THIS OPINION IS NOT INTENDED FOR PUBLICATION.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE FOSTER CAL BLACKMON aka CAL BLACKMON, Debtor,	))))))))))	CASE NO. 95-50786 ADV. NO. 97-5024 CHAPTER 7
E. JEAN BOWMAN, Plaintiff, v. FOSTER CAL BLACKMON, Defendant.	))	JUDGE MARILYN SHEA-STONUM OPINION

This matter is before the Court after the trial which began on December 9, 1997 on the complaint of E. Jean Bowman to determine dischargeability. Appearing at the trial were Nicholas Swyrydenko, counsel for the plaintiff, and Joseph Scott, counsel for the defendant. The Court heard the testimony of Cal Blackmon and E. Jean Bowman. This Court considered their testimony and the exhibits admitted during the trial in reaching its decision.

I. JURISDICTION

This matter involves a determination as to the dischargeability of particular debts and an objection to discharge pursuant to 11 U.S.C. §§ 523(a)(2)(A) and 727(a)(3) & (4). Resolution of this matter is a core proceeding in accordance with 28 U.S.C. §§ 157(b)(2)(I)and (J). This Court has jurisdiction

to enter a final order in this matter pursuant to 28 U.S.C. §§ 157(a) and (b)(1) and the Standing Order of Reference entered in this District on July 16, 1984.

II. ISSUE PRESENTED AND PROCEDURAL HISTORY

The plaintiff alleged, that pursuant to 11 U.S.C. § 523(a)(2)(A), the debt owed to her by the debtor should be nondischargeable because the debtor intentionally misrepresented his financial condition and the purposes for which the money would be used in order to induce her to lend him $30,000. The debtor belatedly acknowledged the debt owed to the plaintiff, but argued that the debt should be dischargeable.

In addition, the plaintiff alleged in her complaint that the debtor should be denied his discharge pursuant to 11 U.S.C. § 727(a)(4) for failure to list her as a creditor on his initial schedules, to indicate the proper amount due to the plaintiff on his amended bankruptcy schedules, and for labeling the debt as disputed on his amended bankruptcy schedules. The defendant denied the allegation and argued that trivial mistakes made inadvertently are not meant to give rise to a denial of a global discharge.

In plaintiff's proposed findings of fact and conclusions of law, the plaintiff asserted that the debtor should be denied his discharge pursuant to 11 U.S.C. § 727(a)(3). At the close of the plaintiff’s case, plaintiff’s counsel moved pursuant to Bankruptcy Rule 7015(b) for an amendment of the complaint to include a claim under 11 U.S.C. § 727(a)(3) so as to conform to the evidence adduced at trial. The Court allowed the parties to submit briefs on the issue and adjourned the hearing on the motion until December 12, 1997. On December 12, 1997, the Court granted the plaintiff’s motion to amend and allowed the defendant’s

counsel time to prepare his defense to the claim pursuant to 11 U.S.C. § 727(a)(3) by adjourning the trial to December 22, 1997.[1] Prior to beginning his case, counsel for the defendant moved for a judgment on partial findings pursuant to Bankruptcy Rule 7052(c). The Court denied that motion. The trial concluded on December 22, 1997.

III. FINDINGS OF FACT

On many matters there was no conflict between the parties' evidence. The following evidentiary matters were undisputed and will be recited as findings of fact in this case. As to points on which there was some tension between the parties' evidence the following recitation will clarify who is being credited and why.

On September 10, 1991, Cal Blackmon Blacktop & Sealer, Inc.(aka Cal Blackmon Blacktop) filed a petition for relief under Chapter 11 of the Bankruptcy Code. Cal Blackmon was the responsible party for that Chapter 11 case. The

---

[1] The Court considered the briefs submitted by counsel on this issue prior to rendering its decision. Bankruptcy Rule 7015(b) provides in pertinent part, "If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence." The Court held that because the amendment sought by the plaintiff dealt with an issue central to the bankruptcy process, production of the debtor's financial records, and was included in the plaintiff's proposed findings of fact and conclusions of law, the concerns of fairness and due process to the defendant were not sufficient to deny the amendment. In addition, the Court allowed the defendant an adjournment to further prepare his defense.

Court entered an order confirming the chapter 11 plan of reorganization proposed by the debtor on December 14, 1993. Less than a year later, on November 30, 1994, the debtor in possession filed a motion to voluntarily dismiss the chapter 11 case because, according to the motion, the business was no longer operating. A hearing was held on the purportedly reorganized debtor's motion on January 10, 1995. As a result of that hearing, the Court entered an order granting that motion to dismiss the case.

On January 20, 1995, the debtor in possession's former counsel filed a motion for reconsideration of the order dismissing the case. The Chapter 7 Trustee appointed in the bankruptcy case of Cal Blackmon's ex-wife and National City Bank, a secured creditor of the DIP, joined in the motion for reconsideration. The Court wrote, "[t]he court does not condone the actions of the Debtor through its present transferring of the assets approximately one year after confirmation of the plan." However, the Court found no evidence that the interests of the estate and the creditors would be better served if the order dismissing the case were set aside. Thus, the Court denied the motion for reconsideration. On April 3, 1995, the Clerk's office sent notice of dismissal of the Chapter 11 case to all creditors and parties in interest. The final decree dismissing the case of Cal Blackmon Blacktop & Sealer, Inc. aka Cal Blackmon Blacktop was entered by the Court on May 10, 1995.

Two days earlier, on May 8, 1995, the responsible party for the Chapter 11 debtor, Cal Blackmon, filed a petition for relief under Chapter 7 of the Bankruptcy Code as Foster Calvin Blackmon aka Cal Blackmon, Cal Blackmon dba Cal Blackmon Blacktop & Sealer, Inc.[2] Many of the debts listed in the

schedules filed in the Chapter 7 case include debts for the same or larger amounts to the same creditors owed by the Chapter 11 debtor. The debtor lists himself as self-employed with an income of $1,629.33 per month on schedule I. He lists his business address as 1666 Collier Rd., Akron, Ohio 44320 which is the same address listed by the chapter 11 debtor. In the trial of this adversary proceeding, Mr. Blackmon testified that from 1991 forward his company was called Cal Blackmon Blacktop & Sealer, Inc. However, at sometime prior to the dismissal of the Chapter 11 case, the debtor transferred the business to Mary Newby. After the transfer, the business name was changed to Blackmon Blacktop, Inc., and Mary Newby allowed Mr. Blackmon to run the business.

The Chapter 7 debtor's discharge was entered on October 2, 1996. On January 7, 1997, the debtor filed an amendment to "Schedule F" to include Jean Bowman as the holder of an unsecured nonpriority claim in the amount of $20,000 that the debtor characterized as disputed. Shortly thereafter, on February 7, 1997, E. Jean Bowman filed a proof of claim for $30,000. On February 18, 1997, E. Jean Bowman filed this adversary proceeding to determine dischargeability and to object to discharge.

The parties stipulated that between December 10, 1993 and March 25, 1994, the plaintiff made a series of loans to the defendant in the total amount of $30,000.00, as evidenced by the series of promissory notes marked Plaintiff's

---

[2] The Chapter 11 case of Cal Blackmon Blacktop Sealer, Inc. aka Cal Blackmon Blacktop was a case on the docket of Judge Harold F. White. By random draw, the Chapter 7 case of Foster Calvin Blackmon aka Cal Blackmon, Cal Blackmon dba Cal Blackmon Blacktop & Sealer, Inc. is a case on the docket of Judge Marilyn Shea-Stonum.

Exhibits 1, 2, and 3. *See* PX 12. The defendant's stated purpose for borrowing $30,000.00 from plaintiff was to pay outstanding personal and corporate liabilities. PX 12. Pursuant to the terms of the promissory notes, the defendant was to pay the full amount loaned to the plaintiff on or before December 9, 1994. PX 12. To date, the defendant has not paid the money in full. The defendant has made payments totaling $3,000; $1,500 in three installments in 1995 and $1,500 in three installments in 1996. PX 10 and 12. PX 10 is a ledger from Blackmon Blacktop. The ledger tracks the repayment of a loan owing to Ms. Bowman from Mr. Blackmon. The loan amount is listed as $30,000.00, and the repayments listed total $1,900.

The repayments were made on the business account, according to Mr. Blackmon, because Mary Newby and Jan Jendrow, the woman who allegedly keeps the books for Blackmon's Blacktop and for Mr. Blackmon personally,[3] gave him permission. The debtor never made any payments to Ms. Bowman from a personal checking account. Later in his testimony when asked why Ms. Bowman was not listed as a creditor in either bankruptcy case until his January 1997 amendment of Schedule F, Mr. Blackmon testified that he did not really know but "we had been trying to make payments to her." The debtor thereupon defined "we" twice; once as referring to the Chapter 11 entity, and once as referring to himself, Mary Newby, and Jan Jendrow.

The debtor and Ms. Bowman met when he resurfaced her driveway in

---

[3] Although Jan Jendrow was listed on the defendant's witness list, she was never called to testify at trial.

June 1993. After that they developed a friendship. The first of the three sets of loans at issue here were made to Mr. Blackmon in November and December 1993. PX 1. The first set of loans totaling $10,750.00 consisted of a loan for $1,250.00 on November 29, 1993; a loan for $6,000.00 on December 9, 1993, and a loan for $3,500.00 on December 20, 1993. Ms. Bowman testified that she and Mr. Bowman had developed a relationship of trust and confidence. When he asked her to loan him money to pay his business insurance, she did so.

Mr. Blackmon testified, at first, that he told Ms. Bowman that his business was in bankruptcy before she loaned him the money. Then, he testified that he did not tell Ms. Bowman. Ms. Bowman testified that at no time prior to the receipt of the amended schedules did he tell her that either his business or he had sought bankruptcy relief and that she would not have made the loans to him had she been aware that the business was in a bankruptcy proceeding. The Court credits Ms. Bowman's testimony on this point.

When questioned about how he used the loan proceeds from Ms. Bowman, the debtor testified at first that he didn't know what he did with the money. Finally, he said he used all of this money to pay taxes. However, the

---

[4]The Chapter 11 debtor had the same problem. The Disclosure statement filed on May 11, 1993 in Chapter 11 Case No. 91-52151 reads, "prior and then current bookkeeping procedures were inadequate...personal expenses were being paid with corporate funds rather than with personal funds...The debtor began to evaluate its accounting system. The following indicates the changes which need to be, or have been addressed: A. a system was established to record all deposits and withdrawals into the corporate general account in order to keep an accurate record of the company's finances... Debtor has had two bookkeepers in the past two and one-half years...Debtor is currently seeking the services of a bookkeeper or accountant... to organize and assist with bookkeeping duties, payroll, quarterly tax preparation,

debtor has no documents to confirm that statement.[4] Although he and his counsel pointedly ignored the Court's suggestion that they use the resources available through the U.S. Attorney's Office with respect to whether such payments had or had not been made, he testified that he went to the bank with the check, obtained a money order and took it "straight to the IRS," rather than mailing it. He produced no receipts or documents to lend credibility to his statement. The Court finds that the proceeds of the first set of loans were not applied in accordance with the debtor's representations to Ms. Bowman.

The second set of loans totaling $8,500.00 consisted of a loan on February 16, 1994 in the amount of $2,500.00 and a loan on March 3, 1994 in the amount of $6,000.00. PX 2 Ms. Bowman testified that she does not remember whether the debtor gave her a specific reason why he needed these particular funds. Rather, she believes that he told her he was having financial trouble after his divorce and needed help. When the debtor said he was in trouble, Ms. Bowman, being unaware of the true financial condition of Mr. Blackmon, empathized with him and lent him the money.

The third set of loans totaling $10,750.00 consisted of a loan on March 14, 1994 in the amount of $1,750.00 and a loan in the amount of $9,000.00 on March 25, 1994. PX 3. Ms. Bowman lent this money to Mr. Blackmon because he said he needed to pay the IRS. He told her that if he didn't get immediate

---

computerize bookkeeping and other related duties... One of debtor's primary problems previously was insufficient record keeping" which made it difficult if not impossible to discern its financial condition. Case No. 91-52151, Doc. 128 filed on May 11, 1993.

funds, the IRS was going to lock the gates to his business. Ms. Bowman withdrew $6,000.00 in funds from her retirement account as part of the funds she loaned to him at this time.

The debtor again testified that he used the money she lent him to pay taxes, although he couldn't remember which ones and had no documents to support that statement. In fact, the only taxes paid by the Chapter 11 debtor totaled $1,000 and were paid on August 11, 1994.[5] The debtor also testified that he really doesn't know if he paid any taxes from December 1, 1993 through December 31, 1994. In addition, he was unable to produce any personal payment records from the IRS to show that payments had been made. The Court finds that the proceeds of the third set of loans were not applied in accordance with Mr. Blackmon's representations to Ms. Bowman.

The debtor has been in the driveway repair and blacktopping business for the last three decades. Despite having had formal education only through the 8th grade, he was able to run his own business for many of those years. The debtor testified, however, that he never handled the record keeping portion of the business. He said that he is responsible for drafting estimates and proposals for clients. His ex-wife, while married to the debtor, did the payroll and he signed the checks. After he divorced his wife in 1991 or 1992, the debtor testified that a woman named "Debbie" helped him with the books. According to

---

[5]No documents indicating payments made to the IRS were admitted into evidence. The debtor's own testimony revealed that tax payments of only $1,000.00 had been made by the Chapter 11 entity and no tax payments had been made by him individually.

the debtor, Debbie was the one who told him that he owed money to the IRS, among others.

According to the debtor, after Debbie, Joan Harris, former counsel for the Chapter 11 debtor Cal Blackmon's Blacktop & Sealer, Inc., helped the debtor. Now, Jan Jendrow, the bookkeeper for Blackmon's Blacktop, helps him do his personal taxes. The debtor maintained that he was never involved in the record keeping for the business.

IV. LAW AND ANALYSIS

A. OBJECTION TO DISCHARGE

1. 11 U.S.C. § 727(a)(4)

The plaintiff claims that the debtor's discharge should be revoked pursuant to 11 U.S.C. §§ 727(d) and 727(a)(4). Pursuant to 11 U.S.C. § 727(d)(1), a creditor may request that the Court revoke a debtor's discharge granted under 727(a) if the discharge was obtained by fraud and the creditor did not know of that fraud until after the discharge had been granted. 11 U.S.C. § 727(d)(1). Ms. Bowman was unaware of the fraud of the debtor until he amended his schedules on January 7, 1997. By that point the debtor's discharge had already been entered. The request for revocation is timely pursuant to 11 U.S.C. § 727(e) as the discharge order was entered on October 2, 1996 and the plaintiff filed this adversary proceeding less than one year later on February 18, 1997. Thus, this Court will treat Ms. Bowman's request that the Court find that Mr. Blackmon is not entitled to his discharge as a request for revocation of discharge pursuant to 11 U.S.C. § 727(d)(1).

In addition, as Ms. Bowman was not listed as a creditor on the debtor's

schedules, she was not provided an opportunity to object to the debtor's discharge prior to the entry of a discharge order. Procedural due process requires that an individual receive notice before that individual's rights can be affected. *See Ford v. Ford (In re Ford)*, 159 B.R. 590(Bankr. D. Oregon 1993). Therefore, the plaintiff's rights were unaffected by the discharge order entered in this case. Thus, Ms. Bowman properly brought an action objecting to discharge, although the results of the action will operate as though the plaintiff requested a revocation of discharge.

The plaintiff alleged in her complaint that in connection with his bankruptcy case, the debtor knowingly and fraudulently made a false oath and should be denied a discharge pursuant to 11 U.S.C. § 727(a)(4). That section provides,

> 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;...

The plaintiff has the burden of proving by a preponderance of the evidence that (1) the debtor made a statement under oath; (2) the statement was false; (3) the debtor knew the statement was false; (4) the debtor made the statement with fraudulent intent or with reckless disregard for the truth; and (5) the statement related materially to the bankruptcy case. *Beaubouef v. Beaubouef(In re Beaubouef)*, 966 F.2d 174, 178(5th Cir. 1992); *Wynn v. Wynn (In re Wynn)*, 205 B.R. 97, 102(Bankr. N.D. Ohio 1996); See *Kalvin v. Clawson (In re Clawson)*, 119 B.R. 851, 852 (Bankr. M.D. Fla. 1990). While a false statement that is the result of mistake or inadvertence may not be sufficient, a knowingly false

statement or **omission** in the debtor's schedules is sufficient to justify the denial or revocation of a debtor's discharge pursuant to 11 U.S.C. § 727(a)(4)(A). *See Beaubouef,* 966 F.2d at 178; *Clawson,* 119 B.R. at 852; Collier on Bankruptcy ¶ 727.04[2].

Once the plaintiff has proven these elements by a preponderance of the evidence, the burden shifts to the defendant to prove otherwise. *In re Folger*, 149 B.R. 183 (D. Kan. 1992); *In re Sausser*, 159 B.R. 352 (Bankr. M.D. Fla. 1993).

STATEMENT UNDER OATH

The debtor's schedules are filed under oath. An omission of information on those schedules may be considered a false oath. *See Beaubouef,* 966 F.2d at 178; *Clawson*, 119 B.R. at 852; *In re Ford,* 159 B.R. 590; *National City Bank, Marion v. McNamara (In re McNamara),* 89 B.R. 648, 654; *Scimeca v. Umanoff*, 169 B.R. 536, 542(D. N.J. 1993). The debtor failed to list E. Jean Bowman as a creditor on his schedules.

FALSITY, KNOWLEDGE OF OR RECKLESS DISREGARD

His failure to list Ms. Bowman was intentional. Mr. Blackmon was well aware at the time of his filing a petition for relief under Chapter 7 of the Bankruptcy Code that he owed money to Ms. Bowman. In addition, he was aware that he owed her $30,000, as evidenced by the fact that various payments were made to Ms. Bowman during the calendar years 1995 and 1996 and the balance listed on the Blackmon Blacktop ledger. PX 10 and 12. Yet, the debtor did not inform the Court or the trustee administering his case about the debt owed to Ms. Bowman until January 1997, and when he did, he understated the

amount owed and stated that the debt was disputed. The debtor's initial failure to list Ms. Bowman as a creditor and his subsequent listing of incorrect information with respect to the debt owed to Ms. Bowman on his schedules was more than a mere mistake. This court finds that his omission was made with, at the very least, a cavalier and reckless disregard for the truth.

MATERIALITY

Materiality of the statement or omission turns not on whether the creditors were prejudiced by it, but on whether the statement was pertinent to the discovery of assets or past transactions. *In re Butler*, 38 B.R. 884, 889(Bankr. D. Kan. 1984). A knowing and intentional omission of a creditor from the debtor's schedules, considering the goals of § 727(a)(4)(A), is material to the case. *See In re Shebel*, 54 B.R. 199 (Bankr. D. Vermont 1985). The debtor's intentional or reckless omission and subsequent misstatements of fact on his schedules were known by the debtor to be false and were material to the debtor's case. Therefore, the plaintiff's objection to discharge pursuant to 11 U.S.C. § 727(a)(4) is well taken.

2. 11 U.S.C. § 727(a)(3)

The plaintiff claims that the debtor's discharge should be denied pursuant to 11 U.S.C. 727(a)(3). That section provides,

> The court shall grant a discharge, unless -(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 transactions might be ascertained, unless such act or

> failure to act was justified under all of the circumstances of the case;...

The plaintiff bears the burden of proof by a preponderance of the evidence on her complaint to deny the debtor's discharge. *In re Wynn*, 205 B.R. 97, 101, *citing Grogan v. Garner*, 498 U.S. 279, 291. Courts measure the sufficiency of the debtor's books and records against the books and records kept by a reasonably prudent debtor with the same occupation, financial structure, education, sophistication, and experience. *In re Wynn*, 205 B.R. 97, 101; *see Fahey Banking Co. v. Irey(In re Irey)*, 172 B.R. 23; *Krohn v. Cromer(In re Cromer)*, 214 B.R. 86, 99(Bankr. E.D. N.Y. 1997). The bankruptcy court is given broad discretion to assess these factors in conjunction with the relevant facts of the case. However, the court's final determination must be made in light of the purpose of § 727(a)(3), which is to preserve its goal of fair dealing by making a debtor's right to discharge dependent on his ability to account, via written record, for his financial condition. *G&J Investments v. Zell(In re Zell)*, 108 B.R. 615, 627(Bankr. S.D. Ohio 1989).

A deteriorating financial condition does not excuse the debtor from the duty to keep books and records. *In re Cromer*, 214 B.R. at 99, 100. If the debtor leaves the conduct of his business and the keeping of books of account to an agent, the debtor is responsible for the failure to keep proper books or records. Collier on Bankruptcy ¶ 727.03[2]. Mr. Blackmon did not bother to take the time to keep records, books, or any documentation with respect to his personal or business finances. Although not directly at issue here, the Court is deeply concerned about the financial records of the Chapter 11 entity to the extent that

the debtor claims to have borrowed funds on behalf of that entity. The debtor could not produce even one receipt to reflect the use he made of the $30,000.00 lent to him by Ms. Bowman. Therefore, the court finds that the plaintiff's objection to discharge pursuant to 11 U.S.C. § 727(a)(3) is also well taken.

B. DISCHARGEABILITY OF DEBT PURSUANT TO 11 U.S.C. § 523

Although the Court has determined that the plaintiff's objections to discharge pursuant to 11 U.S.C. §§ 727(a)(3) and (4) are well taken, the Court must still address the plaintiff's claim that the debt owed to her in the amount of $30,000 should be declared nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A).[6]

> A discharge under section 727, 1141,... does not discharge an individual debtor from any debt... (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's ... financial condition... 11 U.S.C. § 523(a)(2)(A)

Generally, the plaintiff must prove the following five elements by a preponderance of the evidence: (1) the debtor made a false representation or made a representation with gross recklessness as to its truth; (2) the debtor

---

[6]If the Court were to decline to reach the 523 issue, then at the time that the debtor would be eligible to file a petition for relief under the Bankruptcy Code-albeit 6 years from now- he might have the debt determined to be nondischargeable. By the same token, however, Ms. Bowman would not be bound in a later proceeding by a finding that the debt was dischargeable if this Court declines to make the determination. If the Court now determines the dischargeability of the debt, then in any subsequent bankruptcy case initiated by Mr. Blackmon both he and Ms. Bowman will be bound by that determination.

made the representation with the intent to deceive; (3) the plaintiff justifiably relied on the representation; and (4) the proximate result of the misrepresentation being made was a loss by the plaintiff. *In re McCreery*, 213 B.R. 689 (Bankr. N.D. Ohio 1997); *See Brady v. McAllister(In re Brady)*, 101 F.3d 1165(6th Cir. 1996); Collier on Bankruptcy 523.08[1][d] and [e].

FALSE REPRESENTATIONS OF THE DEBTOR

Mr. Blackmon failed to disclose to Ms. Bowman that his business, of which he was the sole shareholder and responsible party at the time, had filed for protection of the Bankruptcy Code. As the responsible party for a Chapter 11 debtor in possession, Mr. Blackmon was under an obligation to deal honestly with his creditors and potential creditors. In addition, Mr. Blackmon specifically told Ms. Bowman that he intended to use the money to pay particular debts, e.g., tax debts and insurance debts. Representations for the purposes of 11 U.S.C. § 523(a)(2)(A) can consist of the debtor's failure to disclose information in addition to statements actually made by the debtor. *Mendez v. Cram (In re Cram)*, 178 B.R. 537, 540(Bankr. M.D. Fla. 1995). The debtor made omissions and statements that are the basis for the plaintiff's claim under 11 U.S.C. § 523(a)(2)(A).

An omission may be a fraudulent misrepresentation (1) when the circumstances imply a particular set of facts, and one party knows the facts to be otherwise, that party may have a duty to correct what would otherwise be a false impression or (2) where an independent duty exists to disclose. *Trizna & Lepri v. Malcolm(In re Malcolm)*, 145 B.R. 259, 262-4(Bankr. N.D. Ill. 1992). As the responsible party for a Chapter 11 debtor in possession purportedly seeking

funds for the operation of that business, Mr. Blackmon was under a duty to disclose to any creditors or potential creditors that his business was currently in the process of obtaining confirmation of its Chapter 11 plan and under an obligation to perform thereunder. *See Id.* at 263; 11 U.S.C. §§ 364 and 1125. The debtor's silence may constitute a materially false representation. *Blasack III v. Sprague(In re Sprague),* 205 B.R. 851, 859(Bankr. N.D. Ohio 1997).

In addition, Debtor's misrepresentation of his intended use of the money may be a false representation if the debtor at the time he made the representation had no intention of performing as promised. *Palmacci v. Umpierrez,* 121 F.3d 781, 786-7(1st Cir. 1997)*; Allison v. Roberts(In re Allison)*, 960 F.2d 481(5th Cir. 1992). The evidence presented to the Court shows that Mr. Blackmon told Ms. Bowman what he specifically planned to do with the first and third sets of loan proceeds. Yet, the evidence also strongly supports the inference that even at the time that he was telling Ms. Bowman these things, he had no intention of using the money in the ways that he represented to her that he would.

INTENT TO DECEIVE

Having established that the debtor made sufficient false representations, i.e , omission that he and his business had filed for protection under Chapter 11 of the Bankruptcy Code, statement of purpose for which he intended to use the money, the Court must consider whether those false representations were made by the debtor with the intent to deceive Ms. Bowman. A court may infer intent to deceive from all the circumstances in a case. *Cram*, 178 B.R. at 540. In addition, intent to deceive may be inferred from representations made in

reckless disregard for their accuracy or truth. *In re Sprague*, 205 B.R. at 861. At the very least, the debtor made representation after representation to Ms. Bowman with reckless disregard for the accuracy or truth of those representations. Further, the methodology which the debtor employed in obtaining the loans from Ms. Bowman is part of the circumstances in this case from which the Court may infer the debtor's intent to deceive. The debtor obtained the money from Ms. Bowman in numerous installments. Although he had not used the initial installments as he had stated he would, he continued to seek to and did obtain more money from Ms. Bowman.

RELIANCE

A plaintiff's reliance on a misrepresentation is justifiable so long as the falsity of the representation is not obvious to someone of the plaintiff's knowledge and intelligence, even though an investigation would have disclosed the falsehood. *Field v. Mans*, 116 S.Ct. at 444 (1995). The characteristics of the particular plaintiff as they affected the circumstances of the particular case are the key to this inquiry . *See Field v. Mans*, 210 B.R. 1, 3(BAP 1st Cir. 1997). For the purposes of determining whether Ms. Bowman justifiably relied upon the false representations of the debtor which were made with the intent to deceive her, the Court will consider each set of loans separately.

All of the loans at issue are the result of a friendship between the debtor and Ms. Bowman. They are personal loans, not loans by a commercial lender. This is so despite the fact that Ms. Bowman has been an employee in the banking industry for 30 years. Since May 1995, the she has been a bank teller at the North Akron Savings Bank. Prior to that, Ms. Bowman had been an

assistant bank manager, an assistant to the bank manager, and a loan officer at TransOhio Bank. She began working as a loan officer in 1981 on residential mortgages. Her training for that position was "on-the-job" training. In processing the loans, the Ms. Bowman would receive financial statements or tax returns from the potential borrowers. She was aware that the bank also ran credit reports. However, Ms. Bowman never ran those reports nor did she have access to running those reports. Ms. Bowman testified that over her entire career in the banking industry she only processed approximately 50 loans.

Ms. Bowman's experiences at work, while they may have educated her on the practices of commercial lenders, do not require that she be held to the same standards of justifiableness as a commercial lender. Rather, she must be held to the standards of justifiableness to which a low level bank employee would be held when lending money to a trusted friend who has been the owner of his own business for 30 years and is going through what he characterized to her as a messy divorce.

As to the first set of loans evidenced by PX 1, Ms. Bowman's reliance on Mr. Blackmon's representations was justified. The evidence revealed that prior to the time the first set of loans was made, the two parties had developed a relationship based on trust and companionship. Ms. Bowman was unaware of the extent of the debtor's financial problems. He approached her as a friend, and asked for her help in paying business insurance debts. Ms. Bowman had no reason not to trust his statements to her and she was not under a duty to further investigate the debtor's financial situation. Therefore, as to the first set of loans totaling $10,750.00, Ms. Bowman justifiably relied on the debtor's false

representations.

As to the second set of loans made to the debtor, the evidence revealed that Ms. Bowman lent this money to the debtor after he told her he had been having financial problems due to his divorce. No evidence was presented to suggest that at that point Ms. Bowman made any inquiry into the debtor's overall financial picture, nor did she inquire as to whether the business belonged to both the debtor and his wife. Rather, Ms. Bowman, who believed herself to be a good judge of character, empathized with the debtor and lent him more money to help him. However, with respect to the second set of loans Ms. Bowman has not identified any representation as to the use of the funds. Thus, as to this set of loans, there is no reason to distinguish Ms. Bowman's claim from those of other holders of general unsecured claims against the debtor.

As to the final set of loans, the debtor affirmatively represented to Ms. Bowman that his business was having trouble with the Internal Revenue Service, such that without immediate funds his gates would be locked. No evidence has been presented to demonstrate that there was any truth to the statement, and it was made at a time when the subject business was supposed to be performing under a confirmed Chapter 11 plan that could avoid any such occurrence. Moreover, the loan proceeds were not used to pay those taxes. The plaintiff still did not inquire into the overall financial health of the debtor or his business. The plaintiff had no reason to believe that the loan proceeds were not being used to pay the obligations which Mr. Blackmon said he would pay with the proceeds. This Court finds, based on the credibility and demeanor of the witnesses it heard during the trial in this matter, that her reliance on the

representations of the debtor was justified as to the third set of loans.

LOSS

Ms. Bowman testified that she withdrew money from her bank accounts and her IRA to loan these monies to the debtor and that had she known the truth she would not have done so. Her loss is a monetary loss, which she would not have incurred but for the false representations of the debtor.

V. CONCLUSION

The debtor's discharge is revoked for fraud. See 11 U.S.C. § 727(d)(1). The debt owed to Ms. Bowman is nondischargeable in part and dischargeable in part. The amount of the debt which is nondischargeable is $21,500.00(the first and third set of loans). In addition, the plaintiff's claim with respect to the second set of loans is allowed in the amount of $5,500.00($8,500.00 minus the $3,000.00 in payments that she has received) as a general unsecured claim. The plaintiff is entitled to interest on that amount at the judgment rate of interest from the date she filed suit. The plaintiff has the same rights as the holders of other unsecured claims have against a debtor whose discharge has been revoked.

IT IS SO ORDERED.

_____
MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 3/27/98