

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

FILED
04 OCT -5 10 31 30
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:) Case No. 03-23757
)
GAIL M. YOUNG,) Chapter 7
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
_____)
)
RICHARD A. BAUMGART, TRUSTEE,) Adversary Proceeding No. 04-1136
)
Plaintiff,)
)
v.) **MEMORANDUM OF OPINION**
)
GAIL M. YOUNG,)
)
Defendant.)

The chapter 7 trustee asks in his complaint that the court deny the debtor Gail Young a discharge on the ground that she allegedly concealed a transfer of non-exempt assets to her 401(k) plan within two months of her bankruptcy filing with the intent to hinder, delay or defraud creditors in violation of bankruptcy code § 727(a)(2)(A). The debtor acknowledges that she transferred funds to repay a loan from her 401(k) account within a few months of filing her bankruptcy case, but denies that she acted with the requisite intent.

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).

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

FACTS¹

Prepetition, Gail Young owned a house jointly with her boyfriend. He moved out in the fall of 2002 and paid his portion of the mortgage note through December of that year. When he refused to contribute further, Ms. Young put the house up for sale. She had difficulty paying the mortgage and other expenses while waiting to find a buyer and made up the shortfall by borrowing \$4,117.05 from her 401(k) retirement account, as well as borrowing from friends and family. She testified that she intended to repay the 401(k) loan from the sale proceeds.

The house sold in June 2003 for \$170,000.00. Ms. Young received \$12,000.00 from the sale. She used part of this money to have her car repaired, to pay some medical bills, and to make a deposit on an apartment. The rest of it remained in her checking account.

On August 4, 2003, she consulted with her bankruptcy attorney. (Stipulation of Fact ¶ 8). By check dated August 13, 2004—which cleared her bank on September 2, 2004—she repaid the loan from her 401(k). (Debtor’s testimony). Ms. Young filed her chapter 7 case on October 16, 2003. She disclosed the real estate sale in her bankruptcy schedules and stated that she had used the proceeds for living expenses. She did not disclose that part of the money had been used to repay her 401(k) loan.

At trial, the debtor testified that she spoke with her employer about paying the loan back through monthly payments. She felt that the amount the employer would withhold (about \$30 to

¹ The court held a trial on October 1, 2004. The debtor was the only witness. These findings of fact reflect the Court’s weighing of the evidence, including determining the debtor’s credibility. 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. *See* FED. R. BANKR. P. 7052 (incorporating FED. R. CIV. P. 52(a)).

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

\$40 each month) would not leave her with enough money to pay her expenses. She decided instead to pay the loan in a lump sum. She did not offer any explanation for why she stated under oath in her schedules that she used all of her house proceeds for living expenses (instead of disclosing the repayment) or why she did not disclose the transfer in her statement of financial affairs.²

DISCUSSION

Bankruptcy code § 727(a) provides that an individual chapter 7 debtor is entitled to a discharge of debts with certain exceptions, one of which is if:

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed –

(A) property of the debtor, within one year before the date of the filing of the petition[.]

11 U.S.C. § 727(a)(2)(A). The party requesting denial of discharge must prove his case by a preponderance of the evidence. *See Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 683 (6th Cir. 2000). *See also* FED. R. BANKR. P. 4005.

The parties agree that a transfer of the debtor’s property took place within one year of the bankruptcy filing. *See* 11 U.S.C. § 101(54)(defining transfer to mean “every mode, direct or

² The statement of financial affairs is signed by the debtor under oath. Question 3(a) reads: “List all payments on loans . . . aggregating more than \$600 to any creditor, made within **90 days** immediately preceding the commencement of this case” (Emphasis in original). The debtor answered “none.” Question 10 directs the debtor to: “[l]ist all other property, other than property transferred in the ordinary course of the business or financial affairs of the debtor, transferred either absolutely or as security within **one year** immediately preceding the commencement of this case” (Emphasis in original). In response, the debtor failed to disclose the transfer to her 401(k). Joint Exh. 1.

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property . . . [.]”). *See also Barber v. Dunbar (In re Dunbar)*, 313 B.R. 430, 436 (Bankr. C.D. Ill. 2004) (holding that the conversion of nonexempt property to exempt property is a transfer within the meaning of § 727(a)(2)(A)). The issue is whether the debtor transferred the funds with the subjective intent to hinder, delay or defraud her creditors. *See Keeney*, 227 F.3d at 683 (noting that §727(a)(2)(A) requires proof of a subjective intent to hinder, delay, or defraud). The requisite intent may be inferred from the circumstances surrounding the debtor’s conduct. *Id.* at 684.

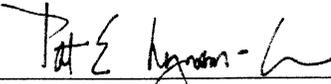
The totality of circumstances in this case shows that the debtor did in fact act with the requisite intent. In reaching this conclusion, the court considers these facts to be particularly significant: although the debtor testified that she always intended to repay the 401(k) loan from the sale proceeds, she did not do so in the weeks after the house sale closed even though she paid other bills and obligations. Instead, she put the money in her checking account and kept it there until she met with her bankruptcy attorney. Nine days later, she repaid the loan, thus converting a non-exempt asset into an exempt asset. At the time of the transfer, the debtor was insolvent. Further, the debtor failed to disclose this transfer in her bankruptcy petition, with the transfer only coming to light when the chapter 7 trustee examined her at the § 341 meeting of creditors. She did not offer any explanation for why she failed to disclose the transfer. From these facts, and having observed the debtor’s testimony, the court concludes that the debtor transferred funds to repay her 401(k) account within one year of filing her bankruptcy case with the intent to hinder, delay or defraud her creditors. As a result, the debtor is not entitled to a discharge of her debts.

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

CONCLUSION

For the reasons stated, the trustee met his burden of proving that the debtor is not entitled to a discharge and judgment will be entered in favor of the trustee on his complaint. A separate judgment will be entered reflecting this decision.

Date: 6 October 2004



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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

Thomas Pavlik, Esq.
Robert Barr, Esq.

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
03-23757
NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:) Case No. 03-23757
)
GAIL M. YOUNG,) Chapter 7
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
_____)
)
RICHARD A. BAUMGART, TRUSTEE,) Adversary Proceeding No. 04-1136
)
Plaintiff,)
)
v.) **JUDGMENT**
)
GAIL M. YOUNG,)
)
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 and the defendant-debtor's discharge is denied under 11 U.S.C. § 727(a)(2)(A).

Date: 6 October 2004

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

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

Thomas Pavlik, Esq.
Robert Barr, Esq.