UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
ROGER KENT BACON,	)	CASE NO. BK00-81615
	)	
Debtor.	)	A00-8065
	)	
TIM & TANYA GIESCHEN,	)	
	)	CH. 7
Plaintiffs,	)	
vs.	)	
	)	
ROGER BACON,	)	
	)	
Defendant.	)	

MEMORANDUM

The parties agreed to submit all factual and legal issues to the court on discovery materials and documentary evidence rather than proceed to trial. James Nisley represents the plaintiffs, and Timothy Brouillette represents the debtor. 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)(I) and (J).

I. Decision

The debtor is denied a discharge pursuant to 11 U.S.C. § 727(a)(5).

II. Background

The complaint seeks denial of a discharge of a debt owed to plaintiffs pursuant to 11 U.S.C. §§ 523(a)(4), and/or denial of a discharge of all of the debtor's debts under 11 U.S.C. §§ 727(a)(2), 727(a)(4), and 727(a)(5).

With regard to the § 523 issue, the debtor installed a wood floor for the plaintiffs in November 1999, for which he was paid $17,549.50. Problems with the flooring subsequently arose, and the manufacturer ultimately refunded the cost of the material. The dispute between the parties deals with the disposition of those funds. The plaintiffs assert a right either to a new floor or to the funds. The debtor asserts the plaintiffs were entitled to the money only if they appropriately maintained the floor. The debtor argues that because the plaintiffs did not follow the manufacturer's instructions and did not properly care for the floor, the money was not for them.

In early 2000, the plaintiffs began the warranty claim process against the manufacturer. The debtor and the flooring distributor were involved in the process as well. The plaintiffs understood that they were to maintain a certain humidity level in their home for a period of 90 days to see if the problem with the floor would resolve itself. They expected to have the floor re-inspected in May 2000 and a final determination made on their claim at that time.

The plaintiffs subsequently learned that in April 2000, the manufacturer issued a refund to the distributor, who in turn issued a refund to the debtor. The manufacturer expected debtor to install a new floor for the plaintiffs, and considered the matter settled. The plaintiffs received neither a new floor nor a refund, thus precipitating this adversary proceeding.

The plaintiffs also filed suit in the District Court of Keith County, Nebraska, in March 2000, alleging that debtor had performed the floor installation and other remodeling work in their home in an unworkmanlike manner. They requested a judgment of $17,054.05 to cover remedial work. While the litigation was still in the discovery stage, the debtor filed his Chapter 7 bankruptcy petition in July 2000.

III. Law & Discussion

A. 11 U.S.C. § 523(a)(4)

Exceptions to discharge are to be narrowly construed in favor of the debtor. Miller v. J.D. Abrams, Inc. (In re Miller), 156 F.3d 598, 602 (5th Cir. 1998), cert. denied, 526 U.S. 1016 (1999); Driggs v. Black (In re Black), 787 F.2d 503, 505 (10th Cir. 1986).

Section 523(a)(4) of the Bankruptcy Code excepts from discharge any debt for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.

"Acting in a fiduciary capacity" is limited in application to technical or express trusts, not to trusts that may be imposed because of the alleged act of wrongdoing from which the underlying indebtedness arose. See Barclays Am./Bus. Credit, Inc. v. Long (In re Long), 774 F.2d 875, 878-79 (8th Cir. 1985) (for purposes of § 523(a)(4) fraud or defalcation exception, fiduciary capacity must arise from express trust, not constructive trust or mere contractual relationship).

Because there is no fiduciary capacity alleged here, the plaintiffs must be proceeding on a theory of embezzlement or larceny, which by definition are mutually exclusive.

For purposes of § 523(a)(4), both embezzlement and larceny are defined by reference to federal common law. Kansas Bankers Sur. Co. v. Eggleston (In re Eggleston), 243 B.R. 365, 378 (Bankr. W.D. Mo. 2000).

"Embezzlement" is the fraudulent appropriation of property of another by a person to whom such property has been entrusted or into whose hands it has lawfully come. Belfry v. Cardozo (In re Belfry), 862 F.2d 661, 662 (8th Cir. 1988). There are five elements of embezzlement, which must be established by clear and convincing evidence:

1. entrustment to the debtor or lawful possession in the debtor;
2. entrustment or possession of "property";
3. the property belongs to another;
4. the debtor appropriated the property for a purpose other than that for which it was entrusted to him;
5. the debtor intended to defraud the creditor of his or her property.

John P. Ludington, Annotation, Bankruptcy: What Constitutes Embezzlement of Funds Giving Rise to Nondischargeable Debt Under 11 U.S.C. § 523(A)(4), 99 A.L.R. Fed. 124, 130-32 (1990).

"Larceny" is the fraudulent and wrongful taking and carrying away of the property of another with intent to convert the property to the taker's use without consent of the owner. Rech v. Burgess (In re Burgess), 106 B.R. 612, 622 (Bankr. D. Neb. 1989). "The essential difference between larceny and embezzlement is the manner in which property comes into the possession of the person charged. Embezzlement involves a lawful or authorized possession. In the case of larceny, however, the original taking and possession is unlawful." Id.

The evidence before the court in this case establishes that Mr. Bacon lawfully possessed the money refunded from the flooring manufacturer. The amount of the refund from the manufacturer was significantly less that the amount the plaintiffs had paid debtor for the job because he had done other work in addition to installing the floor. The manufacturer issued a refund or credit to the distributor from whom debtor purchased the materials, and the distributor issued a refund of $5,772.87 to the debtor. The refund ultimately was set off against Mr. Bacon’s outstanding account balance with the distributor, with a check issued to Mr. Bacon for the remaining $3,737.85 of the refund.

Mr. Bacon deposited the check in his business checking account with the understanding that he was to fix the Gieschens’ floor if certain conditions were met. He testified at his deposition that he believed those conditions were not met, so he did not replace the floor. He testified that he intended to return the money to the distributor, but instead used it for personal and other business expenses.

This debt cannot be ruled nondischargeable under § 523(a)(4) because a key element has not been met. The evidence indicates that the money at issue belonged to the debtor. It was not property of the Gieschens, so the debtor could have committed neither embezzlement nor larceny.

The court has no evidence of the terms of the warranty or the claims procedure, nor does the court have evidence of the terms of any contracts between the relevant participants in the project.

The court does have evidence that the manufacturer was working with the plaintiffs through the distributor, and in turn the debtor, to resolve the plaintiffs’ dissatisfaction with the floor. There also is evidence, in the form of a September 2000 letter from the manufacturer’s quality assurance administrator, suggesting that if the plaintiffs had wanted a settlement rather than a replacement, the manufacturer would have sent them a check directly.

A summarization of the facts, then, is that the manufacturer, through the distributor, issued a refund to the debtor. That sum was intended to reimburse him for the materials and services he would provide to repair or replace the floor. Without question, the plaintiffs are entitled to a new floor.

However, absent evidence to the contrary, they are not entitled to use the money provided to the debtor.

The intention of everyone concerned with resolving the plaintiffs' flooring problem was that Mr. Bacon would lay a new floor. The refund from the manufacturer was intended to compensate him for the new materials, supplies, and other expenses for the Gieschens' job, but nothing suggests that he was required to use the specific funds received from the manufacturer. The situation is analogous to the Eighth Circuit case of Belfry v. Cardozo (In re Belfry), 862 F.2d 661 (8th Cir. 1988). In that case, the plaintiff entered into a written agreement with the debtor to restore a BMW car. The plaintiff paid the debtor $19,500 to perform the necessary work. The debtor spent the money for other purposes and did not restore the car as agreed. The appellate court noted that "[p]ayment of a contract price in exchange for the recipient to undertake an obligation of future performance transfers ownership of the money to the recipient. . . . One cannot embezzle one's own property." 862 F.2d at 662 (internal citations omitted).

The Eighth Circuit reversed the district court's and bankruptcy court's finding that the plaintiff's "understanding" that the debtor would use the funds to restore the car meant he had transferred the money to the debtor in trust and therefore created a nondischargeable debt.

Rather, the appellate court said, "[o]bligations sufficient to support a claim of embezzlement are ones which make the debtor's discretionary use of the payment, prior to complying with the obligations, improper." 862 F.2d at 663. The court observed:

> In this case, there has been a payment of $19,500.00 by a plaintiff, and in return, a debtor undertook an obligation to deliver a restored car. This obligation could be fully performed without regard to how the debtor used the money. He was not required to segregate the funds or place them in an escrow account prior to using them for the restoration. In short, the agreement permitted full use of the money by the debtor. In such a case, the result is a dischargeable breach of contract.

Id. See also Werner v. Hofmann, 5 F.3d 1170 (8th Cir. 1993) (per curiam) (lessee's noncompliance with the specific terms of cattle lease by failing to return correct number of cattle was not nondischargeable as embezzlement because agreement did not provide for segregation or non-use of the leased cattle).

Thus, it appears that the Gieschens hold a breach of contract claim against the debtor, which is dischargeable in bankruptcy. Nothing before the court indicates that the debt at issue constitutes embezzlement or larceny to render it nondischargeable.

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).

Asset concealment is often found to exist "where the interest of the debtor in property is not apparent but where actual or beneficial enjoyment of that property continued." Id. Concealment is also a continuing event, and concealment that began outside the requisite time period is within the reach of § 727(a)(2) if it continues into the statutory time period with the necessary intent. Id.

Here, the plaintiffs allege that debtor caused certain assets not to be listed, or their value to be understated, on his bankruptcy schedules.

Some omissions and variations in his listing of assets and their values in his schedules were noted at the § 341 meeting with the U.S. Trustee. Debtor supplemented his schedules for the Chapter 7 trustee, who did not pursue any of the discrepancies. At his deposition in December 2000, debtor adopted the supplemental list and its values as the correct record of his assets. No other creditor, in particular the debtor's lending institutions, have challenged the supplemental list of assets. There is insufficient evidence before the court from which to find the debtor concealed assets with the intention of defrauding creditors.

Moreover, there is no evidence that debtor transferred title to any assets while retaining a beneficial interest, or otherwise deliberately attempted to shield his assets from creditors.

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.

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. Baldridge (In re Baldridge), 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. Baldridge, 256 B.R. at 289. The omissions must relate to a material matter and may be material even if they do not cause financial prejudice. Id. An omission is material if it relates to the discovery of assets. The materiality of an omission is not lessened by the fact that an omitted asset is exempt or otherwise unavailable for distribution to creditors. Id.

“While the intent required must be actual intent as distinguished from constructive intent, it is well settled that such intent may be established by circumstantial evidence with inferences permitted to be made from the debtor's actions." Erdman, 96 B.R. at 985. The element of actual intent is satisfied where a debtor makes statements with reckless indifference to the truth, for such statements are regarded as intentionally false. McLaren, 236 B.R. at 895.

> In this connection, the existence of multiple falsehoods, taken together with a failure on the part of the debtor to correct all known inconsistencies, omissions, and misstatements upon first amendment, constitutes reckless indifference to the truth and, thus, the requisite intent to deceive. See, e.g., In re Beaubouef, 966 F.2d at 178; Oldendorf v. Buckman, 173 B.R. 99, 105 (E.D. La. 1994). Moreover, the same may apply with equal force where the debtor, in the first instance of filing a petition, Schedules, and Statements of Financial Affairs, makes statements therein, exceeding honest mistake, which are inconsistent and incompatible with her own knowledge and information.

Id.

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)).

Here, the plaintiffs allege that debtor's bankruptcy schedules contain inaccurate or false information. The plaintiffs challenge debtor's income and expenses, checking account balance, valuation of personal property when compared to his valuation of it when using it as collateral for a loan, pre-petition payments to creditors, and financial holdings he allegedly neglected to include in his bankruptcy schedules.

The debtor maintains that he completed his schedules to the best of his knowledge and ability. He does allow, however, that he may have unintentionally misstated some figures because he was confused by "gross" and "net," and "replacement cost" and "liquidation value."

The debtor denies that he undervalued his property for bankruptcy purposes, and suggests that his bank may have overvalued the property for loan purposes. The bank holds a security interest on virtually all of the debtor's property and has taken or will take possession of it, as debtor is unable to continue payments under his reaffirmation agreement.

The type of conduct which raises an inference of fraudulent intent includes the following example:

> Baldridge and his wife freely admit to various financial schemes, including fraud on his federal income tax returns and transferring virtually all of his assets to his wife or his wife's corporation to ensure that his creditors not reach his assets.
>
> Second, although specific questions on the bankruptcy schedule forms prompted disclosure of his bank accounts and other assets, he claims to have forgotten each and every bank account he held or had access to within a year. While a debtor may plausibly forget one of many accounts which may have been closed in the year prior to a bankruptcy filing, Baldridge's claim that he forgot that he held any accounts is so clearly false that the Court can infer a fraudulent intent.
>
> In addition to the absurdity of forgetting all

> bank accounts, there are simply too many omissions of material matters for the Court to accept the Baldridge[s'] assertion that they were "inadvertent." Not only does Baldridge fail to disclose his true income, he fails to disclose each and every asset or transfer of asset of any value.
>
> Finally, the debtor's demeanor at trial . . . [is] indicative of the debtor's motives behind secreting his property from the reach of all his creditors, not merely the IRS. While it is true that the immediate threat of seizure of property by the IRS may have been an impetus for some of the transactions, he clearly intended that no creditors . . . should be able to reach his assets. Therefore, with fraudulent intent, he omitted information that would have revealed his assets and financial transactions.

Baldridge, 256 B.R. at 291.

The indicia of intent raised by the plaintiffs here simply do not rise to the level of fraudulent intent sufficient to preclude discharge. The record merely suggests that certain equipment – which is now owned by the lender – may have been undervalued on the bankruptcy schedules. It also suggests that the alleged discrepancies in various bank account balances, thoroughly reviewed by the plaintiffs, have legitimate explanations, particularly as debtor was experiencing business difficulties on all fronts in the months preceding bankruptcy and was attempting to maintain a viable business enterprise.

The record does not suggest that debtor was hiding assets, materially misstating his financial condition, or manipulating the bankruptcy process. It appears that discrepancies in the schedules are attributable to reasonable errors or inaccuracies. The elements of denial of discharge under § 727(a)(4) have not been met.

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)).

An explanation based on the debtor's estimate, with nothing offered in the way of verification or affirmation by means of books, records, or otherwise is unsatisfactory. Hartman, 181 B.R. at 413 (citing Hacker, 90 B.R. at 997). Any loss of assets is sufficient to deny a discharge if the explanation for such loss is unsatisfactory. Id. The intention of the debtor is irrelevant, as is the credibility of the debtor, if the explanation is unsupported by sufficient documentation. Id. (citing Hacker, 90 B.R. at 1001-02).

Here, the plaintiffs express concern about the debtor's significant decrease in income in 2000. The debtor's response indicates the decrease resulted at least in part from a decrease in collections for work performed due to disputes about the quality of the work. The evidence indicates that a number of his customers withheld payment pending satisfaction of their claims regarding workmanship, so debtor's explanation regarding this issue is reasonable.

The plaintiffs also challenge the alleged diminution in the value of debtor's estate in the year between obtaining a bank loan in July 1999 and filing bankruptcy in July 2000. The plaintiffs point in particular to assets valued by the debtor at $33,000 in July 1999 to obtain a $21,000 loan. Schedule D attached to debtor's bankruptcy petition values the same collateral at $4,500. After the § 341 meeting, the debtor revised his valuation of that collateral to $8,550. He testified in his deposition that he does not recall ever completing a financial statement for the bank, and he attributes the bank’s apparent willingness to loan him more than the collateral value to the bank’s desire to help him continue in business.

These explanations by the debtor are vague and general and do not fully explain the valuation disparity. A similar situation presented itself in the Beshears case:

> In this instance, the debtors failed to satisfactorily explain a diminution of net worth in excess of $330,000 over a ten month period of time. . . . Prior financial statements of the debtors were submitted at [trial] which reflected high values of farm equipment, automobiles and personal property. However, these values are not reflected on the petition. Rather, there is a marked decrease in net worth. For example, the financial statement that Beshears asserts is accurate states a value for farm equipment of $615,000, the petition reflects only $396,500 of such equipment, the testimony at the section 341(a) meeting indicates a value of $160,000. The financial statement reflects automobiles worth $70,000, the petition, only $39,800. The financial statement reflects personalty with a value of $150,000, the petition, only $23,475. Although the bank had a lien on many of the items of equipment, the location of many of those items has never been revealed.
>
> Debtors gave no credible explanation as to the loss of their net worth. Indeed, Beshears' explanations highlight his villainy: some portion of the diminution is due to bribery and fraud. For example, Beshears asserts that the diminution of his assets is due, in part, to the $100,000 he paid to the head of the local drug task force as a bribe. He also asserts the figures on the statements were overstated at the suggestion of a bank officer. The Court does not believe debtor's testimony that the bank placed overvalued figures on the assets in order to lend him money. Beshears essentially advises the Court that his diminution in assets is due to criminal activity and making false statements to obtain loans. Although these statements assist the Court in assigning the value to which Beshears' testimony is entitled, they do not assist either debtor in the defense of this objection to discharge.
>
> Even were the Court to accept Beshears'

> statements, they do not adequately explain the loss of assets. Vague statements that the equipment was overvalued on the financial statements is insufficient to sustain the debtors' burden. The explanations were unsubstantiated, uncorroborated and undocumented.

Beshears, 196 B.R. at 473

In the present case, while some diminishment in value is to be expected due to the passage of time and the reduction in inventory in light of the downturn in debtor's business, there is no substantiated, corroborated, or documented explanation of the drastic devaluation of debtor's assets. Despite being made aware of concerns about this issue by a creditor's attorney at the §341 meeting, and again by the plaintiffs' attorney during the pendency of this case, the debtor has been unable to offer any reasonable explanation for the difference. This lack of information could lead to an inference that Mr. Bacon has either overstated the value of the assets to secure a loan or understated the value of the assets to protect them from his creditors. Debtor's suggestion that the bank overstated the value of his assets to help him out is not credible and is unsupported by any other evidence.

Unlike the sections of § 727(a) addressed above, denial of discharge under § 727(a)(5) does not require evidence of intent; it merely requires proof of loss of assets with no reasonable explanation. Debtor's failure to explain the diminution of the value of his personal property in the twelve months between using the property as collateral to obtain a bank loan and filing bankruptcy warrants a finding that his debts should not be discharged.

IV. Conclusion

Discharge of the debtor's debts is denied pursuant to 11 U.S.C. § 727(a)(5).

Separate order will be entered.

DATED: November 20, 2001

BY THE COURT:

/s/Timothy J. Mahoney
Timothy J. Mahoney

Chief Judge

Copies faxed by the Court to:
Tim Brouillette, Atty. for Debtor, 308/532-6200
James Nisley, Atty. for Plaintiff (129)

Copies mailed by the Court to:
United States 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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FOR THE DISTRICT OF NEBRASKA

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vs.	)	
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ROGER BACON,	)	
	)	
Defendant.	)	

ORDER

IT IS ORDERED that a discharge of the debtor's debts is denied pursuant to 11 U.S.C. § 523(a)(5). See Memorandum entered this date.

DATED: November 20, 2001

BY THE COURT:

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

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ORDER NUNC PRO TUNC

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