

IT IS SO ORDERED.

Dated: 04:01 PM November 22 2011



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

IN RE:)	CASE NO. 10-51370
)	
RICHARD D. DeROSA,)	CHAPTER 7
DEBTOR.)	
_____)	
RICHARD A WILSON, TRUSTEE,)	CHIEF JUDGE MARILYN SHEA-
PLAINTIFF,)	STONUM
)	
v.)	ADV. PRO. NO. 10-5145
)	
RICHARD D. DeROSA,)	
DEFENDANT.)	
)	

This matter comes before the Court on the complaint of Richard Wilson, the Chapter 7 Trustee, to deny Richard D. DeRosa (“Mr. DeRosa” or the “Debtor”) a discharge pursuant to 11 U.S.C. § 727(a)(2) and (4). The Court held a trial in this matter on September 20, 2011. Michael Moran, counsel for the Chapter 7 Trustee, appeared at the trial. Mr. DeRosa did not appear. Prior to the trial in this matter, following the filing of a motion by Mr. Truman to withdraw as counsel for

Mr. DeRosa, the Court directed Mr. DeRosa to cooperate with his attorney. Mr. DeRosa has not cooperated with his attorney and his last filing with the Court indicates that he has relocated to Florida. Therefore, this memorializes that Mr. Truman, counsel of record for Mr. DeRosa, was allowed to withdraw from the representation of Mr. DeRosa.

In addition, the Chapter 7 Trustee filed a motion asking the Court to deem the proposed stipulations filed by him on July 25, 2011 admitted pursuant to Rule 7036 of the Rules of Bankruptcy Procedure. Pursuant to the court's prior pre-trial order, counsel for the Chapter 7 Trustee circulated proposed stipulation of facts but did not receive any response from the defendant in this action. Thereafter, the Court entered an order on August 29, 2011 requiring Mr. DeRosa to file a response to the proposed stipulations by not later than September 9, 2011. The Court's August 29, 2011 order indicated that the proposed stipulations would be deemed admitted in the event a response to the proposed stipulations was not timely filed. No response to the proposed stipulations has been filed and, consistent with the August 29, 2011 order, the proposed stipulations [docket #36] are deemed admitted for the purposes of trial.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (J) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). Based upon testimony and evidence presented at the trial, the arguments of counsel, the pleadings in this adversary proceeding and defendant-debtors' main Chapter 7 case and pursuant to FED. R. BANKR. P. 7052, the Court makes the following findings of fact and conclusions of law.

Findings of Fact

1. Richard D. DeRosa filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on March 26, 2010 (the "Petition Date").

2. Richard A. Wilson was appointed, and is presently acting as the Chapter 7 trustee for the Debtor's bankruptcy estate.
3. On the Petition Date, Kimberly V. DeRosa was the Debtor's spouse. However, a divorce action was pending in the Summit County Common Pleas Court Domestic Relations Division, Case No. 2009-12-3483.
4. The pendency of the divorce case was not disclosed in the Debtor's Statement of Financial Affairs.
5. On the Petition Date, the Debtor was the owner of a 1986 Mercedes.
6. On the Petition Date, the Debtor was the record owner of a Fiat.
7. On the Petition Date, the Debtor was the record owner of a 21' boat.
8. The Debtor did not disclose in his schedules or statement of financial affairs filed with this Court his ownership of the 1986 Mercedes, the Fiat or the 21' boat.
9. On the Petition Date, the records of the U.S. Patent Office indicated that Richard D. DeRosa, the Debtor, is the holder of U.S. Patent #5,980,646 and #6,962,619.
10. The Debtor did not disclose his interest in U.S. Patent #5,980,646 and #6,962,619 in his schedules or statement of financial affairs.
11. The Debtor currently markets the technology set forth in U.S. Patent #5,980,646 and #6,962,619.
12. A separation agreement between the Debtor and Kimberly DeRosa was entered on or about July 26, 2010, within 180 days of the Petition Date. *See Exhibit A to the Stipulations.*

13. Pursuant to the Separation Agreement, the Debtor acquired or became entitled to acquire a 2002 Ford Excursion and a one half interest in real property known as 4785 Ranchwood Road, Akron, Ohio 44333.

14. The Debtor did not amend or supplement his schedules to disclose the acquisition of an interest in the 2002 Ford Excursion and 4785 Ranchwood Road, Akron, Ohio 44333.

Conclusions of Law

“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 (BAP 6th Cir. 1999).

Section 727 of the Bankruptcy Code provides, in pertinent 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; 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;

In order to deny the debtor a discharge under 11 U.S.C. § 727(a)(2) the Trustee must prove by a preponderance of the evidence that there was (1) “a disposition of property, such as a concealment, and (2) ‘a subjective intent on the debtor’s part to hinder, delay or defraud a creditor through the act of disposing of the property.’” *Keeney v. Smith (In re Keeney)* 227 F.3d 679, 683 (6th Cir. 2000) (quoting *Hughes v. Lawson (In re Lawson)* 122 F.3d 1237, 1240 (9th Cir. 1997). A debtor’s failure to disclose information required by law to be made known is concealment. See *Buckeye Retirement Co., LLC, Ltd. v. Swegan (In re Swegan)*, 383 B.R. 646,

655 (BAP 6th Cir. 2008). Subjective intent may be based upon circumstantial evidence or inferences based on a debtor's course of conduct. *Devers v. Bank of Sheridan (In Re Devers)*, 759 F.2d 751,753-54 (9th Cir. 1985).

The Court finds this to be a clear cut case. The Debtor intentionally concealed property in which he has an interest. He did not identify in his schedules or statement of financial affairs property he knew he owned on the Petition Date, he did not amend his schedules or statement of financial affairs to disclose the assets awarded to him in the separation agreement. The Court finds that his failure to do so was done with the intention of preventing the Trustee and the Debtor's creditors from becoming aware of such assets. The Trustee has proven the elements of § 727(a)(2) by a preponderance of the evidence, and the Debtor, Richard DeRosa, is denied a discharge of his debts.

In addition, the Court finds that the Trustee proved by a preponderance of the evidence that the Debtor should be denied a discharge under § 727(a)(4). In order to deny a debtor a discharge under 727(a)(4)(A), a plaintiff must prove by a preponderance of the evidence that: 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. *Keeney v. Smith (In Re Keeney)* 227 F.3d 679, 685 (6th Cir. 2000) citing *Beaubouef v. Beaubouef (In re Beaubouef)*, 966 F.2d 174, 178 (5th Cir. 1992). As already noted, Mr. DeRosa's schedules and statement of financial affairs, both made under oath, omit information that Mr. DeRosa knew should have been included. Mr. DeRosa made these false statements in an attempt to defraud his creditors and the bankruptcy estate. These false oaths were material because they bear a relationship to the Debtor's business dealings and transactions and the discovery of assets. *See Beaubouef v. Beaubouef (In re Beaubouef)* 966 F.2d

174, 178 (5th Cir. 1992). In this case, the voluntary petition, schedules, and statement of financial affairs contain omissions and misrepresentations that are material to the administration of the estate and specifically the Debtor's business dealings, assets, and existence and disposition of property. The Court finds that the Debtor, with intent to hinder, delay, or defraud creditors and the trustee charged with custody of property under Title 11 has concealed property within one year before the date of the filing of the petition and has further concealed property of the estate after the date of the filing of the petition. The Debtor has knowingly and fraudulently, in connection with his Chapter 7 proceeding, made a false oath, and his discharge is denied.

IT IS SO ORDERED.

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cc (via electronic mail):

Michael J Moran	<i>as counsel for</i>	Richard A Wilson, Trustee
Vance P. Truman	<i>as counsel for</i>	Richard D DeRosa
Richard DeRosa mtt@lek.net		