

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

**In Re:**

**RAYMOND PORRELLO,  
  
Debtor.**

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**UNION NATIONAL MORTGAGE CO.**

**Plaintiff,**

**v.**

**RAYMOND PORRELLO, JR., et al.**

**Defendants.**

**In Proceedings Under Chapter 7**

**Case No.: 07-10053  
Adv. Proc. No. 07-1147**

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U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
CLERK

**JUDGE RANDOLPH BAXTER**

**MEMORANDUM OF OPINION AND ORDER**

Herein, the Plaintiff, Union National Mortgage Company (UNMC), seeks a determination of debt dischargeability pursuant to §§ 523(a)(2), (a)(4) and (a)(6) of the Bankruptcy Code. It further seeks a denial of general discharge pursuant to §727 (“Complaint”). Raymond Porrello, Jr., the Debtor, opposes the relief sought. Upon the conclusion of a duly noticed trial proceeding and the consideration of the parties’ respective briefs, arguments of counsel, and an examination of the record, generally, the Court rules as follows:

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The Debtor filed a voluntary Chapter 7 petition on January 4, 2007. United National Mortgage Company (“UNMC”), an unsecured creditor, filed a Complaint to Determine Dischargeability of the Debtor’s Debt and Objecting to the Debtor’s Discharge pursuant to 11 U.S.C. §§ 523(a)(2), (a)(4) and (6) and §727. This adversary proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(J), with jurisdiction further conferred under 28 U.S.C. § 1334 and General Order No. 84 of the District.

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Raymond Porrello, Jr. (“Porrello”) is the sole owner of R.P. Developments, (“RPD”), a real estate developing company. RPD buys, remodels, and resells real estate investment property. Porrello worked with Stanley Motyka, a former real estate agent, who would find homes for Porrello to buy and buyers for the newly renovated homes. For several years, Motyka and Porrello worked together in the real estate business. During one particular transaction, Motyka found an investment property on 3652 Independence Road, Cleveland, Ohio 44105 for Porrello to purchase. After purchasing and renovating the home, Motyka ran a newspaper ad looking for someone to rent or buy the home. In this regard, Motyka found a buyer, one Gregory Cochran.

Funding for the purchase of the house was obtained through UNMC . UNMC is a HUD endorser, which means that it receives its loan money through federal funding. All loans are subject to a HUD investigation that determines whether any loans are procured through fraudulent means. HUD endorsers are required to follow certain guidelines to determine a buyers eligibility before approving any loan for that buyer.

After gathering Cochran's financial file, UNMC approved Cochran for a loan of \$62,000 to purchase the property on Independence Road. Once the home was occupied, Cochran defaulted on the mortgage loan. The house was eventually sold at a sheriff's sale and Cochran was forced to vacate the premises.

After the sheriff's sale, HUD held an investigation and determined that the Cochran loan was obtained by fraudulent means. HUD determined that the alternative letters of credit, Cochran used to qualify for the loan, contained false information. HUD also determined that UNMC failed to exercise due diligence during the loan approval process. Upon these findings, HUD demanded to be indemnified by UNMC in the amount of \$62,000.

Subsequently, Porrello filed his voluntary petition for bankruptcy relief under Chapter 7 with this Court. UNMC filed this adversary proceeding objecting to the Debtor's discharge. UNMC contends that the Debtor, with Motyka's assistance, produced the false alternative letters of credit. UNMC further alleges, that either the Debtor or Motyka, acting as the Debtor's agent, attempted to mislead UNMC by acting as Cochran's creditors who recommended Cochran for loan approval. The Debtor, however, claims that he was not involved and that he had no knowledge of Motyka's fraudulent actions.

UNMC further alleges that Porrello made false, misleading representations to this Court in the filing of his bankruptcy schedules and petition. UNMC contends that the Debtor failed to properly disclose his marital status, failed to disclose several creditors, and failed to disclose the repayment to his wife for a debt he incurred while insolvent. The Debtor denies UNMC's allegations and claims that any omissions were due to either mistake or inadvertence, not fraud. (*See, Complaint and Answer*).

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The Court must determine whether the Debtor should be denied a general discharge under §727 of the Bankruptcy Code and, if not, whether certain debts are dischargeable under §523 of the Code.

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Obtaining the maximum debt relief possible is the ultimate objective of a consumer debtor in U.S. bankruptcy law. Such relief is provided under §727 of the Bankruptcy Code and is referred to as a “general discharge.” Only honest but financially distressed debtors are deserving of a general discharge in bankruptcy. Those debtors who dare to wrongfully manipulate, or otherwise abuse the bankruptcy process, should never become a recipient of a general discharge in bankruptcy. One of the two fundamental purposes of U.S. bankruptcy law is to provide an honest but financially distressed debtor with a fresh start. *See, Local Loan Company v. Hunt*, 292 U.S. 234 (1934). Therein, equal emphasis is placed upon the terms honest and distressed. Where either is found to be lacking the grant of a general discharge is jeopardized.

Herein, Plaintiff UNMC challenges the Debtor’s ability to obtain a general discharge under §727 of the Code. Without enumerating a specific subsection of §727, UNMC alleges, *inter alia*, that the Debtor transferred or concealed, with the intent to hinder, delay or defraud a creditor and the trustee of various real and personal property. It further alleges that the Debtor made one or more false oaths. *See*, Complaint Count III.

In pertinent part, §727 of the Bankruptcy Code provides:

(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; or (B) property of the estate, after the date of the filing of the petition. . . . (a)(4) the debtor knowingly and fraudulently, in or in connection with the case - (A) made a false oath or account; (B) presented or used a false claim; ( C) gave, offered, received, or attempted to obtain money, property, or advantage , for acting or forbearing to act; or (D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;...

11 U.S.C. § 727. UNMC alleges that the Debtor, with the intent to hinder, defraud or delay his creditors, concealed a transfer of personal property between the Debtor and his wife, Sharon Porrello. In order to establish a prima facie case under § 727(a)(2), the Plaintiff must show by a preponderance of the evidence that: (1) the debtor transferred, removed, destroyed, or concealed the debtor's property or property of the bankruptcy estate; (2) the debtor did so within one year before the date their bankruptcy petition was filed or one year after the petition was filed; and (3) the debtor did so with the intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under the Bankruptcy Code. . *In re Howells* , 365 B.R. 764, 768 -769 (Bkrcty.N.D.Ohio, 2007).

In 2006, the Debtor sought to purchase a property located in Garfield Heights, Ohio. Without sufficient funds to purchase the property, the Debtor received an unsecured short term loan from his wife. Once the rehabilitation of the property began, the Debtor refinanced the home, through Countrywide Home Loans, and received \$88,000 in proceeds. Instead of directly repaying his wife, the Debtor placed the proceeds in an escrow account. The Debtor's wife was repaid through the escrow agent. Several months later, the Debtor filed for bankruptcy relief. The Debtor, however, never scheduled such pre-petition transfer between himself and his wife

on his bankruptcy schedules. *See*, R.A. Porrello, Cross Exam; Exh. 56. Furthermore, the Debtor never amended his schedules to reflect the transfer. *Id*; Exh. 55.

The Debtor, however, claims that this transaction was not a transfer. Specifically, the Debtor argues that because the proceeds were distributed through escrow, the proceeds were not from the Debtor, and therefore, was not a transfer within the constraints of §727(a)(2). However, in §101(54)(D) the Code defines a transfer to mean “each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or an interest in property.” *11 U.S.C. §101(54)(D)*. Despite the Debtor’s efforts to conceal this transaction, the Code recognizes “every manner, direct or indirect, of disposing of property as a transfer.” *Id.* *Matter of Darke*, 18 B.R. 510, 513 (Bankr. Mich. 1982) (Proceeds placed in an escrow account to repay pre-petition legal debt, constituted a transfer within the meaning of §101).

In addition to the pre-petition transfer, the Debtor also received a \$15,000 transfer from his wife 10 (ten) months post-petition. *See*, R.A. Porrello Cross Exam; S. Porrello Cross Exam. The Debtor and his wife often worked together on rehabilitation projects. In September 2006, the Debtor’s wife bought a home on Rosalie Drive in Cleveland, Ohio for \$60,000. *See*, Exh. 19. Afterwards, the Debtor rehabilitated the home and his wife sold it in February 2007 for \$139,000. *See*, Exh. 20. For the work the Debtor completed on the house, his wife paid him \$15,000.

Although the payment occurred post-petition, the money transferred is property of the estate because it was given for work completed pre-petition. By the petition date, the Debtor knew he could soon receive payment for his services, however, this future payment was not reflected on his bankruptcy schedules. *See*, R.A. Porrello Cross Exam; S. Porrello Cross Exam;

S. Hobt Direct. When the transfer was made in December 2007, the Debtor had completed the §341 meeting and was fully aware of the need to amend his schedules to reflect both transfers. Section 727(a)(2)(B) states that “the court shall grant a debtor a discharge unless the debtor, with the intent to hinder, delay or defraud a creditor...concealed property of the estate, after the date of the filing of the petition.” 11 U.S.C. §727(a)(2)(B). Notwithstanding, the Debtor never amended his schedules and thus concealed property of the estate. *See*, Exh. 55; Exh. 56. Having determined that both transactions were indeed transfers within the meaning of the Code, and that both transfers occurred within the one year time frame as required by §727(a)(2), the only issue left to discuss is whether the Debtor concealed these transfers with fraudulent intent.

A determination of fraudulent intent depends, in part, on an assessment of the credibility of the debtor. *See* Fed.R.Bankr.P. 8013. *Id.* To prove that the debtor intended to hinder, delay or defraud a creditor, the plaintiff must show an actual intent to deceive; constructive fraud will not suffice. *In re Courtney*, 351 B.R. 491 (Bankr.E.D.Tenn., 2006). Direct evidence of actual intent is hard to prove, therefore, circumstantial evidence will generally suffice. *In re Swegan*, 383 B.R. 646 (6<sup>th</sup> Cir. B.A.P. Ohio). When viewing the Debtor’s conduct as a whole, the fact that the Debtor failed to fully and honestly disclose several transfers displays his continual intent to deceive. Upon these findings, this Court concludes that the Debtor concealed the transfers, with the intent to delay, hinder, or defraud his bankruptcy estate. Although this conclusion leads this Court to deny the Debtor a discharge under §727(a)(2), an analysis under §727(a)(4) is warranted.

UNMC also alleges that the Debtor provided false information on his bankruptcy petition and schedules. A party objecting to a debtor's discharge pursuant to § 727(a)(4)(A) must

establish that, (1) the debtor made a statement while under oath, (2) the statement was false, (3) the statement related materially to the bankruptcy case, (4) the debtor knew the statement was false, and (5) the debtor made the statement with fraudulent intent. *Bank of India v. Sapru*, 127 B.R. 306, 314 (Bankr.E.D.N.Y.1991); *In re Brooks*, 58 B.R. 462, 465 (Bankr.W.D.Pa.1986). The plaintiff bears the burden of proving the objection to the debtor's general discharge by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 287, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991) and *In re Meyers*, 196 F.3d 622, 624 (6th Cir.1999); *In re Howells*, 365 B.R. 764, 768 (Bkrcty.N.D.Ohio,2007)

UNMC alleges that the Debtor provided false information on his petition regarding his marital status. Therein, he stated that he was unmarried. *See*, Exh. 56 (25); Exh. 56 (44). This reported marital status contradicts his trial testimony which revealed that he is married and has been at all relevant time periods. His wife's testimony was credible and revealed they were married and never divorced. *See*, R.A. Porrello, Cross Exam; Exh. 44(2a); S. Porrello, Cross Exam. Such a contradiction affects negatively the Debtor's credibility and clearly demonstrates a false oath made to the Court.

As indicated above, a debtor exercising the Court's jurisdiction necessarily must be an honest and good faith debtor. All representations made by a debtor on the petition papers must be truthful and are subject to the penalty of perjury. *See, In re Beauboef*, 966 F.2d 174, 178 (5th Cir.1992); *In re Hamo*, 233 B.R. 718, 725 (6<sup>th</sup> Cir. Ohio, 1999). Once false oaths are determined to exist in petition papers such permeates the veracity of the petition and related papers upon which the Court and all parties in interest must rely upon. This is especially true where , as exists herein, there has been no amendment to the Debtor's petition to provide an accurate



marital status.

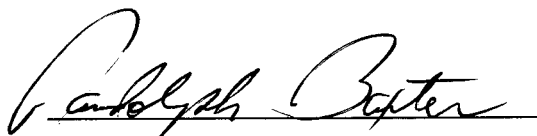
Further, once a false oath is so determined, the Court and other parties in interest should not be placed in a position of having to guess what other papers prosecuted by the Debtor lack truthfulness. *See, Matter of Hussan*, 56 B.R. 288; *also, In re Diodati*, 9 B.R. 804, 807 (Bankr.D.Mass. 1981. The penalty for perjury is addressed in Federal Rules of Bankruptcy Procedure Rule 1008, which states “ [a]ll petitions, lists, schedules, statements and amendments thereto shall be verified or contain an unsworn declaration as provide in 28 U.S.C. § 1746.” *Fed. R. Bankr. P. Rule 1008*. In addition to the requirement set forth in Rule 1008, the Bankruptcy Rules authorizes sanctions to those who sign certain documents that are not “ well grounded in fact and...warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.” *See, Fed. R. Bankr. P. Rule 9011*.

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Upon these findings and conclusions, UNMC has met its burden of proof, by a preponderance of the evidence standard, to show that the Debtor Defendant should be denied a general discharge pursuant to §727(a)(2) and §727(4)(A) of the Bankruptcy Code. Accordingly, further consideration of the debt dischargeability allegations under §523 of the Code are unwarranted as being moot, and the Debtor’s case is hereby dismissed.

**IT IS SO ORDERED.**

Dated, this 11<sup>th</sup> day of  
December, 2008



**JUDGE RANDOLPH BAXTER**  
**UNITED STATES BANKRUPTCY COURT**