UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 13-14830
	)	
DAVID A. OBERG and JOE M. OBERG,	)	Chapter 7
	)	
Debtors.	)	Chief Judge Pat E. Morgenstern-Clarren
	)	
LAUREN A. HELBLING, TRUSTEE,	)	Adversary Proceeding No. 13-1231
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
DAVID A. OBERG, *et al.*,	)	**MEMORANDUM OF OPINION**[1]
	)	
Defendants.	)	

The chapter 7 trustee Lauren Helbling filed a complaint to deny the debtors David and Joe Oberg a discharge based on their failure to disclose a $10,000.00 transfer to their daughter shortly before they filed their bankruptcy case. The trustee brings her case under 11 U.S.C. § 727(a)(2)(A) (transferring or concealing property with intent to hinder, delay or defraud a creditor or officer of the estate within one year of filing) and § 727(a)(4)(A) (knowingly and fraudulently making a false oath in connection with the case). The debtors deny the allegations and request that their discharge be granted. For the reasons stated below, judgment will be entered in favor of the trustee under 11 U.S.C. § 727(a)(4)(A), denying the debtors a discharge.

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

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). This decision 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 held a trial on February 21, 2014. The trustee presented her case through cross-examination of both debtors and their daughter, Rosa Pendleton. The debtors presented their case through their own testimony and that of their daughter. The court accepted into evidence without objection exhibits from both parties.

The following findings of fact are based on that evidence and reflect the court's weighing of the evidence presented, including determining the credibility of the witnesses. "In doing so, the Court considered the witness's demeanor, the substance of the testimony, and the context in which the statements were made, recognizing that a transcript does not convey tone, attitude, body language or nuance of expression." *In re The V Companies*, 274 B.R. 721, 726 (Bankr. N.D. Ohio 2002). *See* FED. R. BANKR. P. 7052 (incorporating FED. R. CIV. P. 52).

FACTS

There are four interrelated events that are relevant to the issue posed here: the date when David and Joe Oberg first considered filing for bankruptcy; the death of David's[2] mother with a

[2] Because the debtors share the same last name, the court will refer to them by first names to avoid confusion.

resulting funeral bill; David's taking a loan from his 401(k) account; and what David and Joe did with that money. This is how they tie together:

Background

David has been employed at Allied Construction for 37 years at a current salary of about $50,000.00. He has also worked at Marc's for almost four years. Joe has been on a medical disability since 1994.

Rosa Pendleton is the debtors' adult daughter. Over the past few years, Rosa has given her parents money to help them through difficult financial times. She did so without any expectation of being repaid. She has also permitted Joe to use her credit card, with Joe making the monthly payments on the $9,800.00 balance carried forward.

The Debtors' First Discussion of a Bankruptcy Filing

In March and April 2013, the debtors began to discuss whether they should file a bankruptcy case because they were running behind on their bills and getting calls from creditors. They also knew that Joe, who had undergone three back surgeries, would be facing another one.

The Death of David's Mother

On April 25, David's mother died, and he and his sister Karen agreed to share 50/50 in the expenses. They selected Walter E. Martens & Sons Funeral Home to handle the funeral arrangements. On April 25, Karen signed a contract agreeing to pay $8,564.14. Their mother had a $4,000.00 life insurance policy which named Karen and David as the beneficiaries. On May 1, both Karen and David assigned their interests in this life insurance over to the funeral home to go toward the expenses.

The 401(k) Loan

On May 17, with Joe's concurrence, David applied to take a $10,000.00 loan from his 401(k) account at Allied Construction. This is the maximum amount that he could borrow. At trial, David testified that he and Joe took this money out to give to their daughter for something related to her house. He received a check for $10,000.00 dated May 24.

Joe and David then called their daughter and asked her to come to their house. When she arrived, they signed the $10,000.00 check over to her and told her the money was hers, but she might need to give some of it back to pay the funeral expenses. Rosa agreed. The debtors both testified that this was not a loan because they did not intend for Rosa to pay them back. Similarly, this was not a gift because gifts are for occasions like birthdays or Christmas. They also denied that it was payment for any debt owed to their daughter. Instead, they were just "helping her out because family comes first." They considered this to be a "significant" amount of money, compared to David's annual income of $50,000.00.

The debtors retained bankruptcy counsel on May 31. Karen made a $4,973.19 payment to the funeral home on July 5. According to David, his sister paid this amount from money collected (apparently from family and/or friends) and $900.00 in cash found in his mother's house. Joe testified that they did not know about this payment until they received the January 2014 bill. Until then, they thought that they would owe at least that amount of money to the funeral home. And, as of the trial date, the insurance company had not paid the policy proceeds to the funeral home.

The Bankruptcy Filing

The debtors filed their chapter 7 case on July 9. They did not disclose the $10,000.00 transfer to their daughter, nor did they list her as a creditor for the credit card debt. They also did not list Karen or the funeral home as creditors. They did disclose that David borrowed $10,000.00 from his 401(k).

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

The trustee held the 341 meeting of creditors on August 12. When she questioned the debtors about why they took the 401(k) loan, David responded "Funeral expenses." Joe said nothing. At trial, Joe said she did not say anything because she thought David was the only one who was supposed to answer the questions. The transcript, however, shows that Joe had spoken about 20 times before that question was asked, and about 40 times after that. The court did not, therefore, believe this explanation for why Joe did not speak up in answer to this question. Instead, the court finds that Joe through her silence was agreeing with David's representation that they had used the money for funeral expenses.

The trustee asked to see the funeral bill, and toward the end of the examination the debtors showed it to her. This exchange followed:

Trustee:	. . . when you send me the bill, give me the date that you paid them. Look that up. I'm sure it's in your records somewhere.
Mrs. Oberg:	Mm-hmm.
Mr. Oberg:	Okay.
Trustee:	She's probably going to go pull it out right there.
Mrs. Oberg:	Yeah.

The debtors did not provide the payment date to the trustee because they had not paid the bill, either for the funeral or for the headstone that Karen purchased about a month after the funeral. They got the $10,000.00 back from their daughter, and on August 21 they gave it to their lawyer to pay over to the trustee. On August 29, they filed an amended Statement of Financial Affairs in which they listed the $10,000.00 transfer to their daughter in May 2013 as a payment to an insider-creditor within one year of the bankruptcy filing.

The Adversary Proceeding

The trustee filed this adversary proceeding to deny the debtors a discharge on October 9, 2013. As part of the litigation, the trustee deposed both debtors. At David's deposition he testified that they decided to give their daughter $10,000.00 because "We–my 401 was doing pretty good and we felt that we–just give her the money because of her house." When asked what was going on with her house, David's answer was not clear, mentioning that she was going to take a loss on her house and needed money to pay house payments or food or diapers or something.[3] The trustee asked later:[4]

> Q. When we met in August I asked you what you did with the $10,000.00 that you took out of your retirement?
>
> A. Yes, ma'am.
>
> Q. Do you recall what your answer was? . . .
>
> A. Yes. Yes, I do.
>
> Q. What is your recollection of your answer?

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[3] Tr. Exhibit 9 at pages 16-18.

[4] *Id.* at pages 26-27.

A. Recollection of my answer was that I paid for part of my mother's funeral.

Q. And that's not an accurate answer; is it?

A. No, ma'am.

Q. Why did you give me that answer at that time?

A. I don't–I–I don't know, ma'am. I don't know, ma'am.

Q. Okay.

A. I'm sorry.

Joe also testified at deposition that they gave their daughter the money because she needed it for her house. The debtors, she said, did not disclose it on the petition because it was not a gift, a loan or a repayment of debt; they gave it to her because she needed it. According to Joe, when they gave their daughter the check "we mentioned at the time that we might need some of that back [for the funeral] and she said, okay, that's fine, you know, that's fine."[5]

POSITIONS OF THE PARTIES

With respect to the § 727(a)(4)(A) claim, the trustee argues that the debtors made false oaths in their petition by failing to disclose the money transferred to their daughter and that they also made false oaths at the 341 meeting when they lied about what they did with the money.

The debtors' position is that they listed the $10,000.00 loan from the 401k plan and that they could not, therefore, have intended to lie about what they did with the money. They also argue that David was confused at the 341 exam when he said they used the money for funeral bills.

[5] Tr. Exhibit 10, at page 22.

DISCUSSION

An individual chapter 7 debtor is entitled to a discharge of debt, with certain exceptions set out in Bankruptcy Code § 727. 11 U.S.C. § 727. Under § 727(a)(4)(A), a debtor is not entitled to a discharge if he or she knowingly and fraudulently made a false oath or account in connection with the case. To deny a debtor's discharge under this provision, 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." *Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 685 (6th Cir. 2000). A party objecting to the discharge must prove her 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).

Statements made in a debtor's petition, schedules, and statement of affairs are statements made under oath for purposes of § 727(a)(4)(A). *See Hamo v. Wilson (In re Hamo)*, 233 B.R. 718, 725 (B.A.P. 6th Cir. 1999). Testimony at the meeting of creditors is also made under oath for purposes of this section. *See Hunter v. Sowers (In re Sowers)*, 229 B. R. 151, 158 (Bankr. N.D. Ohio 1998). A false oath is material if it concerns the discovery of assets or the existence and disposition of the debtor's property. *See Keeney*, 227 F.3d at 686. The debtor's fraudulent intent may be deduced from the facts and circumstances of the case. *Id.* A debtor's knowledge that a statement or omission is false:

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

> truth will suffice as grounds for the denial of a Chapter 7 general discharge.

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

In this case, both debtors made false oaths in their petition and at the 341 meeting. When the debtors signed their petition under oath, they knew that they had transferred $10,000.00 to their daughter, and they knew it was a material amount of money. The failure to disclose it is false if it falls within a category of items that should have been disclosed. There are four possible petition categories where the debtors might have listed the money: gifts, loans, repayments to a creditor, and assets of the debtors held by someone else. Both the debtors and their daughter denied at trial that it was a gift, loan, or repayment of monies owed. The only remaining possibility–and the one that the court finds to be the truth–is that, with the debtors' knowledge and at their instruction, the daughter was holding the debtors' money for them unless and until they needed it back. Thus, their failure to schedule it as their asset was false.

As to fraudulent intent, the debtors argue that they could not have intended to hide the money because they disclosed taking out the loan. Having disclosed the loan, they argue, they could not have intended to hide what they did with the money. If this were true, then when the trustee asked why David took out the loan, the debtors would have said: "we took the money out to give to our daughter." That they *did* intend to conceal it is evidenced by the lie they told instead: "we used the money to pay the funeral bill." The debtors dug themselves in even deeper when the trustee asked them to provide a copy of the bill and the date on which they paid it. They could have, but did not, say: "we did not pay the bill."

The trustee, therefore, proved that the debtors made false oaths both in their petition and during their testimony at the 341 meeting. Having resolved the issue based on § 727(a)(4)(A), the court does not need to address the issue under § 727(a)(2).

CONCLUSION

For the reasons stated, judgment will be entered in favor of the Chapter 7 trustee, finding that the debtors are denied a discharge under 11 U.S.C. § 727(a)(4)(A).

Pat E. Morgenstern-Clarren
Chief Bankruptcy Judge

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DAVID A. OBERG, *et al.*,	)	**JUDGMENT**
	)	
Defendants.	)	

For the reasons stated in the memorandum of opinion entered this same date, the plaintiff is granted judgment and the debtors David Oberg and Joe Oberg are denied discharges under 11 U.S.C. § 727(a)(4)(A).

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
Chief Bankruptcy Judge