

UNITED STATES BANKRUPTCY COURT
Eastern District of Tennessee
Winchester Division

In re

No. 98-15318

George Albert Van Gorder &
Lois Jean Van Gorder

Chapter 7

Colleen Gifford

Plaintiff

v.

Adversary Proceeding
No. 99-1003

George Albert Van Gorder &
Lois Jean Van Gorder

Defendants

MEMORANDUM AND ORDER

The plaintiff filed a complaint against the debtors objecting to their discharge.

The complaint relies on Bankruptcy Code § 727(a)(3) and § 727(a)(5), which provide:

The court shall grant the debtor a discharge unless —

...

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all the circumstances of the case;

...

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

.....

11 U.S.C. § 727(a)(3) & (a)(5).

The debtors have filed a motion for summary judgment. The motion in effect asserts that the debtors, in their depositions and other evidence furnished to the plaintiff during discovery, have satisfactorily explained what happened to their assets and have shown that they kept sufficient records to avoid the denial of a discharge.

The plaintiff has filed a response to the motion for summary judgment. The response contends (1) the debtors have not satisfactorily explained how they spent about \$20,000 received from the sale of some property or produced records that they should have to explain how it was spent; (2) shortly after receiving this money a relative built a house for the debtors' daughter, allegedly with his own money which he lent to the daughter, but the debtors have been living in the house; (3) the debtors have not produced records they should have from the operation of a restaurant.

The court can grant summary judgment only if there are no genuine issues of material fact, and based on the undisputed facts, the law entitles the debtors to judgment in their favor. *Fed. R. Bankr. P. 7056; Fed. R. Civ. P. 7056(c)*. The debtors rely on the rule that the plaintiff has the burden of proof on an objection to discharge. *Fed. R. Bankr. P. 4005*.

The depositions and documents are sufficient to raise a question as to whether the debtors unjustifiably failed to keep adequate records and whether they can explain the disposition of certain assets. Thus, the debtors are arguing that the evidence shows they kept adequate records or such records as were justified under all the circumstances and that they have satisfactorily explained the loss of assets or the deficiency of assets to meet their liabilities.

The court does not agree with this view of the evidence. It makes too much of too little. The evidence is not sufficient for the court to say what kinds of records the debtors should have kept or even what kinds of records they did keep – meaning all their records, not just records regarding particular transactions. This point is made to some extent by the plaintiff's argument regarding the records from the operation of the restaurant. The debtors apparently have some records but not others. The court certainly can not conclude on the present record that they kept adequate records under all the circumstances.

The plaintiff can ask questions at trial that were not asked during discovery. Questions during a discovery deposition do not necessarily cover underlying facts that are relevant but are known to both parties or at least to the party asking the questions. Furthermore, it must be kept in mind that the materials on which the debtors rely are materials discovered primarily from them and their relatives, not from other sources that may be available to the plaintiff.

The same points apply to the objection under § 727(a)(5). The evidence is sufficient to raise a question regarding the debtors' disposition of their assets but not sufficient to conclusively show a satisfactory explanation by the debtors.

Furthermore, with regard to both grounds for objecting to discharge, the weight of the evidence depends greatly on the credibility of the witnesses. The plaintiff has, at least indirectly, challenged the credibility of the debtors and the other witnesses. Credibility should be judged by the court at trial.

The evidence on which the debtors rely simply is not clear enough in their favor to justify summary judgment. 10A Charles A. Wright, et al., *Federal Practice and Procedure 3d* § 2725 at 432-37 (1998). The court concludes there are genuine issues of material fact not answered by the evidence on which the debtors rely. Accordingly,

It is ORDERED that the defendants' motion for summary judgment is DENIED.

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

ENTER:

BY THE COURT

entered Aug. 19, 1999

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE