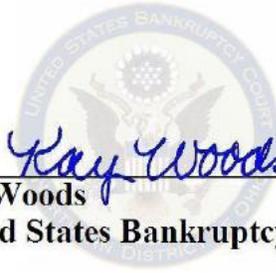


IT IS SO ORDERED.

Dated: August 10, 2016
11:06:31 AM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

SANDRA A. DICKINSON,

Debtor.

* * * * *

MICHAEL D. BUZULENCIA, TRUSTEE

Plaintiff,

v.

SANDRA A. DICKINSON,

Defendant.

CASE NUMBER 15-41003

ADVERSARY NUMBER 15-4048

HONORABLE KAY WOODS

MEMORANDUM OPINION REGARDING DENIAL OF DISCHARGE

On July 19, 2016, the Court held a trial in the instant
adversary proceeding in which Michael D. Buzulencia, Chapter 7

Trustee ("Trustee"), seeks denial of a discharge to Debtor/Defendant Sandra A. Dickinson ("Debtor"). At the trial, the Trustee represented himself and the Debtor was represented by John H. Chaney, Esq. The Court received testimony from the Debtor, who was the only witness. Trustee's exhibits A, B, C, D, and E, and Debtor's exhibit 1 were admitted into evidence. At the conclusion of the trial, the Court took the matter under advisement.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (Gen. Order No. 2012-7) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(J).

Having reviewed the entire record in this case, including the testimony presented at trial, the representations of counsel, the exhibits admitted into evidence, the Proposed Stipulations of Debtor and Trustee ("Stipulations") (Doc. 26),¹ and all pleadings filed in this adversary proceeding and the related bankruptcy case, this Memorandum Opinion constitutes the Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052.

¹ Prior to the start of the trial, counsel for the Debtor and the Trustee represented to the Court that they stipulated to all of the facts set forth in paragraphs 1 through 11 of the Stipulations filed on July 19, 2016 and that they stipulated to the admissibility of exhibits A, B, C, D, E, F, and G offered by the Trustee.

For the reasons set forth below, this Court finds that the Trustee (i) failed to satisfy the requisite elements of the causes of action based on 11 U.S.C. § 727(a)(2)(A), (a)(3), (a)(4)(A), and (a)(4)(D); and (ii) carried his burden of proof for the requisite elements under § 727(a)(5), which will result in the denial of the Debtor's discharge due to her failure to satisfactorily explain the loss of approximately \$7,000.00 of potential property of the estate.

I. PROCEDURAL BACKGROUND

On June 5, 2015 ("Petition Date"), the Debtor filed a voluntary petition pursuant to chapter 7 of Title 11 of the United States Code (Case No. 15-41003). The Trustee commenced this adversary proceeding seeking denial of the Debtor's discharge by filing Complaint to Deny Discharge on October 23, 2015, which contains six causes of action based on 11 U.S.C. § 727(a), as follows:

Count I is based on § 727(a)(2)(A) and alleges that the Debtor "transferred or, [sic] removed, or destroyed, or mutilated, or concealed, or, [sic] permitted to be transferred, or removed, or destroyed, or mutilated, or concealed certain of her property, to wit: approximately \$36,000.00 received from her ex-spouse, and records of its disposition with intent to hinder, delay, or defraud a creditor or an officer of the estate[.]" (Compl. ¶ 15.)

Count II alleges that the Debtor concealed, destroyed, or failed to keep "receipts and written Financial [sic] records of payment of expenses and use of approximately \$36,000.00 from January, [sic] 2015 to the date of the petition" in violation of § 727(a)(3). (*Id.* ¶ 17.)

Count III rests on § 727(a)(4)(A) and alleges that the Debtor made a false oath when she "failed to list her divorce proceeding . . . in her statement of financial affairs #4, from which the Trustee could have more timely discovered said case and proceeds received by the debtor[.]" (*Id.* ¶ 19.)

Count IV is based on § 727(a)(5) and asserts, "At the meeting of his [sic] creditors herein and subsequent thereto although requested to do so, [the Debtor] failed to explain satisfactorily loss of assets of \$36,000.00 between January, [sic] 2015 and the filing of the petition[.]" (*Id.* ¶ 22.) The Trustee alleges, "The Debtor has not produced the requested financial records with completeness." (*Id.* ¶ 23.)

Count V alleges that the Debtor "withheld from the Trustee recorded information regarding the Debtor's property or financial affairs, to wit; [sic] recorded information to explain the loss and use of \$36,000.00 from her divorce settlement per 11 U.S.C. § 727(a)(4)(D) [sic]." (*Id.* ¶ 25.)

Count VI is not based on any statutory provision and appears to repeat the allegations in Count IV. As a consequence, the Court will not separately address this Count.

At trial, the Trustee moved to amend his pleadings to reflect the arguments and testimony presented during the trial. Over the Debtor's objection, the Court granted his oral motion.² As a result, the Trustee adds to his Complaint the alleged false oath, concealment, and failure to explain the loss of the income tax refund in the amount of \$4,948.00 ("Tax Refund") received by the Debtor on April 15, 2015.

On November 23, 2015, the Debtor filed Answer to Complaint to Deny Discharge (Doc. 5), in which she alleges that she timely provided all requested documentation to support her expenditure of the Settlement Funds, as defined *infra*.

II. FACTUAL BACKGROUND

The following facts are based upon (i) testimony of the Debtor; and (ii) exhibits admitted into evidence and pleadings filed with the Court.

The Debtor is a former stay-at-home mother of three now-adult children. The Debtor and her husband divorced in late 2014. In connection with the divorce proceedings, the Debtor received a

² Federal Rule of Civil Procedure 15, incorporated herein by Federal Rule of Bankruptcy Procedure 7015, provides that pleadings may be amended during trial so that the issues raised in the pleadings are consistent with the evidence.

lump sum payment of \$36,550.00, comprising a cumulative property settlement³ ("Settlement Funds"). The Debtor received the Settlement Funds in the form of a check on January 17, 2015. Upon receipt of the Settlement Funds, she promptly cashed the check and kept the cash in a safe at her home. The Debtor testified that, from January 17, 2015 through June 5, 2015, she used the Settlement Funds to replace the household goods that her ex-husband retained in the divorce and to cover her necessary living expenses. The Debtor further testified that (i) she paid cash for certain expenses and purchases; and (ii) she deposited cash into her Huntington Bank checking account to pay other service providers online.

From October 2014 to June 2015, the Debtor was a full-time student at Ross Medical Education Center in Niles, Ohio. While she was a student, she was unemployed and was caring for her ailing parents in their home in Hubbard, Ohio. From January 17, 2015 through the Petition Date of June 5, 2015, the Debtor used the Settlement Funds and Tax Refund to cover her living expenses, including rent,⁴ utilities, food, gasoline, and school expenses.

³ The Separation Agreement, which is part of Exhibit A, states, "Such agreed upon valuation results in marital equity in the amount of \$69,028.00 of which each party would be entitled to \$34,514.00. By agreement, the total monetary amount to be paid to [Debtor], for a complete division of assets and a resolution of any spousal support consideration, shall be \$36,550.00." (Ex. A at 9.)

⁴ The Debtor incurred a rent expense for January 1 to July 31, 2015 in the total amount of \$4,400.00. She relocated to her parents' home in Hubbard on July 31, 2015.

At the meeting of creditors held pursuant to 11 U.S.C. § 341 ("341 Meeting"), the Debtor's failure to list her divorce proceeding on the Statement of Financial Affairs ("SOFA") (Ex. G) came to light. Upon learning about the divorce, the Trustee inquired what the Debtor received in the divorce and learned of the existence of the Settlement Funds. He then requested documentation to support the Debtor's position that she had spent all of the Settlement Funds before the Petition Date.⁵

To explain her expenditure of the Settlement Funds, the Debtor provided receipts totaling \$14,566.89, which encompassed the following purchases and expenses: (i) \$1,818.00 paid to Mr. Chaney for representing the Debtor in the divorce proceeding (Ex. D.); (ii) \$6,000.00 for a used vehicle (Ex. E(a)); (iii) \$1,828.57 for bedroom furniture (Ex. E(b)); (iv) various sundries for her new residence in the following amounts: \$97.08 (Ex. E(c)), \$10.65 (Ex. E(c)), \$39.09 (Ex. E(d)), \$8.51 (Ex. E(d)), and \$364.99 (Ex. E(e)); and (v) \$4,400.00 for rent for January 1 through July 31, 2015 (paid in a lump sum) (Ex. E(f)).

In an effort to explain how she spent the remainder of the Settlement Funds and the Tax Refund, the Debtor provided the Trustee with a list in which she itemized and estimated her

⁵ It is not clear when the Trustee became aware of the Debtor's receipt of the Tax Refund.

expenses ("Itemized List") (Ex. C).⁶ The Debtor also provided the Trustee with various bank statements from her checking account, which she used to create estimates of certain expenses on the Itemized List (Ex. 1). The Debtor testified that she used cash "99 percent of the time" in paying bills and making purchases. (Trial Tr. 10:37:50.)

III. STANDARD FOR REVIEW

Through this adversary proceeding, the Trustee seeks to deny the Debtor's discharge. Because denial of a debtor's discharge is a harsh remedy, the provisions set forth in 11 U.S.C. § 727(a) are precisely drawn to encompass only those debtors who have not been honest and forthcoming about their affairs. *Buckeye Retirement Properties of Indiana, LLC v. Tauber (In re Tauber)*, 349 B.R. 540, 545 (Bankr. N.D. Ind. 2006) ("The denial of a debtor's discharge is akin to financial capital punishment. It is reserved for the most egregious misconduct by a debtor."). Thus, in order to accomplish that limited purpose, the provisions of § 727(a) are to be construed liberally in favor of granting debtors the fresh start contemplated by the Bankruptcy Code and construed strictly against parties seeking to deny a debtor's discharge. *Buckeye Retirement Co., LLC v. Swegan (In re Swegan)*, 383 B.R.

⁶ The parties stipulated to the admissibility of the Itemized List as Exhibit C. (Stip. ¶ E.)

646, 653 (6th Cir. 2008) (citing *Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 683 (6th Cir. 2000)).

IV. ANALYSIS

A. Trustee Failed to Prove Fraudulent Intent

Several causes of action brought by the Trustee require proof that the Debtor acted with fraudulent intent: (i) Count I for transfer/concealment of property of the estate pursuant to § 727(a)(2)(A); (ii) Count III for making a false oath pursuant to § 727(a)(4)(A); and (iii) Count V for withholding information regarding property of the estate or disposition of such property pursuant to § 727(a)(4)(D). The Trustee fails to carry this burden.

1. Count I: § 727(a)(2)(A) Transfer/Concealment

The Trustee seeks denial of the Debtor's discharge pursuant to § 727(a)(2)(A) for her concealment of the Settlement Funds and the Tax Refund. The Trustee recites the laundry list of verbs in Count I, *i.e.*, that the Debtor transferred, removed, destroyed, mutilated, or concealed the Settlement Funds, but at trial he focused only on the Debtor's failure to disclose, *i.e.* conceal, the Settlement Funds on the SOFA or her schedules.

[A]n action under § 727(a)(2)(A) requires: "(1) the disposition of property, such as a transfer or concealment, (2) a subjective intent on the debtor's part to hinder, delay, or defraud a creditor through the act of disposing of the property, (3) the property at issue must be property of the debtor, and (4) the disposition occurred within one year of filing for

bankruptcy." *In re Recupero*, [No. 13-60322,] 2014 WL 1884331, at *6 [(Bankr. N.D. Ohio May 12, 2014)]; see also *In re Keeney*, 227 F.3d at 654. "The purposes of § 727(a)(2)(A) is [sic] to prevent the discharge of a debtor who attempts to avert collection of his debts by concealing or otherwise disposing of assets." *In re Recupero*, 2014 WL 1884331, at *6 (internal quotation marks omitted). While a solitary omission may be sufficient, a pattern of failures is more likely to show fraudulent intent.

In re Varner, No. 14-61103, 2015 WL 4039390, at *12 (Bankr. N.D. Ohio June 30, 2015). Actual intent is required to meet the level of fraudulent intent required to deny a debtor's discharge for the transfer or concealment of property. *In re Keeney*, 227 F.3d at 683.

The integrity of the bankruptcy process requires that a debtor honestly, fully and accurately disclose that information which the law requires. Among other things, the law requires that a debtor, in their [sic] bankruptcy petition, disclose all present interests in property as well as transfers of property made by the debtor within the year immediately preceding the filing of the bankruptcy petition.

In re Newell, 321 B.R. 885, 889-90 (Bankr. N.D. Ohio 2005).

"To distinguish between an honest mistake and a wrongful intent, two considerations are helpful: (1) the extent and the degree of the misinformation; and (2) whether there existed a motive to provide the misinformation." *Id.* at 890-91 (citing *In re Pier*, 310 B.R. 347, 358 (Bankr. N.D. Ohio 2004)). "[T]he failure to abide by this duty of disclosure is strong evidence that a debtor, with the requisite fraudulent intent, 'concealed'

property within the meaning of § 727(a)(2). Nevertheless, honest mistakes can and do occur." *Id.* at 890.

There is no dispute that the Debtor did not disclose the Settlement Funds or the Tax Refund in her schedules or the SOFA. The Trustee failed to elicit any evidence concerning wrongful intent on the part of the Debtor regarding this failure to disclose.

Although the Trustee does not specify in the Complaint where he believed the Debtor should have disclosed the Settlement Funds and the Tax Refund, at trial, he repeatedly stated that the Debtor failed to disclose the Settlement Funds and the Tax Refund as "income," thus indicating they should have been disclosed on the SOFA in response to Questions 1 or 2. In answer to Question 1 of the SOFA, the Debtor disclosed her gross income for the previous year (2014) as \$11,403.00 (Ex. G at 1). Since this response lists the gross income for 2014, the amount of the 2014 Tax Refund,⁷ of necessity, would have been included in the gross amount disclosed. Thus, the Court finds there is no evidence that the Debtor concealed receipt of the Tax Refund.

The Debtor testified, and Exhibit A sets forth, that the Settlement Funds represented a negotiated lump sum payment for her equity in the marital residence rather than spousal support.

⁷ The Debtor received her 2014 Tax Refund in April 2015.

Because property settlements – as opposed to spousal support – are not income,⁸ the Settlement Funds were not inappropriately omitted as “income other than from employment or operation of business” on Question 2 of the SOFA. Thus, there is no evidence that the Debtor concealed the Settlement Funds.

Although neither the Tax Refund nor the Settlement Funds technically constitutes “income,” the Debtor had no other source of money other than the Settlement Funds and the Tax Refund to pay her living expenses during the period January 2015 through the Petition Date. (Stip. ¶¶ 3-4.) The Debtor admitted that she converted the Settlement Funds check into cash. Thus, to the extent the Debtor did not use the entire cash equivalent of the Settlement Funds and the Tax Refund for living expenses, she should have disclosed the remaining amount of cash on hand on Schedule B. The Debtor’s Schedule B, however, indicates that she had no cash on hand as of the Petition Date. (Ex. F at 9.)

Significantly, although the Trustee established that the Debtor received the Settlement Funds and the Tax Refund in the months preceding the Petition Date, he failed to establish that the Debtor was still in possession of the equivalent amount of cash from the Settlement Funds and the Tax Refund as of the

⁸ Although alimony received by an ex-spouse is taxable as ordinary income, money received pursuant to a divorce property settlement is nontaxable; conversely, periodic alimony payments paid by an ex-spouse are deductible whereas property settlement payments are nondeductible. See *Oman v. C.I.R.*, 767 F.2d 290, 292 (6th Cir. 1985); 26 U.S.C. § 71 (2016).

Petition Date. This is a crucial foundational issue that the Trustee must prove before considering his allegations of concealment. As set forth in the Stipulation, the Trustee acknowledges that the Debtor (i) spent at least some of the Settlement Funds prior to the Petition Date; and (ii) provided receipts for at least \$14,566.89 of expenditures. (Stip. ¶ 7; Ex. E.) Although the Trustee questioned the Debtor's lack of receipts for items on the Itemized List (Ex. E), he did not prove that she did not actually make those purchases or spend money in the amounts set forth on the Itemized List. As a result, the Trustee failed to prove that the Debtor actually had cash on hand equivalent to the Settlement Funds and the Tax Refund as of the Petition Date, which the Trustee alleges that she concealed.⁹

2. Count III: § 727(a)(4)(A) False Oath

The Trustee asserts the Debtor's failure to disclose three matters constitutes a false oath and requires denial of discharge pursuant to § 727(a)(4)(A). These matters are: (i) her divorce case; (ii) receipt of the Settlement Funds; and (iii) receipt of the Tax Refund.

The Bankruptcy Code provides:

⁹ The Trustee does not argue that the Debtor fraudulently "transferred" property of the estate. The Trustee acknowledged in the Stipulation that the receipts provided by the Debtor and the Itemized List represent various transfers of the Settlement Funds and Tax Refund; however, he does not allege the Debtor received less than adequate consideration for the transfers identified by the Debtor in the receipts or on the Itemized List.

(a) The court shall grant the debtor a discharge, unless—

* * *

(4) the debtor knowingly and fraudulently, in or in connection with the case—

(A) made a false oath or account[.]

11 U.S.C. § 727(a)(4)(A) (2016). The Sixth Circuit has addressed the elements that must be proven to deny a debtor a discharge under § 727(a)(4)(A):

In order to deny a debtor discharge under this section, 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. See *Beaubouef v. Beaubouef (In re Beaubouef)*, 966 F.2d 174, 178 (5th Cir. 1992).

In re Keeney, 227 F.3d at 685. “[T]he standard necessary to support a finding of knowingly making a false statement with the intent to defraud [under § 727(a)(4)(A)] is, for all practicable purposes, identical to the standard required to support a finding of fraudulent intent under § 727(a)(2).” *In re Newell*, 321 B.R. 885, 892 (Bankr. N.D. Ohio 2005).

The Court must look at the totality of the circumstances when determining whether the debtor’s false statement was the product of fraudulent intent. *Keeney* at 686. Demonstrating fraudulent intent “involves a material representation that [the debtor] know[s] to be false, or, what amounts to the same thing, an omission that [the debtor] know[s] will create an erroneous

impression." *Id.* at 685. "Before a statement will be sufficient to deny discharge under § 727(a)(4)(A), the statement must be made with actual, not constructive, fraudulent intent." *In re Varner* at *5 (citing *McDermott v. Schwartz (In re Schwartz)*, 527 B.R. 266, 275 (Bankr. E.D. Mich. 2015)). Still, "false statements made without adequate care for their accuracy may be sufficiently reckless to justify the denial of discharge." *Id.* (citing *In re Keeney*, 227 F.3d at 686). A debtor may not play ostrich and "disclaim all responsibility for statements which he has made under oath. On the other hand, a false statement resulting from ignorance or carelessness does not rise to the level of knowing and fraudulent." *Id.* (internal citations omitted).

The Trustee asserts that the three omissions from the Debtor's SOFA and schedules equate to false oaths. The Debtor admittedly failed to disclose the existence of her divorce case, which was, indeed, a case pending within the 12 months prior to the Petition Date. As such, the Debtor was required to disclose her divorce case in response to Question 4 on the SOFA.¹⁰ The Debtor provided no reason or excuse for her failure to disclose the divorce case. Accordingly, there is no dispute that the omission was a "knowing" failure to disclose. However, the Trustee failed to prove that

¹⁰ Mr. Chaney represented the Debtor in her divorce case, as well as this bankruptcy case. (Stip. ¶ 8.) Thus, both the Debtor and her attorney knew about the divorce case and failed to disclose it as required on the SOFA.

the Debtor's failure to disclose the divorce case was done with fraudulent intent. At trial, the Debtor argued that she disclosed her divorce at the 341 Meeting and that the disclosure overcame any inference that she attempted to conceal her divorce.¹¹ The Trustee failed to refute the Debtor's assertion that, because of her disclosure at the 341 Meeting, the case proceeded exactly as it would have had she disclosed the divorce in the SOFA. Disclosure of the Debtor's divorce at the 341 Meeting allowed the Trustee to ask the same questions and request the same supplemental details that he would have asked if the divorce had been disclosed in the SOFA.¹² "While an after-the-fact disclosure is not a cure for fraudulent intent, it may help to show that a debtor's omission was only a mistake." *In re Varner* at *6. The Court finds that the Debtor's revelation of her divorce at the 341 Meeting negates the inference that her failure to disclose was done with fraudulent intent. Without fraudulent intent, there can be no cause of action for making a false oath.

¹¹ The Debtor's credibility is affected by (i) the closeness in time between the closure of her divorce case and the Petition Date; (ii) the fact that she retained the same counsel for the divorce proceeding and her bankruptcy filing; and (iii) the unrefuted fact that the Settlement Funds and the Tax Refund were the Debtor's sole means of support for the five months preceding her bankruptcy filing (Stip. ¶ 4).

¹² It is unclear whether the revelation of the Debtor's divorce case was the result of intense questioning by the Trustee at the 341 Meeting or whether it was voluntarily brought forth by the Debtor. Because the Trustee offered no facts to the contrary, the Court assumes the Debtor voluntarily disclosed her divorce at the 341 Meeting.

The Trustee also points to the Debtor's failure to disclose the Settlement Funds in the SOFA or her bankruptcy schedules. As set forth *supra* at 11-12, the Settlement Funds do not constitute "income" so the failure to disclose this item as such on the SOFA cannot constitute a false oath.

The Trustee asserts that the Debtor's failure to report her receipt of her 2014 Tax Refund as income during 2015 constituted a false oath. However, as set forth *supra* at 11, by disclosing her gross income for 2014 in answer to Question 1 on the SOFA, the Debtor did not fail to disclose receipt of the Tax Refund. Thus, this contention cannot support a finding of false oath.

In addition, the Trustee alludes to the fact that the Settlement Funds and/or the Tax Refund should have been disclosed as property of estate on the Debtor's petition and schedules. However, the Debtor claims that she did not have cash equivalent to the Settlement Funds and the Tax Refund as of the Petition Date because she spent the money on necessary living expenses prior to that time. As set forth *supra* at 12-13, the Trustee has failed to prove the Debtor had the cash equivalent of the Settlement Funds and the Tax Refund as of the Petition Date. If the Debtor did not have cash on hand equivalent of the Settlement Funds and the Tax Refund, she could not have been required to disclose these amounts as property of the estate. If she was not required to disclose

the cash equivalent of the Settlement Funds and the Tax Refund, her failure to do so cannot constitute a false oath.

3. Count V: § 727(a)(4)(D) Withholding Information

The Trustee argues that, because the Debtor withheld information and financial records related to the Settlement Funds, she should be denied a discharge pursuant to § 727(a)(4)(D), which states:

(a) The court shall grant the debtor a discharge, unless—

* * *

(4) the debtor knowingly and fraudulently, in or in connection with the case —

* * *

(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(a)(4)(D) (2016).

The Trustee failed to establish that the Debtor's inability to provide complete financial records was the product of a fraudulent intent. The Debtor testified that she gave the Trustee all of the receipts she had. In fact, the parties stipulated that the only receipts the Debtor maintained regarding her use of the Settlement Funds and the Tax Refund were turned over to the Trustee. (Stip. at ¶ 7.) The Trustee questioned the Debtor concerning her lack of receipts for items on the Itemized List.

The Debtor testified that she did not keep all of her receipts during the period January through the Petition Date, but she also stated that she made several purchases at garage sales and did not have receipts for all of the items on the Itemized List. As a result, the evidence does not support the Trustee's argument that the Debtor withheld recorded financial information.

The Debtor's failure to keep receipts for all of her living expenses during the five-month prepetition period does not appear to be the result of a fraudulent intent. In fact, it appears that the Debtor made a good faith effort to provide substantiation as requested by the Trustee. She provided receipts and estimates, along with bank statements to support some of the estimated expenses, to substantiate her assertion that most of the Settlement Funds were expended prior to the Petition Date. As a consequence, the Trustee fails to establish that the Debtor, with fraudulent intent, withheld recorded financial information.

B. Two Causes of Action Do Not Require Fraudulent Intent

There are two causes of action raised by the Trustee for which fraudulent intent is not required: (i) Count II for the Debtor's alleged failure to keep records based on § 727(a)(3); and (ii) Count IV for the Debtor's failure to satisfactorily explain the loss or disposition of potential property of the estate based on § 727(a)(5).

1. Count II: § 727(a)(3) Failure to Keep Records

The Trustee alleges that the Debtor's discharge should be denied pursuant to § 727(a)(3) based on her failure to keep receipts and written financial records regarding her use of cash from the Settlement Funds and the Tax Refund for living expenses and purchases of household goods.

The Bankruptcy Code provides:

(a) The court shall grant the debtor a discharge, unless—

* * *

(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[.]

11 U.S.C. § 727(a)(3) (2016). Fraudulent intent is not required to sustain a cause of action under § 727(a)(3).

The Trustee alleges, "The funds were not deposited into a bank account or placed in any type of vehicle where the funds and their usage could be traced. Instead, these were placed and kept by the [D]ebtor in the form of cash." (Compl. ¶ 9.)

"A debtor's choice to operate on a strictly cash basis, making creditor attachment substantially more difficult than a debtor utilizing a bank account, is also insufficient to show fraudulent intent without additional aggravating factors." *In re Varner* at

*14 (citing *Warner v. Gallimore (In re Gallimore)*, 392 B.R. 707, 710 (Bankr. W.D. Ky. 2008) (“keeping money in a safety deposit box and withdrawing funds as needed to pay personal expenses did not show fraudulent intent”)).

This Court previously held in *In re Hake*, 387 B.R. 490 (Bank. N.D. Ohio 2008):

The Bankruptcy Court has broad discretion to grant or deny discharge based on § 727(a)(3). Under § 727(a)(3), a debtor’s discharge may be denied because he has either actively concealed, damaged, or falsified records or because he has merely failed to keep such records if these records would have allowed creditors to ascertain the debtor’s financial condition or relevant business transactions. Furthermore, there is no need to prove fraudulent intent with § 727(a)(3).

However, in light of the harshness of denial of discharge as a penalty, § 727(a)(3) is “invoked sparingly” and requires more than “the mere ability of a complainant to prove that a specific record was not kept[.]” “The adequacy of a debtor’s records must be determined on a case by case basis. Considerations to make this determination include debtor’s occupation, financial structure, education, experience, sophistication and any other circumstances that should be considered in the interest of justice.”

Id. at 506 (internal citations omitted).

It is not reasonable to expect an ordinary consumer – like the Debtor – to keep receipts for each and every commonplace transaction in which she engages, including purchases of groceries, gas, and utility services. This is particularly true when the consumer engages in mostly cash transactions, as the Debtor testified she did. It is not blameworthy behavior to prefer

to pay cash for such expenses or to prefer to retain money in the form of cash.

Creditors are not entitled to perfect records, but instead "only enough information to ascertain the debtor's financial condition and track financial dealings with substantial completeness and accuracy for a reasonable time past to present." Because deciding if a debtor's records are sufficient is a fact intensive inquiry, trial courts are given "wide discretion" when making the determination. Showing a debtor acted with fraudulent intent when failing to maintain or provide adequate records is not an element of § 727(a)(3).

In re Kandel, No. 11-62597, 2015 WL 1207014, at *5 (Bankr. N.D. Ohio Mar. 13, 2015) (internal citations omitted).

In the Stipulations, the Trustee acknowledges that "[t]he receipts turned over to [the Trustee] are the only receipts she maintained in use of the money from her ex-husband." (Stip. ¶ 7.) Given the Debtor's modest earnings, education level, and lack of financial sophistication, her testimony appears credible that she (i) routinely bought second-hand household items from garage sales for which she did not receive receipts; and (ii) did not retain the retailer's receipt for each purchase incurred for her living expenses during the five-month prepetition period. As a consequence, the Court finds that the Debtor's behavior does not fall within gambit of wrongful conduct under § 727(a)(3).

2. Count IV: § 727(a)(5) Failure to Explain Loss

Finally, the Trustee alleges that Debtor should be denied a discharge on the basis of § 727(a)(5), which states:

(a) The court shall grant the debtor a discharge, unless –

* * *

(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. § 727(a)(5) (2016).

It is the Trustee's initial burden to produce enough evidence to establish that a cause of action exists under § 727(a)(5).

Specifically, plaintiff must establish that there exists a loss or deficiency of a prepetition asset that could have been used to pay creditors. To do so, plaintiff must show that 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 the petition was filed. Once plaintiff meets this burden, the burden shifts to the debtor to provide evidence that satisfactorily explains the loss of the asset.

Section 727(a)(5) does not require any mal intent or scienter and, rather, focuses on the satisfactory explanation of the debtor for the loss or diminution of assets. "The standard for a § 727(a)(5) satisfactory explanation is one that is reasonable under the circumstances" with the capacity for verification by the trustee or creditor to properly investigate the circumstances surrounding the loss. A satisfactory explanation will demonstrate that the debtor exhibited good faith in conducting her affairs and explaining the loss of the asset.

In re Ross, No. 12-61738, 2013 WL 414474, at *3 (Bankr. N.D. Ohio Jan. 30, 2013) (internal citations omitted).

The Trustee points to two items – the Settlement Funds and the Tax Refund – that he believes should have been property of the estate and/or reportable income and such loss or disposition needs

to be explained. The Trustee has proven, and the Debtor admitted, that she received (i) the Settlement Funds approximately five months before the Petition Date; and (ii) the Tax Refund within two months before the Petition Date.

Through the pleadings, the Stipulations, and testimony at trial, the Trustee established that the Debtor received the Settlement Funds in the amount of \$36,550.00 and the Tax Refund in the amount of \$4,948.00 within the five-month period preceding the Petition Date, *i.e.*, "a time not too far removed from [when] the petition was filed[.]" (*Id.*) As a result, the Trustee established that the Debtor received cash in the total amount of \$41,498.00, which the Debtor should have (i) disclosed as property of the estate; or (ii) provided a satisfactory explanation of the disposition.

Through production of receipts, the Itemized List, and her bank statements, the Debtor explained the loss or disposition of only \$34,420.57. As a consequence, \$7,077.43 remains unaccounted for. The loss of this amount of cash has not been satisfactorily explained by the Debtor; indeed, the Debtor offered no explanation regarding what happened to this sum of money. While the Debtor offered no testimony to explain the whereabouts of the \$7,077.43, the Debtor's counsel argued in his opening and closing statements that the Itemized List did not include every purchase the Debtor made to replace her household goods and specifically did not

include pots, pans, plates, and utensils. Although the Debtor may not have itemized every individual expense, as argued by her counsel, the Debtor included several catch-all categories on her Itemized List for estimated expenses: (i) "miscellaneous bathroom items" in the amount of \$210.00; (ii) "miscellaneous bedroom items" in the amount of \$375.00; (iii) "personal care/household expenses" in the amount of \$600.00; and (iv) "other miscellaneous living expenses" in the amount of \$3,000.00. These four catch-all categories collectively represent \$4,185.00 on the Itemized List.

As a result of these miscellaneous categories, the Debtor cannot now credibly claim that the Itemized List fails to include \$7,077.43 of her actual cash expenses, *i.e.*, approximately \$1,400.00 per month for each of the five months pre-petition. On Schedule J, the Debtor indicates that her monthly living expenses amount to \$1,205.00. (Ex. E at 27-29.) Therefore, the Court finds it is not credible that the Debtor had actual additional unaccounted-for miscellaneous cash expenses that would have more than doubled her scheduled monthly living expenses.

Moreover, the Court does not find credible the Debtor's sworn statement on Schedule B that she had no cash on hand as of the Petition Date. This statement is inconsistent with the Debtor's testimony that she operated on a cash basis – routinely paying for her everyday expenses and various household goods with cash.

The Debtor admits that (i) she "was not working at the time between her receipt of [the Settlement Funds] and her bankruptcy filing"; and (ii) her "[s]ole income from 1/2015 to 6/2015 was the money received from her ex-husband and tax refund[.]" (Stip. ¶¶ 3-4.) Given her exclusive reliance on these funds to pay her living expenses, the Debtor's inability to account for approximately 17 percent (approximately 1/6) of the cash equivalent of the Settlement Funds and the Tax Return is troubling to the Court.

The standard applicable for a § 727(a)(5) satisfactory explanation is one that is "reasonable under the circumstances." This Debtor's explanation is, at best, incomplete. The Debtor offered no explanation about how she spent more than \$7,000.00, which is a significant portion of the cash equivalent of the Settlement Funds and the Tax Refund. Therefore, the Court finds that the Debtor failed to satisfactorily explain the loss or deficiency of assets, as set forth in § 727(a)(5). The Trustee has established grounds for the denial of the Debtor's discharge, as set forth in Count IV of the Complaint.

V. CONCLUSION

The Trustee failed to establish that the Debtor (i) actually had the cash equivalent of the Settlement Funds and the Tax Refund as of the Petition Date; (ii) was required to disclose the Settlement Funds as "income" on the SOFA; (iii) failed to disclose the Tax Refund on the SOFA; (iv) acted with fraudulent intent,

which is a necessary element of the causes of action set forth in Counts I, III, and V of the Complaint; and (v) acted unreasonably in failing to keep receipts as required by § 727(a)(3) in Count II of the Complaint.

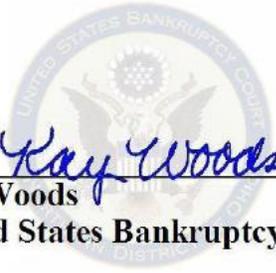
However, the Court will deny the Debtor's discharge pursuant to § 727(a)(5) on the grounds that the Debtor failed to satisfactorily explain the loss of assets, which constituted potential property of the estate, in the amount of \$7,077.43.

An appropriate order will follow.

#

IT IS SO ORDERED.

Dated: August 10, 2016
11:08:14 AM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

SANDRA A. DICKINSON,

Debtor.

* * * * *

MICHAEL D. BUZULENCIA, TRUSTEE

Plaintiff,

v.

SANDRA A. DICKINSON,

Defendant.

CASE NUMBER 15-41003

ADVERSARY NUMBER 15-4048

HONORABLE KAY WOODS

ORDER DENYING DEBTOR'S DISCHARGE

On July 19, 2016, the Court held a trial in the instant
adversary proceeding in which Michael D. Buzulencia, Chapter 7

Trustee ("Trustee"), seeks denial of a discharge to Debtor/Defendant Sandra A. Dickinson ("Debtor"). The Trustee commenced this adversary proceeding by filing the Complaint on October 23, 2015, which contained six causes of action, all of which sought denial of the Debtor's discharge based on 11 U.S.C. § 727(a). His causes of action are centered on the Debtor's (i) cumulative property settlement of \$36,550.00 ("Settlement Funds") from her prepetition divorce, which she received in January 2015; and (ii) 2014 income tax refund in the amount of \$4,948.00 ("Tax Refund"), which she received in April 2015.

For the reasons set forth in this Court's Memorandum Opinion Regarding Denial of Discharge entered on this date, the Court hereby:

1. Finds that the Trustee failed to carry his burden to establish that the Debtor acted with the requisite fraudulent intent as required under Counts I, III, and V;
2. Finds that under Count I, the Trustee failed to establish that the Debtor transferred or concealed property of the estate pursuant to § 727(a)(2)(A) because he failed to prove that the Debtor actually had the cash equivalent of the Settlement Funds and the Tax Refund as of the petition date;

3. Finds that under Count II, the Trustee failed to establish that the Debtor acted unreasonably in failing to keep receipts as required by § 727(a)(3);
4. Finds that under Count III, the Trustee failed to establish that the Debtor made a false oath pursuant to § 727(a)(4) because he failed to prove that the Debtor (i) actually had the cash equivalent of the Settlement Funds and Tax Refund as of the Petition Date; (ii) was required to disclose the Settlement Funds as "income"; and (iii) was required to list the Tax Refund separately as "income";
5. Finds that under Count V, the Trustee failed to prove that the Debtor improperly withheld information because the parties stipulated that the only receipts the Debtor maintained regarding her use of the Settlement Funds and the Tax Refund were turned over to the Trustee;
6. Finds that under his Count IV, the Trustee carried his burden under § 727(a)(5) by proving that there was an unexplained loss or deficiency of a prepetition asset that could have been used to pay creditors;
7. Finds that the Debtor failed to satisfactorily explain the loss of assets, which constituted potential

property of the estate, in the amount of \$7,077.43 as
required by § 727(a)(5).

As a consequence, the Court hereby denies the Debtor's discharge.

#