UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF DANIEL E. ANTHONY, SR., MARCELLA B. ANTHONY, BANKRUPTS FIRST NATIONAL BANK OF WISNER, A Corporation, Plaintiff vs. DANIEL B. ANTHONY, SR., and MARCELLA B. ANTHONY, Defendants	)	CASE NO. BK79-0-9 CASE NO. BK79-0-10

Appearances: Steven C. Turner, Attorney
1400 One First Nat'l. Center
Omaha, Nebraska 68102
and
John M. Thor, Attorney
424 10th Street
Wisner, Ne. 68791
on behalf of plaintiff

James Monahan, Attorney
323 Service Life Building
Omaha, Nebraska 68102
on behalf of defendants

MEMORANDUM OPINION

First National Bank of Wisner in this adversary proceeding objects to the discharge of the defendants on a variety of grounds.

Plantiff objects to the discharge pursuant to §14c [11 U.S.C. §32c] which provides in part as follows:

> "The Court shall grant the discharge unless satisfied that the bankrupt has (1) committed an offense punishable by imprisonment as provided under Title 18, United States Code, Section 152. . ."

Title 18 U.S.C., Section 152 provides in part:

> "Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding. . ."

The plaintiff points to Item 14b of the statement of affairs

of the schedules filed by the defendants in these bankruptcy proceedings which inquire regarding transfers, either absolute or for security, not in the ordinary course of business, during the year preceding the filing of the petition. The bankrupts have answered the question in the negative. Plaintiff points to a mortgage given to Thomas P. and Cheryl R. Anthony within a year preceding the filing of this petition. Background facts are necessary to understand this controversy.

Prior to bankruptcy, the bankrupts, husband and wife, owned a cafe business which Mrs. Anthony operated. In January, 1978, Mrs. Anthony borrowed $10,000.00 from her son, Daniel, Jr. At that point, the loan was unsecured. Thereafter, in June or July, 1978, Thomas P. Anthony, the son-in-law of the bankrupts, advanced to the defendants the approximate sum of $5,846.00 and in July, 1978, advanced $250.00 more to the defendants. Between the time of the $10,000.00 loan to the defendants by Daniel, Jr., and the advances by Thomas P. Anthony, the defendants executed a real estate mortgage as a second mortgage on their homestead to Thomas P. and Cheryl R. Anthony. This mortgage was dated May 26, 1978. The mortgage was not recorded at that time but was recorded the day after the bankrupts filed their voluntary petitions in bankruptcy.

The bankrupts explained this transaction by showing that they wanted their children to have security for the loans which had been made to them. Daniel, Jr., was a career man in the Coast Guard and was living in California at the time of his loan. I gather that the mortgage was payable to Thomas P. and Cheryl Anthony, the son-in-law and daughter respectively, because they were residents of the Wisner, Nebraska, area. I gather further that the mortgage was to include both the previous loan made by Daniel, Jr., and the subsequent loan by Thomas.

It is true that Item 14b fails to disclose this transaction. However, Schedule A-2 (creditors holding security) does disclose the second mortgage to Thomas Anthony. Bankruptcy Rule 407 places upon the plaintiff the burden of establishing all elements necessary in an objection to discharge under §14. Having disclosed the second mortgage in Schedule A-2, the bankrupts at a minimum disclosed minimal information to enable a trustee to investigate further with regard to the possible voidability of the second mortgage. There is no evidence before me which convinces me by preponderance of evidence that the bankrupts omitted the information from Item 14b "willfully and fraudulently" as opposed to unintentionally and by way of oversight. I do observe that the defendants do not appear to be sophisticated business people. The plaintiff has failed in its burden of proof as to this point of objection.

The plaintiff, based on the foregoing facts, also objects to the discharge pursuant to §14c(4) which prohibits the granting of the discharge if the bankrupts within a year preceding bankruptcy have transferred, removed, destroyed, concealed any property with intent to hinder, delay or defraud creditors. Having heard the evidence, I am persuaded that the bankrupts are motivated primarily by a desire to give security to their children. Conversely, I am not persuaded that they gave the mortgage with the intent to hinder, delay or defraud creditors. It is possible that the bankrupts desired to prefer certain creditors over other creditors but that is not a basis for objection to discharge, at least standing alone. I am not unaware that the advances by Thomas P. Anthony had not yet been made when the mortgage was signed. Nevertheless, I am simply unpersuaded that there is evidence before me which convinces me by a preponderance of the evidence that the defendants

were motivated by a desire to hinder their creditors. The cafe was still operating and there is no evidence before me to suggest that creditors were pressing them for payment or had brought suit. In addition, the fact that the mortgage was withheld from record for a period of time after May, 1978, does not change my view. The explanation offered by the bankrupts that they had prospects of selling the business or of refinancing through SBA suggest a rational reason for withholding recording. The bankrupts may well have concluded that if the business were sold, the debts to the children would be repaid. In addition, they may well have concluded that if SBA would refinance, SBA would request a second mortgage on the homestead and there was every reason to leave unrecorded the second mortgage.

Plaintiff also asserts that the defendants made a false oath to their statements where they omitted the assignment of any accounts within a year prior to bankruptcy at Item 15 of the statement of affairs. However, I accept the bankrupts' statements that they had no accounts in the operation of the cafe business and, therefore, even though they had made an assignment of accounts receivable to the plaintiff, they innocently omitted mentioning it.

Plaintiff further asserts that the defendants failed to list certain taxes in Schedule A-1. I accept the defendants' explanation that they were unaware of any unpaid taxes at the time they filed their voluntary petitions.

Plaintiff further suggests that it was omitted from the list of creditors in this bankruptcy proceeding and, accordingly, there was another false oath to the statement and schedules. However, the statement of affairs at Item 12 discloses the lawsuit previously brought by the plaintiff herein against the defendants herein which describes the lawsuit as for attachment to take possession of cafe equipment. The defendants explain this as an inadvertent oversight and, because it is disclosed in other areas of the statement of affairs, I accept their explanation.

Plaintiff also points to the fact that $4,000.00 was transferred to Attorney Melvin Murphy which, under Item 20 of the statement of affairs is shown as "for fee and also used part to pay taxes owed at time." Part of the money was used by Mr. Murphy to pay taxes. However, part of the money was used to repay a loan to a prior person and another part used to pay for previous bookkeeping services. Plaintiff thus complains that transfers to creditors were not disclosed properly in the statement of affairs at Item 13 of the statement of affairs. However, I am unpersuaded from the evidence before me that the evidence is sufficient to show that the omission was "willful and fraudulent" in this situation.

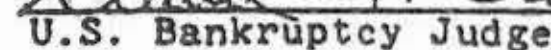
The plaintiff also points to the fact that on Schedule A-2 (creditors holding security) the bankrupts have indicated that Thomas Anthony held a second mortgage and a note. Plaintiff points to the evidence before me which discloses that no note was actually in existence. This strikes me as something which might be done by inadvertence and it is difficult to conceive how I can conclude that it was willfully and fraudulently.

Having concluded the foregoing, I should observe that I am not unmindful of the necessity for bankrupts to file accurate schedules in bankruptcy proceedings. However, in this case, having observed the bankrupts and heard their testimony, I am unpersuaded that they have acted with the requisite intent to hinder or delay either creditors or the trustee in their conduct or in the completion of their schedules.

My finding is in favor of the defendants and against the plaintiff. A separate order is entered in accordance with the foregoing.

DATED: December 28, 1979.

BY THE COURT:



U.S. Bankruptcy Judge

Copies mailed to attorneys who appeared.