THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	Case No. 94-10123
JOHN D. SZYMCZAK,	Adversary Proceeding No. 94-1334
Debtor.	Chapter 7
ARLENE SZYMCZAK,	Judge Pat E. Morgenstern-Clarren
Plaintiff,	
v.	**MEMORANDUM OF OPINION**
JOHN D. SZYMCZAK,	
Defendant.	

This Adversary Proceeding arises out of a domestic relations dispute between Debtor John D. Szymczak and his former wife, Arlene Szymczak. Arlene Szymczak filed a Complaint against John Szymczak requesting that certain debts be found to be non-dischargeable (Counts 1 and 2), objecting to his discharge (Count 3), and asking for dismissal of his Chapter 7 case (Count 4). The Court bifurcated Counts 3 and 4 and tried them on April 11 and 12, 1996. (Docket 38; 49). The parties then filed Post-Trial Briefs, Reply Briefs, Additional Briefs and Proposed Findings of Fact and Conclusions of Law. (Docket 70-74; 77).

I.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding. 28 U.S.C. §§ 157 (b)(2)(A), (b)(2)(J), (b)(2)(O).

II.

FINDINGS OF FACT

On consideration of the file, testimony, exhibits, and arguments, the relevant facts are as follows:

The Court tried Counts 3 and 4 together in the interest of judicial economy because "[t]the factual and legal issues raised in [these Counts] are closely related and potentially dispositive of all issues . . ." in the Complaint. (Docket 38). Both parties had appropriate notice of the trial date. Plaintiff attempted to subpoena Debtor shortly before the trial date, but service of the subpoena was faulty. Debtor did not appear at trial and his counsel stated that he was not willing to attend unless subpoenaed. Plaintiff did not request a continuance of the trial and did not move to compel Debtor's appearance. She did, however, formally call Debtor as a witness in her case-in-chief and Debtor, being absent from the courtroom, did not respond. The trial proceeded in Debtor's absence and concluded.

Debtor's decision not to attend and testify had two consequences. The first is that the trial testimony was disjointed because Plaintiff expected to elicit relevant testimony from Debtor. As a result, the trial testimony is most efficiently discussed on a witness-by-witness basis rather than as a narrative. The second consequence is a substantive one and is discussed under Part III, below.

A. Testimony on Behalf of Plaintiff

Plaintiff testified on her own behalf and called appraiser Russell Warren as a witness.

1. Testimony of Plaintiff Arlene Szymczak

Debtor and Plaintiff were married for 33 years prior to their divorce in 1993.The parties and their four children enjoyed a comfortable lifestyle with the children attending private schools and then college. During the course of the marriage, Debtor built up a substantial and successful business, Royal Packaging Co. and various related entities. Debtor and Plaintiff both served as corporate officers, with Debtor making the corporate and business decisions. Plaintiff also played a role in the business by helping start and operate Royal Products, a subsidiary of Royal Packaging, which sold products manufactured by Royal Packaging at trade shows. She did this from 1989 through September of 1994. Debtor earned a substantial income from Royal Packaging prior to filing his Chapter 7 case. In the years immediately preceding his bankruptcy, Debtor's total compensation was $200,003.20 (1990), $173,509.60 (1991), $162,347.20 (1992) and $137,508.80(1993) (Plaintiff Exh. 3).

Plaintiff feels that the businesses prospered in the early 1990's. Corporate tax returns for the years 1989, 1990, and 1991 show gross sales for Royal Packaging of $1,099,777; $962,867; and $888,372, respectively. (Plaintiff Exh. 15). Nonetheless, Royal Packaging Co. filed a petition under Chapter 11 of the Bankruptcy Code on January 6, 1994 (Case No. 94-10065). A related entity, Royal American Metallurgical Co., had filed its petition under Chapter 11 on December 21, 1993 (Case No. 93-16011). Plaintiff was unaware of any significant financial difficulties prior to the bankruptcy filing. Plaintiff also testified that Debtor constantly borrowed

money to start other companies. During the early 1990's, Royal Packaging borrowed $500,000 from Society Bank to start different ventures, including Royal American Metallurgical.

The parties' marriage ended in divorce on October 27, 1993 following protracted litigation in the Domestic Relations Court for Cuyahoga County, Ohio. The Domestic Relations Court issued a Judgment Entry on that date which valued the parties' property interests, divided the marital property, and made certain awards (the "Judgment") (Plaintiff Exh. 16). The Judgment required Debtor to pay various amounts to Plaintiff, including: $5000 per month "as and for spousal support" and $2500 per month until the total amount of $368,856 was paid "to equalize the property division." Debtor paid his support obligations to Plaintiff prior to that Judgment, but has paid almost nothing since. The two payments received since the Judgment resulted from enforcement actions taken by Plaintiff in Domestic Relations Court. The parties continue to be involved in domestic relations court proceedings.

Debtor filed this Chapter 7 case on January 11, 1994, approximately three months after the Judgment. Plaintiff introduced Debtor's bankruptcy petition and schedules into evidence. (Exhibit 1). They list $2,195,456.08 in unsecured, non-priority debt, a substantial portion of which relates to the Judgment, including debts owed to: Plaintiff ($1,500,000); Joseph Stafford, Plaintiff's divorce attorney ($78,000); First Federal Savings and Loan, guarantee of home loan for Plaintiff ($125,000) and $12,500 (Warren Russell). These additional significant debts are listed: $336,000 to Society National Bank for credit card debt and guarantee of a corporate loan; $99,000 to Royal Packaging Co. and to Royal American Metallurgical for loan advances; $15,000 in debt to Debtor's attorney, David Shillman; and other miscellaneous debt totaling $7,456.08.

Plaintiff testified that Debtor's petition and schedules are faulty, fail to list certain property and litigation, and have not been amended to include the omitted matters in these respects:

(1) Schedule B of Debtor's bankruptcy filing requires a statement of bank accounts held individually and jointly. There Debtor lists two accounts: a National City Bank checking account and a Society National Bank certificate of deposit with a value of $31,000. Debtor failed to list a Florida bank account, Barnett Bank Account No. 1627152395. This account had a balance of $2000 on December 30, 1993 and a somewhat reduced balance on the date Debtor's Chapter 7 case was filed. (Plaintiff Exhs. 12, 42). The account is a joint account which is in the names of Debtor, Debtor's mother and sister. Plaintiff testified this was actually Debtor's account, a conclusion supported by the check register which indicates Debtor's wages were deposited in the account and withdrawals were made to pay his expenses, including his rent. Debtor continued to use the account after his bankruptcy case was filed. Interest payments on the account are listed on Debtor's federal income tax returns. (Plaintiff Exh. 3). Debtor also failed to list Society National Bank Account No. 35-226-6978. (Plaintiff Exh. 23). This account had a balance of $3.31 on the date the petition was filed.

(2) Debtor's Statement of Financial Affairs , Section 4, requires disclosure of all suits to which a debtor was or is a party within the year preceding the filing. Debtor only lists the parties' divorce action in Cuyahoga County Common Pleas Court. Debtor failed to disclose litigation in Pennsylvania pending within the year preceding the bankruptcy filing relating to the Judgment. The Judgment included an award to Plaintiff of a Clifford Trust. Despite this, Debtor filed suit in the Common Pleas Court for Allegheny County, Pennsylvania in December of 1993 seeking to restrain Smith, Barney, Shearson, Inc. from disbursing the proceeds of the trust and

requesting an award of damages, attorney fees and costs against Plaintiff. (Plaintiff Exh. 41). Debtor's petition and schedules do not list this litigation.

(3) Schedule B of the bankruptcy filing requires disclosure of equitable interests, interests in a trust (both contingent and non-contingent), and all other personal property. Although Debtor had claimed an interest in the Clifford Trust by virtue of filing the Pennsylvania lawsuit, he did not list an interest in the Trust in his schedule.

Plaintiff is familiar with Debtor's lifestyle following their divorce and the bankruptcy filing and does not believe it is different than before these events. Debtor's corporate salary was reduced in late 1993 to $90,000. The corporate assets were later sold and Plaintiff is uncertain regarding Debtor's employment situation following the sale of the corporate assets in the corporate cases. Debtor has told Plaintiff that he is a consultant. Debtor is presently involved in a business, Royal American International, Inc., which is owned and operated by their son, Steven Szymczak. Plaintiff visited this operation and concluded the company does essentially the same business as Royal Packaging. While the exact nature of Debtor's involvement with this new Royal is uncertain, Plaintiff suggests Debtor plays a significant role, with their son as a front man having neither the education nor expertise to run this business. In support, Plaintiff testified that Debtor signed a lease dated December 12, 1994 as President of Royal American International, Inc. (Plaintiff Exh. 34). Plaintiff also testified that Debtor is a signatory on the company bank account; the checks introduced as exhibits, however, are for yet another company called "Royal Products International, Inc." (Plaintiff Exh. 40). Finally, although Debtor has stated he cannot pay his bills and no one will hire him, he continues to travel and take vacations. Plaintiff does not know what assets Debtor owns personally.

2. Testimony of Russell Warren, Appraiser

Russell Warren, an expert witness appointed by the Domestic Relations Court to value the Royal Packaging business entities, testified regarding the evaluations he made in 1991. (Plaintiff Exhs. 7, 8). In his opinion, the fair market value of the equity ownership of Royal Packaging Corp. was $750,000 as of August 31, 1988 and $600,000 as of August 31, 1991. The equity ownership of Royal American Metallurgical was valued at -0- on August 31, 1990. In the course of preparing the reports, Warren concluded Debtor was the sole decision maker for the businesses. He described Debtor's management style as very "hands on" , dealing with every facet of the businesses. Debtor operated without a board of directors and took money from the corporation when he needed it. He testified the companies were totally controlled by Debtor and that the decreased value of the equity ownership in Royal Packaging was the result of Debtor's business decisions, including pledging assets and borrowing money from Society Bank to invest in Royal American Metallurgical. Warren did not offer an opinion as to the corporate values after 1991.

B. Testimony on Behalf of Debtor

Debtor called two attorneys as witnesses to testify on his behalf: David Shillman and Thomas Pavlik. Plaintiff requests in her Post-Trial Brief that this testimony be stricken because Debtor did not expressly waive his attorney-client privilege. Plaintiff did not support this request with a factual or legal basis and it is, therefore, denied.

1. Testimony of David Shillman, Attorney

David Shillman, Debtor's divorce counsel, testified as to his dissatisfaction with the Judgment and its one-sidedness. Although Debtor considered filing an appeal, he did not do so

because of the related costs, time, and the limited scope of an appellate review. Debtor instead filed a motion for new trial which was denied. The Judgment was a precipitating factor in Debtor's bankruptcy filing.

2. Testimony of Thomas Pavlik, Attorney

Attorney Thomas Pavlik, counsel for the Chapter 11 Debtors, Royal Packaging and Royal American Metallurgical, testified that the two Chapter 11 cases were filed with the intention of liquidating assets (rather than reorganizing) because attempts to secure additional capital prior to the filings had been unsuccessful. Although the companies had substantial gross sales, $200,000 in cash reserves which had been pledged to Society Bank were subject to a restraining order in Domestic Relations Court; as a result, the companies could not pay their bills. In addition to the corporations' financial problems, Debtor had concerns about his own situation, specifically the Judgment, shareholder loans and advances he had taken from the companies, potential corporate causes of action against him, and his guarantee obligations to Society for the corporate debt. Corporate counsel Pavlik advised Debtor to obtain his own counsel regarding an individual bankruptcy filing. His opinion is that Debtor filed for personal bankruptcy as a result of his guarantee of the bank debt, the Judgment, and the claims the Royal corporations had against him.

Ultimately, Debtor procured an offer for the purchase of the Royal Packaging assets from an old friend, Floyd Jordan, which resulted in a sale after several months of negotiation. Society Bank was paid in the Royal Packaging case and a distribution to unsecured creditors resulted in both cases. This favorable result was unforeseen when the Chapter 11 corporate cases were filed and on January 11, 1994 when Debtor's case was filed.

III.

DISCUSSION

A. Count 3: Objection to Discharge

1. Burden of Proof

Plaintiff has the burden of proving her objection to discharge under Bankruptcy Rule 4005. The burden of proof on a § 727 objection to discharge is a preponderance of the evidence. *In re Adams*, 31 F.3d 389 (6th Cir. 1994), cert. denied, 115 S.Ct. 903 (1995). Applying these requirements in this case is complicated by Debtor's failure to attend trial and to testify when called as a witness as required by Bankruptcy Rule 4002 (2). That rule states that "the debtor *shall* . . . attend the hearing on a complaint objecting to discharge and testify, if called as a witness . . . ." (Emphasis added). Attendance is mandatory because an objection to discharge is difficult to prove without the debtor's testimony. *In re Ishahak*, 130 B.R. 16 (Bankr. E.D. N.Y. 1991); 8 Collier on Bankruptcy, ¶ 4002.04 (15th ed. 1996) .

Debtor argues that a subpoena must be served to invoke the rule and that, in the absence of a subpoena, a debtor has no duty to appear. The language of Rule 4002(2) does not reference a subpoena and Debtor has not cited any authority to that effect. The rule first requires attendance and then requires debtor to testify, if "called". The rule does not state that debtor is only required to testify if "subpoenaed". A debtor's obligation under this rule is not, therefore, conditioned upon service of a subpoena. *In re MacPherson*, 129 B.R. 259 (D.Ct. M.D. Fla. 1991). Debtor also argues that his failure to attend should be excused because his absence shortened what would otherwise have been a lengthy, acrimonious trial. While Debtor may be correct that his absence prevented unpleasant interaction, the language of Rule 4002(2) does not

permit a debtor to make such a choice unilaterally. Regardless of ill will between the parties, the rule required Debtor to appear.

Courts have dealt with a debtor's violation of the rule in two ways. Some courts hold that a debtor's deliberate failure to attend a hearing on an objection to discharge provides an independent basis to deny discharge. *In re Robson,* 154 B.R. 536 (Bankr. E.D. Ark. 1993); *In re Ishahak*; *In re Howard*, 55 B.R. 580 (Bankr. E.D. N.C. 1985). Under the circumstances of this case, Debtor's failure to attend trial and to testify was intentional and his discharge is, therefore, denied on that basis.

Alternatively, Debtor's failure to attend trial and to testify when called by Plaintiff results in a denial of discharge because he failed to offer evidence to rebut Plaintiff's prima facie case for denial of discharge. Some courts have dealt with a debtor's failure to comply with Bankruptcy Rule 4002(2) by assignment of the burden of going forward. *In re MacPherson*, 129 B.R. 259 (D. Ct. M.D. Fla. 1991); *In re Hunn,* 51 B.R. 981 (Bankr. M.D.Fla. 1985). Bankruptcy Rule 4005 places the ultimate burden of proof on Count 3 on Plaintiff. However, although Plaintiff has the burden of proving her objection, the burden of going forward shifts to Debtor after Plaintiff presents sufficient evidence to establish a prima facie case for denial of discharge. Debtor cannot prevail after Plaintiff has established this prima facie case without offering credible evidence to rebut Plaintiff's case. *In re Chalik,* 748 F.2d 616 (11th Cir. 1984); *In re Ishahak.* Here, Plaintiff made a prima facie case for denial of discharge under § 727(a)(4) which Debtor failed to rebut, as discussed below.

2. Section 727 of the Bankruptcy Code

Section 727 provides for an individual debtor's discharge unless the debtor falls within one of the exceptions to discharge. 11 U.S.C. § 727(a). Count 3 of the Complaint requests denial of discharge under § 727 subsections (a)(2), (3), (4) and (5). This Count contains a litany of factual allegations, but fails to indicate which facts are asserted as a basis for relief under the various subsections of § 727(a). Moreover, no evidence was introduced regarding many of the factual allegations contained in the Complaint. On review of the evidence, Plaintiff established a prima facie case for denial of discharge pursuant to § 727(a)(4). Plaintiff did not, however, present a prima facie case for denial of discharge under §§ 727(a)(2), (a)(3), and (a)(5). Each section will be addressed separately.

Section 727(a)(4) bars a debtor's discharge if "the debtor knowingly and fraudulently, in or in connection with the case--made a false oath or account . . . . " 11 U.S.C. § 727(a)(4)(A). Under this section a creditor must establish that: (1) debtor made a statement under oath; (2) the statement was false; (3) debtor knew the statement was false; (4) the statement was made with fraudulent intent; and (5) the statement was materially related to the bankruptcy case. *Williamson v. Fireman's Fund Insurance Co.*, 828 F.2d 249 (4th Cir. 1987). Representations made in a debtor's petition, schedules and statement of affairs are statements made under oath within the meaning of this section. *In re Calder*, 907 F.2d 953 (10th Cir. 1990), explained on other grounds in *Easley v. Pettibone*, 990 F.2d 905 (6th Cir. 1993); *Williamson*. Because a debtor is unlikely to testify directly that his intent was fraudulent, courts may deduce fraudulent intent from all the facts and circumstances of a case. *In re Calder*; *In re Devers*, 759 F. 2d 751 (9th Cir. 1985). Deliberate omissions of even worthless assets can preclude discharge. *In re Calder; In re Chalik*,

748 F.2d 616 (11th Cir. 1984). "Matters are material if pertinent to the discovery of assets, including the history of a bankrupt's financial transactions [citation omitted]." *In re Mascolo*, 505 F. 2d 274, 277 (1st Cir. 1974). Therefore, fraudulent omission of a bank account warrants denial of a discharge without respect to its value. *Williamson; Mascolo.*

Debtor signed a sworn declaration that his bankruptcy schedules were true and accurate to the best of his knowledge, information and belief. (Plaintiff Exh. 1, Declaration). Plaintiff introduced evidence establishing Debtor omitted two open bank accounts from these schedules. Additionally, he failed to schedule the Clifford Trust litigation or an interest in the Trust. Debtor introduced no evidence related to these omissions, factual statements of counsel being argument rather than evidence. These omissions constitute false oaths which Debtor clearly knew were false. His fraudulent intent in omitting these items can be inferred from the circumstances: Debtor is an experienced businessman who is familiar with financial matters. He deposited funds into the Barnett account and continued using it after his bankruptcy case was filed. He omitted not one, but two, bank accounts. He failed to amend his schedules to include them and failed to testify as to why they were omitted. Omission of the Clifford Trust litigation and the claimed interest in the Trust provides further support of improper intent. Finally, the failure to disclose bank accounts relates to the Debtor's finances and constitutes a material omission. This evidence establishes at least a prima facie case for denial of discharge. Debtor might have been able to rebut this testimony if he had testified or presented other evidence on this issue, but he did not do so. Debtor's discharge is, therefore, denied under § 727(a)(4).

Section 727(a)(2) denies discharge to a debtor who has transferred or concealed property in the year preceeding the bankruptcy filing or after the case was filed. Plaintiff's

request for denial of discharge under this subsection is based on various factual assertions regarding a retirement account for which no evidence was introduced. Plaintiff, apparently in recognition of this lack of proof, only requests and discusses discharge under §§ 727(a)(3), (4) and (5) in her Post-Trial Brief. Relief under § 727(a)(2) is, therefore, denied based on the lack of evidence and failure to establish a prima facie case.

Under § 727(a)(3), a debtor is not entitled to a discharge if "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 failure or act was justified under all the circumstances of the case . . . ." 11 U.S.C. § 727(a)(3). The purpose of this provision "is to make the privilege of discharge dependent on a true presentation of the debtor's financial affairs." *In re Underhill*, 82 F.2d 258, 260 (2d Cir. 1936), cert. denied, 299 U.S. 546 (1936). To establish a prima facie case under this section a creditor must show that the debtor failed to maintain and preserve adequate books and records and that the failure makes it impossible to ascertain the debtor's financial condition and business transactions. *Meridian Bank v. Alten*, 958 F.2d 1226 (3d Cir. 1992).

Plaintiff requests relief under this subsection without providing a factual basis for the request. The Complaint generally refers to Debtor's claimed violation of § 727(a)(3) and to his liquidation of certain retirement accounts prior to his bankruptcy filing. The evidence, however, did not address the retirement accounts or the adequacy of Debtor's books and records and does

not establish a prima facie case for denial of discharge under this subsection. Relief under § 727(a)(3) is, therefore, denied.

Section 727(a)(5) provides for denial of discharge when "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 . . . ." The mere allegation of failure to explain loss or deficiency of assets does not constitute a prima facie case under this section. *In re Martin*, 698 F.2d 883 (7th Cir. 1983). To establish a prima facie case a creditor must introduce evidence of a shortage, loss or disappearance of assets. *In re Martin*; *In re Chalik*, 748 F.2d 616 (11th Cir. 1984); *In re Kisberg*, 150 B.R. 354 (Bankr. M.D. Pa. 1992); *In re Dorman*, 98 B.R. 560 (Bankr. D. Kan. 1987). Once a creditor meets this initial burden by producing evidence establishing a basis for the objection to discharge, a debtor must then satisfactorily explain the loss. *In re Chalik.*

Plaintiff asserts in her Complaint that Debtor failed to account for certain retirement funds and has failed to provide any explanation regarding his inability to pay his debts as a basis for relief under § 727(a)(5). As noted, there was no testimony regarding the retirement accounts. Also, Plaintiff did not introduce any evidence regarding Debtor's alleged unexplained loss of assets or of unusual transactions. She asserts merely that Debtor's bankruptcy filing has not been adequately explained in light of his pre-petition income and the pre-petition success of the corporations. These assertions fail to establish a shortage or loss of assets which would provide a basis for denial of discharge. The testimony of appraiser Warren does not prove Plaintiff's case because he simply gave his opinion as to the value of corporate assets two years before the

bankruptcy filing. That testimony is not probative of a shortage, loss or disappearance of assets. Relief under § 727(a)(5) is not, therefore, available based on failure to establish a prima facie case.

B. Count 4: Dismissal of the Chapter 7 Case

Count 4 of the Complaint requests dismissal of Debtor's case under § 707(a) of the Bankruptcy Code based on various factual allegations which Plaintiff asserts constitute lack of good faith and abuse of the bankruptcy system. Specifically, Plaintiff argues that the Chapter 7 case was filed in response to the unfavorable Judgment and that Debtor has made no attempt to adjust his lifestyle and to treat his creditors fairly. Debtor argues that Plaintiff, a creditor, does not have standing to request dismissal and, alternatively, that there is no factual basis for dismissal.

Section 707(a) of the Bankruptcy Code provides:

> The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including--
>
> (1) unreasonable delay by the debtor that is prejudicial to creditors;
>
> (2) nonpayment of any fees or charges required under chapter 123 of title 28; and
>
> (3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on motion by the United States Trustee.

This subsection does not limit the parties in interest who may request dismissal for cause. Plaintiff, a creditor in the Chapter 7 case, is clearly a proper party to request dismissal based on lack of good faith under § 707(a). See *In re Zick*, 931 F.2d 1124 (6th Cir. 1991) (Decision

affirming judgment on creditor's motion for dismissal for cause pursuant to § 707(a)). Debtor's challenge to Plaintiff's standing under this section is without merit.

The Sixth Circuit has held that "cause" for dismissal under § 707 (a) includes lack of good faith. *In re Zick*, 931 F.2d 1124 (6th Cir. 1991). Good faith is "an amorphous notion, largely defined by factual inquiry." *In re Okoreeh-Baah*, 836 F. 2d 1030, 1033 (6th Cir. 1988). The *Zick* court noted:

> Dismissal based on lack of good faith must be undertaken on an ad hoc basis. [Citation omitted]. It should be confined carefully and is generally utilized only in those egregious cases that entail concealed or misrepresented assets and/or sources of income, and excessive and continued expenditures, lavish lifestyle, and intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross negligence.

Plaintiff asserts Debtor has not adjusted his lifestyle and continues to work for an entity conducting essentially the same business as Royal Packaging. She implies that Debtor is either not acknowledging the true extent of his income or that he is artificially depressing it to avoid paying his obligations to her. Plaintiff then concludes the Chapter 7 case was filed to evade the provisions of the Judgment. If properly developed, these facts combined with Debtor's omission of assets, might provide a basis for dismissal based on lack of good faith. Debtor's conduct as presented in the evidence, however, does not come within the ambit of lack of good faith. While Debtor admits that the Chapter 7 case was filed partly in response to the unfavorable Judgment, that admission, standing alone, is insufficient to establish lack of good faith. Debtor correctly notes that many bankruptcy filings are precipitated by adverse judgments in other courts. Moreover, the evidence showed that other events factored into Debtor's decision to file bankruptcy, including the corporate filings, his reduced income, and Debtor's substantial debt

related to the corporations. Plaintiff did not prove that the case was filed with the purpose of improperly avoiding the terms of the Judgment. Similarly, allegations concerning Debtor's post-petition lifestyle are not well developed in the record and allegations that the corporate filings were contrived and unnecessary are unsubstantiated. Plaintiff's case under § 707(a) consists essentially of unsupported claims and relief is, therefore, denied.

CONCLUSION

For the reasons stated, Plaintiff is entitled to judgment against Defendant-Debtor on Count 3 of the Complaint. Defendant-Debtor is denied a discharge under 11 U.S.C. § 727 because he intentionally failed to appear at hearing on objection to discharge in violation of Bankruptcy Rule 4002(2) and, alternatively, because he failed to rebut the prima facie case presented by Plaintiff under 11 U.S.C. § 727(a)(4). Defendant-Debtor is entitled to judgment on Count 4. A separate judgment will be entered in accordance with this Memorandum of Opinion.

Date: 2 August 1996

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served on: John Dyer, Esq. (by mail)
Joan Kodish, Esq. (by mail)

By: Joyce L. Gordon, Secretary

Date: 8/2/96

THIS OPINION IS NOT INTENDED
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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	Case No. 94-10123
JOHN D. SZYMCZAK, Debtor.	Adversary Proceeding No. 94-1334
	Chapter 7
ARLENE SZYMCZAK, Plaintiff,	Judge Pat E. Morgenstern-Clarren
v.	**ORDER DISMISSING COUNTS 1 AND 2**
JOHN D. SZYMCZAK, Defendant.	

On August 2, 1996, the Court entered judgment in favor of Plaintiff on Count 3 of her Complaint and denied a discharge to Defendant-Debtor. Counts 1 and 2 of the Complaint, which request a determination of dischargeability of certain debts, are rendered moot by that judgment. Counts 1 and 2 are, therefore, dismissed.

IT IS SO ORDERED.

Date: 2 August 1996

Pat E. Morgenstern-Clarren
Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: John Dyer, Esq.
Joan Kodish, Esq.

By: Joyce L. Gordon, Secretary
Date: 8/2/96

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 94-10123
	)	
JOHN D. SZYMCZAK,	)	Adversary Proceeding
	)	No. 94-1334
Debtor.	)	
	)	Chapter 7
	)	
ARLENE SZYMCZAK,	)	
	)	Judge Pat E. Morgenstern-Clarren
Plaintiff,	)	
	)	
v.	)	**JUDGMENT**
	)	
JOHN D. SZYMCZAK,	)	
	)	
Defendant.	)	

For the reasons stated in the Memorandum of Opinion filed this date,

IT IS ORDERED that Plaintiff, Arlene Szymczak, is granted judgment against Defendant-Debtor, John D. Szymczak, on Count 3 of the Complaint. Defendant-Debtor is denied his discharge under 11 U.S.C. § 727(a). Judgment is granted in favor of Defendant-Debtor on Count 4 of the Complaint.

Date: 2 August 1996

Pat E Morgenstern-Clarren
Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: John Dyer, Esq.
Joan Kodish, Esq.

By: Joyce L. Gordon, Secretary
Date: 8/2/96