

IT IS SO ORDERED.

Dated: 10:35 AM March 02 2009



**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:)	CASE NO. 06-51587
)	
Thomas E. Deighan and Christine Bowersox,)	CHAPTER 7
)	
DEBTORS.)	
)	ADVERSARY NO. 07-5145
Richard Wilson, Trustee,)	
)	JUDGE MARILYN SHEA-STONUM
PLAINTIFF,)	
)	
vs.)	
)	
Thomas E. Deighan and Christine Bowersox,)	MEMORANDUM OPINION
)	
DEFENDANTS.)	

This matter is before the Court on the amended complaint of Richard Wilson, Chapter 7 Trustee (the “Trustee” or “Plaintiff”) objecting to the discharge of Thomas E. Deighan (“Mr. Deighan”) and Christine Bowersox (“Ms. Bowersox,” and together with Mr. Deighan, the “Debtors”) pursuant to 11 U.S.C. § 727(a)(2) and (4). The Trustee alleges that the

Debtors have not given the Trustee true answers regarding their interests in various business entities and told lies and half truths to conceal or obfuscate the true nature of their financial and business interests.

The Court held a trial in this matter on April 28, 2008, post-trial proposed findings of fact and conclusions of law were filed on May 28, 2008 and closing arguments were held on August 22, 2008. Appearing at the trial were Michael Moran, counsel for the Trustee, and Michelle DiBartolo and Mark Ludwig, counsel for Debtors. Ron Towne, counsel for Promotional Products Group, Inc.,¹ was also present during the trial.

During the trial the parties presented evidence in the form of exhibits and testimony from Mr. Deighan, Gerald Stephens, William Hartung, Jr., Richard Wilson, Morris Laatsch, and Craig Marshall. In addition, prior to the commencement of the trial, counsel filed a list of facts which they agree are not in dispute [*see* docket # 33] (the “Stipulations”). Counsel also stipulated to the admission of Joint Exhibits 1-24. The Court also considered the post-trial submission (i) by Mr. Laatsch of the Debtors’ schedules and statement of financial affairs which reflect the Debtors’ handwritten notations and (ii) of the American Airlines License Agreement.

JURISDICTION

This proceeding arises in a case referred to this Court by General Order No. 84 entered in this district on July 16, 1984. It is determined to be a core proceeding pursuant to

¹Promotional Products Group, Inc. is the plaintiff in a separate action challenging the Debtors’ discharge which has been abated pending outcome of this action. The Stipulations reached in this trial will also be treated as stipulations in that action. However, Mr. Towne did not participate in the actual trial of this matter.

28 U.S.C. §157(b)(2)(A) and (J) over which this Court has jurisdiction pursuant to 28 U.S.C. § 1334. Based upon the testimony and evidence presented at the trial, the arguments of counsel and the documents of record in this adversary proceeding and the Debtors' chapter 7 case, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Debtors filed a joint petition for relief under chapter 7 of the Bankruptcy Code on August 23, 2006.

2. The Debtors' schedules and statement of financial affairs contain many incomplete, misleading or inconsistent disclosures.

3. For instance, in response to question 1 of the statement of financial affairs the Debtors' understated their income. Mr. Deighan's income for 2006 is listed as \$1,700. Ms. Bowersox's income is listed as \$4,200. Schedule I lists the Debtors as managers of Sunset Promotional Products each making approximately \$3,000 per month.

4. The evidence adduced at trial shows the Debtors' income was greater than listed on Schedule I. Though Mr. Deighan attempted to blame the inaccurate information of Mr. Laatsch, his attorney at the time of filing, the Court does not credit his testimony. The copy of the petition with handwritten changes submitted to the Court post-trial contains no indication of an attempt to supplement Mr. Deighan's income information. Furthermore, Mr. Deighan's testimony that he signed the petition, schedules and statement of financial affairs in blank stands in stark contrast to Mr. Laatsch's credible testimony that the schedules, statement of financial affairs and petition were filed in at the time the Debtors signed them.

5. Mr. Deighan has not made a complete disclosure of his business interests and

assets and the disclosure he has made appears designed to obfuscate the truth. For instance, Mr. Deighan had a Key Bank checking account open within the six(6) months immediately preceding the petition date. He did not disclose the Key Bank checking account on his schedules, statement of financial affairs, or at his first 341 examination. It was not until he was confronted by someone with independent knowledge of the account's existence at a subsequent 2004 examination that Mr. Deighan acknowledged he had a Key Bank checking account.

6. At trial, Mr. Deighan first attempted to lay blame for the nondisclosure on Mr. Laatsch, then later he testified that he had forgotten about the Key Bank checking account until confronted at the 2004 examination. His self-serving and inconsistent testimony at trial is not credited by this Court.

7. Similarly, questions surround the true characteristics of the transfer of Mr. Deighan's ownership interests in Sunset Golf, LLC. Though a transfer of "26 shares of Sunset Golf, LLC [to Dan Deighan] for \$10,000 cash" is listed in response to question 10 on the Debtors' statement of financial affairs, there are emails between Mr. Deighan and his brother, Dan, dated after the alleged transfer date that suggest the terms of the transfer remain unresolved or are different than as disclosed in response to question 10. *See* Joint Exhibits 12 and 13. Mr. Deighan's testimony at trial on this subject did not shed any further light. The Court finds that Mr. Deighan has not honestly and completely disclosed the nature and the terms of this transaction.

8. Another area where the Court finds the Debtor has failed to rise to the required level of disclosure is with respect to an alleged trust which is sometimes referred to

as the Ashley Elizabeth Deighan Trust and sometimes the Deighan Family Trust. The Plaintiff argues that the trust was subterfuge and an attempt to conceal Mr. Deighan's real ownership interest in Sunset Promotional Products to prevent creditors from reaching it. Mr. Deighan's answers on the subject at trial were evasive, unresponsive or contradictory. Prior to trial, Mr. Deighan's responses to the Plaintiff's inquiries similarly failed to meet his disclosure duties as a debtor. *See* Joint Exhibits 1-5.

9. By way of example, Mr. Deighan produced an executed copy of the trust agreement upon request by the Plaintiff. The executed copy produced by Mr. Deighan is signed and it bears the date January 2006. At trial, it became clear that the trust agreement had not been signed prior to the Petition Date. Mr. Deighan apparently signed the trust agreement after he had testified about its existence and after the Plaintiff requested an executed copy of the trust, but he did not disclose that the document had not been signed until just prior to its delivery to the Plaintiff. The Court finds his silence was designed to conceal the truth.

10. The Trustee alleges that the Debtors failed to disclose a promissory note payable to Mr. Deighan from Sunset Promotional Products, LLC. Jt. Exhibit 9 - promissory note made payable to Thomas Deighan from Sunset Promotional Products. Mr Deighan says the money is actually owed to Dan Deighan despite the fact that the promissory note and the operating agreement for Sunset Promotional Products say otherwise. *See* Jt. Exhibits 7, 8 and 9. Mr. Deighan attributes these mistakes to his then attorney, Mr. Torres, and claims the paperwork, though signed, was merely a work in progress.

11. The Court record is replete with these types of attempts by Mr. Deighan to

blame any inconsistency or error on the “advice of counsel,” and to make it impossible for a chapter 7 trustee to determine the true nature and extent of Mr. Deighan’s assets and liabilities.

DISCUSSION

“A discharge is a privilege and not a right and therefore the strict requirement of accuracy is a small quid pro quo.” *Hamo v. Wilson (In re Hamo)*, 233 B.R. 718, 725-26 (B.A.P. 6th Cir. 1999) (citing *Hillis v. Martin, Martin v. Martin (In re Martin)*, 124 B.R. 542, 545, 547-48 (Bankr. N.D. Ind. 1991). In his complaint, Trustee claims Debtors should be denied a discharge pursuant to § 727(a)(2) and (4).²

Analysis of Mr. Deighan’s Discharge

727(a)(2)

To prove a case under § 727(a)(2), a 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 the filing of the petition, or property of the estate, at some time after the date of the filing of the petition. *Barclays/American Business Credit, Inc. v. Adams (In re Adams)*, 31 F.3d 389, 394 (6th Cir.

²Section 727 of the Bankruptcy Code provides, in pertinent part,
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 (1) 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; ...

- (4) the Debtor knowingly and fraudulently, in or in connection with the case -
 - (A) made a false oath or account; ...

1994). This section operates to deny a discharge to debtors who, intending to defraud, conceal property which if discovered would become property of the estate. A debtor's failure to disclose information is concealment. *See Buckeye Retirement Co., LLC, Ltd. v. Swegan (In re Swegan)*, 383 B.R. 646, 655 (B.A.P. 6th Cir. 2008). The question is whether the debtor intended to defraud through the concealment. *Keeney v. Smith (In re Keeney)*, 227 F.3d 679 (6th Cir. 2000).

“ ‘Complete financial disclosure’ ” is a prerequisite to the privilege of discharge. *Peterson*, 172 F.3d at 967. The Court of Appeals for the Seventh Circuit has explained that 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.” *In re Chavin*, 150 F.3d 726, 728 (7th Cir.1998). A reckless disregard as to whether a representation is true will also satisfy the intent requirement. *See id.* “ ‘[C]ourts may deduce fraudulent intent from all the facts and circumstances of a case.’ ” *Williamson*, 828 F.2d at 252 (citation omitted). However, a debtor is entitled to discharge if false information is the result of mistake or inadvertence. *See Gillickson*, 108 F.3d at 1294. 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.’ ” *Beaubouef*, 966 F.2d at 178 (citation omitted).

Id. at 685-86.

The Court finds that the evidence presented in this case shows a pattern by Mr. Deighan that is designed to avoid complete financial disclosure and demonstrates his intent to hinder, delay and defraud creditors. Even as he was testifying at trial, Mr. Deighan seemed incapable of telling the complete truth. His answers to even the simplest of questions appeared to the Court to be purposefully phrased to confuse and mislead. Therefore, the Court finds that Mr. Deighan did conceal property with the intent to hinder, delay and defraud creditors.

Mr. Deighan's trial counsel relied on the "mitigating factors" set forth in *In re McVay*, 345 B.R. 846, 851-52 (Bankr. N.D. Ohio 2006) (addressing trustee's objection to exemptions, not discharge) and referenced in *Kovacs v. McVay (In re McVay)*, 363 B.R. 824, 830 (Bankr. N.D. Ohio 2006) (addressing trustee's allegations regarding denial of debtor's discharge). The "mitigating factors" discussed in those decisions are 1) reasonable good faith reliance on advice of counsel; 2) debtor's cognitive ability; and 3) how readily debtors made a full disclosure. In this case, Mr. Deighan claims reliance on the advice of counsel for almost every omission, inconsistency and error.

Generally, reliance on the advice of counsel can mitigate a finding of intent. However, that reliance has to be reasonable and in good faith. The Court doubts that Mr. Deighan actually relied on the advice of counsel. Based on his testimony at trial, the Court believes that Mr. Deighan also hid the truth from his lawyers. Therefore, even if he did rely on counsel's advice, the Court does not believe his reliance was reasonable or in good faith. Debtor is educated. He also seems skilled at avoiding questions. Although he may not be familiar with the bankruptcy process, the Court is confident that, given his education and business experience, Mr. Deighan was able to read the schedules and statement of financial affairs and understand the request to list truthfully and completely all of his property and all transfers of property during a certain time frame. Finally, the evidence in this case showed that Mr. Deighan has still not made a full disclosure or corrected misinformation. The mitigating factors do not weigh in his favor.

Therefore, the Court concludes that Trustee proved by a preponderance of the evidence that Mr. Deighan should be denied a discharge pursuant to § 727(a)(2).

727(a)(4)

To prove his case under § 727(a)(4), the Trustee must establish by a preponderance of the evidence 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.

In re Hamo, 233 B.R. 718 citing *Hunter v. Sowers (In re Sowers)*, 229 B.R. 151, 158 (Bankr. N.D. Ohio 1998).

False Statement while under Oath

Statements in bankruptcy schedules are given under oath. *In re Hamo*, 233 B.R. 718.

The Debtors signed their Schedules and Statement of Financial Affairs under penalty of perjury. At the initial § 341 meeting and subsequent 2004 exams, the Debtors have orally made additions and amendments. According to the testimony of Mr. Deighan, he made hand written changes to the original petition and schedules so that Mr. Laatsch, his bankruptcy counsel at the time, could file amended schedules. He said that the amended schedules and petition were never filed upon advice of counsel based on the commencement of this and other lawsuits challenging the debtors' ability to obtain a discharge.

The Court instructed Mr. Laatsch to provide the Court with a copy of the petition and schedules that bear Mr. Deighan's handwritten changes. Following the trial, Mr. Laatsch submitted these documents to the Court. The "amended" schedules and petition do contain handwritten notations. The notations still fall short.

Omitting material information from a bankruptcy filing may constitute a false oath

under this section. *Job v. Calder (In re Calder)*, 907 F.2d 953 (10th Cir. 1990). The omissions made the Debtors' Schedules and Statement of Financial Affairs false. In this circumstance, an act of amending the Schedules and Statement of Financial Affairs would not negate this finding. *In re Sholdra*, 249 F.3d 380, 382-83 (5th Cir. 2001).

Statement Related Materially to the Bankruptcy Case

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.'" *Keeny v. Smith (In re Keeney)*, 227 F.3d. 679, 686 (6th Cir. 2000) (quoting *Beaubouef v. Beaubouef (In re Beaubouef)*, 966 F.2d 174, 178 (5th Cir. 1992)).

In determining whether or not an omission is material, the issue is not merely the value of the omitted assets or whether the omission was detrimental to creditors." 4 *Collier on Bankruptcy*, ¶ 727.04[1], at 727-59. "The subject matter of a false oath is 'material,' and thus sufficient to bar discharge, 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 Chalik*, 748 F.2d 616, 617 (11th Cir. 1984).

In re Beaubouef, 966 F.2d at 178.

It is not the value of the property, but the complete and honest disclosure that is important. *Id.* ("The veracity of the bankrupt's statements is essential."). The value to the estate of the undisclosed property and transfers may have been minimal, but the omission of the information from his bankruptcy petition was material.

Debtor knew the statement was false

Knowledge may be shown by demonstrating that the debtor knew the truth, but nonetheless failed to give the information or gave contradictory information.

In re Hamo. 233 B.R. 718 (BAP 6th Cir. 1999) citing *In re Beaubouef*, 966 F.2d 174, 178 (5th

Cir. 1992). Without hesitation the Court finds that Mr. Deighan gave contradictory information from one examination to the next. His inability to weave a well spun web was also apparent at trial, where Mr. Deighan gave contradictory answers in response to questions from Plaintiff's counsel. Such an inability on the part of most humans and the diligent response of bankruptcy trustees is a fortunate circumstance that protects the integrity of the bankruptcy system.

Debtor made the statement with fraudulent intent

The intent requirement is satisfied by proving either a knowing misrepresentation or reckless disregard as to the truth of a representation. *Keeney*, 227 F.3d at 685-86. Fraudulent intent may be deduced from the facts and circumstances of the case. *Keeney*, 227 F.3d at 686. A false statement or omission that is made by mistake or inadvertence is not sufficient grounds upon which to base the denial of a discharge, but a knowingly false statement or omission made by the debtor with reckless indifference to the truth will suffice as grounds for the denial of a Chapter 7 general discharge. *In re Hamo*, 233 B.R. at 725. The Court finds that the Plaintiff proved Mr. Deighan's fraudulent intent.

Therefore, the Court concludes that Trustee proved by a preponderance of the evidence that Mr. Deighan should be denied a discharge pursuant to § 727(a)(4).

Analysis of Ms. Bowersox' Discharge

As to Christine Bowersox, the Trustee argues she should be denied a discharge under §§ 727(a)(2) and (4) because Mr. Deighan's actions should be attributed to his wife, Ms. Bowersox, and serve as a basis for denying discharge. The Court disagrees. The Trustee

presented no evidence with respect to the intent of Ms. Bowersox. Because intent is an essential element of the Trustee's case under § 727(a)(2) and (4) the Court finds that the Trustee has failed to prove his case with respect to Ms. Bowersox.

CONCLUSION

The trustee has shown by a preponderance of the evidence that the Mr. Deighan's discharge should be denied pursuant to 11 U.S.C. § 727 (a)(2) and (4). A separate judgment consistent with these findings of fact and conclusions of law will be entered.

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cc: Richard Wilson
Michael Moran
Michelle DeBartolo