

THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:	)	Case No. 05-11927
)	
ANNA M. RIBIC OLDAKOWSKI,	)	Chapter 7
)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
_____)	
)	
STEVEN S. DAVIS, TRUSTEE,	)	Adversary Proceeding No. 05-1245
)	
Plaintiff,)	
)	
v.	)	<u>MEMORANDUM OF OPINION</u>
)	
ANNA M. RIBIC OLDAKOWSKI, et al.,)	
)	
Defendants.)	

The debtor Anna Ribic Oldakowski filed her chapter 7 case without disclosing that she had sold real property about 8 months before the filing, received approximately \$42,000.00 net proceeds, and transferred the money to a friend to hold for her. She also failed to disclose this information at the meeting of creditors. *See* 11 U.S.C. § 341. As a result, the chapter 7 trustee filed this complaint seeking to deny the debtor a discharge under 11 U.S.C. §§ 727(a)(4)(A) and 727(a)(2)(A).¹

¹ The complaint names three other defendants and raises claims against them in counts I and II. The trustee dismissed those parties before trial. Docket 18, 19.

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).

FACTS

The Trial

The trial was held on December 29, 2005. The trustee presented his case through the testimony of the debtor as if on cross-examination and James Raleigh. The debtor testified on her own behalf. The parties stipulated to certain facts and submitted joint exhibits which the court accepted into evidence.²

The following findings of fact:

reflect the Court's weighing of the evidence, including determining the credibility of the witnesses. In doing so, the Court considered the witnesses' 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.

In re The V Companies, 274 B.R. 721, 726 (Bankr. N.D. Ohio 2002) (citing Fed. R. Bankr. P. 7052 which incorporates Fed. R. Civ. P. 52). This definition is used when the court finds that a witness's explanation is satisfactory or unsatisfactory:

The word satisfactory 'may mean reasonable, or it may mean that the Court, after having heard the excuse, the explanation, has that mental attitude which finds contentment in saying that he believes the explanation-he believes what the [witness] says with reference to the [issue at hand]. He is satisfied. He no longer wonders. He is contented.'

² Docket 26.

Id. at 726-27 (quoting *United States v. Trogdon (In re Trogdon)*, 111 B.R. 655, 659 (Bankr. N.D. Ohio 1990)).

The Prepetition Sale of Real Property

Prepetition, the debtor owned real property located at 3878 East 54th St., Cleveland, Ohio. The property was titled in her name, only, and she owned it free and clear of any liens. On June 7, 2004, the debtor sold the property and received \$42,000.00 from the sale proceeds which she gave to her friend James Raleigh “to hold for her.” The debtor and Mr. Raleigh both agree that the money at all times belonged to the debtor.

The Bankruptcy Filing

The bankruptcy code and rules require the debtor to file a petition, schedules, and statement of financial affairs. These filings require the debtor to disclose, among other things, (1) all personal property owned by the debtor, including cash; and (2) all property transferred within the year before the case filing, with exceptions not relevant here.

The debtor filed her chapter 7 case on February 18, 2005. As part of her filing, she filed Schedule B Personal Property.³ The instructions tell the filer to list all of her personal property of whatever kind, and that “[i]f the property is being held for the debtor by someone else, state that person’s name and address under ‘Description and Location of Property’.” Under the category “Cash on hand” the debtor listed \$10.00. She also filed a statement of financial affairs, question 10 of which states:

³ Joint exh. 1.

List 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.⁴

The debtor answered “None.”

The debtor listed general unsecured debt in the amount of \$41,992.04.⁵

The debtor signed declarations under penalty of perjury that all of the information in her petition and statement of financial affairs was true and correct.⁶

The 11 U.S.C. § 341 Meeting of Creditors

The chapter 7 trustee examined the debtor under oath at the meeting of creditors. *See* 11 U.S.C. § 341. Before beginning the exam, the trustee announced that if the debtor did not understand a question posed, she should tell him. The trustee asked the debtor several questions about her assets, including these:⁷

Question: Have you sold, transferred or given anything away that you owned in the last four years?

Answer: No.

* * *

Question: Do you own any other real estate [other than property on East 93d in Cleveland]?

Answer: No.

⁴ Joint exh. 1 (emphasis in original).

⁵ Joint exh. 1, schedule F.

⁶ Joint exh. 1.

⁷ The trustee played the tape from the 341 examination at the trial. The examination is also quoted in joint exhibit 6 at pages 23-24.

Question: Did you own another parcel of real estate?

Answer: No, maybe a long time ago. Not lately.

Question: Did you own a property on East 54 Street?

Answer: No, that was my ex-husband.

During the trial, the trustee played the tape recording made at the 341 meeting. That recording showed that the debtor answered these questions without hesitation and did not ask for clarification or additional time in which to respond. The trustee did not during the examination rush the witness or indicate any time urgency.

THE POSITIONS OF THE PARTIES

The trustee asks that the debtor be denied a discharge for two reasons. First, he argues that the discharge should be denied on the ground that the debtor transferred her money to Mr. Raleigh with the intent to hinder, delay or defraud her creditors. *See* 11 U.S.C. § 727(a)(2)(A). Second, he contends that the debtor should be denied a discharge because she knowingly made false oaths when she failed to disclose the property transfer and the existence of the cash in her bankruptcy filing and again when she failed to disclose the truth during her 341 examination. *See* 11 U.S.C. § 727(a)(4)(A). The trustee 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).

The debtor counters that the trustee did not meet his burden of proof on the issue of intent. She states that she transferred the money to Mr. Raleigh because she was not able to handle money responsibly, not because she intended to hinder, delay or defraud creditors. She admits that the statements made in her schedules and statements are not true, admits that her testimony at the meeting of creditors was not true, and further admits that she did not tell her

attorney the truth. She argues, however, that she failed to disclose the transfer and the cash in her petition and statement of financial affairs because (1) she did not know that she had to; (2) she was not sure what to do; and (3) she made her own decision rather than consult with her lawyer, which she now regrets. She states further that she did not answer the trustee's questions truthfully at the 341 meeting because (1) she was sick and did not know what she was doing; (2) she did not understand the questions completely; (3) she tried to explain, but did not know how to; and (4) she was confused about who owned the house because the mortgage was in her ex-husband's name and he gave the house to her for child support.⁸

11 U.S.C. §§ 727(a)(2)(A) and (a)(4)(A)

Bankruptcy code § 727(a) states that the individual debtor is entitled to a discharge unless:

- (2) the debtor, with intent to hinder, delay, or defraud a creditor . . . has transferred . . . or concealed . . . –
 - (A) property of the debtor, within one year before the date of the filing of the petition[.] . . . [or]
- (4) the debtor knowingly and fraudulently, in or in connection with the case–
 - (A) made a false oath or account[.].

11 U.S. C. §§ 727(a)(2)(A) and (a)(4)(A).

As there is no question that the transfer of the debtor's real estate took place within a year of her bankruptcy filing, the issue under § 727(a)(2)(A) is whether the debtor transferred the real estate with the subjective intent to hinder, delay or defraud her creditors. *See Keeney*, 227 F.3d

⁸ The debtor testified that she was divorced in about 1979.

at 683. The requisite intent may be inferred from the circumstances surrounding the debtor's conduct. *Id.* at 684.

To obtain the denial of a debtor's discharge under § 727(a)(4)(A), the trustee 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." *Id.* at 685. Statements made in a debtor's petition, schedules, and statement of affairs are statements made under oath for purposes of § 727(a)(4)(A). See *Hamo v. Wilson (In re Hamo)*, 233 B.R. 718, 725 (B.A.P. 6th Cir. 1999). Testimony given at the 341 meeting of creditors is made under oath for purposes of the section. See *Hunter v. Sowers (In re Sowers)*, 229 B.R. 151, 158 (Bankr. N.D. Ohio 1998). A false oath is material if it concerns the discovery of assets or the existence or disposition of the debtor's property. See *Keeney*, 227 F.3d at 686. The intent requirement is satisfied with proof either of a knowing misrepresentation or reckless disregard as to the truth of the representation. *Id.* at 685-86. Fraudulent intent may be deduced from the facts and circumstances of the case. *Id.*

DISCUSSION

The trustee asks that the debtor be denied a discharge because she transferred the \$42,000.00 to Mr. Raleigh to hinder, delay or defraud her creditors. After considering all of the facts, the court concludes that the debtor did transfer the money with that intent. The property sold was the debtor's only major unencumbered asset and the money she was entitled to receive from the sale was four times greater than her income in 2004.⁹ This was, obviously, a significant amount of money to her. She could have taken the money and paid some or all of her unsecured

⁹ The debtor listed her 2004 income as \$10,214.00. Joint exh. 1.

creditors, scheduled in the petition at about \$42,000.00. Instead, she directed the agent at the sale closing to deliver the proceeds to Mr. Raleigh. Her agreement with Mr. Raleigh was that he would hold the money for her and disburse it as she directed. There was no evidence that she directed him to pay her outstanding unsecured debt from those funds. Instead, the only concrete evidence was that she had Mr. Raleigh give some of the money to her daughters. These facts show that the debtor acted with the intent to hinder, delay, or defraud her creditors.

The debtor argues that she gave the money to Mr. Raleigh because she was not able to handle the money. She did not explain in any detail what she meant by this. She did present some general evidence that she had been hospitalized at some point and took medicine. If this truly had caused her to be incompetent to control her financial affairs and if her goal had been to deal fairly with her creditors, then she most likely would have both given Mr. Raleigh the money *and* instructed him to gather and pay some or all of her bills. She did not. Again, the only evidence on the issue of disbursements is that she had Mr. Raleigh give some of the money to her daughters, which supports the conclusion that the debtor was acting to defraud her creditors. The debtor's discharge is denied for this reason.

The chapter 7 trustee also contends that the debtor's discharge should be denied because she made false oaths in her petition and at her 341 meeting. The court finds, again on review of all of the evidence, that the debtor's statements in both contexts were false, materially related to the case, and knowingly made with fraudulent intent. The debtor admits that the statements are not true, but defends on the ground that the trustee did not prove the requisite intent. She offered slightly different reasons for her actions at the filing and at the 341 examination, so the court will consider them separately.

With respect to the petition and statement of financial affairs, she states that she did not know she had to disclose the transfer and cash on the petition. However, the petition and statement of affairs clearly stated that the debtor had to disclose these items. She next claims that she did not know what to do. If the debtor did not know what to do, she should have consulted her attorney. She did not. Finally, the debtor claims that she made her own decision rather than consulting her attorney, which she now regrets. This testimony simply shows that the debtor acted knowingly and does not negate the intent proven by the other facts discussed above.

To excuse the lies told at the 341 examination, the debtor testified that she was sick and did not know what she was doing. There is no evidence of this in the record of the examination. She also claims that she did not understand the questions completely. The trustee, though, told her to let him know if she did not understand. There is nothing in the record to show that she ever availed herself of this offer or that she asked to stop to talk with her attorney because she felt uncertain. The court has also considered the nature of the questions posed to the debtor because a question might include legal terms or complicated thoughts that would be hard to understand. In this case, the questions were simply stated; for example, did you get the proceeds from the sale of the house? This is a straightforward question that is not hard to understand. The debtor's next defense is that she tried to explain, but did not know how to. The record shows that she answered each question without hesitation and did not attempt to offer any explanation. And last, the debtor says that she was confused about who owned the property because the mortgage was in her ex-husband's name and he gave the property to her for child support in the 1980's. The evidence was undisputed that the debtor, and only the debtor, sold the house and became entitled to the proceeds. Also, any mortgage in her ex-husband's name was irrelevant because by


the time of the sale, the debtor owned the house free and clear of any mortgages. There could not, therefore, have been any legitimate question in the debtor's mind as to who owned the house. For if she did not own the house, why was she able to sell it? The court finds, based on the debtor's lack of credibility as well as the insufficiency of her explanations, that all of these explanations are the debtor's attempt to avoid the consequences of her decision to conceal the sale and the money in the hope that she would emerge from the bankruptcy filing with no debt and an ample supply of cash.

The court finds on consideration of all of the evidence that the debtor knowingly and fraudulently lied on her petition and statement of affairs and continued that lie in the § 341 examination with the intent to keep the property transfer secret and retain the money for her own use. The debtor's discharge is denied on this additional ground.

CONCLUSION

For the reasons stated, the debtor is denied a discharge under both 11 U.S.C. §§ 727(a)(2)(A) and (a)(4)(A). A separate judgment will be issued reflecting this decision.

Date: 17 January 2006



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION




In re:	)	Case No. 05-11927
)	
ANNA M. RIBIC OLDAKOWSKI,	)	Chapter 7
)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
_____)	
)	
STEVEN S. DAVIS, TRUSTEE,	)	Adversary Proceeding No. 05-1245
)	
Plaintiff,)	
)	
v.	)	<u>JUDGMENT</u>
)	
ANNA M. RIBIC OLDAKOWSKI, et al.,)	
)	
Defendants.)	

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 chapter 7 trustee and the debtor-defendant Anna Ribic Oldakowski is denied a discharge under 11 U.S.C. §§ 727(a)(2)(A) and 727(a)(4)(A).

Date: 17 January 2006



 Pat E. Morgenstern-Clarren
 United States Bankruptcy Judge