UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Official Time Stamp
U.S. Bankruptcy Court
Northern District of Ohio

In re:	)	Case No. 12-13290
	)	
YVONNE M. SPENCER,	)	Chapter 7
	)	
Debtor.	)	Chief Judge Pat E. Morgenstern-Clarren
	)	
	)	
DANIEL M. McDERMOTT, U.S. TRUSTEE,	)	Adversary Proceeding No. 12-1209
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
YVONNE M. SPENCER,	)	**MEMORANDUM OF OPINION**[1]
	)	
Defendant.	)	

The United States trustee (UST) filed this adversary proceeding asking the court to deny a discharge to the debtor Yvonne Spencer under 11 U.S.C. §§ 727(a)(4) and (a)(2) because she did not disclose that, having withdrawn $3,500.00 in cash from her bank account three days before filing this case, she still had $2,300.00 in cash on hand at the filing. The debtor argues that the UST did not meet his burden of proof. For the reasons stated below, judgment will be entered on the complaint in favor of the UST denying the debtor a discharge.

JURISDICTION

Jurisdiction exists under 28 U.S.C. 1334 and General Order No. 2012-7 entered by the United States District Court for the Northern District of Ohio on April 4, 2012. This is a core proceeding under 28 U.S.C. § 157(b)(2)(J), and it is within the court's constitutional authority as analyzed by the United States Supreme Court in *Stern v. Marshall*, 131 S.Ct. 2594 (2011).

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[1] This opinion is not intended for publication, either electronic or in print.

FACTS

I.

At trial, the UST presented his case through the testimony of chapter 7 trustee Waldemar Wojcik and cross-examination of the debtor. The debtor presented her case through her own testimony and cross-examination of Mr. Wojcik. The court accepted all exhibits into evidence without objection.

II.

The debtor Yvonne Spencer filed her chapter 7 case on April 30, 2012. Her schedule B, which lists personal property, includes these statements made by her under oath:

Cash on Hand, Debtor's Possession	$ 0.00
Checking Account with Charter One	$930.03
Savings Account with Charter One	$322.95
Savings Account with Nestle Employees Credit Union	$130.00

To prepare for the June 7, 2012 meeting of creditors,[2] the chapter 7 trustee reviewed the debtor's petition and schedules as well as her 2011 federal income tax return. As a result of that review, the trustee flagged as an issue that the debtor received a tax refund of $7,093.00. He then asked debtor's counsel to provide a copy of the debtor's Charter One bank statement for the period covering the days before she filed her case.

At the meeting of creditors, the chapter 7 trustee began his examination of the debtor by asking his standard questions: Did you sign the petition, schedules, and statements filed in your case? Did you have an opportunity to read it before you signed it? Are you confident that everything is complete and accurate? To these, the debtor answered "yes." The trustee

[2] *See* 11 U.S.C. § 341.

continued by asking if there were any errors or omissions of any kind, to which the debtor answered “no.”

The trustee then turned to the income tax refund. The debtor testified that the IRS deposited it directly to her Charter One bank account on about February 4th or 6th and that she spent the money through that bank account. The trustee came back to this issue, asking “Now, did you spend it through the bank account and you didn’t take out like $4,000.00 cash and spend it as cash?” to which the debtor answered “No.” She then explained that she had taken out some cash to fix her daughter’s car, her truck, to buy some beds, and to pay for some educational tests for her daughter.

The trustee next examined the debtor about her Charter One bank statement that included the days immediately before she filed her case. That statement showed a cash withdrawal of $3,500.00 three days before the filing. When asked why she withdrew the cash, the debtor repeated that she had to fix two vehicles and added that she had a big water bill. Ultimately, the debtor admitted that she had not spent all of the money and still had $2,300.00 in cash when she filed her case. At trial, she admitted further that she did not include the cash in her schedules because she “had plans to do something else with it.”

The trustee filed a motion to turn over the funds. The debtor, who did not oppose the motion, paid the money to the trustee.

DISCUSSION

Under Bankruptcy Code § 727(a) an individual chapter 7 debtor is not entitled to a discharge if:

(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 or account [.]

11 U.S.C. § 727(a)(2)(B) and (a)(4)(A). The party objecting to discharge has the burden of proof by a preponderance of the evidence. *Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 683 (6th Cir. 2000); *see also* FED. R. BANKR. P. 4005.

Under § 727(a)(2)(B), a plaintiff must prove that "(1) the debtor transferred or concealed property, (2) such property constituted property of the estate, (3) the transfer or concealment occurred after the filing of the bankruptcy petition, and (4) the transfer or concealment was made with the intent to defraud the bankruptcy trustee." *Hunter v. Sowers (In re Sowers)*, 229 B. R. 151, 156 (Bankr. N.D. Ohio 1998); *see also In re Keeney*, 227 F.3d at 683 (discussing parallel provision § 727(a)(2)(A)). Concealment here "simply means withholding knowledge of an asset by the failure or refusal to divulge owed information." *In re Sowers*, 229 B. R. at 156; *see also Buckeye Ret. Co., LLC v. Swegan (In re Swegan)*, 383 B.R. 646, 655 (B.A. P. 6th Cir. 2008) (stating that concealment under § 727(a)(2)(A) "includes the withholding of knowledge of an asset by the failure or refusal to divulge information required by law to be made known"). Failing to disclose information at the meeting of creditors and omitting information from the

schedules may constitute concealment after the petition is filed within the meaning of § 727(a)(2)(B). *In re Sowers*, 229 B. R. at 157.

A party challenging discharge under § 727(a)(2)(B) must prove that the debtor subjectively intended to hinder, delay, or defraud. *See In re Keeney*, 227 F.3d at 683. Fraudulent intent is determined based on all the facts and circumstances of a case. *Id.* at 686. "[E]vidence tending to show that a debtor was merely ignorant in his actions will negate the actual intent to defraud as long as the debtor did not act in a manner constituting a reckless indifference to the truth." *In re Sowers*, 229 B.R. at 157; *see also In re Keeney*, 227 F.3d at 685-86 (stating that reckless disregard as to the truth will satisfy the fraudulent intent requirement while mistake or inadvertence will not).

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." *In re Keeney*, 227 F.3d at 685. Statements made in a debtor's petition, schedules, and statement of affairs are 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). As is a debtor's testimony given at the meeting of creditors. *See In re Sowers*, 229 B.R. at 158; *Norsworthy v. Kercher (In re Kercher)*, Case No. 97-0992, 1998 WL 35324203 at *2 (Bankr. W.D. Tenn. Nov. 16, 1998).

A false oath is material under this section if it concerns the discovery of assets or the existence of the debtor's property. *In re Keeney*, 227 F.3d at 686. As with § 727(a)(2), fraudulent intent is determined based on the facts and circumstances of the case. And "[a] false statement or omission . . . made by mistake or inadvertence is not sufficient . . . but a knowingly

false statement or omission made . . . with reckless indifference to the truth will suffice[.]" *In re Hamo*, 233 B.R. at 725.

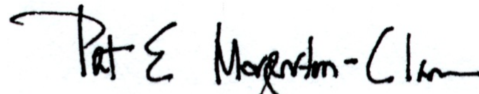
The UST met his burden of proof under both sections. By the debtor's own admission, she stated under oath in her bankruptcy filing that she had "zero" money in her possession when she knew full well that she had $2,300.00 in cash. She did that because she wanted to use the money for her own purposes. She affirmatively told the trustee–again under oath–that she did not take a significant amount of cash out of her account just before filing the case. When confronted with the bank statement, she offered less than complete information about how she used the money. Only after several inquiries did the debtor admit that she still had $2,300.00 of the money that she withdrew prepetition. These facts establish that the debtor concealed the cash after filing her bankruptcy case with the intent to hinder, delay or defraud the trustee. This proves the UST's case under 11 U.S.C. § 727(a)(2)(B).

Similarly, the UST proved his case under § 727(a)(4)(A). The facts recited above show that the debtor made a false oath in her schedules when she said that she had zero cash in hand and that she knew it was false. She made the false statement so that she could keep the money for her own purposes and it related to the existence of the debtor's property.

The debtor argues in her defense that she acknowledged at her meeting of creditors that she had these funds; this is true, but she only did so after repeated questioning by the trustee about the issue. She also argues that she turned the funds over to the trustee before the court entered the order granting the trustee's motion; this is also true, but it does not erase the fact that the trustee only had to file the turnover motion because the debtor concealed the funds and made a false statement in the first place. These facts are not a defense to this action.

CONCLUSION

For the reasons stated, the court will enter a separate judgment stating that judgment is entered in favor of the United States trustee on the complaint and that the debtor is denied a discharge.



Pat E. Morgenstern-Clarren
Chief Bankruptcy Judge

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YVONNE M. SPENCER,	)	**JUDGMENT**[1]
	)	
Defendant.	)	

For the reasons stated in the memorandum of opinion filed this same date, judgment is entered in favor of the plaintiff on the complaint and that the defendant-debtor is denied a discharge.

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
Chief Bankruptcy Judge

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