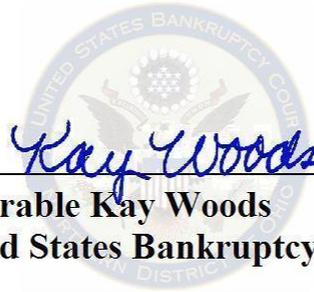


IT IS SO ORDERED.



Dated: September 23, 2009
11:36:50 AM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

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|-------------------------|---|--------------------------|
| 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 |
| | * | |

MEMORANDUM OPINION REGARDING TRIAL

The Court held a trial in the instant Adversary Proceeding on August 10, 2009, at the conclusion of which the Court took the matter under advisement. For the reasons set forth below, this

Court finds that Plaintiff Buckeye Retirement Co. LLC., Ltd. ("Buckeye") failed to establish that Debtor/Defendant Ralph Wendell Swegan ("Debtor") had the requisite intent to hinder, delay or defraud, which is an essential element of a cause of action under 11 U.S.C. § 727(a)(2)(A) to deny Debtor a discharge.

Having reviewed the entire record in this case, including, but not limited to the testimony of Debtor at trial, the representations of counsel, the exhibits admitted into evidence, and all pleadings filed in this Adversary Proceeding, this Memorandum Opinion constitutes the Court's findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure. This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

I. PROCEDURAL BACKGROUND

On November 4, 2003, Debtor filed a voluntary petition pursuant to chapter 13 of title 11 (Case No. 03-45698), which was converted to a case under chapter 7 on February 12, 2004. Buckeye commenced this Adversary Proceeding by filing the Complaint (Doc. # 1) on December 23, 2004, which contained two counts. Count I sought to deny Debtor a discharge pursuant to 11 U.S.C. § 727(a)(2)(A) on the basis that Debtor "concealed property of Debtor within one year before the date of filing the petition by refusing to answer

questions about the proceeds of his late wife's life insurance policies at the May 20, 2003 judgment debtor's examination, and by falsely testifying in that examination that he had no insurance policies on his life." (Compl. ¶ 27.) Count II sought to deny Debtor a discharge pursuant to 11 U.S.C. § 727(a)(4)(A) on the basis that "Debtor knowingly and fraudulently in or in connection with this case, made a false oath or account[.]" (Id. ¶ 30.)

The Court granted summary judgment in favor of Debtor by Memorandum Opinion and Order dated February 6, 2007 (Doc. ## 63 and 64). Buckeye appealed that decision to the Sixth Circuit Bankruptcy Appellate Panel ("BAP"), which entered an order ("BAP Order") (Doc. # 85) on March 19, 2008. The BAP reversed this Court's grant of summary judgment on the basis that there is "a genuine issue of material fact as to whether the Debtor had the requisite intent to hinder, delay, or defraud" when he made statements at the judgment debtor's examination on May 20, 2003 ("Debtor's Exam") (see Ex. E), about (i) not having an insurance policy on his life; and (ii) not receiving proceeds from his late wife's life insurance policy. (BAP Order at 15.) Because Buckeye did not appeal summary judgment in favor of Debtor on the second count regarding false oath, the BAP found that Buckeye had abandoned its second cause of action. (BAP Order at 5, n.4.)

As a consequence, remand to this Court for trial was limited to determining whether Debtor intended to hinder, delay or defraud his creditors when he answered questions about insurance at the

Debtor's Exam.

Prior to trial, each party filed a proposed witness list and exchanged exhibits. In addition, each party filed a motion in limine and Debtor filed a motion to strike a portion of the Joint Stipulations as to Authenticity and Admissibility of Exhibits (Doc. # 105). The Court dealt with the pre-trial matters by: (i) denying Buckeye's motion in limine as untimely; (ii) granting Debtor's motion in limine as to Buckeye's proposed Exhibit G and denying the motion in all other respects; and (iii) finding that the motion to strike had been resolved.

II. FACTUAL BACKGROUND

The following facts are based upon (i) testimony of Debtor, who was the only trial witness, and/or (ii) pleadings filed in this case. Debtor graduated from high school in 1957, but did not attend college. After years of working in various steel mill related jobs, he purchased his own business in 1991, which he named Steelcraft, Inc. ("Steelcraft"). Debtor was the president of Steelcraft, which was a machine shop that made new or fabricated parts from steel. Steelcraft's customers were steel mills, many of which filed for bankruptcy protection or otherwise fell on hard economic times in the late 1990's and early 2000's. As a consequence, Steelcraft ceased operations in or about February 2002, after losing approximately 70% of its customer base. Prior to closing its doors, Steelcraft was current on its secured debt and timely making payroll for its employees, but it was not paying other types of bills.

Steelcraft owned real estate from which the manufacturing operations had been run, as well as equipment and accounts receivable.¹ At the time Steelcraft ceased operations, the company owed a significant debt to Second National Bank ("Second National") for which Debtor was a guarantor or co-signor. Second National, which had a lien on substantially all of Steelcraft's real estate, equipment, accounts receivable and inventory to secure its debt, obtained a judgment jointly and severally against Steelcraft, Debtor, and Debtor's wife, Deborah S. Swegan ("Deborah"), dated March 26, 2002, in the amount of \$439,147.56 plus interest ("Judgment"). (See Ex. C.)

Second National sold Steelcraft's real estate by public auction in the spring of 2002, but the proceeds of sale were not sufficient to satisfy the Judgment. Second National continued its collection efforts by attempting to sell Debtor's 1988 Mercedes Benz ("Mercedes").²

Deborah died suddenly and unexpectedly on June 27, 2002, at the age of fifty-nine. At the time of her death, Debtor and Deborah had been married for nineteen years. Debtor testified that, although closure of Steelcraft was difficult, the death of his wife was "terrible" and afterwards termination of his business no longer mattered. Debtor testified he was distraught and that frequently

¹ At the time it ceased operations, Steelcraft had accounts receivable in the approximate amount of \$400,000.00 for goods that had been shipped, but for which payment had not been received.

² Debtor testified that the Mercedes was Deborah's car.

he would sit on his porch and cry.

The sheriff, on behalf of Second National, came to Debtor's house in late June 2002 to repossess the Mercedes. At that time, Debtor was leaving to go to the funeral home. The Mercedes, however, was not repossessed on that date because, Debtor explained, it was being repaired.

Debtor testified that, when he transferred the Mercedes to his daughter in or about September 2002, he believed he was free to do so because he had previously tendered \$3,000.00 to his attorney to remit to Second National in settlement of the bank's claim against the car. Accordingly, Debtor stated that he believed all issues with the bank had been settled prior to his transfer of the Mercedes. Apparently, however, despite Debtor's belief to the contrary, the dispute with Second National had not been settled at that time.

Second National sold the Judgment to Buckeye on October 8, 2002. Buckeye subsequently filed suit against Debtor to collect on the Judgment, which entailed the Debtor's Exam.

III. STANDARD FOR REVIEW

Through this Adversary Proceeding, Buckeye seeks to deny Debtor's discharge. 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 honest debtor a fresh start in life free from the onus

of oppressive debt." *Rafoth v. Chimento (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. 2009). Hence, § 727 is to be construed liberally in favor of the debtor and strictly against the objector. *Rafoth*, 43 B.R. 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).

IV. ELEMENTS OF § 727(a)(2)(A)

Section 727 reads, in pertinent part:

(a) The court shall grant a debtor a discharge unless --

. . . .

(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 . . . --

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

11 U.S.C. § 727 (West 2004).³ As noted in the BAP Order, "[t]his section is to be liberally construed in favor of the debtor, and the party objecting to discharge bears the burden of proof by a preponderance of the evidence. *Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 683 (6th Cir. 2000); *Barclays/American Bus. Credit, Inc. v. Adams (In re Adams)*, 31 F.3d 389, 393 (6th Cir. 1994); *Hamo v. Wilson (In re Hamo)*, 233 B.R. 718, 724 (B.A.P. 6th Cir. 1999)."

(BAP Order at 8.) Because § 727 must be construed liberally in favor of the debtor, "this burden is not easily met." *Rafoth*, 43 B.R. at 403.⁴

³ This case was filed prior to the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") on October 17, 2005, thus pre-BAPCPA law applies.

⁴ Federal Rule of Bankruptcy Procedure 4005 imposes the burden of proof on the party objecting to discharge. 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

The BAP noted that, while the test in *Kaler v. Craig* (*In re Craig*), 195 B.R. 443, 449 (D.N.D. 1996), was not binding in this Circuit regarding the elements of a nondischargeability action under § 727(a)(2)(A), the elements set forth therein "provide[d] a convenient framework" for such analysis. (BAP Order at 8.) The BAP stated:

The *Craig* test requires that: (1) the Debtor conceal assets within one year of the petition date; (2) the act of concealment be performed by the Debtor; (3) the act consist of a transfer, removal, destruction or concealment of the Debtor's property; and (4) the act be done with the intent to hinder, delay and/or defraud either a creditor or officer of the Debtor's estate.

(*Id.*) The BAP specifically found that Buckeye had established the first three elements of the *Craig* test.⁵

Buckeye bears the burden of proof by the preponderance of evidence that Debtor intended to hinder, delay, and/or defraud Buckeye when he concealed (i) receipt of the proceeds of Deborah's life insurance policy; and (ii) the existence of the life insurance policy on his own life.

Buckeye must show that the Debtor's act of concealment was done with the intent to hinder, delay, or defraud. *In re Keeney*, 227 F.3d at 683 (requiring a subjective intent on the debtor's part to hinder, delay, or defraud a creditor); see also *In re Craig*, 195 B.R. at 448 (fourth element of test requires act of concealment be done with intent to hinder, delay, or defraud creditor). To do so, Buckeye must prove that Debtor possessed an actual intent

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).

⁵ In granting summary judgment, this Court found that the first two elements of § 727 had been met. The BAP found this Court's holding regarding concealment to be too narrow and that the third element had also been established.

to deceive. *Roberts v. Montgomery (In re Montgomery)*, Adv. Pro. No. 05-3099, 2007 WL 625196, *2 (Bankr. E.D. Tenn. Feb. 27, 2007) ("Section 727(a)(2)(A) requires proof of actual fraudulent intent, as constructive fraud will not suffice.").

(BAP Order at 10.)

V. ATTORNEY-CLIENT PRIVILEGE ISSUE

Before dealing with the limited issue at trial, this Court will discuss whether Debtor waived the attorney-client privilege and what impact this issue had on the trial. This Court sustained an objection of Debtor's counsel on the basis of attorney-client privilege, finding that Debtor had not knowingly and intentionally waived the privilege.⁶ There are only two grounds upon which waiver could be based.

Although Buckeye never asserted the first ground as waiver, the Court will briefly address the fact that listing Mr. Walker as a potential trial witness did not, of itself, waive the attorney-client privilege. In *B.H. v. Gold Fields Mining Corp.*, 239 F.R.D.

⁶ The Court recognizes that Debtor, through counsel, took decidedly inconsistent positions concerning testimony of his former legal counsel, Mr. Walker. Despite acknowledging the privileged nature of testimony from Mr. Walker, Mr. Buzulencia identified Mr. Walker on Debtor's witness list as a potential witness. (Amend. Def. Witness List at 1) (Doc. # 109). However, it was not clear whether Debtor had made the decision to name Mr. Walker as a witness, or whether that decision was made entirely by Mr. Buzulencia. Only Debtor - not Mr. Buzulencia or Mr. Walker - can waive the attorney-client privilege. The attorney-client privilege belongs solely to the client, and "[o]nly the client can waive [the] privilege[.]" *Conn. Mut. Life Ins. Co. v. Shields*, 18 F.R.D. 448, 451 (S.D.N.Y. 1955); see also 81 AM. JUR. 2D *Witnesses* § 333 (2009). The record reflects that, at least at the start of trial, Debtor did not have a clear understanding of the attorney-client privilege. Before proceeding with trial, the Court questioned whether Debtor intended to waive the attorney-client privilege. In response, Mr. Buzulencia stated that Debtor (i) did not intend to waive the attorney-client privilege, and (ii) would not call Mr. Walker as part of his case in chief. Based on Mr Buzulencia representation and because Mr. Walker was withdrawn as a potential trial witness, the Court concluded that Debtor did not intend to waive the attorney-client privilege.

652 (N.D. Okla. 2005), the Oklahoma District Court found that listing attorneys or consultants with privileged information as trial witnesses did not waive the attorney-client privilege when such potential witnesses did not testify at trial. In that case, the court resolved certain pre-trial motions that made the testimony of the proposed witnesses unnecessary. Like the Oklahoma District Court, this Court resolved certain motions in limine prior to the start of trial, which eliminated one of the subjects (*i.e.*, Debtor's schedules) identified as a possible topic for Mr. Walker's testimony.⁷ After this ruling, Debtor's counsel affirmatively stated that Mr. Walker would not be called as a witness.⁸ The fact that Mr. Walker was not going to testify was made known to Buckeye prior to the start of the trial. Thus, this Court finds that listing Mr. Walker as a potential trial witness did not of itself constitute a waiver of the attorney-client privilege.

The next ground, upon which Buckeye asserts Debtor *did* waive the privilege, is certain testimony of Debtor. This testimony consisted of the following two statements by Debtor in response to questions from Buckeye's counsel about his failure to review documents prior to the Debtor's Exam. When Scott Fink, Esq., Buckeye's attorney, asked Debtor if he had reviewed certain documents prior to attending the Debtor's Exam, Debtor stated, "I

⁷ In addition, given the limited scope of the trial, the Court stated that there was no reason for testimony on any of the subjects about which Mr. Walker was identified as a witness.

⁸ If Mr. Walker *had* testified, Debtor would have waived the attorney-client privilege.

wasn't told to." (Trial Tr. 11:14:50.) Mr. Fink then asked, "Who would have told you to?" The Court sustained an objection to this question on the basis that it would likely get into the area of attorney-client privilege. (Tr. 11:15:26.) Mr. Fink continued by questioning Debtor concerning what Mr. Fink characterized as Debtor's "choice" not to review documents prior to the Debtor's Exam. In response, Debtor stated, "That's what I was advised to do." (Tr. 11:16:16.)

Following an objection by Mr. Buzulencia, the Court inquired of Debtor whether he was going to testify about something his attorney had said to him and, if so, whether he intended to waive the attorney-client privilege. Because Debtor stated that he did not fully understand the privilege (Tr. 11:18:22), the Court determined that a break would be appropriate and instructed Mr. Buzulencia to fully explain to Debtor (i) the attorney-client privilege; (ii) what can constitute a waiver of such privilege; and (iii) the potential consequences of such waiver. The Court stated that, if Debtor intended to waive the attorney-client privilege, there would be no further objections on that basis.

After a brief recess, the Court ascertained that (i) Mr. Buzulencia had instructed Debtor about the attorney-client privilege (Tr. 11:40:00 - 11:40:29); and (ii) Debtor did not intend to waive such privilege (Tr. 11:40:35). Based on those representations, the Court sustained the objection when Mr. Fink inquired about this issue again, holding that Debtor's earlier statement was inadvertent

and not a knowing waiver of the attorney-client privilege. (Tr. 11:43:08.)

Buckeye does not dispute that the privilege covers communications between Debtor and Mr. Walker and/or Debtor and Mr. Buzulencia, in their capacities as Debtor's attorneys.⁹ Rather, Buckeye claims that this privilege was waived when Debtor testified "I wasn't told to" and "That's what I was advised to do" regarding why Debtor had not reviewed certain documents prior to the Debtor's exam. Mr. Fink was stopped from ascertaining that Mr. Walker was the person to whom Debtor referred, but it was clear that such references were to Debtor's former attorney.

The Court finds that Debtor's statement that he "wasn't told" to review documents does not on its face constitute a waiver of the attorney-client privilege. Debtor merely said that no one told him to do something - not that his attorney advised him not to review documents.

The second instance of alleged waiver of the privilege is Debtor's statement, "That's what I was advised to do." Unlike the first instance, this statement does indicate an affirmative communication, which could constitute or lead to a waiver of the attorney-client privilege. However, Debtor's passing reference to advice from his attorney does not waive the attorney-client

⁹ Communications by and between Debtor and either Mr. Walker or Mr. Buzulencia are covered by the attorney-client privilege. "[W]hat is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer." *Constr. Indus. Servs. Corp. v. Hanover Ins. Co.*, 206 F.R.D. 43, 48 (E.D.N.Y. 2001) (quoting *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961)).

privilege regarding the substance of the advice given to Debtor.¹⁰ Moreover, Debtor never asserted as a defense that he relied on advice of counsel as the reason or basis for his answers to the two questions at issue.¹¹ As a result, the totality of the circumstances indicates that Debtor's single comment about what he was advised to do did not constitute a waiver of the attorney-client privilege. This position is fortified by the fact that, after the break during which the attorney-client privilege and waiver were explained to Debtor, he made no further references to anything that would be deemed privileged communications. As a consequence, Debtor did not waive the attorney client privilege with either statement.

Even if Debtor's single statement may have constituted waiver of the attorney-client privilege, there was no error in limiting Buckeye's questions on this subject. Given the lack of reliance on advice of counsel as a defense, any advice from Mr. Walker to Debtor

¹⁰ The attorney-client privilege is not waived when the substance of the communication is not disclosed. *Libbey Glass, Inc. v. Oneida, Ltd.*, 197 F.R.D. 342, 346-47 (N.D. Ohio 1999) (The passing allusions extracted by counsel did not disclose the substance of the communication between attorney and client, and therefore, the privilege was not waived); see also *Joy Global Inc. v. Wis. Dep't of Workforce Dev. (In re Joy Global, Inc.)*, 2008 U.S. Dist. LEXIS 46495, *16 (D. Del. 2008) ("even disclosure that an attorney approved a course of conduct, does not waive the privilege otherwise attaching to communications between an attorney and client on the subject of the consultation.").

¹¹ If Debtor had asserted that he answered the two questions inaccurately because he had not reviewed any documents, as advised by his attorney, the defense of reliance on counsel's advice would have constituted a waiver of the attorney-client privilege. See *Garcia v. Zenith Elecs. Corp.*, 58 F.3d 1171, 1175 n.1 (7th Cir. 1995) (The implicit waiver rule applies "when the client asserts claims or defenses that put his attorney's advice at issue in the litigation."); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) (defendant cannot use the attorney-client privilege as both a sword to defeat plaintiff's arguments and a shield to protect against disclosure of the basis for its affirmative defense). In the instant case, however, Debtor did not state at or before trial that he relied on Mr. Walker's advice in answering the two insurance related questions at the Debtor's Exam.

regarding what to review prior to the Debtor's Exam was not relevant to ascertaining Debtor's intent in answering the two insurance related questions.

VI. DEBTOR'S INTENT TO HINDER, DELAY OR DEFRAUD

Buckeye adduced no direct evidence of Debtor's intent to hinder, delay or defraud Buckeye when Debtor answered the two insurance related questions at the Debtor's Exam.¹² However, Buckeye asserts that Debtor's conduct demonstrates a pattern of concealment of assets from his creditors (first, Second National and later, Buckeye) and that this pattern is sufficient from which to infer Debtor's intent to hinder, delay or defraud Buckeye at the Debtor's Exam.¹³ Buckeye alleges that the following instances¹⁴ of conduct establish a pattern of concealment:

1. Debtor transferred the Mercedes to his daughter in or about September 2002 when Second National was trying to attach the vehicle.
2. Debtor did not review documents prior to the Debtor's Exam

¹² "Proving the requisite actual intent with direct evidence is difficult. However, intent may be inferred through circumstantial evidence." (BAP Order at 10, citing *In re Keeney*, 227 F.3d at 684.)

¹³ One bankruptcy court set forth six kinds of evidence that could be used as "badges of fraud" to prove actual intent, including "the existence or cumulative effect of the pattern or series of transactions or course of conduct after the incurring of debt, onset of financial difficulties, or pendency or threat of suits by creditors[.]" *Bank of Dawson v. Cutts (In re Cutts)*, 233 B.R. 563, 570 (Bankr. M.D. Ga. 1999)(internal citations omitted).

¹⁴ Buckeye also attempted to question Debtor about the incomplete schedules filed with his bankruptcy petition. The Court limited such questioning because it previously held that Debtor's original schedules were not at issue in light of Debtor's receipt of two extensions of time to file his schedules. Thus, the schedules dated January 20, 2004, were not "amended" schedules, but were deemed timely filed as original schedules. As noted by the BAP, Buckeye abandoned this Count as a basis for denial of discharge.

and, thus, was not prepared to answer questions accurately at that time.

3. Debtor did not produce documents after the Debtor's Exam, although ordered to do so by the Court of Common Pleas for Mahoning County, Ohio ("State Court"), nor did Debtor appear at the November 6, 2003, hearing on the State Court's Order to Appear and Show Cause.
4. Debtor changed the beneficiary of the last survivor life insurance policy to his current wife, Tatiana, in or about February 2004.
5. The contrast between Debtor's memory in answering Mr. Fink's questions and answering questions posed by his own counsel is a continuation of Debtor's attempt to keep assets from his creditors.

The Court will address each of these instances individually and collectively to determine if an inference can be drawn that Debtor had the requisite intent to hinder, delay or defraud Buckeye.

1. Debtor's transfer of the Mercedes to his daughter is the first instance in what Buckeye alleges is a pattern of deception. Buckeye argues transfer of the Mercedes on September 3, 2002, is "suspicious" since Second National was attempting to obtain the vehicle to sell in partial satisfaction of the Judgment. Debtor, who denied that the timing was suspicious, testified that he transferred the Mercedes to his daughter in September 2002 because: (i) she needed a car and he had no need for a second vehicle after

Deborah's death in June; (ii) previously the Mercedes had not been operable, but it had been repaired during the summer; and (iii) Debtor believed all disputes about the Mercedes had been resolved when he tendered \$3,000.00 to Mr. Walker to give to Second National. Debtor testified that, after he gave \$3,000.00 to his attorney, he believed he was free to transfer the Mercedes to his daughter. Buckeye made no attempt to refute this testimony; Buckeye merely raised the specter that the timing of the transfer was "suspicious."

Although Buckeye characterizes the timing of Debtor's transfer of the Mercedes as "suspicious," more than mere suspicion is required. In *Fokkena v. Chapman (In re Chapman)*, 2009 Bankr. LEXIS 1945, at *12 (Bankr. N.D. Iowa July 9, 2009), the bankruptcy court stated, "Denial of discharge, however, must be based on more than mere suspicion. The evidence must convince the Court that Debtor concealed property or made false statements with the intent to hinder or defraud creditors." The Court credits Debtor's testimony that he believed (i) he had paid for the Mercedes; and (ii) the dispute with Second National had been settled prior to his transfer of the vehicle to his daughter. The Court finds nothing untoward in the timing of the transfer of the Mercedes to Debtor's daughter.

2. Buckeye argues that Debtor's failure to review documents in preparation for the Debtor's Exam is a second instance of Debtor's pattern of intent to defraud. Debtor's failure to review documents in preparation for the Debtor's Exam may be an indication of his intent. Buckeye established that Debtor had certain

documents, including insurance policies, in his possession prior to the Debtor's Exam, but that Debtor did not review them. Debtor testified that he could testify "within certain limits" about his assets without reviewing documents. (Tr. 11:14:23.)

Debtor argues that, if he had wanted to conceal the insurance assets from Buckeye, he would not have disclosed that there was a policy on the life of Deborah and that he was the sole beneficiary. (See Ex. F, Transcript of Debtor's Exam at 29-30.) There is no dispute that Debtor truthfully disclosed the existence of Deborah's life insurance policy at the Debtor's Exam. The Court finds that disclosure of Deborah's life insurance policy and acknowledgment that Debtor was the sole beneficiary thereof is inconsistent with and negates any fraudulent intent to conceal this asset.

However, Debtor's failure to understand that the annuity he was receiving constituted proceeds of Deborah's life insurance policy does not appear to be reasonable. Buckeye offered a letter on the letterhead of Ohio National Financial Services, dated August 28, 2002, regarding the proceeds of a life insurance policy "On the Life of Deborah S. Swegan," which provided for payment to Debtor "In 60 Monthly installments of \$1,756.83 each from June 24, 2002 to and including May 24, 2007." (See Ex. J.) Even if Debtor believed the annuity constituted "income" and that he was not required to testify about income at the Debtor's Exam,¹⁵ his answer to the question

¹⁵ Mr. Walker took the position at the Debtor's Exam that Debtor would answer only questions concerning property. Mr. Walker instructed Debtor not to answer questions concerning income. (See Ex. F at 11.)

concerning *whether* he had received Deborah's life insurance policy should have been in the affirmative.

At trial, Debtor could only state that didn't know why he denied receiving receipt of Deborah's life insurance proceeds at the Debtor's Exam. ("I don't know why I answered it that way." Tr. 3:24:30) Debtor's excuse for the failure to acknowledge receipt of the insurance proceeds was that he was in a bad mental state as a result of the upheaval in his personal life. Debtor testified that, although he testified as truthfully as he could at the Debtor's Exam, on "that particular day or that particular time" he was not in a "mental state to be accurate." (Tr. 11:14:27.) Although Debtor's testimony concerning his desire to testify truthfully may be self-serving, the Court finds his statements about his state of mind to be credible. Debtor's wife died less than a year before the Debtor's Exam - in June 2002 - and his business had failed approximately fifteen months prior to the Exam - in February 2002. Debtor testified that the unexpected death of his wife left him in a "terrible" state.¹⁶

Although Debtor denied that he had received the proceeds of Deborah's insurance policy, he acknowledged the existence of the policy and that he was the sole beneficiary. Debtor's testimony at the Debtor's Exam about Deborah's life insurance policy - albeit

¹⁶ Debtor also testified that he was dating his current wife at the time of the Debtor's Exam (Tr. 3:34:42) and that he married Tatiana in July 2003, two months after the Debtor's Exam. Although this relationship could indicate that he was "over" grieving for Deborah, that is not the only conclusion one could reach. Debtor also testified that he did not have a positive outlook on life until 2005. (Tr. 3:24:03.)

contradictory - put Buckeye on notice that the policy existed. Although Debtor's denial of receipt of Deborah's life insurance proceeds delayed Buckeye in obtaining such information, there is insufficient evidence that Debtor intended to deceive Buckeye in so answering. Taken as a whole, the Court does not find that Debtor's answer to this question shows an intent to hinder, delay or defraud Buckeye.

Debtor also testified that he was confused when he denied having an insurance policy on his own life because he did not understand that the last survivor policy was still in effect after Deborah's death. (Tr. 3:27:52.) The Court credits this testimony based on two independent unrefuted facts. First, Debtor claimed that he did not know that the insurance policy on his life had a substantial cash value. Based upon Debtor's need for cash prior to and at the time of the Debtor's Exam, it is reasonable to assume that, *if* Debtor was aware that the policy was still in effect on his life and that it had a substantial cash value, he would have utilized that cash value.¹⁷ Second, although Debtor married Tatiana in July 2003, he did not name her as a beneficiary on this policy until seven months later in February 2004 - *after* he filed his bankruptcy petition and *after* the policy was disclosed on his schedules. The timing of Debtor changing the beneficiary on this policy is consistent with Debtor's representation that he did not

¹⁷ There was no testimony whatsoever about the actual cash value of this policy at the time of the Debtor's Exam. Buckeye referenced the cash value of \$60,333.54 as of July 29, 2004, which is more than a year after the Debtor's Exam. (See Ex. I.)

understand at the time of the Debtor's Exam that the last survivor policy was still in effect on his life after Deborah's death. Thus, the Court finds that Debtor's incorrect answer regarding the lack of a policy on his life stemmed from confusion and/or ignorance rather than establishing an intent to deceive.

3. The third instance of conduct of the alleged pattern to defraud is Debtor's failure to produce documents after the Debtor's Exam.¹⁸ Debtor acknowledged that (i) he attended, with Mr. Walker, a show cause hearing in State Court subsequent to the Debtor's Exam; (ii) he did not provide Buckeye with any documents in connection with the Debtor's Exam;¹⁹ and (iii) there was no continuation of the Debtor's Exam after the show cause hearing.

Buckeye alleges that, based upon its renewed motion to show cause, the State Court issued an order for Debtor to appear at a hearing on November 6, 2003.²⁰ Although Debtor acknowledged he filed for bankruptcy protection on November 4, 2003, he denied that the timing of such filing was driven by the State Court hearing scheduled for November 6, 2003. In light of the fact that Debtor was required to (and did) disclose the insurance policy on his life

¹⁸ Buckeye cites this conduct as evidence of Debtor's intent at the Exam even though it occurred thereafter.

¹⁹ The BAP affirmed that Debtor had no obligation to bring any documents to the Debtor's Exam. (BAP Order at 10.)

²⁰ Based upon Debtor's failure to identify documents marked as Exhibits O, P, Q and R, which related to the show cause hearing, the Court denied their admission into evidence. Buckeye did not move for admission of these documents as self authenticating public records. The Court can and will take judicial notice of the documents marked as Exhibits O-R, because they are file-stamped pleadings and orders from the State Court proceeding.

and receipt of the annuity (*i.e.*, proceeds from Deborah's life insurance policy) as assets when he filed for bankruptcy protection, the Court credits Debtor's testimony on this subject.

4. Fourth, Buckeye attributes Debtor's change of beneficiary to his current wife, Tatiana, as an indication of his intent to defraud when he concealed the existence of the policy on his life at the Debtor's Exam. The Court finds this argument to be without foundation. Debtor changed the beneficiary on the life insurance policy only after disclosing the same on his bankruptcy schedules. Changing the beneficiary in February 2004 could not keep the asset out of the hands of Buckeye or the bankruptcy trustee. Rather than constitute an indication of intent to defraud, this Court finds that the timing of the change of beneficiary (seven months after the Debtor's Exam) is consistent with Debtor's testimony that he did not understand, at the time of the Debtor's Exam, that he had an insurance policy on his life.

5. The last argument Buckeye makes is that Debtor was able to answer questions posed by his own counsel with clarity whereas he was not able to recall the answers to many questions asked by counsel for Buckeye. Buckeye alluded to Debtor's selective memory in being able to recall his employment history, his relationships with loan officers at Second National, and the sheriff's attempt to take the Mercedes when Debtor was on his way to the funeral home for Deborah's funeral or calling hours. Buckeye attempted to cast doubt on Debtor's inability to recall information about the exact nature

of the questions asked at the Debtor's Exam when he could recall events from his past.²¹

The Court does not attribute any significance to Debtor being able to recall (i) his long ago past, including his employment history and/or events that led to the cessation of Steelcraft; or (ii) events relating to important dates in his life such as Deborah's death, even though he did not have complete recall about all events.

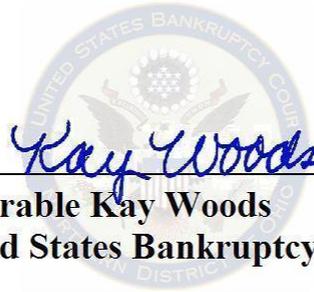
Based on the above analysis, the Court finds that the first, third, fourth and fifth instances cited by Buckeye do not support an inference that Debtor intended to hinder, delay or defraud Buckeye when he concealed assets regarding the life insurance policy on his life and/or receipt of proceeds from Deborah's life insurance policy. As set forth above, the second instance *might* provide such a basis regarding receipt of the life insurance proceeds; however, taken as a whole, Buckeye has failed to carry its burden of proof by the preponderance of evidence that Debtor intended to deceive Buckeye by concealing assets when he gave inaccurate answers to the questions regarding receipt of Deborah's insurance proceeds and the existence of a life insurance policy on his life.

An appropriate order will follow.

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²¹ In addition, Buckeye accused Debtor of making a transfer of a vacation property to a trust and transfer of his principal residence to a trust. (Tr. 2:07:12) Debtor denied making any such transfer or having any trust whatsoever. Buckeye provided absolutely no foundation or support for these questions, which were clearly unfounded innuendo.

IT IS SO ORDERED.



Dated: September 23, 2009
11:36:50 AM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

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

ORDER REGARDING TRIAL

The Court held a trial in the instant Adversary Proceeding on August 10, 2009, at the conclusion of which the Court took the matter under advisement. For the reasons given in the Court's

Memorandum Opinion entered this date, the Court finds that Plaintiff Buckeye Retirement Co. LLC., Ltd. ("Buckeye") failed to establish that Debtor/Defendant Ralph Wendell Swegan ("Debtor") had the requisite intent to hinder, delay or defraud, required by 11 U.S.C. § 727(a)(2)(A) when Debtor gave inaccurate answers to questions regarding (i) the receipt of life insurance proceeds and (ii) the existence of a life insurance policy on Debtor's life. As a consequence, Buckeye's Complaint to deny Debtor's discharge is denied.

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