

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
ROBERT BENJAMIN BAKER,)	CASE NO. 05-37744 HCD
)	CHAPTER 7
)	
DEBTOR.)	
)	
)	
REBECCA HOYT FISCHER, TRUSTEE,)	
)	
PLAINTIFF,)	
vs.)	PROC. NO. 07-3034
)	
ROBERT BENJAMIN BAKER,)	
)	
DEFENDANT.)	

Appearances:

Rebecca Hoyt Fischer, Esq., chapter 7 Trustee, Laderer & Fischer, P.C., 112 West Jefferson Boulevard, Suite 310, South Bend, Indiana 46601; and

Timothy M. Mikula, Esq., attorney for debtor, Mikula & Stephen, P.C., 401 State Street, LaPorte, Indiana 46340-3323.

MEMORANDUM OF DECISION

At South Bend, Indiana, on March 14, 2008.

Before the court is the Motion for Summary Judgment filed by the chapter 7 debtor and defendant in this adversary proceeding, Robert Benjamin Baker (“debtor”). The debtor is seeking summary judgment on the Complaint to Revoke Discharge filed by Rebecca Hoyt Fischer, chapter 7 Trustee (“Trustee”) and plaintiff herein, against the debtor-defendant. Following the Trustee’s response and debtor’s reply, the court took the matter under advisement. For the reasons presented in this Memorandum of Decision, the court denies the debtor’s Motion for Summary Judgment.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(J) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

The debtor filed his chapter 7 bankruptcy petition on October 11, 2005, and was granted a discharge of his debts on April 19, 2006. According to the Complaint, after the debtor was discharged the Trustee received information and documentation that indicated that the debtor had transferred real estate he owned within one year of filing bankruptcy. *See* R. 1 at 1. The Complaint alleged that the transfer was not disclosed in the debtor's schedules or at the Section 341 meeting of creditors. The Complaint sought revocation of the debtor's discharge of his debts pursuant to 11 U.S.C. § 727(d)(1). *See id.* at 2.

The debtor, in his Amended Answer to Trustee's Complaint, admitted that he had transferred four vacant lots to his wife Sheryl M. Baker ("Sheryl Baker") and had received \$25,000, which he claimed was a reasonably equivalent value in exchange for the transfer. *See* R. 9 at 1-2. However, he asserted, the transfer took place on September 27, 2004 – 379 days before the filing of the petition. *See id.* At that time, he stated, he was not insolvent and had no intention of hindering, delaying, or defrauding any creditor. Because the transfer fell outside the one-year limitation, he argued, the Complaint must be denied.

The debtor also filed a Motion for Summary Judgment, asking the court to enter summary judgment for the debtor on the ground that there were no issues of material fact and that he was entitled to judgment as a matter of law. *See* R. 26. Attached to the Motion were a Statement of Undisputed Material Facts, a memorandum of law, affidavits of the debtor and his wife Sheryl Baker, and numerous attachments.¹ In his Statement of Undisputed Material Facts, the debtor explained the background circumstances leading to his transfer of four unimproved lots (also described as nine acres of unimproved land) to his second wife, Sheryl Baker. The only fact pertinent to this motion for summary judgment, however, was that the debtor sold the property to Sheryl Baker on September 27, 2004, by warranty deed.² His argument is that the date of execution of the deed (September 27, 2004), and not the date of recording the deed (October 13, 2004), determined the date of transfer for the purposes of § 727 of the Bankruptcy Code. Because the executed deed was not transferred within one year of the bankruptcy filing, the debtor claimed that an essential allegation in the Trustee’s Complaint was incorrect and that summary judgment should be awarded to him as a matter of law.

Discussion

In her Complaint, the Trustee sought revocation of the debtor’s discharge because the discharge was obtained through fraud. She brought the Complaint pursuant to § 727(d)(1) of the Bankruptcy Code, which provides:

¹ The court notes that many of the filed documents – e.g., Debtor’s Memorandum in Support of Motion for Summary Judgment, Robert Benjamin Baker’s Affidavit, and Sheryl M. Baker’s Affidavit – are incomplete. The affidavits are also unsigned, undated, and unverified. They even contain factual discrepancies. For example, the debtor’s Affidavit states that he married his present wife Sheryl on January 1, 2003; Sheryl Baker’s Affidavit states that she married the debtor on January 11, 2003. One could call it a scrivener’s error or could comment, in a politically incorrect way, that husbands never remember anniversaries. However, affidavits are presented to a court as verified, sworn statements. A court may strike such documents, under Rule 11, if they severely prejudice the opposing party. *See Kovilic Constr. Co, Inc., v. Missbrenner*, 106 F.3d 768, 772 (7th Cir. 1997). In this case, however, the uncompleted affidavits provided no real challenge to material facts and added nothing to issues of law; they therefore were simply ignored. *See Scholes v. Lehman*, 56 F.3d 750, 762 (7th Cir.), *cert. denied*, 516 U.S. 1028 (1995).

² The warranty deed was proffered as an exhibit; it appears to be complete.

§ 727 (d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if –

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge.

11 U.S.C. § 727(d)(1); *see Disch v. Rasmussen*, 417 F.3d 769, 777 (7th Cir. 2005) (stating that “[t]he Bankruptcy Code places strict limits on a court’s authority to revoke a discharge,” describing the statutory grounds permitting revocation under § 727(d)).

The Trustee alleged that the debtor had transferred real estate he owned within one year of filing bankruptcy and without disclosing the transfer. The Bankruptcy Code distinguishes, in § 727, between the denial of a discharge and the revocation of it. The statute denies a discharge to a debtor for the reasons listed in subsection (a). In this case, the pertinent subsection states that discharge is denied to a debtor who transfers property within a year of filing bankruptcy with the intention of defrauding creditors:

§ 727 (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 . . .

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

(B) property of the estate, after the date of the filing of the petition.

11 U.S.C. § 727(a)(2) (emphasis added). According to the Seventh Circuit, § 727(a)(2)(A) has two main components: “an act (i.e., a transfer or a concealment of property) and an improper intent (i.e., a subjective intent to hinder, delay, or defraud a creditor).” *In re Kontrick*, 295 F.3d 724, 736 (7th Cir. 2002), *aff’d*, 540 U.S. 443 (2004) (citation omitted). If a debtor conceals the transfer and obtains a discharge, however, a trustee may have the discharge revoked under § 727(d).³ The parties herein focused on the “within one year” language in

³ The court notes that this debtor’s discharge was granted when it was procedurally proper: The meeting of (continued...)

§ 727(a)(2)(A). The Trustee argued that the debtor's property transfer took place on the date that the transfer was recorded in the LaPorte County Recorder's Office, October 13, 2004, which was less than one year from the debtor's petition date of October 11, 2005. The debtor insisted, however, that the property transfer occurred on the date that the warranty deed was executed between the debtor and his wife Sheryl, September 27, 2004 – more than a year before he filed his bankruptcy petition.

Relying on the warranty deed's date of execution as the date of transfer, the debtor raised two arguments: that the debtor did not receive his discharge by fraudulent means and that the plaintiff's Complaint was untimely. The court considers first the debtor's contention that the Complaint was not timely filed because the transfer date of the property was more than a year before the filing of the bankruptcy petition.⁴ See R. 31 at 2. The debtor mistakenly links the time limitations for filing a § 727(d) complaint with the timing of property transfers "within one year before the date of the filing of the petition" under § 727(a)(2)(A). The statute of limitations for filing a complaint seeking revocation of discharge under § 727(d)(1) is found in § 727(e)(1):

- (e) The trustee, a creditor, or the United States trustee may request a revocation of a discharge –
 - (1) under subsection (d)(1) of this section within one year after such discharge is granted.

11 U.S.C. § 727(e)(1). In this case, the chapter 7 Trustee requested revocation of the debtor's discharge by filing her Complaint on April 18, 2007. The debtor was granted a discharge on April 19, 2006. The complaint was timely. See *United States v. Willey*, 57 F.3d 1374, 1392 n. 33 (5th Cir.), cert. denied, 516 U.S. 1029 (1995);

³(...continued)

creditors had been held, no objection to discharge had been filed, no motion to dismiss the case was pending, no extension of time had been granted, and no other § 727(a) reason for denying discharge had been raised. See Fed. R. Bankr P. Rule 4004; see also *Disch*, 417 F.3d at 775 (explaining "relatively automatic procedure" of entering the chapter 7 discharge). Only after the discharge was issued and new evidence was obtained did the Trustee question whether the transfer of the real estate was fraudulent.

⁴ This argument, raised for the first time in the reply brief, could be deemed waived. See *Nelson v. La Crosse County Dist. Attorney*, 301 F.3d 820, 836 (7th Cir. 2002). However, the court addresses it to clarify the debtor's misperception of time limitations in § 727.

Marlin v. United States Trustee, 333 B.R. 14, 22 (W.D.N.Y. 2005); *Mazer v. Jones (In re Jones)*, 178 B.R. 1, 3 (Bankr. D. N.M. 1995).

The debtor's central argument, however, was that his discharge was not obtained through fraud because the transfer of the property at issue occurred more than a year before he filed bankruptcy. The debtor reasoned that, since the warranty deed was executed more than a year before bankruptcy, the transfer of that property was not part of the bankruptcy estate and should not have been included in his schedules. He further contended that he committed no fraud because he sold the property for fair market value and for the purpose of paying off a divorce settlement. According to the debtor, the discharge was valid and thus revocation of that discharge would be improper.

The Seventh Circuit Court of Appeals has long held that "the Bankruptcy Code was meant to discharge only an honest debtor from his or her debts, and that the Code should be liberally applied to protect the [debtor] only in those cases where there is no intent to violate its provisions." *Disch*, 417 F.3d at 774 (citations, quotations omitted). The debtor in this case insisted that he qualified for a discharge of his debts and that the court correctly ordered that he was entitled to the discharge. The issue of law upon which the parties disagreed, therefore, was whether, for purposes of § 727, the transfer of the debtor's property to his wife was made within one year of the debtor's filing of his chapter 7 petition on October 11, 2005. The Trustee answered "yes" by claiming that the debtor transferred the property when the warranty deed was recorded in the LaPorte County Recorder's Office on October 13, 2004 – within the one-year period. The debtor answered "no" by insisting that the transfer occurred when the warranty deed was signed between the parties, on September 27, 2004 – outside the one-year period.

The Bankruptcy Code defined the term "transfer" to mean the following:

- (A) the creation of a lien;
- (B) the retention of title as a security interest;
- (C) the foreclosure of a debtor's equity of redemption; or
- (D) each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with –

- (i) property; or
- (ii) an interest in property.

11 U.S.C. § 101(54). That definition is very broad, *see Village of San Jose v. McWilliams*, 284 F.3d 785, 793-94 (7th Cir. 2002), and it applies in § 727 analyses. *See Groman v. Watman (In re Watman)*, 301 F.3d 3, 10 (1st Cir. 2002). However, the statute does not define which act or acts count as a transfer, and the Seventh Circuit Court of Appeals has not yet addressed the issue.

Some courts, when considering whether a debtor should be denied a discharge, count the transfer as “made” on the date the transfer instrument was recorded. They justify their rulings by pointing out that the transfer was effective as to third parties only when the recordation took place. *See, e.g., Ingersoll v. Kriseman (In re Ingersoll)*, 124 B.R. 116, 121 (M.D. Fla. 1991) ; *Ford v. Poston (In re Ford)*, 53 B.R. 444, 447 (W.D. Va. 1984), *aff’d*, 773 F.2d 52 (4th Cir. 1985); *Young Contracting Co. Inc. v. Roy (In re Roy)*, 42 B.R. 102, 104 (Bankr. S.D. Fla. 1984). Other courts find that the transfer occurred when the parties executed or delivered the deed. They emphasize that the debtor’s act, in transferring property, was to execute or deliver the instrument and that recordation was done by the transferee. *See, e.g., Finalco, Inc. v. Roosevelt (In re Roosevelt)*, 176 B.R. 534, 539 (9th Cir. B.A.P. 1995), *aff’d*, 87 F.3d 311 (9th Cir. 1996), *amended*, 98 F.3d 1169 (9th Cir. 1996), *cert. denied*, 520 U.S. 1209 (1997), *overruled on other grounds by Murray v. Bammer (In re Bammer)*, 131 F.3d 788 (9th Cir. 1997) (en banc); *Town & Country Bank v. Crawford (In re Crawford)*, 65 B.R. 378, 381 (D. Cal. 1986), *Mahon v. Milam (In re Milam)*, 172 B.R. 371, 374 (Bankr. M.D. Fla. 1994).

In this case, the warranty deed was executed prior to (and therefore outside) the one-year statutory period and the recordation of the transfer was made within the one-year period. A thoughtful analysis of which date triggers the denial of a debtor’s discharge, and the better view, in the opinion of the editors of *Collier on Bankruptcy*, was found in the decision of the Court of Appeals for the Ninth Circuit in *Finalco, Inc. v. Roosevelt (In re Roosevelt)*, 87 F.3d 311 (9th Cir. 1996), when it affirmed the Bankruptcy Appellate Panel decision. The circuit court held that the one-year period in § 727(a)(2) should be measured from the date of the act of transfer,

regardless of when the transfer was recorded. *See In re Roosevelt*, 87 F.3d at 318 (“Thus, a transfer under § 727(a)(2) is ‘made’ at the time it is valid between the parties to that transfer, irrespective of whether it is valid as against BFPs [third parties]”).

This approach recognizes that the recording of a transfer may not always be in the debtor’s control, and gives effect to the often-expressed preference for strictly construing objections to discharge in favor of granting relief to the debtor. Under this approach, however, it must be recognized that some failures to record transfers are intentional and are in the nature of continuing concealments, in which case the date of recordation may be used to determine whether the transfer occurred during the one-year period.

6 *Collier on Bankruptcy* ¶ 727.02[2][c], 727-15 to 727-16 (Alan N. Resnick & Henry J. Sommer, eds.-in-chief, 15th ed. rev’d 2007).

This court agrees with the cogent consideration presented in *Roosevelt* and discussed in the *Collier* treatise. When it considers the Bankruptcy Code’s broad definition of a “transfer” as any “mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or an interest in property,” the court believes that the Ninth Circuit’s analysis in *Roosevelt* best implements that definition in § 101(54). The court finds, therefore, that the debtor’s position on the issue of law – that the date of transfer, for purposes of § 727(a)(2), is the date that the deed was executed by the debtor and the transferee – was the correct one. It further determines that the court properly granted a discharge to the debtor, in light of the fact that the property had been transferred by a warranty deed executed more than a year before the debtor had filed bankruptcy and, it appears, no suspicious questions had arisen at that time.

Nevertheless, the Complaint was brought under § 727(d)(1). The court recognizes that § 727(d) permits revocation of a discharge obtained through fraud, and the “within one year” time limitation is not an element of that subsection of § 727. The Complaint alleged that the transfer was not disclosed in the debtor’s schedules or at the 341 meeting of creditors. *See* R. 1, ¶ 2. The debtor asserted, however, that he had revealed the transfer, *see* R. 9, ¶ 8, and that leaves the court with a genuine issue of material fact. If this transfer was not revealed but should have been, present knowledge of it may be a ground for revoking a discharge. In addition,

the court finds other genuine issues of material fact concerning the debtor's discharge. A transfer which occurred more than a year prior to the petition may provide a ground for revocation of a discharge if the transfer was concealed or if the debtor retained secret beneficial interests in the transferred property.⁵ See, e.g., *Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 684-85 (6th Cir. 2000); *Hughes v. Lawson (In re Lawson)*, 122 F.3d 1237, 1240-42 (9th Cir. 1997); *Diamond Bank v. Carter (In re Carter)*, 203 B.R. 697, 706-07 (Bankr. W.D. Mo. 1996); *March v. Sanders (In re Sanders)*, 128 B.R. 963, 968-69 (Bankr. W.D. La. 1991); *Penner v. Penner (In re Penner)*, 107 B.R. 171, 173 (Bankr. N.D. Ind. 1989).

The court determines that there are issues of fact concerning the debtor's intent when transferring the real estate, as well. Whether the discharge was obtained through the fraud of the debtor involves fact-specific issues which must be considered by a trier of fact. The court therefore denies the debtor's Motion for Summary Judgment.

Conclusion

For the reasons stated above in this Memorandum of Decision, the Motion for Summary Judgment filed by the debtor-defendant Robert Benjamin Baker is denied. The Complaint and Answer will be set for a pre-trial conference by separate order.

SO ORDERED.

/s/ Harry C. Dees, Jr.
HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT

⁵ The Seventh Circuit recognized the doctrine of continuing concealment in *In re Kontrick*, 295 F.3d at 737; *In re Martin*, 698 F.2d 883, 887 (7th Cir. 1983); and *Matter of Kauffman*, 675 F.2d 127, 128 (7th Cir. 1981) (per curiam). My colleague Judge Robert A. Grant presented a thoughtful, detailed discussion of the concept in *Penner v. Penner (In re Penner)*, 107 B.R. 171 (Bankr. N.D. Ind. 1989).