NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. MB 13-061

Bankruptcy Case No. 12-10838-WCH
Adversary Proceeding No. 13-01375-WCH

JONATHAN W. GREEN,
d/b/a Spot on Creative, a/k/a Jon Worth Green,
Debtor.

MINOR ADAMS HUNNICUTT,
Plaintiff-Appellant,

v.

JONATHAN W. GREEN,
Defendant-Appellee.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. William C. Hillman, U.S. Bankruptcy Judge)

Before
Lamoutte, Deasy, and Kornreich,
United States Bankruptcy Appellate Panel Judges.

Richard N. Gottlieb, Esq. and Alex R. Hess, Esq., on brief for Plaintiff-Appellant.
Jacob T. Simon, Esq., on brief for Defendant-Appellee.

August 6, 2014

Lamoutte, U.S. Bankruptcy Appellate Panel Judge.

Minor Adams Hunnicutt ("Hunnicutt") appeals from the bankruptcy court's order dismissing his adversary complaint for failure to state a claim to revoke the debtor's discharge pursuant to § 727(d)(1).[1] As set forth below, we conclude that the bankruptcy court erred in dismissing the complaint under Fed. R. Civ. P. 12(b)(6) ("Rule 12(b)(b)(6)"), and, therefore, we **REVERSE** the order dismissing the complaint and **REMAND** the matter to the bankruptcy court for further proceedings.

BACKGROUND

Jonathan W. Green (the "Debtor"), who is married, filed an individual chapter 7 petition on February 1, 2012. On his schedule F, the Debtor listed Hunnicutt as the holder of an undisputed, noncontingent, liquidated claim in the amount of $64,409.14. On his Schedule I, the Debtor reported monthly gross wages of $7,500.00 and average monthly income of $5,355.34; he reported his wife's income as $0.00. Additionally, on his Schedule I, the Debtor claimed he had worked for Raizlabs, Inc. as a "UI/UX Designer" for six months. On his Schedule J, the Debtor listed day care expenses of $800.00 per month. On his Statement of Financial Affairs, the Debtor indicated his income for the "Year before last" (2010) was $160,500.00, his income for "Last year" (2011) was $39,916.80, and his income for "This year to date" (through February 1, 2012) was $56,712.50. He did not report any income for his wife.

[1] Unless expressly stated otherwise, all references to "Bankruptcy Code" or to specific statutory sections shall be to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. § 101, et seq. All references to "Bankruptcy Rule" shall be to the Federal Rules of Bankruptcy Procedure.

On February 10, 2012, the Debtor filed a Chapter 7 Statement of Current Monthly Income and Means-Test Calculation (often referred to as "Form 22A"), declaring (by checking the box in Question 1B) his debts were not primarily consumer debts and, therefore, he was not subject to the means test under § 707(b)(1) & (2). Having declared his debts were not primarily consumer debts, the Debtor was not required to complete the rest of the statement and it contained no income information.

On February 29, 2012, the Debtor filed an Amended Statement of Current Monthly Income and Means-Test Calculation ("Amended Form 22A"), declaring the majority of his debts were consumer in nature and, therefore, he was subject to the means test. In Part II of the Amended Form 22A, the Debtor indicated his current monthly income was $8,125.00; the column relating to his wife's income was left blank. In the means test calculation in Part III of the Amended Form 22A, the Debtor revealed his annualized current monthly income was $97,500.00, which put the Debtor just below the median family income level of $99,067.00.

The bankruptcy court set April 30, 2012, as the deadline for filing complaints objecting to the Debtor's discharge under § 727(a). On April 20, 2012, Hunnicutt filed a motion requesting an extension of the deadline until July 2, 2012, which was granted. On June 26, 2012, Hunnicutt filed a motion requesting another extension of the deadline to September 19, 2012, and requested permission to conduct a Bankruptcy Rule 2004 examination of the Debtor. The bankruptcy court granted both requests. On September 20, 2012, the bankruptcy court entered an order discharging the Debtor. Hunnicutt immediately filed a motion for leave to file a complaint to determine the dischargeability of debt, indicating that he believed the debt owed to him may have been obtained by fraud and he needed additional time to investigate. The

bankruptcy court denied the motion because the deadline had expired prior to the filing of the motion. On October 9, 2012, the Debtor's case was closed.

Almost a year later, on September 17, 2013, Hunnicutt filed an Emergency Motion to Reopen the Chapter 7 Case, which was granted. He also filed a complaint seeking revocation of the Debtor's discharge pursuant to § 727(d)(1). In the complaint, Hunnicutt made the following statement of facts (as summarized):

1. The Debtor filed an initial Form 22A, which indicated he was not subject to the means test under § 707(b)(1) and (2). He subsequently filed an Amended Form 22A claiming he was subject to the means test, his "Current Monthly Income" as defined under § 101(10A) was $8,125.00 per month, and his wife earned nothing. Based on the foregoing, the Debtor asserted there was no presumption of abuse because his household income was below the family median.

2. On his Schedule I, the Debtor claimed to be earning $7,500.00 each month gross and his wife earned nothing. In addition, he claimed he worked for Raizlabs, Inc. for only six months.

3. On his Schedule J, the Debtor claimed he was paying $800.00 per month for day care despite the fact that, according to Amended Form 22A and Schedule I, his wife was "ostensibly unemployed and earning nothing."

4. On his Statement of Financial Affairs, the Debtor's "Year to Date Income" (which only covered January 2012 as he filed his petition on February 1, 2012) was $56,712.50. In addition, although he claimed on his Schedule I he only worked at Raizlabs, Inc. for six

months, he listed on his Statement of Financial Affairs that he earned $23,850.14 from Raizlabs, Inc. in 2011, and $73,500.00 from Raizlabs, Inc. in 2010.

5. Based upon the income listed for January 2012 of $56,712.50, the Debtor's "Current Monthly Income" would necessarily be $9,452.08, putting his annualized income at $113,425.00, well above the family median.

As the basis for relief under § 727(d)(1), Hunnicutt alleged that, after reviewing the Debtor's schedules and statements for the first time in May 2013, he asked the chapter 7 trustee to provide him with copies of the Debtor's tax returns. In August 2013, the trustee provided him with a copy of the Debtor's 2010 joint tax return, which indicated the Debtor's wife was employed in "Human Resources" and earned $28,403.00 that year. Hunnicutt acknowledged that the trustee did not provide him with a copy of the Debtor's 2011 return. Nonetheless, Hunnicutt asserted that "[u]pon information and belief, the Debtor's spouse, Lindsey Green, was employed during the six (6) month period preceding the Debtor's bankruptcy filing on February 1, 2012." Thus, Hunnicutt argued, "based upon the absence of any income attributable to his wife, Lindsey Green, the Debtor intentionally misrepresented his 'Current Monthly Income' to the court, thereby committing a fraud on the court within the meaning of 11 U.S.C. § 727(d)(1)." Moreover, Hunnicutt alleged, the "necessary information was not actually known to [him] until after the granting of the [Debtor]'s discharge . . . ."

On November 12, 2013, the Debtor filed a motion to dismiss the complaint for failure to state a claim. In his supporting memorandum of law, the Debtor asserted that Hunnicutt's complaint did not state a claim for revocation of his discharge under § 727(d)(1) because: (1) the allegations in the complaint were unspecific and baseless; (2) Hunnicutt had not alleged he was

unaware of the alleged fraud at the time of the Debtor's discharge; and (3) the complaint failed to state with particularity the intentional misrepresentation and/or circumstances constituting the alleged fraud. According to the Debtor, the complaint was "completely devoid of a basis with which to allege fraud and it [wa]s also totally silent as to when the alleged fraud occurred. [Hunnicutt] has failed to provide any evidence that shows any of [the Debtor's] statements were untrue or misleading, to say nothing of his burden to specifically show a knowingly made false oath." Moreover, the Debtor argued, Hunnicutt had an affirmative duty to investigate before the discharge was granted, and the record shows that although Hunnicutt clearly suspected fraud in the months leading up to discharge, he failed to conduct an investigation for almost a full year.

On December 10, 2013, Hunnicutt filed an opposition to the Debtor's motion to dismiss, arguing he had "properly and plausibly pled" that the Debtor made a substantial misrepresentation on his Amended Form 22A and that "the factual basis of the misrepresentation regarding the [Debtor]'s and his spouse's income was not discovered until . . . well after the date" the Debtor received his discharge. Hunnicutt pointed to the allegations in his complaint that the Debtor made misrepresentations on his Amended Form 22A by failing to include his wife's income and "falsely reflecting that the [Debtor] had passed the 'Means Test' by operation." Moreover, Hunnicutt alleged, the misrepresentation was "further buttressed" by the discrepancy between the income figures shown on the Amended Form 22A and the Debtor's answers to Item 1 on the Statement of Financial Affairs. Finally, Hunnicutt argued that the allegations in the complaint made it clear he did not discover the misrepresentations regarding the Debtor's and his wife's income until the summer of 2012, well after the date of the discharge.

On December 18, 2013, the bankruptcy court held a hearing on the Debtor's motion to dismiss, and Hunnicutt's objection thereto. At the hearing, the Debtor argued the complaint was entirely devoid of any specific allegations of fraud. Although Hunnicutt had pointed to some discrepancies between the Debtor's income in the Amended Form 22A and the Statement of Financial Affairs[2] and pointed out the day care expenses on Schedule J (which presumably would have been unnecessary if the Debtor's wife did not work), he made no allegations that the Debtor intended to lie. Moreover, the Debtor argued, even if it were true he was earning more than he stated in his schedules and statements, Hunnicutt had a chance to object to the dischargeability of his debt and failed to do so before the discharge entered. And although Hunnicutt claimed he did not know about the allegedly fraudulent conduct until after discharge entered because "the necessary information was not actually known to him," he could have conducted a Bankruptcy Rule 2004 examination before the entry of the discharge but failed to do so. Thus, the Debtor argued, Hunnicutt should not get a "last bite at the apple" by seeking revocation of his discharge.

In response, Hunnicutt argued that the fraudulent conduct was not just the discrepancies as to the Debtor's income, but the Debtor's failure to report his wife's income for means testing purposes. According to Hunnicutt, if the Debtor had reported his wife's income, he would not have been eligible to be in chapter 7. Moreover, Hunnicutt reasserted his claim that he was not

[2] He also explained that the reporting of his income in his Statement of Financial Affairs was a scrivener's error.

aware of the wife's income until he received copies of the Debtor's tax returns after the discharge entered.

After hearing the parties' arguments, the bankruptcy court ruled from the bench as follows:

> Well, assuming that this evil debtor did not report his wife's income and if he had reported his wife's income, someone might have moved to dismiss the case as an abuse, but no one did move to dismiss the case as an abuse and the case went forward. And there's no representation that the wife's income would have enhanced the estate. Forgetting about the means testing, there's no representation that the wife's income would have enhanced the estate. And I think objections to means testing are waivable. Since the childcare expenses were shown on the [Form] 22A and on [Schedule] "J," it should have been clear to those who looked that there had to be a reason for childcare which could at least require an explanation.
>
> In any event, I don't think the simple fact that this debtor may have misspoken when providing the information on which a means testing determination is made has done anything that should affect his right to a discharge when no one timely objected to it frontend.
>
> Motion to dismiss the case is granted.

This appeal followed.

JURISDICTION

We may consider appeals from final orders. 28 U.S.C. § 158(a)(1). An order granting a motion to dismiss an adversary proceeding is a final order. Gonsalves v. Belice (In re Belice), 480 B.R. 199, 203 (B.A.P. 1st Cir. 2012). Thus, we have jurisdiction to consider this appeal.

STANDARD OF REVIEW

Appellate courts apply the clearly erroneous standard to findings of fact and *de novo* review to conclusions of law. See Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 269 (1st Cir. 2010). An order dismissing a complaint for failure to state a claim is subject to *de novo* review. See Juárez v. Select Portfolio Servicing, Inc., 708 F.3d 269, 276 (1st Cir. 2013); Banco Santander de P.R. v. López-Stubbe (In re Colonial Mortg. Bankers Corp.), 324 F.3d 12, 15 (1st Cir. 2003); Porst v. Deutsche Bank Nat'l Trust Co. (In re Porst), BAP No. MW 12-080, 2013 Bankr. LEXIS 5037, at *7 (B.A.P. 1st Cir. Nov. 20, 2013). In reviewing the bankruptcy court's dismissal of a complaint, we "must accept all well-pleaded facts as true and draw all reasonable inferences in favor of the appellant." Burrell-Richardson v. Mass. Bd. of Higher Educ. (In re Burrell-Richardson), 356 B.R. 797, 800 (B.A.P. 1st Cir. 2006) (citing Aybar v. Crispin-Reyes, 118 F.3d 10, 13 (1st Cir. 1997)); see also Rederford v. U.S. Airways, Inc., 589 F.3d 30, 32 (1st Cir. 2009). We may affirm "only if the factual averments in the complaint hold out no hope of recovery under any theory set forth in the complaint." Burrell-Richardson, 356 B.R. at 800 (citing Colonial Mortgage, 324 F.3d at 15).

DISCUSSION

I. The Rule 12(b)(6) Standard

Under Fed. R. Civ. P. 12(b)(6) ("Rule 12(b)(6)"), made applicable in adversary proceedings by Bankruptcy Rule 7012(b), a court must dismiss a complaint if it fails to state a claim upon which relief can be granted. In Ashcroft v. Iqbal, the Supreme Court explained:

> 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." [Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)]. 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. Id. at 556. . . . 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. Ibid. 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.'" Id. at 557. . . .

556 U.S. 662, 678-79 (2009). This standard established by Twombly and Iqbal represents "a middle ground between heightened fact pleading, which is expressly rejected, and allowing complaints that are no more than labels and conclusions or a formulaic recitation of the elements of a cause of action, which the [Supreme] Court stated will not do." Khalik v. United Air Lines, 671 F.3d 1188, 1191 (10th Cir. 2012) (internal quotations and citation omitted).

When considering a motion to dismiss brought pursuant to Rule 12(b)(6), the court must treat all well-pleaded allegations in the complaint as true, and must view them in the light most favorable to the plaintiff. However, the court's function is not to decide "whether a plaintiff will ultimately prevail[,] but whether the claimant is entitled to offer evidence to support [his] claims." Romano v. Defusco (In re Defusco), 500 B.R. 664, 668 (Bankr. D. Mass. 2013) (internal quotations and citation omitted). "The make-or-break standard . . . is that the combined allegations, taken as true, must state a plausible, not a merely conceivable, case for relief." Sepúlveda-Villarini v. Dep't of Educ. of P.R., 628 F.3d 25, 29 (1st Cir. 2010) (internal quotations and citations omitted). Dismissal for failure to state a claim is, therefore, appropriate if the complaint fails to set forth factual allegations, either direct or indirect, regarding each material element under an actionable legal theory. Gagliardi v. Sullivan, 513 F.3d 301, 305 (1st Cir. 2008).

We must consider whether Hunnicutt alleged enough facts to state a plausible claim for revocation of discharge under § 727(d)(1).

II. Analysis

A. Revocation of Discharge Claim

Section § 727(d)(1) provides:

> On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if . . . such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge[.]

11 U.S.C. § 727(d)(1).

Revocation of a discharge is an extraordinary remedy, which "should be construed liberally in favor of the debtor and strictly against those objecting to discharge." Yules v. Gillis (In re Gillis), 403 B.R. 137, 144 (B.A.P. 1st Cir. 2009). The party seeking revocation bears the burden of proving all of the facts upon which revocation is conditioned by a preponderance of evidence. Id. at 145. To meet this burden, the moving party must demonstrate that:

> (1) the debtor obtained the discharge through fraud; (2) the creditor possessed no knowledge of the debtor's fraud prior to the granting of the discharge; and (3) the fraud, if known, would have resulted in denial of discharge under § 727(a).

Id. at 144 (citation omitted).

As for the first element, the plaintiff must demonstrate that the debtor committed "actual fraud" involving an intentional wrong, such as the intentional omission of assets from the debtor's schedules. Id. at 144-45 (citing 6 Collier on Bankruptcy ¶ 727.17[2] (16th ed. rev. 2010)). The third element also incorporates a standard of actual fraud, such that a court would

have denied a debtor's discharge under § 727(a) had the fraud been known. "In this way, the third element subsumes the first to the extent that an analysis of the third element . . . inherently requires the same analysis of whether the debtor committed fraud in fact." Shamban v. Larson (In re Larson), A.P. Nos. 06-1381, 06-1446, 2010 WL 1633466, at *4 (Bankr. D. Mass. Apr. 20, 2010).

A finding of fraud in obtaining a discharge requires evidence of some conduct that under § 727(a) would have been sufficient grounds to deny the debtor's discharge, such as the debtor knowingly and fraudulently making a false oath in connection with his bankruptcy case. See 11 U.S.C. § 727(a)(4)(A). Thus, an action for revocation of a discharge under § 727(d)(1) can be based on a false oath or account under § 727(a)(4)(A). Smith v. Smith (In re Smith), 489 B.R. 875, 891 (Bankr. M.D. Ga. 2013) (citations omitted). When a § 727(d)(1) revocation of discharge claim is based on § 727(a)(4)(A), the elements partially merge, and a plaintiff states a claim under § 727(d)(1) if he states a claim under § 727(a)(4)(A), and alleges no knowledge of the fraud before the discharge. Id.

To deny a discharge under § 727(a)(4)(A), the plaintiff must show the debtor: (1) knowingly and fraudulently made a false oath; and (2) the false oath related to a material fact in connection to the bankruptcy case. See Razzaboni v. Schifano (In re Schifano), 378 F.3d 60, 67 (1st Cir. 2004) (citing Boroff v. Tully (In re Tully), 818 F.2d 106, 110 (1st Cir. 1987)); Perry v. Warner (In re Warner), 247 B.R. 24, 26 (B.A.P. 1st Cir. 2000) (citations omitted). "A debtor's Schedules and Statement of Financial Affairs are the equivalent of a verification under oath," and, therefore, misrepresentations and omissions in a debtor's schedules and statement of financial affairs qualify as false oaths for purposes of § 727(a)(4)(A). In re Warner, 247 B.R. at

26 (citations omitted); see also In re Smith, 489 B.R. at 891 (citations omitted). A false oath is knowingly and fraudulently made if the debtor "knows the truth and nonetheless willfully and intentionally swears to what is false." Lussier v. Sullivan (In re Sullivan), 455 B.R. 829, 837 (B.A.P. 1st Cir. 2011) (internal quotations and citation omitted). "Deliberate omissions by the debtor" in his schedules or statements satisfy the requirement for a "knowing" misrepresentation. Harrington v. Donahue (In re Donahue), A.P. No. 10-01071-JBH, 2011 Bankr. LEXIS 4951, at *37 (B.A.P. 1st Cir. Dec. 20, 2011). In addition, a debtor's "reckless indifference to the truth [is] treated as the functional equivalent of fraud" for purposes of § 727(a)(4)(A). Smith v. Grondin (In re Grondin), 232 B.R. 274, 277-78 (B.A.P. 1st Cir. 1999) (internal quotations and citations omitted). Thus, "reckless disregard of both the serious nature of the information sought [in the debtor's Schedules and Statement of Financial Affairs] and the necessary attention to detail and accuracy in answering may rise to the level of the fraudulent intent necessary to bar a discharge." Vasiliades v. Dwyer, No. 05-10479-FDS, 2006 WL 1494081, at *4 n.15 (D. Mass. May 23, 2006). As one court has observed:

> The Debtor's schedules, including Schedule B, are "unsworn declarations made under penalty of perjury and are, according to federal law, the equivalent of a verification under oath." Poliquin v. Cox (In re Cox), No. 05-15357, 2009 WL 57523, at *2 (Bankr. D.N.H. 2009) (quoting In re Grondin, 232 B.R. 274, 276 (1st Cir. BAP 1999)). The "requirement of an honest, conscious effort to prepare accurate, detailed and complete Schedules . . . is not intended as a trap for the unwary or undue emphasis on technical compliance but, rather, as a reasonable quid pro quo." Guardian Industr. Prod, Inc. of Mass. v. Diodati (In re Diodati), 9 B.R. 804, 809 (Bankr. D. Mass. 1981). Again, in the words of Tully, "[s]worn statements filed in any court must be regarded as serious business. In bankruptcy administration, the system will collapse if debtors are not forthcoming." 818 F.2d at 112.

JPMorgan Chase Bank, N.A. v. Koss (In re Koss), 403 B.R. 191, 212 (Bankr. D. Mass. 2009).

Finally, as to the last element for denial of a discharge under § 727(a)(4)(A), a false statement is material if it "bears a relationship to the [debtor's] business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of the debtor's property." In re Tully, 818 F.2d at 110 (internal quotations and citations omitted). Courts have acknowledged that the threshold for materiality under § 727(a)(4)(A) is fairly low. In re Sullivan, 455 B.R. at 839.

To survive the Debtor's motion to dismiss, Hunnicutt must have pled factual content as to each of the above elements. Here, a fair reading of Hunnicutt's complaint reveals allegations that: (1) the Debtor committed a fraud on the court within the meaning of § 727(d)(1); (2) such fraud consisted of the Debtor's failure to disclose his wife's income for means testing purposes, and/or his failure to accurately list his own income on his Amended Form 22A (as evidenced by discrepancies between the income set forth on his Amended Form 22B and his Statement of Financial Affairs); (3) based upon the Debtor's income as set forth on his Statement of Financial Affairs (rather than that set forth on his Amended Form 22A), his annualized income would have been well above the family median; (4) by failing to include any income attributable to his wife, the Debtor "intentionally misrepresented" his "Current Monthly Income" to the court; and (5) Hunnicutt did not know about the fraud until he received the Debtor's income tax returns from the trustee after the discharge.

More specifically, as to the first element under § 727(a)(4), Hunnicutt alleged the Debtor's wife was employed and earning income during the six-month period preceding the Debtor's bankruptcy filing on February 1, 2012, and, therefore, the Debtor misrepresented his current monthly income when he failed to include his wife's income on his schedules and

statements. In support, Hunnicutt pointed to the Debtor's 2010 income tax return which showed the Debtor's wife was employed and earned income for that year, and the Debtor's Schedule J, which showed monthly day care expenses of $800.00, which in theory would not have been necessary if the Debtor's wife was not employed. In addition, Hunnicutt's alleged facts demonstrated there were some discrepancies between the reported income on the Debtor's Amended Form 22A and on his Statement of Financial Affairs. These facts, if true, would show the Debtor made a false oath.

Moreover, Hunnicutt alleged that the Debtor "intentionally misrepresented" his Current Monthly Income, which constituted a fraud on the court. If true, this allegation would satisfy the "knowingly and fraudulently" requirement. The Debtor argues, however, that Hunnicutt has not alleged he lied, and that the discrepancies in his schedules and statements were simply a mistake or a scrivener's error. Although the alleged facts are consistent either with an inference of deliberateness (as Hunnicutt suggests) or an inference of carelessness (as the Debtor argues), this is a question that goes to the merits of the complaint, not whether it sufficiently set forth a claim. As long as the allegations as to this element were described in sufficient detail, they satisfy Rule 12(b)(6).

As to the "materiality" factor, Hunnicutt alleged that, based on the Debtor's representation of his monthly income for January 2012 in his Statement of Financial Affairs, his annualized income would have exceeded the family median, making him ineligible for chapter 7. Implicit in this statement is the allegation that the misrepresentation is material because it relates to the Debtor's bankruptcy estate and eligibility to be a chapter 7 debtor.

Thus, viewing the complaint as a whole, the allegations are sufficient to satisfy the requirements of Rule 12(b)(6) with respect to the fraud elements for a cause of action under § 727(a)(4)(A).

This brings us to the final element for a revocation of discharge claim under § 727(d)(1). As noted above, Hunnicutt's complaint states a claim under § 727(d)(1) if it states a claim under § 727(a)(4)(A), *and* alleges facts showing he had no knowledge of the Debtor's fraud at the time the discharge was granted.

In his complaint, Hunnicutt alleged that he was not aware the Debtor's wife earned any income until he received the Debtor's income tax returns in the summer of 2012, well after the discharge. The Debtor counters, however, that Hunnicutt has not sufficiently pled this element because he had a duty to diligently investigate and fraudulent conduct before discharge and prove he was unaware of the fraud at the time of the discharge. It is possible Hunnicutt may have a problem explaining during a revocation of discharge proceeding why he did not conduct due diligence prior to the entry of discharge. Nonetheless, the question of whether Hunnicutt could have, and should have, conducted an investigation prior to the entry of discharge goes to the merits of the case, not whether Hunnicutt sufficiently pled his claim under § 727(d)(1).

As stated previously, a court considering a motion to dismiss under Rule 12(b)(6) must treat all well-pleaded allegations in the complaint as true and must view them in the light most favorable to the plaintiff. The court's function on a Rule 12(b)(6) motion is not to weigh the potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be (not necessarily will be) granted. Sutton v. Utah State Sch. for the Deaf & Blind, 173 F.3d 1226, 1236 (10th Cir.

1999). Viewing the complaint as a whole, we conclude that the allegations are sufficient to state a cause of action under § 727(d)(1), and that the bankruptcy court erred in granting the motion to dismiss.

B. The Standard Applied By The Bankruptcy Court

In addition, we conclude that the bankruptcy court applied the wrong standard when granting the motion to dismiss. It appears the bankruptcy court relied on three different bases for granting the motion to dismiss, which are not directly relevant to properly pleading a claim for revocation of discharge.

First, the bankruptcy court indicated that even an intentional misrepresentation as to a debtor's income on the means test cannot constitute a basis for revocation of discharge unless the plaintiff proves the omitted income "would have enhanced the estate." There is, however, no requirement in § 727(d)(1) (or § 727(a)(4)(A)) that where a debtor makes a false oath regarding his income, the plaintiff must show that if the income was accurately stated it "would have enhanced the estate." A direct benefit to the estate is not an element of a revocation of discharge action.

Second, the bankruptcy court stated that "[s]ince the childcare expenses were shown on the [Form] 22A and on [Schedule] 'J', it should have been clear to those who looked that there had to be a reason for childcare which could at least require an explanation." This statement suggests the Debtor's inclusion of questionable expenses (i.e., the monthly day care expense) on his Schedule J and Form 22A should have given rise to knowledge of possible fraud so as to preclude bringing a revocation of discharge action. This factor goes to the merits of the case (i.e. whether Hunnicutt should have known of and investigated the alleged fraud prior to the

entry of discharge) and is a possible defense to the claim, but is beyond the scope of determining whether the factual allegations in the complaint sufficiently set forth the claim. In the context of a Rule 12(b)(6) motion, all allegations in the complaint must be taken as true, including Hunnicutt's allegation that he was not aware the Debtor's wife was earning income until after the trustee provided his counsel with a copy of the Debtor's 2010 tax return post-discharge.

Finally, the bankruptcy ruled that "the simple fact that this debtor may have misspoken when providing the information on which a means testing determination is made has done anything that should affect his right to a discharge when no one timely objected to it frontend." This statement seems to suggest that even if a debtor misrepresents income on his Form 22A for means test purposes, that misrepresentation will not affect his right to a discharge if no one timely objected to it before the entry of the discharge. If this were true, then a misrepresentation as to a debtor's income could never form the basis for an actionable revocation of discharge claim. Surely, that is not the case.

CONCLUSION

For the reasons set forth above, we conclude that the bankruptcy court erred in dismissing the complaint. Therefore, we **REVERSE** the order dismissing the complaint and **REMAND** the matter to the bankruptcy court for further proceedings.