UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO

In Re:	)	
	)	**JUDGE RICHARD L. SPEER**
Twana Boyd	)	
	)	Case No. 03-3488
Debtor(s)	)	
	)	(Related Case: 03-37160)
Dieter Weeber	)	
	)	
Plaintiff(s)	)	
	)	
v.	)	
	)	
Twana Boyd	)	
	)	
Defendant(s)	)	

DECISION AND ORDER

Before this Court are the Plaintiff's dual Motions: a Motion for Findings of Fact and Conclusions of Law pursuant to Bankruptcy Rule 7052; and a Motion to Alter or Amend this Court's Judgment pursuant to Bankruptcy Rule 9023. As it pertains thereto, the Debtor/Defendant filed a Motion in Opposition, and a Request for Ruling on its Counterclaim. For the reasons set forth herein, the prior decision of this Court will stand.

The Plaintiff's dual Motions pertain to this Court's prior decision wherein judgment was entered unfavorably on the Plaintiff's Complaint pertaining to the dischargeability of his individual claim. In this Decision, the Court also stated:

> [o]n a final point of order, the Plaintiff included in his pleadings a cause of action to deny the Debtor's discharge under 11 U.S.C. § 727(a)(4). However, the evidence presented at Trial did not substantively address this cause of action and thus will not be discussed.

(Doc. No. 21, at pg. 10). Although a further review of the evidence does not reveal any substantive matters that were overlooked, the Court, in accordance with Bankruptcy Rule 7052, sets forth the following findings of fact and conclusions of law on the matter. Also incorporated herein, are those findings made in this Court's prior decision dated July 28, 2004 and constituting docket number 21.

FACTS

The Plaintiff, who has a child 10 years of age, has worked as a meter reader for approximately 21 years. In October of 2002, the Debtor represented, in a loan application, that her gross monthly pay was $2,743.00. (Pl. Ex. No. 5).

On her 2002 federal income tax return, the Debtor listed her gross wages as $33,746.00, or 2,812.16 per month. (Pl. Ex. No. 9A). On her 2003 federal income tax return, the Debtor listed her gross wages as $34,909.00, or $2,909.08 per month. (Pl. Ex. No. 9B).

In her bankruptcy petition, the Debtor listed a monthly expense for electricity and heating fuel at $200.00 per month. A payment history of the Debtor's gas bill showed that the Debtor was paying between $120.00 to $160.00 a month on her gas bill, but had an arrearage of over $1,000.00. (Pl. Ex. No. 11). With respect to electricity, the Debtor was paying approximately $70.00 per month, but had an arrearage of over $700.00. (Pl. Ex. No. 13).

At the time of the Trial held in this matter, the Debtor had an expense of approximately $50.00 per month to repay two 401(k) loans whose aggregate

principal sum was $3,000.00. (Pl. Ex. No. 12). In her original bankruptcy petition, the Debtor listed this expense at $215.32.

In her bankruptcy petition, filed in this Court on September 9, 2003, the Debtor represented that her gross monthly pay was $2,818.40, with a net pay of 2,254.46. The Debtor listed her total monthly expenses at 2,242.00. (Doc. No. 1). Prior to the meeting of creditors, the Debtor amended her bankruptcy petition on two separate occasions.

On the second amendment, the Debtor submitted updated expense and income figures. These figures show the Debtor's gross monthly income at $2,818.40, with a net pay of $2,434.46. The Debtor's monthly expenses were revised to $2,432.00. Although there were some other minor variations, the substance of these revisions stemmed from a $100.00 decrease in an employer insurance deduction, an employer milage allowance of $180.00, an additional 401(k) repayment expense of $117.00, a business car expense of $125.00, an increase in day care by $60.00 and an increase in life insurance of $66.00. (Doc. No. 4).

The Plaintiff filed his Complaint on December 2, 2003. After filing his Complaint, the Debtor submitted revised income and expense figures to the Plaintiff, which again, and similar to the above, showed some variations in the Debtor's income and expenses.

LEGAL ANALYSIS

At issue here is the applicability subparagraph (A) of § 727(a)(4) which provides, "[t]he court shall grant the debtor a discharge, unless the debtor knowingly and fraudulently, in or in connection with the case made a false oath or account[.]" This statute is based on the fundamental principle of bankruptcy law that, in return for receiving the protections of the discharge injunction, a debtor must make a full, complete and

accurate disclosure of all required financial information. *Peterson v. Scott (In re Scott),* 172 F.3d 959, 967 (7th Cir.1999). As taken directly from the above statutory language of § 727(a)(4)(A), five elements must be established to deny a debtor's discharge: (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 the intent to deceive; and (5) the statement related materially to the bankruptcy case. *Keeney v. Smith (In re Keeney),* 227 F.3d 679, 685 (6th Cir. 2000). It is the Plaintiff's burden to establish the existence of each of these elements by at least a preponderance of the evidence. *Hamo v. Wilson (In re Hamo),* 233 B.R. 718, 724 (B.A.P. 6th Cir. 1999). In looking at this burden, a court must proceed on the presumption that a debtor is entitled to the benefits of the bankruptcy discharge. *Baker v. Reed (In re Reed),* 310 B.R. 363 (Bankr. N.D.Ohio 2004).

Upon applying the evidence to these elements, the first is unarguably met; information (or the omission thereof) set forth in a debtor's bankruptcy schedules qualifies as a statement made under oath. *Crawford v. Monfort, (In re Monfort),* 276 B.R. 793, 796 (Bankr. N.D.Ohio 2001). Beyond this, however, the Plaintiff has not carried his burden.

In arguing for the applicability of § 727(a)(4)(A), it is the Plaintiff's overall position that the Debtor attempted, through various overstatements and understatements of her income and expenses, to disguise available income that was available to service her debts. (Doc. No. 23, at pg. 2). To support this position, the Plaintiff relies on variations in those income and expense figures submitted to the Court, and the lack of a proper accounting thereof. And, there is no actual dissension from the Debtor that those income and expense figures put before the Court exhibited, over a relatively short period, a number of variations. Alone, however, variations in a debtor's reported income and expenses neither establish the falsity of the figures, nor that the debtor, with knowledge as to their falsity, acted with the intent to deceive. The reasons for this are straightforward.

To begin with, bankruptcy law specifically permits a debtor to make postpetition amendments to his or her petition. FED.R.BANK.P. 1009. In turn, this is simply the mechanism which implements the general bankruptcy policy that a debtor, until his or his case is fully administered, is under a continual duty of to make full, complete and accurate disclosure of all required information. With respect to a debtor's income expenses and expenses, postpetition fluctuations are common which, in conformance with the continual duty of disclosure, must be disclosed if they are material in nature. Consequently, to subsume an inference of fraud based simply on a debtor's submission of revised income and expense figures – in essence, punishing the debtor for complying with his or her continual duty of disclosure – runs contrary to bankruptcy policy.

On the other hand, the postpetition disclosure or the amending of information not originally disclosed by a debtor in their bankruptcy original petition may still be a potential consideration bearing on the debtor's honesty. *Banc One, Texas, N.A. v. Braymer, (In re Braymer)*, 126 B.R. 499, 501 (Bankr. N.D.Tex 1991) (original petition and schedules are generally the yardstick by which § 727(a)(4)(A) actions are measured). On this matter, and contrary to what may be an emerging practice of some debtors, the subsequent disclosure of information omitted from a bankruptcy petition will not undo a prior transgression; the tenet of no harm, no foul, does not apply. *Nat'l American Ins. Co. V. Guajardo (In re Guajardo)*, 215 B.R. 739, 741 (Bankr. W.D.Ark. 1997). The evidentiary value of variations in a debtor's petition, however, can work both ways; that is, the subsequent disclosure of information may show that the debtor was attempting to hide something. Or, it may simply be indicative of benign intent. *Bensenville Community Center v. Bailey (In re Bailey)*, 147 B.R. 157, 165 (Bankr.N.D.Ill.1992).

In the end then, variations in a debtor's income and expense figures are just one of many possible factors from which the existence of those elements under § 727(a)(4)(A) may be distilled. As was set forth by the Sixth Circuit Court of Appeals in addressing the elements of a § 727(a)(4)(A) cause of action:

> Complete financial disclosure is a prerequisite to the privilege of discharge. The intent to defraud involves a material representation that you know to be false, or, what amounts to the same thing, an omission that you know will create an erroneous impression. A reckless disregard as to whether a representation is true will also satisfy the intent requirement. Courts may deduce fraudulent intent from all the facts and circumstances of a case. However, a debtor is entitled to discharge if false information is the result of mistake or inadvertence. The subject of a false oath is material if it bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property.

In re Keeney, 227 F.3d at 685-86 (internal quotations and citations omitted).

As detailed below, the evidence presented in this case, when viewed in the aggregate, including the logical inference which may be derived therefrom, does not support the existence of a *prima facie* case to sustain an action under § 727(a)(4)(A).

> As an overall indicia of honesty, the Debtor's gross income, as listed in her petition and amended petition, corresponds closely to her tax returns and the representations she made on a loan agreement.
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> Those expenses listed by the Debtor in her petition for utilities, being higher than the actual monthly charges, can easily be account for by the existence of significant arrearages on the obligations. In a like manner, those variable expenses listed for her 401(k) loans can easily be explained by the Debtor making inconsistent and higher than required payments on the obligations. In this regard, it must be remembered that § 727(a)(4)(A) is only concerned with the honest disclosure of the expense, not its propriety.
>
> It is also logical to conclude that variations in many of the Debtor's other monthly expenses are simply the result of fluctuations that are normal and commonly occur in a person's monthly budget. Or, if not the case, by the fact that the Debtor was

> getting her finances in order. In this respect, it is not uncommon that a debtor does not have, at or around the time a bankruptcy petition is filed, a complete handle on their finances. This is especially true of extraneous income and/or expenses that can be easily overlooked – e.g., in this case, an employer's car expense and milage allowance, as well as expenses for employer provided benefits. Also, the Court is keenly aware that, in many instances, a debtor's monthly budget will fluctuate simply because required expenses are not actually paid every month.
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> A final miscellaneous point. The Plaintiff's argument that the Debtor overstated her withholdings appears to have been explained in his own exhibit, admitted into evidence over the Debtor's objection, wherein it was pointed out that the Debtor "alternates with the father of her child to claim the boy as her dependant." (Pl. Ex. No. 20, at pg. 2).

In the end, however, what is important is that once the mistake is realized, steps are taken to correct it. Here, this is exactly what happened; the Debtor filed two amendments to her bankruptcy petition, one of which revised her income and expense figures. On this matter, it has not gone unnoticed that the Debtor filed her amendments prior to the time and not in response to inquiries made at the first meeting of creditors. Similarly, these amendments were filed prior to the time the Plaintiff commenced the instant adversary case. These points are especially critical; normally, a debtor, who by giving false information in their petition, intends to commit an act of fraud, will not voluntarily come forth with information until compelled by some external force.

Accordingly, for these reasons, the Plaintiff's Motion to Alter or Amend pursuant to Bankruptcy Rule 9023 will be Denied. As for the Debtor's counterclaim under 11 U.S.C. § 523(d),[1] this section

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[1] Paragraph (d) of § 523 provides, "[i]f a creditor requests a determination of dischargeability of a

requires a court to award attorney fees and costs to the debtor if it is found that the plaintiff position was not "substantially justified." This provision, however, is specifically limited to actions brought under § 523(a)(2), not as was suggested by the Plaintiff to actions brought to deny discharge brought under § 727(a). For this purpose, this Court, in addressing the Plaintiff's Complaint under § 523(a)(2), stated that it was "a rather close call . . ." Thus, ruling *sub silentio* that the Plaintiff's complaint was "substantially justified," as that term is used in § 523(d), but, after Trial on the merits, it fell short of the evidentiary burden placed on the Plaintiff by bankruptcy law.

In reaching the conclusions found herein, the Court has considered all of the evidence, exhibits and arguments of counsel, regardless of whether or not they are specifically referred to in this Decision.

Accordingly, it is

ORDERED that the Motion of the Plaintiff, Dieter Weeber, to Alter or Amend Judgment pursuant to Bankruptcy Rule 9023 and Federal Rule of Civil Procedure 59, be, and is hereby, DENIED.

It is ***FURTHER ORDERED*** that the Motion of the Defendant/Debtor, Twana Boyd, for a Request for Ruling on Counterclaim, be, and is hereby, DENIED.

Dated:

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consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust."

Richard L. Speer
United States
Bankruptcy Judge