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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

FILED  
98 NOV 20 PM 3:47

NORTHERN DISTRICT OF OHIO  
CLEVELAND

In re:	)	Case No. 97-18680
	)	
THOMAS STRBAC,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
_____	)	
	)	
TUROCZY BONDING CO.,	)	Adversary Proceeding No. 98-1100
	)	
Plaintiff,	)	
	)	
v.	)	<u>MEMORANDUM OF OPINION</u>
	)	
THOMAS STRBAC,	)	
	)	
Defendant.	)	

Plaintiff Turoczy Bonding Co. ("Plaintiff" or the "Company") filed a Complaint to determine the non-dischargeability of a debt under 11 U.S.C. § 523 and also to deny Debtor Thomas Strbac a discharge under 11 U.S.C. § 727. After discovery, the Company filed a Motion for Summary Judgment, which Debtor opposes. (Docket 14,19).

**JURISDICTION**

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

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FACTS

These are the undisputed material facts based on admissions in the pleadings, the evidence offered in connection with the summary judgment motion, and the stipulations entered into by the parties (Docket 26):

Plaintiff is a bonding company. In November 1995, Thomas Strbac applied to the Company for a recognizance bond to obtain the release of his son who was being held on an aggravated murder charge. Mr. Strbac agreed to indemnify the Company for losses incurred in connection with the bond. The Company issued the bond, the son did not appear in court as required, and the bond was forfeited. (Answer admitting ¶¶ 1, 2, 3, 6 and 7 of the Complaint; Docket 4). As a result of the forfeiture, the Company obtained judgment against Mr. Strbac in the amount of \$100,000 plus interest on August 19, 1997. (Stipulations ("Stip.") ¶ 1; Joint Pretrial Statement Docket 7). Debtor filed this Chapter 7 case a few months later.

Debtor made several statements under oath in his Statement of Financial Affairs filed with his bankruptcy petition. Among them, he declared that his only income for 1995 and 1996 came from wages in the amount of \$12,000 and \$9,000, respectively. He did not state an employer. (Case No. 97-18680, Docket 1). He further declared that he is unemployed and has \$1,000 monthly income from "Regular income from operation of business, profession or farm." (Schedule I). (Case No. 97-18680, Docket 1). Although that category requires a detailed statement in support to be attached to the schedule, nothing is attached. Debtor's monthly expenses listed in his Current Expenditures schedule total exactly \$1,000 a month. (Schedule J). (Case No. 97-18680, Docket 1).

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In the course of discovery, the Company attempted to obtain documents about Debtor's financial history. Those efforts were for the most part unavailing. The parties then entered into certain stipulations, including these: Debtor stipulated that he did subcontracting work for Motch Corporation, Universal J&Z, Advanced Manufacturing, and others in the year before he filed this case; some customers paid him in cash and in kind. (Stip. ¶¶ 16, 17). Debtor kept no records of his subcontracting work. (Stip. ¶ 18). From 1995 to the date of filing, Debtor also did computer programming for Galaxy Machine Co. without compensation. (Stip. ¶ 14). He did this because he was "a nice guy, out of the goodness of [his] heart. (Deposition of Thomas Strbac ("Strbac Dep.") taken September 23, 1998, Tr. 13). (Docket 15). Debtor operated a company called E.T. Machine Co. for an unspecified period of time from May 1996 forward. (Stip. ¶ 4; Joint Pretrial Statement). He kept no records of money received either directly or indirectly from E.T. Machine Co. (Stip. ¶ 19; Joint Pretrial Statement). Debtor also operated an unincorporated business named E.T.T. Co. with his daughter, again for an unspecified period of time. He had signature authority over E.T.T. Co.'s checking account and wrote checks on that account to himself, his wife, and his father-in-law. (Stip. ¶¶ 6, 7, 8, 11). He kept no records of money received either directly or indirectly from E.T.T. Co. (Stip. 19). Debtor testified:

Q. Besides the 1099's you received, do you keep a record of any other services you receive in kind?

A. Didn't make much more than that.

Q. Tell me what kind of records you keep.

A. None.

Q. You keep no records?

A. Not too much at all, no. All I estimate is if I'm going to owe taxes or if I'm not going to owe taxes. If I don't owe the taxes, fine. If I do, then I keep a record.

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- Q. How do you know?
- A. If I'm making too much money. Usually that hasn't been the case.
- Q. How do you know if you're going to owe taxes or not?
- A. If I make over \$12,000, and that hasn't been the case for a number of years.
- Q. At some point you must calculate whether you earned \$12,000 or not?
- A. Sure.
- Q. Where do you do that?
- A. In my head.
- Q. You have no other numbers besides what's in your head?
- A. Exactly.

(Strbac Dep. taken September 23, 1998, Tr. 19, 20). (Docket 15). Debtor did not file income tax returns for 1995 and 1996. (Strbac Dep. taken January 20, 1997, Tr. 17). (Docket 18).

**DISCUSSION**

**I.**

**The Positions of the Parties**

The Company moves for summary judgment on multiple grounds. Of those grounds, this Memorandum of Opinion will only address the request that Debtor's discharge be denied under 11 U.S.C. § 727 (a)(3), for reasons explained below. The Company argues under § 727(a)(3) that Debtor failed to keep records sufficient to permit a creditor to follow Debtor's business transactions for a reasonable period of time before the bankruptcy filing. In response, Debtor filed an Affidavit that states in its entirety:

1. I have no ownership interest nor have I ever had any ownership interest in E.T. Machine Co., E.T.T. Company or Galaxy Machine Co.

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2. I have never transferred or concealed any assets at any time either before or after the within bankruptcy.
3. My only source of income for the year prior to the bankruptcy was miscellaneous work as an independent contractor in programming C&C Machines for various companies. I do not believe that I ever made more than \$1,000.00 in any month.
4. I did not file tax returns as my accountant indicated that I did not make sufficient monies to qualify.

(Docket 19).

II.

**Summary Judgment Standard**

Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Federal Rule of Civil Procedure 56(c), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056; *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The movant must initially demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. at 323. The burden then is on the nonmoving party to show the existence of a material fact which must be tried. *Id.* The nonmoving party must oppose a proper summary judgment motion “by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves . . . .” *Celotex Corp. v. Catrett*, 477 U.S. at 324. All reasonable inferences drawn from the evidence must be viewed in the light most favorable to the party opposing the motion. *Hanover Ins. Co. v. Am. Eng’g Co.*, 33 F.3d 727, 730 (6<sup>th</sup> Cir. 1994). Conclusory allegations of an affidavit do not, however, create specific fact disputes for summary judgment purposes. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888-889 (1990). The issue at

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this stage is whether there is evidence on which a trier of fact could reasonably find for the nonmoving party. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6<sup>th</sup> Cir. 1989).

III.

11 U.S.C. § 727(a)(3)

A Chapter 7 debtor is entitled to receive a discharge unless the debtor falls within one of the exceptions stated in 11 U.S.C. § 727. Of those exceptions, Plaintiff invokes § 727(a)(3).

That subsection states that:

- (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[.]

A debtor has an affirmative duty under this provision to keep records that will permit creditors to investigate and analyze the debtor's financial history. In general, the records must give creditors "enough information to ascertain the debtor's financial condition and track his financial dealings with substantial completeness and accuracy for a reasonable period past to present." *Bay State Milling Co. v. Martin (In re Martin)*, 141 B.R. 986, 995 (Bankr. N.D. Ill. 1992).

The creditor has the initial burden of showing that the records are inadequate to allow the creditor to determine the debtor's financial history and condition. Once that is shown, the burden shifts to the debtor to explain why the failure to keep records is justified under the circumstances. *Meridian Bank v. Alten*, 958 F.2d 1226 (3d Cir. 1992). The creditor, however, has the ultimate

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burden of proving its objection to discharge by a preponderance of the evidence. Fed. R. Bankr. Pro. 4005, *Barclay's/Am. Bus. Credit Inc. v. Adams (In re Adams)*, 31 F.3d 389 (6<sup>th</sup> Cir. 1994).

The parties agree that Debtor does not have records reflecting his financial actions pre-petition. He has no records of his wages or his expenses, no income tax returns, and no documents to show what his "in kind" exchanges were or how they were handled. Debtor does not make any statements in his Affidavit in opposition to summary judgment that any records exist and does not make any argument in his brief in opposition on this point. There is not one piece of paper offered by Debtor relating to his financial activities. If there were ever a situation where a creditor established a prima facie case of inadequate records, this is it.

Once the Company meets its burden of proving that the records are inadequate, the burden shifts to Debtor to prove that there is a justification for the failure to keep records. Whether a debtor is justified in failing to keep adequate books and records depends on the circumstances of each case. The issue of justification turns largely on what a normal, reasonable person would do under similar circumstances. *In re Wilson*, 33 B.R. 689, 692 (Bankr. M.D. Ga. 1983). The only justification offered by Debtor is the statement in his Affidavit that he did not file income tax returns because his accountant said he did not make "sufficient money to qualify." Debtor does not identify the tax years to which he is referring. Debtor also does not explain what he means by "qualifying," but the Court assumes he means that he did not make enough money to be required to file a return. How Debtor would know this if he did not keep any records of his financial affairs is not explained. Beyond that problem, Debtor has not offered any explanation to justify his failure to keep financial records other than the tax returns. A trier of fact could not reasonably find that Debtor justified his failure to keep adequate books and

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records. As Debtor did not meet his burden of showing justification, Debtor's discharge will be denied.

In light of the conclusion that Debtor is not entitled to a discharge of any of his debts, it is not necessary to address the alternative arguments relating to the claimed non-dischargeability of the particular debt owed to Plaintiff under 11 U.S.C. § 523.

IV.

For the reasons stated, the Motion of Turoczy Bonding Co. for Summary Judgment on the issue of whether debtor should be denied a discharge under 11 U.S.C. § 727 (labeled the "Second Cause" in the Complaint) is granted. The remaining Counts in the Complaint are moot as a result. A separate Order in accordance with this decision will be entered.

Date: 20 Nov 1998

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

Served by mail on: Dale Finley, Esq.  
Thomas Pavlik, Esq.  
United States Trustee

By: Joyce L. Gordon, Secretary

Date: 11/20/98



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TUROCZY BONDING CO., ) Adversary Proceeding No. 98-1100  
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Plaintiff, )  
)  
v. ) **JUDGMENT**  
)  
THOMAS STRBAC, )  
)  
Defendant. )

For the reasons stated in the Memorandum of Opinion filed this same date, the Motion of Turoczy Bonding Co. for Summary Judgment on the issue of whether debtor should be denied a discharge under 11 U.S.C. § 727 (labeled the "Second Cause" in the Complaint) is granted. The remaining Counts in the Complaint are moot.

IT IS SO ORDERED.

Date: 20 Nov 1998

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

Served by mail on: Dale Finley, Esq.  
Thomas Pavlik, Esq.  
United States Trustee

By: Gayle L. Gordon, Secretary  
Date: 11/20/98