

UNITED STATES BANKRUPTCY COURT
 NORTHERN DISTRICT OF OHIO
 EASTERN DIVISION



In re:)	Case No. 13-11129
)	
YAKOV J. TRAVIS,)	Chapter 7
)	
Debtor.)	Chief Judge Pat E. Morgenstern-Clarren
)	
_____)	
)	
DANIEL M. McDERMOTT,)	Adversary Proceeding No. 13-1184
UNITED STATES TRUSTEE,)	
)	
Plaintiff,)	
)	
v.)	
)	
YAKOV J. TRAVIS,)	<u>MEMORANDUM OF OPINION</u> ¹
)	
Defendant.)	

The United States trustee filed a complaint to deny a discharge to the debtor Yakov Travis on the grounds that he: (1) made false oaths in his case and withheld records (11 U.S.C. § 727(a)(4)(A)); (2) withheld records from an officer of the estate (11 U.S.C. § 727(a)(4)(D)); and/or (3) failed to keep or preserve recorded information from which his financial situation might be ascertained, without justification under the circumstances (11 U.S.C. § 727(a)(3)). The debtor opposes this relief. For the reasons stated below, the UST is granted judgment in his favor on the § 727(a)(3) count, making it unnecessary to decide the § 727(a)(4) counts.

¹ This opinion is not intended for publication, either in print or electronically.

JURISDICTION

Jurisdiction over this proceeding 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).

THE TRIAL

The court conducted a trial on February 11, 2014. The UST presented his case through the debtor's testimony as if on cross-examination, the testimony of Catherine Lowman (analyst in the office of the UST) and Waldemar Wojcik (chapter 7 trustee), and cross-examination of Lee Janovitz (the debtor's recently-hired CPA). The debtor represented himself at trial. He presented his case through his own testimony as well as that of Mr. Janovitz, in addition to the cross-examination of Ms. Lowman and Mr. Wojcik. The parties stipulated to certain facts and to the admissibility of all exhibits.

11 U.S.C. § 727(a)(3)

An individual chapter 7 debtor is not entitled to a discharge if he “has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which . . . [his] financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all the circumstances of the case[.]” 11 U.S.C. § 727(a)(3). “The purpose of this provision is to require a debtor to produce sufficient records so that creditors are not required to risk the concealment of

assets under the guise of chaotic or incomplete records.” *Noland v. Johnson (In re Johnson)*, 387 B.R. 728, 736 (S.D. Ohio 2008).

A plaintiff must prove its objection to discharge under § 727(a)(3) by a preponderance of the evidence. FED. R. BANKR. P. 4005; *Barclays/American Business Credit, Inc. v. Adams (In re Adams)*, 31 F.3d 389, 393-94 (6th Cir. 1994). The burden of production, however, is a shifting one. The plaintiff must first show that the debtor failed to keep adequate records, at which point the burden shifts to the debtor to explain why the failure is justified. *Turoczy Bonding Co. v. Strbac (In re Strbac)*, 235 B.R. 880, 882-83 (B.A.P. 6th Cir. 1999); *CM Temp. Servs., Inc. v. Bailey (In re Bailey)*, 375 B.R. 410, 415-16 (Bankr. S.D. Ohio 2007).

Under § 727(a)(3), the adequacy of a debtor’s records is determined on a case-by-case basis. *Dolin v. Northern Petrochemical Co.*, 799 F.2d 251, 253 (6th Cir. 1986). A debtor is required “to provide creditors ‘with enough information to ascertain the debtor’s financial condition and track his financial dealings with substantial completeness and accuracy for a reasonable period of time past to present.’” *Strbac*, 235 B.R. at 882 (quoting *In re Martin*, 141 B.R. 986, 995 (Bankr. N.D. Ill. 1992)). As noted in *Strbac*, “The bankruptcy code does not impose upon . . . creditors the obligation to take the Debtor’s word that his income was insubstantial. Creditors are entitled to see it for themselves from contemporaneous, accurate and reliable records that the Debtor is required to maintain and produce.” *Id.* at 885.

Relevant considerations as to the adequacy of a debtor’s records include, but are not limited to, the debtor’s sophistication, education, business experience, financial structure, and occupation. *Id.* at 882. The adequacy of a debtor’s records “should be measured ‘against the type of books and records kept by a reasonably prudent debtor with the same occupation,

financial structure, education, and experience.” *Ayers v. Babb (In re Babb)*, 358 B.R. 343, 354 (Bankr. E.D. Tenn. 2006) (quoting *Wazeter v. Mich. Nat’l Bank (In re Waetzer)*, 209 B.R. 222, 227 (W.D. Mich. 1997)).

If the plaintiff carries its burden of showing that the debtor failed to keep adequate records, the debtor’s justification for that failure is assessed using an objective standard. *Allied Bus. Brokers, Inc. v. Amro (In re Amro)*, 326 B.R. 901 at *3 (B.A.P. 6th Cir. 2005) (unpublished opinion). The question is how a reasonable person would have acted under similar circumstances, taking into consideration—

the debtor’s intelligence, education, and sophistication, his or her experience in business matters, the volume and complexity of the debtor’s business, the extent of the debtor’s involvement in the business, the extent of the indebtedness, the extent to which the debtor has relied on others to keep records, and the extent to which such reliance was reasonable and in accordance with nonbankruptcy law.

Id.; see also *Meridian Bank v. Alten*, 958 F.2d 1226,1231 (3d Cir. 1992).

FACTS

The debtor is an ordained rabbi who holds two master’s degrees and a PhD in Jewish Studies. In 2007, the debtor was laid off from his position as a religion professor. He then created a not-for-profit business that provided religious and spiritual instruction to communities. In 2008, when that business failed, he decided to go into the solar energy field in Canada. He did so because Canada had recently adopted new legislation that, in the debtor’s view, was causing the energy field to “boom.” When the boom turned to a bust, he filed his chapter 7 case on February 23, 2013 through counsel.

The question that arose in the beginning of the case and that continued to dog the debtor through trial is the murky financial relationship between the debtor and several companies.

In his petition, the debtor stated that he had an interest in, or connection to, these companies:

Schedule B, Question 13

Ontario Solar Academy, Inc.	Sole shareholder. “Shares have no value. Company’s liabilities exceed its assets.”
Travis Associates, LLC	“Debtor is the single member. Company has no value. Liabilities exceed assets.”
SSX Events, Inc., a Canadian corporation	Debtor is 50% owner. “Set up to run a single solar conference. Conference lost money. No assets. Liabilities: amounts owed on exhibition contracts and contractors.”

Schedule B, Question 16 **Personal Property Accounts receivable**

“SSX Events, Inc. owes debtor approximately \$20,000.00 but will not be able to pay.”

Schedule I **Current Income of Individual Debtor(s)**

Ontario Solar Academy, Inc.	The debtor’s employer for last 2 years; the debtor’s income from all sources: zero
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Statement of Financial Affairs, Question 18 **Nature, location, and name of business**

Ontario Solar Academy, Inc.	Solar education	8/30/11 to present
Travis Associates, LLC	Executive search	2008 to present
SSX Events, Inc.	Solar conference	9/2012 [Single event-Corp. has not been dissolved]
Ontario Solar Solutions, Inc. dissolved	Consulting for Solar Energy	8/2011 - present. Inactive but not formally

The debtor also identified a present interest in these bank accounts: Toronto Dominion Bank (Canada) (checking), Toronto Dominion Bank (Canada) (savings account); Huntington National Bank (checking), Huntington National Bank (checking), Capital One (checking). He scheduled a Bank of Montreal account as closed and Charter One as a claimant based on overdrafting for business.

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

The chapter 7 trustee scheduled the meeting of creditors for April 4, 2013. As is the usual procedure, both the chapter 7 trustee and the UST reviewed the debtor's filing before that date. Additionally, the chapter 7 trustee received a phone call from PayPal in which that company advised that it held two accounts in the debtor's name with some funds in them. The trustee emailed the debtor's counsel asking him to explain this undisclosed asset and also to produce bank statements for November 2012 through January 2013. The debtor responded by identifying three PayPal accounts, but he did not provide the bank statements.

Catherine Lowman, analyst for the UST, reviewed the materials as part of her regular responsibilities. Lowman holds a Bachelor of Science in accounting, an MBA with a concentration in finance, and a law degree. She passed these exams: certified public accountant, certified management accounting, and certified internal auditor. Before joining the UST's office in June 2006, she served as an in-house auditor, a financial analyst, and an operations analyst.

Lowman investigates chapter 7 filings to see if the numbers are accurate and whether cases should be referred for litigation. On reviewing the debtor's petition, she immediately had questions about the debtor's stated 2012 income of \$0, with a stated household income including his non-debtor wife of \$1,730.56. Lowman noted that the family's monthly payment on the note

secured by a mortgage on their house was \$1,300.00, and that the family appeared to be current with the lender because the lender had not moved for relief from stay. If so, that would leave only \$430.00 for all other expenses, including utilities, food for a family of four, clothing, taxes, car payments, laundry, school expenses, recreation, charitable contributions, a note secured by a second mortgage on the house, and the like. Because this amount appeared inadequate to pay those expenses, Lowman questioned whether the debtor had accurately reported his income. As a result of these concerns, she attended the April 4, 2013 meeting on behalf of the UST.

At that time, she questioned the debtor about the relationship between and among the debtor, Travis Enterprises LLC, SSX, and the other SSX individual partner. The debtor also identified an additional entity, Solar Academy International, as a dba of Travis Associates LLC. Lowman asked if any financial statements had been prepared for SSX. The debtor responded that his partner was working with an accountant to do that. Lowman then told the debtor that the UST would be filing a motion for a Rule 2004 exam to address the financial issues.

Among other issues, the chapter 7 trustee asked the debtor about SSX. The debtor responded that it was a “failed venture” and had been set up for one event only.

This exam did not allay Ms. Lowman’s concerns because, among other things, she had conducted a public records search and found what appeared to be more ongoing business activity than the debtor had scheduled.

The UST’s Efforts to Obtain Needed Documents from the Debtor

On April 26, 2013, the UST filed his motion for a Rule 2004 exam and the court granted it. The UST requested that the debtor do two things: produce documents by May 10, 2013 and appear for examination on May 17, 2013. These are the documents requested:

- Personal bank accounts for the period from January 1, 2012 to April 30, 2013, for any account in which the debtor held an interest or had the right of deposit and withdrawal;
- Bank account statements for the period from January 1, 2012 to April 30, 2013 for any business in which the debtor had any interest;
- Financial statements and tax returns prepared and/or filed for any entity in which the debtor had an interest for the tax year ending 12/31/2012, or the most recent fiscal tax year ending, for the United States or Canada;
- Copies of personal income tax returns prepared and/or filed by the debtor for 2012 in the United States or Canada;
- Copies of the debtor's quarterly retirement account statements for 2012 and for the first quarter of 2013.

May 10 came and went with only some documents being produced. By email dated May 14, counsel for the UST wrote to counsel for the debtor stating that these documents had not been provided:

- Any information on Solar Academy Ontario or SSX Events, Inc.;
- Bank account statements;
- Financial statements and income tax returns for any entity in which the debtor held an interest in the year ending 2012;
- Personal bank account statements (also noting that the statements that had been provided were for an account that had not been listed on Schedule B);
- Quarterly retirement savings for 2012 and the FQ 2013.

Counsel for the UST pointed out that these documents were needed for a productive 2004 exam.

On May 17, the debtor, his wife, and his attorney appeared at the UST's office without having produced the documents in advance and without bringing them to the exam. The parties

talked, but the UST did not conduct the exam. Late that afternoon, the debtor emailed zip files to the UST.

On review, Lowman found that the debtor had sent some documents, but still had not sent the critical financial statements and tax returns for his businesses. She also noted that:

- the documents provided showed that the debtor had several more bank accounts than he had previously disclosed;
- some business deposits went into personal accounts;
- the business money seemed to flow through PayPal and then into different entities, but she did not have the PayPal monthly statements to review and compare;
- some business expenses gave her pause, including charges to Marathon, PriceLine, and Shawnee Lodge; and
- although the debtor had described SSX as a failed venture, one document showed that SSX had a \$22,000.00 profit from March 2012 through February 2013, half of which would belong to the debtor as the 50% owner.

The UST's counsel wrote again to the debtor's counsel, this time on June 3. He identified these missing documents: monthly statements for the PayPal account from January 1, 2012 through April 30, 2013; monthly bank account statements for the Ontario Solar Solution, Ontario Solar Academy, Solar Alliance of Ontario, Solar Network International and any other accounts for that period; and tax returns prepared or filed in the U.S. or Canada for these entities and any other entity in which the debtor had an interest. He again emphasized that he could not reschedule or conduct the 2004 exam without these documents.

The debtor did not provide the documents.

The Adversary Proceeding

On August 2, 2013, the UST filed a complaint to deny the debtor a discharge on the grounds, as noted above, that he failed to provide necessary documents and made false oaths. A few months later, the debtor filed a notice that he would be representing himself.² At the November 7, 2013 pretrial, the court set a December 31, 2013 discovery cutoff and a trial date of February 11, 2014. The order also required each party to file a brief, witness list, and exhibit list by January 31, 2014 and to provide copies of all exhibits to the court and the opposing party by January 31, 2014.

The UST complied with the trial order. The debtor did not timely comply, providing his exhibits only a few days before trial.

Shortly before trial, the debtor retained accountant Lee Janovitz to file an amended tax return and also to testify at trial. Mr. Janovitz's straightforward testimony about the state in which he found the debtor's books and records speaks volumes. Asked to describe the debtor's record keeping, he answered: "at best messy, and probably unauditabile."

Catherine Lowman testified at trial that, under the facts of this case, she could not accurately determine the debtor's 2012 income without starting with the financial statements and tax returns for each of the entities through which the debtor did business. Also, as time went on she had determined that the bulk of the business revenue ran through the debtor's personal PayPal accounts, meaning that she also needed a full year of those statements. Here, where the debtor testified that some accounts and expenses were business, and some accounts and expenses

² At trial, he explained that he did not have the funds to retain his counsel for the adversary proceeding.

were personal, and that to some extent he had used the accounts interchangeably, she would start with the financial statements and then go to the source documents (receipts, check registers, and bank account statements). She was skeptical of the debtor's representations, including the ones concerning business v. personal expense. The court found Ms. Lowman's testimony completely credible.³

The UST unquestionably proved that the debtor failed to keep adequate books and records from which the debtor's financial condition could be ascertained. The burden shifted at that point to the debtor to explain why his failure was justifiable. He did not do so. He instead defended on the grounds that: (1) his attorney gave him bad advice; (2) the UST got upset at the beginning of the case and then refused to look rationally at the documentation that the debtor provided, including what he provided a few days before trial as his trial exhibits; and (3) his trial exhibits should have satisfied all of the UST's concerns.

As to the first point, the debtor claimed that his attorney was distracted by his own office issues and that he should have counseled the debtor to hire an accountant and straighten out all of the record-keeping issues before filing the bankruptcy case. He did not call his former attorney as a witness and so the court is left with only one side of the story. Regardless, it was the debtor's responsibility to keep appropriate records as he conducted his business and he cannot

³ An example that supports the court's conclusion: the debtor claimed a family trip to Shawnee Lodge in West Portsmouth, Ohio as a business expense. When asked how that could be, the debtor testified that he went there as part of a business trip to Ontario. The court takes judicial notice of the fact that West Portsmouth, Ohio is 234 miles south of Cleveland while Ontario, Canada is 695 miles north of Cleveland. There is no way that a trip to Shawnee Lodge could be "on the way" to Canada.

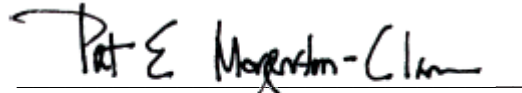
successfully pin that failure on anyone but himself when it comes to defending against this complaint.

On the second point, there is no credible evidence that the UST's office behaved other than in a professional manner. The office repeatedly asked the debtor for specific documents that the debtor did not provide. Even by the time of trial, the debtor's documents did not include financial statements and tax returns for each of the entities operated by the debtor. The debtor is an intelligent man and well-educated, albeit not in business. He chose to go into the solar energy field after concluding that Canadian laws presented good opportunities. He formed and operated various businesses. He opened and closed bank accounts. For whatever reason, he chose to do all of this without keeping adequate books and records. And he chose not to remedy the problem after filing his bankruptcy case, despite being told explicitly what documents the UST needed to review the situation. He has no one to blame for this situation but himself.

His third point is that he brought all the necessary documents to the trial. This is both factually incorrect and legally insufficient. The debtor did not bring the needed documents to the trial, having failed to produce all of the financial statements and tax returns. Not only were his actions too little, they were also too late. He should have kept the documents contemporaneously. Failing that, he should at least have provided the documents far earlier in the proceeding if he could do so using records maintained contemporaneously to produce, for example, the missing financial statements. If every debtor failed to produce documents when requested, forced the UST to file a complaint to deny a discharge, and then waited until the day of trial to present them, the system would be in chaos.

CONCLUSION

For the reasons stated, the United States trustee is granted judgment in his favor, and the debtor Yakov Travis is denied a discharge under 11 U.S.C. § 727(a)(3). A separate judgment will be entered reflecting this decision.


Pat E. Morgenstern-Clarren
Chief Bankruptcy Judge

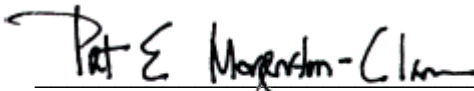
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DANIEL M. McDERMOTT,) Adversary Proceeding No. 13-1184
UNITED STATES TRUSTEE,)
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Plaintiff,)
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v.)
)
YAKOV J. TRAVIS,) **JUDGMENT**
)
Defendant.)

For the reasons stated in the memorandum of opinion entered this same date, the United States trustee is granted judgment and debtor Yakov Travis is denied a discharge under 11 U.S.C. § 727(a)(3).

IT IS SO ORDERED.



Pat E. Morgenstern-Clarren
Chief Bankruptcy Judge