

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: )  
)  
DALE & CAROL CARLSON, ) CASE NO. BK01-41001  
)  
Debtor. ) A01-4048  
\_\_\_\_\_)  
EDWARD A. COOK III and FIRST )  
STATE BANK, co-personal repre- ) CH. 7  
sentatives of the Estate of )  
Hugh Ralston, deceased, )  
)  
Plaintiff, )  
vs. )  
)  
DALE & CAROL CARLSON, )  
)  
Defendant. )

MEMORANDUM

Hearing was held in Lincoln, Nebraska, on February 13, 2002, on Defendants' Motion to Dismiss (Fil. #26) and Plaintiffs' Objection (Fil. #27). Richard Gee appeared for the debtor defendants and James McClymont appeared for the plaintiffs. This memorandum contains findings of fact and conclusions of law required by Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(J).

The motion is denied.

The plaintiffs filed this adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7001 to object to the discharge of the debtors in accordance with 11 U.S.C. § 727. The plaintiffs allege that debtors transferred real and personal property within one year before filing their bankruptcy petition, and did not disclose the transfers or their interest in the property in their bankruptcy schedules. The plaintiffs also assert that the debtors refuse to or have failed to disclose financial and business information regarding the alleged transfers.

The debtors have filed a motion to dismiss the adversary proceeding, arguing that the case is really a contract issue and is not a core proceeding under the Bankruptcy Code. The debtors also assert that the facts are not as stated in the plaintiffs' complaint.

At the hearing on this motion, evidence was received and oral argument heard. The plaintiffs offered the transcripts of the debtors' Rule 2004 examinations, but ruling on their admissibility was deferred pending review of the debtors' objections to the offer of that evidence. Although the debtors were given additional time after the hearing in which to review the transcripts and file an affidavit regarding their accuracy, no such affidavit was filed.

In ruling on this motion, however, I have not reviewed the transcripts, and I sustain the debtors' objection to their admission for purposes of this motion. The present motion is a motion to dismiss the adversary, presumably under Fed. R. Bankr. P. 7012 as it incorporates Fed. R. Civ. P. 12(b). To the extent it is a motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(2), the motion is denied because it is clear from the face of the complaint that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(J) objecting to discharge. To the extent it is a motion to dismiss for failure to state a claim under Rule 12(b)(6), such motions are generally decided on the pleadings, without additional evidence. If additional evidence is considered, the motion should be treated as a motion for summary judgment under Fed. R. Civ. P. 56 and Fed. Rule Bankr. P. 7056. See Fed. R. Civ. P. 12(b).

The present motion can be decided without resort to matters outside the pleadings. The question when considering a Rule 12(b)(6) motion is whether the facts alleged in the complaint support the claim asserted. For purposes of the motion, all factual allegations of the complaint, as well as all reasonable inferences to be drawn therefrom, must be taken as true. Doe v. Delie, 257 F.3d 309, 313 (3d Cir. 2001). A complaint may be dismissed pursuant to Rule 12(b)(6) only if it is manifestly obvious that relief cannot be granted under any set of facts that could be proved consistent with the allegations made. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

The issue is not whether the plaintiff will ultimately prevail but whether the plaintiff is entitled to an opportunity to offer evidence in support of the claim. Scheuer v. Rhodes,

416 U.S. 232, 236 (1974). Here, the plaintiffs allege that denial of discharge is appropriate under 11 U.S.C. § 727(a)(2), (a)(3), and (a)(4). Because it appears from the face of the complaint that the plaintiffs may be able to prove facts in support of their claims, the motion to dismiss is denied.

Denial of discharge is "a serious matter not to be taken lightly by a court." McDonough v. Erdman (In re Erdman), 96 B.R. 978, 984 (Bankr. D.N.D. 1988). The provisions of § 727 are strictly construed in the debtor's favor, while remaining cognizant that § 727 exists to prevent a debtor's abuse of the Bankruptcy Code. Fox v. Schmit (In re Schmit), 71 B.R. 587, 589-90 (Bankr. D. Minn. 1987). The objecting party must prove each element by a preponderance of the evidence. Korte v. Internal Revenue Serv. (In re Korte), 262 B.R. 464, 471 (B.A.P. 8th Cir. 2001)

Section 727(a)(2) of the Bankruptcy Code denies a debtor a discharge if he or she, with intent to hinder, delay, or defraud a creditor, transferred, removed, destroyed, mutilated, or concealed property of the debtor or property of the estate.

To succeed on a § 727(a)(2) claim, the creditor must establish by a preponderance of the evidence that the debtor committed the act complained of, resulting in transfer, removal, destruction or concealment of property belonging to the debtor or the estate, within the statutory time period, with the intent to hinder, delay or defraud a creditor or officer of the estate. Kaler v. Craig (In re Craig), 195 B.R. 443, 449 (Bankr. D.N.D. 1996).

Here, the plaintiffs allege that the debtors transferred property within a year before the bankruptcy filing, in an effort to hinder, delay, or defraud the plaintiffs. Such allegations, if supported by evidence, are sufficient to cause a denial of discharge. Accordingly, the plaintiffs are entitled to go forward with this claim.

Section 727(a)(3) denies a discharge to a debtor who has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which his financial condition or business transactions might be ascertained.

That section does not contain an intent element, but rather imposes a standard of reasonableness. The debtor is required "to

take such steps as ordinary fair dealing and common caution dictate to enable the creditors to learn what he did with his estate." Davis v. Wolfe (In re Wolfe), 232 B.R. 741, 745 (B.A.P. 8th Cir. 1999) (quoting First State Bank of Newport v. Beshears (In re Beshears), 196 B.R. 468, 474 (Bankr. E.D. Ark. 1996)).

Here, the plaintiffs have alleged that the debtors failed to keep or produce records regarding their conveyance of property into a trust and the nature of that trust. According to the complaint, that alleged failure has prevented these creditors from learning what, if anything, the debtors have done with their property. If the plaintiffs are able to provide proof to support these allegations, relief could be granted thereon. Accordingly, the claim withstands the motion to dismiss.

Section 727(a)(4) of the Bankruptcy Code denies a debtor a discharge if, in or in connection with the case, he or she knowingly and fraudulently made a false oath or account; presented or used a false claim; withheld any recorded information regarding his or her property or financial affairs; or gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act.

Courts do not look kindly upon scheming and dishonest debtors. As the Bankruptcy Appellate Panel of the Eighth Circuit has stated:

Section 727(a)(4)(A) "provides a harsh penalty for the debtor who deliberately secretes information from the court, the trustee, and other parties in interest in his case." Cepelak v. Sears (In re Sears), 246 B.R. 341, 347 (8th Cir. B.A.P. 2000). That provision provides in relevant part that a debtor is entitled to a discharge unless he "knowingly and fraudulently, in or in connection with the case . . . made a false oath or account." 11 U.S.C. § 727(a)(4)(A) (1994). For such a false oath or account to bar a discharge, the false statement must be both material and made with intent. . . . Noting that the "threshold to materiality is fairly low," this court recently articulated the standard for materiality: "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 his property." In re Sears, 246 B.R. at 347 (quoting In re Chalik, 748 F.2d at 618). The question of a debtor's "knowledge and intent under § 727(a)(4) is a matter of fact." In re Sears, 246 B.R. at 347 . . . Intent "can be established by circumstantial evidence," and "statements made with reckless indifference to the truth are regarded as intentionally false." Golden Star Tire, Inc. v. Smith (In re Smith), 161 B.R. 989, 992 (Bankr. E.D. Ark. 1993) (citing In re Sanders, 128 B.R. 963, 964 (Bankr. W.D. La. 1991)).

As § 727(a)(4)(A) makes clear, "[t]he Code requires nothing less than a full and complete disclosure of any and all apparent interests of any kind." Fokkena v. Tripp (In re Tripp), 224 B.R. 95, 98 (Bankr. N.D. Iowa 1998). . . . The debtor's "petition, including schedules and statements, must be accurate and reliable, without the necessity of digging out and conducting independent examinations to get the facts." In re Sears, 246 B.R. at 347 . . . Statements made in schedules are signed under penalties of perjury and have "the force and effect of oaths," and testimony elicited at the first meeting of creditors is given under oath. In re Smith, 161 B.R. at 992 (citing In re Sanders, 128 B.R. 963 (Bankr. W.D. La. 1991)).

Korte v. Internal Revenue Serv. (In re Korte), 262 B.R. 464, 474 (B.A.P. 8th Cir. 2001) (some internal citations omitted).

In order to demonstrate that discharge should be denied under § 727(a)(4), the plaintiff must prove by a preponderance of the evidence:

- (1) the debtor made a statement 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.

Johnson v. Baldrige (In re Baldrige), 256 B.R. 284, 289 (Bankr. E.D. Ark. 2000) (citing Kaler v. McLaren (In re McLaren), 236 B.R. 882, 894 (Bankr. D.N.D. 1999) and Allied Domecq Retailing USA v. Schultz (In re Schultz), 2000 WL 575505, \*7 (Bankr. N.D. Ohio Apr. 21, 2000)).

False statements as well as omissions from the schedules may qualify as false oaths if they are made knowingly and with fraudulent intent. Baldrige, 256 B.R. at 289.

Here, the plaintiffs allege that the debtors failed to include in their bankruptcy schedules information about the conveyance of property and that they withheld such information from the Chapter 7 Trustee. Again, much remains to be proven, but the allegations stated by plaintiffs in their complaint appear sufficient to support a denial of discharge if they are proven. Therefore, the motion to dismiss is denied as to this claim.

The movant should understand that the foregoing discussion and the denial of the motion to dismiss is not a determination that the plaintiffs' claims have merit or that they ultimately will be able to prove any of their allegations; it is simply a finding that the plaintiffs have stated their claims sufficiently to survive a motion to dismiss and go forward with the lawsuit. Any dispute as to the merits of the action or lack of proof for the factual allegations are more appropriately raised in the context of a motion for summary judgment.

For the foregoing reasons, the Defendants' Motion to Dismiss (Fil. #26) is denied. Separate order to be filed.

DATED: March 25, 2002

BY THE COURT:

/s/Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

Copies faxed by the Court to:

James McClymont, Atty. for Plaintiffs, FAX 308/534-0248  
Electronic notice to United States Trustee

Copies mailed by the Court to:

Philip Kelly, Chap. 7 Trustee  
\*Richard Gee, Atty. for Debtor/Defendants, 916 W. 1st St.,  
Grand Island, NE 68801

Movant (\*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.

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Plaintiff, )  
vs. )  
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DALE & CAROL CARLSON, )  
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ORDER

Hearing was held in Lincoln, Nebraska, on February 13, 2002, on Defendants' Motion to Dismiss (Fil. #26) and Plaintiffs' Objection (Fil. #27). Richard Gee appeared for the debtor defendants and James McClymont appeared for the plaintiffs.

IT IS ORDERED Defendants' Motion to Dismiss (Fil. #26) is denied. See Memorandum filed this date.

DATED: March 25, 2002

BY THE COURT:

/s/Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

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