UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT LAFAYETTE

IN RE: CASE NO. 05-41771 JOHN W. MARTIN LYNN M. MARTIN Debtors KIMBERLY A. GILBERT, TRUSTEE, et. al. Plaintiffs vs. JOHN W. MARTIN LYNN M. MARTIN Defendants	)	PROC. NO. 06-4014

DECISION

At Fort Wayne, Indiana on April 16, 2007.

This matter is before the court following trial of the issues raised in this adversary proceeding by which the plaintiffs seek the denial of the discharge of one of the debtors, John Martin, in this chapter 7 bankruptcy case. Plaintiffs seek denial of discharge pursuant to several of the provisions of § 727(a), including §§ 727(a)(2)(A), (a)(2)(B), (a)(3), (a)(4), (a)(5), and (a)(6), as a result of a variety of actions and inactions for which Mr. Martin is supposedly responsible. The court need not discuss all of them, because three in particular are more than enough to persuade the court that denial of discharge is appropriate.

First, and most blatantly, is § 727(a)(2)(B) – after filing the petition the defendant transferred, concealed, and/or removed property of the bankruptcy estate with the intent to hinder, delay or defraud creditors or the trustee. In order to successfully oppose a debtor's discharge under this subsection, the plaintiff must prove that the debtor transferred, removed, destroyed or concealed property of the bankruptcy estate after the petition was filed with the actual intent to hinder, delay, or defraud a creditor or the bankruptcy trustee. In re Heil, 289 B.R. 897, 907 (Bankr. E.D. Tenn. 2003). Direct evidence of such intent is often unavailable, and so it may be inferred from the facts and circumstances of the case and the debtor's conduct. Matter of Krehl, 86 F.3d 737, 743 (7th Cir. 1996); Matter of Smiley, 864 F.2d 562, 566 (7th Cir. 1989).

Shortly after the date of the petition, and prior to the § 341 meeting, the debtor arranged for Larry Coogle of Coogle Trucking to haul a truckload of equipment to Florida where it was to be sold at auction. Much of that equipment was property of the bankruptcy estate. The trustee learned of the debtor's plans before the property could leave the jurisdiction and was able to prevent its removal, take possession of it and sell much of it for the sum of $7,000. The debtor attempted to justify his conduct by suggesting that the property would bring a better price in Florida and that he was going to deliver the proceeds to the trustee. Yet, the debtor did not tell anyone of these plans, including the bank who had a lien upon some of the items being shipped off, the trustee, or even his own attorney because, as he acknowledged at trial, if he had told anyone what he was doing, they all would have stopped him.

Despite the debtor's prostrations that he intended to turn the money over to the trustee, the court can discern no legitimate purpose for the debtor's attempt to surreptitiously spirit property of the bankruptcy estate out of the jurisdiction in an effort to sell it. Furthermore, the debtor's acknowledgment that he did not tell anyone about his actions because he would have been stopped, at a minimum, reveals some degree of consciousness that those actions were wrongful. Admittedly, the debtor's scheme was not successful because the trustee learned about it and was able to frustrate it before the debtor brought it to fruition, but that does not, in any way, diminish the debtor's responsibility for his misconduct. See, Smiley, 864 F.2d at 569 (proof of harm not a required element of § 727(a)(2)).

The second challenge to the debtor's discharge is based upon § 727(a)(3) – that the debtor failed to keep or preserve appropriate books and records from which his financial condition and business transactions might be ascertained. In order set out a prima facie case under this subsection, the plaintiff must show "(1) that the debtor failed to maintain and preserve adequate records, and (2) that such failure makes it impossible to ascertain the debtor's financial condition and material business transactions." Matter of Juzwiak, 89 F.3d 424, 427-28 (7th Cir. 1996); Meridian Bank v. Alten, 958 F.2d 1226, 1232 (3rd Cir. 1992).

Prior to the petition, the debtor was an equipment dealer. His statement of affairs indicates that during the two years prior to filing, his business generated $1,200,000, exclusive of a transaction in July or August of 2005 with Everett Auctioneers for approximately $400,000. The court regards these as substantial sums and would normally expect the debtor to have books and records consistent with a business on this scale. Debtor's books and records, however, appear all but non-existent. The only records the debtor says he maintained consist of a checkbook and the information that he keeps in his head.[1] While this type of financial information might be sufficient for a simple consumer, it does not suffice for an operation on a scale of that which the debtor conducted. See, In re Scott, 172

[1]This statement contradicts other statements by the debtor that he did maintain books and records, but his access to those records was denied by his wife and/or the bank who then lost or destroyed them. Based upon the court's assessment of the debtor's credibility, it is much more likely that he only had a checkbook and the information in head, and, therefore, no records for others to lose.

F.3d 959, 970 (7th Cir. 1999); Juzwiak, 89 F.3d at 429. The debtor failed to keep books and records from which his financial condition and business transactions might be ascertained.

The final challenge is that Mr. Martin's discharge should be denied pursuant to § 727(a)(4)(A) for knowingly and fraudulently making a false oath as a result of his failure to disclose bank accounts on his bankruptcy schedules. A false oath includes a material omission from the debtor's schedules, In re Martin, 88 B.R. 319, 323 (D. Colo. 1988), which means that the omission was pertinent to the discovery of assets or past transactions. In re Montgomery, 86 B.R. 948, 957 (Bankr. N.D. Ind. 1988). The "knowingly and fraudulently" requirement "may be inferred from the debtor's conduct or from the particular circumstances of the case," In re Ingersoll, 106 B.R. 287, 292 (Bankr. M.D. Fla. 1989), and includes circumstances in which the debtor has demonstrated a "reckless disregard of both the serious nature of the information sought and the necessary attention to detail and accuracy" regarding statements made under penalties of perjury. Martin, 88 B.R. at 324 (quoting In re Diodati, 9 B.R. 804, 808 (Bankr. D. Mass. 1981)).

The debtor has an absolute duty to accurately disclose its assets. Matter of Yonikus, 974 F.2d 901, 904 (7th Cir. 1992). This disclosure is initially made by filing schedules of assets and liabilities and a statement of affairs. 11 U.S.C. § 521(1). The instructions on the schedule in question, Schedule B – Personal Property – specifically direct the debtor to "list all personal property of the debtor of whatever kind." Similarly, question 11 on the statement of affairs requires the debtor to list all financial accounts closed during the year prior to the petition. When the debtor signed his bankruptcy schedules and statement of affairs, he declared under penalty of perjury that the information they contained was accurate. Similarly, at the first meeting of creditors, he was asked, under oath, if he listed everything he owned and he replied that he had. These statements were not true.

As filed with the court, the debtor's schedule B and statement of affairs indicate that the only bank account he had was with Fowler State Bank. After he met with his bankruptcy counsel, but before the petition for relief was filed, the debtor opened another account at Sumner Bank in Sheldon, Illinois. The debtor never informed his bankruptcy lawyer about this account and the schedules which he signed, on October 11, 2005, were not updated prior to their filing to reflect its existence. When the debtors filed for relief on October 11, 2005, the Sumner Bank account had a balance of more than $13,500. By the time of the § 341 meeting, the balance had been reduced to slightly more than $5,000. In addition to the account at Sumner Bank, the debtor had another bank account at Boswell Bank through which more than $200,000 may have passed during the year prior to the petition. The existence of this account is not included on either the schedules or the statement of affairs and was only divulged for the first time at trial.

The only justification that the debtor offered for his failure to disclose these significant accounts is that he had either forgotten about them or did not think they were important, or, as to the Sumner account, that the money deposited represented some type of Social Security disability payment and was therefore exempt. The evidence presented at trial, however, indicates that the money in that account came from various sources, and even if some of it might have been from a Social Security disability payment that certainly is not true of the entire fund. As to whether the debtor forgot about these accounts or did not believe that they were important, that is rather difficult to believe. Neither account had a balance or activity which was so insignificant as to render it easily forgettable.

A debtor's obligation is to list all of the property in which it has an interest, regardless of the sense of importance which the debtor places upon the property, and neither the source of that property nor any perception that it might be exemptible justifies the failure to disclose. See, In re Wilson, 290 B.R. 333, 337 (Bankr. C.D. Ill. 2002). See also, Mertz v. Rott, 955 F.2d 596, 598 (8th Cir. 1992). Furthermore, disclosure during the course of a § 341 meeting (or at trial) is not a substitute for listing property in the bankruptcy schedules and statement of affairs. In re Whitehead, 278 B.R. 589, 595 (Bankr. M.D. Fla. 2002).

The debtor clearly made a false oath when he signed and filed bankruptcy schedules and a statement of affairs which did not disclose the bank accounts with Sumner Bank and Boswell Bank. Whether that false oath was knowingly and fraudulently made is a matter that the court must determine based upon the facts and circumstances surrounding the asset. Here, the court believes that the accounts are of sufficient significance and activity that it cannot accept an innocent explanation. More than $200,000 passed through the Boswell account prior to the date of the petition. As for the Sumner bank account, it was opened during the month prior to the petition and was actively being used by the debtor at that time. If not completely knowing and fraudulent, to sign, under penalties of perjury, bankruptcy schedules and a statement of affairs that fail to disclose these accounts reflects an uncaring attitude and a cavalier disregard for the accuracy of those documents; that is the equivalent of a fraudulent intent.

John Martin's discharge will be DENIED. Judgment will be entered accordingly.[2]

/s/ Robert E. Grant
Judge, United States Bankruptcy Court

---

[2]In accordance with 18 U.S.C. § 3057, a copy of this decision will also be forwarded to the United States Attorney.