

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
TIMOTHY WAYNE RUSSELL,)
) CASE NO. BK01-42811
Debtor(s).)
A02-4005
JULIAN AG SERVICE,)
)
Plaintiff,) CH. 7
)
vs.)
)
TIMOTHY WAYNE RUSSELL,)
)
Defendant.)

MEMORANDUM

Trial was held in Lincoln, Nebraska, on March 7, 2003, on the complaint filed by Julian Ag Service. Robert William Chapin, Jr., appeared for the plaintiff and Willis G. Yoesel appeared for debtor/defendant Timothy Wayne Russell. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(I) and (J).

I. BACKGROUND

The plaintiff brought this adversary proceeding against the defendant on the theory that the defendant had, by his receipt of checks from the plaintiff, obtained money from the plaintiff under false pretenses, a false representation, or actual fraud. Plaintiff requests an order denying the debtor a discharge of the specific obligation owed to the plaintiff under 11 U.S.C. § 523(a)(2)(A), and under 11 U.S.C. § 727(a)(2), (3), and (5).

II. LAW

A. 11 U.S.C. § 523(a)(2)(A)

For a debt to be declared nondischargeable under § 523(a)(2)(A) for fraud, the creditor must show, by a

preponderance of the evidence, that: (1) the debtor made a representation; (2) the representation was made at a time when the debtor knew the representation was false; (3) the debtor made the representation deliberately and intentionally with the intention and purpose of deceiving the creditor; (4) the creditor justifiably relied on such representation; and (5) the creditor sustained a loss as the proximate result of the representation having been made. Universal Bank, N.A. v. Grause (In re Grause), 245 B.R. 95, 99 (B.A.P. 8th Cir. 2000) (citing Thul v. Ophaug (In re Ophaug), 827 F.2d 340, 342 n.1 (8th Cir. 1987), as supplemented by Field v. Mans, 516 U.S. 59 (1995)). In Field v. Mans, the Supreme Court held that § 523(a)(2)(A) requires justifiable reliance, in which "[j]ustification is a matter of the qualities and characteristics of the particular plaintiff, and the circumstances of the particular case, rather than of the application of a community standard of conduct to all cases." Id. at 71 (citing the Restatement (Second) of Torts § 545A cmt. b (1976)).

B. 11 U.S.C. § 727(a)(2)

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).

C. 11 U.S.C. § 727(a)(3)

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)).

D. 11 U.S.C. § 727(a)(5)

Section 727(a)(5) of the Bankruptcy Code denies a debtor a discharge if he or she has failed to explain satisfactorily any loss of assets or deficiency of assets to meet his or her liabilities. Section 727(a)(5) does not contain an intent element as part of its proof. First St. Bank of Newport v. Beshears (In re Beshears), 196 B.R. 468, 473 (Bankr. E.D. Ark. 1996).

Under section 727(a)(5), when the plaintiff demonstrates a loss of assets, the burden of proof shifts to the debtor to explain the loss. United States v. Hartman (In re Hartman), 181 B.R. 410, 413 (Bankr. W.D. Mo. 1995). If the debtor's explanation is too vague, indefinite, or unsatisfactory then the debtor is not entitled to a discharge. Id. Moreover, the debtor must "explain his losses or deficiencies in such a manner as to convince the court of good faith and businesslike conduct." Miami National Bank v. Hacker (In re Hacker), 90 B.R. 994, 996 (Bankr. W.D. Mo. 1987) (quoting 1A Collier on Bankruptcy ¶ 14.59 at 1436 (14th ed. 1976)). The explanation should be sufficient so the court does not have to speculate as to what happened to the assets or speculate as to the veracity of the explanation. Beshears, 196 B.R. at 473 (citing Bay State Milling Co. v. Martin (In re Martin), 145 B.R. 933 (Bankr. N.D. Ill. 1992), appeal dismissed, 151 B.R. 154 (N.D. Ill. 1993)).

III. DECISION

The plaintiff has failed to prove all of the elements

necessary to obtain a judgment of nondischargeability under Section 523(a)(2) or Section 727(a)(2), (3), or (5). Therefore, the obligation, if any, running from the defendant to the plaintiff is discharged, but for the total of \$1,500 ordered as restitution in the state court criminal action.

IV. FACTS

During the years 1998 and 1999, and part of 2000, and for several years prior to 1998, defendant's father, Dan Russell, was the manager of the elevator owned by the plaintiff. Dan Russell had apparent or actual authority to hire seasonal and part-time employees, without obtaining permission of the owners of the business. Tim Russell, the defendant, had worked at the elevator off and on since he was a young teenager. After he graduated from high school in 1994, he continued to work part-time and seasonally at the elevator. He did not have any regular work hours, but when his father would call and ask for help, he worked as many hours as necessary to complete the job that he was assigned.

Tim's work at the elevator included loading and unloading trucks, cleaning up, running errands, and, specifically, driving to Topeka, Kansas, to pick up checks, all at the request of his father. During the calendar years 1998 and 1999 and for a few months in the early part of calendar year 2000, Tim received checks from the elevator, signed by his father, in the total amount of \$11,545.80.

Tim's father, Dan, ended his employment at the elevator in March of 2000. Thereafter, the owners of the elevator discovered what they believed to be a serious shortage in funds belonging to the elevator. They have accused Daniel Russell of either embezzlement or misapplication of funds to the tune of approximately \$100,000. The \$11,545.80 paid to Tim is part of the amount that Dan is claimed to have misapplied.

When the discrepancy in the accounts was discovered, the owners reviewed the checks paid to Tim. They found no information in the records of the elevator which would indicate that Tim was paid as an employee, was provided an Internal Revenue Service W-2 form or Internal Revenue Service 1099 form, and they found no checkbook records which would support Tim's position that the funds he received were earned by him for personal services or for reimbursement of expenses incurred by him on behalf of the elevator.

The owners apparently caused criminal charges to be filed against Tim and against his father. The charges against Tim included "receipt of stolen property," with no particular identification of the property or the value of the property received. Tim pleaded "no contest" and was found guilty of the felony of receiving stolen property. He was placed on probation and ordered to pay restitution in the amount of \$1,500.00. He has made all or almost all of the payments on restitution and remains under probation supervision.

At the time involved in the receipt of the \$11,545.80, Tim was in his early 20s and had little or no other employment. He dealt with his father with regard to his job duties at the elevator and he was paid by his father.

After the criminal charges were filed and the plea entered, the elevator filed suit in state court in an attempt to obtain a judgment against Tim for the \$11,545.80. Prior to judgment being entered, this Chapter 7 case was filed. Thereafter, the adversary proceeding was filed.

The elevator, during the time Dan operated it, and to this day, does not have a time clock for its employees. Usually it has only one employee, the manager. However, during certain times of each year, Dan had employed the services of Tim, and the new management employed the services of part-time and seasonal workers. None of them punch into a time clock, and no time records are kept for their employment.

In his defense, Tim testified that all of the money he received was earned by him either for services rendered or for reimbursement of expenses incurred, such as gasoline charges when he traveled to Topeka or elsewhere. The current manager testified that he was an employee of the elevator during the years in question and, although he saw Tim on occasion, and specifically during the harvesting season, he did not recall seeing Tim at the elevator on a regular basis. His testimony is, basically, that Tim was not there and could not have earned the funds represented by the checks which are in evidence. He did acknowledge, however, that Tim did work part-time, particularly during the harvest season, and he did acknowledge that he even saw Tim in Topeka on one occasion in 1998, on a trip requested by Dan.

Neither party presented any records to support either the position of Tim that he received payments for services rendered

or the position of the elevator that Tim did not provide any services. The elevator was operated then, and now, without keeping time records for its employees.

Tim denies that he received any funds that were unearned. The elevator has presented no evidence to support its position that the funds were not earned, other than the testimony of the current manager who, admittedly, was not present at all times and who did acknowledge that Tim worked some of the time.

V. CONCLUSION

There is no direct evidence and no evidence upon which an inference can be made that Tim received the checks in question by false pretenses, false representation, or actual fraud. There is no evidence that Tim did any of the things necessary to deny him a discharge under Section 727(a)(2), (3), or (5). Tim's plea of no contest, and the finding of guilty to the charge of receiving stolen property is relevant only to the extent that he acknowledged that he did receive some property from the elevator that he did not have a right to receive. The charge does not specifically relate to the checks in question, and the guilty plea is not determinative of his culpability in this bankruptcy case with regard to these checks and the statutory requirements concerning nondischargeability and denial of a discharge.

For a plaintiff to be successful under 11 U.S.C. § 523(a)(2)(A) or § 727(a)(2), (3), or (5) the plaintiff must present evidence on all of the elements of each of those sections.

Separate judgment will be entered.

DATED: May 27, 2003

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

*Robert William Chapin, Jr.
Willis G. Yoesel
United States Trustee

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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JUDGMENT

Trial was held in Lincoln, Nebraska, on March 7, 2003, on the complaint filed by Julian Ag Service. Robert William Chapin, Jr., appeared for the plaintiff and Willis G. Yoesel appeared for debtor/defendant Timothy Wayne Russell.

IT IS ORDERED: For the reasons stated in the Memorandum entered this date, judgment is hereby entered in favor of the debtor/defendant. This debt, other than \$1,500 previously ordered as restitution, is discharged.

DATED: May 27, 2003

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

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