

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 2012-7 entered by the United States District Court for the Northern District of Ohio on April 4, 2012. This is a core proceeding under 28 U.S.C. § 157(b)(2)(J) and it is within the court's constitutional authority as analyzed by the United States Supreme Court in *Stern v. Marshall*, 131 S.Ct. 2594 (2011) and *Executive Benefits Insur. Agency v. Arkison*, 134 S.Ct. 2165 (2014).

THE TRIAL

At trial, the United States trustee (UST) presented his case through cross-examination of the debtor and her father Samuel Moore, the deposition testimony of the debtor's former attorney Alan Silver,² stipulations,³ and exhibits. The debtor presented her case through her testimony, her father's testimony, the deposition testimony of attorney Silver, stipulations, and exhibits.

The findings of fact are based on that evidence and reflect the court's weighing of the evidence presented, including determining the credibility of the witnesses. "In doing so, the Court considered the witness's demeanor, the substance of the testimony, and the context in which the statements were made, recognizing that a transcript does not convey tone, attitude, body language or nuance of expression." *In re The V Companies*, 274 B.R. 721, 726 (Bankr. N.D. Ohio 2002). *See* FED. R. BANKR. P. 7052 (incorporating FED. R. CIV. P.52).

² The parties expected Mr. Silver to appear at trial. He left messages for the attorneys and the court shortly before trial that he would not be attending. Counsel then agreed to go forward using Mr. Silver's deposition testimony in lieu of his appearance.

³ Docket 42.

FACTS

The Debtor's Prepetition Insurance Claim

In November 2013, the debtor made a claim against her homeowner's insurance policy with State Farm for hail damage. State Farm estimated the cost of repair or replacement at \$13,693.13 and made an initial payment of \$5,116.31 to The Third Estimate, the contractor doing the repairs (contractor).⁴

On February 7, 2014, State Farm issued a joint check to the debtor and Select Portfolio Servicing⁵ in the amount of \$4,280.17. The debtor held the check because the contractor had not yet started the work, despite her telephone calls to them. On March 10, 2014, when she learned from the contractor that they would be starting, she deposited this check into a joint checking account that she had with her father, Samuel Moore.⁶

After waiting a day for the check to clear, on March 11, 2014 the debtor withdrew \$4,070.00 from that same account.⁷ She accounted for the difference between the funds deposited and the funds withdrawn by explaining that she used the \$210.17 for groceries and a furniture rental payment, assuming that she could borrow that money from her brother before she had to pay the contractor. The debtor took the funds to her father's house and put the cash in a

⁴ Stip. 6.

⁵ Select Portfolio Servicing serviced the note that is secured by a mortgage on the debtor's residence.

⁶ Stip. 7.

⁷ Stip. 8. During this same time frame, the debtor received an income tax refund of approximately \$4,000.00 and used those funds to pay some bills and to pay her attorney for the bankruptcy case.

drawer so that she would not be tempted to spend any more of it before paying the contractor.⁸ She had placed cash at her parent's house several times over the years for the same reason, but not in an amount as large as this. The cash was in the drawer on the day the debtor filed her case.⁹

Having observed the debtor's testimony, the court finds that the facts stated above that go beyond the stipulations are true.

The Debtor's Bankruptcy Petition and Schedule

Schedule B requires a debtor to list all of her personal property and its value. The debtor provided these responses under oath:

PROPERTY	VALUE
1. Cash on hand	None
18. Other liquidated debts owed to the debtor including tax refunds. Give particulars.	None
21. Other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims. Give estimated value of each.	None
35. Other personal property of any kind not already listed. Itemize.	None

The debtor testified that she did not list the insurance money under "cash" or any other category because she believed the money belonged to the contractor as soon as they did the

⁸ Stip. 9; trial testimony.

⁹ Stip. 9.

work. She was just waiting for them to finish the work before she turned over the money. She explained that she had a personal injury insurance claim in the past where the proceeds came to her individually; she felt money that came in that situation would have been her property. Here, however, she considered the situation to be different because the money was not intended to be hers. This is incorrect, as the debtor now acknowledges.

In response to questions posed in the Statement of Financial Affairs, the debtor gave these answers:

8. Losses List all losses from fire, theft, other casualty or gambling within one year immediately preceding the commencement of the case.	None
14. Property held for another person List all property owned by another person that the debtor holds or controls.	None

The debtor acknowledges that she know understands that these answers are not true. She felt at the time that they all fell within the category discussed above: she thought the money had to be paid to Third Estimate. Based on the debtor's testimony, as well as the fact that the first State Farm check went directly to the contractor, the court believes that the debtor had an honest belief when she signed Schedule B and the Statement of Financial Affairs that the cash fell outside of these categories.

The Debtor's Post-Filing Dispute with the Contractor

When the contractor completed the work on March 28, 2014, they demanded payment of \$4,280.00. The debtor responded by identifying some items that needed to be fixed before she would pay the money. The contractor replied that they would come and tear the siding off of the house.

The Debtor's Communications with her Attorney Alan Silver

On April 7, 2014, the debtor called Mr. Silver to ask what she could do about this problem. Another attorney in his office answered the phone, said that Mr. Silver was not there, and advised the debtor that the contractor should have been listed as a creditor and that she should bring in the documentation plus \$200.00 for Mr. Silver to amend the schedules. The debtor made an appointment with Mr. Silver for April 9, 2014. When she went to his office, however, he was not there. At the suggestion of Mr. Silver's associate, the debtor left the documents and the \$200.00 for him.

The debtor followed up with Mr. Silver by phone a few days later to see if he had gotten everything. He said yes, and he would call the contractor's attorney. In another phone conversation, Mr. Silver asked if the debtor wanted to pay the contractor and if she had the money. The debtor responded that she had no problem paying them after they fixed the problem. When Mr. Silver asked where the money was, the debtor replied that it was at her father's house.

On April 17, 2014, the debtor emailed Mr. Silver asking him to confirm that he had amended the filing to include the contractor. He said there was no rush, they had time to do

that. At some point he told her that the contractor's lawyer would be at the April 21st meeting of creditors¹⁰ and they would try to resolve the issue then.

Mr. Silver never filed the amendment.¹¹

The Events of April 18, 2014

Based on Mr. Silver's statement that he would try to resolve the matter with the contractor's attorney at the § 341 meeting scheduled for April 21, 2014, the debtor obtained the cash from her father and went to the bank to get a money order to take to the meeting. Driving her father's car, she parked at a shopping plaza, put the cash in the glove compartment, and thought she followed her usual practice of pushing the button that locks the doors. In reality, she had not locked the car.¹²

On April 20, 2014, the debtor called her father from a shopping plaza to say that the money had been stolen from her car. He told her to call the police, which she did. She also filed a police report.¹³ The debtor told Mr. Silver about the theft at some point before the § 341 meeting.

¹⁰ 11 U.S.C. § 341.

¹¹ Nor did he return the \$200.00 to the debtor.

¹² Stip. 11 re the last sentence. The court here is recounting the debtor's testimony, but is not making any findings of fact.

¹³ Stip. 11.

The § 341 Meeting of Creditors on April 21, 2014

Chapter 7 trustee Lauren Helbling held the meeting of creditors on April 21, 2014. At that time, the debtor gave this testimony under oath in response to the trustee's questions:

Q. It's a 30 to 40 page document, did you look through all the pages before signing?

A. Yes, I did.

Q. Are all your assets, all your liabilities and all your income listed?

A. Yes, it is.

Q. Are there any changes that need to be made that you're aware of?

A. No, there isn't.¹⁴

* * *

Q. Have you received a lump sum distribution of cash or property from any source in the past two years?

A. No.¹⁵

* * *

Q. Have you settled any claims out of court where you received money in the past two years?

A. No, I haven't.

Q. And are there any pending claims now that you may sue on in the future?

A. No, there isn't.

¹⁴ UST Exhibit 8, p. 3.

¹⁵ UST Exhibit 8, p. 4.

Q. Okay. When you filed this case in March, did you have any insurance claims that you're just waiting to get the insurance check on?

A. Excuse me. No. I – no, I wasn't.¹⁶

Mr. Silver sat silently through this, saying nothing about the insurance claim, the contractor dispute, or the debtor's request that he amend the filing to include the insurance issue. He did speak up to correct the debtor's statements about his legal fee and also about how she paid for her daughter's high school tuition. After the trustee concluded the meeting of creditors, Mr. Silver went directly to Ms. Helbling's office, then to the office of another chapter 7 trustee, then back to Ms. Helbling's office to tell her assistant about the insurance proceeds and the contractor claim. He apparently did not tell the debtor that he was going to do so, either then or later.

The debtor continued to telephone and email Mr. Silver asking whether the amendment had been filed. A few months later, the debtor hired new counsel. Mr. Silver still has the \$200.00 paid to him by the debtor for the amendment.

DISCUSSION

A chapter 7 debtor is entitled to a discharge of her debts, subject to certain exceptions. The UST relies on the three exceptions stated in Bankruptcy Code § 727(a)(2), (a)(4)(A), and (a)(6)(A), which provide that a debtor is not entitled to a discharge if:

- (2) the debtor, with intent to hinder, delay, or defraud . . . an officer of the estate charged with custody of property under this title, has . . . concealed . . .

¹⁶ UST Exhibit 8, p. 10.

- (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[.]

* * *

[or]

- (6) the debtor has refused, in the case –
 - (A) to obey any lawful order of the court, other than an order to respond to a material question or to testify[.]

11 U.S.C. § 727(a)(2), (a)(4)(A), and (a)(6)(A). As the party objecting to the debtor’s discharge, the UST has the burden of proof by a preponderance of the evidence. *Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 683 (6th Cir. 2000); *see also* FED. R. BANKR. P. 4005.

The court finds that the dispositive section under the facts presented is § 727(a)(4)(A). To obtain a denial of discharge under this provision, the UST must prove 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*, 227 F.3d. at 685. The statements made in a debtor’s petition, schedules, and statement of affairs are statements made under oath for the purposes of this provision. *See Hamo v. Wilson (In re Hamo)*, 233 B.R. 718, 725 (B.A.P. 6th Cir. 1999). The same is true for a debtor’s testimony at her meeting of creditors. *Hunter v. Sowers (In re*

Sowers), 229 B.R. 151, 158 (Bankr N.D. Ohio 1998). A statement under oath is material if it concerns the debtor's transactions or estate, the existence and disposition of her property, or discovery of her assets or business dealings. *Keeney*, 227 F.3d at 685-86.

Whether a debtor had the requisite fraudulent intent in making a false oath may be determined from the facts and circumstances of the case. *Id.* at 686. In this context, "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.'" *Id.* at 685-686 (quoting *In re Chavin*, 150 F.3d 726, 728 (7th Cir. 1998)). A reckless disregard will satisfy the intent requirement; however, mere mistake or inadvertence will not. *Id.* at 686.

A debtor's reliance on the advice of counsel can show that she lacked the intent needed to deny her a discharge under this provision. *Eifler v. Wilson & Muir Bank & Trust Co.*, 588 Fed. Appx. 473, 478-79 (6th Cir. 2014) (citing *Buckeye Ret. Co. v. Swegan (In re Swegan)*, 383 B.R. 646, 656 (B.A.P. 6th Cir. 2008)). "To prevail on this theory . . . [the debtor] must show: (1) full disclosure of all pertinent facts to counsel; and (2) good faith reliance on counsel's advice." *Id.*

At the § 341 meeting, the trustee asked the debtor point blank if she knew of any changes that needed to be made to her petition and schedules. By that time, the debtor had discussed amending the petition and/or schedules with Mr. Silver and the colleagues in his office. She wanted him to amend and had paid him to do so. She should, therefore, have answered "yes" to this question, but instead she said "no." If that question did not trigger her memory, the ones that followed about insurance claims should have. The debtor did not offer any explanation at trial for why she said no, leading the court to conclude that she made this statement under oath

with reckless disregard for the truth. The information she withheld was material as it related to the debtor's transactions and the existence and disposition of her property.

The debtor relies as a defense on the advice of counsel doctrine. The court must look to the events before the § 341 meeting to determine if this defense is available. The court finds that the debtor told Mr. Silver about the dispute with the contractor, including that she was holding on to the insurance proceeds until the contractor fixed the problem. In doing so, she disclosed the pertinent facts about the issue from her point of view, not being an attorney. If Mr. Silver felt that her disclosure raised other questions, he should have posed them to her before the meeting. There is nothing in the record to suggest that he asked her for more information or that, having asked for it, the debtor failed to respond. This satisfies the first part of the test.

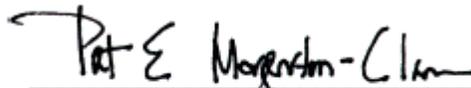
The debtor did not, however, satisfy the second part because there was no evidence that Mr. Silver responded to the disclosure by giving her advice concerning her testimony. Without advice, there is nothing on which the debtor could have relied.

The thrust of the debtor's argument is actually that Mr. Silver represented her poorly when he failed to file the amendment before the § 341 meeting or to speak up at that meeting. She argues that if Mr. Silver had filed the amendment (for which he took a \$200.00 fee) the trustee would undoubtedly have asked her questions about it and she would have been able to correct the situation. Additionally, the debtor takes exception to the fact that Mr. Silver did not speak up and say "What about the house insurance claim?" On the latter point, she notes that Mr. Silver spoke up during other parts of the debtor's testimony where Mr. Silver identified additional information, such as how the debtor paid a school bill and the amount of his fee.

This inaction does give the court pause. There was no testimony, however, that Mr. Silver told the debtor to *deny* that she intended to file an amendment—but deny it she did. That the legal representation at the § 341 meeting was of dubious quality is a different question than whether Mr. Silver actually advised the debtor not to disclose the insurance-related issues. Because there was no evidence to that effect, the defense is unavailing.

CONCLUSION

For the reasons stated, the debtor is denied a discharge under Bankruptcy Code § 727(a)(4)(A). A separate judgment will be entered reflecting this decision.



Pat E. Morgenstern-Clarren
Chief Bankruptcy Judge

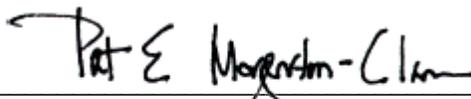
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 14-11646
)
PATRICIA M. SEALS,) Chapter 7
)
Debtor.) Chief Judge Pat E. Morgenstern-Clarren
_____)
)
DANIEL M. McDERMOTT, U.S. TRUSTEE,) Adversary Proceeding No. 14-1124
)
Plaintiff,)
)
v.)
)
PATRICIA M. SEALS,) **JUDGMENT**
)
Defendant.)

For the reasons stated in the memorandum of opinion entered this same date, the plaintiff is granted judgment on the complaint and the defendant-debtor Patricia Seals is denied a discharge under Bankruptcy Code § 727(a)(4)(A).

IT IS SO ORDERED.



Pat E. Morgenstern-Clarren
Chief Bankruptcy Judge