

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
KRIS ANDREW HILEMAN,)	CASE NO. BK94-81452
)	A94-8142
_____ DEBTOR(S))	CH. 7
)	Filing No. 10
STANLEY R. MARR,)	
)	
Plaintiff(s))	
vs.)	
)	<u>ORDER</u>
KRIS ANDREW HILEMAN,)	
)	
_____ Defendant(s))	

Upon the filing of **Motion for Summary Judgment** by **Plaintiff** and **Resistance** by **Defendant**.

APPEARANCES

David Pederson: Plaintiff
Bert Blackwell: Debtor/Defendant

IT IS ORDERED:

Plaintiff's Motion for Summary Judgment is denied. See Memorandum Opinion.

DATED: October 19, 1995

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:
*David Pederson 8-308-532-2741

Copies mailed by the Court to:
Bert Blackwell, P.O. Box 426, McCook, NE 69001
United States Trustee

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

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<hr/> DEBTOR(S))	CH. 7
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STANLEY R. MARR,)	
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Plaintiff(s))	
vs.)	
)	<u>MEMORANDUM OPINION</u>
KRIS ANDREW HILEMAN,)	
)	
<hr/> Defendant(s))	

Hearing was held on September 8, 1995, on Motion for Summary Judgment filed by the Plaintiff and Resistance by the Defendant. Appearances: David Pederson for Plaintiff and Bert Blackwell for Debtor/Defendant. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(j).

Background

The plaintiff, Stanley R. Marr, filed an adversary complaint on November 25, 1994, seeking to deny the debtor, Kris A. Hileman, a discharge under 11 U.S.C. § 727(a)(3) and (a)(5). The current matter under consideration by the Court is whether the plaintiff is entitled to summary judgment under 11 U.S.C. § 727(a)(3).

Beginning in October or November of 1985, the debtor served as an investment advisor to the plaintiff and received a fee for said services. The plaintiff invested a total of \$27,825.00 with the debtor. Prior to October of 1992, the debtor regularly reported to the plaintiff regarding the status of his investments. In October of 1992, the debtor informed the plaintiff for the first time that his entire investment was gone.

The debtor has not been able to account to or to explain to the plaintiff how all of the investment funds were lost. The debtor has failed to maintain records which would explain the loss of the investment funds. The plaintiff has alleged that the debtor may have fraudulently transferred the funds to himself.

The debtor states that the funds were lost on the stock market. The debtor concedes that he submitted false investment reports to the plaintiff prior to October 1992, but states that he confessed the loss to the plaintiff in October of 1992. The debtor attributes the loss of the investment funds and the subsequent inability to resurrect financial records which would show how the money was lost on the stock market to dementia and to the side-effects of medicine resulting from Parkinson's disease.

Decision

The Motion for Summary Judgment is denied. The debtor has raised a material issue of fact regarding whether his illness was a justifiable explanation for the destruction of the financial records under the circumstances of this case.

Discussion

A. Standard for Summary Judgment

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, 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. BANKR. R. 7056(c); FED. R. CIV. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The burden is on the moving party to establish both that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. United States Gypsum Co. v. Greif Bros. Cooperage Corp., 389 F.2d 252 (8th Cir. 1968). The materials submitted on a motion for summary judgment are viewed in a light most favorable to the non-moving party, and the non-moving party is given the benefit of all inferences reasonably deducible from the evidence. Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970).

B. Section 727(a)(3)

Under Section 727(a)(3), a debtor is not entitled to a discharge under Title 11 if:

[T]he 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. § 727(a)(3).

The debtor has conceded that he destroyed the financial records that would show the transactions which concern the plaintiff's investment funds. It is not necessary to make a finding regarding the debtor's intent under Section 727(a)(3). Community Bank of Homewood-Flossmoor v. Bailey (In re Bailey), 145 B.R. 919, 924 (Bankr. N.D. Ill. 1992). Once it has been shown that the debtor destroyed or failed to keep adequate financial records under Section 727(a)(3), the burden shifts to the debtor to show that the destruction of these records was justified under all the circumstances of the case. Cox v. Lansdowne (In re Cox), 904 F.2d 1399, 1403 n. 5 (9th Cir. 1990); Bailey, 145 B.R. at 924.

In Rissman v. Mann (In re Mann), 102 B.R. 873 (Bankr. S.D. Fla. 1989), the bankruptcy court denied discharge to a debtor who failed to keep adequate financial records during a period of time when the debtor underwent a cancer operation, was dependent on drugs and had a mental collapse. However, in Mann, the court did not conclude that illness could not ever be a justifiable cause for the failure to produce adequate financial records, but instead, concluded that under the circumstances of the particular case, the facts of the debtor's illness and surrounding circumstances did not justify the failure to keep adequate records. Id. at 874; see also Tavormina v. Resnick (In re Resnick), 4 B.R. 602 (Bankr. S.D. Fla. 1980) (holding that advancing years, disorientation and other ailments did not substantially justify the debtor's failure to produce financial records because circumstances surrounding case indicated wrongdoing).

Even though the debtor has admitted to destroying financial records in violation of Section 727(a)(3), the debtor may raise a defense to justify his conduct, and such a defense is a question of fact because the specific circumstances of the case must be evaluated. In this case, the debtor has raised a material issue of fact regarding his physical and mental health during the time period in question, and he has the right to present evidence on this issue at trial.

However, the illness of the debtor does not exist in a vacuum which automatically supersedes the failure of the debtor to keep adequate business records and entitle the debtor to a

discharge in this case. This Court will examine all surrounding circumstances, including the debtor's admission that he sent the plaintiff false financial documents prior to October of 1992 and that the debtor has thus far failed to contact securities firms who executed stock trades on behalf of the debtor and his clients to reconstruct the investment transactions on behalf of the plaintiff. See Anderson v. Wiess (In re Wiess), 132 B.R. 588, 593 (Bankr. E.D. Ark. 1991) (discussing that the debtor failed to reconstruct financial documents through other sources after the creditor requested said information and rejecting reasoning of debtor that creditor could "obtain" documents through other sources after debtor destroyed his own records); Rimmel v. Frank (In re Frank), 14 B.R. 166, 168 (Bankr. S.D. Fla. 1981) (holding that debtor has burden to provide organized records because it is not the duty of the creditor to collect this information or reconstruct the debtor's transactions). Even though the failure to reconstruct these transactions is not dispositive under Section 727(a)(3), the Court will consider whether the debtor's failure to reconstruct records may indicate that the stockbroker records do not support the debtor's claim that the plaintiff's money was lost on the stock market.

DATED: October 19, 1995

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

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