IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
Eastern Division

IN RE:	**IN PROCEEDINGS UNDER CHAPTER 7**
JAMES & KAREN HAMILTON,	**CASE NO. 03-22737**
	ADVERSARY PROCEEDING NO. 03-1541
Debtors.	
	JUDGE RANDOLPH BAXTER

MARVIN A. SICHERMAN, TRUSTEE,

Plaintiff,

v.

JAMES & KAREN HAMILTON,

Defendants.

MEMORANDUM OF OPINION AND ORDER

The matter before the Court is a trial proceeding on a complaint filed by Marvin A. Sicherman, Chapter 7 Trustee (Trustee) objecting to the discharge of codebtor James Hamilton (Debtor) in the above-styled bankruptcy case. Trustee seeks denial of the debtor's discharge under §§ 727(a)(2)(A), (a)(4)(A), and (a)(5) of the Bankruptcy Code. 11 U.S.C. §§ 727(a)(2)(A); (a)(4)(A); (a)(5). The Debtor generally denies the complaint allegations. The Court acquires core matter jurisdiction over this proceeding under 28 U.S.C. 157 (b)(2)(J) and General Order No. 84 of this District. Upon a trial proceeding and an examination of the parties' respective briefs and supporting documentation, the following findings and conclusions are made:

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BACKGROUND

The Debtors, James and Karen Hamilton, sought voluntary relief under Chapter 7 proceedings on September 24, 2003. On September 9, 2003, codebtor James Hamilton received a total of $15,497.94 from the settlement of a pending personal injury claim. The personal injury claim was scheduled in the bankruptcy petition, but the settlement was not included in the debtors' schedules or Statement of Financial Affairs. The meeting of creditors was scheduled for November 3, 2003 and continued on January 1, 2003. Before the meeting of creditors commenced, Debtor revealed that he received the settlement check to his counsel. Debtor amended his Statement of Financial Affairs to list the settlement. Prior to commencement of trial, the parties entered into the following stipulated facts:

> 1. The Defendant/Debtor paid fees to apply for services related to his bankruptcy case to his counsel on each of August 13,2002, August 21,2002 and Sept. 12,2003.
> 2. The Defendant/Debtor's personal injury case was settled with the knowledge of the Debtor on August 26, 2003.
> 3. The Defendant/Debtor received the settlement funds, namely the sum of $15,497.94, representing the net proceeds of his personal injury case on September 9, 2003.
> 4. The Defendant/Debtor signed his bankruptcy petition under oath on September 12,2003.
> 5. The Defendant/Debtor's bankruptcy petition was filed with this Court on September 24, 2003.
> 6. The last day in which to file a timely complaint opposing the Defendant/Debtor's discharge was January 4, 2004.
> 7. On December 3, 2003 the Trustee sent a fax to the Debtor's counsel, which was received that day by the Debtor's counsel, the pertinent text of which was as follows:
>
> > Receipt of your faxed letter dated today is acknowledged. As I indicated to you on Monday, Dec. 1, 2003, the Debtor can file a waiver of discharge by the end of the day today, or I will file a complaint opposing his discharge. I appreciate the current willingness or intent to restore the funds to the estate, but I don't believe it is appropriate for trustee to traffic in discharges. Thus we are going to have to let the Bankruptcy Judge

decide if Mr. Hamilton is entitled to a discharge.

> 8. On January 24, 2003, after the timely filing of the Complaint commencing this Adversary Proceedings and the last day on which to file such complaints had expired, the Defendant/Debtor caused the sum of $10,097.94 to be paid to the Trustee; and which sum the Debtor postures is the "non-exempt" portion of the proceeds of the settlement of his personal injury claim.
> 9. Plaintiff s exhibits Nos. 1 and 2, consisting of a copy of the Settlement Sheet from the personal injury case, and a December 3, 2003 letter from Priscilla Schnittke to the Trustee; and Defendant's exhibits, consisting of copies of his bankruptcy petition and schedules, the personal injury settlement statement and a copy of the money order to the trustee, may all be admitted in evidence without any objection by any party.

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The dispositive issue is whether the Trustee has sufficiently established the required elements under §§ 727(a)(2)(A), (a)(4), and (a)(5) for a determination that the Debtor should not receive a discharge in this case.

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SECTION 727(a)(2)(A)

Section 727 provides, in part:

> (a) the court shall grant the debtor a discharge, unless--
>
> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed--
>
> (A) property of the debtor, within one year before the date of the filing of the petition;....

11 U.S.C.§ 727(a)(2)(A). The element of intent to deceive involves a two-part inquiry. First, the debtor's actual intent must be found as a matter of fact from the evidence presented. "Constructive intent cannot be the basis for the denial of a discharge...." Lovell v. Mixon, 719 F.2d 1373, 1377 (8th Cir. 1983); American General Finance, Inc. v. Burnside, 209 B.R. 867, 870 (Bankr. N.D.Ohio 1997). However, "[w]hen the creditor introduces circumstantial evidence proving the debtor's intent to deceive, the debtor cannot

overcome [that] inference with an unsupported assertion of honest intent.'" Caspers v. Van Horne (In re Van Horne), 823 F.2d 1285, 1287 (8th Cir. 1987). Because a debtor rarely admits to a fraudulent intent, the objecting party must generally rely on a combination of circumstances that suggest the debtor harbored the necessary intent. Id. The burden of proof is upon the Trustee and that burden must be borne by a preponderance of the evidence. Barclays/American Business Credit, Inc. v. Adams, 31 F.3d 389, 393-94 (6th Cir. 1994); In re Sowers, 229 B.R. 151 (Bankr. N.D. Ohio 1998).

In order to determine whether fraud has occurred (because fraud is rarely demonstrated by direct evidence) the courts generally look to certain factors, or "badges of fraud," to make the determination of the existence of a fraudulent intent. These factors are include:

> (1) the transfer or obligation was to an insider;
> (2) the debtor retained possession or control of the property transferred after the transfer;
> (3) the transfer or obligation was disclosed or concealed;
> (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
> (5) the transfer was of substantially all of the debtor's assets;
> (6) the debtor absconded;
> (7) the debtor removed or concealed assets;
> (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
> (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
> (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and
> (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Brown v. Third Nat'l Bank (In re Sherman), 67 F.3d 1348 (8th Cir. 1995). Herein, the Trustee relied on stipulated facts to allege that the Debtor transferred assets of the estate, primarily through gambling. The Trustee contends that the transfer of assets was done with the intent to hinder, delay or defraud creditors. At trial, Trustee rested without presenting his case-in-chief, relying entirely on the stipulation of facts and documents-in- support. Because he failed to present evidence of Debtor's actual intent under § 727(a)(2),

the Trustee failed to meet his burden of proof. The evidence is insufficient to prove that Debtor acted with actual intent to hinder, delay, or defraud or creditors. Therefore, an objection to discharge under § 727 (a)(2)(A) is without merit.

Section 727(a)(4)

Section 727 also provides, in part:

(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;....

11 U.S.C. § 727 (a)(4)(A). To meet his burden of proof under § 727(a)(4)(A), the Trustee must show by a preponderance of the evidence:

(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; and
(5) the statement related materially to the bankruptcy case.

Kenney v. Smith (In re Kenney), 227 F.3d 679 (6th Cir. 2000)(citing In re Beaubouef, 966 F.2d 174, 178 (5th Cir. 1992)); In re Chalik, 748 F.2d 616, 618 (11th Cir. 1984); In order for a "false oath or account to bar a discharge, the false statement must be 'material.' " Mertz v. Rott, 955 F.2d 596, 598 (8th Cir. 1992). 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 his property."Id. (quoting In re Chalik, 748 F.2d at 618); see also Palatine Nat'l Bank of Palatine, Ill. v. Olson (In re Olson), 916 F.2d 481, 484 (8th Cir.1990)).

Under § 727(a)(4), certain courts have opined that as a matter of law that no inference of fraudulent intent can be drawn from an omission from the schedules when *the debtor promptly* brings it to the court's or trustee's attention *absent other evidence of fraud.* Gillickson v. Brown (In re Brown), 108 F.3d 1290,

1294-95 (10th Cir. 1997)(The fact that a debtor comes forward with omitted material of his own accord is strong evidence that there was no fraudulent intent in the omission; Dalton v. Internal Revenue Service, 77 F.3d 1297, 1300 (10th Cir. 1996); Beaubouef, 966 F.2d at 178 (suggesting that an opportunity to clear up inconsistencies and omissions with amended schedules may be considered in analyzing findings of actual intent to defraud). See also 6 *Collier on Bankruptcy* § 727.04(2) (15th ed. rev.1996) (stating items omitted by honest mistake should not be grounds for denial of discharge). This line of authority relies on one of the fundamental purposes of bankruptcy...to give the honest debtor a fresh start.

Other courts have opined that the fact that the debtor amended his schedules does not negate the fact that he knowingly made a false oath in his original schedules and statement of financial affairs. See e.g. In re Keeney, 227 F.3d at 68 (citing In re Scott, 172 F.3d, 959, 967 (7th Cir. 1999)('Complete financial disclosure' is a prerequisite to the privilege of discharge); In re Sholdra, 249 F.3d 380, 382 -383 (5th Cir. 2001)(stating that "full disclosure of assets and liabilities in the schedules required to be filed by one seeking relief under Chapter 7 is essential"); Swicegood v. Ginn, 924 F.2d 230, 232 (11th Cir.1991) (per curiam) (affirming fraudulent intent finding partially relying on debtor's amendment of schedules made after debtor's former wife revealed omitted assets to judgment creditor). In re Brown, 108 F.3d 1290, 1294 (10th Cir. 1997).

Here, Trustee's reliance on the stipulated facts is sufficient to prove the Debtor made a materially false oath on his bankruptcy schedules, despite the amendment made after the § 341 meeting. Debtor offered no credible reason for his failure to schedule the receipt of the settlement check. The Debtor was less than forthright when he filed the schedules omitting the receipt of the settlement check. Debtor testified that he did not want his wife to find out about the money and his gambling trips. (Debtor, Direct). His testimony is incredible that he believed that he could do anything he wanted with the settlement check. (Id.). Not only was the Debtor a debtor in bankruptcy on a prior occasion (Court Inquiry), but he made

sure he revealed the receipt of the check to his counsel prior to presenting further sworn testimony at the meeting of creditors. If Debtor truly believed he was entitled to spend the funds he surely would not have rushed to reveal the receipt of the funds. Thusly, based on the evidence presented, the Trustee has met his burden of proving the required elements under § 727(a)(4).

Section 727 (a)(5)

Section 727 further provides, in part:

(a) the court shall grant the debtor a discharge, unless–

> (5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities.

11 U.S.C. § 727(a)(5). Under § 727 (a)(5), the initial burden is on the objecting party to introduce some evidence of the disappearance of substantial assets or of unusual transactions. 6 COLLIER ON BANKRUPTCY, ¶ 727.08 at 727- 47 (Lawrence P. King ed., 15th ed.1998). The debtor must then satisfactorily explain what happened. *Id.* " 'To be satisfactory, an explanation must convince the judge.' " Hawley v. Cement Indus., Inc. (In re Hawley), 51 F.3d 246, 249 (11th Cir.1995) (quoting Chalik, 748 F.2d at 619 (citation omitted)). In other words, a debtor's explanation must consist of more than vague, indefinite, and uncorroborated reasons; a satisfactory explanation is one that convinces the bankruptcy court. In re Yonikus, 974 F.2d 901 (7th Cir. 1992); In re Hasan, 245 B.R. 550 (Bankr.N.D.Ill.2000). In re Barman 244 B.R. 896, 900 -901 (Bankr. E.D. Mich.2000). This section has generally been considered broad enough to deny a discharge based on any unexplained disappearance or shortage of assets. See In re Chalik, 748 F.2d at 616.

Courts have consistently held that unsubstantiated gambling losses are a basis for denial of the discharge under § 727(a)(5). Dolin v. Northern Petrochemical Co. (In re Dolin), 799 F.2d 251 (6th

Cir.1986); In re Wilch, 157 B.R. 342 (Bankr. N.D. Ohio 1993)(Speers, J.); Indian Head Nat'l Bank v. Mitchell (In re Mitchell), 74 B.R. 457, 461 (Bankr. D. N. H. 1987); Clark v. Clark (In re Clark), 211 B.R. 105 (Bankr. M.D. Fla.1997) (Vague assertions that money was lost through gambling, without corroborating documentation, is unacceptable); Cassady-Pierce Co., Inc. v. Burns (In re Burns), 133 B.R. 181 (Bankr. W.D. Pa.1991) (Unsubstantiated gambling losses warrant denial of discharge.); McManus v. McManus (In re McManus), 112 B.R. 773, 775 (Bankr. E.D. Va. 1990) ("Bankruptcy is a privilege and creditors are defrauded if considerable funds are missing and this is merely chalked off to a gambling spree[.]"); Dignam v. McMahon (In re McMahon), 116 B.R. 857 (Bankr. M.D. Fla.1990) (Court denied the discharge where there was no documentation, corroboration, or substantiation of alleged gambling losses.).

Herein, the Trustee has presented sufficient evidence to find that the Debtor gambled or spent estate assets without any credible explanation. Indeed, Debtor testified that he either gambled the settlement proceeds or used the funds to check into hotel rooms, purchase football game tickets and clothing, and dinner for friends who accompanied him on his trips between Windsor, Canada, Las Vegas, and San Francisco, California. (Debtor, Cross). No credible explanation was given nor were documents produced evidencing his spending. Therefore, the pleadings evince a finding that Debtor's discharge should be denied under §727(a)(5) and applicable case law.

Accordingly, the Trustee has met his burden of objecting to the Debtor's discharge in this case under § § 727(a)(4) and (a)(5). Each party is to bear its respective costs.

IT IS SO ORDERED.

/s/ Randolph Baxter

Dated, this _22_ day of
June, 2004

RANDOLPH BAXTER
CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	**IN PROCEEDINGS UNDER CHAPTER 7**
JAMES & KAREN HAMILTON,	**CASE NO. 03-22737**
	ADVERSARY PROCEEDING NO. 03-1541
Debtors.	
_____	**JUDGE RANDOLPH BAXTER**

MARVIN A. SICHERMAN, TRUSTEE,

Plaintiff,

v.

JAMES & KAREN HAMILTON,

Defendants.

JUDGMENT

At Cleveland, in said District, on this 22 day of June, 2004.

A Memorandum Of Opinion And Order having been rendered by the Court in this proceeding,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Trustee has met his burden of objecting to the Debtor's discharge in this case under § § 727(a)(4) and (a)(5). Judgment is entered hereby in favor of the Trustee. Each party is to bear its respective costs.

IT IS SO ORDERED.

/s/ Randolph Baxter

RANDOLPH BAXTER
CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT