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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
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U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:)	Case No. 02-21611
)	
LOUIS M. FULMER,)	Chapter 7
)	
Debtor.)	Judge Pat E. Morgenstern-Clarren
_____)	
)	
MARY ANN RABIN, TRUSTEE,)	Adversary Proceeding No. 03-1227
)	
Plaintiff,)	
)	
v.)	<u>MEMORANDUM OF OPINION</u>
)	
LOUIS M. FULMER,)	
)	
Defendant.)	

The chapter 7 trustee asks that debtor Louis Fulmer's discharge be revoked under 11 U.S.C. §§ 727(d)(1) and (2) because the debtor did not schedule certain property on his bankruptcy schedules and also failed to respond to the trustee's requests for an accounting of monies he received just before filing his bankruptcy case.¹ For the reasons stated below, judgment will be entered in favor of the trustee and the debtor's discharge is revoked.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered 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).

¹ The trustee was given leave to amend her complaint to conform to the trial evidence. See Docket 23, 25 and 27.

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FACTS**

The debtor filed his chapter 7 case on October 15, 2002. He scheduled a single checking account totaling \$200.00. (Plaintiff's Exh. 1). He did not disclose that he received a distribution from his profit sharing plan. The last date to oppose the debtor's discharge was set for January 20, 2003.

The trustee examined the debtor on November 19, 2002 at the meeting of creditors. At that time, the debtor testified that he had provided his attorney with the information to include in his bankruptcy petition. He reviewed and signed the petition as accurate before it was filed. The debtor told the trustee that he had received a \$40,000.00 distribution from his company's profit sharing plan in September 2002. Of that distribution, he still held about \$12,000.00 in his checking account on the day he filed his bankruptcy petition. He admitted that his bankruptcy schedules were not accurate because he had far more in his account than the \$200.00 that he scheduled.

The trustee asked the debtor, who was represented by counsel, for a full accounting of the profit sharing distribution within 10 days. When the debtor did not respond, the trustee again asked for the information in January 2003. The trustee did not request an extension of time to object to the debtor's discharge and the debtor received his discharge on January 28, 2003. In February 2003, the trustee received records of the debtor's checking account. She could not decipher those records and requested additional information. Finally, in May 2003, after being

² The trial was held on May 10, 2004. The debtor did not appear as required by the bankruptcy rules. *See* FED. R. BANKR. P. 4002(2) (requiring the debtor to "attend the hearing on a complaint objecting to discharge and testify, if called as a witness."). The trustee listed the debtor as her only witness. (Docket 10). The findings of fact are based on testimony proffered by the chapter 7 trustee which the debtor failed to rebut.

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required to appear for examination by the trustee, the debtor gave the trustee information showing that he received a \$42,216.42 distribution on September 23, 2002 and that he had \$12,857.70 on deposit in his bank account on the date his bankruptcy case was filed. (Plaintiff's Exhs. 2, 3).

On July 3, 2003, the trustee filed the complaint to revoke the debtor's discharge.

DISCUSSION

11 U.S.C. § 727(d)

The trustee asks to revoke the debtor's discharge under bankruptcy code §§ 727(d)(1) and (2), which provide:

- (d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if --
 - (1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge; [or]
 - (2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee[.]

11 U.S.C. §§ 727(d)(1) and (2). The trustee has the burden of proving her case by a preponderance of the evidence. *See Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 683 (6th Cir. 2000); FED. R. BANKR. P. 4005.

A.

Section 727(d)(1) provides for revocation of a discharge which the debtor obtained

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through fraud. For a discharge to be revoked under this section, the trustee must prove that: (1) the discharge was obtained by fraud in fact; (2) the trustee was unaware of the fraud before the discharge was entered; and (3) the fraud, if known, would have resulted in denial of discharge under § 727(a). See *Staten Island Savings Bank v. Scarpinito (In re Scarpinito)*, 196 B.R. 257, 267 (Bankr. E.D. N.Y. 1996).

If a debtor omits assets from his bankruptcy schedules, that omission can be grounds to revoke his discharge if the debtor omitted the assets with a knowing intent to defraud. See *Pelletier v. Donald (In re Donald)*, 240 B.R. 141, 146 (B.A.P. 1st Cir. 1999). See also 11 U.S.C. §§ 727(a)(2)(A) and (4)(A) (providing that a debtor's fraudulent concealment of assets or false oath results in a denial of discharge). The trustee is, however, required to prove that she did not know about the fraud until after the debtor received his discharge. See 11 U.S.C. § 727(d)(1). As one court stated, "the burden is on the objecting party to diligently investigate any possible fraudulent conduct before discharge [and] [i]f the party decides to wait until discharge, that party risks dismissal of its § 727(d)(1) action." *Bowman v. Belt Valley Bank (In re Bowman)*, 173 B.R. 922, 925 (B.A.P. 9th Cir. 1994). "[T]he party seeking revocation . . . must not have known sufficient facts regarding the [d]ebtor's actions and/or omissions 'such that [it was] put on notice of a possible fraud'." *Buckeye Retirement Co. v. Heil (In re Heil)*, 289 B.R. 897, 903 (Bankr. E.D. Tenn. 2003) (quoting *Mid-Tech Consulting, Inc. v. Swendra*, 938 F.2d 885, 888 (8th Cir. 1991)).

In this case, the trustee bases her revocation request on the debtor's failure to schedule the correct amount (\$12,857.70) which he had in his bank account on the date his bankruptcy case was filed. The trustee argues that the omission of this asset was fraudulent and the evidence

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supports that finding. The failure to schedule an asset of that amount can hardly be viewed as an oversight. This is particularly so because the debtor received the profit sharing distribution a mere month before he filed his petition. A person in financial straits dire enough to warrant a bankruptcy filing is not going to forget that he recently received more than \$40,000.00 and still has over \$12,000.00 in the bank. The finding of fraudulent intent is also supported by the debtor's substantial delay in giving the trustee the information she requested concerning the bank account. *See Woolman v. Wallace (In re Wallace)*, 289 B.R. 428, 434 (Bankr. N.D. Okla. 2003) (noting that a finding of fraudulent intent may be inferred). The debtor did not provide any evidence on this point; as a result, his decision to disclose the truth at the meeting of creditors does not negate this finding. *See Rosenbaum v. Kilson (In re Kilson)*, 83 B.R. 198, 203 (Bankr. D. Conn. 1988) (noting that later disclosure does not expunge a false oath but may provide some evidence of innocent intent).

The next issue is whether the trustee proved that she did not know about the fraud until after the discharge was entered on January 28, 2003. The trustee argues that she was prevented from opposing the debtor's discharge before it was granted because the debtor failed to give her adequate information about his financial affairs until after January 28, 2003. The evidence which the trustee offered on this point, however, shows that she had notice of the debtor's fraud as of the debtor's November 19, 2002 meeting of creditors when the debtor acknowledged omitting this asset from his filing. This information put the trustee on notice that the debtor had made a false oath in connection with his case and that a challenge to his discharge might be appropriate. *See* 11 U.S.C. § 727(a)(4)(A) (providing for the denial of discharge based on a debtor's knowingly and fraudulently making an oath in connection with the bankruptcy case). The

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debtor's failure to provide the follow-up information which the trustee requested gave further notice of this possible fraud. Consequently, the trustee had notice of the fraud before the debtor received his discharge. This timing precludes the trustee from seeking revocation under this theory.

The trustee argues alternatively that revocation is available under § 727(d)(1) because the debtor failed to provide an accounting of the \$42,216.42 which he received from his profit sharing plan. This failure could have been the basis to deny the debtor's discharge. *See* 11 U.S.C. § 727(a)(4)(D) (providing for denial of a debtor's discharge based on a fraudulent failure to provide recorded information relating to a debtor's financial affairs). Once again, however, the trustee had to prove that she did not have notice of this issue before the debtor received his discharge. The trustee requested the bank information at the meeting of creditors and knew before the discharge was entered that the debtor had not responded appropriately to the request. The trustee did not, therefore, prove this element of her case.

B.

The trustee also challenges the debtor's discharge under § 727(d)(2). That section provides that a discharge may be revoked when a debtor acquires estate property and knowingly and fraudulently fails to report that acquisition or fails to deliver the property to the trustee. 11 U.S.C. § 727(d)(2). This provision is not limited to a debtor's postpetition acquisition of property and "[a] debtor who hides known pre-bankruptcy assets from the [c]hapter 7 [t]rustee and creditors may find [his] discharge revoked . . . for fraud occasioned by such concealment." *Rezin v. Barr (In re Barr)*, 207 B.R. 168, 174 (Bank. D. Ill. 1997). Also, § 727(d)(2) (in contrast

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to § 727(d)(1)) does not require that “the moving party lack pre-discharge knowledge of the debtor’s conduct.” *Id.*

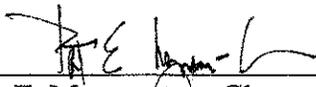
The trustee argues that the debtor acquired the \$42,216.42 profit sharing distribution, concealed that fact from the trustee, and failed to account for the funds he received.³ The trustee did not, however, introduce sufficient evidence to prove that the \$42,216.42 distribution was property of the estate at the time of the filing. As a result, there is no basis to conclude that those funds are an asset of the debtor’s bankruptcy estate. In contrast, the evidence *does* support a finding that the \$12,857.70 which the debtor held on deposit at the time of his bankruptcy filing is an asset of his estate. *See* 11 U.S.C. § 541(a)(1) (defining the estate to include “all legal and equitable interests of the debtor in property as of the commencement of the case.”). The issue, then, is whether the debtor fraudulently failed to report and account for this property. As found above, the evidence established that the debtor fraudulently failed to include this asset on his schedules and failed to provide the trustee with adequate information regarding this asset until May 2003. Therefore, the trustee has proven her case under § 727(d)(2) and the debtor’s discharge is revoked on that basis.

³ The trustee did not argue that the debtor has failed to deliver the funds to her and did not provide evidence on that issue. The amended complaint alleges that she intends “to seek turnover of assets still in the possession of the debtor.” (Docket 25).

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CONCLUSION

For the reasons stated, the debtor's discharge is revoked under 11 U.S.C. § 727(d)(2). A separate judgment will be entered in accordance with this memorandum of opinion.

Date: 1 Jun 2004



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center on:

Mary Ann Rabin, Esq.
Charles Van Ness, Esq.

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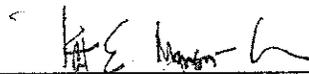
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MARY ANN RABIN, TRUSTEE,)	Adversary Proceeding No. 03-1227
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Plaintiff,)	
)	
v.)	<u>JUDGMENT</u>
)	
LOUIS M. FULMER,)	
)	
Defendant.)	

For the reasons stated in the memorandum of opinion issued this same date, judgment is entered in favor of the plaintiff-trustee, and the debtor's discharge is revoked under 11 U.S.C. § 727(d)(2).

IT IS SO ORDERED.

Date: 1 June 2004



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center on:

Mary Ann Rabin, Esq.
Charles Van Ness, Esq.