

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

In re

Case No. 01-30656

STEPHEN G. MARSHALL

Debtor

N. DAVID ROBERTS, JR., TRUSTEE

Plaintiff

v.

Adv. Proc. No. 01-3096

STEPHEN G. MARSHALL

Defendant

MEMORANDUM

APPEARANCES: LITTLE & MILLIGAN, P.L.L.C.
F. Scott Milligan, Esq.
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Knoxville, Tennessee 37915
Attorneys for Plaintiff

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Suite 800
Knoxville, Tennessee 37902
Attorney for Defendant

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

N. David Roberts, Jr., Trustee of the Debtor's Chapter 7 estate (Trustee), filed the present Complaint on July 20, 2001. The Trustee objects to the Debtor's discharge pursuant to 11 U.S.C.A. § 727(a)(2), (3), (4), and (5) (West 1993). A trial was held on March 26, 2002.

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

I

The Debtor filed a Voluntary Petition under Chapter 7 on February 9, 2001. His meeting of creditors required under 11 U.S.C.A. § 341(a) (West 1993) subsequently took place on March 20, 2001.

At trial, the court heard the testimony of the Debtor and the Trustee. Additionally, twenty exhibits were admitted into evidence. Following a review of the relevant evidence and testimony, the court finds the following omissions and inconsistencies in the Debtor's bankruptcy disclosures:

1. On Schedule A, the Debtor claimed a "partnership interest as tenant in common" in unimproved real property located at 12421 Hounds Ear Point, Farragut, Tennessee. However, at both his § 341 meeting of creditors and at trial, the Debtor acknowledged that the realty was in fact not owned by a partnership. Instead, the property was owned by the Debtor and his ex-wife as tenants in common.
2. On Schedule C, the Debtor exempted \$3,125.00 of his "partnership interest" in the real property pursuant to TENN. CODE ANN. § 26-2-103 (2000).¹ The

¹ Section 26-2-103 provides:

Personal property to the aggregate value of four thousand dollars (\$4,000) debtor's equity interest shall be exempt from execution, seizure or attachment in the hands or possession of any person who is a bona fide citizen permanently residing in Tennessee, and such person shall be entitled to this exemption without regard to the debtor's vocation or pursuit or to the ownership of the debtor's abode. Such person may select for exemption the items of the owned and possessed personal property,

(continued...)

§ 26-2-103 exemption is, however, applicable only to personal property.² The Hounds Ear Point property is realty never properly subject to exemption under § 26-2-103.³

3. On Schedule D, the Debtor failed to list his ex-wife, or the trustee of his ex-wife's separate bankruptcy estate, as a codebtor on the deed of trust encumbering the Hounds Ear Point property.

4. On Schedule G, the Debtor failed to list the unexpired lease of his present residence.

5. On his Statement of Financial Affairs, the Debtor did not disclose his interests in "Insurance Recruiters of Tennessee," an employee placement business operated as a partnership by the Debtor and his ex-wife. The Debtor further failed to disclose his interest in "Insurance Recruiters, Inc.," a similar business existing, according to the Debtor's testimony, as "a Delaware corporation." Each business was actively operated by the Debtor within the year preceding his bankruptcy, at least in the capacity of collecting outstanding accounts receivable. The Debtor's Statement of Financial Affairs did not contain a Question 18, relating to businesses in which the Debtor had an operating or ownership interest within the six years preceding his bankruptcy.⁴ The Debtor's interest in Insurance Recruiters of Tennessee and Insurance Recruiters, Inc. should have been disclosed in response to Question 18.

6. On his Statement of Financial Affairs, at Question 11, the Debtor did not disclose his interests in the checking accounts of his businesses.

7. On his Statement of Financial Affairs, at Question 12, the Debtor did not disclose that he maintains a safe deposit box.

¹(...continued)

including money and funds on deposit with a bank or other financial institution, up to the aggregate value of four thousand dollars (\$4,000) debtor's equity interest.

TENN. CODE ANN. § 26-2-103 (2000).

² If the Debtor's interest in the realty was in fact a partnership interest, § 26-2-103 would apply. See TENN. CODE ANN. § 61-2-701 (1989) ("A partnership interest is personal property."). As noted, however, the Debtor testified repeatedly that the realty was never owned by a partnership.

³ On March 23, 2001, the Trustee challenged the exemption by filing an Objection to Exemptions. By Order entered April 25, 2001, the exemption was disallowed.

⁴ The Statement of Financial Affairs also did not contain Questions 16 or 17. Questions 1 through 18 must be completed by all debtors. See 11 KING, COLLIER ON BANKRUPTCY § 8.43, at Pt. 8-140 (15th ed. rev. 2002).

8. On his Statement of Financial Affairs, at Question 14, the Debtor did not disclose his possession of furniture and household goods belonging to his ex-wife.

9. The Debtor's Statement of Financial Affairs did not contain Questions 19 through 25. Because of his ownership of Insurance Recruiters of Tennessee and Insurance Recruiters, Inc., the Debtor was required to respond to these questions, see 11 KING, COLLIER ON BANKRUPTCY § 8.43, at Pt. 8-140 (15th ed. rev. 2002), and should have disclosed, at minimum, a \$15,850.00 payment from Teachers Insurance Annuity Association - College Retirement Equity Fund (TIAA-CREF) and at least one additional account receivable in the approximate amount of \$12,000.00.

The Debtor did not subsequently amend his schedules or Statement of Financial Affairs to cure the above noted inadequacies.

Further, at the § 341 meeting of creditors the Trustee requested: (1) the books and records of the partnership and corporation; (2) the Debtor's personal income tax returns for 1999 and 2000; and (3) the Debtor's personal bank records for the preceding two years. The Debtor acknowledged that these documents existed and agreed to produce them within two weeks. However, he did not in fact deliver anything to the Trustee until eleven months later.⁵ The Trustee testified that he has still not received a copy of the Debtor's 1999 tax return and has not been supplied with sufficient records from which he can reconstruct the Debtor's business transactions.

⁵ A small packet of records was delivered to the Trustee on the eve of an earlier scheduled trial date.

II

Section 727 of the Bankruptcy Code directs that a discharge must be granted to a Chapter 7 debtor unless specific grounds for denial are proven to exist under § 727(a). This statutory right to discharge is liberally construed in favor of debtors and strictly against objecting creditors. See *Comprehensive Accounting Corp. v. Morgan (In re Cycle Accounting Servs.)*, 43 B.R. 264, 270 (Bankr. E.D. Tenn. 1984). Courts must be mindful, however, that the “fresh start” offered by Chapter 7 is reserved only for the honest debtor. See 6 KING, COLLIER ON BANKRUPTCY ¶ 727.01[4], at 727-12 (15th ed. rev. 2002); see also *Butler v. Ingle (In re Ingle)*, 70 B.R. 979, 982 (Bankr. E.D.N.C. 1987) (“The solicitude of Congress, however, stops at the debtor who does not measure up to that appealing image [honest but unfortunate debtor] and who has engaged in grossly irresponsible or fraudulent conduct, has been recalcitrant during the case or has overutilized the privilege.” (citation omitted)). Further, “[a] debtor’s cooperation is a prerequisite to granting a discharge.” *Gold v. Guttman (In re Guttman)*, 237 B.R. 643, 650 (Bankr. E.D. Mich. 1999).

The Trustee bears the burden of proof under § 727(a)’s discharge exceptions by a preponderance of the evidence. See *Barclays/American Business Credit, Inc. v. Adams (In re Adams)*, 31 F.3d 389, 394 (6th Cir. 1994). The court finds that the Trustee has met his burden. The Debtor’s discharge will accordingly be denied pursuant to § 727(a)(2)(A), (2)(B), (3), (4)(A), (4)(D), and (5).

(a) 11 U.S.C.A. § 727(a)(2)

Under § 727(a)(2), the objecting party must show, in material part, that:

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 . . . concealed . . . or has permitted to be . . . concealed—

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition[.]

11 U.S.C.A. § 727(a)(2) (West 1993).

There must be both a disposition of property, such as by concealment, and a subjective intent by the debtor to hinder, delay, or defraud a creditor through the same concealment. See *Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 683 (6th Cir. 2000). The omission of assets from a debtor's statements and schedules constitutes concealment under § 727(a)(2). See *Ingle*, 70 B.R. at 983. The requisite intent to hinder, delay, or defraud may be inferred from the circumstances surrounding a debtor's objectionable conduct. See *Keeney*, 227 F.3d at 684; see also 6 KING, COLLIER ON BANKRUPTCY ¶ 727.02[3][b], at 727-18 (15th ed. rev. 2002) (“[A] debtor is unlikely to testify that the intent was fraudulent. Thus a court may look to all the surrounding facts and circumstances.”).

As outlined above, the Debtor failed to schedule numerous property interests. This amounts to concealment under § 727(a)(2). See *Ingle*, 70 B.R. at 983. Although the Debtor has not admitted to an intent to hinder, delay, or defraud, the court infers such intent from the following

pattern of conduct: (1) the sheer volume of the Debtor's omissions and nondisclosures; (2) the Debtor's failure to amend his schedules and Statement of Financial Affairs to correctly show the full extent of his property interests; and (3) the Debtor's failure to provide requested documentation to the Trustee from which additional assets might be discovered. The Debtor's discharge should therefore be denied under § 727(a)(2) for his concealment of his property (and property of the estate) with the intent to hinder, delay, or defraud creditors and the Trustee.

(b) 11 U.S.C.A. § 727(a)(3)

Section 727(a)(3) provides in relevant part that:

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

(3) the debtor has concealed . . . 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[.]

11 U.S.C.A. § 727(a)(3) (West 1993).

A debtor must "provide creditors with enough information to ascertain the debtor's financial condition and track his financial dealings with substantial completeness and accuracy for a reasonable period past to present.'" *Turoczy Bonding Co. v. Strbac (In re Strbac)*, 235 B.R. 880, 882 (B.A.P. 6th Cir. 1999) (quoting *Bay State Milling Co. v. Martin (In re Martin)*, 141 B.R. 986, 995 (Bankr. N.D. Ill. 1992)). If the objecting party is able to prove the inadequacy of the debtor's production of records, the burden then shifts to the debtor to justify the inadequacy. *Strbac*, 235 B.R. at 883.

For more than eleven months, the Debtor concealed requested financial records from the Trustee. See BLACK'S LAW DICTIONARY 282 (7th ed. 1999) (Concealment is "[t]he act of refraining from disclosure; esp., an act by which one prevents or hinders the discovery of something."). The Debtor is yet to disclose his 1999 tax return despite his testimony that a return was in fact filed. Also, according to the Trustee, the Debtor has not yet revealed sufficient business records to permit reconstruction of his business affairs. The Debtor does not dispute that the requested documents (namely all bank statements and his 1999 tax return) exist. Instead, he appears to have revealed to the Trustee only what he could quickly put his hands on at the eve of trial.⁶ Copies of the missing documents would be readily available from the bank and the I.R.S.

The court finds that the Debtor's lengthy and continuing concealment of requested financial records is not justified under the circumstances of this case. The Debtor's discharge should therefore be denied under § 727(a)(3).

(c) § 727(a)(4)

The discharge exceptions of § 727(a)(4) provide in material part that:

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

(4) the debtor knowingly and fraudulently, in or in connection with the case—

(A) made a false oath or account; [or]

⁶ In further attempt to excuse his nonproduction of records, the Debtor testified that he suffers from depression, cares for his seriously ill ex-wife, and works unusual hours at one or more jobs. While the court is not unsympathetic to these troubles, it is the rare Chapter 7 debtor who comes before the court without a multitude of personal and financial concerns. These problems can in no way excuse a debtor's failure to fulfill his most basic obligations of cooperation and disclosure under the Bankruptcy Code.

. . . .

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs[.]

11 U.S.C.A. § 727(a)(4)(A), (D) (West 1993).

As with other discharge exceptions, § 727(a)(4) recognizes that “[c]omplete financial disclosure’ is a prerequisite to the privilege of discharge.” *Keeney*, 227 F.3d at 685 (quoting *Peterson v. Scott (In re Scott)*, 172 F.3d 959, 967 (7th Cir. 1999)). For denial of a debtor’s discharge under § 727(a)(4)(A), the objecting party must demonstrate that:

1. the debtor made a statement under oath;
2. the statement was false;
3. the debtor knew the statement was false;
4. the debtor made the statement with fraudulent intent; and
5. the statement related materially to the bankruptcy case.

Keeney, 227 F.3d at 685. Fraudulent intent “involves a material representation that you know to be false, or, what amounts to the same thing, an omission that you know will create an erroneous impression.” *Id.* (quoting *In re Chavin*, 150 F.3d 726, 728 (7th Cir. 1998)). The fraudulent intent requirement is also satisfied by a reckless disregard for the truth and may be inferred from the facts and circumstances of the case. *See Keeney*, 227 F.3d at 686. A statement relates materially to the bankruptcy 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 his property.” *Id.*

(quoting *Beaubouef v. Beaubouef (In re Beaubouef)*, 966 F.2d 174, 178 (5th Cir. 1992) (citation omitted)).

The statements and omissions contained in the Debtor's schedules and Statement of Financial Affairs occurred "under oath" for purposes of § 727(a)(4)(A). See *Hunter v. Sowers (In re Sowers)*, 229 B.R. 151, 158 (Bankr. N.D. Ohio 1998). Further, the court is satisfied that the Debtor knew the falsity of at least some of his statements and omissions. For example, the Debtor's testimony clearly revealed an understanding that he never held a "partnership interest" in the Hounds Ear Point realty.⁷ The court infers further knowledge (and fraudulent intent) from the reckless disregard evident in the myriad omissions occurring throughout the Debtor's bankruptcy papers, particularly the omissions relating to his two business entities. See *id.* at 158 ("Knowledge may be shown by demonstrating that the debtor knew the truth, but nonetheless failed to give the information or gave contradictory information."); accord *Keeney*, 227 F.3d at 686.

While isolated errors or omissions are at times inevitable, the sheer volume of the Debtor's misstatements and omissions cannot be excused as mere inadvertence. Because these instances relate materially to the bankruptcy and occurred under oath with fraudulent intent and with knowledge of their falsity, the Debtor is not entitled to a discharge pursuant to § 727(a)(4)(A).

⁷ The issues of the Debtor's business sophistication and understanding of partnership law were not developed by either party at trial. However, at one point the Debtor testified that Insurance Recruiters, Inc. was set up as a "tax entity" solely to receive checks for the partnership Insurance Recruiters of Tennessee. From this and other testimony, the court has no trouble concluding that the Debtor knew what was, and what was not, partnership property.

Under § 727(a)(4)(D), the debtor may not withhold from the trustee any recorded information relating to the debtor's property or financial affairs. See 11 U.S.C.A. § 727(a)(4)(D). The debtor's withholding must be both knowing and fraudulent. See *id.*

Contrary to the assertions of the Debtor's counsel at trial, it is not the Trustee's responsibility in this case to gather necessary documentation by contacting, among others, the Delaware Secretary of State and the Debtor's bank. See *Morton v. Dreyer (In re Dreyer)*, 127 B.R. 587, 595 (Bankr. N.D. Tex. 1991) ("A debtor is under an affirmative duty to assist the Trustee in assembling records. The Trustee is not required to play detective and does not have the resources to do so."); accord *Gold v. Guttman (In re Guttman)*, 237 B.R. 643, 650 (Bankr. E.D. Mich. 1999) ("It was [the debtor's] duty to produce the requested documents. If he was not in possession of the documents, it was his duty to take action to obtain them and turn them over to the trustee, not to send the trustee in search of them."). As discussed above, the Debtor withheld from the Trustee recorded information pertinent to the Debtor's property and financial affairs. Because the Trustee's request for documentation was communicated directly to the Debtor at his § 341 meeting of creditors, there can be no question that the documents were knowingly withheld. Further, the court will infer a fraudulent intent from the Debtor's prolonged withholding of these documents. See *Guttman*, 237 B.R. at 650; *Rafoth v. Chimento (In re Chimento)*, 43 B.R. 401, 403 (Bankr. N.D. Ohio 1984). Section 727(a)(4)(D) therefore mandates that the Debtor's discharge be denied.

(d) 11 U.S.C.A. § 727(a)(5)

Lastly, § 727(a)(5) provides for the denial of a debtor's discharge where "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.A. § 727(a)(5) (West 1993). Once the objecting party meets his burden of proof, the burden then shifts to the debtor to "explain satisfactorily" the loss or deficiency of assets by demonstrating his good faith to the court. See *FDIC v. Hendren, (In re Hendren)*, 51 B.R. 781, 788 (Bankr. E.D. Tenn. 1985). The debtor must do more than merely produce vague explanations unsupported by documentation. See *id.* (The court need not accept "unsupported generalities" or a "vague, indefinite, and uncorroborated hodgepodge of financial transactions." (citations omitted)).

In explaining the dissipation of the \$15,850.00 payment from TIAA-CREF, the Debtor vaguely testified that the funds were used to pay "past business debts that I owed." The Debtor offered no supporting documentation. In evaluating the Debtor's testimony, the court notes that the multitude of omissions and misstatements previously discussed places the Debtor's credibility in grave doubt. Accordingly, the court finds his unsubstantiated explanation unsatisfactory. See *Hendren*, 51 B.R. at 788. Section 727(a)(5) dictates that the Debtor's discharge must be denied.⁸

⁸ In view of the frequent reminders from the Debtor's counsel that "this is not a business bankruptcy," the court recognizes that the \$15,850.00 TIAA-CREF payment is (or was) arguably an asset of Insurance Recruiters of Tennessee and/or Insurance Recruiters, Inc. The court employs the term "arguably" because the gross inadequacy of the Debtor's documentation and disclosures makes resolution of that issue impossible. Assuming, *arguendo*, that the payment was a business asset, the court notes that the Debtor scheduled at least one business debt - a \$7,775.00 breach of contract claim resulting from the Debtor's alleged partial conversion of the very same TIAA-CREF payment. It is therefore perfectly reasonable, under § 727(a)(5), to require a "satisfactory explanation" of why the purported "business" funds are unavailable to meet a scheduled "business" liability relating to those very same funds.

A judgment consistent with this Memorandum will be entered.

FILED: April 4, 2002

BY THE COURT

/s/

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

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Case No. 01-30656

STEPHEN G. MARSHALL

Debtor

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Plaintiff

v.

Adv. Proc. No. 01-3096

STEPHEN G. MARSHALL

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 Complaint filed July 20, 2001, objecting to the discharge of the Defendant Stephen G. Marshall, is SUSTAINED. The Defendant's discharge is accordingly DENIED.

ENTER: April 4, 2002

BY THE COURT

/s/

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE