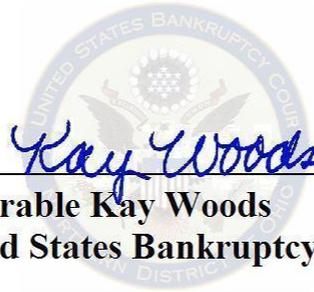


IT IS SO ORDERED.



Dated: February 06, 2007  
09:36:07 AM

Honorable Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
RALPH W. SWEGAN,	*	
	*	CASE NUMBER 03-45698
Debtor.	*	
	*	
*****	*	
	*	
BUCKEYE RETIREMENT CO.,	*	
LLC., LTD.,	*	
	*	
Plaintiff,	*	ADVERSARY NUMBER 04-4256
	*	
vs.	*	
	*	
RALPH W. SWEGAN,	*	
	*	
Defendant.	*	HONORABLE KAY WOODS
	*	
	*	

\*\*\*\*\*  
M E M O R A N D U M O P I N I O N  
\*\*\*\*\*

This cause is before the Court on cross motions for summary judgment. On August 18, 2006, Buckeye Retirement Co. LLC., LTD. ("Buckeye") filed Motion for Summary Judgment on its complaint, which seeks to deny the discharge of Debtor Ralph W. Swegan ("Debtor"). Pursuant to 11 U.S.C. § 727(a)(2)(A), Buckeye alleges

that, within one year of the petition date, Debtor concealed property with the intent to hinder, delay or defraud Buckeye. (Compl. ¶¶ 25-28.) In addition, Buckeye seeks denial of Debtor's discharge on the grounds that, pursuant to 11 U.S.C. § 707(a)(4)(A), Debtor knowingly and/or fraudulently made a false oath and/or account when he filed his schedules. (Compl. ¶¶ 29-30.)

On October 25, 2006, Debtor filed Response to Motion for Summary Judgment/Motion for Summary Judgment of Ralph W. Swegan ("Debtor's Response" or "Debtor's Motion"). Debtor alleges that he did not conceal property with intent to hinder, delay or defraud Buckeye within one year of filing the petition and that he did not knowingly and/or fraudulently make a false oath and/or account in any matter pertaining to his bankruptcy case.

On November 1, 2006, Buckeye filed Plaintiff's Combined Reply to Defendant's Response to Motion for Summary Judgment and Response to Defendant's Motion for Summary Judgment ("Buckeye's Reply Brief"). Buckeye's Reply Brief reiterates its position, as set forth in the Motion for Summary Judgment, and denies the facts, allegations and authority set forth in Debtor's Motion.

This Court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(2)(A) and (J) and 1334. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391, 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(J). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

For the reasons that follow, this Court denies Buckeye's Motion for Summary Judgment in its entirety.

## I. STANDARD OF REVIEW

The procedure for granting summary judgment is found in FED. R. CIV. P. 56(c), made applicable to this proceeding through FED. R. BANKR. P. 7056, which provides in part that:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

FED. R. BANKR. P. 7056(c). Summary judgment is proper if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it could affect the determination of the underlying action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Tennessee Department of Mental Health & Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996). An issue of material fact is genuine if a rational fact-finder could find in favor of either party on the issue. *Anderson*, 477 U.S. at 248-49; *SPC Plastics Corp. v. Griffith (In re Structurlite Plastics Corp.)*, 224 B.R. 27 (B.A.P. 6th Cir. 1998). Thus, summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. 242, 248 (1986).

In a motion for summary judgment, the movant bears the initial burden to establish an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 322; *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195, 198 (B.A.P. 6th Cir. 1998). The burden then

shifts to the nonmoving party to demonstrate the existence of a genuine dispute. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992). The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). However, in responding to a proper motion for summary judgment, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 257). That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *Street*, 886 F.2d at 1479.

## II. FACTS

As required by the Court's Initial Case Management Order, the parties have filed Joint Stipulations of Fact (Doc. #52) ("Joint Stip."), which consists of 26 numbered paragraphs. Because each of the parties has moved for summary judgment on the basis that there is no dispute as to any material fact, this Court deems the Joint Stip. to encompass all facts that either party considers to be material.

Buckeye is a creditor of Debtor's estate; Buckeye is the assignee of a judgment in the amount of \$436,107.84 awarded to Second National Bank of Warren on March 26, 2002 in Case No. 2002-CV-703, Trumbull County Court of Common Pleas. (Joint Stip. ¶ 1.)

Debtor filed a voluntary petition (Case No. 03-45698) pursuant to chapter 13 of the Bankruptcy Code on November 4, 2003

(the "Petition Date"). (Doc. # 1; Joint Stip. ¶ 8.) Debtor's bankruptcy case was converted to a chapter 7 case on February 12, 2004. (Doc. # 24.) Debtor's case, which was filed electronically by and through Debtor's counsel Keith Walker, was the first case for which Mr. Walker filed the petition, schedules and Statement of Financial Affairs electronically using ECF. (Joint Stip. ¶ 8.) Debtor's schedules and Statement of Financial Affairs were not filed with the petition on the Petition Date. (Joint Stip. ¶ 8.) On November 21, 2003, Debtor filed Motion for Extension of Time to File Statements, Schedules and Chapter 13 Plan ("First Motion to Extend Time") in which he sought an extension of time, until December 19, 2003, to file the referenced documents.<sup>1</sup> (Doc. # 5.) That same day, Debtor amended the First Motion to Extend Time without making any substantive changes to the relief requested. (Doc. # 6.) On November 23, 2003, the Court<sup>2</sup> granted the First Motion to Extend Time and granted Debtor "an extension of time to file his Statements, Schedules and Chapter 13 Plan herein on or before December 19, 2003." (November 23, 2003 Order, Doc. # 7.) On December 19, 2003, Debtor filed a second Motion for Extension of Time to File Schedules, Statements and Chapter 13 Plan, which motion was granted by the Court<sup>3</sup> on December 23, 2003. (Doc. ## 13 and 16, respectively.) The December 23, 2003 Order granted Debtor an extension of time until January 19, 2004 to file statements,

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<sup>1</sup> Debtor did not move to "amend" his schedules, statements, and/or chapter 13 plan. Instead, Debtor sought and obtained an extension of time to timely file such documents.

<sup>2</sup> The Honorable William T. Bodoh, former presiding judge for the Northern District of Ohio at Youngstown, granted both motions for extension of time.

<sup>3</sup> See *supra* n. 2.

schedules and chapter 13 plan. (Doc. # 16.) Debtor filed and served the missing schedules on January 20, 2004.<sup>4</sup> (Doc. # 20.)

Debtor's "petition and schedules were amended on January 20, 2004 and December 30, 2004 to reflect certain amendments and reflect changes in assets and creditors not listed with previous specificity." (Joint Stip. ¶ 24.) Paragraphs 17 through 23 each include identical language that certain income, debts, or assets "were not listed in debtor's original schedules, dated November 4, 2003, but were listed in amended schedules filed by debtor on January 20, 2004." (Joint Stip. ¶¶ 17, 18, 19, 20, 21, 22 and 23.) The Court notes that paragraphs 17 through 24 of the Joint Stip. are inconsistent with paragraph 8 of the Joint Stip., which provides that the "schedules and statement of affairs were not filed with the petition." (Joint Stip. ¶ 8.) Because of this discrepancy and because the parties cannot agree or stipulate to "facts" that appear otherwise on the Court docket, the Court takes judicial notice of the official Court docket and finds that it controls with respect to whether and what documents were filed and/or amended.

Debtor's petition was filed November 4, 2003. The docket entry for the petition states as follows: "Chapter 13 Voluntary Petition. Receipt Number cc, Fee Amount Filed by Ralph Wendell Swegan. Chapter 13 Plan due by 11/19/2003. Inventory of Property due 11/19/2003. Schedules A-J due 11/19/2003. Statement of

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<sup>4</sup> Debtor's schedules are deemed timely pursuant to §§ 1307(c)(9) and 707(a)(3) of the Bankruptcy Code. The Court granted Debtor two extensions to file his statement, schedules and chapter 13 plan. To the extent that these documents may have been filed late, §§ 1307(c)(9) and 707(a)(3) authorize only the United States Trustee to move to dismiss a case for failing to file this information timely. The United States Trustee did not move to dismiss this case.

Financial Affairs due 11/19/2003. Summary of schedules due 11/19/2003. Legal Description and Permanent Parcel Number due 11/19/2003. (Walker, Keith aty) (Entered: 11/04/2003)." (Doc. # 1.) The notation that all of these documents are "due" to be filed by 11/19/2003 is consistent with paragraph 8 of the Joint Stip. that the "schedules and statement of financial affairs were not filed with the petition." (Joint Stip. ¶ 8.) Along with the petition, Debtor filed Summary of Schedules, to which were attached 14 pages of schedules. The Summary of Schedules listed total assets of "0.00" and total liabilities of "0.00." Schedules A - E were incomplete and provided only the Debtor's name and "none" or "0.00" as information. Schedule F listed the names of some creditors but set forth "0.00" as the amount of each claim. Schedule G was blank. Schedules I and J contained numbers and figures. The Statement of Financial Affairs was signed by Debtor on October 31, 2003 and has the "none" box checked for all questions except number 9 regarding payments to any attorney. Verification of Creditor Matrix is also dated October 31, 2003 and electronically signed by Debtor. (See Doc. # 1.)

Consistent with the entry at Doc. # 1, the docket reflects that "missing" schedules were served by Debtor on January 20, 2004. (Doc. #20.) The Summary of Schedules is marked "Amended" with 18 pages attached thereto. The Declaration is dated January 20, 2004 and electronically signed by Debtor. None of the individual schedules are marked as "Amended" although Schedules F, I and J were previously completed in some fashion. The Statement of Financial Affairs is not marked "Amended." On December 30, 2004,

Debtor filed Amended Schedules A, B, and C, which are each marked as "Amended." (Doc. # 89.)

As set forth in the Joint Stip. and Buckeye's Motion for Summary Judgment, Buckeye relies on 11 U.S.C. § 727(a)(2)(A) and (B) in seeking denial of Debtor's discharge. Buckeye alleges that Debtor concealed certain assets<sup>5</sup> with intent to hinder, delay or defraud a creditor by: (i) failing or refusing to answer certain questions at a pre-petition debtor's examination on May 20, 2003 (Joint Stip. ¶¶ 5 and 6), and (ii) failing to disclose or adequately disclose assets owned by Debtor when he filed his petition on November 4, 2003. (Joint Stip. ¶¶ 17, 18, 19, 20, 22, 23 and 24.) Buckeye also seeks denial of Debtor's discharge pursuant to 11 U.S.C. § 727(a)(4). Buckeye alleges that Debtor knowingly and fraudulently made a false oath and/or account when he signed the Declaration on November 4, 2003 (Joint Stip. ¶ 8) by: (i) not listing all of his assets and creditors as of the Petition Date (Joint Stip. ¶¶ 9, 10, 17, 18, 19, 20, 21, 22, 23, and 24), and (ii) filing a chapter 13 petition even though Debtor's debts exceeded the limit to be eligible for protection under chapter 13.

### III. LEGAL ANALYSIS

The discharge provision of § 727 has been described as "the heart of the fresh start provisions of the bankruptcy law." H.R. Rep. No. 595, 95th Cong., 1st. Sess. 384 (1977). Discharge "embodies the principle that the bankruptcy laws afford to the

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<sup>5</sup> Buckeye alleges that, at the May 20, 2003 debtor's examination, Debtor concealed property consisting of (i) the proceeds of Debtor's late wife's life insurance policy, about which Buckeye claims Debtor refused to answer questions, and (ii) Debtor's life insurance policy, which Buckeye claims Debtor testified did not exist.

honest debtor a fresh start in life free from the onus of oppressive debt." *Chimento v. Rafoth*, (*In re Chimento*) 43 B.R. 401, 403 (Bankr. N.D. Ohio 1984). Because discharge is the objective of a bankruptcy case, denial of discharge is a drastic measure. "Completely denying a debtor his discharge, as opposed to avoiding a transfer or declining to discharge an individual debt pursuant to § 523, is an extreme step and should not be taken lightly." *Rosen v. Bezner*, 996 F.2d 1527, 1531 (3rd Cir. 1993). The Third Circuit Court of Appeals went on to state in *Rosen* that, "[A] total bar to discharge is an extreme penalty. From the statutory language, it is clear that Congress intended this penalty to apply only where there is proof that the debtor intentionally did something improper during the year before bankruptcy." *Id.* at 1534.

"The provisions denying a discharge to a debtor are generally construed liberally in favor of the debtor and strictly against the creditor." 6 COLLIERS ON BANKRUPTCY ¶ 727-12.1[4] (Alan N. Resnick & Henry J. Sommer eds., 15 ed. rev. 2006). Hence, § 727 is to be construed liberally in favor of the debtor and strictly against the objector. *In re Chimento* at 403, citing *Kasakoff v. Schnoll* (*In re Schnoll*), 31 B.R. 909 (Bankr. E.D. Wis. 1983); *Patterson Dental Co. v. Mendoza* (*In re Mendoza*), 16 B.R. 990 (Bankr. S.D. Cal. 1982); *Baltic Linen Co., Inc. v. Rubin* (*In re Rubin*), 12 B.R. 436 (Bankr. S.D. N.Y. 1981); *O'Brien v. Terkel* (*In re Terkel*), 7 B.R. 801 (Bankr. S.D. Fla. 1980)). However, "[w]hile the law favors discharges in bankruptcy, it will not ordinarily tolerate the [debtor's] intentional departure from honest business practices where there is reasonable likelihood of prejudice." *Kentile Floors, Inc. v. Winham*, 440 F.2d 1128, 1131 (9th Cir. 1971).

FED. R. BANKR. P. 4005 imposes the burden of proof on the party objecting to discharge. Because § 727 must be construed liberally in favor of the debtor, "this burden is not easily met." *In re Chimento* at 403. The standard of proof in a case seeking discharge under § 727 is the preponderance of the evidence standard. See *Grogan v. Garner*, 498 U.S. 279, 289 (1991) (dictum). "Since the *Grogan* decision, courts in at least eight districts have reversed their prior holding and have held that a preponderance of the evidence is sufficient [for a denial of discharge]." *Ransier v. McFarland (In re McFarland)*, 170 B.R. 613, 628 (Bankr. S.D. Ohio 1994)(citations omitted).

**A. Section 727(a)(2)(A)**

Relying on § 727(a)(2)(A), Buckeye argues that Debtor, with intent to defraud, concealed assets from Buckeye within one year prior to filing his petition. Buckeye alleges that the undisputed facts meet the test in *Kaler v. Craig (In re Craig)*, 195 B.R. 443, 448 (D.N.D. 1996) regarding a § 727(a)(2)(A) nondischargeability claim. (Buckeye's Motion for Summary Judgment p. 11.) The *Craig* test requires that: (i) Debtor conceal assets within one year of the petition date, (ii) the act of concealment be performed by Debtor, (iii) the act consists of a transfer, removal, destruction or concealment of Debtor's property and (iv) the act be done with the intent to hinder, delay and/or defraud either a creditor or officer of Debtor's estate. (*Id.*)

Buckeye claims that Debtor concealed information with the intent to hinder, delay and/or defraud Buckeye from collecting its judgment. Debtor allegedly concealed information by (i) withholding documentation about his assets at the state court debtor's

examination, (ii) failing to provide Buckeye with requested documents after the Mahoning County Court's show cause order, (iii) refusing to divulge information at the debtor's examination relating to his employment, income and/or his receipt of the proceeds of an insurance policy on his deceased wife, and (iv) falsely testifying at the debtor's examination that he did not maintain a life insurance policy on his life and he did not receive the proceeds of his deceased wife's life insurance policy. Buckeye maintains that these acts meet the four elements in the *Craig* test; however, the Court finds otherwise.

The Court finds that Buckeye meets the first element of the *Craig* test because the debtor's examination was held on May 20, 2003, which was within one year prior to the Petition Date. Buckeye has not established the second element of the test because, although Debtor was being examined, he was directed not to answer certain questions by his legal counsel.<sup>6</sup> (Joint Stip. ¶ 7; Buckeye's Motion for Summary Judgment at 3-6 and Ex. I thereto.) As discussed below, the Court finds that Buckeye has failed to demonstrate either the third or fourth elements of the *Craig* test.

The third and fourth elements of the *Craig* test require that there be an act that consists of transfer, removal, destruction or concealment of Debtor's property and that the act be done with the intent to hinder, delay and/or defraud a creditor of Debtor's estate. In an attempt to meet the third element of the test, Buckeye equates Debtor's failure or refusal to answer certain questions at the debtor's examination with "concealment." Section

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<sup>6</sup> The second element will be more fully discussed at pages 13-14, *infra*.

727(a)(2) deals with affirmative acts of "transfer[], remov[al], destr[uction], mutilat[ion]" as well as concealment. The inclusion of concealment in this context implies more than mere lack of full disclosure, but encompasses a debtor's retention of some interest after divestiture of legal ownership. Indeed, the *Craig* case itself demonstrates this point. In *Craig*, the debtor was a doctor who titled assets in his wife's name and put money in his wife's bank account to avoid creditors. The debtor failed to disclose that he had any interest in the property that he had transferred, although he claimed only a one-half interest in other property on the basis that such property constituted marital assets. The *Craig* court held:

Asset concealment is typically found to exist where the interest of the debtor in property is not apparent but where actual or beneficial enjoyment of that property continued. Illustrative is the case of *In re Towe*, 147 B.R. 545 (Bankr. D. Mont. 1992) where, in an effort to retain antique automobiles, the debtor placed the titles in the name of a closely held non-profit corporation for the purpose of preventing the IRS from effecting a levy and at the same time retaining effective ownership.

*Id.* at 449.

Likewise, in *In re McFarland*, the Bankruptcy Court held:

Concealment of property for purposes of 11 U.S.C. § 727(a)(2)(A) generally involves the transfer of legal title of the property to a third party with the debtor retaining the benefits of ownership in the property. See *Ohio Citizens Trust Company v. Smith (In re Smith)*, 11 B.R. 20, 22 (Bankr. N.D. Ohio 1981) and *Thibodeaux v. Olivier (In re Olivier)*, 819 F.2d 550, 553 (5 th Cir. 1987). The key to a finding of concealment is the retention of ownership with an accompanying divestiture of legal title.

*In re McFarland* at 629 (emphasis added).

Buckeye cites only to 6 COLLIERS ON BANKRUPTCY ¶ 727.02[6][b] in support of its position as to the definition of concealment, which Buckeye defines as a lack of full disclosure. (Buckeye's Motion for Summary Judgment at 12.) "Concealment is not confined to physical secretion. It covers other conduct, such as placing assets beyond the reach of creditors or withholding knowledge of the assets by failure or refusal to divulge owed information." 6 COLLIERS ON BANKRUPTCY ¶ 727.02[6][b]. The footnoted cases cited by *Colliers* for this proposition, however, all deal with a debtor's concealment of his beneficial or retained interest in property transferred to a third party. *Colliers* does not support the meaning - *i.e.*, lack of full disclosure - that Buckeye attributes to "concealment." As a consequence, Buckeye has failed to establish the act of concealment, which is required under the third element of the *Craig* test.

In support of the fourth element of the *Craig* test, Buckeye alleges that Debtor intentionally concealed assets by refusing to answer questions at the debtor's examination. Buckeye acknowledges, however, that Debtor relied on advice of legal counsel and such counsel's instructions not to answer certain questions at the debtor's examination. (Joint Stip. ¶ 7; Buckeye' Motion for Summary Judgment at 3-6, Exhibit I thereto.) When Debtor refused to provide an answer to a question, he did so upon the instruction of his lawyer. (*Id.*)

"Generally, a debtor who acts in reliance on the advice of his attorney lacks the intent required to deny him a discharge of his debts." *First Beverly Bank v. Adeeb (In re Adeeb)*, 787 F.2d 1339, 1343 (9th Cir. 1986). Debtor's reliance on advice of counsel must

be reasonable and in good faith. *Id.*; *U.S. v. Lindo*, 18 F.3d 353, 356 (6th Cir. 1994); *Spring Works, Inc. v. Sarff (In re Sarff)*, 242 B.R. 620, 629 (B.A.P. 6th Cir. 2000); *In re Colvin*, 288 B.R. 477, 483 (Bankr. E.D. Mich. 2003). (“[R]eliance on the advice of counsel can save a debtor from the consequences of failing to disclose assets only when that reliance is reasonable and in good faith.”). Here, Buckeye does not allege that Debtor did not reasonably and in good faith rely on the advice of his legal counsel; nor can any inference be drawn to that effect. Debtor refused to answer certain questions when he was so instructed by counsel. The fact that counsel’s objections may have been later overruled by the Court of Common Pleas does not negate Debtor’s reasonable and good faith reliance on advice of counsel.<sup>7</sup> Debtor’s failure or refusal to answer any question at the May 20, 2003 debtor’s examination was based on advice of counsel; hence, Buckeye has failed to establish intent, which is the fourth element of the *Craig* test.

Buckeye also alleges that Debtor’s failure to acknowledge that he had any life insurance policies on his own life and his statement that he had not received any proceeds of a life insurance policy on his late wife demonstrate concealment. (Buckeye’s Motion for Summary Judgment at 4 and 6; Joint Stip. ¶¶ 5 and 6.) Debtor counters that he was confused about the life insurance policy, which is a “last survivor” type policy that insured the lives of Debtor and his now deceased wife, Deborah R. Swegan. (Joint Stip. ¶ 11;

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<sup>7</sup> To the extent Buckeye may attempt to argue that Debtor’s counsel, rather than Debtor, is responsible for the concealment of assets because of counsel’s instructions not to answer questions, then Buckeye will have failed to establish the second element of the *Craig* test, which requires that Debtor be responsible for the act of concealment.

Debtor's Response at 6.) Debtor also maintains that, at the time of the debtor's examination, he had not received the proceeds of his late wife's life insurance policy. (Debtor's Response at 6.) Indeed, although Debtor may have been entitled to the proceeds of the life insurance policy on his wife, as Buckeye argues, there is no evidence to contradict Debtor's answer at the debtor's examination that he had not received such proceeds. (Joint Stip. ¶¶ 5, 11, 13 and 16; Debtor's Response at 6; Buckeye's Motion for Summary Judgment at 4-6.) Based upon the subsequent disclosure of the life insurance policies when Debtor filed his schedules on January 20, 2004, there is no reasonable inference that Debtor intended to hinder, delay or defraud his creditors when he answered the questions about his and his wife's life insurance policies and policy proceeds.<sup>8</sup> (Schedules B, C.)

Buckeye's reliance on Debtor's answers to a few questions at the debtor's examination (where Debtor was not following advice of counsel) is not sufficient to find concealment that warrants a denial of discharge of Debtor's debts. Seeming to recognize this weakness, Buckeye attempts to bolster its argument by alleging a "pattern" of concealment.<sup>9</sup> (Buckeye's Motion for Summary Judgment at 12-13.) Buckeye argues the following in an attempt to demonstrate

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<sup>8</sup> Even if, *arguendo*, Debtor at one point concealed these assets, ". . . concealment may be undone simply by disclosing the existence of the property. . . ." *In re Adeeb*, 787 F.2d at 1345.

<sup>9</sup> As part of the "pattern" Buckeye argues that Debtor failed to answer questions (i) concerning the life insurance policies, which have already been considered by this Court, and (ii) simple questions regarding his income and employment. (Buckeye's Motion for Summary Judgment at 13.) Buckeye conveniently ignores the fact that Debtor refused to answer questions about income and employment on the instruction of counsel. (Buckeye's Motion for Summary Judgment at 3-4.) As set forth above (see *supra* pp. 13-14.), reasonable reliance on advice of counsel negates a debtor's intent to hinder, delay or defraud his creditors.

a "pattern:" (i) Debtor transferred his interest in a 1986 Mercedes to his daughter on September 2, 2002 (Joint Stip. ¶ 2; Buckeye's Motion for Summary Judgment at 12); (ii) Debtor's failure to produce any documents at the debtor's examination in "disregard [of] Orders of the Court in an effort to delay or hinder the efforts of Buckeye to execute and collect upon its judgment" (Buckeye's Motion for Summary Judgment at 12.); and (iii) Debtor's failure to turn over documents or attend a rescheduled debtor's examination. (*Id.* at 13.)

The referenced conduct on the part of Debtor, however, is not sufficient to establish any "pattern" to hinder, delay or defraud Buckeye or any other of Debtor's creditors. First, Debtor did not fail to disclose the transfer of the Mercedes to his daughter. Prior to the Petition Date, Buckeye brought suit in state court alleging that such transfer constituted a fraudulent conveyance. Buckeye was well aware of the transfer and exercised its rights with respect to such transfer. Second, Debtor's failure to produce any documents at the debtor's examination was not in "disregard" of a court order. (Joint Stip. ¶ 4.) Indeed, Exhibit H to Buckeye's Motion for Summary Judgment, which is a copy of the order for the debtor's examination, explicitly demonstrates that the order only required Debtor to appear and provide testimony concerning his property. The order is silent about the production of any documents. (Buckeye's Motion for Summary Judgment, Exhibit H; Joint Stip. ¶ 4.) Since there was no requirement to bring documents to the debtor's examination, Debtor's failure to produce any documents at that time was not in "disregard" of a court order and can have no adverse inference. Last, even though Debtor did not turn over

documents or appear at a rescheduled debtor's examination, by filing his bankruptcy petition, the continued debtor's examination was stayed, and thus Debtor was not required to attend. Because the documents that were to be produced at or prior to the debtor's examination were subsequently produced by Debtor in connection with his bankruptcy case (Buckeye's Motion for Summary Judgment at 12-13), Buckeye received all documents about which it now complains.<sup>10</sup> Buckeye's reliance on what is ultimately the timing of production of these documents to prove intent is misplaced. Buckeye argues that "[t]hese actions alone represent sufficient circumstantial evidence to establish Debtor's long-standing pattern of avoidance of collection efforts against him and further serve to establish that the acts complained of were done with an intent to hinder, delay or defraud Buckeye." (Buckeye's Motion for Summary Judgment at 13.) As Buckeye acknowledges, these actions are, at best, "circumstantial evidence." Contrary to Buckeye's characterization, as set forth above, these events do not establish a "pattern" of any sort, let alone a pattern of conduct that would warrant the extreme sanction of denial of discharge.

As a consequence, Buckeye has not established the elements of 11 U.S.C. § 727(a)(2)(A) and, accordingly, is not entitled to summary judgment on this basis. Because the facts do not support this basis for denial of discharge, summary judgment in favor of Debtor on this claim is warranted.

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<sup>10</sup> See *supra* n. 8.

**B. Section 727(a)(2)(B)**

Buckeye also relies on 11 U.S.C. § 727(a)(2)(B) to support its contention that Debtor should be denied a discharge. Buckeye relies on Debtor's failure to include certain assets, liabilities and employment/income information in his schedules and Statement of Financial Affairs when the petition was filed on November 4, 2003. (Joint Stip. ¶¶ 17, 18, 19, 20, 21, 22, 23 and 24.) Buckeye concedes, however, that these assets, liabilities and other information were disclosed in Debtor's later schedules and statements.<sup>11</sup> (Joint Stip. ¶¶ 17-24.) There is no question that Debtor timely filed his Statement of Financial Affairs, schedules and chapter 13 plan, when they were filed on January 20, 2004. Debtor did not move to "amend" any of the statements or schedules that were filed on November 4, 2003. Instead, Debtor sought and obtained extensions of time to timely file such documents. (Doc. ## 5, 6, 7, 13 and 16.) Debtor timely filed his statement and schedules pursuant to §§ 1307(c)(9) and 707(a)(3) of the Bankruptcy Code because they were filed in accordance with the Court's Orders that granted Debtor two extensions of time to file these documents.<sup>12</sup>

As a consequence, based on the Bankruptcy Code and this Court's prior Orders (Doc. ## 7 and 16), Buckeye has not and cannot

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<sup>11</sup> See *supra* n. 8.

<sup>12</sup> Buckeye argues that Debtor's conduct in moving for extensions of time to file schedules when he did not need such time constitutes making a knowing and false oath and/or account. (Complaint ¶ 30; *supra* n. 4.) This argument is meritless because the Court orders indicate the extensions were granted "for cause." (Doc. ## 7 and 16.) Debtor properly sought and obtained Court approval to extend time to file these documents. Neither Buckeye nor any other party ever objected to Debtor's motions to extend time.

establish that the omission of these items on the Petition Date constitutes concealment within the parameters of § 727(a)(2)(B). Section 521 of the Bankruptcy Code provides that debtor shall file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of debtor's financial affairs. FED. R. BANKR. P. 1007(c) provides that the schedules and statements are to be filed within 15 days of the order for relief unless the court extends such time. In the instant case, the Court, upon written motion and for good cause, extended Debtor's time to file the statement and schedules. Since Debtor timely filed his statement and schedules, which included the material information referenced by Buckeye, as a matter of law, Debtor cannot have concealed property of the estate after the date of the filing of the petition. Accordingly, Buckeye is not entitled to summary judgment on the basis of 11 U.S.C. § 727(a)(2)(B) and summary judgment in favor of Debtor on this claim is appropriate.

**C. 11 U.S.C. § 727(a)(4)**

As the last basis for denial of discharge, Buckeye argues that, pursuant to 11 U.S.C. § 727(a)(4), Debtor knowingly and fraudulently made a false oath and/or account when he (i) signed the Declaration on November 4, 2003, and (ii) attempted to qualify under chapter 13 of the Bankruptcy Code. The Court will deal with these allegation separately.

The Sixth Circuit has addressed the elements that must be proven to deny a debtor a discharge under § 727(a)(4)(A), as follows:

In order to deny a debtor discharge under this section, a plaintiff must prove by a preponderance of the evidence 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. See *Beaubouef v. Beaubouef (In re Beaubouef)*, 966 F.3d 174, 178 (5th cir. 1992).

*Keeney v. Smith (In re Keeney)* 227 F.3d 679 at 685 (6th Cir. 2000).

The Court first considers Buckeye's argument that discharge should be denied based upon the Declaration Debtor signed on November 4, 2003. With respect to the elements enumerated in *Keeney*, the Court finds that the first element is met because Debtor's Declaration was a statement made under oath. As to the second element, the Declaration was false in that it states "the information provided in the electronically filed petition, statements and schedules. . . is true, correct, and complete." Even if Debtor and his attorney believed the petition constituted a "pre-file," the indication of "none" and/or "0.00" to most of the questions is contrary to the statement that the information is "complete." (Declaration, Doc. # 2.) The third element requires that Debtor knew the statement was false; Debtor knew or should have known that, at minimum, the statements and schedules did not contain complete information. The fourth element requires that the statement must be made with fraudulent intent, which is more difficult to determine. "Actual fraudulent intent - not the lesser intent of Section 727(a)(2) to delay or hinder a creditor or the trustee - is required." *Bauman v. Post (In re Post)*, 347 B.R. 104, 112 (Bankr. M.D. Fla. 2006).

"[I]ntent may be inferred from all of the circumstances surrounding the matter. *In re Parsell*, 172 Bankr. 226, 231 (Bankr. N.D. Ohio 1994). But there must be facts which point toward fraud." *Garcia v. Coombs (In re Coombs)*, 193 B.R. 557, 566 (Bankr. S.D. Cal. 1996). The *Coombs* Court also stated that actual intent to defraud was an "essential element under § 727(a)(4)(A)" and that there must be "specific facts or circumstances which point toward fraud." *Id.* at 564. Similar to the instant case, the debtor in *Coombs* filed a "barebones" petition under chapter 7. Because of omissions that became apparent during questioning at the first meeting of creditors, the trustee directed debtor to amend his schedules, which was done. Debtor subsequently amended the schedules and statements a second time. In analyzing whether there was any evidence of fraud, the *Coombs* Court stated:

None of the badges of fraud have been demonstrated. There is no showing that debtor has retained any secret interest in undisclosed transfers, or that debtor received inadequate consideration for them (except as to the gifts to Harper). There is no showing that the transfers were made in anticipation of any impending (sic) or pending lawsuit, although a suit was pending. There was no showing that any transfer significantly depleted the debtor's assets, or that substantially all the debtor's property was transferred. Nor was there evidence as to the secrecy of any conveyance, or that the pattern or cumulative effect of debtor's transactions, and failure to disclose them suggest any intent to defraud. Careless or sloppy preparation of schedules, although an impediment to proper and efficient administration of the Chapter 7 estate, do not support denial of a discharge under § 727(a)(4)(A) absent a supportable inference of fraudulent intent.

*Id.* at 567.

Buckeye argues that it "strains credulity to believe that this Debtor, when giving his attorney the information to prepare his Petition and Schedules, simply 'forgot' he was employed; 'forgot' that he owned any real estate, life insurance, cars, IRA's, 401(k)'s, clothing or jewelry; 'forgot' that he owed at least \$873,000 to his unsecured creditors; and 'forgot' that he had liens on his house and car." (Buckeye's Motion for Summary Judgment at 16.) Debtor counters that the petition was intended to be filed as a "pre-file" and that the Statement of Financial Affairs and the schedules were not filed with the petition. (Debtor's Response at 4; Joint Stip. ¶ 8.) The parties acknowledge that this was the first time Debtor's counsel filed a petition using ECF. (Joint Stip. ¶ 8). Debtor's explanation is bolstered by Debtor's two motions for extension of time to file (not "amend") the statement, schedules and chapter 13 plan, as well as the docket entry for Doc. # 1, which indicates that the statements and schedules were "due" to be filed. There is no evidence - only Buckeye's argument and characterization - that Debtor "forgot" to tell his attorney about any of the items set forth in paragraphs 17-23 of the Joint Stip., which were later and timely disclosed. See *supra* pp. 5-8.

Debtor's disclosure of the missing assets, liabilities and income information prior to the first meeting of creditors and without being prodded by the trustee is indicative of lack of fraudulent intent. "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 Cadle Company v. Stewart (In re Stewart)*, 263 B.R. 608, 617 (10th Cir. B.A.P. 2001). "[E]vidence of fraudulent intent is lacking where the debtor comes

forward with omitted information on his own accord." *May v. Jamison* (*In re Jamison*), 329 B.R. 743, 752 (Bankr. D. Kan. 2005). *Cf. Wolinsky v. Wisell* (*In re Wisell*), 2006 Bankr. LEXIS 1378 \*10 (Bankr. D. Vt. 2006) ("The failure to amend this false statement supports the Plaintiff's position that the Debtor exhibited a reckless disregard for the truth in the preparation of his Schedule I and throughout his bankruptcy case.") and *Fokkena v. Huff* (*In re Huff*), 349 B.R. 587, 594 (Bankr. S.D. Iowa 2006) (Court found that presence of knowledgeable creditors at § 341 meeting the likely reason debtor provided omitted information under trustee's questioning when information was not otherwise voluntarily provided.).

As a consequence, Buckeye has failed to establish the fourth - and most important - element required by *Keeney*, which is that the statement was made with fraudulent intent. Because the fourth element is lacking, it may not be necessary for the Court to consider whether the fifth element is met, *i.e.*, that the statement is related materially to the bankruptcy case. However, the Court finds that this element is met since the omitted material constituted the essence of Debtor's assets and liabilities. Consequently, Buckeye has failed to establish all of the elements of the *Keeney* test. Because Buckeye has failed to establish that Debtor made a knowing and fraudulent false oath and/or account in connection with signing the Declaration, Buckeye's motion for summary judgment is denied on this basis and summary judgment is awarded to Debtor on this ground.

The Court now turns to the second basis under § 727(a)(4) that Buckeye asserts requires denial of discharge, *i.e.*, Debtor initially

filed for protection under chapter 13 of the Bankruptcy Code when his debts made him ineligible for such filing pursuant to § 109(e).<sup>13</sup> Buckeye alleges that, on the Petition Date, Debtor listed his unsecured claims in the amount of \$0.00, when Debtor's unsecured claims actually totaled more than \$873,000.00. (Buckeye's Motion for Summary Judgment at 16.) When Debtor filed his schedules on January 20, 2004, some creditors were scheduled with "unknown" amounts. In its Reply Brief, Buckeye acknowledges that not all creditors' claims were listed as \$0.00. In fact, Debtor "listed only \$87,881.45 in unsecured debt in an attempt to appear qualified for Chapter 13 relief despite the fact that Buckeye held an unsecured claim in excess of \$550,000.00, while the Ohio Department of Development held an unsecured claim in excess of \$90,000.00 and Grow America, Inc. held an unsecured claim in excess of \$232,000.00," which debts placed Debtor over the threshold in § 109(e). (Buckeye's Reply Brief at 8 (unnumbered).) As a consequence, Buckeye concludes that Debtor made a false oath and/or account by filing for chapter 13 protection when his unsecured debt was more than the statutory limit. Buckeye's conclusion, however, is not supported by the *Keeney* test.

Buckeye meets the first element of the *Keeney* test, which requires an oath, because the January 2004 schedules included Declaration Concerning Debtor's Schedules, which was [electronically] signed under penalty of perjury. The second element of the *Keeney* test requires that the statement be false. To the extent "\$0.00" meant that no amount was owed, that

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<sup>13</sup> On the Petition Date, § 109(e) required an individual to have less than \$290,525.00 in noncontingent, liquidated, unsecured debts.

information was false. To the extent "\$0.00" meant that the exact amount of liability was unknown, that information may or may not be false. As a consequence, the second element is inconclusive.

Element three of the *Keeney* test requires that Debtor knew the statement was false. The only evidence Buckeye offers regarding Debtor's knowledge is that: Debtor's unsecured debts totaled more than the debt limit in § 109(e); thus, Debtor knew that he could not qualify as a chapter 13 debtor. Debtor, however agrees that he did not know his debts exceeded the chapter 13 threshold for unsecured debt. The Affidavit of Ralph Wendell Swegan ("Debtor's Affidavit") states, "I was unsure of several debts and believed that I qualified for a Chapter 13 bankruptcy. . . ." (Debtor's Affidavit, ¶ 12.)

Debtor's affidavit is supported by the record created when Buckeye moved to convert Debtor's case. Buckeye filed Motion to Convert on November 18, 2003 (Doc. # 3), which was heard by Honorable William T. Bodoh on December 18, 2003 ("Conversion Hearing"). Debtor argued at the Conversion Hearing that he did not know the exact amount of certain debts because they were based upon his guarantee of liabilities owed by Steelcraft, Inc., which was in the process of liquidating assets to partially satisfy its debts. Buckeye countered that the deficiency judgments (after liquidation of Steelcraft's assets) exceeded the § 109(e) debt limits. The Court concluded that the initial issue appeared to require discovery and set the matter for further hearing, if necessary.

The Court held a further hearing on January 22, 2004<sup>14</sup>, after which the Court entered Order Converting Case to One Under Chapter

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<sup>14</sup> This was after Judge Bodoh's retirement. Judge William Clark presided at the January 22, 2004 hearing.

7 dated February 12, 2004 ("Conversion Order").<sup>15</sup> The Conversion Order provided: "Based upon the motion, the objection, the evidence submitted by Movant on December 11, 2003 (sic) and the arguments of counsel, the Court hereby finds that the Debtor is not now eligible for Chapter 13 relief . . . ." (Conversion Order at pp. 1-2 (unnumbered)(emphasis added).) There was no finding in the Conversion Order that Debtor knew he was not eligible to file under chapter 13 at the time the petition was filed. Based upon the entire record, there is no evidence that Debtor knew he was ineligible to file for chapter 13 relief on the Petition Date.

Moreover, Buckeye fails to establish the fourth prong of the *Keeney* test, *i.e.*, that in filing for chapter 13 protection, Debtor did so with fraudulent intent. Buckeye has not pointed to any specific facts or circumstances that would indicate actual intent to defraud. See *In re Coombs*, 193 B.R. at 564, 566. Buckeye merely alleges that Debtor listed the debts owing to Grow America, Inc., the Ohio Department of Development and Buckeye as "unknown," when Debtor knew the amounts of such debts exceeded the statutory limits under § 109(e). Buckeye has not alleged any facts that Debtor's actions in so listing these debts was done to defraud any of Debtor's creditors. Indeed, Buckeye does not provide any reason (or even speculation) why Debtor would try to qualify under chapter 13 if he knew he could not qualify and how or why such action would be

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<sup>15</sup> The February 12, 2004 Order was prepared and submitted by counsel for Buckeye.

done for the purpose of defrauding creditors.<sup>16</sup> For these reasons, Buckeye fails to meet the fourth element of the *Keeney* test.

The fifth element of the *Keeney* test requires that the statement be materially related to the bankruptcy. Here, the amount of unsecured debt directly impacted Debtor's ability to qualify for chapter 13 relief. As a consequence, the statement meets prong five of the *Keeney* test.

Buckeye's argument that Debtor's attempt to qualify for chapter 13 constitutes a false oath fails to meet at least two of the five elements of the *Keeney* test, with a third element being inconclusive. Hence, Buckeye is not entitled to summary judgment on this ground and summary judgment will be granted in favor of Debtor.

#### CONCLUSION

As set forth above, Buckeye has failed to establish that there are no genuine issues of material fact with respect to its claims under 11 U.S.C. §§ 727(a)(2)(A) and (B) and 727(a)(4)(A). Because the undisputed facts establish that Debtor is entitled to judgment as a matter of law, Debtor is granted summary judgment on all counts.

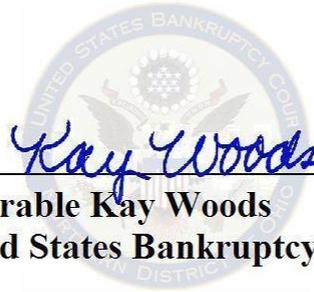
An appropriate order will follow.

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<sup>16</sup> It appears as if Buckeye made the argument only to bolster its argument that Debtor made a false oath when Debtor signed the Declaration.

IT IS SO ORDERED.



Dated: February 06, 2007  
09:36:07 AM

Honorable Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
RALPH W. SWEGAN,	*	
	*	CASE NUMBER 03-45698
Debtor.	*	
	*	
*****	*	
	*	
BUCKEYE RETIREMENT CO.,	*	
LLC., LTD.,	*	
	*	
Plaintiff,	*	ADVERSARY NUMBER 04-4256
	*	
vs.	*	
	*	
RALPH W. SWEGAN,	*	
	*	
Defendant.	*	HONORABLE KAY WOODS
	*	
	*	

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O R D E R  
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For the reasons in this Court's Memorandum Opinion entered on this date, the Court grants summary judgment to Ralph W. Swegan ("Debtor") with respect to claims filed by Buckeye Retirement Co., LLC., LTD. ("Buckeye") under 11 U.S.C. §§ 727(a)(2)(A) and (B) and

727(a)(4)(A), because the undisputed facts establish that Debtor is entitled to judgment as a matter of law. Debtor is granted summary judgment on all counts.

**IT IS SO ORDERED.**

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