United States Bankruptcy Court
District of New Mexico

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
JEROD R. TRICARICO,
Debtor. No. 7-98-16838 SR

VAN WINKLE ROOFING, INC.;
RONNIE VAN WINKLE and
DENE VAN WINKLE,
Plaintiffs,
v. Adv. No. 99-1030 S

JEROD R. TRICARICO,
Defendant.

MEMORANDUM OPINION ON PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on the Motion for Summary Judgment filed by the plaintiff. This is a core proceeding under 28 U.S.C. § 157(b)(2)(J). This memorandum opinion constitutes the Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052.

New Mexico Local Bankruptcy Rule 7056-1 states, in part:

> A party opposing the motion [for summary judgment] shall, within 20 days after service of the motion, file a written memorandum containing a short, concise statement in opposition to the motion with authorities. If no such responsive pleading is filed, the court may grant the motion for summary judgment. ... All material facts set forth in the statement of the movant shall be deemed admitted unless specifically controverted.

Defendant did not file a response to the motion for summary judgment. Therefore, all material facts set forth in plaintiff's statement are deemed admitted. The Court has also taken judicial

notice of this adversary proceeding and the main bankruptcy, No. 7-98-16838 (Bankr. D. N.M. 1998), and the Court finds as follows:

Findings of Fact

1. Debtor filed for bankruptcy on November 9, 1998.
2. Plaintiffs are a creditor of debtor.
3. The first meeting of creditors was held on December 16, 1998.
4. Plaintiffs filed this complaint objecting to discharge on February 8, 1998.
5. At the first meeting of creditors, Debtor was sworn, and testified that:

   a) he reviewed the schedules, statement of financial affairs, and petition with his attorney and that they were true and correct,

   b) that he did not plan on making any changes or additions to the schedules or statements or petition, and

   c) that he listed all of the property in which he had an interest, giving it its fair market value.
6. The Debtor signed a *Declaration Concerning Debtor's Schedules* and *Declaration Under Penalty of Perjury by Individual Debtor* in connection with the statements and schedules filed in the case.
7. Debtor's schedule A lists Lots 1, 2, 3, and 4 with a total value of $5,000. Schedule B lists no firearms, no interest

in unincorporated businesses, no accounts receivables or debts owing to the debtor, no cars (7 trucks are listed), and no office equipment, furnishings, supplies, machinery, fixtures, equipment, or inventory. The statement of financial affairs lists no income from employment or operation of business, and no income other than from employment or operation of a business for the two years preceding the filing of the case. It also states that no gifts were made within one year of the bankruptcy, that there were no losses due to fire, theft or gambling during that year, that there were no transfers during that year, and that the debtor had not been an officer, director, partner, or managing executive of a sole proprietorship and had not been a self employed professional within the two years before the bankruptcy.

8. Debtor misstated the value of property listed on his schedules.

9. Debtor failed to disclose his ownership interest in the following: a 1995 Mitsubishi two door, lots 5 and 6 of the Stacy subdivision (his residence), firearms, equipment, inventory, business assets, business accounts receivable, and five mobile homes.

10. Upon questioning by Plaintiff’s counsel and the first meeting of creditors, Debtor testified:

A. his land was worth $20,000.

B. he gave a mobile home to his parents about 8 months before the filing.

C. he had a Fleetwood mobile home that burned down “in April”.

D. he was the sole proprietor of La Casa Mobile Homes, which ceased business when the bankruptcy was filed, and that there was another business, Tri-co Trucking, that has been in existence since May, 1995.

E. he stated “naturally I had income” during the years before the case.

11. At the first meeting of creditors, the Trustee requested that Debtor file certain amendments. Those amendments have never been filed. Instead, on August 2, 1999, Debtor filed a motion to dismiss his bankruptcy.

12. On May 13, 1999, Plaintiffs served Interrogatories and a Request for Production on the defendant. On July 8, 1999, Plaintiffs filed a motion to compel answers to the discovery and for sanctions. On August 2, 1999, Debtor filed a certificate of service that he had responded to the discovery.

Conclusions of Law

Under Fed. R. Civ. P. 56(c) a moving party is entitled to summary judgment

> if the pleadings, depositions, answers to interrogatories, and 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.

Plaintiff seeks summary judgment under 11 U.S.C. § 727(a)(2), (a)(3), and (a)(4)(A). Each of these will be discussed in turn.

Section 727(a)(2)

Section 727(a)(2) denies a discharge when a debtor "with intent to hinder, delay, or defraud a creditor" transfers or conceals property within one year of filing bankruptcy. 11 U.S.C. §727(a)(2). The cases uniformly agree that "constructive intent" is not sufficient to deny discharge; there must be a finding of "actual intent". See e.g. First Beverly Bank v. Adeeb (In re Adeeb), 787 F.2d 1339, 1343 (9th Cir. 1986); 6 Collier on Bankruptcy ¶727.02[3][a]. This intent, however, can be established by circumstantial evidence, or inferences drawn from a course of conduct. Adeeb 787 F.2d at 1343 (citing In re Devers, 759 F.2d 751, 754 (9th Cir. 1985). Courts consider various factors that evidence actual intent:

1) lack or inadequacy of consideration

2) familial, friendship, or close relationship

3) retention of possession, benefit or use

4) the financial condition of the transferor before and after the transfer

5) cumulative effect of the series of transactions or course of conduct, and

6) the general chronology of the events.

Najjar v. Kablaoui (In re Kablaoui), 196 B.R. 705, 709-10 (Bankr. S.D.N.Y. 1996). Courts have also stated that there is a "presumption of actual fraudulent intent" when property is transferred gratuitously to relatives. Id. (citing Pavy v. Chastant (In re Chastant), 873 F.2d 89, 91 (5th Cir. 1989)).

Having reviewed the record, the Court finds that plaintiffs have not made a sufficient case for denial of discharge under this section by way of summary judgment. Specifically, there is no evidence on items 3 through 6 listed above, and the evidence on item 1 is contradictory. Debtor testified that he "gave [the mobile home] away", but also testified it was "junked out", taken off the tax roles, and that he was told to remove it from his property and that his mother "pulled it off ... so I guess she paid me for it." Therefore, even though there may be a presumption because of the family relationship, the transfer may not have been gratuitous. Summary judgment will be denied on this issue.

Section 727(a)(3)

Section 727(a)(3) denies a discharge when a debtor conceals, destroys, mutilates, falsifies, or fails to keep or preserve any recorded information from which the debtor's financial condition or business transactions may be ascertained, "unless such act or failure to act was justified under all of the circumstances". 11 U.S.C. § 727(a)(3). In order to state a prima facie case under this section, the creditor must show 1) that the debtor failed to maintain or preserve adequate records, and 2) such failure makes it impossible to ascertain the debtor's financial condition and material business transactions. In re Brown, 108 F.3d 1290, 1295 (10th Cir. 1997)(citing In re Folger, 149 B.R. 183, 188 (D. Kan. 1992)).

Plaintiff states that it is undisputed that Debtor has not kept adequate records. The transcript of the first meeting of creditors is not clear on this issue:

> Q: You list -- who does your books and records after your ex-wife? You said she did them?
> A: I am in the process of learning...
> Q: And do you have the books and records for your business?
> A: I hold receipts, yes.
> Q: Is there a bookkeeper or anybody that is helping you?
> A: No.
> Q: And where are those receipts located?
> A: In my office.

The testimony indicates that there are, at least, some records. The record does not indicate when the ex-wife stopped keeping books, or the length of time for which there may be inadequate records. The burden is on the creditor to prove the inadequacy of the records. Wazeter v. Michigan National Bank (In re

Wazeter), 209 B.R. 222, 227 (W.D. Mi. 1997). Plaintiffs have not met this burden, at least for the purposes of a motion for summary judgment. The record hints that records were kept by an ex-wife, and that debtor has keep "receipts". The Court cannot find as a matter of law that this is inadequate. Also, because the statements and schedules totally fail to identify the actual nature or scope of the businesses, the Court cannot determine whether the Debtor's financial condition can be ascertained from those records, or whether the lack of any further records would be justified in the circumstances. Summary judgment on this issue will be denied.

Section 727(a)(4)(A)

Section 727(a)(4)(A) denies a discharge when a debtor "knowingly and fraudulently, in or in connection with the case, made a false oath or account." To trigger this section, the false oath must relate to a material matter and must be made willfully with intent to defraud. Job v. Calder (In re Calder), 907 F.2d 953, 955 (10th Cir. 1990). A matter is material if it bears a relationship to the debtor's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property. Id. (citing In re Chalik, 748 F.2d 616, 618 (11th Cir. 1984)). It is well established that an omission of assets from a schedule may constitute a false oath under §727(a)(4)(A). Id. At the initial

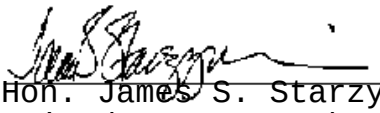
pretrial conference, counsel for defendant conceded that assets were not disclosed, but argued that the items were not material because they would have been exempt anyway. First, the Court disagrees that the assets would all have been exempt. For example, any property recovered by a trustee that has been voluntarily transferred by the debtor is not subject to exemption. See 11 U.S.C. § 522(g)(1)(A). Therefore, to the extent that the trustee could recover the mobile home "given" to Debtor's parents, no exemption would be available. Second, and perhaps more important, is the fact that the value of omitted assets is really not the evil addressed by 727(a)(4)(A). The purpose of the section is to ensure that a complete and accurate disclosure of all assets, debts, and financial affairs is made to the creditors and trustee. "A recalcitrant debtor may not escape ... denial of discharge by asserting that the admittedly omitted ... information concerned a worthless business relationship or holding; such a defense is specious". Calder, 907 F.2d at 955. The Court finds that the plaintiffs have established a prima facie case to deny discharge under this section.

Debtor signed declarations under penalty of perjury that his schedules and statement of financial affairs were true and correct. Similarly, he testified under oath at his first meeting of creditors that he had reviewed the statements and schedules with his attorney, that they were true and correct, and that they listed all of his property at its fair market value. Later,

under questioning, he admitted: 1) the real estate was worth four times the amount at which it was listed on schedule A, 2) that his residence and a car were not listed at all, 3) that he had given away property not disclosed on the statements, 4) that he in fact operated at least two businesses that had assets and receivables but failed to disclose the existence of those businesses or their assets on the statements and schedules, 5) that he had guns not listed on Schedule B (he later stated they did not belong to him; the statements, however, list no property held for another), 6) that his answers to the questions about income were false, and 7) that he had a fire loss and failed to report it on the statements. All of the misstatements and omissions relate to the debtor's business dealings or assets, or potentially recoverable assets and are therefore material. The Court finds that the omissions and misstatements were fraudulent and intentional. Furthermore, the debtor's failure to amend the statements and schedules, and his attempt to dismiss the bankruptcy at this late stage point to a continuing attempt to conceal the existence of assets and hinder the trustee from reviewing his business affairs. Finally, due to the number and nature of the omissions and misstatements (e.g. the omission of his house and car, the failure to disclose the gift to his parents) the Court also finds that the statements and schedules reflect a reckless indifference to the truth. See Id. at 956 (number of omissions is significant). The false valuations, the

omissions of assets from the schedules, and the false answers to the questions on the statement of financial affairs, together with Debtor's signatures under penalty of perjury constitute a "false oath". The Court will grant summary judgment under section 727(a)(4)(A).

Plaintiff is directed to submit a form of judgment in compliance with this memorandum opinion within ten days, approved as to form by defendant's attorney.



Hon. James S. Starzynski
United States Bankruptcy Judge

I hereby certify that, on the date file stamped above, a true and correct copy of the foregoing was either electronically transmitted, faxed, mailed, or delivered to the following:

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