

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT
NEW HAVEN DIVISION

In re:	:	Case No.: 17-30067 (AMN)
MOISES N. GUEDES,	:	Chapter 7
<i>Debtor</i>	:	
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MOISES N. GUEDES,	:	AP No.: 17-03011
<i>Plaintiff</i>	:	
v.	:	
FLORENCE DIGIORGIO,	:	
RAYMOND DIGIORGIO,	:	
<i>Defendants</i>	:	Re: ECF No. 6

**RULING AND MEMORANDUM OF DECISION
DENYING DEFENDANTS' MOTION TO DISMISS**

Before the court is a motion, brought by Florence DiGiorgio and Raymond DiGiorgio, (the "Defendants"), to dismiss the above captioned adversary proceeding, asserting, generally, that Moises N. Guedes (the "Debtor") lacked standing to prosecute the adversary proceeding, and the complaint fails to state a claim on which relief can be granted. AP-ECF No. 6.¹ For the reasons that follow, the motion is denied.

I. COMBINED PROCEDURAL AND FACTUAL HISTORY

On January 20, 2017, the Debtor filed a chapter 7 case in this court (the "Petition Date"). ECF No. 1. On Schedule A/B, the Debtor listed a 1/9 interest in 31 Evers Street, Bridgeport, Connecticut, which he valued at either \$16,885.00, or \$17,056.00. (ECF No. 1).² The Debtor is not living at the property, and represented to the court at a

¹ Citations to the docket in Case No. 17-30067 are noted by "ECF No." Citations to the docket Adversary proceeding No. 17-03011, are noted by "AP-ECF No."

² The Debtor's schedule includes a discrepancy as to the value of his interest in 31 Evers Street. In response to the question to list the "Current value of the portion you own," the Debtor listed \$16,885.00. However, on the same page, the Debtor indicated "Debtor owns one-ninth interest in 31 Evers Street, Bridgeport, CT which is \$17,056.00." No explanation is given for the discrepancy, and as the issue is not

hearing held on September 19, 2017, that he inherited his interest in 31 Evers Street from his mother, now deceased. AP-ECF No. 12. On Schedule C, the Debtor claimed his interest in 31 Evers Street as exempt under 11 U.S.C. § 522(d)(5).³ ECF No. 1. On Schedule E/F, the Debtor listed an unsecured claim of Defendants, in the amount of \$150,366.00, which the Debtor indicated on his Statement of Financial Affairs was the result of a Connecticut Superior Court judgment entered on October 23, 2014. ECF No. 1. The Chapter 7 Trustee filed a report of No Distribution on April 14, 2017, and the court entered a discharge order on May 3, 2017. ECF No. 10.

On July 14, 2017, the Debtor filed the above captioned adversary proceeding and complaint seeking to avoid the Defendants' judicial lien encumbering the Debtor's exemption in 31 Evers Street. AP-ECF No. 1. The complaint asserted the Defendants recorded a judgment lien against 31 Evers Street, on October 28, 2016, and such lien was "an involuntary transfer that the trustee could have but did not seek to avoid pursuant to [§] 547(b) and that the Debtor exempted the property as an involuntary transfer pursuant to [§] 522(g)." The complaint further asserted the judgment lien was a "preferential transfer" under § 547(b), as the judgment lien was filed within 90 days of the Petition Date and "enabled the Defendants to receive more in that the Judgment Lien was attached to an interest of the Debtor worth \$16,885.00." AP-ECF No.1.

On August 10, 2017, Defendants moved to dismiss the complaint and the adversary proceeding, asserting the Debtor lacked standing to proceed, and he had failed to state a claim for relief under § 522(g). AP-ECF No. 6. Defendants'

material to the instant motion, and as the value of the Debtor's interest is not material to this motion, the Court need not, and does not, make a specific valuation at this time.

³ Unless otherwise noted, all statutory citations refer to the Bankruptcy Code, Title 11 of the United States Code.

accompanying memorandum of law asserted the Debtor lacked standing to bring the adversary proceeding under Federal Rule of Bankruptcy Procedure 7001, as motions to avoid judicial liens are contested matters, to be brought under Rule 4003. AP-ECF No. 7.⁴ Defendants further asserted the complaint failed to state a claim on which relief could be granted under §522(g). AP-ECF No. 7; See Fed. R. Bankr. P. 7012(b); Fed. R. Civ. P. 12(b)(6).

On September 14, 2017, the Debtor filed a memorandum in opposition to Defendants' motion to dismiss. AP-ECF No. 11. The Debtor's motion clarified the legal theory on which he sought to proceed, stating "[§]522(h) gives the debtor the right to avoid a transfer if the trustee does not attempt to avoid such transfer." AP-ECF No. 11.

The court held an initial pretrial conference on September 19, 2017, at which the Defendants did not appear. AP-ECF No. 12.

Having considered the pleadings and arguments of the parties, the court is prepared to rule on the Defendants' motion.

II. APPLICABLE LAW

The standards governing pleading requirements in the federal district court are applicable to pleadings in adversary proceedings in bankruptcy court, as the Federal Rules of Bankruptcy Procedure incorporate the Federal Rules of Civil Procedure. See Fed. R. Bankr. P. 7008, 7012. As to the legal sufficiency of a complaint, to survive a motion to dismiss, a complaint requires "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to 'give the defendant fair notice of

⁴ The court notes on May 23, 2017, the Debtor filed a "Motion to Avoid Judicial Lien" in the Main Case, the allegations in which closely match the allegations in the complaint. ECF No. 13. However, the Debtor withdrew said motion on July 11, 2017. ECF No. 20.

what the . . . claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)) (citing Fed. R. Civ. P. 8(a)). As to the factual sufficiency of a complaint, to survive a motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Elias v. Rolling Stone LLC*, 2017 U.S. App. LEXIS 18686, at *13 (2d Cir. Sept. 22, 2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Section 547(b) permits the trustee to avoid certain transfers if it proves by a preponderance of the evidence the transfer was made “(1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt owed by the debtor before such transfer was made; (3) made while the debtor was insolvent; (4) made [during the Preference Period]. . . ; and (5) . . . [enabled the creditor] to receive more than such creditor would receive [if the creditor received payment on the debt in a chapter 7 liquidation, rather than through the transfer]. . . .” *Ames Merch. Corp. v. Cellmark Paper, Inc. (In re Ames Dept. Stores, Inc.)*, 450 B.R. 24, 30-31 (Bankr. S.D.N.Y. 2011). A rebuttable presumption exists under § 547(f) that the debtor is insolvent within 90 days of the petition. Furthermore, the rules provide that actions to “recover money or property,” such as preferential transfer actions, are adversary proceedings. Fed. R. Bankr. P. 7001.

Ordinarily, chapter 7 debtors lack standing to assert preference actions “[b]ecause they do not function as representatives of the bankruptcy estate.” *Collier on Bankruptcy* ¶ 5-547.11 (16th ed. 2017). “Under the provisions of section 522(h), however, individual chapter 7 debtors are entitled to avoid certain types of ‘preferential

transfers' in order to protect their exemption rights in the property so transferred if the trustee does not seek to avoid those transfers." *Id.*

Under §522(f), a Debtor may avoid a judicial lien, such as the Defendants' lien, encumbering an exemption in the debtor's property. *Cadle Co. v. Banner (In re Banner)*, 394 B.R. 292, 300 (Bankr. D. Conn. 2008).

III. DISCUSSION

Defendants assert that the Debtor's complaint "fails to plead facts stating a cause of action," under §522(g), and the adversary proceeding should be dismissed. AP-ECF No. 7.

Here, the Debtor's complaint alleges that the Defendants' recordation of a judgment lien was a preferential transfer under § 547(b), in that it was recorded within ninety days of the Petition Date. AP-ECF No. 1. However, the complaint states the transfer "was an involuntary transfer that the trustee could have but did not seek to avoid pursuant to [§] 547(b) and that the debtor exempted the property as an involuntary transfer pursuant to [§] 522(g)." On the latter point, the Debtor misstates the law.

Section 522(g) provides, in pertinent part, that the Debtor "may exempt under [§522(b)] property that the trustee *recovers* under section 510(c)(2), 542, 543, 550, 551, or 553 . . . to the extent the debtor could have exempted such property."⁵ That section, by its plain terms, requires the trustee, and the trustee alone, to have sought, and recovered property for the estate. If the trustee recovers property, the Debtor may claim property as exempt, to the extent permitted by § 522(b).

⁵ Notably, § 547(b), is not included in the list of sections under which the Debtor may exempt property recovered by the trustee. 11 U.S.C. §522(g).

Here, it is undisputed the Trustee in the Debtor's case did not seek to avoid the Defendants' judicial lien encumbering 31 Evers Street.

However, § 522(h), permits the "debtor" to "avoid a transfer of property of the debtor . . . to the extent the debtor could have exempted the property under [§522(g)] if the trustee had avoided such transfer, if (1) such transfer is avoidable under section 544, 545, 547, 549, or 724(a) . . . and; (b) the trustee does not attempt to avoid such a transfer." In other words, § 522(h) permits a debtor to step into the trustee's shoes, and bring an action to recover a preferential transfer under § 547(b) where the trustee declines to do so. If a debtor is successful in prosecuting such a preference action, she may exempt any property she recovers for the benefit of the estate, under § 522(g). See *Collier on Bankruptcy* ¶ 5-547.11[2][a] (16th ed. 2017). Absent the existence of § 522(h), the debtor would not have standing to prosecute a preference action by vesture of § 522(g), or § 547(b).

However, the court concludes the operative legal theory on which the Debtor seeks to proceed can be gleaned from the face of the complaint. The complaint alleges the Defendants' judicial lien was recorded for their benefit, while the Debtor was insolvent, and enabled Defendants to receive more "in that the Judgment Lien was attached to an interest of the Debtor worth \$16,885.00." AP-ECF No. 1. This brief statement, though not a model of clarity, accurately states the required elements of a preference action under § 547(b). See *Ames*, 450 B.R. at 30-31. While the Complaint fails to chart a precise course from § 547(b) to § 522(g) via § 522(h), it plausibly articulates facts, that, if true, would entitle the Debtor to relief. As Defendants had

adequate notice of the central theory on which the Debtor sought to proceed, nothing more was required. *Twombly*, 550 U.S. at 555.

Defendants' further assert that the Debtor lacks standing to assert his complaint in an adversary proceeding, as the Federal Rules of Bankruptcy Procedure provide a claim under which the Debtor seeks relief, §522(g), is to proceed by motion as a contested matter, not as an adversary proceeding. ECF No. 7. As the court concludes the Debtor's complaint states with sufficient clarity the basis to pursue "an action to recover money or property," the Debtor has standing, and such an action is properly before this court as an adversary proceeding. Fed. R. Bankr. P. 7001.

NOW THEREFORE, it is hereby

ORDERED, that Defendants' motion to dismiss, AP-ECF No. 6 is DENIED.

Dated on October 13, 2017, at New Haven, Connecticut.

Ann M. Nevins
United States Bankruptcy Judge
District of Connecticut

