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

In re

Case No. 04-30293

EMILY GRZYB

Debtor

MICHELLE WILSON

Plaintiff

v. Adv. Proc. No. 04-3167

EMILY GRZYB

Defendant

NOTICE OF APPEAL FILED: March 25, 2005

DISTRICT COURT NO.: 3:05-cv-241

DISPOSITION: Affirmed by United States District Judge James Jarvis.

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

In re

Case No. 04-30293

EMILY GRZYB

Debtor

MICHELLE WILSON

Plaintiff

v. Adv. Proc. No. 04-3167

EMILY GRZYB

Defendant

M E M O R A N D U M

APPEARANCES: JENKINS & JENKINS ATTYS., PLLC
Brian C. Quist, Esq.
2121 First Tennessee Plaza
800 South Gay Street
Knoxville, Tennessee 37929-2121
Attorneys for Plaintiff

JOHN P. NEWTON, JR., ESQ.
Post Office Box 2069
Knoxville, Tennessee 37901-2069
Attorney for Defendant/Debtor

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding is before the court upon the Complaint Objecting to Discharge Pursuant to §727 and Dischargeability Pursuant to §523 (Complaint) filed by the Plaintiff, Michelle Wilson, on July 2, 2004, objecting to the Defendant/Debtor's discharge under 11 U.S.C.A. § 727(a)(2)(A), (3), (4)(A), and/or (4)(B) (West 2004). In the alternative, the Plaintiff seeks a determination that a judgment granted to the Plaintiff by the Circuit Court for Knox County, Tennessee, is nondischargeable under 11 U.S.C.A. § 523(a)(4) and/or (6) (West 2004).

The trial was held on February 14, 2005. The record before the court consists of thirty-one exhibits introduced into evidence, along with the testimony of the parties.

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

I

On September 24, 2003, the Plaintiff obtained a Judgment in the amount of $40,372.96 against the Debtor in the Circuit Court for Knox County, Tennessee (Judgment). The Judgment was granted following a jury trial (State Court Lawsuit) concerning the following facts. In July 2000, the Plaintiff's husband, who was the Debtor's son, died, leaving the Plaintiff as the sole beneficiary of four life insurance policies totaling $133,041.00. In September 2000, the Plaintiff established a savings account with ORNL Federal Credit Union (Credit Union), listing herself as "owner" and the Debtor as "joint owner." The account was initially created so that the Plaintiff, who was not a member, could obtain an automobile loan through the Credit Union, which had

lower interest rates than other lenders. In October 2000, the Plaintiff deposited $86,554.00 from the life insurance proceeds into the joint savings account.[1]

Also in October 2000, the Plaintiff, at the Debtor's request, agreed to pledge the account as collateral to the Credit Union to secure an automobile loan to the Debtor. Pursuant to this agreement, in December 2000, the Debtor received a loan from the Credit Union in the amount of $13,608.07 to purchase a Ford Contour automobile. In early 2001, the Plaintiff again agreed to pledge the account as collateral so that the Debtor could obtain a signature loan in the amount of $25,000.00 with the Credit Union, based upon the Debtor's representations that she could not pay her bills and would have to file for bankruptcy. As with the automobile loan, the Plaintiff understood that if the Debtor did not make the requisite payments, the Credit Union would seize the account's funds.

In July 2001, the Plaintiff discovered that the Debtor made three withdrawals, in the aggregate amount of $3,399.71, from the joint savings account.[2] Following this discovery, the Plaintiff opened a new savings account with the Credit Union and transferred the remaining balance, less $5.00, to the new account, which then served as collateral for the Debtor's two loans. The Debtor made payments on the two loans through June 2001; however, she did not make payments in July or August, and by September 2001, both loans were in default. The Credit

[1] The Plaintiff maintains that she deposited the funds into the joint account on the Debtor's advice so that, in the event of an emergency, the Debtor could access and use the account's funds on the Plaintiff's behalf. The Debtor maintains that the Plaintiff deposited the funds into the joint account voluntarily and of her own accord, with the intention that they would share the funds.

[2] The Plaintiff claimed that the withdrawals were made without her knowledge or consent. The Debtor argued that these monies were owed to her by the Plaintiff for the down-payment on a house, federal express charges, and long distance telephone charges.

Union, pursuant to its security interest in the Plaintiff's savings account, seized $12,134.13 as payment for the automobile loan and $22,249.85 as payment for the signature loan, resulting in a total of $34,383.98 being removed from the Plaintiff's account. The Debtor acknowledged that she stopped paying the loans in June 2001, knowing that the Credit Union would seize the balances due from the Plaintiff's account.

The Plaintiff filed the State Court Lawsuit against the Debtor on February 5, 2002, alleging breach of fiduciary duty, breach of contract, equitable subrogation/unjust enrichment, and conversion. The Judgment states the following findings by the jury: (1) that the Plaintiff "did not make a gift of any portion of the joint bank account that was the subject of this case to [the Debtor]" and (2) that the Plaintiff "did not owe any money to [the Debtor] for claimed loans or amounts allegedly paid for [the Plaintiff's] account or benefit to which [the Debtor] was entitled to be reimbursed." With respect to damages, the state court awarded the Plaintiff damages in the amount of $38,526.89, plus pre-judgment interest in the amount of $1,846.07, for a total judgment of $40,372.96.

The Debtor filed the Voluntary Petition commencing her Chapter 7 bankruptcy case on January 22, 2004, four months after the Judgment was entered. She listed the Plaintiff as an unsecured nonpriority creditor, based upon the Judgment rendered in the State Court Lawsuit. Other than the Plaintiff, the Debtor's remaining unsecured debt, consisting of one medical bill and six credit cards, totals $13,729.83, and her secured debt totals $22,000.00.

The Plaintiff contends that the Debtor should be denied a discharge pursuant to § 727(a)(2)(A) for transferring property with the intent to hinder, delay, or defraud creditors within

one year prior to filing her Chapter 7 petition. Next, the Plaintiff asserts that the Debtor failed to keep or preserve records from which her financial condition and business transactions could be ascertained, justifying denial of discharge pursuant to § 727(a)(3). Additionally, the Plaintiff argues that the Debtor should be denied a discharge for knowingly and fraudulently making false statements under oath regarding her case, including under-reporting her income, which falls within the purview of § 727(a)(4)(A). Finally, the Plaintiff asserts that the Debtor has not satisfactorily explained the loss of assets and that denial of discharge is appropriate under § 727(a)(5). In the alternative, the Plaintiff contends that the debt underlying the Judgment was obtained through embezzlement and is the result of the Debtor's willful and malicious actions, rendering it nondischargeable under § 523(a)(4) and (a)(6), respectively.

II

Discharge accomplishes one of the Bankruptcy Code's primary goals by allowing an "honest but unfortunate" debtor the opportunity to obtain a "fresh start" through relief from his debts. *In re Krohn*, 886 F.2d 123, 125 (6th Cir. 1989) (citing *Local Loan Co. v. Hunt*, 54 S. Ct. 695, 699 (1934)); *see also Meyers v. Internal Revenue Serv. (In re Meyers)*, 196 F.3d 622, 624 (6th Cir. 1999); *In re Castle*, 289 B.R. 882, 886 (Bankr. E.D. Tenn. 2003). Under the Bankruptcy Code, Chapter 7 debtors receive a general discharge of their pre-petition debts unless the court finds that one of the statutory reasons set forth in 11 U.S.C.A. § 727(a) exists. Section 727 provides, in material part:

(a) The court shall grant the debtor a discharge, unless—

. . . .

> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—
>
> > (A) property of the debtor, within one year before the date of the filing of the petition; . . .
> >
> > . . . .
>
> (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 of the circumstances of the case;
>
> (4) the debtor knowingly and fraudulently, in or in connection with the case—
>
> > (A) made a false oath or account;
> >
> > (B) presented or used a false claim; [or]
> >
> > . . . .
>
> . . . .
>
> (b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter[.]

11 U.S.C.A. § 727.[3] The burden of proof by a preponderance of the evidence falls upon the party objecting to discharge, as § 727(a) is liberally construed in favor of the debtor. *Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 683 (6th Cir. 2000); FED. R. BANKR. P. 4005.

[3] In the Plaintiff's Pretrial Memorandum filed on February 7, 2005, the Plaintiff also argues that the Debtor's discharge should be denied under § 727(a)(5) for her failure "to explain satisfactorily . . . any loss of assets or deficiency of assets to meet the debtor's liabilities." 11 U.S.C.A. § 727(a)(5). Because neither the Complaint nor the Pretrial Order entered on October 5, 2004, identifies § 727(a)(5) as an issue, it will not be considered by the court.

A

The Plaintiff first objects to the Debtor's discharge under § 727(a)(2)(A), which consists of two elements: (1) the disposition of property, including transfer or concealment, within one year of filing her bankruptcy petition, and (2) the Debtor's subjective intent to hinder, delay, or defraud creditors by disposing of her property. *Keeney*, 227 F.3d at 683-84 (citing *Hughes v. Lawson (In re Lawson)*, 122 F.3d 1237, 1240 (9th Cir. 1997)); *see also Cuervo v. Snell (In re Snell)*, 240 B.R. 728, 730 (Bankr. S.D. Ohio 1999) (stating that a plaintiff need not prove the debtor intended to hinder, delay, and defraud creditors, since proof of any one satisfies § 727(a)(2)(A)). Harm suffered by the Plaintiff is irrelevant for the purposes of § 727(a)(2)(A). *Clean Cut Tree Serv., Inc. v. Costello (In re Costello)*, 299 B.R. 882, 894 (Bankr. N.D. Ill. 2003) (citing *Peterson v. Scott (In re Scott)*, 172 F.3d 959, 968 (7th Cir. 1999)).

With respect to the subjective element, the Plaintiff must prove the Debtor actually intended to deceive her creditors, and because of the inherent difficulties in proving intent, the Plaintiff may use circumstantial evidence, including the Debtor's conduct, to establish her intent. *Buckeye Retirement Co., L.L.C. v. Heil (In re Heil)*, 289 B.R. 897, 907 (Bankr. E.D. Tenn. 2003) (citing *Hunter v. Sowers (In re Sowers)*, 229 B.R. 151, 157 (Bankr. N.D. Ohio 1998)). Intent may also be inferred if any of the following "badges of fraud" are present:

1. The lack or inadequacy of consideration;

2. A family, friendship, or other close associate relationship between the parties;

3. The retention of possession, benefit, or use of the property in question;

4. The financial condition of the party sought to be charged both before and after the transaction in question;

> 5. The existence or cumulative effect of a pattern or series of transactions or course of conduct after incurring of debt, onset of financial difficulties, or pendency or thereat of suit by creditors; and
>
> 6. The general chronology of events and transaction.

Stevenson v. Cutler (In re Cutler), 291 B.R. 718, 723 (Bankr. E.D. Mich. 2003) (citing *HSBC Bank U.S.A. v. Handel (In re Handel)*, 266 B.R. 585, 589 (Bankr. S.D.N.Y. 2001)). Moreover, "[j]ust one wrongful act may be sufficient to show actual intent . . . [although] a continuing pattern of wrongful behavior is a stronger indication [thereof]." *Sowers*, 229 B.R. at 157.

The Plaintiff avers that the Debtor should be denied her discharge for transferring property with the "intent to hinder, delay, or defraud" her creditors, namely the Plaintiff. Specifically, the Plaintiff is concerned with the Debtor's execution and recording of three Quit Claim Deeds wherein she transferred her interest in three separate properties to her former husband, Paul Grzyb (Mr. Grzyb),[4] and a Deed of Trust encumbering her residence. As an initial matter, there is no question that the execution of either a quit claim deed or a deed of trust constitutes a "transfer," which is defined by the Bankruptcy Code as including "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption." 11 U.S.C.A. § 101(54) (West 2004). Moreover, this court has previously recognized that the creation of a lien constitutes a "transfer" under the Bankruptcy Code's definition. *Hendon v. Gen. Motors Acceptance Corp. (In re B & B Utils., Inc.)*, 208 B.R. 417, 421 (Bankr. E.D. Tenn. 1997).

[4] At the time she executed the Quit Claim Deeds, the Debtor and Mr. Grzyb were married. At trial, the Debtor testified that they separated in 2003 and divorced in 2004, after she filed her bankruptcy.

Upon review, however, only the Deed of Trust, executed by the Debtor on September 3, 2003, and recorded on October 24, 2003 (October 2003 Deed of Trust), falls within one year of her bankruptcy filing.[5] *See* TRIAL EX. 25. The first Quit Claim Deed was executed on October 3, 2001, and recorded on February 19, 2002. *See* TRIAL EX. 22. The second Quit Claim Deed was also executed on October 3, 2001, and recorded on February 19, 2002. *See* TRIAL EX. 23. The third Quit Claim Deed was executed on April 17, 2002, and recorded on April 23, 2002. Each of these transfers occurred well before January 22, 2003, the beginning of the one-year period prior to the Debtor's bankruptcy filing, and thus, they are outside the scope of § 727(a)(2)(A).[6]

The October 2003 Deed of Trust, which was recorded ninety-one days before the Debtor filed her bankruptcy petition, evidences the establishment of a revolving line of credit in the amount of $25,000.00 from National Bank of Commerce. In exchange, it grants National Bank of Commerce a lien upon real property located at 9208 Mirkwood Drive, in Knoxville, Tennessee. At trial, the Debtor testified that she used the proceeds from this loan to pay her attorney in the State Court Lawsuit. She also testified that this was not her loan, but Mr. Grzyb's loan, and that she would eventually have to pay him back. Finally, even though the Debtor admits that she

---

[5] The Complaint also states that the Debtor executed and recorded a deed of trust emcumbering her interest in rental property on February 20, 2004, which is clearly after the date she filed for bankruptcy. *See* TRIAL EX. 26. Post-petition transfers of estate property are addressed by § 727(a)(2)(B), which was not pled in the Complaint, was not set forth as a basis for relief in the Pretrial Order entered on October 5, 2004, and was not expressly raised at trial.

[6] The Plaintiff argued that the timeline concerning these three Quit Claim Deeds evidences the Debtor's intention to hinder the Plaintiff's ability to collect the Judgment. The first two Quit Claim Deeds were executed within one month of the Debtor's receipt of a letter advising that the Plaintiff had retained counsel to recover the $3,399.00 withdrawn from the joint account. *Compare* TRIAL EX. 22 and 23 *with* TRIAL EX. 16. These Quit Claim Deeds were not then recorded until February 19, 2002, ten days after the Debtor was served with the Summons and Complaint commencing the State Court Lawsuit. *See* TRIAL EX. 21 (evidencing that the Debtor was personally served with process on February 9, 2002). Although these transfers themselves do not fall within the one-year limitation of § 727(a)(2)(A), the court may examine these transfers and their respective timelines with respect to the Debtor's overall intent and the existence of any "badges of fraud."

executed the October 2003 Deed of Trust, she stated that she was never to be responsible for paying the loan to National Bank of Commerce, but instead, she was instructed by the closing agent that she was only signing off her marital rights to the property.[7]

Although the court is not persuaded by the Debtor's assertion that the National Bank of Commerce loan was only for Mr. Grzyb, the fact remains that the Debtor did not have an ownership interest in the 9208 Mirkwood Drive property when the October 2003 Deed of Trust was executed. Moreover, the Debtor acknowledged using the loan proceeds to pay her attorney's fees incurred in defending the State Court Lawsuit, and there is no evidence to indicate that either she or Mr. Grzyb allowed National Bank of Commerce to encumber the property without consideration. Furthermore, there is nothing in the October 2003 Deed of Trust requiring that the loan proceeds be used for a particular purpose that was not followed. The court will not deny the Debtor's discharge under § 727(a)(2)(A) based upon the Debtor's execution of the October 2003 Deed of Trust.

B

The Plaintiff also objects to the Debtor's discharge under § 727(a)(4)(B), which requires "the objecting party to prove that the debtor 'presented or used an inflated or fictitious claim.'" *Hendon v. Oody (In re Oody)*, 249 B.R. 482, 487 (Bankr. E.D. Tenn. 2000) (quoting *Painewebber Inc. v. Gollomp (In re Gollomp)*, 198 B.R. 433, 439 (S.D.N.Y. 1996)). "Claim" is defined by the Bankruptcy Code as "[a] right to payment, whether or not such right is reduced to judgment,

[7] The Debtor transferred her interest in the 9208 Mirkwood Drive property to her husband pursuant to the Quit Claim Deed executed on April 17, 2002. Accordingly, title to this property was vested solely in Paul Grzyb at the time the October 2003 Deed of Trust was executed.

liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured[.]" 11 U.S.C.A. § 101(5)(A) (West 2004). Therefore, § 727(a)(4)(B) applies to claims listed in the Debtor's statements and schedules, as well as any claims she filed on behalf of other entities or parties in interest within her bankruptcy case. *See Parnes v. Parnes (In re Parnes)*, 200 B.R. 710, 722 (Bankr. N.D. Ga. 1996) ("Cases involving allegations of a false claim under § 727(a)(4)(B) generally involve the scheduling of non-existent debts, the scheduling of inflated debts, or the filing by the debtor of a false proof of claim."). On the other hand, however, this subsection does not apply to simple "assertions" within a debtor's statements and schedules, such as exemptions. *See Garcia v. Garcia (In re Garcia)*, 168 B.R. 403, 407 (D. Ariz. 1994).

The purpose of § 727(a)(4)(B) is to prevent debtors from fraudulently presenting fictitious or inflated claims, *Tavormina v. Van Den Heuvel (In re Van Den Heuvel)*, 125 B.R. 846, 851 (Bankr. S.D. Fla. 1991), and the evidence of fraudulent intent required under § 727(a)(4)(A) is likewise required under § 727(a)(4)(B).

The Plaintiff offered no evidence with respect to this subsection. Accordingly, there is no basis to deny discharge pursuant to § 727(a)(4)(B).

C

The Plaintiff additionally argues that the Debtor should be denied a discharge pursuant to § 727(a)(4)(A) for omitting information in her statements and schedules. To satisfy this subsection, the Plaintiff must prove: (1) the Debtor made a statement under oath; (2) that was false; (3) she knew that the statement was false when she made it; (4) she fraudulently intended to make the statement; and (5) the statement materially related to the bankruptcy case. 11 U.S.C.A. § 727(a)(4)(A); *Keeney*, 227 F.3d at 685; *Hendon v. Oody (In re Oody)*, 249 B.R. 482, 487 (Bankr. E.D. Tenn. 2000). Section 727(a)(4)(A), encompassing both affirmative false statements and omissions, *Searles v. Riley (In re Searles)*, 317 B.R. 368, 377 (B.A.P. 9th Cir. 2004), also applies to a debtor's statements and schedules, which are executed under oath and penalty of perjury. FED. R. BANKR. P. 1008; OFFICIAL FORM 1 (Voluntary Petition); OFFICIAL FORM 7 (Statement of Financial Affairs); *Hamo v. Wilson (In re Hamo)*, 233 B.R. 718, 725 (B.A.P. 6th Cir. 1999). Furthermore, statements are material for the purposes of § 727(a)(4) if they "bear[] a relationship to the [debtor's] business transactions or estate, or concern[] the discovery of assets, business dealings, or the existence and disposition of property." *Keeney*, 227 F.3d at 686 (quoting *Beaubouef v. Beaubouef* (*In re Beaubouef)*, 966 F.2d 174, 178 (5th Cir. 1992)).

Knowledge that a statement is false can be evidenced by a demonstration that the debtor "knew the truth, but nonetheless failed to give the information or gave contradictory information." *Hamo*, 233 B.R. at 725; *Sowers*, 229 B.R. at 158 (citing *Pigott v. Cline (In re Cline)*, 48 B.R. 581, 584 (Bankr. E.D. Tenn. 1985)). Fraudulent intent "involves a material representation that [the debtor knows] to be false, or . . . an omission that [the debtor knows] will create an erroneous

impression." *Keeney*, 227 F.3d at 685 (quoting *In re Chavin*, 150 F.3d 726, 728 (7th Cir. 1998)). Reckless disregard or indifference for the truth also demonstrates fraudulent intent. *Keeney*, 227 F.3d at 686; *Beaubouef*, 966 F.2d at 178. Likewise, intent may be inferred from a debtor's conduct, and a continuing pattern of omissions and/or false statements in the debtor's bankruptcy schedules exhibits reckless indifference. *Hamo*, 233 B.R. at 724-25; *Sowers*, 229 B.R. at 159. On the other hand, courts do not generally find that debtors who mistakenly or inadvertently give false information, and those who amend their schedules and report omissions or misstatements prior to or during their meetings of creditors possess the requisite fraudulent intent for denial of their discharge under § 727(a)(4)(A). *Keeney*, 227 F.3d at 686; *Gold v. Guttman (In re Guttman)*, 237 B.R. 643, 647 (Bankr. E.D. Mich. 1999).[8]

The Plaintiff avers that the Debtor made several false statements, omissions, and material misrepresentations, constituting cause to deny her discharge under § 727(a)(4)(A), including omissions concerning her true income. The Plaintiff focused first upon payments made for the Debtor's benefit by Concord Realty, Inc. (Concord Realty), a Tennessee corporation formed on May 15, 2001. At its inception and continuing through February 7, 2005, the Debtor served as Concord Realty's Registered Agent. *See* TRIAL EX. 15. At trial, the Debtor acknowledged that she and Mr. Grzyb owned Concord Realty, that she served as president in 2001, and that she

[8] This view furthers the purpose of § 727(a)(4)(A), which is "'to insure that adequate information is available to those interested in the administration of the bankruptcy estate without the need of examination or investigation to determine whether the information provided is true.'" *Goodmar, Inc. v. Hamilton (In re Hamilton)*, 305 B.R. 575, 585 (Bankr. W.D. Ky. 2004) (quoting *Dubrowsky v. Estate of Perlbinder (In re Dubrowsky)*, 244 B.R. 560, 572 (E.D.N.Y. 2000)).

continued to perform some appraisal work for Concord Realty.[9] She also stated that Concord Realty did not own or manage property, but instead, was simply an appraisal business.

The Plaintiff introduced into evidence checking account statements for Concord Realty for the period of June 2001 through December 2003. *See* COLL. TRIAL EX. 28. The majority of the checks produced were signed by the Debtor. Although these records were incomplete, missing several pages of checks, they clearly evidence that during that time period, Concord Realty made numerous payments which the Debtor acknowledged were personal in nature. For example, from the records presented, the following aggregate payments were made to satisfy the Debtor's credit card obligations: $7,338.40 to MBNA America, $9,415.39 to HSBC, and $21,488.00 to Target. Additionally, Concord Realty paid at least $1,500.00 to the Debtor's attorney in the State Court Lawsuit for the Debtor's benefit, and $855.56 was paid to camps and clubs for the benefit of the Debtor's daughter. Finally, Concord Realty paid every payment on the Debtor's automobile loan with AmSouth from February 2003 through December 2003, totaling $4,483.93.[10]

At trial, when questioned about these payments, the Debtor first stated that she could not remember if the credit card payments were for her accounts or not. Later, however, the Debtor acknowledged that Concord Realty had paid her credit card obligations, as she originally admitted in her 2004 examination taken in June 2004.[11] Additionally, she testified that any payments made by Concord Realty on her behalf were merely loans that she would be paying back. More

[9] The Debtor also testified that she does some work for Concord Real Estate & Appraisals, Inc., another company owned by Mr. Grzyb.

[10] The Debtor has reaffirmed her debt to AmSouth.

[11] The Debtor remembered this information after portions of the 2004 examination testimony were used to refresh her recollection.

specifically with respect to the funds used to pay her attorney in the State Court Lawsuit, the Debtor stated that she had an agreement with Mr. Grzyb and daughter to repay the "loan" and that she has already paid some of it back.

The court notes that there are no references to any "loan" or "repayment agreement" in her statements and schedules, and the Debtor has not listed any repayment as an expense in her budget, leading the court to conclude that these payments were not actually "loans."[12] Likewise, there are no references in the Debtor's Schedule I to employment of any kind by Concord Realty or Concord Real Estate & Appraisals, Inc. The fact that the Debtor received a benefit from the foregoing payments made by Concord Realty, which was a closely-held corporation, and that she receives compensation for work performed for Concord Realty and Concord Real Estate & Appraisals, Inc. does not support a denial of her discharge. Her failure to list these payments as a source of income, however, does.

As additional proof that the Debtor understated her income in her statements and schedules, the Plaintiff offered into evidence two credit applications completed by the Debtor which garner more scrutiny and weigh against the Debtor's being granted a discharge, especially in concert with the foregoing. The first application, dated January 27, 2003, was an Application Statement to Ford Motor Credit, whereby the Debtor received her automobile loan with AmSouth Bank. *See* TRIAL EX. 9. On this application, the Debtor indicated that her gross monthly salary was $6,000.00 and that she had "other income" of $1,600.00 per month, stating the source was

[12] Concord Realty's 2001, 2002, and 2003 Form 1120-A U.S. Corporation Short-Form Income Tax returns disclose no loans to the Debtor. Rather, payments made on behalf of the Debtor appear to have been deducted from Concord Realty's gross receipts as "Cost of goods sold" or deducted from the corporation's total income as an "Other deduction." *See* TRIAL EX. 18; TRIAL EX. 19; TRIAL EX. 20.

"rentals." TRIAL EX. 9. At trial, the Debtor acknowledged that this application was filled out by her and was in her own handwriting; however, she also stated that the information on it was incorrect, as she did not receive rents, but Mr. Grzyb did. Nevertheless, the Debtor did not offer any insight into why she purposely misrepresented her income on this application.

The second application, with American General Financial Services, does not have a date, but according to the Debtor's statements and schedules, the debt was incurred in September 2003. *See* COLL. TRIAL EX. 1; TRIAL EX. 10. On this application, the Debtor filled in an annual income of $25,000.00, along with "other income" of $1,615.00 from "rents." TRIAL EX. 10. Again, when questioned about this application at trial, the Debtor stated that she needed furniture, so she filled out the application at a store where a friend worked. The Debtor did not explain, however, why, only four months before she filed her bankruptcy case, she once again listed an additional monthly income from rents if that were not true.[13]

The Debtor argued that she truthfully completed her bankruptcy statements and schedules, and when she found errors in those filed on January 22, 2004, she filed an Amendment to Statement of Financial Affairs (Amendment) on February 11, 2004, prior to her meeting of creditors, to remedy the incorrect information and to add the disclosure of payments and property transfers that had inadvertently been originally left out. *See* TRIAL EX. 31. In further support of her contention that she truthfully reported her income, the Debtor additionally relied upon her income tax returns for 2000 through 2003. *See* TRIAL EX. 11 through 14. The Debtor stated that she obtained the 2002 income set forth in her Statement of Financial Affairs directly from her

[13] The Debtor has also reaffirmed this debt with American General Financial Services.

income tax return and that she then estimated her 2003 income because she had not yet received the 1099s from her employers. Likewise, the Debtor testified that she estimated her income for 2004, as well as her monthly income listed in her Schedule I, based upon her earnings in previous years.

The 2002 income of $12,564.00 listed on the Debtor's Statement of Financial Affairs at section 1 does match the reported income on her 2002 tax return. *Compare* COLL. TRIAL EX. 1 *with* TRIAL EX. 13. It is also plausible that the Debtor might estimate her 2003 and 2004 income on the Statement of Financial Affairs, although the failure to receive 1099 forms does not fully excuse the Debtor's failure to know her income for the previous year or the prior month for that matter. Nevertheless, the estimated 2003 income was not substantially less than the Debtor's actual 2003 income, as reflected on her later-filed tax return. *See* TRIAL EX. 14. These differences alone are not substantial enough to justify denying the Debtor's discharge.

However, when taken in conjunction with the proof in support of the Plaintiff's final basis for objecting to discharge, § 727(a)(3), all of the foregoing discrepancies persuade the court that cause exists to deny the Debtor's discharge. Section 727(a)(3) provides that the court shall deny discharge if it finds that the Debtor has concealed financial information or has failed to maintain and provide documentation "with enough information to ascertain [her] financial condition and track [her] financial dealings with substantial accuracy for a reasonable period past to present." *Wazeter v. Mich. Nat'l Bank (In re Wazeter)*, 209 B.R. 222, 227 (W.D. Mich. 1997) (quoting *In re Juzwiak*, 89 F.3d 424, 427 (7th Cir. 1996) (citations omitted)). This disclosure provides the trustee and creditors with sufficient information concerning the Debtor's financial history and current

financial affairs. *Wazeter*, 209 B.R. at 227; *Christy v. Kowalski (In re Kowalski)*, 316 B.R. 596, 601 (Bankr. E.D.N.Y. 2004).

The Plaintiff bears the burden of proof under § 727(a)(3) that the Debtor "has failed to maintain adequate books and records and that such failure renders it impossible to discern [her] true financial condition[.]" *Kowalski*, 316 B.R. at 601. Nevertheless, the Plaintiff is not required to investigate and acquire the Debtor's records, but rather, it is the Debtor's responsibility to provide sufficient information. *See Wazeter*, 209 B.R. at 227-28 (citing *Juzwiak*, 89 F.3d at 428). If the Plaintiff meets her burden of proving that the Debtor's records are inadequate, the burden shifts to the Debtor to prove that her failure to maintain records was justified under the specific circumstances of her case. *Turoczy Bonding Co. v. Strbac (In re Strbac)*, 235 B.R. 880, 883 (B.A.P. 6th Cir. 1999). Intent is not an issue under § 727(a)(3). *Wazeter*, 209 B.R. at 227.

The adequacy of a debtor's records is determined on a case by case basis, *Strbac*, 235 B.R. at 882, and judges have broad discretion to deny discharge based on inadequately kept books and records. *Dolin v. N. Petrochemical Co. (In re Dolin)*, 799 F.2d 251, 253 (6th Cir. 1986). The 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." *Wazeter*, 209 B.R. at 227 (quoting *Wynn v. Wynn (In re Wynn)*, 205 B.R. 97, 101 (Bankr. N.D. Ohio 1997)). Other factors focused on by courts include:

> 1. Whether the debtor was engaged in business, and if so, the complexity and volume of the business;
>
> 2. The amount of the debtor's obligations;

3. Whether the debtor's failure to keep or preserve books and records was due to the debtor's fault;

4. The debtor's education, business experience and sophistication;

5. The customary business practices for record keeping in the debtor's type of business;

6. The degree of accuracy disclosed by the debtor's existing books and records;

7. The extent of any egregious conduct on the debtor's part; and

8. The debtor's courtroom demeanor.

Kowalski, 316 B.R. at 602 (citing *Krohn v. Frommann (In re Frommann)*, 153 B.R. 113, 117 (Bankr. E.D.N.Y. 1993)). Examples of inadequate disclosures include the production of withdrawal records without indicating the disposition of funds, the failure to produce checking account statements, and the failure to provide any household bills. *See Dolin*, 799 F.2d at 253; *Strbac*, 235 B.R. at 884; *Wazeter*, 209 B.R. at 228.

The Plaintiff avers that the Debtor has not adequately produced documents she requested, including checking account statements, copies of checks, and financial records concerning Concord Realty, Inc., all of which justifies denying the Debtor's discharge. In support of this argument, the Plaintiff introduced into evidence her first, informal request for documentation pursuant to a letter dated June 1, 2004, which expressly states that "in lieu of a subpoena *duces tecum*," the Debtor was agreeing to bring documents to her 2004 examination on June 9, 2004. TRIAL EX. 6. Following the Debtor's 2004 examination, the Plaintiff filed a Request for Production of Documents on December 17, 2004, requesting many of the same documents previously requested. *See* TRIAL EX. 7. On January 18, 2005, the Debtor's attorney forwarded a letter to the Plaintiff's attorney, enclosing some of the requested documents, stating that the

Debtor had provided the records in her possession, and advising that "[s]ome of the requested production of documents must be requested from Jim Clark, CPA and Ms. Grzyb's ex-husband, Paul Grzyb." TRIAL EX. 8. Of those requested, the majority of documents were denoted as needing to be obtained from a party other than the Debtor.

At trial, the Debtor argued that she produced what she had in her possession, including the checking account statements for Concord Realty from June 2001 through December 2003, her own personal checking account statements from January 2003 through December 2003, and all of the personal and company tax returns requested. *See* TRIAL EX. 28; TRIAL EX. 29. With respect to the missing pages of checks in the various bank statements, the Debtor stated that she did not know where they were and that she produced everything she had available.

The Plaintiff additionally sought information from the Debtor concerning various non-appraisal expenses and payments made by Concord Realty, as well as information concerning entries on its tax returns for "costs of goods." Specifically, the Plaintiff pointed out that Concord Realty wrote a check in the amount of $189.06 to Knoxville Discount Wallcovering in July 2001, and inquired of the Debtor why. The Debtor testified that she did not know, that counsel would "have to ask Paul." Similarly, the Plaintiff questioned payments in August 2001 to Sam Sale Siding of $4,846.00, referencing the Debtor's Residence on the memo line and $1,946.00 referencing property located at 9122 High Bridge,[14] as well as a check to Broadway Carpet in the

[14] The Debtor testified that she and Mr. Grzyb bought this property from her son's trust fund for their minor daughter. Even though the house is titled to both herself and Mr. Grzyb, the Debtor stated that only Mr. Grzyb manages it or receives rents from it. This property is the subject of the second Quit Claim Deed dated October 3, 2001, and recorded February 19, 2002.

amount of $224.08. Again, the Debtor stated that she had no knowledge what those checks were for, but to ask her accountant or Mr. Grzyb.

The fact that Concord Realty wrote these checks is not an issue here. However, the Debtor's failure to explain how and why her closely-held corporation was spending its money is an issue. The Debtor stated that she knew nothing about these purchases; however, the court notes that the Debtor was the person who wrote out and signed each of the aforementioned checks. In fact, according to the records that she did produce, it appears that the Debtor signed the vast majority of the checks written between June 2001 and December 2003 for Concord Realty. This evidence also weighs against the Debtor's testimony that she did not handle the books for Concord Realty, nor did she know anything about the books. It is incredulous that the Debtor would blindly write out and sign checks without knowing their purpose and without keeping track of the books.

The Debtor also testified that she could not fully explain the information concerning the deductions for Concord Realty in its tax returns, specifically the amounts for the costs of goods, because she did not know anything about taxes, she did not prepare the corporation's tax returns, and she did not even remember if she signed the tax returns filed by Concord Realty. However, when questioned whether she attempted to obtain the requested information from either her accountant or Mr. Grzyb, the Debtor acknowledged that she had not.

The Debtor did produce some of the documentation requested; however, there were missing documents at key times. The Debtor had some checks but not all checks for Concord Realty. She produced personal bank statements for 2003; however, many months did not have all of the checks accompanying them. The January statement referenced twenty-eight checks

clearing, but the Debtor produced only twenty-three. The February statement referenced thirty checks, and only fourteen were produced. The April statement referenced thirty-three checks, and the Debtor produced seventeen. Although the May statement referenced twenty-one checks, the Debtor only supplied nineteen. The July 2003 statement had no attached checks, despite the statement evidencing that thirteen were written. Only the March, June, October, and December statements contained all of the referenced checks, and there are no statements or checks produced at all for August, September, or November.

Despite her attempts to seem unsophisticated, the court is satisfied that the Debtor possesses sufficient business savvy to know more than she implied. Additionally, it is the Debtor's responsibility to produce documentation that will allow her creditors to fully ascertain her financial circumstances. It appears that the Debtor has chosen to produce documentation and make disclosures as she sees fit, providing an incomplete picture of her true financial condition. Her self-serving statements that she knew nothing and that anyone seeking information would have to ask her accountant or her former husband do not satisfy the requirements that she maintain books and records commensurate with that of another in similar circumstances. Her testimony at trial, such as her failure to give a straight answer regarding whether Mr. Grzyb worked part-time or full-time, only confirmed her unwillingness to be forthcoming with respect to her financial situation.

Taking all of these factors together, the court finds that cause exists to deny the Debtor's discharge, and accordingly, it is not necessary to address any of the Plaintiff's § 523(a) issues.

A judgment consistent with this Memorandum will be entered.

FILED: September 24, 2005

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. 04-30293

EMILY GRZYB

Debtor

MICHELLE WILSON

Plaintiff

v. Adv. Proc. No. 04-3167

EMILY GRZYB

Defendant

J U D G M E N T

For the reasons set forth in the Memorandum filed this date containing findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure, made applicable to the adversary proceeding by Rule 7052 of the Federal Rules of Bankruptcy Procedure, it is ORDERED, ADJUDGED, and DECREED as follows:

1. The Complaint Objecting to Discharge Pursuant to §727 and Dischargeability Pursuant to §523 filed by the Plaintiff on July 2, 2004, is, to the extent the Plaintiff objects to the Defendant's discharge, SUSTAINED.

2. The Defendant's discharge is DENIED pursuant to 11 U.S.C.A. § 727(a)(3) and (a)(4)(A) (West 2004).

ENTER: September 24, 2005

BY THE COURT

s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE