

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
WYNN HALL,)
)
Debtor(s).) CASE NO. BK01-41034
)
) A01-4042
NANCY G. WALDRON,)
)
Plaintiff,) CH. 7
)
)
vs.)
)
WYNN HALL,)
)
Defendant.)

MEMORANDUM

Trial on the adversary complaint was held in Lincoln, Nebraska on July 1, 2003. Nancy G. Waldron appeared pro se; Jeremy Murphy appeared for the debtor/defendant. 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).

BACKGROUND

The plaintiff, a former attorney for the defendant in the defendant's dissolution of marriage action, brought this adversary proceeding to obtain an order denying the debtor/defendant a discharge. The position of the plaintiff, as recited in the Joint Preliminary Pretrial Statement (Fil. #16), is that on the petition date debtor owned a 1967 Ford Mustang worth \$4,000 which was not listed on his schedule of assets. In addition, on the petition date the debtor owned furniture, purchased within nine months of the date of the petition, with a value of approximately \$3,000. The furniture was not listed as an asset. Finally, as part of the furniture purchase transaction, the debtor received from the furniture store airline tickets which had value and which were in the possession of the debtor on the petition date, but were not listed as an asset.

The Bankruptcy Code at 11 U.S.C. § 727(a)(2) provides that the debtor shall be denied a discharge if the debtor, with intent to hinder, delay or defraud a creditor, has transferred, removed, destroyed, mutilated, or concealed property of the debtor within one year before the date of filing of the petition. In addition, Section 727(a)(4) permits the court to deny the debtor a discharge if the debtor knowingly and fraudulently, in connection with the case, made a false oath or account.

FINDING OF FACTS, CONCLUSIONS OF LAW, AND DISCUSSION

The plaintiff asserts that, both by failing to schedule the assets listed above and by testifying at the meeting of creditors under questioning by the trustee that the schedules accurately reflected the assets and liabilities of the debtor, the debtor has violated both subsections of Section 727(a) and he should be denied a discharge.

Trial was held on July 1, 2003. The debtor testified on direct and cross-examination by both counsel to the following effect:

1. The Mustang was transferred to his mother prior to bankruptcy, and for consideration. A description of the transaction is contained in answer 10 on the Statement of Financial Affairs.

2. He inadvertently left off his interest, if any, in the furniture, because, first of all, he forgot. Second, he is not sure that he has an interest in the furniture because his wife paid for all of it from her separate funds.

3. He had not received airline tickets at the time of the purchase of the furniture. He received a voucher which would permit him and his wife, upon request, to receive a two-day vacation, including airfare and hotel accommodations. The vouchers were non-transferable and could be used only by him and his spouse. As with the furniture, he forgot to list the asset. On the other hand, from his point of view, the voucher has no value to any other party, although he does acknowledge that it was property of his on the date of his bankruptcy.

During the trial, both the debtor and his mother testified concerning the transaction regarding the Ford Mustang. They both agreed that she loaned him \$3,500 which was paid directly

to his appellate counsel in the dissolution of marriage case. As security for the loan of \$3,500, he delivered possession of the vehicle to his mother and she was allowed to title the vehicle in her name. Their agreement included a provision that if he repaid the \$3,500 plus interest pursuant to an amortization schedule, he could basically redeem the property from her. In other words, although title transferred, the grant of title was for security purposes only.

The problem that arises from the testimony and the evidence presented in support of the testimony is that the debtor failed to schedule his mother as a creditor, either secured or unsecured. Therefore, this is another example of a serious error in the preparation of the documentation of the assets and liabilities of the debtor.

Although there is case law to the effect that any failure to list assets or liabilities on the schedules or any failure to testify truthfully about the assets and liabilities of the debtor can result in a denial of the discharge, the majority view is that it is the high burden of the plaintiff to prove the elements of intentional fraud or intentional false statements on behalf of the debtor.

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).

To deny a debtor a discharge under § 727(a)(4)(A), for making a false oath or account in a bankruptcy proceeding, the false statement must be both material and made with intent. Gray v. Gray (In re Gray), ___ B.R. ___, 2003 WL 21419260, at *3 (Bankr. W.D. Mo. June 17, 2003) (quoting Korte v. United States Internal Revenue Service (In re Korte), 262 B.R. 464, 474 (B.A.P. 8th Cir. 2001)).

Deliberate omissions from the schedules may constitute false oaths and result in the denial of a discharge. Chalik v. Moorefield (In re Chalik), 748 F.2d 616, 618 (11th Cir. 1984). Since defendants will rarely admit their fraudulent intent, actual intent may be established by circumstantial evidence. Weese v. Lambert (In re Lambert), 280 B.R. 463, 468 (Bankr. W.D. Mo. 2002).

Gray, ___ B.R. ___, 2003 WL 21419260, at *3.

Courts may deduce fraudulent intent from all the facts and circumstances of a case. Keeney v. Smith (In re Keeney), 227 F.3d 679, 686 (6th Cir. 2000). However, a debtor is entitled to discharge if false information is the result of mistake or inadvertence. Id. (citing Gillickson v. Brown (In re Brown), 108 F.3d 1290, 1294 (10th Cir. 1997)). An honest error or mere inaccuracy is not a proper basis for denial of discharge. Brown, 108 F.3d at 1295 (citing In re Magnuson, 113 B.R. 555, 559 (Bankr. D.N.D. 1989)).

CONCLUSION

I find the debtor's testimony to be credible. He is a relatively young man who works as a farmhand. He was involved in an acrimonious dissolution of marriage, and was dissatisfied with the result. He needed to appeal the result of the dissolution of marriage and, to do so, needed to pay a retainer to appellate counsel. The retainer amount was \$3,500, which he did not have. His mother provided the funds, but wanted security. He gave her the car as security. The transaction was fully disclosed in the Statement of Financial Affairs, although the transaction was described as a sale and the repayment obligation to his mother was not properly described on either the schedules or the Statement of Financial Affairs.

He entered into a contract with regard to the furniture in September of 2000. The furniture was financed through an entity with a lending relationship to the furniture outlet. His spouse paid more than \$1,800 of the approximate \$2,000 purchase price. He paid one payment of \$164. The voucher he received as a result of the purchase contract was not exercised until after the bankruptcy case was filed.

The debtor had no motivation for concealing his ownership, or an interest in, furniture used for household purposes. It has no value to creditors because of the Nebraska exemption statutes. The voucher presents a similar situation.

It is a little more difficult for me to understand his failure to list the obligation to his mother concerning the \$3,500 payment for the car. He signed a promissory note within a week of filing the bankruptcy case. The note should have been listed. However, he did disclose the transfer to his counsel and the transaction was generally but inaccurately described on the Statement of Financial Affairs, and all creditors had an opportunity to realize there was a transfer of the vehicle prior to bankruptcy.

His failure to schedule the assets is not excused, but I find no intent to defraud and I find no intentionally misleading statements. His statements at the meeting of creditors, although inaccurate, were not intentionally false.

Separate judgment shall be entered in favor of the debtor/defendant and against the plaintiff. A discharge shall be entered.

DATED this 25th day of July, 2003

BY THE COURT:

/s/ Timothy J. Mahoney

Chief Judge

Notice given by the Court to:

*Nancy G. Waldron
Jeremy Murphy

John A. Wolf, Chapter 7 Trustee
U.S. Trustee

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

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NANCY G. WALDRON,)
))
Plaintiff,)) CH. 7
)
vs.)
)
WYNN HALL,)
))
Defendant.)

JUDGMENT

IT IS ORDERED that judgment is entered in favor of the defendant and against the plaintiff. A discharge shall be entered.

DATED this 25th day of July, 2003.

BY THE COURT:

/s/Timothy J. Mahoney

Chief Judge

Notice given by the court to:

*Nancy G. Waldron
Jeremy Murphy
John A. Wolf
U.S. Trustee

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