor's removal of his name from the vehicle title is within the purview of Section 727(a)(2)(A) and (b) the Debtor's failure to list such event in item 10 of the SOFA or the Amended SOFA is within the purview of Section 727(a)(4)(A).

Under Maine law, "[a] certificate of title . . . is prima facie evidence of the information appearing on it," 29-A Maine Rev. Stat. Ann. § 658(4) (2013). Such showing may be rebutted by competent evidence. *See O'Donnell v. Chertok (In re Cork & Bagel Trading Co.),* 192 B.R. 789 (Bankr. D. Me. 1995).[22] The court credits the Debtor's testimony[23] that he did not own the Ford F350 (but that his friend did) and concludes that such testimony is sufficient to overcome the inference of ownership. Accordingly, no "transfer" occurred within the purview of Section 727(a)(2)(A) or within the meaning of item 10 of the SOFA or the Amended SOFA. Even if such inference is not overcome, the court credits the Debtor's testimony that he honestly believed and

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[21] The potential applicability of Section 727(a)(3) is discussed below.

[22] The law in Connecticut is to similar effect. *See Malcolm v. Gunn,* No. 524910, 1994 WL 590572, at *3-*4 (Conn. Super. Ct. Oct. 18, 1994).

[23] The Plaintiff raises two general attacks on the Debtor's credibility. First, the Plaintiff alleged in paragraph 2 of the Amended Complaint that the Debtor lost his high paying job in 2009 because he had "been terminated for [e]mbezzlement and [f]raud and forced to settle with the employer or face charges," (ECF No. 16 ¶ 2). That allegation was denied by the Debtor in paragraph 2 of the Amended Answer (ECF No. 25), and there is no evidence of the same in the record. Second, the Plaintiff testified at trial that, in or about 2003, the Debtor transferred vehicles into his father's name when the Debtor's divorce was going on and subsequently the vehicles were transferred back into the Debtor's name. (*See* Oral Record of 12/15/2011 Hearing at 11:45:58 *et seq.*) Even if the court accepts that testimony, because of the event's remoteness in time the court gives such testimony little weight on the merits. Even if the court takes such testimony into consideration in determining the Debtor's credibility, the court has had an opportunity to assess the Debtor's demeanor at trial and found him to be a credible witness notwithstanding the foregoing.

intended that his friend owned the Ford F350, not he, and that he honestly believed that no transfer occurred when the Debtor took his name off the title to the Ford F350 for no consideration in 2010. Accordingly, the court is not persuaded that the fraudulent intent required by Section 727(a)(2)(A) and 727(a)(4)(A) has been established. *Accord Manning v. Watkins (In re Watkins),* 474 B.R. 625, 644 (Bankr. N.D. Ind. 2012) (materially similar circumstances, same result). *Cf. Tibbs v. Caterinacci,* 191 F.2d 957 (4th Cir. 1951) (different result under prior Bankruptcy Act when other, suspicious circumstances were present).

C. Vehicle Transfers (11 U.S.C. §§ 727(a)(2)(A), 727(a)(4)(A))[24]

With respect to the Vehicle Transfers, the court construes the Plaintiff's allegations as follows: (a) the June 2010 transfer of the 1993 Lincoln is within the purview of Section 727(a)(2)(A);[25] and (b) the Debtor's failure to disclose the Vehicle Transfers in his SOFA is within the ambit of Section 727(a)(4)(A).

With respect to the transfer of the 1993 Lincoln, the court credits the Debtor's testimony that such transaction was an arm's-length transaction with a third party. On the other hand, the Plaintiff offers no persuasive evidence of fraudulent intent. Accordingly, the Plaintiff cannot prevail on his Section 727(a)(2)(A) allegation.

With respect to the Plaintiff's Section 727(a)(4)(A) allegation, the court credits the Debtor's testimony that he misunderstood item 10 of the SOFA, and that his failure to include the Vehicle Transfers in his response to item 10 was an honest mistake. The court's belief in the foregoing testimony is buttressed by the fact that the Debtor disclosed the Vehicle Transfers to the Trustee at

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[24] The applicability of Section 727(a)(3) is discussed below.

[25] The other two Vehicle Transfers are not within the purview of Section 727(a)(2) because they are outside the statutory one-year time period.

the Section 341 Examination. As a result, the court is not persuaded that there was the requisite fraudulent intent. Accordingly, the Plaintiff cannot prevail on his Section 727(a)(4)(A) allegation.

D. Adequacy of Financial Records (11 U.S.C. § 727(a)(3)) (Motor Vehicles)

Paragraph 3 of the Amended Complaint asserts the applicability of Section 727(a)(3) on the following grounds: "The debtor named above failed to preserve a complete documentation of all motor vehicles purchased, transfered [sic] or financed from person to person or financial institution with a legally written transfer or a bill of sale within the State of Connecticut and the State of Maine," (ECF No. 16 ¶ 3). Thus, the court's Section 727(a)(3) analysis is limited to motor vehicle documents. It is uncontested that except for references in his bank statements to AutoTrader.com transactions, the Debtor did not retain any motor vehicle documents.

The record indicates that the Debtor is a consumer debtor. For example, the petition does not list the Debtor as a business debtor but, rather, as a consumer debtor. (*See* Case ECF No. 1 (petition cover sheet).) Further, both the SOFA and the Amended SOFA show the Debtor as a pure wage earner (sometimes unemployed) for 2009, and a wage earner (sometimes unemployed) and a small-scale landlord for 2010. (*See* Case ECF Nos. 1 (SOFA), 22 (Amended SOFA).)[26] The Debtor's 2009 and 2010 tax returns are not to the contrary. (*See* Debtor Exh. D, E, F, G.) At most, the record may suggest that the Debtor may have operated some small scale vehicle buying and selling business during the relevant period. To the extent that such business existed, it was small – too small to require substantial record keeping. Given the general simplicity of the Debtor's financial affairs, the court is not persuaded that the Plaintiff has made out his Section 727(a)(3) *prima facie* case.

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[26] The Debtor's brief bar ownership is too remote in time to be relevant.

VI. CONCLUSION

For the reasons discussed above, (a) ECF No. 66 shall be vacated and (b) the court concludes that the Plaintiff has failed to carry his burden of proof under Sections 727(a)(2)(A), (3) and/or (4)(A).[27] Accordingly, a separate judgment shall enter for the Debtor on ECF No. 16, and a discharge shall issue in this case.

It is **SO ORDERED.**

Dated: February 19, 2013

BY THE COURT

Lorraine Murphy Weil
Chief United States Bankruptcy Judge

[27] The court has considered the Plaintiff's other arguments and finds them to have been abandoned at trial, or to be unpersuasive or otherwise inapposite.