

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
JAY B. SMILEY,)	CASE NO. BK85-622
)	
DEBTOR)	A85-142
)	
TRI-COUNTY BANK & TRUST CO.,)	
)	
Plaintiff)	
)	
vs.)	
)	
JAY B. SMILEY,)	
)	
Defendant)	

MEMORANDUM

Trial on plaintiff's complaint objecting to the discharge of defendant/debtor's debts under Section 727 of the Bankruptcy Code was held on June 1, 1988. Following trial, the parties were requested to provide written final arguments which have now been presented to the Court. This memorandum constitutes the findings of fact and conclusions of law required by Bankr. R. 7052. Appearing on behalf of plaintiff, Tri-County Bank & Trust Co., (Bank), was Jerrold Strasheim of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, Omaha, Nebraska. Defendant/debtor appeared pro se.

Facts

Defendant/debtor, Jay Smiley, filed a voluntary bankruptcy petition under Chapter 7 on March 20, 1985. The Bank timely filed a complaint objecting to discharge.

Prior to March 20, 1985, Mr. Smiley was involved as a principal in at least one partnership and a principal shareholder and officer of several corporate entities which operated various businesses in the Omaha, Nebraska, area and which will be identified as the "Central Companies." To finance those business activities as well as to finance other investment opportunities, Mr. Smiley borrowed money from various sources, including plaintiff Bank. At the time of his bankruptcy filing, Mr. Smiley was a defendant in eleven separate collection actions including

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AT Plaintiff Bank, M
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Judith M. Napier
Clerk, U.S. Bankruptcy Court
By [Signature] Deputy

31

two actions brought by plaintiff Bank. Bank, prior to bankruptcy, was granted judgments in the amount of \$308,730.48 and \$283,096.31.

A. The Ranch

In 1979, Mr. Smiley was divorced. Pursuant to the divorce decree as modified, a trust was set up for his three children with Mr. Smiley as one of the trustees. The original trust assets were two residences. In 1984, following applications to the state district court, Mr. Smiley, as trustee, was authorized to encumber one residence in consideration for a conveyance to the trust of one of his personal assets, a three-quarter interest in the Lazy J Ranch.

Mr. Smiley had purchased the three-quarter interest in 1982. In 1983, the total Ranch appears to have been worth \$272,000. However, the Ranch land was encumbered by a real estate mortgage and taxes. From the evidence presented, the Court is unable to determine the net value of debtor's interest in the Ranch in 1982, 1983 or 1984 because it is unclear what amount was owed by the debtor against the Ranch.

The 1984 transfer to the trust occurred at a time when two lawsuits which had been filed by Bank against debtor were ready for trial. In addition, such transfer occurred within one year of the bankruptcy filing.

B. The Diamonds

Prior to his bankruptcy, Mr. Smiley was a purchaser of certain diamonds from a local jewelry store. His Schedule A-2 shows that he made the purchase on April 24, 1984, and that the purchase price was approximately \$8,000. At the time of trial, Mr. Smiley could not explain the location of the diamonds or what could possibly have happened to them. He simply testified that he couldn't remember where he put the diamonds and blamed his lack of recollection upon a stroke that he had had some time in the past.

C. The Other Assets

On January 5, 1982, Mr. Smiley provided to Bank, then called Southroads Bank, a personal financial statement in which he itemized his assets by type and value. The financial statement showed a net worth of \$1,571,374 and included cash on hand in the amount of \$25,000, securities held by brokers in the amount of \$78,000, real estate in the amount of \$831,500 and stock holdings and partnership interests in various business entities, including the Central Companies and the Lazy J Ranch located in Rock County, Nebraska, discussed above.

On March 20, 1985, a little more than three years after providing Bank with the financial statement, Mr. Smiley listed on his bankruptcy schedules debts in the amount of \$2,230,177 and assets in the amount of \$614,126. In other words, he showed a negative net worth of approximately 1.6 million dollars.

D. The Explanation

Mr. Smiley had no explanation for the disappearance of cash and securities in an amount over \$100,000 which were listed on his 1982 financial statement. Although he attempted to explain that the cash on hand of \$25,000 was used in the operation of his business, he had absolutely no explanation for the use or disposition of the \$78,000 in stock and securities which were listed on the 1982 financial statement. He did suggest that the stock and securities may have been liquidated for use in the Central Companies, but he wasn't certain.

Mr. Smiley, although apparently a relatively successful businessman in 1982 by virtue of his financial statement, became insolvent by March 20, 1985, and had debts exceeding assets according to his bankruptcy schedule of approximately \$1,600,000. However, even though he was able to determine his financial status as of March 20, 1985, he has no records showing either his business transactions or his personal financial transactions for any year. The trustee in Mr. Smiley's personal bankruptcy case testified that he received no financial records from Mr. Smiley although such records, in addition to business records, were requested. The trustee in the bankruptcy case of one of the Central Companies testified that he had been provided no personal books or records of Mr. Smiley and that the corporate records were not adequate to determine what had actually occurred with regard to the operation of the Central Companies and Mr. Smiley's relationship to them.

Conclusions of Law and Discussion

The Bankruptcy Code at Section 727 is the legal authority for denying a Chapter 7 debtor a discharge. That section states, in relevant part:

(a) The court shall grant the debtor a discharge, unless--

...

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed,

mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed--

(A) property of the debtor, within one year before the date of the filing of the petition;

...

(3) the 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 fact or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case--

(A) made a false oath or account; ... or

...

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities.

11 U.S.C § 727(a).

Bank has urged this Court to deny discharge to debtor on various grounds including each of the sections cited above. Bank urges that the transfer of the Lazy J Ranch to the trust, although authorized by the state district court, was a conveyance made with intent to hinder, delay or defraud a creditor under Section 727(a)(2) because the transfer was made for insufficient

consideration and not in conformance with the court authorization. From the evidence presented, the Court cannot determine the value of the Lazy J Ranch at the time of its conveyance to the trust. Some, but not enough, evidence was presented to show the net value of the property at the time of the transfer.

This Court concludes that the creditor has failed to meet its burden of proof regarding debtor's intent, the value of the property, and the significance of state court approval. Therefore, the debtor should not be denied a discharge under Section 727(a)(2).

On the other hand, the evidence does support a denial of discharge under Section 727(a)(5). Debtor has absolutely no credible reason for the disappearance of over \$100,000 in assets that he claims he had in 1982 but that he did not have on the date of filing his bankruptcy petition. He simply "cannot remember" the disposition of the diamonds or the stock investments or cash. Such explanation is not satisfactory.

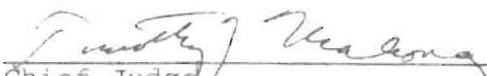
In addition, the evidence is sufficient to convince the Court that debtor should be denied a discharge under Section 727(a)(3). Mr. Smiley had complex financial and business arrangements. He invested in significant assets over the years and was a major shareholder in several businesses and a principal in at least one partnership. Nonetheless, at the time of his bankruptcy filing, he claimed to have no records for any of his business or financial transactions for the several years prior to the bankruptcy filing. He has suggested in written final argument that he did have such records but that Bank had seized and apparently lost the records. Such a claim was not made at trial, and this Court will not consider it as anything but a self-serving statement thought of following the hearing on this matter. The Bankruptcy Code is designed to give an honest debtor a discharge of his debts so that he can have a fresh start financially. It is not designed to permit discharge of debts of a debtor who, although sophisticated enough to show a net worth of well over \$1,000,000 in 1982, claims now to be so unsophisticated as to have no records of his business transactions for a several-year period.

Finally, Bank urges the Court to deny discharge under Section 727(a)(4) because it claims Mr. Smiley knowingly made a false oath with regard to the schedules which he signed denying his interest in Lazy J which Bank claims he actually owned at the time of the bankruptcy filing. This Court finds that Mr. Smiley did not own the Lazy J at the time of the bankruptcy filing because his interest had been transferred to the trust prior to the bankruptcy filing. Although such transfer was within one year of the bankruptcy filing, he disclosed the transfer at page 3, paragraph no. 12, on his statement of affairs for a debtor not engaged in business.

In conclusion, the Court shall enter a separate order denying the discharge of this debtor under Section 727(a)(5) and Section 727(a)(3).

DATED: September 8 , 1988.

BY THE COURT:


Chief Judge