

NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION



In re:	)	Case No. 07-11794
	)	
STEPHEN RASSI,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
_____	)	
	)	
SAUL EISEN, UNITED STATES	)	Adversary Proceeding No. 07-1209
TRUSTEE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	<b><u>MEMORANDUM OF OPINION</u></b>
	)	(NOT FOR COMMERCIAL PUBLICATION)
STEPHEN RASSI,	)	
	)	
Defendant.	)	

The United States trustee filed a complaint to deny chapter 7 debtor Stephen Rassi a discharge under 11 U.S.C. § 727(a)(2)(B) on the ground that he concealed assets in his bankruptcy case and under § 727(a)(4)(A) on the ground that he knowingly made a false oath. The debtor acknowledges that he did not specifically list two assets, but denies that he did so with the requisite intent. For the reasons stated below, the United States trustee did not meet his burden of proof and judgment will be entered in favor of the debtor.

**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

## FACTS

### I.

At trial, the United States trustee presented his case through the testimony of the debtor, his brother Michael Rassi, and chapter 7 trustee Steven Davis. The debtor presented his case through his own testimony and cross-examination. The parties submitted stipulated exhibits.

These findings of fact are based on that evidence and reflect the court's weighing of the evidence presented, 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). *See* FED. R. BANKR. P. 7052 (incorporating FED. R. CIV. P. 52). When the court finds that a witness's explanation was satisfactory or unsatisfactory, it is using this definition:

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.

*United States v. Trogdon (In re Trogdon)*, 111 B.R. 655, 659 (Bankr. N.D. Ohio 1990) (internal citation and quotation marks omitted).

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<sup>1</sup> In the court's view, the value of this opinion is solely to decide the dispute between the parties, rather than to add anything to the general bankruptcy jurisprudence. For that reason, the opinion is not intended for commercial publication.

## II.

### **Master Tech Automotive Company**

The debtor Stephen Rassi and his brother Michael Rassi owned and operated a business called Master Tech Automotive Company that repaired cars. Master Tech was organized as a sub-chapter S corporation, and each brother owned 50% of the stock, with Michael Rassi serving as president and Stephen Rassi as vice-president. Michael<sup>2</sup> ran the front office and Stephen did the repairs. At times, they had a few other employees.

They started the business with money borrowed from their parents, as well as some of their own money. Michael was in charge of the day-to-day financial operations and he worked with an accountant on this issue. The brothers sometimes loaned money to the company by borrowing on their credit cards. The company had limited assets from the beginning: a space lease; a computer; office supplies; money in a bank account; tools (most of which were subject to a security interest); and flush machines (which the company did not own, but had the right to use).

The brothers closed the company in December 2006. These factors contributed to their decision: tough competition, more expenses than income, and their inability to draw a salary for the preceding six months. They notified the landlord and moved out of the leased space, leaving behind anything that belonged to the landlord. They took with them the computer, flush machines, tools, and office supplies, all of which have been sitting in Michael's garage—unused—since that date. They did not sell the business or any of its assets.

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<sup>2</sup> To avoid confusion, the brothers will at times be referred to by first names in this opinion.

## **Rassi Distribution LLC**

Rassi Distribution LLC was formed in January 2006 by Michael, Stephen, and their brother Mark Rassi. Neither Stephen nor Michael put any capital into the company. Mark operates the business, which distributes food to grocery stores. Mark uses a truck titled in his mother's name. Stephen does not work for the business and does not get any income from it. There was no evidence that the company had any value.

### **Stephen Rassi' s Chapter 7 Filing**

Both Stephen and Michael determined that they would need to file for bankruptcy protection when Master Tech closed. They wanted to hire an attorney but did not have enough money to do so. Instead, they hired a petition preparer.

Stephen filed his chapter 7 petition on March 21, 2007.<sup>3</sup> He signed his petition, schedules, and statement of financial affairs under penalty of perjury. On the front page of the petition, Stephen checked the box stating that his debts were primarily consumer debts rather than business debts. On schedule B, in response to the instruction to list "Stocks and interests in incorporated and unincorporated businesses," he stated "none." Similarly, in the statement of financial affairs, he stated "none" in response to the question instructing him to list "Nature, location and name of business."

Stephen scheduled these creditors, among others:

(1) Schedule D. Creditors Holding Secured Claims

Matco Tools

(2) Schedule F. Creditors Holding Unsecured NonPriority Claims

Allied Waste Services

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<sup>3</sup> Michael also filed a chapter 7 petition, which is not at issue here.

JB Dollar Stretcher  
Kovachy Auto Parts  
Phil and Marie Plestis  
Car Parts Warehouse  
Conrad's Total Care  
Cornwell Quality Tools  
Englefield Oil Company  
Federated Auto Stores  
Waterloo Transmission  
MJ Napa Auto Part  
MBNA

(3) Schedule G. Executory Contracts and Unexpired Leases

Phil and Marie Plestis—Business Lease for \$158,731.54

(4) Schedule J. Current Expenditures of Individual Debtor(s)

12. Taxes (not deducted from wages or included in home mortgage payments)

(Specify) Business Taxes/Federal & State \$500.00 [a month]

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

The chapter 7 trustee held the meeting of creditors on April 23, 2007. The debtor was questioned first by the chapter 7 trustee and then by counsel for the United States trustee. The testimony included these questions and answers:<sup>4</sup>

Q. . . . You have not provided me with tax returns. You are required to have submitted them seven days prior to today's hearing.

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<sup>4</sup> Jt. exh. 5-6, 5-13 to 5-15, 5-17 to 5-20.

A. Oh, I have them with me.

Q. I'll take a look at them but—are these 2005 or 2006 returns?

A. Both.

\* \* \* \*

Q. Have you ever been in business for yourself?

A. Yes.

Q. When were you in business for yourself?

A. From October 2003 through December of '06.

Q. Well, I'm looking at your statement of financial affairs and it says nature, location and name of business. And it says list the names, addresses, taxpayer identification and so forth for any businesses in the last six years. The answer was none.

A. Owned?

Q. Yeah.

A. I mean everything in the business was in my personal name so—

Q. Okay. But you did business?

A. Yes.

Q. What did you do?

A. I owned an automotive repair facility.

Q. Where was that?

A. In Mentor.

Q. Was it a corporation or—

A. Yes.

Q. —was it a—

A. It was an S corporation.

Q. An S corporation. Okay. All right. And the reason that's not disclosed in the papers?

A. I probably missed that.

Q. Okay. I'm going to need to see—is there a K-1 in here?

A. In the '05 I believe there is.

Q. Is this MasterTech Automotive?

A. Correct.

Q. Was that the name of the business?

A. Yes.

Q. Well, what's Rassi Distribution, LLC?

A. That's another company that we just opened.

Q. So you're in business now?

A. Yes.

Q. And what are you—what does Rassi Distribution do?

A. Food distribution company.

Q. What assets does that business have?

A. Absolutely none.

\* \* \* \*

[Questioning by Dean Wyman, counsel for the United States trustee]

Q. . . . You list all these creditors on Schedule F. Are these primarily business debts or are they primarily consumer debts?

A. No, they're primarily business debts.

\* \* \* \*

Q. . . . Why then on Schedule B did you list none for stock and interest in incorporated and unincorporated businesses itemize? . . .

A. I didn't even see it.

Q. You didn't even see that is what you're saying?

A. I mean I must have missed that. I mean I didn't put that down because I don't do any work [at Rassi]. I mean I own a stake in the company but I mean I don't get any profits. I don't get anything out of that company.

\* \* \* \*

Q. Now, you have to tell me clearly why you didn't disclose your interest in either Rassi Distribution Company or MasterTech Automotive?

A. Well, I placed all my debt in there from those companies. I just didn't—I probably—I don't know why I didn't put those in there.

### **The Debtor Stephen Rassi's Amendments to His Schedules**

Stephen realized at the § 341 meeting that there was a problem, so he promptly retained counsel. With counsel's assistance, he filed amendments to his petition and schedules stating that the debts are primarily business debts, disclosing the 50% interest in Master Tech and the 33% interest in Rassi Distribution LLC, amending his exemptions, and making a few other changes, including clarifying which credit card debts arose from the business.

### **THE POSITIONS OF THE PARTIES**

The United States trustee argues that the debtor concealed assets (his interest in Master Tech and Rassi Distribution LLC) and made a false oath when he concealed those assets. He contends that the debtor's actions were at least reckless.



The debtor states that he had no intention of concealing assets or making a false oath, as evidenced by the fact that he made repeated reference in his petition and schedules to his business debt and that he freely responded to the chapter 7 trustee's and the United States trustee's questions at the meeting of creditors. He acknowledges that he made a mistake in how he listed his debts (thinking that they were personal debts because he owed the money personally) and assets (thinking that he had disclosed everything he needed to), but denies that he did anything fraudulently.

### DISCUSSION

An individual chapter 7 debtor is entitled to a discharge of debt, unless:

- (2) the debtor, with intent to hinder, delay, or defraud . . . an officer of the estate charged with custody of property under this title, has . . . concealed . . . —

\* \* \*

- (B) property of the estate, after 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 . . . [.]

11 U.S.C. § 727(a)(2)(B) and (a)(4)(A). The United States trustee, as the party objecting to the discharge, must prove his case by a preponderance of the evidence. *See Barclays/American Business Credit, Inc. v. Adams (In re Adams)*, 31 F.3d 389, 393–94 (6th Cir. 1994).

To deny a debtor a discharge under § 727(a)(2), the plaintiff must prove that the debtor concealed property of the estate with a subjective intent to hinder, delay or defraud the chapter 7 trustee through the act. *See Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 683 (6th Cir. 2000).

Concealment can include omitting information from bankruptcy schedules. *Hunter v. Sowers* (*In re Sowers*), 229 B.R. 151, 156–57 (Bankr. N.D. Ohio 1998). The party challenging discharge must prove that the debtor subjectively intended to defraud creditors; constructive fraud is not enough. “[I]ntent to defraud ‘involves a material representation that you know to be false, or, what amounts to the same thing, an omission that you know will create an erroneous impression’.” *In re Keeney*, 227 F.3d at 685–86 (quoting *In re Chavin*, 150 F.3d 726, 728 (7th Cir. 1998)). Actual intent may be inferred from the circumstances of the case. *Id.* at 684.

To deny a debtor’s discharge under § 727(a)(4)(A), 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.” *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 also made under oath for purposes of the section. See *In re Sowers*, 229 B.R. at 158. A false oath is material if it concerns the discovery of assets or the existence of the debtor’s property. See *In re Keeney*, 227 F.3d at 686.

Fraudulent intent may be deduced from the facts and circumstances of the case. *Id.* A debtor’s knowledge that a statement or omission is false:

may be shown by demonstrating that the debtor knew the truth, but nonetheless failed to give the information or gave contradictory information. A false statement or omission that is made by mistake or inadvertence is not sufficient grounds upon which to base the denial of a discharge, but a knowingly false statement or omission made by the Debtor with reckless indifference to the truth will suffice as grounds for the denial of a Chapter 7 general discharge.

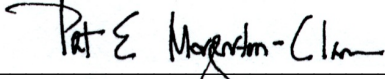
*In re Hamo*, 233 B.R. at 725 (internal quotation marks and citations omitted).

Having considered all of the evidence, and in particular having observed the testimony of the debtor and his brother, the court is convinced that the debtor did not knowingly make a false statement or conceal an asset. With respect to Master Tech, the debtor explained that he checked the box for consumer debt rather than business debt because he was personally responsible for the debt he incurred in running his small business. Consistent with this belief, he scheduled several debts relating to Master Tech, including a lease specifically noted as a “business lease” and debts incurred by the business for tools, waste removal, and auto parts. He also noted in his budget that he was paying \$500.00 a month for federal and state business taxes. Additionally, he brought tax returns to his § 341 meeting that identified the business, and he was forthright about acknowledging the business when asked about it directly. There was no evidence that Master Tech had any value as a going concern or that its few assets had any value. The court concludes that the debtor’s actions were those of someone who was confused, not someone who was acting dishonestly.

Similarly, the trustee did not prove that the debtor knowingly concealed his one-third membership interest in Rassi Distribution LLC. The debtor explained that he does not work for that entity and does not draw any income from it. There was no evidence that the company has assets, as the only item discussed in the testimony was a truck titled in a third-party’s name. There was no evidence that the debtor had ever received any funds from this entity, that it had any debts for which the debtor is liable, or that the debtor’s ownership interest had value. The debtor should have listed his interest, but his failure to do so was, again, negligent rather than fraudulent.

**CONCLUSION**

For the reasons stated, the United States trustee failed to meet his burden of proof and the debtor is entitled to receive his discharge. The court will enter a separate judgment reflecting this decision.

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

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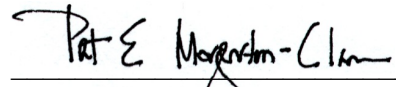
UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
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STEPHEN RASSI,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
_____	)	
	)	
SAUL EISEN, UNITED STATES	)	Adversary Proceeding No. 07-1209
TRUSTEE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	<b>JUDGMENT</b>
	)	(NOT FOR COMMERCIAL PUBLICATION)
STEPHEN RASSI,	)	
	)	
Defendant.	)	

For the reasons stated in the memorandum of opinion issued this same date, judgment is entered in favor of the defendant-debtor Stephen Rassi.

IT IS SO ORDERED.

  
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 Pat E. Morgenstern-Clarren  
 United States Bankruptcy Judge