THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE	)	Case No. 95-52282
RONALD L. HAMO	)	
Debtor(s)	)	Chapter 7
	)	[Converted from Chapter 13]
RICHARD WILSON, TRUSTEE	)	
Plaintiff	)	Adv. No. 97-5098
	)	
v.	)	Judge Marilyn Shea-Stonum
	)	
RONALD L. HAMO	)	
Defendant	)	**MEMORANDUM OPINION**

This matter came before the Court on plaintiff-trustee's complaint to determine dischargeability pursuant to 11 U.S.C. §§727(a)(2)(A) and (B), (a)(3), (a)(4)(A), and (a)(5). This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is determined to be a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (J), over which this Court has jurisdiction pursuant to 28 U.S.C. §1334.

Facts

On December 15, 1996, debtor filed a joint chapter 13 bankruptcy petition with his wife, Susan Hamo. On May 8, 1996, Mrs. Hamo deconsolidated her portion of that joint

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[1] Mrs. Hamo completed all obligations under the 100% plan in her deconsolidated chapter 13 case and received a discharge in that case on November 14, 1997. No objections

chapter 13 case into an individual chapter 13 case.[1] On May 30, 1996, debtor converted his case to one under chapter 7 and Richard Wilson was appointed to serve as the chapter 7 trustee. On February 12, 1996, the debtor and his wife filed schedules in their joint chapter 13 case.[2] Those schedules were then amended on February 14, 1996 and, after converting his case to one under chapter 7, the debtor again amended his schedules on July 18, 1996. During the entire pendency of his main bankruptcy case, as well as this adversary proceeding, the debtor has been represented by counsel.[3]

On May 29, 1997, the trustee filed a complaint requesting that the debtor's

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were filed regarding the Hamo's assignment of claims from their joint case to each of their individual cases and no objections were filed as to whether the schedules in Mrs. Hamo's individual chapter 13 case were accurate and complete.

[2] On January 2, 1996, Mr. and Mrs. Hamo filed a motion to extend time to file their chapter 13 schedules and plan. On January 4, 1996, the Court entered an Order granting the debtors' motion and allowing them until January 23, 1996 to file the required chapter 13 documents. The debtors failed to meet the January 23 deadline and on January 30, 1996, the Court entered an Order requiring the debtors to appear and show cause why their case should not be dismissed for their failure to file schedules and a chapter 13 plan. A hearing on the matter was held on February 9, 1996, at which time the debtors' counsel represented that he, and not his clients, was responsible for the failure to file the required documents. Based upon counsel's representation, the Court ordered that all required chapter 13 documents were to be filed on or before February 12, 1996.

[3] In their original, joint chapter 13 case the debtors' counsel was Paul Hoffer. On March 21, 1996, Mr. Hoffer moved to withdraw as counsel, citing certain conflicts of interest. The Court withheld ruling on Mr. Hoffer's motion until the debtors could retain substitute counsel. On May 8, 1996, Kathryn Belfance entered an appearance as counsel on behalf of Mr. Hamo (Mrs. Hamo having already retained her own individual counsel) and Mr. Hoffer was permitted to withdraw. On March 2, 1998, Ms. Belfance also moved to withdraw as debtor's counsel in both the main chapter 7 case and the within adversary proceeding, citing that "the relationship between counsel and [d]ebtor is such that counsel does not believe that [she] can continue to represent the debtor." Given the impending trial in this matter the Court noted the professional obligation of Ms. Belfance to remain as the debtor's counsel if the client would cooperate with his counsel; on April 15, 1998, the Court held a status conference on Ms. Belfance's motion to withdraw. During that status conference, it was reported that the debtor had begun cooperating in his defense and Ms. Belfance's motion was orally withdrawn.

discharge be denied pursuant to §727 of the Bankruptcy Code. The Court held a trial in this matter on April 24 and June 1, 1998. Appearing at trial were Kathryn Belfance and Robert Thomas, attorneys for the debtor, and Richard Wilson, the chapter 7 trustee. During the trial, the Court heard testimony from the debtor; Richard Valore ("Valore"), the debtor's former counsel and business associate; and James Capwill ("Capwill"), the debtor's former accountant.

Prior to the trial, the parties filed "Stipulations of Fact" that set forth the following pertinent facts which they agreed were not in dispute:

1. Freedom Properties, Inc., formerly known as R.D.P. Properties, Inc. ("Freedom Properties"), is an Ohio corporation incorporated in 1989;

2. Ronald L. Hamo is the President of Freedom Properties authorized by Valore to sign documents pertaining to the property Freedom Properties;

3. Since its inception in 1989, Freedom Properties has owned up to nine single family rental properties in the Summit County area;

4. Freedom Properties purchased nine rental properties by obtaining loans and/or mortgages, refurbished the properties, rented the properties and subsequently sold all but two of the remaining parcels of real estate;

5. Ronald L. Hamo has signed documents as agent and/or President of Freedom Properties including mortgages, deeds and federal and state income tax returns;

6. Prior to and at the time of the filing of this chapter 7 bankruptcy proceeding Ronald Hamo owed Valore in excess of $60,000.00 to $70,000.00 for monies lent to Ronald Hamo other family members for various legal services, investments and personal loans dating from 1965 until the date of Ronald Hamo's petition;

7. Valore is duly listed as a general, unsecured creditor in Ronald Hamo's amended bankruptcy schedules, filed on July 18, 1996;

8. Freedom Properties was formed, in part, to repay Ronald Hamo's Valore;

9. Ronald Hamo, acting on behalf of Freedom Properties was to manager Freedom Properties and any profits derived from the sale of real estate was to be paid to Valore to reduce Ronald Hamo's debt;

10. Within the last four years, Valore received approximately $40,000.00 from proceeds derived from the sale of properties owned and titled in the name of Freedom Properties;

11. Valore credited the $40,000.00 he received against the prior indebtedness owed by Ronald Hamo;

12. Sometime in 1986, Ronald Hamo and various family members, including but not limited to his brother Peter Hamo, Jr. and Joe Kalm invested over $100,000.00 in a limited partnership known as Financial America, Inc. ("Financial America") which owned various units in Lock Raven Condominiums, Belmont Condominiums and Euclid Avenue Properties;

13. Sometime prior to July, 1991, the properties of Financial America went into foreclosure;

14. On or about February 22, 1991, Ronald Hamo, Peter Hamo, Jr. and Joe Kalm recovered a judgment against the defendant, Financial America, in the Court of Common Pleas of Cuyahoga County Court in Case number 91 CV 183787, in the amount of $62,304.00, bearing interest at 10% from February 22, 1991, and costs therein as a result of filing a Certificate of Judgment Lien;

15. On November 19, 1996, Francis E. Gaul, Treasurer of Cuyahoga county, Ohio filed a complaint for Collection of Delinquent Taxes, Foreclosure and Equitable Relief in the case styled Francis E. Gaul v. Financial America, Inc., et al., in the Cuyahoga County Common Pleas Court, Case No. CV 319035; and

16. On or about May 27, 1997, Valore, on behalf of Ronald Hamo, Peter Hamo, Jr. and Joe Kalm, filed an anser and cross-claim for foreclosure against all other defendants in the above-captioned complaint.

Based upon these undisputed facts and the evidence presented at trial, which is discussed in relevant context below, the Court must determine whether the debtor should be denied a discharge in this case.

Discussion

A. Objection to Discharge Based Upon 11 U.S.C. §727 (a)(2)(A) and (B)

In his complaint, the trustee claims that the debtor should be denied a discharge pursuant to 11 U.S.C. §727(a)(2)(A) and (B). That claim is based upon the debtor's failure to disclose his debt-reduction arrangement with Valore.

To justify denial of a discharge pursuant to those code provisions, the trustee must demonstrate, by a preponderance of the evidence, that the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate, concealed property of the debtor, within one year before or at some time after the date of the filing of the petition. 11 U.S.C. §727(a)(2)(A) and (B); *Barclays/American Business Credit v. Adams (In re Adams),* 31 F.3d 389, 394 (6th Cir. 1994), *cert. denied* 513 U.S. 1111 (1995); *First of America Bank v. Afonica (In re Afonica),* 174 B.R. 242, 244 (Bankr. N.D. Ohio 1994); *Fahey Banking Co. v. Parsell (In re Parsell),* 172 B.R. 226, 230 (Bankr. N.D. Ohio 1994). The purpose of §727(a)(2) is to deny a discharge to those debtors who, intending to defraud, conceal property which, if discovered, would become property of the estate.

Pursuant to the undisputed facts in this case, Freedom Properties was formed to repay the debtor's obligation to Valore through an arrangement by which the debtor would manage Freedom Properties and Valore would apply profits from the sale of the company's real estate to the reduction of the debtor's debt. It is also undisputed that within the last four years, Valore has utilized this arrangement to reduce the debtor's debt by approximately $40,000.00. During the trial, the debtor testified that his obligation to Valore was, at least partially, evidenced by promissory notes but that the whereabouts of that documentation is unknown. Additionally, the debtor testified that on December 14, 1996, (one day before the debtor and his wife filed a joint, chapter 13 bankruptcy petition)

Valore was granted a mortgage on the Hamo residence to secured his debt. Legal title to the Hamo residence is held in Mrs. Hamo's name alone but the debtor still has dower rights in that property.

Although the debtor does not deny the arrangement used to reduce his pre-petition debt to Valore, he testified that he did not disclose the arrangement on his bankruptcy petition because he does not consider it to be an asset of his bankruptcy estate. The debtor further testified that, in his opinion, the debt-reduction arrangement does not constitute income from Freedom Properties for his services as its president. No legal authority was presented by the debtor to support either of these contentions.

Property of a bankruptcy estate is broadly defined to include "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. §541(a)(1). Based upon the record in this case, the Court determines that the proceeds from the sale of the Freedom Properties real estate is income to the debtor for his service as president of the company. Therefore, pursuant to the broad sweep of §541, any executory portion of the debt-reduction arrangement constituted property of this bankruptcy estate which should have been reported on the debtor's schedules. *Cf.* 26 U.S.C. §61(a)(12) (defining "gross income" for taxation purposes as "all income from whatever source derived, including (but not limited to)...[i]ncome from discharge of indebtedness"); *Old Colony Trust Co. v. C.I.R.*, 279 U.S. 716, 729 (1929) (holding that reduction of a debt constitutes income for taxation purposes). The Court must now decide whether the debtor's failure to report the debt-reduction arrangement and the income that was created thereby, was done with intent to hinder, delay or defraud his creditors.

Absent evidence by a debtor to his state of mind, direct proof of a debtor's intent

is nearly impossible to obtain. As such, the trustee is most often required to present evidence of the circumstances surrounding the debtor's actions from which the debtor's intent may be inferred. *See In re Van Horne*, 823 F.2d 1285, 1287 (8th Cir. 1987). The evidence presented by the trustee in this case surrounding the debtor's failure to disclose the debt-reduction arrangement with Valore demonstrates a cavalier disregard for full disclosure on his bankruptcy schedules as well as an attempt to prefer one of his creditors. It does not, however, demonstrate an intent by the debtor to hinder, delay or defraud his creditors. *See Douglas County Bank v. Fine (In re Fine),* 89 B.R. 167 (Bankr. D. Kan. 1988) (noting that an attempt to prefer creditors does not justify denial of discharge pursuant to §727(a)(2)(A) and (B)). As such, the Court holds that the trustee has not met the burden required to justify a denial of discharge pursuant to 11 U.S.C. §727(a)(2)(A) and (B).

B. Objection to Discharge Based Upon 11 U.S.C. §727 (a)(4)(A)

In his complaint, the trustee also claims that the debtor knowingly and fraudulently made a false oath or account in connection with his bankruptcy case. This claim is based upon certain inaccuracies and omissions contained in the debtor's bankruptcy schedules and statement of financial affairs.

To justify denial of a discharge pursuant to 11 U.S.C. §727 (a)(4)(A), the trustee must demonstrate, by a preponderance of the evidence, that the debtor made a false oath or account in connection with his bankruptcy proceeding and that such false oath or account was knowingly and fraudulently made. 11 U.S.C. §727(a)(4)(A); *Barclays/American Business Credit v. Adams*, 31 F.3d at 394; *Wynn v. Wynn (In re Wynn)*, 205 B.R. 97, 102 (Bankr. N.D. Ohio 1997); *In re Chalik*, 748 F.2d 616, 618 (11th Cir. 1984); *Martin v. Martin (In re Martin),* 124 B.R. 542, 544 (Bankr. N.D. Ind. 1991). A material omission from the debtor's schedules or a false answer on a statement of

financial affairs may constitute a false oath for the purposes of §727. *In re Martin*, 88 B.R. 319, 323 (D. Colo. 1988). Any matter is material if it bears a relationship to the debtor's business transactions or estate, or concerns discovery of assets, business dealings or the existence or disposition of the debtor's property. *Martin v. Martin,* 124 B.R. at 544. If the trustee satisfies his burden of proof, the burden then shifts to the debtor to justify his actions. *In re Sausser,* 159 B.R. 352, 355-56 (Bankr. M.D. Fla. 1993); *Martin v. Martin (In re Martin),* 124 B.R. at 545.

The record in this case reveals several omissions from the debtor's schedules as well as several false answers on the debtor's Statement of Financial Affairs. On each of the three sets of schedules filed in this case, the debtor's answer to question 16(a) of the Statement of Financial Affairs does not disclose that he is president of Freedom Properties.[4] On the first two sets of schedules, the debtor answered question 16(a) by merely listing the name "Bumpers Emporium," a business entity in which debtor served as president. On the third set of schedules, the debtor answered "none" to question 16(a). Based upon his prior answers and the stipulations regarding the debtor's relationship with Freedom Properties, it is clear that in all three sets of schedules, the debtor's answer to question 16(a) was inaccurate.

During the trial, the debtor testified that he did not disclose his involvement in Freedom Properties in response to question 16(a) because he had never owned any stock

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[4] Question 16(a) in the Statement of Financial Affairs requires an individual debtor to list "the names and addresses of all businesses in which the debtor was an officer, director, partner, or managing executive of a corporation, partnership, sole proprietorship, or was a self-employed professional within the two years immediately preceding the commencement of this case, or in which the debtor owned 5 percent or more of the voting or equity securities within the two years immediately preceding the commencement of this case."

in the company and because he does not consider his role as president in the company to be an asset of his bankruptcy estate. The debtor claimed that he never tried to conceal his involvement with Freedom Properties as evidenced by the fact that, when questioned on the subject during the §341 first meeting of creditors, he informed the trustee about his relationship with that company. The debtor did not, however, explain why he only offered information about his relationship to Freedom Properties upon questioning by the trustee, why he omitted his role in Bumpers Emporium from his third set of schedules or why he interpreted the request for information in question 16(a) to be limited to only "assets" of his bankruptcy estate.

In addition to omitting his role in Freedom Properties, the debtor also failed to list his interest in a $50,000.00 personal injury action on both the first and second set of schedules. Although the debtor eventually disclosed that he had a personal injury claim pending in state court on his third set of schedules, he failed to also list that claim in response to question 4(a) of the Statement of Financial Affairs.[5]

During the trial, the debtor testified that this personal injury claim arose from a 1993 accident in which the automobile that he was driving was rear-ended by a truck and an automobile. The debtor recounted the accident in some detail and explained that he remembered the event so well because it occurred on the first day that he resumed driving after undergoing coronary by-pass surgery. Due to injuries suffered in the accident, the debtor testified that he was forced to go to the emergency room for treatment of back pain and impaired breathing. Despite his detailed description of the accident, the debtor

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[5] Question 4(a) of the Statement of Financial Affairs requires a debtor to "[l]ist all suits and administrative proceedings to which the debtor is or was a party within one year immediately preceding the filing of this bankruptcy case."

testified that he did not list the related personal injury action on his first two sets of schedules because he had forgotten about the case. According to the debtor, he telephonically authorized his attorney to file a personal injury lawsuit on his behalf and he has not spoken to that counsel in over two years.

During the trial, the trustee presented evidence that in May, 1996 (which is two months before the debtor filed his third amended schedules that listed the personal injury lawsuit as "pending") the lawsuit was voluntarily dismissed pursuant to a settlement. The debtor could not recall whether he authorized dismissal of the case or whether he received any money from the settlement. The debtor also did not explain what caused him to remember this lawsuit so as to finally report it in portions of his third amended schedules.

In addition to omitting the foregoing information, the debtor also failed to list the debt owed to him by Financial America in any of the three sets of schedules filed in this case. It is undisputed that the debtor and two other investors hold a judgment for more than $62,000.00 against Financial America. It is also undisputed that in order to secure that judgment, a lien was filed against the properties owned by Financial America.

During the trial, the debtor acknowledged that he was owed money by Financial America and that that money has never been repaid. Despite the fact that he knew this debt was still outstanding, the debtor offered no explanation as to why it was not listed in his bankruptcy petition except to say that he was unaware that a judgment in his name was ever rendered against Financial America.

While a false statement or omission that is the result of mistake or inadvertence is not sufficient to justify the denial of a debtor's discharge pursuant to 11 U.S.C. §727 (a)(4)(A) suffice, a knowingly false statement or omission or a statement made with reckless indifference to the truth will suffice. *Beaubouef v. Beaubouef (In re Beaubouef),*

966 F.2d 174, 178 (5th Cir. 1992); *March v. Sanders (In re Sanders)*, 128 B.R. 963, 972 (Bankr. W.D. La. 1991); *Kalvin v. Clawson (In re Clawson)*, 119 B.R. 851, 852 (Bankr. M.D. Fla. 1990). The record in this case demonstrates a continued pattern by the debtor of making omissions and false statements in his bankruptcy schedules. Even assuming that the debtor's testimony of a failed memory as to each of these matters is true, his reckless indifference to learn the truth before seeking protection of the bankruptcy system is sufficient to deny his discharge pursuant to 11 U.S.C. §727 (a)(4)(A).

> [T]he very purpose of. . . 11 U.S.C. §727 (a)(4)(A), is to make certain that those who seek the shelter of the bankruptcy code do not play fast and loose with their assets or with the reality of their affairs. The statutes are designed to insure that complete, truthful, and reliable information is put forward at the outset of the proceedings, so that decisions can be made by the parties in interest based on fact rather than fiction. . .Neither the trustee nor the creditors should be required to engage in a laborious tug-of-war to drag the simple truth into the glare of daylight.

In re Tully, 818 F.2d 106, 110 (1st Cir. 1987). *See also In re Krich*, 97 B.R. 919, 924 (Bankr. N.D. Ill. 1988) (noting that "[a] discharge is a privilege and not a right and therefore the strict requirements of accuracy is a small quid pro quo").[6]

C. Objection to Discharge Based Upon 11 U.S.C. §727 (a)(3) and (a)(5)

In his complaint, the trustee also alleged that the debtor's discharge should be denied pursuant to 11 U.S.C. §727 (a)(3) and (a)(5). Based upon the evidence presented at trial, the Court determines that the trustee failed to meet his burden of proof under

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[6] During the trial, the trustee also argued that the debtor's schedules failed to include assets that were reported on a draft financial statement prepared by Capwell for submission to First Merit Bank of Akron, Ohio. The trustee did not meet his burden of proof on this argument as it remains unclear whether this draft document was ever finalized and submitted to the bank. The trustee's evidence on this matter does, however, raise questions about the debtor's reporting his assets in this case, which other evidence demonstrates was not accurate and complete.

these provisions.[7]

Conclusion

Based upon the foregoing, the Court determines that the debtor's discharge should be denied pursuant to 11 U.S.C. §727 (a) (4)(A). A separate judgment consistent with these findings of fact and conclusions of law will be entered.

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MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 9/21/98

[7] During the trial of this matter, the trustee was given every opportunity to fully present his evidence on these matters including the adjournment of trial and the arrest of Capwell, who despite being subpeoned, failed to voluntarily appear. Despite such accomodation, the trustee was unable to present sufficient evidence to meet his burden of proof as to these matters.