

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF: )  
)  
SANDRA PAWLUSIAK, )  
) CASE NO. BK03-80540  
Debtor(s). )  
) A03-8049  
KEITH PAWLUSIAK, )  
)  
Plaintiff, ) CH. 7  
)  
vs. )  
)  
SANDRA PAWLUSIAK, )  
)  
Defendant. )

MEMORANDUM

Trial was held in Omaha, Nebraska, on November 14, 2003, on the complaint objecting to discharge of the debtor. Bernard McNary appeared for the debtor, and Keith Pawlusiak appeared on his own behalf. 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)(J).

I. Facts

The debtor and the plaintiff were married for a number of years. Mr. Pawlusiak suffered an injury in the course of his employment and was incapacitated for a significant period of time. His wife was named initially as a guardian for him and, in 1992, in connection with obtaining workers' compensation benefits for him, she was appointed his conservator. Eventually, the plaintiff received a settlement of his workers' compensation claim, including an up-front lump-sum payment and an annuity which is payable in five-year increments. In 1994, during the term of the guardianship and conservatorship, Mrs. Pawlusiak purchased a house on the parties' behalf. That purchase was approved by the probate division of the Douglas County Court.

The county court terminated the guardianship and conservatorship in 1996. Mrs. Pawlusiak filed for divorce in 1998. A divorce decree has been entered and appealed to the Nebraska Supreme Court with regard to the property division elements of the decree. The court affirmed the determination of

the trial court, but a final resolution of the distribution of the property remains to be had.

The debtor, who was employed during most of the marriage, became disabled and currently receives Social Security disability benefits. She was awarded the house in the divorce decree, subject to a lien of a little more than \$3,000 in favor of the plaintiff. Because of her disability and lack of income, and his apparent failure to pay child support, she was unable to make the house payments and the house was foreclosed and sold in January 2003. Thereafter, she filed this Chapter 7 bankruptcy case and listed a debt to the plaintiff, representing the judicial lien on the equity in the house awarded in the decree of dissolution.

Mr. Pawlusiak then filed this adversary proceeding objecting to the discharge of the debtor's liability on her debts, alleging that she committed fraud while acting as his guardian and conservator.

## II. Law

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).

The applicable subsections under which Mr. Pawlusiak's allegations may fall include the following:

### A. 11 U.S.C. § 727(a)(2)

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).

B. 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 or her 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)).

C. 11 U.S.C. § 727(a)(4)

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.

In order to demonstrate that discharge should be denied under § 724(a)(4), a 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)).

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).

### III. Discussion and Conclusion

Mr. Pawlusiak asserts that the debtor should not receive a discharge because, during the now-closed conservatorship, she purchased the house without indicating that he was under conservatorship. He presented no evidence that the debtor misled anyone concerning her capacity as guardian and conservator, nor that anyone was harmed by her action in purchasing the house. He is upset about her sale of the first house and purchase of the second one, and believes she misused his money while she was his conservator.

However, that question was within the jurisdiction of the probate court, and the evidence shows that she received authority from the probate court to enter into the purchase of the house. In addition, the question could have been raised in the divorce court, but it entered a decree granting her the house and giving him a lien. Therefore, this court has no general jurisdiction over the question concerning her activities in the guardianship and conservatorship.

Based on the evidence presented, I find no evidence of fraud by the debtor, and a discharge should be granted. A separate judgment will be filed.

DATED: November 21, 2003

BY THE COURT:

/s/ Timothy J. Mahoney  
Chief Judge

Notice given by the court to:

Keith Pawlusiak  
Bernard McNary

Richard Myers  
U.S. Trustee

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JUDGMENT

Trial was held in Omaha, Nebraska, on November 14, 2003, on the complaint objecting to discharge of the debtor. Bernard McNary appeared for the debtor, and Keith Pawlusiak appeared on his own behalf.

IT IS ORDERED: For the reasons stated in the Memorandum filed this date, judgment is hereby entered in favor of the debtor and against the plaintiff. A discharge shall be entered in the bankruptcy case.

DATED: November 21, 2003

BY THE COURT:

/s/ Timothy J. Mahoney  
Chief Judge

Notice given by the court to:  
Keith Pawlusiak  
Bernard McNary  
Richard Myers  
U.S. Trustee