IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 99-30284

JOHN LEONARD PERLINGIERO

Debtor

REBECCA L. PERLINGIERO

Plaintiff

v. Adv. Proc. No. 99-3058

JOHN LEONARD PERLINGIERO

Defendant

M E M O R A N D U M

APPEARANCES: Wade M. Boswell, Esq.
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Knoxville, Tennessee 37901
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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding was commenced by the Plaintiff's filing of a Complaint on April 27, 1999. Pursuant to the Pretrial Order entered on October 22, 1999, and the Agreed Order presented by the parties and entered on January 24, 2000, the court is called upon to determine whether the Debtor's discharge should be denied under 11 U.S.C.A. § 727(a)(4)(A) (West 1993) or, alternatively, whether the Debtor's obligation to pay one-half of the mortgage payments due Citizens National Bank on a loan secured by the parties' former marital residence is nondischargeable under 11 U.S.C.A. § 523(a)(15) (West Supp. 1999). All issues were tried before the court on January 31, 2000, on the testimony of the Plaintiff and Debtor. Twenty-seven exhibits were introduced into evidence.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(I), (J) (West 1993).

I

The Plaintiff and Debtor were divorced on July 17, 1998, pursuant to an Order of the Circuit Court for Sevier County, Tennessee. Issues regarding custody, child support, property division, and payment of debt were reserved for future resolution. However, prior to the divorce, the state court entered an Amended Order on May 1, 1998, requiring the Debtor to make payments on a joint obligation of the parties owing Citizens National Bank in the quarterly amount of $2,768.81. The Citizens National Bank loan was incurred on March 7, 1997, in the original principal amount of $88,000.00. The Promissory Note calls for eleven quarterly payments and a final balloon payment on March 7, 2000, estimated at $81,405.22. The loan is secured by a house owned by the Plaintiff's parents which served as the marital residence of the parties. The

Plaintiff and the parties' nine-year old son continue to reside on the property. Subsequent to a trial on November 17, 1998, the state court awarded the Plaintiff custody of the minor child, fixed the Debtor's child support obligation at $54.52 weekly, directed the Debtor to pay a $13,743.05 arrearage to Citizens National Bank owing on the parties' loan by December 7, 1998, and directed that the Debtor pay one-half of the balance owing on the Citizens National Bank debt.[1]

On December 4, 1998, the Debtor employed a bankruptcy attorney, Denna Middleton. Ms. Middleton provided the Debtor with worksheets which he was to complete which were designed to elicit information sufficient to allow preparation of the statement of affairs and schedules which he would be required to file upon the commencement of his bankruptcy case. On December 17, 1998, the Debtor paid Ms. Middleton $500.00. The completed Voluntary Petition, Statement of Financial Affairs, and Schedules were prepared by Ms. Middleton and were reviewed and signed by the Debtor on January 8, 1999. A second payment of $475.00 was made to Ms. Middleton by the Debtor on January 25, 1999. On January 26, 1999, the Debtor commenced his Chapter 7 case by the filing of his petition, statements, and schedules.

Prior to filing his petition, the Debtor borrowed $5,400.00 from his father, Ray Perlingiero, on December 7, 1998, and an additional $5,400.00 on January 7, 1999. The Debtor paid the proceeds of these loans, together with other funds, to Citizens National Bank prior to the commencement of his bankruptcy case in satisfaction of the arrearage.[2]

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[1] The Order memorializing the court's ruling after the November 17, 1998 trial was not entered until February 19, 1999.

[2] Each loan is represented by a check drawn on the Debtor's father's account. The record does not establish the date the Debtor remitted the proceeds of the December 7, 1998 loan to Citizens National Bank. The proceeds of (continued…)

The Debtor is forty-seven years old. He is employed by Adjusting Services Unlimited and Claim Adjustment Specialists, Inc., as an insurance adjuster. He is articulate and well-spoken. The record does not establish his education.

II

The Statement of Financial Affairs and Schedules filed by the Debtor on January 26, 1999, are replete with errors, inaccuracies, and undisclosed information. The following identifies the most egregious inaccuracies:

Statement of Financial Affairs:

A. At paragraph 1, which requires a disclosure of the gross amount of income received from the Debtor's trade or business within the two years preceding the filing of the bankruptcy case, the Debtor states that he received $8,600.00 during 1997 from his employment with Adjusting Services Unlimited. In the Answer to Complaint filed by the Debtor on June 29, 1999, without benefit of counsel, the Debtor acknowledged that he had understated his 1997 income and stated that it **?**should have been listed as 35% higher." In a second Answer filed September 30, 1999, through counsel, he again acknowledges that his 1997 income was **?**actually 35% higher than listed in 1997." During the trial, the Debtor testified that his 1997 income approximated $9,600.00 rather than $8,600.00 as scheduled.

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[2](…continued)
the second loan were paid to Citizens National Bank by the Debtor on the same day the loan was made, January 7, 1999.

B. At paragraph 3, which requires a list of payments on loans within the 90 days preceding the commencement of his bankruptcy case, the Debtor states that he made one payment, $750.00, to Ralph Hickman, an accountant. The Debtor did not list the $5,400.00 payment made to Citizens National Bank in December 1998 nor did he list the $5,400.00[3] payment made on January 7, 1999, the day before he signed his Voluntary Petition, Statement of Financial Affairs, and Schedules.

C. At paragraph 9, which requires a listing of all payments made to attorneys within the year preceding the commencement of the bankruptcy case, the Debtor states ?none." He did not list his December 17, 1998 payment of $500.00 to Denna Middleton nor did he list the January 25, 1999 payment to Ms. Middleton of $475.00.

D. At paragraph 10, which requires a list of property transferred within the year preceding the commencement of the bankruptcy case, the Debtor states ?none." However, on January 25, 1999, the Debtor transferred his 1991 GMC pickup truck to his father. The Certificate of Title executed by the Debtor evidencing the transfer states the value of the pickup truck to be $5,000.00. The Debtor testified that this action merely formalized a ?verbal" transfer of the truck to his father that had occurred some months previous in partial payment of loans his father had made to him.[4]

E. At paragraph 14, which requires the listing of property owned by another person that is held by the debtor, the Debtor states ?none." The Debtor testified, however,

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[3] The January 7, 1999 payment to Citizens National Bank included $94.44 of other funds of the Debtor and was actually in the amount of $5,494.44.

[4] The Debtor's testimony that the truck was transferred to his father several months prior to January 25, 1999, is belied by his inclusion of the truck as an asset in the work papers he prepared for Ms. Middleton after their December 4, 1998 meeting.

that at the time he commenced his case he was in possession of a generator in which he holds a one-half interest with a man by the name of Joe Brown. The Plaintiff testified that the Debtor told her the generator was worth $3,000.00 to $4,000.00.

Schedules:

A. At Schedule B - Personal Property, the Debtor failed to list his interest in a tool box mounted on the truck bed of the 1991 GMC truck, a waist-high roll-around tool chest containing an unknown quantity of hand tools, miscellaneous electric tools, wearing apparel, a nugget wedding band containing three diamond chips, two gold rings, a specially tooled fire agate ring, a .22 caliber rifle with carrying case, a 12-gauge shotgun with carrying case, a tax refund approximating $1,000.00 which he and the Plaintiff were jointly due,[5] the generator in which he has a one-half interest, a sickle-bar mower, shovels, posthole digger, miscellaneous garden tools, and the 1991 GMC truck.[6]

B. At Schedule E - Creditors Holding Unsecured Priority Claims, the Debtor states that he has no creditors. In fact, the Internal Revenue Service is a priority creditor because of the Debtor's failure to pay his 1997 income tax.

C. At Schedule F - Creditors Holding Unsecured Nonpriority Claims, the Debtor lists Citizens National Bank as the holder of a claim against him, individually, in the

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[5] The work papers prepared by the Debtor after his December 4, 1998 meeting with Ms. Middleton states $500.00 at a category labeled **?**Other Money Owed to You (tax refunds, etc.)." The Debtor offered no explanation for not including this in Schedule B.

[6] On January 8, 1999, the date the Debtor signed his schedules, he still owned the truck. *See supra* note 3. It was not transferred to his father until January 25, 1999, the day before he filed his petition. He apparently did not make any changes to his Statement of Financial Affairs and Schedules between January 8 and 26, 1999.

?estimated" amount of $500.00. The parties' obligation to Citizens National Bank arising out of the March 7, 1997 loan has a balloon payment in excess of $81,000.00 due on March 7, 2000, and is secured by the marital residence, which is owned by the Plaintiff's parents. The Debtor testified that he knew of the substantial amount of this obligation at the time he filed his petition and knows that the Plaintiff is jointly liable on the Citizens National Bank debt.

D. At Schedule F, the Debtor lists his father, Ray Perlingiero,[7] as the holder of a nonpriority unsecured debt of $6,900.00. The Debtor owed his father at least $10,800.00 as a result of the two $5,400.00 loans made on December 7, 1998, and January 7, 1999. In addition, the Debtor testified that he had a ?rolling account" with his parents for room and board he was unable to pay while residing in their home.

E. At Schedule H - Codebtors, the Debtor states that he has no codebtors. The Plaintiff is a co-obligor on the March 7, 1997 Citizens National Bank note.

F. At Schedule J - Current Expenditures of Individual Debtor(s), the Debtor itemizes expenses for electricity, cable television, and related household expenses. The Debtor testified that he lives with his parents and that these are not actual expenses, but estimates of what he would owe his parents if he were paying room and board.

[7] The Debtor's father is identified as ?Roy" Perlingiero on Schedule F.

The Debtor testified that he read his statements and schedules before he signed them, but that he was under stress, had forgotten about certain items, had moved to his parents' house, and relied on his attorney to accurately prepare the documents.[8]

III

The purpose of the Bankruptcy Code is to permit debtors to **?**reorder their [financial] affairs, make peace with their creditors, and enjoy ‹a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'" *Grogan v. Garner*, 111 S. Ct. 654, 659 (1991) (quoting *Local Loan Co. v. Hunt*, 54 S. Ct. 695, 699 (1934)). However, this fresh start is available only to the **?**‹honest but unfortunate debtor.'" *Id.* (quoting *Local Loan Co.*, 54 S. Ct. at 699).

Section 727 of the Bankruptcy Code is primarily designed to provide a means of dealing with abusive debtor conduct through the denial of a discharge. *See Harman v. Brown (In re Brown)*, 56 B.R. 63, 66 (Bankr. D.N.H. 1985). The exceptions to discharge set forth in § 727 are to be construed liberally in favor of the debtor and strictly against the objecting creditor. *Federal Deposit Ins. Corp. v. Church (In re Church)*, 47 B.R. 186, 189 (Bankr. E.D. Tenn. 1985). Such a construction furthers the purpose of the Bankruptcy Code in providing debtors with a fresh start. *Up State Fed. Credit Union v. Carletta (In re Carletta)*, 189 B.R. 258, 262 (Bankr.

[8] During the trial, the Debtor attempted to admit into evidence an Amended Statement of Financial Affairs and Amended Schedule E, F and H which were filed in his case on May 26, 1999. The court sustained the Plaintiff's objection to the admissibility of these documents because they do not contain the unsworn declaration signed by the Debtor as required by FED. R. BANKR. P. 1008. Rather, Denna Middleton, the Debtor's attorney, signed the Debtor's name to the unsworn declaration. *See In re Harrison*, 158 B.R. 246 (Bankr. M.D. Fla. 1993) (Chapter 13 petition signed by nondebtor was a nullity and individual who signed the debtor's name was required to show cause why sanctions should not be imposed pursuant to FED. R. BANKR. P. 9011.).

N.D.N.Y. 1995). The objecting creditor bears the burden of proving an exception to discharge under § 727 by a preponderance of the evidence. *Barclays/Am. Bus. Credit, Inc. v. Adams (In re Adams)*, 31 F.3d 389, 394 (6th Cir. 1994).

Bankruptcy Code § 727 provides, in material part:

> (a) The court shall grant the debtor a discharge, unless—
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> . . . .
>
> (4) the debtor knowingly and fraudulently, in or in connection with the case—
>
> (A) made a false oath or account . . . .

11 U.S.C.A. § 727.

The Bankruptcy Appellate Panel for the Sixth Circuit has recently enumerated the elements essential to sustain an objection to discharge under § 727(a)(4)(A).

> ?A party objecting to a debtor's discharge pursuant to § 727(a)(4)(A) must establish that, (1) the debtor made a statement while under oath, (2) the statement was false, (3) the statement related materially to the bankruptcy case, (4) the debtor knew the statement was false, and (5) the debtor made the statement with fraudulent intent." Statements in bankruptcy schedules are given under oath, and ?a fact is material if it ‹concerns discovery of assets, business dealings or [the] existence or disposition of property.'" ?Knowledge 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 v. Wilson (In re Hamo), 233 B.R. 718, 725 (B.A.P. 6th Cir. 1999) (citation omitted) (quoting *Hunter v. Sowers (In re Sowers)*, 229 B.R. 151, 158 (Bankr. N.D. Ohio 1998)).

The court then observed:

> ?The very purpose of . . . 11 U.S.C. § 727(a)(4)(A), is to make certain that those who seek the shelter of the bankruptcy code do not play fast and loose with their assets or with the reality of their affairs. The statutes are designed to insure that complete, truthful, and reliable information is put forward at the outset of the proceedings, so that decisions can be made by the parties in interest based on fact rather than fiction . . . Neither the trustee nor the creditors should be required to engage in a laborious tug-of-war to drag the simple truth into the glare of daylight.
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> . . . .
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> A discharge is a privilege and not a right and therefore the strict requirement of accuracy is a small quid pro quo. The successful functioning of the bankruptcy code hinges upon the bankrupt's veracity and his willingness to make a full disclosure."

Id. (quoting *Hillis v. Martin (In re Martin)*, 124 B.R. 542, 547-48 (Bankr. N.D. Ind. 1991) (quoting *In re Tully*, 818 F.2d 106, 110 (1st Cir. 1987) and *In re Krich*, 97 B.R. 919, 924 (Bankr. N.D. Ill. 1988))).

Here, the proof is overwhelming and requires little analysis. The Debtor made no attempt to file an accurate Statement of Financial Affairs and Schedules. He had from December 4, 1998, the date he received the bankruptcy work papers from his attorney, Ms. Middleton, until January 8, 1999, the day he signed his Voluntary Petition, Statement of Financial Affairs, and Schedules, to reconstruct his financial affairs and to accurately disclose the required information. He had from January 8, 1999, until January 26, 1999, the day his petition was filed, to correct any inaccuracies.

The Plaintiff has met her burden of proof under § 727(a)(4)(A). Regarding the first three elements, it is undisputed that the Debtor's statement of affairs and schedules were filed under oath;

that they were false because they did not contain the numerous disclosures discussed by the court; and that the statements were material to the Debtor's bankruptcy case because they relate to his assets and liabilities. *See Chalik v. Moorefield (In re Chalik)*, 748 F.2d 616, 618 (11th Cir. 1984) (?The subject matter of a false oath is ‹material,' and thus sufficient to bar discharge, if it bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of property.").

Regarding the fourth element, it is clear that the Debtor knew the statements were false. It is undisputed that he made two payments of at least $5,400.00 each to Citizens National Bank shortly before signing his statement of affairs and schedules on January 8, 1999, with the last payment being made on January 7, 1999. It is equally undisputed that the Debtor was aware that his obligation to Citizens National Bank substantially exceeded the $500.00 ?estimated" on Schedule F and that the 1991 GMC pickup truck should have been disclosed as either an asset or as property that had been transferred prior to the commencement of his Chapter 7 case.

Finally, the court finds that the Debtor made the statements with fraudulent intent. A false oath is knowing and fraudulent if the Debtor ?knows the truth and nonetheless willfully and intentionally swears to what is false." *Pigott v. Cline (In re Cline)*, 48 B.R. 581, 584 (Bankr. E.D. Tenn. 1985); *see also Buck v. Buck (In re Buck)*, 166 B.R. 106, 108 (Bankr. M.D. Tenn. 1993). Proof of intent may be inferred from circumstantial evidence. *Cline*, 48 B.R. at 584. At least one court has held that a failure to schedule assets of significant value creates a presumption of actual intent. *Kriseman v. Ingersoll (In re Ingersoll)*, 106 B.R. 287, 293 (Bankr. M.D. Fla. 1989), *aff'd* 124 B.R. 116 (M.D. Fla. 1991). In addition to a finding of intent, a false oath will

also be deemed fraudulent if ?[t]he cumulative effect of the errors and omissions in [a debtor's] schedules [and] statement of financial affairs . . . amounts to a reckless indifference to the truth . . . ." *Comprehensive Accounting Corp. v. Morgan (In re Cycle Accounting Servs.)*, 43 B.R. 264, 273 (Bankr. E.D. Tenn. 1984); *see also Federal Deposit Ins. Corp. v. Ligon (In re Ligon)*, 55 B.R. 250, 253 (Bankr. M.D. Tenn. 1985).

Here, the court concludes that the cumulative effect of the Debtor's errors and omissions, at the very least, amounts to a reckless indifference to the truth. Moreover, there are numerous facts which could further justify a finding of fraudulent intent. The court is satisfied that this Debtor is not the ?honest, but unfortunate debtor" for whom the Bankruptcy Code was designed to provide relief. *Grogan*, 111 S. Ct. at 659.

Having determined that the Plaintiff has sustained her burden of proof under § 727(a)(4)(A) and that the Debtor is therefore not entitled to his discharge, the court need not consider whether the Debtor's obligation to pay one-half of the balance owing on the March 7, 1997 loan from Citizens National Bank is nondischargeable under 11 U.S.C.A. § 523(a)(15).

An appropriate judgment sustaining the Plaintiff's objection to the Debtor's discharge will be entered.

FILED: February 23, 2000

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 99-30284

JOHN LEONARD PERLINGIERO

Debtor

REBECCA L. PERLINGIERO

Plaintiff

v. Adv. Proc. No. 99-3058

JOHN LEONARD PERLINGIERO

Defendant

J U D G M E N T

For the reasons stated in the Memorandum filed this date containing findings of fact and conclusions of law as required by FED. R. CIV. P. 52(a), it is ORDERED, ADJUDGED, and DECREED that the Plaintiff's objection to the discharge of the Defendant, John Leonard Perlingiero, under 11 U.S.C.A. § 727(a)(4)(A) (West 1993) is SUSTAINED and the Defendant's discharge is DENIED.

ENTER: February 23, 2000

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE