UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 07-14181
	)	
MELVIN FINCH and	)	Chapter 7
BARBARA FINCH,	)	
Debtors.	)	Judge Pat E. Morgenstern-Clarren
	)	
RONALD E. HENDERSON,	)	Adversary Proceeding No. 08-1020
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**MEMORANDUM OF OPINION**
MELVIN FINCH and	)	
BARBARA FINCH,	)	
	)	
Defendants.	)	

The plaintiff Ronald Henderson filed this adversary proceeding against the debtors Melvin and Barbara Finch asking that the debtors be denied a discharge under 11 U.S.C. §§ 727(a)(2), (a)(4), and (a)(5). The plaintiff is an attorney who represented the debtors prepetition and who obtained a state court judgment against them for unpaid attorney fees. The plaintiff moves for summary judgment[1] and the defendants oppose the motion.[2] For the reasons stated below, the motion is granted as to the amount of the debt owed (that amount having been determined by the state court judgment) and denied as to all other issues.

[1] Docket 63, 64, 75, 76, 77, 80, 81.

[2] Docket 72.

I. 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).[3]

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c) (made applicable by FED. R. BANKR. P. 7056); *see also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574 (1986). The party seeking summary judgment has the initial burden of "informing the . . . court of the basis for its motion, and identifying those portions of the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323 (quoting FED. R. CIV. P. 56(c)). A material fact is one whose resolution will affect the determination of the underlying action. *Tenn. Dep't of Mental Health & Mental Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996). An issue is genuine if a rational trier of fact could find in favor of either party on the issue. *Schaffer v. A.O. Smith Harvestore Prods., Inc.*, 74 F.3d 722, 727 (6th Cir. 1996) (citation omitted).

If the moving party meets this burden, the burden shifts to the non-moving party to show the existence of a material fact which must be tried. *Id.* The non-moving party may oppose a

[3] In the court's view, the value of this opinion is 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, whether print or electronic.

proper summary judgment motion "by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves . . . ." *Celotex Corp.,* 477 U.S. at 324.

All reasonable inferences drawn from the evidence must be viewed in the light most favorable to the party opposing the motion. *Hanover Ins. Co. v. Am. Eng'g Co.*, 33 F.3d 727, 730 (6th Cir. 1994). The issue at this stage is whether there is evidence on which a trier of fact could reasonably find for the non-moving party. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989).

III. DISCUSSION

A chapter 7 debtor is entitled to a discharge of his or her debts, subject to certain exceptions. The plaintiff here relies on the exceptions stated in §§ 727(a)(2)(A), (a)(4)(A), and (a)(5).[4] Those sections provide that an individual debtor shall be denied a discharge if:

> (a)(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[.]
>
> (4) The debtor knowingly and fraudulently, in or in connection with the case—
>
> (A) made a false oath or account[.]
>
> (5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities[.]

[4] The amended complaint identifies the subsections except for counts six and seven.

11 U.S.C. §§ 727(a)(2)(A), (a)(4)(A), (a)(5).

The creditor must prove his case by a preponderance of the evidence. FED. R. BANKR. P. 4005; *Barclays/Am. Bus. Credit, Inc. v. Adams (In re Adams)*, 31 F.3d 389, 393-94 (6th Cir. 1994). The burden of production under the provisions relied upon by the plaintiff is a shifting one. *See Skyles v. Stinson (In re Stinson)*, 364 B.R. 269, 278 (Bankr. W.D. Ky. 2007) (noting that once the party objecting to discharge under § 727(a)(5) meets the initial burden of showing the disappearance of assets, the burden shifts to the debtor to provide a satisfactory explanation); *Ayers v. Babb (In re Babb)*, 358 B.R. 343, 350-51 (Bankr. E.D. Tenn. 2006) (discussing § 727(a)(2)(A) and noting that once the plaintiff "establishes the existence of badges of fraud [with respect to a debtor's disposition of property before the bankruptcy filing], the burden shifts to the debtor to rebut the presumption."); *United States Trustee v. Halishak (In re Halishak)*, 337 B.R. 620, 626 (Bankr. N.D. Ohio 2005) (stating that once an objecting party meets the initial burden of introducing evidence of all of the elements of § 727(a)(4)(A), the burden of production shifts to the debtor to provide a credible explanation for his actions).

The Adversary Proceeding Amended Complaint

The amended complaint[5] is based on a state court judgment obtained by the plaintiff against his former clients, the debtors, for attorney fees. The complaint has seven counts:

Count I § 727(a)(2)

The plaintiff alleges that Barbara Finch knowingly and fraudulently failed to include these assets in her bankruptcy schedules: a security deposit held by her landlord, accounts with Steel Valley Credit Union, and two annuities.

[5] Docket 39.

Count II § 727(a)(2)

The plaintiff alleges that Melvin Finch knowingly and fraudulently (1) failed to include in his bankruptcy schedules a security deposit held by his landlord and a beneficial ownership interest in M&R Enterprises, Inc.; and (2) incorrectly scheduled a KeyBank account.

Count III § 727(a)(4)

As against Barbara Finch, the plaintiff alleges that she made false oaths when she filed her schedules, statement of financial affairs, and Form 22A and later affirmed at the meeting of creditors that they were correct as filed, (1) knowing that she had omitted from her assets the security deposit, the accounts at Steel Valley Credit Union, the annuities, wages paid by the East Cleveland Board of Education from March through June 2007, and certain retirement income; and (2) knowing that she did not have an interest in a scheduled Cleveland Teachers' Credit Union account.

As against Melvin Finch, the plaintiff alleges that he made a false oath when he omitted unemployment income from his Form 22A.

Count IV 11 U.S.C. § 727(a)(4)

The plaintiff alleges that Melvin Finch made a false oath when he certified as true that he had a KeyBank checking account with $150.00 at the time of filing and later claimed the account had been closed on July 2, 2004 with a $164.20 balance.

Count V 11 U.S.C. § 727(a)(5)

The plaintiff alleges that the debtors had "surplus income" in 2003 through 2006 that they failed to account for.

Count VI [no statutory reference identified in amended complaint]

The plaintiff alleges that when Barbara Finch filed amended schedules, she knowingly failed to disclose the value of the annuities.

Count VII 11 [no statutory reference identified in amended complaint]

The plaintiff alleges that when Barbara Finch filed her second amended schedules, she knowingly failed to disclose the value of her annuities.

The Answer to the Amended Complaint

The debtors filed an answer in which they admitted that the plaintiff has a prepetition judgment against them and that the debt is $104,231.00. They denied all other material allegations.[6]

11 U.S.C. § 727(a)(2)(A)

To prove a case under § 727(a)(2)(A), the plaintiff must prove that the debtors (1) disposed of property (whether by transfer, concealment or other disposition) that would have become property of the estate, (2) within one year before the filing date, (3) with a subjective intent to defraud the creditor through that act. *Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 683 (6th Cir. 2000). The term "transfer" includes "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with—(i) property; or (ii) an interest in property." 11 U.S.C. § 101(54)(D). Concealment can include omitting information from bankruptcy schedules. *See Hunter v. Sowers (In re Sowers)*, 229 B.R. 151, 156-7 (Bankr. N.D. Ohio 1998).

In his motion for summary judgment under § 727(a)(2)(A), the plaintiff argues that Barbara Finch "transferred from her Steel Valley Credit Union Account to her daughter

[6] Docket 53.

$23,304.40 for which she received no consideration."[7] The first issue is that there is no count in the complaint that makes this allegation. Setting that concern aside, the court looks to the evidentiary support for the claim. The only source cited is a general reference to an evidentiary hearing in the main case on a different issue. That hearing was resolved without a court decision when the parties decided to enter into an agreed order, so there is no opinion making that finding of fact. Neither does the plaintiff attach a transcript from the hearing that would support the factual assertion. Without such evidence, the plaintiff has not met his burden of showing that there is no genuine issue of material fact with respect to this claim, and summary judgment cannot, therefore, be granted.

Moreover, even if there had been evidentiary support, Barbara Finch provided an explanation in her affidavit that, if believed, would counter the argument that she acted with intent to defraud. Although the plaintiff argues that her explanation is not worthy of belief, a determination of credibility cannot be made at the summary judgment stage. *Keweenaw Bay Indian Cmty. v. Rising*, 477 F.3d 881, 886 (6th Cir. 2007). Summary judgment cannot, therefore, be granted.

11 U.S.C. § 727(a)(4)(A)

To prove his case under this subsection, the plaintiff must show 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." *In re Kenney*, 227 F.3d at 685. The party challenging the 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,

[7] Motion at 15, docket 63.

what amounts to the same thing, an omission that you know will create an erroneous impression.'" *Id.* 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 686 (concluding that the lower court did not err in denying the debtor's discharge under § 727(a)(4)(A) after inferring based on the circumstances of the case that the debtor had omitted property from his schedules with the intent to defraud). The debtor's statements in the petition, schedules, and statement of affairs are all made under oath. *See* FED. R. BANKR. P. 1008, 9009; Official Forms B1, B6, and B7. 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.

Hamo v. Wilson (In re Hamo), 233 B.R. 718, 725 (B.A.P. 6th Cir. 1999) (internal quotations and citations omitted). A statement is material to the case if it relates to the debtor's business transactions, discovery of assets, or the existence or disposition of property. *Id.*

The plaintiff asserts claims against both Barbara and Melvin Finch under this section stemming from their alleged failure to list assets in the schedules.[8] As against both of the debtors, the plaintiff contends that they fraudulently concealed their interest in a $1,620.00 security deposit given to their landlord. The debtors responded with affidavits stating that they paid the security deposit 11 years before they filed their bankruptcy petition, and they forgot about it. They also did not realize that they "owned" the deposit at the time of the filing. This is

[8] *See* argument in motion for summary judgment at 18-23, docket 63.

enough to create a genuine issue of material fact as to whether the debtors acted with the requisite fraudulent intent. Summary judgment cannot, therefore, be entered on this claim.

As against Melvin Finch only, the plaintiff argues that the debtor fraudulently concealed his interest in these additional assets:

(1) two wide screen TVs;

(2) golf clubs;

(3) a beneficial interest in M&R Enterprise, Inc.; and

(4) wages from M&R Enterprises that he earned in 2007.

Melvin Finch responded through an affidavit as follows:

(1) he bought the TVs second hand and they do not have an individual value of more than $200.00;

(2) the golf clubs are not valued at more than $200.00; and

(3) he has no interest, direct or indirect, in M&R Enterprises, Inc. This statement is buttressed by an affidavit of Ralph Jones stating that he has been the sole owner of M&R "since its inception . . . and Melvin Finch does not have an ownership interest, direct or indirect, in M&R Enterprises, Inc."[9]

The plaintiff did not make a prima facie case that Melvin Finch failed to disclose wages from M&R. Assuming as to the other allegations that the plaintiff met his burden of going forward on this claim, the debtor through his affidavit met his burden of showing that there are genuine issues of material fact as to whether he owns an interest in M&R Enterprises and as to his intent with respect to the other assets. Summary judgment cannot, therefore, be granted on this claim.

[9] Exh. A to defendants' brief in opposition, docket 72.

The plaintiff also contends that Melvin Finch failed to disclose in his petition and related documents that he earned $5,985.57 in wages from M&R Enterprises in 2007. The plaintiff cites to the debtors' 2007 joint income tax return and W-2s that show that Melvin Finch was paid $5,985.57 by M&R Enterprises that was not disclosed on his Statement of Financial Affairs.[10] The debtor filed his petition on June 6, 2007 and there is no evidence as to the dates in 2007 on which he earned this income. If he earned it after the case was filed, it would not have been stated on the Statement of Financial Affairs. If he earned it before the case was filed, the plaintiff would then have to show that Melvin Finch intentionally omitted it from the Statement of Financial Affairs. The plaintiff has not shown the absence of a genuine issue of material fact here, and summary judgment cannot, therefore, be granted.

As against Barbara Finch only, the plaintiff alleges that she:

(1) failed to disclose two annuities;

(2) disclosed that she had $200.00 in the Cleveland Teachers' Credit Union when she really had at least $8,369.00 on deposit on the petition date; and

(3) failed to disclose that she earned $7,130.09 in wages while employed by the East Cleveland Board of Education from March through June 2007.

The plaintiff did not present any evidence to meet his burden of going forward on the issues of whether Barbara Finch had funds in any amount with the Cleveland Teachers' Credit Union or that she had undisclosed wages. Assuming that the plaintiff met his burden of going forward on the annuity issue, Barbara Finch acknowledged that she had not listed the annuities and filed amended schedules to do so.[11] She stated in her affidavit in response to the motion for

[10] Statement of Financial Affairs ¶ 2, docket 1.

[11] Defendants' answer at ¶ 9, docket 53.

summary judgment: "I did not list my retirement annuity contracts in the bankruptcy proceeding as my attorney indicated to me that they were not property of the estate; in fact, that they were spinoffs from my STRS."[12] This statement, made under oath, if believed, is a credible explanation for Barbara Finch's actions, particularly because the parties ended up entering into an agreed order allowing her exemption. Although the affidavit is not dispositive of her intent, it is sufficient evidence at this point in the proceedings to establish a genuine issue of material fact. Summary judgment cannot be entered based on this claim.

With respect to the credit union account, the plaintiff argues that Barbara Finch failed to disclose her Steel Valley Credit Union Accounts. Barbara Finch averred that: "I originally told my attorney that I belonged to the East Cleveland Teachers Credit Union because, for approximately twenty (20) years, that was the name by which I knew the credit union. In the last few years, they changed their name to Steel Valley Credit Union; however, my account remained the same. The fact that the original *Schedules* cited Cleveland Teachers Credit Union was a typographical error, and should have read "East Cleveland Teachers Credit Union nka Steel Valley Credit Union."[13] This explanation, if believed, is sufficient to create a genuine issue of material fact with respect to the debtor's intent. Summary judgment cannot, therefore, be granted on this claim.

11 U.S.C. § 727(a)(5)

Bankruptcy code § 727(a)(5) provides that a debtor is entitled to a discharge unless "the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities[.]" 11 U.S. C.

[12] Exh. B to defendants' brief in opposition at ¶ 4, docket 72.

[13] *Id.* at ¶ 2 (emphasis in original).

§ 7272(a)(5). The plaintiff argues here that the debtors failed to provide a satisfactory explanation for what he terms their "surplus income" in 2003, 2004, 2005, and 2006. He outlines the debtors' income and expenses and concludes that they must have had income that is unaccounted for. The debtors respond via affidavits that they did not have any "surplus income" and that to the extent any of their income is not accounted for, they spent it on vacations, living expenses, travel, children and grandchildren, gambling, clothes and the like. The plaintiff responds in essence that this explanation is not worthy of belief. Again, however, at this stage of the proceedings the court may not make decisions about any affiants' credibility. The question is not whether the court should believe the statements, but whether the affiant's statements raise a genuine issue of material fact. As the statements are sworn statements that are material to whether the debtors had any unaccounted for income, the affidavits preclude the entry of summary judgment.

The Underlying Debt Has Been Established

On October 27, 2006, the Cuyahoga County Court of Common Pleas entered a judgment in favor of the plaintiff and against Barbara and Melvin Finch in the amount of $84,780.47 plus accrued interest to that date.[14] When Barbara and Melvin Finch filed their chapter 7 petition, they scheduled Mr. Henderson as an unsecured creditor to whom they owed $104,231.00. The state court judgment as to the existence of the debt and the amount of the debt is entitled to preclusive effect in this action. *See Nat'l City Bank v. Plechaty (In re Plechaty)*, 213 B.R. 119, 128-29 (B.A.P. 6th Cir. 1997). The debt is, therefore, established by the previous judgment.

[14] Amended complaint at ¶¶ 3 and 5; admitted in answer.

IV. CONCLUSION

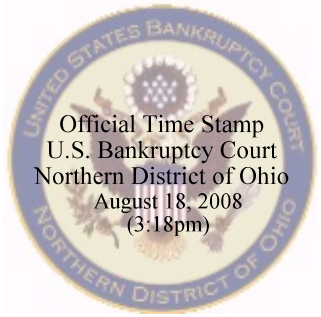
The plaintiff is entitled to summary judgment that the debtors Barbara and Melvin Finch owe him a debt as reflected in the state court judgment. As to all remaining issues, the plaintiff did not show that there are no genuine issues of material fact and that he is entitled to judgment as a matter of law. The motion on those issues is denied.

The court will enter a separate order reflecting this decision.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



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RONALD E. HENDERSON,	)	Adversary Proceeding No. 08-1020
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**ORDER**
MELVIN FINCH and	)	
BARBARA FINCH,	)	
	)	
Defendants.	)	

For the reasons stated in the memorandum of opinion filed this same date, plaintiff's motion for summary judgment is granted in part and the defendant debtors' debt to the plaintiff is determined to be established by the previous state court judgment. (Docket 63). The plaintiff's motion for summary judgment denying the defendant debtors' discharge under 11 U.S.C. § 727 is denied.

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge