

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

In re

Case No. 00-31629

TOMMY ALLEN MULLINS
d/b/a T. MULLINS JEWELERS

Debtor

MICHAEL H. FITZPATRICK, TRUSTEE

Plaintiff

v.

Adv. Proc. No. 00-3116

TOMMY A. MULLINS

Defendant

**MEMORANDUM ON DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

APPEARANCES: THE McCORD LAW FIRM, P.C.
David L. McCord, Esq.
Post Office Box 2046
Knoxville, Tennessee 37901
Attorneys for Plaintiff

TURNER & VITTONI
Jimmie D. Turner, Esq.
Joy L. Vittone, Esq.
1119 East Tri-County Boulevard
Oliver Springs, Tennessee 37840
Attorneys for Defendant

**RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE**

Michael H. Fitzpatrick, Trustee (Trustee), filed a Complaint on October 16, 2000, seeking denial of the Defendant/Debtor's discharge pursuant to 11 U.S.C.A. §§ 727(a)(2)(A), (a)(2)(B), and (a)(3).¹ By an Amended Complaint filed July 27, 2001 (collectively, the Complaint), the Trustee advances 11 U.S.C.A. §§ 727(a)(4)(A) and (a)(4)(D)² as further grounds for denial of the Debtor's discharge.

¹ (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; or

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

11 U.S.C.A. § 727(a)(2), (3) (West 1993).

² (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;

. . . .

(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).

Now before the court is the Debtor's Motion for Summary Judgment or in the Alternative for Partial Summary Judgment filed on August 15, 2001. The parties have briefed their respective positions. Additionally, the parties have filed the following documents:

1. Plaintiff's First Set of Interrogatories Propounded to Michael H. Fitzpatrick, Trustee, Plaintiff;
2. Trustee's document request, mailed to the Debtor on June 9, 2000;
3. Affidavit of the Debtor;
4. Affidavit of Frank Kerns;
5. Affidavit of Joseph B. Terry; and
6. Affidavit of Michael H. Fitzpatrick.

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

I

The Debtor operated a jewelry sales and repair business from approximately February 1999 through February 2000. On April 24, 2000, the Debtor filed a Voluntary Petition under Chapter 7. Attached to Schedule B of that petition is an itemized list of the business's remaining inventory, valued by the Debtor at \$3,796.70.

The Debtor purchased the assets of his business from Joseph and Bonnie Terry in late 1998 or early 1999. The Terrys purportedly received a promissory note and a security interest in the items transferred. By affidavit, Mr. Terry states that the inventory was sold to the Debtor at its wholesale value, \$21,866.00.

Mr. Terry further asserts that he frequently visited the Debtor's business in its final months of operation, last seeing the inventory in mid-February 2000. According to Mr. Terry, 80% of the Debtor's original inventory remained in stock at that time, supplemented by additional jewelry obtained from other sources. Based on his twenty-five years of experience in the jewelry business, Mr. Terry places a wholesale value of \$25,000.00 on the Debtor's February 2000 inventory, attributing approximately \$17,000.00 of that sum to items remaining from the Debtor's original stock.

The court also has before it the Affidavit of Frank Kerns. Mr. Kerns claims nearly twenty years experience as a jewelry wholesaler. According to his affidavit, through a consignment arrangement he placed jewelry with a wholesale value of \$5,518.45 into the Debtor's inventory. Mr. Kerns further states he inspected the Debtor's store "[j]ust prior to the debtor filing his bankruptcy petition." Mr. Kerns places a wholesale value of at least \$25,000.00 on the items in stock at that time, which included the majority of the items originally consigned to the Debtor.

Both Mr. Terry and Mr. Kerns state that they reviewed the inventory list attached to the Debtor's Schedule B. Each affiant contends that the list substantially understates the quantity and value of the Debtor's remaining merchandise.

By letter dated June 9, 2000, subsequent to the Debtor's § 341 meeting, the Trustee instructed the Debtor to provide:

1. Tax returns for the business for the last two years filed;
2. Monthly bank statements and cancelled checks for one year preceding April 24, 2000, and any subsequent statements; and
3. Any ledgers of the business.

The Debtor states that he more than complied with the Trustee's request by turning over all available records. The Trustee disagrees, pointing out that he has received no bank statements beyond February 2000. The Trustee additionally claims that the business records provided to him are "insufficient, incomplete and of no value" to him in resolving the alleged inventory discrepancy.

II

Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c) (made applicable to this adversary proceeding by FED. R. BANKR. P. 7056). The Debtor, as movant, bears the initial burden of proving both that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. *See Owens Corning v. National Union Fire Ins. Co.*, 257 F.3d 484, 491 (6th Cir. 2001).

The burden then shifts to the nonmoving party to demonstrate that there is in fact a genuine issue for trial. *See Harris v. General Motors Corp.*, 201 F.3d 800, 802 (6th Cir. 2000). In so

doing, the nonmovant must cite specific evidence and may not merely rely on allegations contained in the pleadings. *See id.*

Inferences drawn from the facts are to be viewed in the light most favorable to the nonmovant. *Morales v. American Honda Motor Co.*, 71 F.3d 531, 535 (6th Cir. 1995) (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356 (1986)). There is no “genuine issue for trial” if “the record taken as a whole could not lead a rational trier of fact to find for the non-moving party[.]” *Owens Corning*, 257 F.3d at 491 (quoting *Matsushita*, 106 S. Ct. at 1356).

III

The recurring theme of the Debtor’s summary judgment argument as set forth in his Brief in Support of Motion for Summary Judgment (Brief) is that the Trustee has not plead sufficient facts in support of his Complaint.

On a related note, the Debtor’s August 15, 2001 Answer to Amended Complaint raises a FED. R. CIV. P. 9(b)³ defense to most of the Trustee’s allegations. However, other than by indirect statements within the Debtor’s Brief, where he appears to occasionally allude to Rule 9(b),⁴ he has not further advanced that defense.

³ Rule 9(b), through FED. R. BANKR. P. 7009, requires that “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.”

⁴ “There is no statement of any information and facts upon which the allegation is based” is representative of the arguments contained in the Debtor’s Brief.

The court is perplexed by the motion before it. Although labeled a summary judgment motion, the argument advanced by the Debtor in his Brief is couched more in terms that would support a motion to dismiss. As the Sixth Circuit has explained, the two motions are not one in the same:

[There is a] distinction between a motion for summary judgment and a motion to dismiss for failure to state a claim. While a motion to dismiss for failure to state a claim is a challenge to the sufficiency of the plaintiff's allegations, a motion for summary judgment is a challenge to the sufficiency of the plaintiff's proof. A motion to dismiss for failure to state a claim argues that even if the plaintiff's allegations are true, the plaintiff is still not entitled to relief under the applicable law. On the other hand, a motion for summary judgment does not accept the plaintiff's allegations as true, but rather argues that the plaintiff cannot prove his claim.

Searcy v. City of Dayton, 38 F.3d 282, 286 (6th Cir. 1994).

In the end, this court can decide only the motion that it has before it - the Motion for Summary Judgment or in the Alternative for Partial Summary Judgment, brought by the Debtor pursuant to Rule 56 of the Federal Rules of Civil Procedure and Bankruptcy Rule 7056." The court will therefore proceed to resolve that motion - as it is bound to do - by applying the summary judgment standard of Rule 56(c) as outlined above.

(a) 11 U.S.C.A. § 727(a)(2)

To sustain his objections to discharge under § 727(a)(2), the Trustee must prove that:

1. the act complained of was either done at a time within one year of the date of filing of the petition [§ 727(a)(2)(A)] or the act was done with respect to the property of the estate after the filing of the petition [§ 727(a)(2)(B)];
2. the act was done with intent to hinder, delay or defraud a creditor or an officer of the estate charged with custody of property under the Bankruptcy Code;

3. the act was that of the debtor or his duly authorized agent; and
4. the act consisted of transferring, removing, destroying or concealing any of the debtor's property or permitting any of these acts to be done.

Secretary of Labor v. Hargis (In re Hargis), 44 B.R. 225, 228 (Bankr. W.D. Ky. 1984).

Through the Terry and Kerns affidavits, the Trustee has offered evidence that a substantial amount of the Debtor's business inventory is unaccounted for. Viewing the resulting inferences from that fact in the light most favorable to the Trustee, *see Matsushita*, 106 S. Ct. at 1356, genuine issues of fact exist for trial under both prongs of § 727(a)(2).

(b) 11 U.S.C.A. § 727(a)(4)(A)

To succeed in his § 727(a)(4)(A) objection, the Trustee 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.

Hunter v. Sowers (In re Sowers), 229 B.R. 151, 158 (Bankr. N.D. Ohio 1998).

The Trustee points to the discrepancies relating to the itemized inventory filed with the Debtor's Schedule B. According to the Trustee's affidavit, the Debtor confirmed the truthfulness and accuracy of his statements and schedules during his § 341 meeting.

Statements contained in a Debtor's bankruptcy schedules qualify as occurring under oath for purposes of § 727(a)(4)(A), as does testimony given at a § 341 meeting. See *Sowers*, 229 B.R. at 158. Viewing again the inferences raised by the Terry and Kerns affidavits in the light most favorable to the Trustee, genuine issues of fact remain for trial under § 727(a)(4)(A).

(c) 11 U.S.C.A. § 727(a)(3), (a)(4)(D)

Section 727(a)(3) requires debtors to provide creditors and trustees "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) (citation omitted). Somewhat similarly, § 727(a)(4)(D) prohibits debtors from knowingly and fraudulently withholding any recorded information relating to their property or financial affairs. See 11 U.S.C.A. § 727(a)(4)(D).

In his affidavit, the Trustee states that the Debtor's financial records are insufficient to account for the inventory discrepancies alleged in the Terry and Kerns affidavits. The Trustee further states that the Debtor has not provided all of the financial documentation requested on June 9, 2000. This evidence, when coupled with the purported inventory discrepancies and viewed in the light most favorable to the Trustee, demonstrates the existence of genuine issues of material fact regarding both § 727(a)(3) and (a)(4)(D).

IV

For the reasons discussed herein, the Debtor's Motion for Summary Judgment or in the Alternative for Partial Summary Judgment must be denied. An order consistent with this Memorandum will be entered.

FILED: October 9, 2001

BY THE COURT

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

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

In re

Case No. 00-31629

TOMMY ALLEN MULLINS
d/b/a T. MULLINS JEWELERS

Debtor

MICHAEL H. FITZPATRICK, TRUSTEE

Plaintiff

v.

Adv. Proc. No. 00-3116

TOMMY A. MULLINS

Defendant

ORDER

For the reasons stated in the Memorandum on Defendant's Motion for Summary Judgment filed this date, the court directs that the Motion for Summary Judgment or in the Alternative for Partial Summary Judgment filed by the Defendant on August 15, 2001, is DENIED.

SO ORDERED.

ENTER: October 9, 2001

BY THE COURT

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE