

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

In re:

No. 00-12712
Chapter 7

MARY GREEN HARTMAN

Debtor

THOMAS E. RAY, TRUSTEE

Plaintiff

v.

Adversary Proceeding
No. 00-1177

MARY GREEN HARTMAN

Defendant

MEMORANDUM

The trustee in bankruptcy alleges that the debtor's discharge should be denied because she failed to reveal her interest in real estate that she sold before she filed her chapter 7 bankruptcy case. The complaint dealt with two parcels of real estate, one located at 7011 Moses Road and the other at 7015 Moses Road. Before the trial, however, the issues were narrowed to eliminate any question as to the property at 7015 Moses Road. The court set out the issues, as follows, in an order entered on February 23, 2001.

Did the defendant, within one year before the filing of her bankruptcy petition, transfer real property located at 7011 Moses Road, Hixson, Tennessee, with the intent to hinder, delay or defraud defendant's creditors and/or the trustee

of the estate charged with custody of the property in violation of 11 U.S.C. § 727(a)(2)?

Did the failure of the defendant to list the transfer in her bankruptcy schedules and statement of affairs constitute a false oath in violation of 11 U.S.C. § 727(a)(4)(A)?

Has the defendant failed to satisfactorily explain any loss of assets or deficiency of assets arising from the sale of the property at 7011 Moses Road, Hixson, Tennessee?

The court takes judicial notice of the following facts concerning Ms. Hartman's earlier chapter 13 case. *Fed. R. Evid.* 201; Hon. Barry Russell, *Bankruptcy Evidence Manual* § 201.5.

Ms. Hartman filed a chapter 13 case in August 1998. The property at 7011 Moses Road was included on schedule A in the chapter 13 case. In June 1999 Ms. Hartman filed a motion and an amended motion seeking the court's permission to sell the property to her son, Todd Hartman. In July 1999 the court entered an order allowing the sale for not less than \$35,000. The order provided that the sale proceeds would be used to pay the existing mortgage of about \$19,000 and the usual closing fee, including prorated property taxes. The order provided that the balance would be paid to the chapter 13 trustee. In September 1999, before the sale was carried out, the court entered an order dismissing the chapter 13 case. Ms. Hartman appealed the dismissal. The appeal and

other motions filed by Ms. Hartman prevented the clerk from closing the case. As a result, when Ms. Hartman filed her chapter 7 case in July 2000, the chapter 13 case was still open.

The property at 7011 Moses Road was not included on schedule A in the chapter 7 case. The chapter 7 trustee testified that Ms. Hartman did not mention the property during the meeting of creditors in the chapter 7 case. The trustee had not looked at the chapter 13 file before the meeting of creditors in the chapter 7 case. He testified that chapter 7 trustees have too many no-asset cases scheduled at once to allow them to compare the schedules with those filed in an earlier bankruptcy case. He looked at the schedules after the meeting and saw the listing of the property at 7011 Moses Road. Further investigation revealed that the property had been transferred to Ms. Hartman's son, Todd Hartman, in January 2000.

The trustee testified that the failure to schedule the property complicated the administration of the chapter 7 case. Since he did not have the opportunity to question Ms. Hartman about the property at the meeting of creditors, he was forced to investigate afterward. In particular, he was forced to ask Todd Hartman for information. He filed a lawsuit against Todd Hartman and Ms. Hartman's sister, Joyce Adkerson. In the lawsuit, the trustee asserted the sale was a fraudulent transfer. Adversary Proceeding No. 00-1165. The lawsuit was voluntarily dismissed by the trustee. The trustee could not remember how this was worked out, but it was dismissed without any money being paid to the trustee, evidencing a lack of merit.

The trustee put into evidence the settlement sheet from the closing on the sale to Todd Hartman. It lists Ms. Hartman and her sister, Joyce G. Adkerson, as the sellers. It reveals that the sale price was \$38,500. The settlement sheet also shows that Ms. Hartman and her sister were supposed to receive net proceeds totaling about \$10,900. Ms. Hartman testified that she received about \$570 from the net proceeds of the sale, and the remainder was paid to her sister. Ms. Hartman stated that when she filed the chapter 7 case, she simply forgot to schedule the property at 7011 Moses Road. She did remember that she received about \$500 cash from the sale, and she scheduled \$500 in cash. Indeed, the first line of schedule B shows \$500 cash on hand. She also knew that the property was scheduled in the chapter 13 case that was still open.

DISCUSSION

The trustee has the burden of proving his case by a preponderance of the evidence. *Barclays/American Business Credit, Inc. v. Adams (In re Adams)*, 31 F.3d 389 (6th Cir. 1994). To prove that the Ms. Hartman's discharge should be denied under § 727(a)(2), the trustee must prove that she had the subjective intent to hinder, delay or defraud a creditor or the trustee in bankruptcy. *Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 683 (6th Cir. 2000).

The participants in fraud usually do not provide the trustee with direct evidence of their fraudulent intent. The trustee must prove the fraud by circumstantial evidence. In this regard, the courts have pointed out numerous "badges of fraud" – facts suggesting fraud. See, e.g., *Painewebber Inc. v. Gollomp (In re Gollomp)*, 198 B.R. 433

(S. D. N. Y. 1996); *Diamond Bank v. Carter (In re Carter)*, 203 B.R. 697 (Bankr. W. D. Mo. 1996).

The property was transferred to a family member, but that fact by itself does not show fraud. In Ms. Hartman's prior chapter 13 case, the court had entered an order allowing Ms. Hartman to sell the property for not less than \$35,000. About six months after dismissal of the chapter 13 case, Ms. Hartman and her sister sold the property to Ms. Hartman's son for \$38,500. The trustee brought suit to have the transfer set aside as fraudulent but abandoned the lawsuit. No evidence was presented in this lawsuit to show that the sale to Ms. Hartman's son was in any way fraudulent as to Ms. Hartman's creditors. The price appears to have been fair. No one made any attempt to conceal the sale. The deed to Ms. Hartman's son was recorded almost immediately. In this regard, the court notes that the deed was mistakenly dated 1999, instead of 2000. The trustee might have argued that paying almost all the net proceeds to Ms. Hartman's sister is an indicator of fraud on Ms. Hartman's creditors. But the trustee did not make that argument. The trustee was apparently satisfied that he could not prove any such fraud.

Thus, the trustee has not shown that the transfer was made to keep the property away from Ms. Hartman's creditors or out of her bankruptcy estate or that the transfer deprived Ms. Hartman's creditors of a substantial asset.

One fact that does suggest fraud is Ms. Hartman's failure to reveal the transfer in the schedules filed in her chapter 7 case. In this regard, the trustee asserts another ground for denying Ms. Hartman's discharge. A debtor must sign the bankruptcy

schedules under oath or under penalty of perjury. *Fed. R. Bankr. P.* 1008. If the debtor omits information that the schedules request, then the debtor's discharge may be denied on the ground that debtor made a false oath or account. 11 U.S.C. § 727(a)(4). The question again involves the debtor's intent. The court will deny a discharge only if the debtor omitted the information with the intent to defraud. *Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 685 (6th Cir. 2000).

Ms. Hartman testified that she simply forgot to list the transfer. The court believes this explanation. She listed the cash she received in the schedule of personal property. Moreover, she had no reason to omit the transfer from the schedules. A debtor need not attempt to hide a transfer that is not fraudulent. Of course, a debtor may not understand the law, and as a result, may attempt to conceal a transfer even though it is safe from attack by creditors or the bankruptcy trustee. But the court does not think that is what happened in this case. Ms. Hartman's chapter 13 case involved numerous hearings, and they often involved problems with her interests in real property. Ms. Hartman knew that her chapter 13 case had not been closed and that the property was scheduled in that case. She surely did not expect that the omission of the property from the chapter 7 schedules would escape everyone's notice. Ms. Hartman has appeared regularly in court in her chapter 13 case and in her chapter 7 case. Like most *pro se* litigants, she has suffered at times from her lack of legal knowledge, but the court has never doubted her desire to follow the rules. The court sees no good reason to believe that she omitted the transfer for the purpose of misleading her creditors or the bankruptcy trustee. The omission of the transfer from the schedules appears to have been inadvertent and without

the intent to defraud, hinder or delay. As a result, the omission does not prove that Ms. Hartman's discharge should be denied under either § 727(a)(2) or § 727(a)(4).

Finally, the trustee alleges that Ms. Hartman has failed to satisfactorily explain the loss or deficiency of assets resulting from the sale of the property at 7011 Moses Road. 11 U.S.C. § 727(a)(5). The sale of the property has been satisfactorily explained. The real issue is whether Ms. Hartman has failed to satisfactorily explain the disposition of the net proceeds from the sale. Ms. Hartman testified that she received about \$570 and the remainder of the net proceeds were paid to her sister, Joyce G. Adkerson. The trustee had the opportunity to investigate the division of the proceeds in the fraudulent transfer suit against Todd Hartman and Mrs. Adkerson. The trustee dismissed that lawsuit. In the trial of this proceeding, the trustee did not challenge Ms. Hartman's explanation of what happened to the net proceeds, and he did not assert that Ms. Hartman should have received more of the net proceeds. Since Ms. Hartman's explanation makes sense, and is believable, and the trustee did not challenge it, the court concludes that Ms. Hartman has satisfactorily explained what happened to the asset, her interest in the property at 7011 Moses Road. See *Krohn v. Cromer (In re Cromer)*, 214 B.R. 86 (Bankr. E. D. N. Y. 1997); *Sweeney v. Lombardi (In re Lombardi)*, 263 B.R. 848 (Bankr. S. D. Ohio 2001); *McLaughlin v. Jones (In re Jones)*, 114 B.R. 917 (Bankr. N. D. Ohio 1990).

In summary, the court rules in Ms. Hartman's favor on all counts of the objection to discharge. This leaves only one issue to be dealt with. The rules require a deadline for the filing of complaints to deny a discharge, and the court set a deadline in Ms.

Hartman's chapter 7 case. A creditor or the bankruptcy trustee can obtain an extension of the time, but the motion for the extension must be filed within the original time allowed. *Fed. R. Bankr. P.* 4004(a), (b). The trustee filed a timely motion for an extension. The court granted the extension, and the trustee filed the complaint within the extended time. But the court granted the extension without notice and a hearing as required by the rule. *Fed. R. Bankr. P.* 4004(b). Ms. Hartman contends that the order extending the time was invalid because (1) it was entered without notice and a hearing, or (2) the motion would not have been granted if there had been a hearing since the trustee had no grounds for extending the time.

When the court mistakenly grants an extension without notice and a hearing, the question should be whether the motion would have been granted if the debtor had received notice and a hearing had been held. If so, then the debtor has no grounds for asking that the extension order be vacated and the complaint dismissed as untimely. *Coggin v. Coggin (In re Coggin)*, 30 F.3d 1443 (11th Cir. 1994). The rule requires the moving party to show cause for an extension. *Fed. R. Bankr. P.* 4004(b). The trustee's motion asserted the need for further investigation of the facts in order to decide whether to file a complaint. The need for additional investigation is generally a ground for extending the time. See, e.g., *Forbes v. Dixon (In re Dixon)*, 92 B.R. 770 (M. D. Tenn. 1988); *In re James*, 187 B.R. 395 (Bankr. N. D. Ga. 1995); *In re Schultz*, 134 B.R. 604 (Bankr. E. D. Mich. 1991). Nevertheless, an extension to allow more investigation is not automatic. It may be denied if the moving party did not diligently investigate before the deadline. *In re*

Desiderio, 209 B.R. 342 (Bankr. E. D. Pa. 1997); *In re Mendelsohn*, 202 B.R. 831 (Bankr. S. D. N. Y. 1996).

The facts before the court do not allow it to say whether the motion would or would not have been granted after a hearing on notice to Ms. Hartman. In any event, the court's ruling in Ms. Hartman's favor makes the issue irrelevant.

The court will enter an order denying the relief requested by the trustee and directing the clerk to enter the discharge.

This Memorandum constitutes findings of fact and conclusions of law as required by *Fed. R. Bankr. P. 7052*.

ENTER:

[entered 12-21-01]

BY THE COURT

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE