UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:

Charlene Hilliard,
Debtor.

In Proceedings Under Chapter 7
Case No.: 09-12219
Adv. Proc. No.: 09-1220

Daniel McDermott, U.S. Trustee
Plaintiff.

vs.
Charlene Hilliard,
Defendant.

JUDGE RANDOLPH BAXTER

MEMORANDUM OF OPINION AND ORDER

Herein, the Plaintiff, Daniel McDermott, United States Trustee, filed a Complaint Objecting to Discharge pursuant to §§ 727(a)(2), (a)(3), (a)(4) and (a)(5) of the Bankruptcy Code. Charlene Hilliard, the Debtor, opposes the relief sought. 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. Upon the conclusion of a duly noticed trial proceeding and the consideration of the parties' respective briefs, arguments of counsel, testimony of witnesses and an examination of the record, generally, the following findings of fact and conclusions of law are hereby rendered:

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The undisputed facts are as follows: The Debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code on March 19, 2009. The Debtor is currently an assistant principal in a local secondary school district and holds a doctoral degree in child and youth studies. As a result of her higher education, the Debtor accumulated a fair amount of student loan debt. (Debtor, Direct). Consequently, the Debtor entered into the real estate business to supplement

her income. (Debtor, Direct). During the two years prior to filing bankruptcy, the Debtor acquired ten parcels of real property. The ten parcels were used as rental properties to generate extra income for the Debtor. At the time of the bankruptcy, the Debtor owned eight of the ten parcels of real property. The Debtor also has an interest in four vehicles. The last vehicle acquired, a 2009 Lexus RX 350, was leased on March 10, 2009, nine days before the Debtor filed for bankruptcy relief. Additionally, the Debtor is the sole owner of two businesses known as Hill E. Homes Co. and Hill E. Homes, LLC. On her bankruptcy petition, she scheduled her assets in the amount of $592,229.84 and liabilities of $775, 112.46. (See Exh. 2-6). Her secured debt is $565,607.60. (See Exh. 2-23). Her unsecured debt is $209,504.86. (See Exh. 2-6). A significant portion of the unsecured debt is the Debtor's student loan debt. (See Exh. 2-17).

According to the Debtor, the eight parcels of real property were acquired by quit claim deed. With each acquisition, the Debtor paid no consideration nor did she enter into a written agreement regarding either property's purchase price. Instead, the Debtor and the seller orally agreed that a property's purchase price would be the appraised value of that property. The Debtor acquired parcels of real property from either the Debtor's business associate, Marvin Atkins, Sabrina Kidd, Jamal Sanders, JKS Management and Consulting (Atkin's business), or MLR Investments (Sanders' business). (Debtor, Cross-Exam).

Subsequently, the Debtor sought a mortgage from either JP Morgan Chase Bank, Key Bank, or National City Bank. The bank obtained an appraisal of each property acquired by the Debtor and subsequently loaned the Debtor funds to purchase the property. The proceeds from the acquired mortgage were electronically placed into the Debtor's Chase business checking

account. The Debtor then paid one of her business associates from the mortgage proceeds. The rental properties, however, were not profitable and generated negative income for the Debtor in 2008 and 2009. This negative rental income precipitated the Debtor's bankruptcy filing.

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The U.S. Trustee filed a complaint objecting to the discharge of the Debtor's debts. Specifically, the U.S. Trustee alleges that the Debtor should be denied a discharge because she committed a false oath by not disclosing her interest in the following four companies on her original Schedule B (Personal Property): Hill E. Homes Co., Hill E. Homes, LLC, JKS Management and Consulting and Horne Investments. The U.S. Trustee asserts that the Debtor intentionally omitted her interest in these companies to defraud her creditors. He further asserts that the Debtor amended Schedule B only after she was examined at the §341 meeting. The U. S. Trustee also alleges that the Debtor failed to maintain or preserve business records for these business and, therefore, cannot satisfactorily explain the loss of the assets from her bank accounts. The U. S. Trustee avers that the Debtor's overall course of conduct shows a fraudulent intent on her behalf to conceal assets that could be used to pay her creditors.

The Debtor denies these allegations. She asserts that the U.S. Trustee cannot present evidence to demonstrate the Debtor's failure to maintain adequate records. The Debtor avers that she has provided all financial documentation to the U.S. Trustee. She asserts that the records provided to the U.S. Trustee sufficiently explains her business transactions. The Debtor further asserts that any omission of her interest in the above named businesses was an inadvertent mistake and argues that her amendment of Schedule B proves that fraud was not a factor. For these reasons, the Debtor contends that the U.S. Trustee's complaint should be

dismissed.

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The Court must determine whether the Debtor should be denied a general discharge under §727 of the Bankruptcy Code. [11 U.S.C. §727(a)].

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Section 727 provides:

> **(a)** The court shall grant the debtor a discharge, unless--**(1)** the debtor is not an individual; **(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; **(3)** the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case; **(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, or a promise of 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; **(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.A. § 727 . Herein, the U.S. Trustee has the burden of proof which is to be demonstrated by a preponderance of the evidence standard. *In re Adams,* 31 F.3d 389 (6th Cir. 1994).

Section 727(a)(2):

To establish a prima facie case under § 727(a)(2), the Plaintiff must show that: (1) the debtor transferred, removed, destroyed, or concealed the debtor property or property of the

bankruptcy estate; (2) the debtor did so within one year before the date their bankruptcy petition was filed or 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 Hamo,* 233 B.R. 718, 720 (B.A.P. 6th Cir. 1999); *In re Howells* , 365 B.R. 764, 768 -769 (Bankr.N.D.Ohio, 2007). 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. Direct evidence of actual intent is hard to prove, therefore, circumstantial evidence may suffice. *In re Swegan,* 383 B.R. 646 (6th Cir. B.A.P. Ohio).

The U.S. Trustee alleges that the Debtor, with fraudulent intent, concealed her interest in Hill E. Homes Co. and Hill E. Homes, LLC when she failed to list these companies on the original Schedule B. To support this allegation, the U.S. Trustee exhibited the Debtor's original Schedule B. (See Exh. 2-17; Exh. 2-18; Exh. 2-19). He argued that the Debtor amended this schedule only after the examination at the §341 meeting. The Debtor denies this allegation asserting that her interest in the two companies were inadvertently omitted. (Debtor, Direct).

Herein, the U.S. Trustee has not met its burden to prove the Debtor should not be granted a discharge pursuant to §727(a)(2) of the Bankruptcy Code. Although the Debtor did not list her interest in Hill E. Homes Co. and Hill E. Homes, LLC on her original Schedule B, she did, however, list the companies on the unamended Statement of Financial Affairs. (Exh. 2-41). She explained that the omission was attributed to her belief that her nominal interest in the businesses was inconsequential to the estate. She later filed an amended Schedule B to correct the omission. (See Exh. 4). Although her reasoning was erroneous, her testimony in this manner

was credible. The omission was clearly an inadvertent mistake on behalf of the Debtor and cannot be attributed to fraud or an intent to deceive. A mere showing of a debtor's mistake is insufficient to warrant dismissal pursuant to §727(a)(2). *In re Keeney,* 227 F.3d 679 (6th Cir. 2000); *In re Pier,* 310 B.R. 347 (Bankr.N.D. Ohio 2004). Accordingly, dismissal relief under §727(a)(2) is denied.

Section 727(a)(3):

A debtor will be denied a discharge if he has "concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information ... from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case." 11 U.S.C. § 727(a)(3). The goal of §727(a)(3) is to require an accurate presentation of the debtor's financial affairs as the *quid pro quo* for a discharge. *In re Carter,* 274 B.R. 481, 485 (Bankr.S.D.Ohio 2002). Thereby giving creditors and the bankruptcy court "complete and accurate information concerning the status of the debtor's affairs and to test the completeness of the disclosure requisite to a discharge." *Meridian Bank v. Alten,* 958 F.2d 1226, 1230 (3rd Cir.1992); *In re Strbac,* 235 B.R. 880, 882 (6th Cir. B.A.P. 1999).

Section 727(a)(3) has been interpreted to apply a shifting burden of proof. The plaintiff must establish a *prima facie* case showing the debtor failed to keep adequate records. *Meridian Bank v. Alten,* 958 F.2d 1226 (3rd Cir. 1992); *Grange Mut. Ins. Co. v. Benningfield (In re Benningfield),* 109 B.R. 291, 293 (Bankr.S.D.Ohio 1989). Notwithstanding, the plaintiff is not entitled to perfect, or even necessarily complete, records. *Id.* In determining the adequacy of records, the court can consider the debtor's education, business experience, sophistication,

credibility, reasonableness of explanation or any other relevant factor. *In re Trogdon,* 111 B.R. 655, 658 (Bankr.N.D.Ohio 1990).

The U.S. Trustee argues that the Debtor failed to keep or preserve recorded information, including books, documents, records and papers from which her business transactions might be ascertained. (Plaintiff's Trial Brief, p. 8). He admits that the Debtor provided minimal documentation, but he asserts that complete documentation has not been provided. *Id.* The Debtor denies withholding any financial documentation related to either Hill E. Homes Co. or Hill E. Homes, LLC. (Debtor, Direct). She contends that the reason the U.S. Trustee has not received certain documentation is because he did not make a specific request for the documents. She further asserts that she was never in possession of certain financial documentation related to JKS Management and Consulting or Horne Investments. *Id.*

Herein, the Debtor is not a licensed real estate agent. This is not to suggest, however, that she is not an astute businesswoman. She is a well-educated debtor who worked for two real estate management companies over the past five years - JKS Management and Consulting and Horne Investments. (Debtor, Cross-Exam). Her primary responsibility at JKS Management and Horne Investments was to shadow the principals of the two companies, Jamal Sanders and William Horne, in order to learn the business of real estate. *Id.* Her goal was to start her own real estate management business so that she could buy, sell and rent homes for profit. (Debtor, Direct).

In response to court inquiry at trial, the U.S. Trustee acknowledged that he did not make requests for specific documentation regarding the Debtor's business transactions. (Court Inquiry). It is, however, incumbent upon a debtor who seeks discharge to make his or her

financial history transparent. 11 U.S.C. §727(a)(3). Absent this transparency, the debtor will not receive a discharge. See *Trogdon*, 111 B.R. at 659 (Bankr.N.D.Ohio 1990)(Business transactions...require recordation of some type as a requisite to obtaining discharge). It was the Debtor's position that her companies, Hill E. Homes Co. and Hill E. Homes, LLC did not operate. (See Amended Schedule B; Debtor, Cross Exam). She maintained this position until the second day of trial when the Debtor admitted that she opened up her business checking account at JP Morgan Chase Bank for business operations. (Debtor, Cross Exam). The Debtor later testified to not maintaining records of canceled checks made to business associates, Sabrina Kidd, Marvin Atkins (a.k.a. Marv Atkins) and Jamal Sanders. (Debtor, Cross Exam). By her own admission, she testified to inadvertently destroying the perforated stubs from her business checks one month prior to filing for bankruptcy relief. (Debtor, Cross Exam). The Debtor further testified to collecting rents from tenants without maintaining receipts. *Id.*

The Debtor gave conflicting testimony regarding available recorded information. (Debtor, Direct; Debtor, Cross-Exam). Except where noted above, the Debtor's failure to produce documentation was not attributed to the U.S. Trustee's lack of specific inquiry. Instead, it was an admission of the Debtor's failure to maintain business records without a justifiable explanation. The Debtor's business records in this regard are incomplete. Further, the Debtor's conflicting testimony was incredible. Thusly, the Debtor is denied a discharge pursuant to §727(a)(3).

Section 727(a)(4):

Section 727(a)(4) provides that the court shall grant the debtor a discharge, unless the debtor knowingly and fraudulently, in or in connection with the [bankruptcy] case, made a false

oath or account. 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. *In re Keeney,* 227 F.3d at 685; *In re Brooks,* 58 B.R. 462, 465 (Bankr.W.D.Pa.1986).

A fact is material if it "concerns discovery of assets, business dealings or [the] existence or disposition of property." *In re Keeney,* 227 F.3d at 686 (quoting *Matter of Beaubouef,* 966 F.2d 174 (5th Cir. 1992)). The intent to defraud element is satisfied where the statement "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." *Id.* Fraudulent intent may be deduced from the facts and circumstances of the case and may be inferred from circumstantial evidence or from the debtor's course of conduct. *In re Hamo,* 233 B.R. at 725 (quoting *Sowers,* 229 B.R. at 159).

The U.S. Trustee asserts that the Debtor should be denied a discharge pursuant to §727(a)(4) of the Bankruptcy Code because she fraudulently committed a false oath by intentionally omitting her interest in the following four companies: Hill E. Homes, Co., Hill E. Homes, LLC, JKS Management and Consulting and Horne Investment on Schedule B. The Debtor denies these allegations, asserting that the omission of her interest in Hill E. Homes Co. and Hill E. Homes, LLC was inadvertent. She also asserts that she has no interest in JKS Management and Consulting and Horne Investments.

The U.S. Trustee has not met his burden to prove that Debtor committed a false oath regarding JKS Management and Consulting and Horne Investments. The U.S. Trustee has not

produced any evidence showing that the Debtor holds an interest in either of those two companies. The first two elements of this subsection, however, have been met for Hill E. Homes Co. and Hill E. Homes, LLC. The Debtor made false statements regarding her interest in the two businesses on her original Schedule B under oath. *See e.g., Dana Federal Credit Union v. Holt,* 190 B.R. 935; *Ire re Sowers,* 229 BR. 151, 158 (Bankr.N.D.Ohio 1998)(Testimony given at a §341 meeting, and statements or omissions contained in a debtor's bankruptcy schedules qualify as occurring under oath for the purposes of § 727(a)(4)(A)). Notwithstanding, the false oaths regarding these two businesses were apparently unintentional as heretofore determined under the §727(a)(2) analysis. As such, disclosure of the Debtor's interest in the two businesses on her Statement of Financial Affairs sufficiently overcame any inference of fraud created by the lack of disclosure on her original Schedule B. *Supra.* Therefore, the U.S. Trustee has not met his burden to deny the Debtor a discharge pursuant to §727(a)(4) of the Bankruptcy Code.

Section 727(a)(5):

The debtor will be granted a discharge unless, pursuant to §727(a)(5), the debtor fails to explain satisfactorily...any loss of assets or deficiency of assets to meet the debtor's liabilities. [11 U.S.C. §727(a)(5)]. Two conditions must exist in order for a creditor to meet the initial burden to establish the existence of a loss or deficiency of a pre-petition asset: (1) the debtor had a cognizable ownership interest in a specific fund(s) or identifiable piece of property; and (2) that such an interest existed at a time not too far removed from when the petition was filed. *In re Reed* 310 B.R. 363, 369 (Bankr.N.D.Ohio 2004). Once this burden has been established, the burden then shifts to the debtor to come forward with evidence that will satisfactorily explain the loss of the asset. *Manhattan Leasing Sys., Inc. v. Goblick (In re Goblick),* 93 B.R. 771, 775

(Bankr.M.D.Fla.1988). A satisfactory explanation "is one that is reasonable under the circumstances." *In re Bell,* 156 B.R. 604, 605 (Bankr.E.D.Ark.1993). "An important component in ascertaining the reasonableness of any explanation is its capacity for verification; that is, is the explanation sufficient to enable either the trustee or a creditor to properly investigate the circumstances surrounding the loss or deficiency." *Reed,* 310 B.R. at 370.

The U.S. Trustee alleges that the Debtor has not been able to satisfactorily explain the disposition of the mortgage proceeds she received from the acquisition of three parcels of real property by way of quit claim deed during the year proceeding her bankruptcy filing. The Debtor denies these allegations and avers that the bank records and canceled checks she produced have sufficiently explained the disposition of the mortgage proceeds.

Despite the Debtor's assertion, she has not provided a complete and accurate picture of her financial affairs. Although some documents have been produced, there are still many questions regarding her financial transactions that have yet to be answered. The U.S. Trustee presented evidence regarding requests for canceled checks and bank statements from the Debtor that were not produced. (Myers, Direct; Exh. 23). The Debtor admitted that she did not produce such documents and had not made requests for those documents from JP Morgan Chase until one week prior to trial. (Debtor, Cross Exam).

During trial, the Debtor attempted to account for the many withdrawals from her business checking account at JP Morgan Chase. (See Exh. 17). She testified that the withdrawals from this account were checks written to her business associates for the purchase of real property. (Debtor, Cross Exam). The checks that were produced, however, were from her personal checking account at Key Bank. (See Exh. 18). Equivocally, the Debtor changed her testimony

and stated that she withdrew the mortgage proceeds from her business account and placed them into her personal checking account. (Debtor, Cross Exam). The checks from her personal checking account, however, did not correspond with the amounts withdrawn from her business checking account. (See Exh. 17; Exh. 18).

The Debtor's testimony was often confusing and indefinite. She was generally unsure of the nature and/or source of specific withdrawals and deposits. Her conflicting testimony did not clarify questions regarding the disposition of the mortgage proceeds. Without corroborating evidence, the Debtor's financial status, at the time of the bankruptcy filing, remains unclear. Although the U.S. Trustee carries the burden of proof, this burden does not relieve the Debtor of her responsibility of providing a satisfactory explanation of the loss of assets. *Reed,* 310 B.R. at 370. "Vague and indefinite explanations of losses that are based upon estimates, uncorroborated by documentation are unsatisfactory." *Chalik v. Moorefield,* 748 F.2d 616 (11th Cir.1984). Thusly, the Debtor is denied a discharge pursuant to §727(a)(5) of the Bankruptcy Code.

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Herein, the U.S. Trustee has met his 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)(3) and §727(5) of the Bankruptcy Code. Accordingly, judgment is hereby granted in favor of the U.S. Trustee, as determined herein. Each party is to bear its respective costs.

IT IS SO ORDERED.

Dated, this 13th day of January, 2010

JUDGE RANDOLPH BAXTER
UNITED STATES BANKRUPTCY COURT