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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED

02 JUN 21 PM 4:19

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:)	Case No. 00-16631
)	
LAWRENCE NOMOS,)	Chapter 7
)	
Debtor.)	Judge Pat E. Morgenstern-Clarren
)	
DONALD M. ROBINER, UNITED)	Adversary Proceeding No. 01-1025
STATES TRUSTEE,)	
)	
Plaintiff,)	
)	
v.)	<u>MEMORANDUM OF OPINION</u>
)	
)	
LAWRENCE NOMOS,)	
)	
Defendant.)	

The United States Trustee requests that Debtor-Defendant Lawrence Nomos be denied a discharge of debt under 11 U.S.C. § 727(a)(4)(A) on the ground that Mr. Nomos knowingly made a false oath when he failed to disclose assets in his bankruptcy filing. The parties agree that the Debtor omitted \$20,000.00 cash and at least nine firearms from his bankruptcy schedules. The issue is whether the failure to schedule this personal property should bar the Debtor from receiving a discharge.

JURISDICTION

Jurisdiction exists 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 under 28 U.S.C. § 157(b)(2)(J).

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FACTS¹

The Debtor filed his Chapter 7 case on September 6, 2000. The Bankruptcy Code and Rules require a debtor to list all personal property of whatever kind, including cash on hand and firearms, on Schedule B. The Debtor's Schedule B listed personal property totaling \$1,905.00. The Debtor stated in this Schedule that he had \$5.00 cash on hand and no firearms. This filing was inaccurate because the Debtor omitted: (1) \$20,000.00 in cash which the Debtor had in a drawer at home; and (2) numerous firearms. The Debtor did not amend his schedules to include this property.

The Debtor's meeting of creditors was set for October 11, 2000. That day, before the meeting was formally called by the Chapter 7 Trustee, the Debtor's counsel told the Trustee that the Debtor had property which he had not previously disclosed.² The Trustee then questioned the Debtor under oath. In response to the Trustee's questions, the Debtor stated that he had \$20,000.00 in cash at home and at least nine firearms worth from \$200.00 to \$500.00 each. The Debtor delivered the \$20,000.00 to the Trustee later that same day.

The Debtor is 39 years old and single with no dependents. He has a tenth grade education and is able to both read and write. He filed for bankruptcy protection as a result of credit card debt, which exceeded \$105,000.00. This debt includes approximately \$75,000.00 in cash

¹ The trial was held on April 15, 2002. The United States Trustee presented his case through the testimony of the Chapter 7 Trustee and exhibits which included the Debtor's Petition, Statement of Financial Affairs and Schedules, and transcripts from the Debtor's testimony at the meeting of creditors (*see* 11 U.S.C. § 341) and deposition. The Debtor did not appear at trial and did not present any evidence.

² The parties agree that counsel disclosed this to the Trustee as soon as he heard about it from the Debtor.

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advances which the Debtor took on his credit cards in 1998. He did not make any payments on this debt.

In 1999, the Debtor used \$45,000.00 of the cash advances to pay off a loan secured by his home and truck. He also spent \$10,000.00 on a trip to Las Vegas. He kept the remaining \$20,000.00 at home in an unlocked drawer and checked periodically to see that it was still there.

The United States Trustee questioned the Debtor about this at his deposition:

Q What were you going to do with the twenty thousand dollars (\$20,000) that you placed in your drawer?

A I guess I was going to keep it.

The Debtor signed his bankruptcy schedules on August 18, 2000, at which time he knew that he had the \$20,000.00 cash. At deposition, when the United States Trustee asked the Debtor why he did not schedule the money, the Debtor invoked his Fifth Amendment rights under the United States Constitution.

DISCUSSION

11 U.S.C. § 727(a)(4)(A)

An individual debtor is entitled to a discharge of his debts in a Chapter 7 case unless he falls within an exception to discharge. The United States Trustee relies on the exception set out in § 727(a)(4)(A), 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 –

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

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11 U.S.C. § 727(a)(4)(A). To deny a debtor a discharge under this section, a plaintiff 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 v. Smith (In re Keeney)*, 227 F.3d 679, 685 (6th Cir. 2000) (citation omitted). Whether the debtor made a false oath under this section is a question of fact and the plaintiff has the burden of proof by a preponderance of the evidence. *Id.* See also FED. R. BANKR. P. 4005.

Statements made in a debtor’s petition, schedules, and statement of affairs are statements made under oath. See *In re Hamo v. Wilson (In re Hamo)*, 233 B.R. 718, 725 (B.A.P. 6th Cir. 1999). Omitting information from a filing may constitute a false oath under this section. *Job v. Calder (In re Calder)*, 907 F.2d 953 (10th Cir. 1990). A false oath “is material if it ‘bears a relationship to the bankrupt’s business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property’.” *Keeney*, 227 F.3d at 686 (quoting *Beaubouef v. Beaubouef (In re Beaubouef)*, 966 F.2d 174, 178 (5th Cir. 1992)). The intent requirement is satisfied by proving either a knowing misrepresentation or reckless disregard as to the truth of a representation. *Keeney*, 227 F.3d at 685-86. On the other hand, mistake or inadvertence is insufficient to prove intent. *Id.* Fraudulent intent may be deduced from the facts and circumstances of the case. *Keeney*, 227 F.3d at 686.

The United States Trustee requests that the Debtor’s discharge be denied based on his intentional failure to schedule the \$20,000.00 and the firearms.³ The Debtor admits that he failed

³ The United States Trustee initially also relied on the Debtor’s alleged failure to disclose his interest in a vehicle and a house that he transferred to his brother before filing the Chapter 7 case. He later abandoned those grounds. See Complaint, Counts II and III. (Docket 1).

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to disclose these assets, but argues that he should still receive a discharge because he belatedly but in good faith reversed his initial failure to disclose.

After considering all of the facts and circumstances, the Court concludes that the Debtor's statements on Schedule B with respect to the amount of cash on hand and firearms were false, related materially to the case, and were knowingly made by the Debtor with fraudulent intent. When the Debtor failed to schedule the \$20,000.00 and the firearms, he made a false statement under oath. The Debtor knew the schedule was false because he knew he had the cash and the guns when he signed the schedules, and yet he did not include them. The omissions are material because they relate to the discovery of assets which impact the Trustee's administration of the case. Additionally, it is clear that the Debtor's failure to schedule these assets was not the result of mistake or inadvertence. The Debtor's fraudulent intent can readily be inferred from the circumstances. Twenty thousand dollars is a substantial sum of money in any case and it is particularly so in this case based on the totality of the Debtor's assets. The Debtor obviously intended to keep the cash for himself based on his deposition testimony and because he kept it at home where it would not be discovered. Also, the Debtor did not schedule any firearms at all, despite the fact that he had several and knew they were valuable, particularly in light of his overall financial situation. If the Debtor had eight guns and disclosed seven, that would be evidence of inadvertence as to the eighth weapon. Here, however, the Debtor had numerous guns and disclosed none of them, supporting a finding of fraudulent intent.

The Debtor argues that his decision to disclose the assets to the Chapter 7 Trustee at the 341 meeting negates a finding of fraudulent intent. A debtor's decision to voluntarily come forward with omitted assets can be evidence that the initial omission was mistaken or inadvertent rather than fraudulent. *See for example, Gullickson v. Brown (In re Brown)*, 108 F.3d 1290, 1295

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(10th Cir. 1997) (“The fact that a debtor comes forward with omitted material of his own accord is strong evidence that there was no fraudulent intent in the omission.”). The mere fact that the Debtor revealed the unscheduled assets on the verge of the 341 meeting, however, is not such evidence. The Debtor did not appear at trial and did not testify regarding his decision to tell the Trustee about the assets. There is no evidence to explain why the Debtor decided to reveal the previously hidden assets at that time. Consequently, there is an insufficient factual basis to conclude that his decision to do so was voluntary.⁴

Finally, the United States Trustee requests that the Court draw an adverse inference based on the Debtor’s invocation of the Fifth Amendment in response to the question about why he did not schedule the \$20,000.00. *See In re Cadillac by DeLorean & DeLorean Cadillac, Inc.*, 265 B.R. 574, 581, n. 4 (Bankr. N.D. Ohio 2001) (noting that the Fifth Amendment does not forbid adverse inferences being drawn in civil proceedings based on a party’s refusal to testify in response to probative evidence against them). The United States Trustee proved his case without such inference and as a result it is not necessary to address this issue.

⁴ Bankruptcy Rule 4002(2) requires a debtor to “attend the hearing on [the] complaint objecting to discharge and testify, if called as a witness[.]” FED. R. BANKR. P. 4004(2). The Debtor did not appear at trial, although the United States Trustee listed him as a witness. (Docket 21). Courts deal with a violation of this Rule in a number of ways. A debtor’s deliberate failure to attend the trial has been cited as an independent basis to deny discharge. *See In re Robson*, 154 B.R. 536 (Bankr. E.D. Ark. 1993); *In re Ishahak*, 130 B.R. 16 (Bankr. E.D. N.Y. 1991); *In re Howard*, 55 B.R. 580 (Bankr. E.D. N.C. 1985). Alternatively, courts have dealt with a debtor’s failure to comply by assigning the Debtor the burden of going forward. *See In re MacPherson*, 129 B.R. 259 (M.D. Fla. 1991). The latter alternative is the appropriate consequence in this proceeding. The United States Trustee proved a case for denial of the Debtor’s discharge under § 727(a)(4)(A). The Debtor might have been able to rebut this case, but he did not do so.

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CONCLUSION

For the reasons stated, the Debtor's discharge is denied under 11 U.S.C. § 727(a)(4)(A).

A separate judgment will be entered in accordance with this Memorandum of Opinion.

Date: 21 Jun 2002

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

Served by mail on: Dean Wyman, Esq.
Steven Freedman, Esq.
Saul Eisen, Trustee

By: Joyce L. Gordon, Secretary
Date: 6/21/02

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v.)	<u>JUDGMENT</u>
)	
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LAWRENCE NOMOS,)	
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Defendant.)	

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

IT IS, THEREFORE, ORDERED that judgment is entered in favor of the Plaintiff United States Trustee and the Debtor-Defendant Lawrence Nomos is denied a discharge under 11 U.S.C. § 727(a)(4)(A).

Date: 21 June 2002

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

Served by mail on: Dean Wyman, Esq.
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