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

MEMORANDUM ON DEFENDANT'S
MOTION TO ALTER OR AMEND JUDGMENT

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

This matter is before the court upon the Defendant's Motion to Alter or Amend Judgment (Motion) filed on March 7, 2005, requesting that the court alter or amend two findings of fact contained in its Memorandum entered on February 24, 2005, following the trial in this adversary proceeding held on February 14, 2005.

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

On February 24, 2005, the court entered a Judgment in this adversary proceeding, denying the Defendant/Debtor's discharge pursuant to 11 U.S.C.A. § 727(a)(3) and (a)(4)(A) (West 2004). Contemporaneously therewith, the court filed a Memorandum containing findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52(a), made applicable to adversary proceedings by Rule 7052 of the Federal Rules of Bankruptcy Procedure. On March 7, 2005, the Debtor filed the present Motion, asking the court to alter or amend the following findings of fact: (1) that the Debtor's Schedule I fails to disclose income from Concord Realty and Appraisal [sic]; and (2) that the Debtor and her former spouse, Paul Grzyb, owned Concord Realty, Inc.

The Debtor's Motion was filed pursuant to Federal Rule of Civil Procedure 52(b), which states, in material part: "[o]n a party's motion filed no later than 10 days after entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly." FED. R. CIV. P. 52(b). "As a general rule a motion to amend the Court's findings of fact should be based on a 'manifest error of law or mistake of fact, and a judgment should not be set aside except for substantial reasons.'" *In re Novak*, 223 B.R. 363, 371 (Bankr. M.D. Fla. 1997) (quoting *Ramos v. Boehringer Manheim*

Corp., 896 F. Supp. 1213, 1214 (S.D. Fla. 1994)). In addition to cases of manifest factual error, relief under Rule 52(b) may be appropriate when a party has newly discovered evidence available or when the court needs to clarify the record for appeal. *Dow Chem. Co. v. United States*, 278 F. Supp. 2d 844, 847 (E.D. Mich. 2003); *see also Nat'l Metal Finishing Co., Inc. v. Barclays/American/Commercial, Inc*., 899 F.2d 119, 123 (1st Cir. 1990); *In re Smith Corona Corp*., 212 B.R. 59, 60 (Bankr. D. Del. 1997). Additionally, there is a considerable amount of discretion in deciding whether to grant a Rule 52(b) motion. *Wal-Mart Stores, Inc. v. El-Amin (In re El-Amin)*, 252 B.R. 652, 654 (Bankr. E.D. Va. 2000). However, "[e]rroneous factual findings need not be amended under this rule if they are immaterial to the case's ultimate disposition." *Dow Chem. Co.*, 278 F. Supp. 2d at 847.

The first finding of fact challenged by the Debtor is the statement that the Debtor did not disclose income from Concord Real Estate & Appraisals, Inc., on her Schedule I, arguing that, in fact, Schedule I includes $500.00 each month from Concord Realty and Appraisal [sic] as "other income." Upon further review of the questioned statement contained in the Memorandum and Schedule I, the court agrees that the Debtor's Schedule I does list "Other Monthly Income" in the amount of $600.00 from "Concord Realty [sic] Estate & Appraisal." TRIAL EX. 1 (Schedule I). Accordingly, the Memorandum erroneously states that "there are no references in the Debtor's Schedule I to employment of any kind by Concord Realty or Concord Real Estate & Appraisals, Inc." *Wilson v. Grzyb (In re Grzyb)*, slip op. at 16 (Bankr. E.D. Tenn. Feb. 24, 2005). Therefore, the Memorandum should be corrected to state that although the Debtor's Schedule I does indicate that she receives income from Concord Real Estate & Appraisals, Inc. (Concord Real Estate & Appraisals) in the amount of $600.00 per month, it does not reflect any income

received from or payments made on the Debtor's behalf by Concord Realty, Inc. (Concord Realty), a separate entity from Concord Real Estate & Appraisals. Furthermore, the record is clear that the Debtor did receive a substantial amount of financial assistance from Concord Realty, which is income to the Debtor, that was not reported in her statements and schedules.[1]

The second statement in the Memorandum challenged by the Debtor is that Concord Realty was owned by the Debtor and Mr. Grzyb, arguing instead that their daughter owns the company, a fact supported by Trial Exhibit 17. The portion of the Memorandum at issue states as follows: "At trial, the Debtor acknowledged that she and Mr. Grzyb owned Concord Realty, that she served as president in 2001, and that she continued to perform some appraisal work for Concord Realty." *Wilson v. Grzyb (In re Grzyb)*, slip op. at 14 (Bankr. E.D. Tenn. Feb. 24, 2005) (footnote omitted).

The court agrees that this exhibit evidences that, on September 9, 2001, the Debtor and Mr. Grzyb executed a certificate, in their respective capacities as president and secretary of Concord Realty, certifying that their minor daughter, Laura, owned 1,000 shares of common stock in the company. *See* TRIAL EX. 17. At trial, the Debtor stated that she was an officer with Concord Realty, but that she did not know who the original shareholders were. Instead, she testified that this question would need to be addressed to her accountant. She did, however, acknowledge that it was not until after she became aware that the Plaintiff

[1] For example, compare the November 28, 2003 bank statement for Concord Realty, evidencing check number 1266, dated November 20, 2003, signed by the Debtor, and payable in the amount of $510.00 to "Cash," COLL. TRIAL EX. 28, with the Debtor's December 16, 2003 bank statement, evidencing a deposit in the amount of $510.00 on November 20, 2003, and the checks written by the Debtor out of the personal account to various creditors on that same date. COLL. TRIAL EX. 29.

was represented by counsel on September 4, 2001, that she and Mr. Grzyb placed 1,000 shares of stock in Concord Realty in the name of their daughter, who was approximately twelve years old at the time.

With respect to the Debtor's testimony regarding Concord Realty, the court will clarify its findings as follows. First, although the Debtor may not have actually "owned" Concord Realty, the record is clear that she had substantial control over its everyday operations. Despite her testimony to the contrary, the proof shows that it was the Debtor who, in fact, wrote and signed the majority of the checks for Concord Realty between June 2001 and December 2003. *See Wilson v. Grzyb (In re Grzyb)*, slip op. at 22 (Bankr. E.D. Tenn. Feb. 24, 2005); COLL. TRIAL EX. 28. Many of those checks, in addition to paying the Debtor's personal bills, paid for activities for the Grzybs' daughter, and were paid to remodel the two rental houses that the Debtor wanted to disclaim. As set forth in the court's Memorandum, although the Debtor attempted to disclaim any knowledge as to the purposes of the checks for remodeling the rental houses, she was the person who wrote and signed each check. *See Wilson v. Grzyb (In re Grzyb)*, slip op. at 22 (Bankr. E.D. Tenn. Feb. 24, 2005).[2]

The court will grant the Debtor's Motion to clarify the above referenced findings. Nevertheless, these clarifications are not material to and do not change the court's conclusions of law. In the

[2] The Plaintiff has not sought to pierce the corporate veil in order to hold Concord Realty liable for the Debtor's Judgment. However, the court will note that several of the following factors that are examined in such cases are present with respect to the Grzybs and Concord Realty: the failure to issue stock certificates, an individual's sole ownership of stock, the use of the same office or business location, the use of the corporation as an instrumentality or business conduit for an individual or another company, the diversion of assets to an entity resulting in detriment to creditors, and the failure to maintain arms length relationships among entities. *See Fed. Deposit Ins. Corp. v. Allen*, 584 F. Supp. 386, 397 (E.D. Tenn. 1984); *Schlater v. Haynie*, 833 S.W.2d 919, 925 (Tenn. Ct. App. 1991); *VP Bldgs., Inc. v. Polygon Group, Inc.*, No. M2001-00613-COA-R3-CV, 2002 Tenn. App. LEXIS 11, at *17 (Tenn. Ct. App. Jan. 8, 2002).

Memorandum, following the statement that the Debtor did not list income from either company in her Schedule I, the court makes the following statement:

> 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.

Wilson v. Grzyb (In re Grzyb), slip op. at 16 (Bankr. E.D. Tenn. Feb. 24, 2005). Even with the change to reflect that the Debtor did list income from Concord Real Estate & Appraisals on her Schedule I, the fact remains that the Debtor did not list income from Concord Realty, when, in fact, she received payments totaling more than $45,000.00 from Concord Realty. Notwithstanding her testimony that these were loans to be repaid, nowhere in her statements and schedules did the Debtor reference these "loans," and this fact is not impacted by the court's alteration.

More importantly, however, is the fact that these statements were not the court's basis for denying the Debtor's discharge. With respect to § 727(a)(4)(A), the court found that the Debtor failed to report the above referenced payments and "loans" and provided an income on two credit applications completed within one year of her bankruptcy filing that was different than she reported in her statements and schedules, without offering a viable explanation. Additionally, the court notes that the Debtor listed $200.00 in monthly expenses for electricity on her Schedule J, *see* Coll. TRIAL EX. 1, but at trial, she testified that pursuant to their divorce decree, Mr. Grzyb "has to pay the mortgage, the electric, and all that until Laura reaches eighteen." This likewise qualifies as a false statement.

The court also found cause to deny the Debtor's discharge pursuant to § 727(a)(3), for her failure to adequately maintain and produce records. In the Memorandum, the court identified records that the Debtor failed to produce, including bank statements from her personal account for August, September, and November 2003, immediately prior to her bankruptcy filing in January 2004, as well as numerous checks for prior months in 2003. *Wilson v. Grzyb (In re Grzyb)*, slip op. at 22-23 (Bankr. E.D. Tenn. Feb. 24, 2005). In this respect, the court additionally based its findings of fact and conclusions of law upon the Debtor's demeanor and "her unwillingness to be forthcoming with respect to her financial situation." *Wilson v. Grzyb (In re Grzyb)*, slip op. at 24 (Bankr. E.D. Tenn. Feb. 24, 2005). The court found that the Debtor possessed more "business savvy" than she implied or attempted to convey, that she bore the responsibility of producing sufficient records to "allow her creditors to fully ascertain her financial condition[,]" and that her directives that such information must be obtained from Mr. Grzyb or her accountant were unreasonable under the circumstances. *Wilson v. Grzyb (In re Grzyb)*, slip op. at 23-24 (Bankr. E.D. Tenn. Feb. 24, 2005). Moreover,

> [t]he Court need not fragmentize the evidence and make extensive findings to negative every offer of proof which has failed to persuade it, nor must it make findings and conclusions to set forth the extent of its reliance upon the testimony of witnesses or its assessment of their credibility, or the weight given to such testimony in relation to other evidence introduced at trial. The Court need only find such ultimate facts as are necessary to reach a decision in the case and is not required to make findings encompassing each and every detailed dispute or disagreement asserted by counsel or appearing in the evidence.

In re Braithwaite, 197 B.R. 834, 835-36 (Bankr. N.D. Ohio 1996) (quoting *Erickson Tool Co. v. Balas Collet Co.*, 277 F. Supp. 226, 234-35 (N.D. Ohio 1967)).

Revising the Memorandum with respect to the two challenged statements does not alter the remainder of the court's findings of fact or its conclusions of law, and the Debtor's Motion shall be denied as it seeks an amendment to the Judgment.

An order consistent with this Memorandum will be entered.

FILED: March 16, 2005

BY THE COURT

s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

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In re

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Debtor

MICHELLE WILSON

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v. Adv. Proc. No. 04-3167

EMILY GRZYB

Defendant

O R D E R

For the reasons set forth in the Memorandum on Defendant's Motion to Alter or Amend Judgment filed this date, the court directs the following:

1. To the extent the Defendant requests that the court alter or amend the February 24, 2005 Memorandum, the Defendant's Motion to Alter or Amend Judgment filed March 7, 2005, is GRANTED. The February 24, 2005 Memorandum is amended to the extent set forth in the accompanying Memorandum on Defendant's Motion to Alter or Amend Judgment.

2. To the extent the Defendant requests that the court alter or amend the February 24, 2005 Judgment, the Defendant's Motion to Alter or Amend Judgment filed March 7, 2005, is DENIED.

SO ORDERED.

ENTER: March 16, 2005

BY THE COURT

s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE