SO ORDERED.

SIGNED this 04 day of December, 2006.

JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:
WILLIAM JACK KECK,

Debtor.

Case No. 05-43269
Chapter 7

UNITED STATES TRUSTEE,

Plaintiff,

v.

WILLIAM JACK KECK,

Defendant.

Adversary No. 05-7149

MEMORANDUM AND ORDER DENYING
MOTION FOR SUMMARY JUDGMENT

The United States Trustee's Motion for Summary Judgment,[1] on its 11 U.S.C. § 727(a)(4) claim, is presented for decision. The parties have fully briefed this matter,[2] and the Court is now prepared to rule. The parties stipulate that this matter constitutes a core proceeding,[3] and the Court has jurisdiction to decide it.[4] The Court concludes a trial will be necessary to resolve the question of Debtor's intent, and that this summary judgment motion must be denied.

I. BACKGROUND

The Trustee's Motion sets forth 68 numbered facts, none of which Debtor disputes. Essentially, the Trustee's claim is that Debtor's bankruptcy pleadings contained material errors and omissions, that he has failed to correct those erroneous pleadings, that the errors and omissions were material, and that he also testified falsely, under oath, about material matters at a meeting of creditors under 11 U.S.C. § 341,[5]or that the testimony was made with reckless disregard for the truth, equivalent to fraud. The undisputed facts set forth by the Trustee in her motion, in general, establish that Debtor made statements

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[1]Doc. 28. The Trustee has also preserved, in the final Pretrial Order (Doc. 26), its objection to discharge under 11 U.S.C. § 727(a)(2) and (a)(5), but does not make a Motion for Summary Judgment on those statutory grounds. She will be allowed, of course, to present evidence at trial on all theories preserved in the Pretrial Order.

[2]The Trustee has informed the Court that she does not intend to file a reply brief in further support of her Motion, nor challenge the late filing of Debtor's memorandum in opposition to it.

[3]28 U.S.C. § 157(b)(2)(K).

[4]28 U.S.C. § 1334.

[5]This case was filed before October 17, 2005, when most provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 become effective. All statutory references are thus to the Bankruptcy Code, 11 U.S.C.A. §§ 101 - 1330 (2004), unless otherwise specified.

under oath that were false, and for purposes of this summary judgment motion, Debtor admits that the statements were materially related to the bankruptcy case.

Some of the admitted false statements include a) that Debtor made no transfers within a year of bankruptcy, when in fact he made several transfers into and out of accounts at Capitol Federal Savings, Kaw Valley State Bank, and Kansas Super Chief Credit Union, b) that he had no losses, when in fact he had gambling losses, c) that he had no income other than from social security, when he actually had $753 income from the sale of Westar stock, and d) that he did not close any financial accounts within one year of filing bankruptcy, when in fact he closed the credit union account and the Capital Federal account within one year.

II. STANDARDS FOR GRANTING SUMMARY JUDGMENT MOTION

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law."[6] In applying this standard, the Court must view the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party, here Debtor Keck.[7] An issue is "genuine" if "there is sufficient evidence on each side so that a

[6]Fed. R. Civ. P. 56(c). Fed. R. Civ. P. 56(c) is made applicable to adversary proceedings pursuant to Fed. R. Bankr. P. 7056.

[7]*Lifewise Master Funding v. Telebank*, 374 F.3d 917, 927 (10th Cir. 2004).

rational trier of fact could resolve the issue either way."[8] A fact is "material" if, under the applicable substantive law, it is "essential to the proper disposition of the claim."[9]

The moving party bears the initial burden of demonstrating an absence of a genuine issue of material fact and entitlement to judgment as a matter of law.[10] In attempting to meet that standard, a movant who does not bear the ultimate burden of persuasion at trial need not negate the other party's claim; rather, the movant need simply point out to the court a lack of evidence for the other party on an essential element of that party's claim.[11]

If the movant carries this initial burden, the nonmovant who would bear the burden of persuasion at trial may not simply rest upon the pleadings; the burden shifts to the nonmovant to go beyond the pleadings and "set forth specific facts" that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant.[12] To accomplish this, sufficient evidence pertinent to the material issue "must be identified by reference to an affidavit, a deposition transcript, or a specific

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[8]*Thom v. Bristol-Myers Squibb Co.*, 353 F.3d 848, 851 (10th Cir. 2003) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

[9]*Id.* (citing *Anderson*, 477 U.S. at 248).

[10]*Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).

[11]*Id.* (citing *Celotex*, 477 U.S. at 325).

[12]*Id.* (citing Fed.R.Civ.P. 56(e)).

exhibit incorporated therein."[13] A party opposing summary judgment must produce more than a scintilla of evidence to survive summary judgment.[14]

As a very general rule, questions involving a person's intent or other state of mind cannot be resolved by summary judgment.[15] But in an exceptional case, a person's "denial of knowledge may be so utterly implausible in light of conceded or irrefutable evidence that no rational person could believe it," making a trial on the question of the person's state of mind unnecessary.[16] Finally, the Court notes that summary judgment is not a "disfavored procedural shortcut;" rather, it is an important procedure "designed to secure the just, speedy and inexpensive determination of every action."[17]

III. ANALYSIS

Plaintiff contends that summary judgment is proper under § 727(a)(4), which provides:

> (a) The court shall grant the debtor a discharge, unless --
>
> (4) the debtor knowingly and fraudulently, in or in connection with the case--
>
> (A) made a false oath or account....

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[13]*Diaz v. Paul J. Kennedy Law Firm*, 289 F.3d 671, 675 (10th Cir. 2002).

[14]*See, e.g., U.S. v. AMR Corp.*, 335 F.3d 1109, 1113 (10th Cir. 2003).

[15]*Compton v. Herrman (In re Herrman)*, Case No. 05-5834 (D. Kan. November 28, 2006) (Judge Somers), citing *Prochaska v. Marcoux*, 632 F.2d 848, 851 (10th Cir. 1980), *cert. denied*, 451 U.S. 984 (1981) and 10B Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Fed. Practice & Procedure § 2730 (3d ed. 1998) (indicating actions involving state of mind can rarely be determined by summary judgment, except when the opposing party does not present sufficient circumstantial evidence to support a potential finding contrary to the person's professed state of mind).

[16]*Id.*, citing *In re Chavin*, 150 F.3d 726, 728-29 (7th Cir. 1998).

[17]*Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

Plaintiff must thus establish, by a preponderance of the evidence,[18] that Debtor intended to make the false statements. To grant summary judgment to Plaintiff, the Court must be convinced that no reasonable factfinder could fail to be persuaded that Debtor had such an intent. Plaintiff has presented no direct evidence of Debtor's intent, and asks the Court to instead infer that intent from the undisputed facts, including that the number and significance of the omissions were so reckless that intent must be inferred.

To defeat summary judgment, Debtor essentially argues that he is elderly (mid-70s) and has a poor memory, and that he was merely negligent in completing his bankruptcy schedules, due to his honest failure to remember certain financial information. He further asserts that he was simply confused when his deposition was taken by Plaintiff's counsel, and that he had no intent to provide false information or omit material information. To support those contentions, Debtor attaches numerous pages of his sworn deposition testimony to his response. In reviewing that testimony in the light most favorable to Debtor Keck, as the Court must in deciding this summary judgment motion, Debtor's sworn responses do reflect confusion and a poor memory for details.

During his deposition, because he testified he could not remember certain details or dates, Debtor Keck consistently volunteered to quickly supply documentary evidence that would fill in the gaps in his memory. There is no allegation that after that deposition, he failed to provide the promised information.

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[18] *In re Carlson*, 2006 WL 3391508 (Table) (10th Cir. BAP 2006), citing *Grogan v. Garner*, 498 U.S. 279 (1991) and *First Nat'l Bank of Gordon v. Serafini (In re Serafini)*, 938 F.2d 1156 (10th Cir. 1991).

Again, interpreting that testimony in the light most favorable to Debtor, the Court cannot state that there is no genuine issue of material fact concerning Debtor's intent. The Court is inherently deprived, when reviewing a deposition transcript, of the ability to assess the credibility of the witness or to judge his demeanor during examination on the issue of intent. Since intent is the critical remaining element that Plaintiff must prove in order to prevail on her § 727(a)(4) claim, the Court cannot here grant summary judgment.

IV. CONCLUSION

Because, at the summary judgment stage, all evidence and reasonable inferences therefrom must be weighed in favor of the non-movant, and because the Court cannot conclude (based on reading a cold transcript) that no rational factfinder would believe Debtor, the Court finds that there remains a genuine issue of material fact concerning whether Debtor had the requisite intent to defraud when he made the admittedly false statements, under oath, in his bankruptcy pleadings and during his § 341 meeting of creditors (or whether the statements were sufficiently reckless to justify an inference of fraudulent intent). Therefore, summary judgment is not proper in this case, and the motion is denied.

The Court sets this case for trial on the Court's stacked evidentiary docket, **January 17-18, 2007.** The companion Objection to Exemptions[19] filed by the Trustee,

[19]Doc. 7.

which was previously set to trial on the December stacked docket, shall be continued, and shall be concurrently heard with this Adversary Proceeding on the January stacked docket.

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